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BEFORE THE NEVADA STATE ENVIRONMENTAL COMMISSION

In Re:	)	
	)	
Appeal of NDEP's Approval of the Sampling and Analysis Plan; Comstock Mining, Inc.	)	**Comstock Mining Inc.'s Motion to Dismiss**
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Comstock Mining, Inc. ("Comstock"), by and through its counsel, hereby files its Motion to Dismiss the Comstock Residents Association ("CRA") appeal of approval of Comstock's Sampling and Analysis Plan ("SAP") by the Nevada Division of Environmental Protection ("NDEP").

I. INTRODUCTION AND FACTUAL BACKGROUND

In connection with planned exploration activities on Comstock's Dayton Consolidated mineral lease area, Comstock applied for and was issued Reclamation Permit No. 0315 ("Permit"). NDEP issued the Permit after public comment and hearing on December 20, 2011. CRA appealed issuance of the Permit (the "Permit Appeal") and the Permit was upheld on appeal to the State Environmental Commission ("SEC"). *SEC Order Granting Motion to Dismiss Appeal* (Mar. 15, 2012)(finding that CRA's notice of appeal failed to specify where NDEP failed to meet statutory or regulatory requirements when issuing the Permit).

NDEP imposed several requirements on Comstock as conditions of the Permit, including that Comstock submit a sampling and analysis plan. Though under no statutory or regulatory obligation to do so, NDEP provided a courtesy copy of Comstock's January 6, 2012 draft of the SAP to CRA and afforded its members eleven days in which to review the SAP. In Appellant CRA's Opening Brief and Witness List ("Opening Brief"), CRA describes the SAP as a "massive document (over 600 pages in length)" and a "huge technical document". *Opening Br.* p. 2-3. However, the substance of the SAP is contained in 23 pages of text, followed by approximately 30 pages of sampling maps. The rest of the SAP is contained in appendices, the two largest of which—each over 100 pages—set out the quality assurance and quality control procedures implemented by two independent laboratories selected for sample analysis.[1] While these procedures are important, they are based upon regulatory requirements and are not subject to change regardless of public comment. In short, the relevant portion of the SAP for public review consisted of 23 pages of text and not more than 30 pages of maps.

NDEP received three comment letters or emails by January 17, 2012 from Gayle Sherman, Robin Cobbey, and Daan Eggenberger.[2] The two letters contained comments, but were also complimentary. Ms. Sherman stated:

> I am impressed with the overall clarity and detail contained in the SAP as well as the obvious efforts made to address the concerns of the communities of Virginia City, Gold Hill and Silver City. I also want to thank you and Jack Yates for all of your efforts to provide a balanced regulatory oversight of the proposed mining activities in residential areas of the Carson River Superfund site. Gayle Sherman four-page letter to Jeff Collins, dated January 17, 2012, p. 1.

Similarly, Mr. Eggenberger stated: "Many of the issues, we are concerned about, are being addressed by this plan and we appreciate the attention to detail in the SAP." Daan Eggenberger letter to NDEP, dated January 15, 2012, p. 1. Robin Cobbey's comments, which seem to request air monitoring, and Mr. Eggenberger's objection to the "lack of RCRA permitting and controls" (Eggenberger letter, p. 1), raised issues that were dismissed in the Permit Appeal.

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[1] Appendices A1 and A2, each of which is over 100 pages in length, provide the Laboratory Data Quality Objectives, Sample Handling Procedures, and SOPs for the two independent laboratories selected for sample analysis. Appendix B MGA SOPs sets forth, in approximately 30 pages, the standard, in-field sampling procedures. Appendices C1 and C2, each one page, provide a copy of the Chain-of-Custody Form used by each of the two independent laboratories. Appendices D1 and D2, also each one page, provide a copy of the Sample Label used by each of the two independent laboratories. Lastly, Appendix E, the Site Health and Safety Plan is forty-nine pages in length.

[2] In his comment letter, Mr. Eggenberger identifies his affiliation as Friends of the Comstock demonstrating that NDEP made the SAP more generally available to members of the public beyond the CRA.

By letter dated January 17, 2012 NDEP approved the SAP, subject to several requirements that Comstock revise the SAP and respond to questions and comments presented by NDEP that included comments from the public. Comstock incorporated all requested revisions and responded to all NDEP comments by transmittal letter dated January 27, 2012 that attached the revised, final SAP. On January 31, 2012, NDEP approved the final SAP and response letter. CRA now appeals NDEP's determination to make the SAP final (the "SAP Appeal"), although it is not clear what relief CRA is seeking. Moreover, as with its Permit Appeal, in its SAP Appeal CRA again focuses much on the same arguments it raised during the public comment process and focuses little on the legal analysis of where or how NDEP failed to meet the statutory or regulatory requirements with regard to finalizing the SAP.[3]

The scope of the SAP Appeal is narrow, presenting only three grounds for challenge. First, CRA complains that the final SAP was not available at the time of public hearing on the Permit. Form 3, ¶ 5. CRA cites generally to NAC 519A.160, 519A.185, 519A.190, and 519A.160, and to NRS 233B.032 and NRS 233B.121 and asserts that "a public hearing should have been conducted to provide an opportunity for the public to submit written and oral input" without specific statutory or regulatory reference. *Id.* Second, CRA asserts that two documents referenced in the SAP—an archeological survey and a field review—were not "reviewed for validity by NDEP staff", but fails to identify the factual basis for this assertion or cite to any authority for how this argument renders NDEP's final approval of the SAP improper. Third, CRA claims that the SAP provides for removal of certain areas of Comstock holdings from the Carson River Mercury Superfund Site ("CRMS") prior to testing and therefore "the Permit/SAP is not adequately protective of public health and safety per NAC 519A.260." *Id.* (emphasis added). Despite CRA's attempts to conflate the Permit with the SAP—a condition to the Permit—the Permit itself has been upheld and is not at issue in this SAP Appeal. *SEC Order Granting Motion to Dismiss Appeal* (Mar. 15, 2012).

As addressed below, the SAP, as a Permit condition, is not a proper document for appeal, nor does NDEP's failure to include it in the Permit public notice and comment create a basis for appeal. CRA simply has no legal basis to appeal the SAP; therefore this SAP Appeal should be dismissed. Even if the SEC hears the SAP Appeal, all arguments raised in the Opening Brief that are

[3] Only two short paragraphs in CRA's eleven page Opening Brief reference statutory or regulatory requirements. *See* Opening Br. p.4 ¶ 2 and p.5 ¶ 1. These two paragraphs are mere references without analysis as to how the action in question actually violates the cited legal authority.

outside the scope of CRA's Request for an Appeal Hearing, as articulated in its Form 3 filing, should be dismissed before or at the outset of the hearing.

II. ARGUMENT

A. Public Comment Is Not Required for Permit Conditions and, Therefore, CRA's First Issue on Appeal Lacks Merit

CRA acknowledges that it was aware that public comment is not generally provided for on conditions included in permits, such as the requirement to file the SAP. *See Opening Br.* p. 2-3. At page 5 in its Opening Brief, CRA cites (without analysis) to NAC 419A.180, 419A.185, and 419A.210[4] in support of its argument that NDEP was under some requirement to obtain public comment on the SAP. However, nothing in these regulations authorizes or requires NDEP to provide for public comment on anything other than the Permit, itself.

NAC 519A.180(1) simply states that the Division "shall prepare and issue a draft of a permit or notice of intent to deny the application" and prepare a public notice pursuant to NAC 519A.185. NAC 519A.185 applies to issuance of draft permits and requires 30 days advanced public notice of the Division's intent to issue or deny a draft permit. Neither NAC 519A.180 nor 519A.185 address the Division's required actions with respect to anything other than its intent to issue or deny a permit. Finally, NAC 519A.210 simply requires that when the Division issues a final permit it shall issue at the same time a statement responding to public comments on the matter. CRA does not allege that NDEP failed to respond to public comments received by the time that it issued the Permit. NDEP complied with all of these requirements with respect to the Permit and the Permit was upheld in the Permit Appeal. *SEC Order Granting Motion to Dismiss Appeal.* These issues are simply not now properly before the SEC.

The mere act of citing to NAC 519A.180, 519A.185, and 519A.210 does not render these provisions applicable to the SAP. The SAP, both by its nature, and as a condition of the Permit, is not subject to public comment. NAC 519A.125.2. identifies the necessary content of an application for an exploration permit. Required information includes the applicant's name, address and phone number, a complete plan for reclamation, the estimate cost to implement the reclamation plan, the applicant's agreement to assume responsibility for reclamation, and a map showing the area to be reclaimed. NAC 519A.125.2. A sampling and analysis plan is not required information. It stands to

[4] NAC 419A does not exist, so Comstock assumes that these citations were intended to refer to 519A. Comstock further notes that CRA did not reference NAC 519A 180, as a basis for its appeal.

reason, therefore, that the Permit was not incomplete without the SAP. Public notice and comment cannot be required independently on the SAP, because it is not information that is required to be included in the permit application.

Conversely, if the SEC agrees either that the Permit was incomplete without the SAP or that the SAP independently required public notice and comment, that would establish precedent for public hearing requirements regarding all other conditions of the Permit. For example, the Permit requires that "[t]he operator shall file and maintain an acceptable surety as specified in NAC 519A.350 to ensure that reclamation will be completed." Permit Limitation and Requirements: No. 6. The Permit also requires that "[o]n or before July 31st, 2012, the Permittee will provide a site-specific baseline vegetation report...". Permit Limitation and Requirements: No. 10.B. Each of these Permit requirements is an obligation under the Permit—something that Comstock must do to comply with the Permit—but is not, itself, a required component of the Permit that must be available for public notice and comment. If the SEC were to find otherwise, that would undermine NAC 519A.125 by imposing additional required information for a Permit that is not included in Nevada law. It would also render meaningless *SEC Order Granting Motion to Dismiss Appeal*, which embodies the SEC's March 15, 2012 decision that NDEP properly issued the Permit—without the SAP.

CRA also generally states that when issuing reclamation permits NDEP is charged with protecting Nevada's resources, and cites to NRS 519A.010(b) and NAC 519A.260. *Opening Br.* p. 4 ¶ 2. However, CRA fails to demonstrate how NDEP's acceptance of the SAP violates the cited authority. In fact, the above-referenced permit requirements, No. 6 (requiring surety compliant with NAC 519A.350), No. 9. (requiring a sampling and analysis plan that conforms to the standard operating procedure in the Long Term Sampling and Response Plan ("LTSRP")), and No. 10.B. (requiring a site-specific baseline vegetation report), are among the Permit conditions and requirements through which NDEP will determine compliance with Nevada health, safety, and environmental protection laws. And, it is NDEP—not the public—that has the requisite expertise and judgment to evaluate whether a particular submittal in response to each of these Permit requirements complies with the Permit, and thereby protects health, safety, and the environment.[5]

[5] The requirement that Comstock submit a SAP is further distinguished in that the bureau issuing the Permit, the Bureau of Mining Regulation and Reclamation (BMRR), will be relying on the judgment, expertise, and approval of the Bureau of Corrective Actions (BCA).

While CRA makes abundantly clear that it disagrees with NDEP's assessment of various matters pertaining to the Permit process, mere disagreement with NDEP is not sufficient to demonstrate that NDEP has failed to meet the statutory or regulatory requirements with regard to finalizing the SAP. Neither the Nevada laws governing the NDEP, nor the Nevada Administrate Procedure Act (NRS 233B.010 *et seq.*) require public notice and comment for any of the above-described permit conditions, including the requirement that Comstock submit a SAP. Nor does NDEP solicit or accept such comments as a matter of practice, as admitted by CRA. *Opening Br.* p. 2-3. To hold otherwise, would at best undermine the authority, expertise, and discretion of the NDEP and at worst, substitute public opinion for NDEP's professional judgment. CRA has failed to identify any statutory or regulatory requirement that NDEP has failed to meet, as there is no statutory or regulatory requirement pertaining to public comment on conditions to permits such as the SAP. Accordingly, the SEC should dismiss the SAP Appeal.

B. The SAP Covers the Appropriate Area; All of CRA's Objections Regarding the Scope of the SAP Lack Merit and Should Be Dismissed

1. NDEP Did Not Improperly Narrow the CRMS Boundaries

CRA argues that through the SAP, NDEP improperly narrowed the CRMS boundaries (*Opening Br.* p. 6), that Comstock will remove sites from the CRMS without sampling (*Opening Br.* p. 8), and that it is improper to sample only at locations that have been historically disturbed (*Opening Br.* p.7). While CRA lists reasons why it disagrees with NDEP's determinations with respect to SAP sampling locations and site boundaries, CRA fails to cite to a single statutory or regulatory requirement that NDEP failed to meet. Moreover, these arguments evidence that CRA fundamentally misunderstands a number of aspects of the CRMS, the LTSRP, and the SAP. Accordingly, Comstock provides the following brief background regarding the CRMS.

The United States Environmental Protection Agency ("EPA") listed the CRMS on the National Priority List ("NPL") on August 30, 1990, under authority of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. §§ 9601 *et seq.*. According to EPA's remedy selection document, the Record of Decision ("ROD") dated March 30, 1995, the CRMS "consists of the portions of the Carson drainage and Washoe Valley in Northwestern Nevada which are affected by mercury released from milling operations during the Comstock Lode. The exact boundaries of the affected area were not defined as part of this remedial investigation…". ROD, §1.1.

EPA divided the CRMS into two areas, or Operable Units (OU's): OU1, which includes parts of Virginia City and Gold Hill, consists of old mill sites and related tailings; and OU2 which consists of the Carson River from the area of New Empire to its terminus in the Carson Sink where mercury may be in the sediments and adjacent flood plain of the Carson River and in the sediments of Lahontan Reservoir, Carson Lake, Stillwater Wildlife Refuge, and Indian Lakes. Only OU1 is of concern for purposes of the SAP Appeal because the Permit pertains to exploration and reclamation activities in the Dayton Resource area,[6] which is in the OU1 area. While EPA included "tailing piles, sediments and soil in Gold Canyon, Sixmile Canyon, and Sevenmile Canyon" in the CRMS OU1 study area (*see* ROD, §1.1), EPA determined that "[i]ngestion of ground water, surface water and sediment were screened out of the exposure assessment because the [contaminants of potential concern] COPCs were detected at relatively low levels in these media." ROD, § 8.1.

EPA conducted a human health risks assessment at the CRMS which established that "the exposure pathways of potential concern for the CRMS are: (1) consumption of fish or waterfowl from the Carson River system and (2) incidental ingestion of contaminated soil." ROD, § 5.2. The mercury exposure risks associated with consumption of fish or waterfowl largely relate to OU2, while incidental ingestion of contaminated soil is a risk in OU1. The ROD reports a further evaluation of these potential risks led to the findings that "[i]ncidental ingestion of surface water and sediment while swimming does not appear to be an exposure pathway of concern" and "[i]nhalation of airborne contaminants does not appear to be an exposure pathway of concern... irrespective of the land use scenario." ROD, § 8.6.

The focus of EPA's remedy for OU1 was predominantly residential properties; five residential properties were remediated by soil removal. The sixth proposed remediation location, a ditch in the Dayton area, was ultimately not addressed due to residents' objections and limited risk.[7] EPA states that the objective of the remedy was "to reduce human health risks by reducing direct exposure to surface soils containing mercury at concentrations equal to or greater than 80 milligrams per kilogram (mg/kg) in residential areas." ROD, Part 1, Description of the Remedy. EPA further stated that the remedy selected for OU1 was "only intended to reduce direct exposure to mercury contaminated surface soils and not to protect surface water." ROD, § 5.1. Thus, EPA conducted the

[6] The Dayton Consolidated Exploration Project is located in Sections 8, 9, 16, and 17 of Township 16 North, Range 21 East M.D.B. & M., Lyon County, Nevada.

[7] The only other cleanup action taken by EPA was the removal of two mercury contaminated tailing piles from OU1 in 1990 and 1992 to the Flowery Mine heap leaching facility for treatment by cyanidation.

remedy for the residential yards to "address the incidental soil ingestion exposure pathway which was found to be of potential concern for populations near impacted areas." ROD, Part 1. The remedy was completed in 1998 and determined to be protective of human health and the environment when reviewed in 2003 and again in 2008.

Despite the passage of nearly twenty years since the CRMS was listed as a Superfund site, EPA has never defined the boundaries of the CRMS. Furthermore, until the last several years, there was no indication from EPA that it would take further action in OU1 or address anything other than elevated mercury concentrations in residential yard soil. Rather, EPA authorized NDEP to manage OU1; NDEP delegated that responsibility to the BCA. As a preliminary method of bounding the site, NDEP identified risk area boundaries, meaning the largest areas within the general site description where there is a potential that historic mill sites or tailings might be present and where soil might contain mercury in concentrations above 80 mg/kg. NDEP has applied three risk categories: low, medium, and high. Conversely, EPA and NDEP have excluded from the CRMS upland areas and areas away from historic mill sites. NDEP developed a CRMS potential risk area boundary map ("NDEP Risk Area Map") that was first made available to the public on the NDEP website on April 27, 2011.

EPA and NDEP also developed the *Draft Carson River Mercury Superfund Site Long-Term Sampling and Response Plan Risk Assessment and Soil Management* ("LTSRP"), most recently updated December 16, 2011. Until CRMS boundaries are better defined, under the LTSRP if a given property is currently identified anywhere within the NDEP risk area boundaries, it must be sampled before soil disturbance to determine whether there is any presence of mercury above the residential action level. If there is not, NDEP can update the risk area designations by removing that property from the risk area boundaries. Areas on the NDEP Risk Area Map that are outside the designated risk areas—marked in yellow, orange, and red for low, medium, or high potential risk, respectively—are not in the CRMS, are not risk areas, and do not require sampling.

It is not clear, but CRA seems to object that the SAP fails to address sampling throughout the CRMS. *See Opening Br.,* § B.1., p. 6. Comstock's land holdings total 6,099 acres of joint mineral estate which includes a combination of 999 acres of patented and 5,100 acres of unpatented active lode mining claims in the Comstock District. This area is a small fraction of the land potentially within OU1. Independent of the Permit, the LTSRP requires sampling before "excavation activities

that disturb greater than 3 cubic yards of soil" within any CRMS risk area. LTSRP, § 4.[8] Thus, consistent with the LTSRP, Comstock is only required to sample in areas that are within its own land holdings and that are within the risk area boundaries defined by NDEP—not the entire CRMS—and only in areas where it intends to engage in an activity that would disturb greater than 3 cubic yards of soil. It is preposterous to suggest, as CRA seems to, that Comstock has "illegally restricted the scope of the SAP" (*Opening Br.,* § B.1., p. 6), simply because the SAP only addresses property within Comstock's land holdings that are also within the CRMS risk areas.

2. CRA Misunderstands the Scope of the SAP

Comstock stated in the SAP: "[d]ue to the size, scope and duration of this project [the SAP] it is expected that the areas to be addressed will evolve as additional information is collected. Comstock plans to provide periodic updates to NDEP as significant changes are forecasted." SAP, § 2.1. Comstock identified the order of priority in which it would conduct sampling, as well. *Id.*, p. 10. Because of Comstock's exploration plans in the Dayton Resource area, Comstock gave the second highest priority to sampling in the Dayton. *Id.* The SAP did not include detailed sampling information for lower priority areas. However, the SAP clearly indicates that those areas will be "addressed with addenda to this SAP at a later date". *Id.; see also* SAP, § 4. Comstock has already submitted seven addenda to the SAP—all of which NDEP has approved—as Comstock has expanded the areas sampled beyond the original priorities stated in the SAP.

Accordingly, CRA has taken an SAP statement out of context in its objection that "the SAP expressly excludes sediments".[9] *Opening Br.,* § B.2., p. 6. The top priority sampling areas included in the SAP did not include any drainage areas or areas that would include sediments.[10] Though the LTSRP does not include any reference to the term "sediments", the ROD evaluated risks associated with sediments and found "[i]ncidental ingestion of surface water and sediment while swimming does not appear to be an exposure pathway of concern" and "[i]nhalation of airborne contaminants does not appear to be an exposure pathway of concern... irrespective of the land use scenario."

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[8] *See also* LTSRP § 2.0, which states "Everything lying within the outermost Low Risk area boundary is deemed to be within the portion of the CRMS that will need to undergo some form of initial sampling and verification sampling per guidance in this document." By implication, anything outside the risk area boundary does not require sampling.

[9] The objection that the SAP excluded sediment sampling was not included in CRA's SAP Appeal Form 3, as addressed in Section C., *infra.* Consequently, the SEC should reject this objection as outside the scope of the SAP Appeal.

[10] Neither the ROD nor the LTSRP define the term "sediments." As discussed in Comstock's Motion, the term has its ordinary meaning of soil material deposited in the bottom of a stream or water body.

ROD, § 8.6. Nonetheless, where Comstock may disturb greater than 3 cubic yards of soil (or sediment) within the boundary of the NDEP identified CRMS risk areas, Comstock is required to, and will, conduct sampling under the SAP. In fact, Comstock has submitted an addendum to the SAP to sample in the area of the ephemeral Gold Canyon Creek and included sediment sampling in that addendum.

3. CRA Is Wrong; the SAP Does Not Limit Sampling to Sites In An Undisclosed Historic Survey

The mercury of concern in the CRMS is not native to the Comstock area—it was imported from California to use in processing for recovery of gold and silver. This processing method, known as the "Washoe process," was used from approximately 1860 to 1900. Thus, EPA identified mills and tailings piles from this era as the primary sources of mercury. ROD, §§ 6.2. and 8.3. NDEP incorporates this focus on mills and tailings piles in the LTSRP, noting that property is subject to the LTSRP if "[i]t is located adjacent to or down-gradient of a former mill site". LTSRP, § 2.0. It is, therefore, imminently logical and appropriate that Comstock would look preferentially to sample in "areas of the Site where historic disturbance has been documented by archaeological verification and aerial photo analysis" (SAP, § 2.1) and that NDEP would approve that approach.

CRA objects to the SAP's approach that undisturbed areas would not be sampled. Yet, if the area is undisturbed, it is highly unlikely that it would be the location of a former millsite or tailings pile. CRA next contends that the identification of disturbed areas and undisturbed areas is "based on data and information that is referred to but not included in the SAP." *Opening Br.*,§ B.3., p. 7. Yet, it is well documented that EPA conducted historical research to locate Comstock era mills and developed maps identifying 143 historic millsites. ROD, § 3.0. Aerial photographs are also a commonly used source of information. The results of these evaluations are clearly shown in the thirty or so figures included with the SAP. Additionally, SAP Section 4.0 clearly states:

> there are areas of the site that are within the CRMS Risk Area maps which are not proposed for sampling at this time. These areas have no visual evidence of historic impacts as verified by aerial photo interpretation and archaeological survey. These areas, however, are adjacent to areas which do have evidence of historic impacts. The areas with defined historic impacts (as shown on Figures 17-30) will be sampled and pathways for contaminant transport will also be sampled. Specifically, roads and fluvial transport areas will be sampled for the first linear quarter acre. Based upon the results of the first round of sampling, additional sampling may be required if [contaminants of concern] COCs are found above the Screening/Action Levels.

> These areas are shown as the "areas to be assessed" on Figures 10 and 11. Addenda will be provided to this SAP to define this additional sampling, as necessary.

CRA lists numerous mill sties that are purportedly not included in the SAP for any sampling (*Opening Br.,* B.3., p. 7). Comstock already has or will sample each one of the listed mill site areas. Specifically, Figure 16 of the final SAP identifies the Stuart/Kilpatrick and the Seals mill sites as areas to be sampled at a later date. Comstock has taken more than 90 samples throughout the area of the Lucerne Pit, including at the Alpha, Ramsell, and Succor mill sites. Similarly, Comstock has taken more than 70 samples in the Gold Creek Canyon, including the area of the former Globe and Lindsay mill site. CRA's objection is simply wrong. Furthermore, even if CRA's argument is accepted at face value, CRA here again fails to cite to any statutory or regulatory requirement that NDEP failed to meet.

4. OU1 of the CRMS Only Includes Parts of the Carson River Drainage, Primarily Old Mill Sites and Related Tailings

According to EPA, the focus of the CRMS is on portions of the Carson drainage which are affected by mercury released from milling operations during the Comstock era. ROD, §1.1. EPA's description of OU1 is "tailing piles, sediments and soil in Gold Canyon, Sixmile Canyon, and Sevenmile Canyon." *Id.* Only land "within the outermost Low Risk area boundary [of the NDEP Risk Area Map] is deemed to be within the portion of the CRMS that will need to undergo some form of initial sampling and verification sampling per guidance in this document." LTSRP § 2.0. CRA's objection in Section B. 4. of the Opening Brief that sampling will not be done in recently disturbed or historically undisturbed areas ignores the scope of the CRMS.

CRA also apparently misunderstands how an area may be removed from the NDEP risk areas or from the CRMS. CRA's statement "CMI therefore intends to remove areas from the CRMS without sampling them for the presence of toxic material based solely on its assessment – unreviewed by NDEP, the public or state archeological experts..." is absolutely false. Nowhere does the SAP state that Comstock will remove any area from the CRMS. Rather, the SAP states: "areas of the Site with COCs below screening/action levels will be proposed for official removal from the CRMS, including removal from CRMS Risk Area maps." SAP, § 1.5. *See also,* SAP, § 12. NDEP will make any decision to modify its CRMS Risk Area Map. EPA will make any decision to actually define the CRMS boundary. CRA's objection is baseless.

C. CRA's Other Arguments Are Outside the Scope of this Appeal, Separately Lack Merit, and Must Be Dismissed

A valid appeal to the SEC requires that the aggrieved person file a Form 3 and provide the information required on the Form 3. NAC 519A.415(2). Form 3 requires a description of the "nature of the appeal and the grounds thereof" (question #5), as well as the sections of state law or regulation involved in the appeal (question #6). These questions are designed to provide fair and appropriate notice to NDEP and the permittee in order to have a fair hearing. *Federal Trade Com'n v. National Lead Co.*, 352 U.S. 419, 77 S. Ct. 502 (1957). CRA's remaining arguments were not included in the SAP Appeal Form 3 and thus do not meet the requirements for fair notice. CRA's SAP Appeal is improper in this regard, as well, and must be dismissed. In the alternative, CRA should be strictly limited to the very specific issues and regulatory provisions identified in the SAP Appeal Form 3.

Without waiving the above objections, Comstock will briefly address CRA's additional extrajudicial arguments regarding air monitoring, sediment sampling, and historic preservation issues.

1. CRA's Objection that the SAP Does Not Include Air Monitoring Is Not Properly Before the SEC

CRA's Form 3 did not include any objection or reference to air quality issues and CRA likewise failed to include any objection or reference to the need for air monitoring in its Form 3. Therefore, the objection raised in Section B.5. of the Opening Brief is outside the scope of the SAP Appeal and should not be considered by the SEC.

Furthermore, this concern was already dismissed by the SEC in its ruling on the Permit Appeal. In the Permit Appeal, CRA argued that NDEP has the authority to and should regulate air and water quality issues within the context of the Permit. Appellant CRA'S Response to NDEP'S Motion to Dismiss and CMI's Joinder, dated February 8, 2012, Section B.3. NDEP responded: "[t]he NDEP has no authority to issue an air permit for an exploration project less than 20 acres." Nevada Division of Environmental Protection's Motion to Dismiss, dated January 13, 2012, p. 7-8. The objection was resolved by dismissal in *SEC Order Granting Motion to Dismiss Appeal.* It is not properly before the SEC and the SEC should not reconsider this concern.

2. The SEC Should Dismiss the Objection Regarding Sediment Sampling Because the CRA Failed to Include It In Its SAP Appeal Form 3

CRA's Form 3 makes no mention of sediment sampling. As Comstock has already noted in Section B.2., above, CRA's objection that the SAP fails to sample sediment (*Opening Br.*, § B.2.) is not correct and should be dismissed by the SEC. This objection should also be dismissed as outside the scope of SAP Appeal.

3. Historic Resources Are Adequately Protected, And Litigating the Permit in Relation to Historic and Archeological Resources is Outside the Scope of This Appeal

CRA argues that "exploration and reclamation actions required in Permit 0315" may have unfavorable impacts on historic and archeological resources. CRA further asserts noncompliance with "Federal law and regulation". *CRA Br.* p. 8, 9 (emphasis added). CRA here again ignores that their appeal of the underlying Permit has already been dismissed and that relitigating the Permit is outside of the scope of this SAP Appeal. Fundamentally, any contention that NDEP or Comstock is not complying with Federal law is outside the SEC's jurisdiction. That problem, alone, prevents the SEC from considering the objection raised in Section C. of CRA's Opening Brief.

Without waiving this objection to jurisdiction, Comstock briefly explains why the CRA's last objection should be dismissed for several additional reasons. First, Comstock is subject not only to regulation by NDEP, but also Storey and Lyon counties, and EPA and BLM. For example, Comstock's Storey County Special Use Permit includes specific historic preservation provisions. Moreover, the federal, state, and local agencies are working together to ensure that all historic preservation issues are adequately and properly addressed.

EPA in adopting the ROD—in compliance with the Archaeological and Historic Preservation Act, 16 U.S.C. §469, and implementing regulations—considered impacts to historical and archaeological resources and found "that it is unlikely that any historical property or archaeological remains will be encountered." ROD, § 9.2.2., p. 34. Section 106 of the National Historic Preservation Act obligates Federal agencies with jurisdiction over a federally assisted undertaking to take into account the effects on historic properties. 16 U.S.C. §470, *et seq.* The Section 106 process is conducted in conjunction with the overall planning schedule, runs parallel to other required federal reviews, and is initiated by the Federal agency involved by first determining whether its action constitutes an "undertaking" that has the potential to cause effects on historic

properties.[11] The first step in the Section 106 process is to determine if the undertaking will affect a historic resource. If the agency's review indicates that there is a possibility that its action may have an effect on a historic resource, the agency must identify the historic properties and, in consultation with the State Historic Preservation Officer ("SHPO"), must make a reasonable and good faith effort to carry out appropriate identification efforts.

Here, as noted above, in connection with its 1995 ROD, EPA conducted historical research as part of the remedial investigation and feasibility study to determine the locations and information on the operations of Comstock mills and to develop chain-of-titles for the mills. The EPA's assessment expanded well beyond architectural resources. The EPA found that it was unlikely that any historical property or archeological resource would be encountered given the limited scope and area of the selected remedial action. Despite the EPA's finding, however, the agency produced an assessment of the location of historic Comstock mills that could be used in future reports. Though Comstock's further action by implementing the SAP have been determined not to constitute an "undertaking" and therefore do not trigger additional action under historic preservation laws, Comstock has consulted with the SHPO, with EPA, NDEP, and BLM regarding historic preservation and, further, has conducted a survey on its patented lands prior to SAP sampling. Thus, even if this aspect of the CRA SAP Appeal were properly before the SEC, CRA's objections are unfounded.

III. WITNESS LIST

1. Ms. Cindi Byrns
2. Mr. Joe McGinley
3. Any witnesses listed or called by any other party
4. Any witnesses that may become necessary for impeachment and/or rebuttal

IV. CONCLUSION

There is no basis in arguments presented in Form 3 or the Opening Brief sufficient to demonstrate that NDEP failed to meet statutory or regulatory requirements with regard to finalizing the SAP. CRA's arguments are more akin to a critique of the permitting process generally and

[11] "Undertakings" are broadly defined and include any project, activity or program funded by a Federal agency (including projects subject to federal agency permit or approval). *See also* 36 CFR § 800.16(y). However, action on private property requiring only state or local permits or approvals will generally not constitute an "undertaking" and will not trigger the historic resources review process.

express general disagreement with NDEP determinations on this particular Permit. If CRA is unhappy with the permitting process that is in place and that was followed by NDEP, an appeal in this forum is not the appropriate way to address such matters. As CRA has not identified any instance where NDEP failed to meet statutory or regulatory requirements, NDEP's determination on the SAP should be upheld and this SAP Appeal should be dismissed. If the SEC elects to hear the SAP Appeal, Comstock respectfully requests that the SEC deny the SAP Appeal.

RESPECTFULLY SUBMITTED this 4th day of April, 2012.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of April, 2012, I electronically served the foregoing **Comstock Mining, Inc.'s Motion to Dismiss** upon the following by email:

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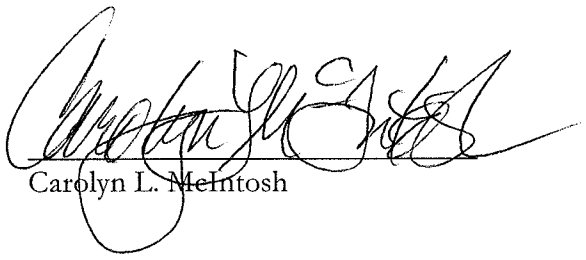

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