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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

In the Matter of: Appeal of Water Pollution Control Permit No. NEV2020104,	**INTERVENOR LITHIUM NEVADA CORP.'S MOTION TO STRIKE**

Pursuant to NAC 445B.8914, Lithium Nevada Corp. ("Lithium Nevada") files this motion to strike (the "Motion") Exhibit 4 to Great Basin Resource Watch's ("GBRW's") Opening Brief in its appeal of the Nevada Department of Environmental Quality's ("NDEP's") decision to issue Water Pollution Control Permit No. NEV2020104 (the "Permit") for the Thacker Pass Project ("Project"). For the reasons set forth below, the State Environmental Commission (the "Commission") should strike Exhibit 4 in its entirety, along with the portions of GBRW's Opening Brief which refer to Exhibit 4, and decline to consider this evidence on appeal.

I. INTRODUCTION

On appeal, GBRW argues that NDEP erred in issuing the Permit, asking the Commission to "withdraw" the Permit and remand the matter to NDEP to collect additional data and analysis. *See* Opening Brief, at 20. GBRW's argument relies primarily on a report prepared for GBRW by Steven H. Emerman, Ph.D., on April 7, 2022, and revised on April 11 and April 21, 2022 (the "Emerman Report"), which GBRW attached to its Opening Brief as Exhibit 4. *See* GBRW Opening Brief, at Exhibit 4. GBRW contracted with Dr. Emerman to prepare the 76-page, highly-

technical report in preparation for this appeal, arguing that the Emerman Report "conducts the analysis that should have been done" with regard to the Project's clay tailings filter stack ("CTFS"). *See* Opening Brief, at 14.

GBRW's reliance on the Emerman Report disregards NDEP's regulations and the fundamental tenet of administrative law, which limit the Commission's review of NDEP's decision to the record before the agency. *See*, *e.g.*, NAC 445B.8914(5); *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996). Although GBRW participated throughout the lengthy permitting and public comment process, at no point did it provide NDEP with the technical analyses or conclusions in the Emerman Report. In fact, the Emerman Report postdates both the Permit and GBRW's initiation of this appeal.[1] GBRW provides no justification for its failure to timely submit the Report to NDEP, despite engaging extensively in the public comment process regarding the Permit. As such, the Emerman Report should be stricken and not considered on appeal under the Commission's regulations and Ninth Circuit precedent. GBRW's numerous Opening Brief references to the Emerman Report should also be disregarded and stricken from the record for the same reasons.

II. STANDARD OF REVIEW

Review of administrative agency decisions requires deference to factual findings supported by substantial evidence limiting the determination to whether the agency acted arbitrarily or capriciously. *Nev. Pub. Emples. Ret. Bd. v. Smith*, 129 Nev. 618, 623-24 (2013). Although purely legal questions can be decided without deference, "when an agency's conclusions of law are closely related to its view of the facts, those conclusions are entitled to deference and [will not be disturbed] if they are supported by substantial evidence." *Id*. at 624.

[1] GBRW filed a Form #3 to initiate this appeal on March 7, 2022.

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1 Accordingly, administrative law requires that an agency's decision be reviewed based on
2 "the administrative record already in existence, not some new record made initially in the
3 reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *see also Citizens to Pres. Overton*
4 *Park v. Volpe*, 401 U.S. 402, 419–20 (1971), *abrogated on other grounds by Califano v. Sanders*,
5 430 U.S. 99 (1977) (judicial review "is to be based on the full administrative record that was before
6 the [agency] at the time [it] made [its] decision").
7
8 Under this well-settled rule, post-decision information and information otherwise not in
9 the administrative record "may not be advanced as a new rationalization either for sustaining or
10 attacking an agency's decision." *Sw. Ctr. for Biological Diversity*, 100 F.3d at 1450 (internal
11 citations omitted); *Ass'n of Pac. Fisheries v. EPA*, 615 F.2d 794, 811-12 (9th Cir. 1980). When a
12 party improperly submits and relies on material outside the record, the appropriate remedy is to
13 strike the extra-record materials and all arguments based on them. *See*, *e.g.*, *Ctr. for Biological*
14 *Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006); *Nw. Envtl. Advocates*
15 *v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1144 (9th Cir. 2006); *Sw. Ctr. for Biological*
16 *Diversity*, 100 F.3d at 1451; *Rybachek v. U.S. Envtl. Prot. Agency*, 904 F.2d 1276, 1296 n.25 (9th
17 Cir. 1990); *Friends of the Earth v. Hintz*, 800 F.2d 822, 829 (9th Cir. 1986) (all upholding district
18 court decisions to strike extra-record materials and all portions of the parties' briefs that referred
19 to those documents where applicable).
20
21 The Commission's own regulations adopt and reaffirm these well-established
22 principles, similarly prohibiting post-decisional extra-record attacks on agency decisions
23 except in limited circumstances where reasonable cause is shown. Specifically:
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> The Commission will not, at a hearing to affirm, modify or reverse an action of the Director pursuant to NRS 444.570, 445A.605 or 445B.360, consider evidence which was not submitted to the Department before the issuance of the decision or order which is the subject of the appeal unless:
>
> (a) The Department allowed a period for public comment before the Director took the action; *and*

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> (b) The Commission determines that *reasonable cause exists for the failure of a party to submit the evidence.*

NAC § 445B.8914(5)(emphasis added).

III. ARGUMENT

GBRW's Opening Brief relies heavily on the April 2022 Emerman Report (*See* Opening Brief, at 1, 4-11, 14-19), which GBRW improperly presented to the Commission for the first time on appeal, demonstrating a blatant disregard for both the Commission's regulations and precedent for excluding extra-record evidence offered to attack agency decisions. *See, e.g.*, NAC § 445B.8914(5); *Sw. Ctr. for Biological Diversity*, 100 F.3d at 1450.

NDEP conducted a thorough and extensive review over the course of a nearly two-year-long permitting process, during which time it solicited both written and verbal public comments (the latter during a public hearing in December 2021), prior to issuing the notice of decision approving the Permit on February 25, 2022. *See* NDEP's Response Brief, at Exhibits 1 & 3-4. GBRW participated in NDEP's public comment process by providing both written and verbal comments. *See, e.g.*, NDEP's Response Brief, at Exhibit 3, pp. NDEP 39, 41, 67. Yet, at no time during the extensive permitting process did GBRW provide NDEP with the Emerman Report – a 76-page highly-technical analysis – which it now attaches to its Opening Brief and asks the Commission to rely upon to set aside NDEP's decision to issue the Permit. Dr. Emerman prepared the report on GBRW's behalf *after* NDEP issued the Permit in February 2022, necessarily preventing NDEP from considering this information prior to issuing the Permit.

Under NAC 445B.8914(5), the Emerman Report should not be considered on appeal. There is no dispute that the Emerman Report was not included in the record before NDEP at the time it issued the Permit. GBRW's Opening Brief provides no explanation whatsoever for failing to present the analysis to NDEP during the public comment period, despite GBRW's participation in the commenting process. Absent "reasonable cause" for this prejudicial delay, the Commission

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should strike the Emerman Report pursuant to NAC 445B.8914(5) and decline to consider GBRW's arguments based on the Emerman Report.

NAC 445B.8914(5) establishes a presumption against post-decisional extra-record attacks on agency decisions. This sound public policy is reflected in Nevada administrative law and in Ninth Circuit case law, and the Commission should decline to consider the Emerman Report. For example, under NRS Chapter 233B, the Nevada Administrative Procedure Act ("233B"), judicial review of agency decisions is limited to the record before the agency at the time of decision. *See* NRS 233B.135(1) (requiring that judicial review of a final agency decision be "[c]onfined to the record."). NRS 233B prohibits the submittal of additional evidence without a showing that said evidence is "material and that there were good reasons for failure to present it in the proceeding before the agency[.]" NRS 233B.131(2).

The Ninth Circuit has also consistently recognized a presumption against the submittal of extra-record evidence to attack an agency's decision after the fact. While GBRW argues that NDEP "should have [] done" the analysis in the Emerman Report, it is unclear how a report which post-dates NDEP's decision could have any bearing on NDEP's decision to issue the Permit. To the contrary, such "post-decision information . . . may not be advanced as a new rationalization . . . for . . . attacking an agency's decision." *Sw. Ctr. for Biological Diversity*, 100 F.3d at 1450 (internal citations omitted). In asking the Commission to consider this extra-record evidence, GBRW improperly requests the Commission revisit NDEP's reasoned consideration of the permitting issues – including seepage through the CTFS – *de novo*, ignoring the fact that the Commission's review is limited to determining whether NDEP's factual findings and all closely-related legal conclusions are supported by the substantial evidence before NDEP *at the time it issued the Permit*. *See Nev. Pub. Emples. Ret. Bd. v. Smith*, 129 Nev. 618, 623-24 (2013). Doing so would implicate the primary concern in prohibiting the review of extra-record information, as

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it would "inevitably lead[] the [Commission] to substitute its judgment for that of the agency." *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980). Not only must GBRW's introduction of extra-record evidence be rejected because it upends these well-established limits on review of agency decisions, but – as a policy matter – to hold otherwise would effectively squander finite administrative resources at both NDEP and Commission levels, especially where GBRW fails to offer a single "reasonable cause" rationale for the delay.

Nor does GBRW argue that the Commission should consider the Emerman Report under the Ninth's Circuit's limited exceptions allowing consideration of extra-record evidence. A court may allow supplementation of an administrative record in only four circumstances: (1) "if admission [of extra-record evidence] is necessary to determine 'whether the agency has considered all relevant factors and has explained its decision,'" (2) "if the agency has relied on documents not in the record," (3) "when supplementing the record is necessary to explain technical terms or complex subject matter," and (4) "when plaintiffs make a showing of agency bad faith." *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005) (en banc). These four circumstances are to be "narrowly construed and applied." *Id.*; *see also id.* (explaining that the scope of the exceptions "is constrained, so that the exception does not undermine the general rule," because "were the federal courts routinely or liberally to admit new evidence when reviewing agency decisions, it would be obvious that the federal courts would be proceeding, in effect, de novo rather than with the proper deference to agency processes, expertise, and decision-making").

The *Lands Council* exceptions do not apply here. The Emerman Report and references thereto are not necessary to determine whether NDEP considered all relevant factors – rather, the post-decisional report presents an untimely attack on NDEP's very consideration of the relevant factors. The Emerman Report seeks to "answer the following question: What is the predicted seepage through the [CTFS] at the Lithium Nevada Thacker Pass mine both during operation and

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after closure?" Emerman Report, at 7. Yet, as the Emerman Report acknowledges, NDEP already considered two such seepage analyses during the permitting process – one prepared by NewFields and another by Piteau Associates – and reached reasonable conclusions based on those studies. *Id.* at 7; *see also* NDEP's Response Brief, at Exhibits 8 & 9. Although GBRW participated in the permitting process and commented extensively during NDEP's review, it never provided the Emerman Report until *after* NDEP issued its decision. Allowing such improper belated introduction of new evidence on appeal to challenge an agency's decision would lead to absurd results and a never-ending permit review process. Thus, even if the Emerman Report "might have supplied a fuller record, [it does] not address issues not already there[,]" rendering it unnecessary to the Commission's determination on appeal. *Sw. Ctr. for Biological Diversity*, 100 F.3d at 1451 (internal quotation marks omitted). For the same reasons, the Emerman Report and GBRW's references thereto are not necessary to determine whether NDEP has explained its decision– NDEP could not have addressed an analysis which was not before it, and the evidence already in the record demonstrates that NDEP adequately explained its decision to issue the Permit. Finally, there are no possible arguments that the Emerman Report and references thereto relate to documents NDEP relied on that are outside the record, contain technical or complex terms in need of explanation, or bad faith on the part of NDEP. Accordingly, the Commission should strike both the Emerman Report and GBRW's opening brief references to the same. *See, e.g.*, *Cachil Dehe Band of Wintun Indians*, 889 F.3d at 601; *Sw. Ctr. for Biological Diversity*, 100 F.3d at 1450.

Finally, GBRW's introduction of the Emerman Report at this late stage is highly prejudicial to Lithium Nevada as the permittee. Under NAC 445A.397, Lithium Nevada was required to (and did) submit various reports as part of the Permit application process and had no opportunity to respond to what is clearly a litigation-driven product containing unsupported claims as part of the years-long permitting process or during NDEP's December 2021 public hearing. *See Asarco, Inc.*,

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616 F.2d at 1162 (concluding that "it was a prejudicial violation of agency law principles not to allow [appellee] an opportunity to challenge [the] accuracy" of a report on which the agency relied). In light of that, the untimely introduction of the Emerman Report, should the Commission consider it, constitutes a potential violation of due process given Lithium Nevada's legitimate claim of entitlement to the continued possession of the existing Permit. *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319 (1976) (due process in the administrative setting demands an opportunity to be heard that is meaningful under the circumstances); *see Bell v. Burson*, 402 U.S. 535, 539 (1971) (recognizing that "[o]nce licenses are issued, ... their continued possession may become essential in the pursuit of a livelihood . . . . In such cases the licenses are not to be taken away without the procedural due process required by the Fourteenth Amendment"); *Buckingham v. Sec'y of U.S. Dep't of Agric.*, No. 307CV00073BESRAM, 2009 WL 10691087, at *11–12 (D. Nev. Mar. 12, 2009), *aff'd sub nom. Buckingham v. Sec'y of U.S. Dep't of Agr.*, 603 F.3d 1073 (9th Cir. 2010) ("Plaintiff had a protected property interest in the duration of his 2005 grazing permit for Due Process purposes."). While the Emerman Report is wholly unreliable and unsubstantiated, it also is untimely and appears to be a transparent improper attempt to cause unnecessary delays in the permitting process. NDEP's regulations, NRS 233B, and well and long established caselaw all explain and implement the sound policy basis for requiring technical analyses to be submitted during the permitting process rather than waiting until that process is completed to then present late technical information to try to undermine the decision. Allowing such after-the-fact analyses to be submitted for the first time in an appeal of an agency's decision would undermine administrative efficiency and the process in its entirety, inviting third parties who want to delay the process itself to simply sit back and strategically wait until NDEP makes it decision to then raise new technical information on appeal for the first time.

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Accordingly, because GBRW fails to provide "reasonable cause" for its untimely and improper attack on NDEP's decision to issue the Permit, the Commission should strike the Emerman Report and all references thereto in GBRW's Opening Brief pursuant to NAC 445B.8914(5), NRS 233B, and well-established law in this circuit disallowing such extra-record evidence.

IV. CONCLUSION

For the reasons set forth in above, Lithium Nevada respectfully requests that, pursuant to NAC 445B.8914(4), the Commission:

(a) find that no reasonable cause exists for GBRW's failure to submit the Emerman Report before NDEP issued the Permit;

(b) strike the Emerman Report – which is attached to GBRW's Opening Brief as Exhibit 4;

(c) strike all references in GBRW's Opening Brief (and any references GBRW includes in its Reply Brief) to the Emerman Report; and

(d) decline to consider both the Emerman Report and GBRW Opening Brief (and any Reply Brief) references thereto in this appeal.

DATED this 8th day of June, 2022.

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