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7
8 **BEFORE THE STATE OF NEVADA**
9 **STATE ENVIRONMENTAL COMMISSION**

10
11 In the Matter of:

12 GREAT BASIN RESOURCE WATCH'S
13 APPEAL OF NOTICE OF DECISION TO
RENEW WATER POLLUTION
14 CONTROL PERMIT NEV2008106 TO
EUREKA MOLY, LLC FOR THE
15 MOUNT HOPE PROJECT

**NEVADA DIVISION OF
ENVIRONMENTAL
PROTECTION'S REPLY IN
SUPPORT OF AMENDED
MOTION TO DISMISS**

16 The State of Nevada, Department of Conservation and Natural Resources, Division
17 of Environmental Protection ("NDEP"), by and through counsel, Nevada Attorney General
18 AARON D. FORD and Deputy Attorney General, DANIEL P. NUBEL, hereby files its
19 Reply in Support of its Amended Motion to Dismiss Great Basin Resource Watch's
20 ("GBRW") Appeal without prejudice. This Reply is based on the attached Memorandum of
21 Points and Authorities and all pleadings on file, as well as all oral arguments the State
22 Environmental Commission ("SEC") will hear on this matter.

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 **I. INTRODUCTION**

25 "Ripeness is essentially a **question of timing**, and depends on whether the
26 plaintiffs' threatened injury is sufficiently imminent to warrant judicial action." *Domino*
27 *v. Didion Ethanol, LLC*, 670 F. Supp. 2d 901, 914 (W.D. Wis. 2009) (emphasis added).
28 NDEP's Motion asks the SEC to determine whether it is more prudent to decide the issue

1 of expected pit lake water quality based on current characterization or to make that
2 determination after more characterization data has been collected through the proposed
3 Permit amendments' additional requirements.

4 Case law supports the notion that judicial bodies should utilize the ripeness
5 doctrine to postpone cases to allow for additional fact-finding when doing so would not
6 cause harm to the petitioning party. For example, in *Ohio Forestry Ass'n, Inc. v. Sierra*
7 *Club*, 523 U.S. 726 (1998), the United States Supreme Court dismissed a case on ripeness
8 grounds because "further factual development would significantly advance our ability to
9 deal with the legal issues presented and would aid us in their resolution." *Id.* at 737. Also
10 of importance to the Court's decision was that the environmental group would "have
11 ample opportunity later to bring its legal challenge at a time when harm is more
12 imminent and more certain." *Id.* at 734. Despite this relevant case law, GBRW's Response
13 examines cases that are unrelated to ripeness and fundamentally different from the
14 present case.

15 NDEP's renewed Permit requirements and proposed revisions would benefit the
16 parties and the SEC. The renewed Permit requires additional characterization data
17 collection and incorporation of this information into the subsequent model updates with
18 the next renewal. The proposed Permit revisions would allow for additional factual
19 development while retaining GBRW's opportunity to comment and appeal before its
20 alleged harm, the formation of the Mount Hope Pit Lake, can take place. Since one of
21 GBRW's main contentions is that NDEP did not gather enough data before permitting
22 mining, the renewed Permit and the proposed Permit revisions provide a reasonable path
23 forward for both parties.

24 To be clear, NDEP considers the current data and modeling analyses substantial
25 and credible evidence to support a decision to permit Eureka Moly, LLC ("E/M") to mine
26 past the groundwater table. However, NDEP acknowledges that additional data collection
27 conducted after mining has commenced will further inform future predictions of pit lake
28 water quality which will, if needed, further inform the remediation and reclamation plan

1 for the pit lake and the amount of financial assurance required to ensure that
2 remediation and reclamation is completed. In this regard, NDEP agreed with GBRW's
3 comments on the 2018 Permit renewal and incorporated a permit requirement to collect
4 and analyze additional data in areas that were previously lacking characterization. In
5 addition, in a further attempt to address GBRW's concerns, NDEP proposed modification
6 of the renewed Permit to incorporate requirements for additional data collection and
7 modeling efforts. All of this information will be further evaluated by NDEP and the
8 public, and will be subject to appellate review based on compliance with applicable
9 statutes and regulations prior to formation of the pit lake.

10 **II. LEGAL ANALYSIS**

11 **A. The Case Law Cited in GBRW's Brief Supports NDEP's Position That** 12 **This Appeal is Not Yet Ripe for Review.**

13 *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726 (1998) presented a situation
14 similar to the present case. In that case, the court found an environmental group's
15 challenge of the United States Forest Service's management plan unripe for review. *Id.*
16 at 728. The Forest Service's plan set logging goals and methods for harvesting timber, but
17 it did not "itself authorize the cutting of any trees." *Id.* at 729. Instead, it created a
18 phased permitting approach whereby the cutting of trees would only commence after
19 additional criteria were characterized. *Id.* at 730. An environmental group challenged the
20 plan and the Forest Service contended that issues relating to logging and clearcutting
21 were not yet ripe for adjudication under the plan. *Id.* at 732. The United States Supreme
22 Court found that the plan did not inflict "significant practical harm upon the interest that
23 [the environmental group] advances." *Id.* at 733. The environmental group "will have
24 ample opportunity later to bring its legal challenge at a time when harm is more
25 imminent and more certain." *Id.* at 734. Also of importance to the Court was that "the
26 possibility that further [agency] consideration will actually occur before the Plan is
27 implemented is not theoretical, but real." *Id.* at 735. Finally, the Court found that
28 "further factual development would significantly advance our ability to deal with the legal

1 issues presented and would aid us in their resolution.” *Id.* at 737. Given that the
2 environmental group’s alleged harm was not imminent, and that the case would benefit
3 from further factual development, the Court found the suit unripe for review. *Id.* at 739.

4 Whereas the harm in *Ohio Forestry* was the cutting down of trees, the alleged harm
5 here is creation of a mine pit that penetrates the water table and creates a pit lake that
6 violates the standards established by NAC 445A.429. Just as in *Ohio Forestry*, NDEP’s
7 proposed permit revisions would allow GBRW ample time to bring a legal challenge to
8 prevent its alleged harm. Additionally, NDEP’s proposed revisions would allow for further
9 factual development that may impact NDEP’s consideration of future Permit
10 requirements and the required bonding to ensure protection of waters of the State. Since
11 NDEP’s proposed revision would allow for factual development without causing GBRW
12 significant harm, the SEC should grant NDEP’s Motion for the same reasons stated in
13 *Ohio Forestry*.

14 GBRW also cites *Save Our Cabinets v. U.S. Dep’t of Agric.*, 254 F.Supp.3d 1241 (D.
15 Mont. 2017) and *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015 (9th Cir. 2011)
16 to support its position. However, these two cases do not involve the doctrine of ripeness
17 and are inapposite to the present case.

18 To this point, GBRW contends that “the issue of ripeness was squarely faced in
19 *Save Our Cabinets v. U.S. Dep’t of Agric.*, 254 F.Supp.3d 1241 (D. Mont. 2017).”
20 See GBRW’s Response at 10:15-16. Yet, even a cursory look at that case reveals that the
21 court never mentioned or addressed ripeness. In *Save Our Cabinets*, the court reviewed a
22 phased permitting process similar to the one at issue with this case. *Id.* at 1253. The court
23 found the permit to be improperly issued because the Montana Department of
24 Environmental Quality “determined that, based on available data, the Project would not
25 comply with Montana law.” *Id.* This is fundamentally different from the present case. In
26 this case, all available data indicates that the expected Mount Hope Pit Lake will not
27 violate Nevada law.

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1 Next, GBRW cites *Greater Yellowstone*, 665 F.3d 1015 (another case that does not
2 contain the word ripeness). That case involved the Forest Service’s adaptive plan that
3 removed the grizzly bear as an endangered species. *Id.* at 1019. Under the adaptive
4 management plan, the Service would “continue to monitor the abundance and
5 distribution of major grizzly bear foods such that any decline in the grizzly bear
6 population as a result of these declines is detected in a sufficient time and addressed
7 through adaptive management.” *Id.* at 1028. The court rejected the idea that “the future
8 possibility of relisting a species can operate as a reasonable justification for delisting.”
9 *Id.* at 1029. Once again, this case is distinguishable from the present case. First, *Greater*
10 *Yellowstone* did not address the issue of ripeness. Second, the harm at issue in *Greater*
11 *Yellowstone* (grizzly bear population reduction) was not protected under the adaptive
12 management plan. By the time the adaptive management plan was adjusted, the
13 population would necessarily already have decreased. By contrast, in this case, NDEP’s
14 proposal would ensure that GBRW’s harm (creation of a pit lake that violates
15 NAC 445A.429) could not occur without another opportunity to appeal.

16
17 **B. The Parties and the SEC Would All Benefit From Allowing
Additional Facts and Data to be Gathered.**

18 In deciding a ripeness inquiry, “the core question is whether the agency has
19 completed its decision making process, and whether the result of that process is one that
20 will directly affect the parties.” *Truyen Gia Phan v. Colvin*, 2014 WL 794255, at *7
21 (S.D. Cal. Feb. 25, 2014). The ripeness doctrine examines issues individually rather than
22 the permit as a whole. Some issues in a permit may be ripe for appeal while others may
23 need further factual development. *See Ohio Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S.
24 726, 726, 118 S. Ct. 1665, 1667, 140 L. Ed. 2d 921 (1998) (“In deciding whether an agency
25 decision is ripe, this Court has examined the fitness of the particular issues for judicial
26 decision and the hardship to the parties of withholding review”). “Ripeness is essentially a
27 question of timing, and depends on whether the plaintiffs’ threatened injury is sufficiently

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1 imminent to warrant judicial action.” *Domino v. Didion Ethanol, LLC*, 670 F. Supp. 2d
2 901, 914 (W.D. Wis. 2009).

3 The primary issues at the center of GBRW’s appeal are the amount of material
4 characterization and pit lake modeling methodology. In the present case, both the parties
5 and the SEC will benefit from NDEP’s proposed Permit amendments. These proposed
6 amendments would delay NDEP’s reevaluation of expected pit lake water quality until
7 after E/M conducts additional rock characterization under the plan required by the
8 proposed amendments. NDEP will benefit by having additional information for
9 determining whether modification to the operating or closure plans, or a remediation plan
10 will be necessary to protect waters of the State. GBRW will benefit by getting additional
11 information, which is a primary concern in its appeal.

12 GBRW argues that NDEP should have examined molybdenum mines across the
13 country to evaluate the future predicted water quality of this pit lake. But, this proposed
14 methodology of evaluating pit lakes is flawed, as admitted in GBRW’s brief, due to the
15 unique geology and physical characteristics of each site.

16 The most reasonable way for NDEP to determine future pit lake quality is through
17 drilling and/or mining and incorporation of this data into predictive models. The renewed
18 Permit requires that E/M collect and incorporate this data into the next update of the
19 predictive pit lake model. The proposed permit revisions would allow E/M to begin mining
20 with a requirement to submit a Major Modification or renewal for review and approval
21 prior to mining below the groundwater table. These proposed revisions will provide E/M
22 the ability to begin facility construction and initial mining after funding is obtained while
23 also providing enough time (approximately 1–2 years) for sample collection,
24 characterization, model and operating management plan updates, and amendments to
25 the reclamation bonding, as applicable. Finally, the SEC will benefit by delaying its
26 decision until a time when more information is available to predict future pit lake quality
27 and assess any reclamation and remediation plans for compliance with applicable
28 statutes and regulations as well as any financial assurance posted to ensure those plans

1 are completed. If determined reasonable by the SEC, incorporation of the proposed
2 amendments would allow GBRW to appeal NDEP's future decision prior to E/M mining
3 below the groundwater table.

4 **C. NDEP Has Substantial Evidence to Permit E/M to Mine Below the**
5 **Groundwater Table.**

6 GBRW argues that NDEP's request to dismiss this case on ripeness grounds is an
7 admission that NDEP's decision was not supported by substantial evidence. To the
8 contrary, NDEP considers the current data and modeling analyses substantial evidence to
9 support a decision to permit E/M to mine past the groundwater table. NAC 445A.429(3)
10 provides that "bodies of water which are a result of mine pits penetrating the water table
11 must not create an impoundment which: (a) has the potential to degrade the
12 groundwaters of the State; or (b) has the potential to affect adversely the health of
13 human, terrestrial or avian life." Current evidence and modeling conclusions demonstrate
14 that water in the pit lake will not mix with the groundwater around the pit lake and
15 cannot flow up gradient away from the pit lake. *See* NDEP's Response Brief, Exhibit 8 at
16 NDEP 266. Additionally, a comprehensive risk assessment report concluded that there is
17 no meaningful possibility that the Mount Hope Pit Lake would affect adversely the health
18 of human, terrestrial or avian life. *See* NDEP's Response Brief, Exhibit 10 at NDEP 389-396.
19 These studies provide substantial evidence to support NDEP's decision to allow GBRW to
20 mine below the groundwater table.

21 In sum, the current Permit provides required information in a timely manner,
22 protects waters of the State, and gives the public an opportunity to review and appeal
23 during the next renewal period. Nonetheless, NDEP sees little downside in delaying its
24 reevaluation of the issue of expected pit lake water quality until E/M completes further
25 characterization. NDEP expects this additional characterization to confirm the results of
26 the previous studies. However, as discussed above, if this new characterization and
27 modeling shows that the expected pit lake would violate NAC 445A.429, then NDEP
28 would require a remediation and reclamation plan and financial assurance before mining

1 below the water table is permitted. Dismissing GBRW's appeal until that additional
2 characterization takes place will allow for additional factual development without risking
3 any harm to the parties.

4 **IV. CONCLUSION**

5 For these reasons, NDEP requests that the SEC dismiss GBRW's appeal without
6 prejudice and modify E/M's 2018 Permit NEV2008106 Schedule of Compliance item 6 to
7 require E/M to obtain written NDEP approval of a revised groundwater flow model,
8 predictive pit lake model, and ecological risk assessment prior to E/M mining below the
9 groundwater table. This modification will include an additional public comment period
10 and possible appeal of any NDEP decision to allow E/M to continue mining below the
11 groundwater table.

12 DATED this 12th day of June, 2019.

13 AARON D. FORD
14 Attorney General

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of the State of Nevada, Office of the
3 Attorney General, and on this 12th day of June, 2019, I served a copy of the foregoing,
4 NEVADA DIVISION OF ENVIRONMENTAL PROTECTION'S REPLY IN SUPPORT OF
5 AMENDED MOTION TO DISMISS, via email to:

6 Val King
7 Executive Secretary
8 State of Nevada
9 State Environmental Commission
10 Email: vking@ndep.nv.gov

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/s/ Daniel Nubel
Daniel Nubel
State of Nevada,
Office of the Attorney General