AARON D. FORD
Attorney General
DANIEL P. NUBEL (Bar No. 13553)
Deputy Attorney General
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
T: (775) 684-1225
E: dnubel@ag.nv.gov

Attorneys for Nevada Division of Environmental Protection

BEFORE THE STATE OF NEVADA
STATE ENVIRONMENTAL COMMISSION

In the Matter of: GREAT BASIN RESOURCE WATCH'S APPEAL OF NOTICE OF DECISION TO RENEW WATER POLLUTION CONTROL PERMIT NEV2008106 TO EUREKA MOLY, LLC FOR THE MOUNT HOPE PROJECT	**NEVADA DIVISION OF ENVIRONEMENTAL PROTECTION'S AMENDED MOTION TO DISMISS**

The Nevada Division of Environmental Protection ("NDEP"), by and through legal counsel, hereby files its Amended Motion to Dismiss Great Basin Resource Watch's Appeal ("GBRW") without prejudice. This Motion is based on the attached Memorandum of Points and Authorities and all pleadings on file, the exhibits attached hereto, as well as all oral arguments the State Environmental Commission ("SEC") will hear on this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

NDEP has received and evaluated many studies and a substantial amount of data regarding the Mount Hope Project, and based on this information, concluded that the future Mount Hope Pit Lake will not degrade the State's groundwater, nor will it adversely affect the health of humans or animals. GBRW's brief manipulates law and fact to justify its conclusions about the Project's protectiveness. GBRW contends that pit lakes must meet drinking water standards. To meet that result, GBRW misapplies and misreads Nevada's water pollution control statutes and regulations. A finding in GBRW's

favor would completely upend the regulatory authority governing Nevada's hardrock mining industry and give undue validation to GBRW's unsubstantiated concerns.

However, the SEC does not need to decide these issues now. Instead, it should dismiss GBRW's appeal, without prejudice, based on the ripeness doctrine. In considering whether an agency's decision is ripe for review, an adjudicatory body like the SEC should consider whether it "would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998). While NDEP considers the current data and modeling analyses substantial and credible evidence to support a decision to permit Eureka Moly, LLC ("E/M") to mine past the groundwater table, NDEP acknowledges that additional data collection conducted after mining has commenced will further inform the evaluation of pit lake water quality into the future. As a result, NDEP will stipulate to revise the Permit to require E/M to obtain written NDEP approval of a revised groundwater flow model, predictive pit lake model, and ecological risk assessment, prior to E/M mining below the pre-dewatering groundwater elevation. This revised Permit item will include an additional public comment period and process for appeal. GBRW's appeal is focused on the water quality of the expected Mount Hope Pit Lake. But, a pit lake can only be created by mining penetrating the water table. These permit revisions would require additional characterization and data collection without risking any of the harm GBRW seeks to prevent (creation of a pit lake).

GBRW contends that once mining commences, it will be impossible to stop or regulate. However, GBRW's argument unjustifiably assumes that NDEP and the SEC would ignore applicable law. NDEP's regulations provide that a pit lake cannot have the potential to degrade groundwaters of the State or adversely affect human or animal health. Although unlikely, if the additional characterization shows that the Mount Hope Pit Lake is expected to violate NAC 445A.429, then NDEP would require a remediation plan and sufficient bonding to keep and maintain compliance with that regulation. Further, GBRW would retain the ability to file a direct appeal to this administrative body

of any such permit issued on that basis. These technical, legal, and procedural checks ensure that any decision to allow E/M to mine past the water table will be based on substantial and credible evidence and will comply with the law governing the formation of a pit lake.

For these reasons, NDEP requests that the SEC allow for further factual development to occur by dismissing this appeal, without prejudice, and allowing GBRW to revisit this issue, if needed, prior to E/M mining below the groundwater table.

II. STATEMENT OF FACTS

A. Mount Hope Mine Project

The Mount Hope Project (the "Project") covers approximately 8,253 acres on both private land (261 acres) and public land (7992 acres) in west-central Eureka County, Nevada. The Project, once operational, is expected to mine up 29 million tons of molybdenum ore per year with a mine lifespan of approximately 44-years. E/M would extract the ore from a single open pit.

B. Original Permit

Eureka Moly, LLC (E/M), a joint venture between General Moly, Inc. (80%) and POS Minerals Corporation (20%), filed an application to permit the Project on July 11, 2008. Thereafter, NDEP provided public notice and held a public hearing in Eureka, Nevada regarding E/M's permit application. As part of this process, NDEP received comments from GBRW. *See* GBRW's 2012 Comment Letter attached as Exhibit 1 to NDEP's Response Brief. GBRW commented on the need for additional site monitoring wells, possible improvements to the pit lake study, and on the proximity of a proposed stormwater channel to the Potentially Acid Generating ("PAG") Waste Rock Disposal Facility ("WRDF"). *Id.* In addition to responding to these comments, NDEP added an item to the Permit's Schedule of Compliance ("SOC")[1] requiring E/M to install seven (7) additional monitoring wells. *See* 2012 Permit Notice of Decision attached as Exhibit 2 to

[1] A SOC sets out specific studies or data collection efforts that the permittee must complete to maintain compliance with the permit terms. SOC items are firm requirements in the permit with a specified timeframe for completion.

NDEP's Response Brief at NDEP 25. GBRW did not comment on any of the other provisions of the Permit, nor did it appeal NDEP's decision to issue the Permit. On December 13, 2012, NDEP's decision to grant the Permit became final.

C. Permit Renewal

Pursuant to NAC 445A.409(2) and 445A.420, the term of E/M's original permit was five years. E/M applied for renewal of the Project permit on August 2, 2017. The renewal application, due to the lack of mine development over the previous five years, was nearly identical to the original permit application. NDEP conducted a public comment period for E/M's renewal application. In response to E/M's renewed permit application, GBRW submitted a 27-page comment letter on June 23, 2018. The letter offered GBRW's concerns regarding the level of characterization, modeling approaches, monitoring well locations, mined materials management, and NDEP's interpretation of the regulations it administers. *See* GBRW's June 23, 2018 letter attached as Exhibit 3 to NDEP's Response Brief.

NDEP reviewed and evaluated GBRW's concerns and made a number of modifications to the SOC and continuing investigations in the renewed permit. *See* NDEP's November 6, 2018 Notice of Decision attached as Exhibit 4 to NDEP's Response Brief. Specifically, NDEP's modifications were as follows: First, E/M is required to construct an additional monitoring well downgradient of the non-potentially acid generating waste rock disposal facility (non-PAG WRDF) for the purpose of obtaining additional background (pre-mining) and post-mining water quality data to detect any impact to water quality in that area from mining operations. *Id.* at NDEP 71. Second, E/M is required to revise the waste rock management plan to provide additional characterization of portions of the final pit wall. *Id.* at NDEP 75–76. These characterization data will increase certainty in the pit lake model's final water quality predictions. Third, to address GBRW's concern about the engineering design of the SP-7 conveyance system[2] and its potential to collapse under the non-PAG WRDF, E/M is

[2] SP-7 is a spring that will be covered up by the non-PAG WRDF. The conveyance system is designed to collect and transport spring water under the non-PAG WRDF.

required to submit a revised design that will provide a more robust conveyance system that will ensure flows are conveyed as intended beneath the non-PAG WRDF footprint and exit at the nearest natural drainage. *Id.* at NDEP 80. Fourth, E/M is required to implement a study that will measure the diffusion of oxygen in the pit wall rock, which GBRW hypothesizes may impact water quality in the pit lake. *Id.* at NDEP 82.

NDEP issued the Notice of Decision for the Mount Hope Project Permit renewal on November 6, 2018. The Permit became effective on November 21, 2018. *See* 2018 Permit, NEV2008106 attached as Exhibit 5 to NDEP's Response Brief. Despite NDEP addressing many of GBRW's concerns, GBRW filed the present appeal on November 16, 2018.

D. Water Quality is Not Expected to Harm Human, Terrestrial or Avian Life.

The factual matters at issue in this appeal concern the water quality and ecological risk in and around the pit both during and after E/M's mining of the molybdenum deposit. NDEP's decision to grant the original and renewed permit is based on studies that were conducted in and around the Project which generated data and information for input into PHREEQC – a publicly available and widely accepted United States Geological Survey computer model. The PHREEQC model provides NDEP with predictive quantitative results of water quality in and around the pit.

1. Substantial Data has Been and will be Collected in and Around the Project Which will Increase the Certainty of the Modeling Results.

a. Rock Characterization Data

E/M conducted a geochemical investigation, which collected samples from drilled bore holes to determine the subsurface characteristics of the rock or rocks in and around the Project. *See* Waste Rock and Pit Wall Geochemical Characterization attached as Exhibit 6 to NDEP's Response Brief. These data and information were inputted in the PHREEQC model to determine whether the waste rock extracted from the pit and the pit walls had the potential to degrade waters above state action levels. With this information,

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NDEP formed management and closure strategies to ensure protection of waters of the State during operations and closure of the mining facility.

b. Data That Will be Collected After Mining Commences.

The 2018 Permit Renewal requires E/M to submit a revised Waste Rock Management Plan (WRMP) within 180 days after it initiates the Project's construction schedule. *See* the Permit attached as Exhibit 5 at NDEP 92. This updated WRMP is required to include a characterization plan that outlines sampling and analytical procedures for portions of the final pit wall that have not been characterized. The data collected from this characterization plan will be inputted into the PHREEQC model to further characterize the expected pit lake water quality.

2. Pit Lake Water will Not Mix with Surrounding Groundwater.

NDEP has reviewed the groundwater flow model and the PHREEQC model results which are based on the above referenced data collected in and around the Project. The model results indicate that the Mount Hope Pit Lake is expected to be a hydrologic sink (also known as a "terminal sink"). In other words, the volume of water that is expected to flow into the pit lake from the surrounding aquifer and precipitation after mining is complete[3] is expected to be equal to the evaporation from the surface of the pit lake at equilibrium.[4] Groundwater levels around the perimeter of the mine pit are expected to remain higher in elevation than the water elevation in the pit lake; therefore, water in the pit lake will not mix with surrounding groundwater due to the downward gradient from the surrounding groundwater table to the surface of the pit lake. *See* July 2010 Hydrology and Numerical Modeling Executive Summary attached as Exhibit 8 to NDEP's Response Brief at NDEP 266.

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[3] The model simulations assume that NDEP will authorize E/M to mine beneath the water table. As discussed more fully below, E/M must obtain NDEP's approval before it mines beneath the water table.

[4] The modeling results assume the current climate conditions persist over the life of the model simulation period, which is 1,613 years into the future (33 years of dewatering, followed by 1,580 years of post-dewatering pit lake development).

3. Pit Lake Geochemistry Will Not Harm Human Health or the Environment.

The PHREEQC model was also used to predict pit lake water chemistry at specific time steps after mining has completed and water is permitted to flow into the pit from the surrounding aquifer. According to the model, the constituents of concern that are predicted to exceed NDEP Profile III reference values[5] are fluoride and cadmium. *See* Final Pit Lake Geochemistry Report attached as Exhibit 9 to NDEP's Response Brief at NDEP 330. The pH of the pit lake is predicted to be neutral to slightly alkaline, with a pH of approximately 7.7 su, throughout the pit filling to 200 years post-closure. *Id.*

E/M performed an ecological risk assessment of the Mount Hope Pit Lake. This evaluation used the predicted pit lake water quality result from the PHREEQC model and followed guidance provided by the U.S. Department of the Interior, BLM *Ecological Risk Guidelines for Open Pit Mine Lakes in Nevada* (2008). *See* Mount Hope Project Pit Lake Screening-Level Ecological Risk Assessment ("SLERA") attached as Exhibit 10 to NDEP's Response Brief.[6] The SLERA's results found that concentrations of constituents of concern would not exceed species exposure concentration levels for avian or terrestrial life, except cadmium and fluoride for livestock. However, since the pit lake water is not expected to be accessible or desirable for livestock to use as their primary watering source, no adverse effects are expected to livestock.[7] *Id.* at NDEP 389–396. Ultimately,

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[5] NDEP developed Profile III reference values in 2014 to represent toxicity screening levels for pit lakes. The 2010 pit lake geochemistry report stated that the pit lake would exceed Profile I reference values for fluoride, antimony, cadmium, and manganese, which is incorrect, because Profile I reference values apply only to groundwater, not to pit lake water which is regulated by NAC 445A.429 since no beneficial use has been prescribed to pit lakes. Only fluoride and cadmium exceed Profile III reference values.

[6] This ecological risk assessment was performed prior to the NDEP's creation and implementation of the Profile III Reference Values. NDEP reassessed exposure risks to human, terrestrial, and avian life using the Profile III reference values. Notably, the results of the analysis did not change the outcome of the assessment (NDEP-BMRR Pit Lake Tables and Mount Hope Screening Ecological Risk Assessment).

[7] The hazard quotient (HQ) for livestock was less than one, which means that no adverse health effects are expected occur.

the SLERA concluded that "even using the most sensitive receptors (i.e. lowest toxicity criteria), the results of the assessment indicate that the most likely predicted water quality of the modeled future pit lake water at the Mount Hope Project would represent a low risk (HQ<1) to wildlife, terrestrial and avian, that are exposed to it via direct ingestion." *Id.* at NDEP 391–392. A hazard quotient ("HQ") of less than 1 is the lowest achievable risk criteria in the SLERA. *Id.* at NDEP 390.

4. Pit Lake Water Quality is Not an Issue During This Permit Cycle.

As part of this review process, NDEP will stipulate to revise Schedule of Compliance ("SOC") item 6 in the Permit to require E/M to obtain written NDEP approval of a revised groundwater flow model, predictive pit lake model, and ecological risk assessment, prior to E/M mining below the pre-dewatering groundwater elevation. These revised studies shall be submitted as a permit renewal or major modification to the permit, which will include an additional public comment period and an opportunity for appeal.

III. LEGAL ANALYSIS

A. The SEC Should Dismiss GBRW's Appeal Without Prejudice Based on the Ripeness Doctrine.

The ripeness doctrine "supports dismissal where further factual development may provide additional focus, the agency may revise the plan, or review may ultimately become unnecessary." *Cent. Delta Water Agency v. U.S. Fish & Wildlife Serv.*, 653 F. Supp. 2d 1066, 1088 (E.D. Cal. 2009). "Ripeness is essentially **a question of timing**, and depends on whether the plaintiffs' threatened injury is sufficiently imminent to warrant judicial action." *Domino v. Didion Ethanol, LLC*, 670 F. Supp. 2d 901, 914 (W.D. Wis. 2009) (emphasis added).

The ripeness doctrine serves to prevent judicial bodies, "through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an

administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148–49 (1967). "A claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Id.* "In interpreting the finality requirement, a court looks to whether the agency action represents the final administrative word to insure that judicial review will not interfere with the agency's decision-making process." *Winter v. California Med. Review, Inc.*, 900 F.2d 1322, 1325 (9th Cir. 1989). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998).

Notably, the ripeness doctrine examines each individual issue involved in the appeal. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 726, 118 S. Ct. 1665, 1667, 140 L. Ed. 2d 921 (1998) ("In deciding whether an agency decision is ripe, this Court has examined the **fitness of the particular issues** for judicial decision and the hardship to the parties of withholding review"); *see also Consol. Rail Corp. v. United States*, 812 F.2d 1444, 1451 (3d Cir. 1987) (finding some issues ripe for appeal of agency decision while other issues were not); *see also Nat. Res. Def. Council, Inc. v. U.S.E.P.A.*, 859 F.2d 156, 215 (D.C. Cir. 1988) ("In sum, we hold that the following issues are not ripe for review…").

"In deciding whether an agency's decision is, or is not, ripe for judicial review, the Court ... must consider: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Pub. Lands for the People, Inc. v. U.S. Dep't of Agric.*, 733 F. Supp. 2d 1172, 1184 (E.D. Cal. 2010).

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1. Further Factual Development Will Benefit the SEC in Making its Determination and Will Not Interfere with Further Administrative Action.

While NDEP considers the current data and modeling analyses substantial and credible evidence to support a decision to permit E/M to mine past the groundwater table, NDEP acknowledges that its conclusions will only become more certain with data collection conducted after mining of the Project has commenced. The renewed permit requires E/M to submit a revised Waste Rock Management Plan ("WRMP") within 180 days after it initiates the Project's construction schedule. This updated WRMP must include a characterization plan that outlines sampling and analytical procedures for portions of the final pit wall that have not been characterized. The data collected from these samples will be inputted into PHREEQC model to further characterize the expected pit lake water quality after mining is completed. In addition, as part of this appeal process, NDEP will stipulate to revise Schedule of Compliance item 6 in the Permit to require E/M to obtain written NDEP approval of a revised groundwater flow model, predictive pit lake model, and ecological risk assessment, prior to E/M mining below the groundwater table. These revised studies will be submitted as a permit renewal or major modification to the permit, which will include an additional public comment period and possible appeal of any NDEP decision to allow E/M to continue mining below the groundwater table.

The crux of GBRW's argument is that E/M has not collected enough data and its modeling is too uncertain for NDEP to permit mining past the groundwater table. GBRW cannot dispute that data collected from the rock characterization plan will offer more complete and representative data of the pit lake wall than land surface data collection techniques. For these reasons, GBRW's concerns about data gaps in pit wall rock characterization are clearly remedied by NDEP's proposal. NDEP's proposed permit revisions would allow NDEP to obtain additional rock characterization data without risking any harm to GBRW. Further, the proposed permit revisions would allow NDEP, and potentially the SEC, to review the updated groundwater flow model, predictive pit

lake model, and ecological risk assessment, and E/M's pit lake reclamation plan, including reclamation bonding, prior to E/M mining below the groundwater table.

2. A Delayed Review Would Not Cause Hardship to GBRW.

Critical to the ripeness analysis is whether the petitioner will suffer hardship as a result of delayed review. Hardship in this context "does not mean just anything that makes life harder; it means hardship of a legal kind, or something that imposes a significant practical harm upon the plaintiff." *Underwood v. Mackay*, 2013 WL 3270564 at *5 (D. Nev. June 26, 2013), *aff'd*, 614 F. App'x 871 (9th Cir. 2015). "Plaintiffs must show that postponing review imposes a hardship on them that is **immediate, direct, and significant**." *Id.* (emphasis added). Hardship does not exist when "petitioners may protect all of their rights and claims by returning to court when the controversy ripens." *Atl. States Legal Found. v. E.P.A.*, 325 F.3d 281, 284–85 (D.C. Cir. 2003); *see also Nat. Res. Def. Council v. Abraham*, 388 F.3d 701, 707 (9th Cir. 2004) ("we see no realistic, as opposed to chimeric, danger that NRDC will sustain an injury if we await developments"); *see also Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726 (1998) (finding the case unripe because the Forest Service had to take additional steps to permit logging, and its decisions were subject to an administrative-appeals process and judicial review).

As stated above, GBRW must show that delayed review would impose hardship that is "immediate, direct, and significant." *Underwood v. Mackay*, 2013 WL 3270564 at *5 (D. Nev. June 26, 2013), *aff'd*, 614 F. App'x 871 (9th Cir. 2015). Instead, GBRW offers only the speculative hardship that, once mining commences, it will be impossible to stop. *See* GBRW's Reply at 3 ("It is not uncommon for mining companies to argue that once construction has begun that to deny the permit will cost the hosting community many jobs and weaken the local economy"). But, this argument is flawed for three reasons.

First, the primary claims set forth in GBRW's appeal relate to the harm caused by the expected Mount Hope pit lake. But, a pit lake can only be formed when a mine pit penetrates the water table. *See* NAC 445A.429. Here, the permit, with stipulated modifications, would take a phased approach where NDEP would first permit E/M to

break ground and mine to just above the water table. At that time, E/M would be required to submit a revised groundwater flow model, predictive pit lake model, ecological risk assessment, for NDEP's review and determination. GBRW would have another opportunity to comment and, to the extent it is not satisfied with NDEP's decision on the next phase of mining, appeal NDEP's decision prior to E/M mining below the groundwater table. Since GBRW's alleged harm would not occur prior to the next appeal opportunity, it will not suffer any prejudice as a result of delayed review.

Second, GBRW's argument assumes that NDEP will ignore applicable regulation and instead be biased by local economic conditions. NAC 445A.429 provides that a pit lake cannot have the potential to degrade groundwaters of the State or adversely affect human or animal health. Although unlikely, if the additional characterization shows that the Mount Hope Pit Lake is expected to violate this regulation, NDEP would require a remediation plan to keep the pit lake in compliance with that regulation. Additionally, NDEP would require that additional bonding be established for any necessary future remediation. NDEP would not be requiring E/M to not mine altogether. Rather, NDEP would require a plan be in place to ensure that the pit lake met NAC 445A.429's water quality standards.

Third, to the extent NDEP's decision is appealed, GBRW's argument assumes, without any justification, that this body and any judicial body will not fairly judge the facts and apply the relevant statutes and regulations based on local economic pressure. Such argument is equally objectionable and speculative when applied to this process as it is to the permit review process describe above.

These technical, legal, and procedural checks are in place to make sure that any decision to permit E/M to mine past the water table will be supported by substantial and credible evidence and will comply with environmental laws governing the formation of a pit lake.

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IV. CONCLUSION

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

DATED this 15th day of May, 2019.

AARON D. FORD
Attorney General

By: /s/ Daniel P. Nubel
DANIEL P. NUBEL (Bar No. 13553)
Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
Tel: (775) 684-1225
Fax: (775) 684-1108
Email: DNubel@ag.nv.gov
Attorneys for Nevada Division of Environmental Protection

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General, and on this 15th day of May, 2019, I served a copy of the foregoing, NEVADA DIVISION OF ENVIRONMENTAL PROTECTION'S AMENDED MOTION TO DISMISS, via email to:

Val King
Executive Secretary
State of Nevada
State Environmental Commission
Email: vking@ndep.nv.gov

Julie Cavanaugh-Bill
CAVANAUGH-BILL LAW OFFICES, LLC
401 Railroad Street, Third Floor
Elko, NV 89801

(775)753-4357
Email: julie@cblawoffices.org

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