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

9  
10 In the Matter of:

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

**NEVADA DIVISION OF  
ENVIRONMENTAL'S  
MOTION TO DISMISS**

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

20 **MEMORANDUM OF POINTS AND AUTHORITIES**

21 **I. INTRODUCTION**

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

1 in GBRW's favor would completely upend the regulatory authority governing Nevada's  
2 hardrock mining industry, give undue validation to its unsubstantiated concerns, and call  
3 into question the viability of the mining industry now and into the future.

4         However, the SEC does not need to decide these issues now. Instead, it should  
5 dismiss GBRW's appeal, without prejudice, based on the ripeness doctrine. In considering  
6 whether an agency's decision is ripe for review, an adjudicatory body like the SEC should  
7 consider whether it "would benefit from further factual development of the issues  
8 presented." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998). While  
9 NDEP considers the current data and modeling analyses substantial and credible  
10 evidence to support a decision to permit Eureka Moly, LLC ("E/M") to mine past the  
11 groundwater table, NDEP acknowledges that its conclusions will only become more  
12 certain with data collection conducted after mining of the Project has commenced. As a  
13 result, NDEP will stipulate to revise the Permit to require E/M to obtain written NDEP  
14 approval of a revised groundwater flow model, predictive pit lake model, and ecological  
15 risk assessment, prior to E/M mining below the pre-dewatering groundwater elevation.  
16 This revised Permit item will include an additional public comment period and process for  
17 appeal.

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

## 21 **II. STATEMENT OF FACTS**

### 22 **A. Mount Hope Mine Project**

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

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1           **B.     Original Permit**

2           Eureka Moly, LLC, a joint venture between General Moly, Inc. (80%) and POS  
3 Minerals Corporation (20%), filed an application to permit the Project on July 11, 2008.  
4 Thereafter, NDEP provided public notice and held a public hearing in Eureka, Nevada  
5 regarding E/M's permit application. As part of this process, NDEP received comments  
6 from GBRW. *See* GBRW's 2012 Comment Letter attached as Exhibit 1 to NDEP's  
7 Response Brief. GBRW commented on the need for additional site monitoring wells,  
8 possible improvements to the pit lake study, and on the proximity of a proposed  
9 stormwater channel to the Potentially Acid Generating (PAG) Waste Rock Disposal  
10 Facility (WRDF). *Id.* In addition to responding to these comments, NDEP added an item  
11 to the Permit's Schedule of Compliance (SOC)<sup>1</sup> requiring E/M to install 7 additional  
12 monitoring wells. *See* 2012 Permit Notice of Decision attached as Exhibit 2 to NDEP's  
13 Response Brief at NDEP 25. GBRW did not comment on any of the other provisions of the  
14 Permit, nor did it appeal NDEP's decision to issue the Permit. On December 13, 2012,  
15 NDEP's decision to grant the Permit became final.

16           **C.     Permit Renewal**

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

27 \_\_\_\_\_  
28           <sup>1</sup> 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.

1 NDEP reviewed and evaluated GBRW's concerns and made a number of  
2 modifications to the SOC and continuing investigations in the renewed permit.  
3 See NDEP's November 6, 2018 Notice of Decision attached as Exhibit 4 to NDEP's  
4 Response Brief. Specifically, NDEP's modifications were as follows: First, E/M is required  
5 to construct an additional monitoring well downgradient of the non-potentially acid  
6 generating waste rock disposal facility (non-PAG WRDF) for the purpose of obtaining  
7 additional background (pre-mining) and post-mining water quality data to detect any  
8 impact to water quality in that area from mining operations. *Id.* at NDEP 71. Second,  
9 E/M is required to revise the waste rock management plan to provide additional  
10 characterization of portions of the final pit wall. *Id.* at NDEP 75-76. These  
11 characterization data will increase certainty in the pit lake model's final water quality  
12 predictions. Third, to address GBRW's concern about the engineering design of the SP-7  
13 conveyance system<sup>2</sup> and its potential to collapse under the non-PAG WRDF, E/M is  
14 required to submit a revised design that will provide a more robust conveyance system  
15 that will ensure flows are conveyed as intended beneath the non-PAG WRDF footprint  
16 and exit at the nearest natural drainage. *Id.* at NDEP 80. Fourth, E/M is required to  
17 implement a study that will measure the diffusion of oxygen in the pit wall rock, which  
18 GBRW hypothesizes may impact water quality in the pit lake. *Id.* at NDEP 82.

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

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

25 The factual matters at issue in this appeal concern the water quality and ecological  
26 risk in and around the pit both during and after E/M's mining of the molybdenum deposit.  
27 NDEP's decision to grant the original and renewed permit is based on studies that were

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28 <sup>2</sup> 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.

1 conducted in and around the Project which generated data and information for input into  
2 PHREEQC – a publicly available and widely accepted United States Geological Survey  
3 computer model. The PHREEQC model provides NDEP with predictive quantitative  
4 results of water quality in and around the pit.

5 **1. Substantial data has been and will be collected in and around**  
6 **the Project which will increase the certainty of the modeling**  
7 **results.**

8 **a. Rock characterization data**

9 E/M conducted a geochemical investigation, which collected samples from drilled  
10 bore holes to determine the subsurface characteristics of the rock or rocks in and around  
11 the Project. *See* Waste Rock and Pit Wall Geochemical Characterization attached as  
12 Exhibit 6 to NDEP’s Response Brief. These data and information were inputted in the  
13 PHREEQC model to determine whether the waste rock extracted from the pit and the pit  
14 walls had the potential to degrade waters above state action levels. With this information,  
15 NDEP formed management and closure strategies to ensure protection of waters of the  
16 State during operations and closure of the mining facility.

17 **b. Data that will be collected after mining commences.**

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

25 **2. Pit lake water will not mix with surrounding groundwater.**

26 NDEP has reviewed the groundwater flow model and the PHREEQC model results  
27 which are based on the above referenced data collected in and around the Project. The  
28 model results indicate that the Mount Hope pit lake is expected to be a hydrologic sink.  
In other words, the volume of water that is expected to flow into the pit lake from the

1 surrounding aquifer and precipitation after mining is complete<sup>3</sup> is expected to be equal to  
2 the evaporation from the surface of the pit lake at equilibrium.<sup>4</sup> Groundwater levels  
3 around the perimeter of the mine pit are expected to remain higher in elevation than the  
4 water elevation in the pit lake; therefore, water in the pit lake will not mix with  
5 surrounding groundwater due to the downward gradient from the surrounding  
6 groundwater table to the surface of the pit lake. See July 2010 Hydrology and Numerical  
7 Modeling Executive Summary attached as Exhibit 8 to NDEP's Response Brief at NDEP  
8 266.

9 **3. Pit lake geochemistry will not harm human health or the**  
10 **environment.**

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

18 E/M performed an ecological risk assessment of the Mount Hope Pit Lake. This  
19 evaluation used the predicted pit lake water quality result from the PHREEQC model  
20 and followed guidance provided by the U.S. Department of the Interior, BLM *Ecological*  
21 *Risk Guidelines for Open Pit Mine Lakes in Nevada* (2008). See Mount Hope Project Pit

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

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

28 <sup>5</sup> 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. Only fluoride and cadmium exceed Profile III  
reference values.

1 Lake Screening-Level Ecological Risk Assessment (SLERA) attached as Exhibit 10 to  
2 NDEP's Response Brief.<sup>6</sup> The SLERA's results found that concentrations of constituents  
3 of concern would not exceed species exposure concentration levels for avian or terrestrial  
4 life, except cadmium and fluoride for livestock. However, since the pit lake water is not  
5 expected to be accessible or desirable for livestock to use as their primary watering  
6 source, no adverse effects are expected to livestock.<sup>7</sup> *Id.* at NDEP 389-396. Ultimately, the  
7 SLERA concluded that "even using the most sensitive receptors (i.e. lowest toxicity  
8 criteria), the results of the assessment indicate that the most likely predicted water  
9 quality of the modeled future pit lake water at the Mount Hope Project would represent a  
10 low risk (HQ<1) to wildlife, terrestrial and avian, that are exposed to it via direct  
11 ingestion." *Id.* at NDEP 391-392. A hazard quotient (HQ) of less than 1 is the lowest  
12 achievable risk criteria in the SLERA. *Id.* at NDEP 390.

13 **4. Pit lake water quality is not an issue during this permit cycle.**

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

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

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

1 **III. LEGAL ANALYSIS**

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

4 The doctrine of ripeness “supports dismissal where  
5 further factual development may provide additional focus, the agency may revise the  
6 plan, or review may ultimately become unnecessary.” *Cent. Delta Water Agency v. U.S.*  
7 *Fish & Wildlife Serv.*, 653 F. Supp. 2d 1066, 1088 (E.D. Cal. 2009). “In deciding whether  
8 an agency's decision is, or is not, ripe for judicial review, the Court ... must consider: (1)  
9 whether delayed review would cause hardship to the plaintiffs; (2) whether judicial  
10 intervention would inappropriately interfere with further administrative action; and (3)  
11 whether the courts would benefit from further factual development of the issues  
12 presented.” *Pub. Lands for the People, Inc. v. U.S. Dep't of Agric.*, 733 F. Supp. 2d 1172,  
13 1184 (E.D. Cal. 2010). The ripeness doctrine serves to prevent judicial bodies, “through  
14 avoidance of premature adjudication, from entangling themselves in abstract  
15 disagreements over administrative policies, and also to protect the agencies from judicial  
16 interference until an administrative decision has been formalized and its effects felt in a  
17 concrete way by the challenging parties.” *Abbott Laboratories v. Gardner*, 387 U.S. 136,  
18 148-49 (1967). In considering whether a case is ripe, a judicial body must evaluate “the  
19 fitness of the issues for judicial decision and the hardship to the parties of withholding  
20 court consideration.” *Id.* at 149. “A claim is fit for decision if the issues raised are  
21 primarily legal, do not require further factual development, and the challenged action is  
22 final.” *Id.* “In interpreting the finality requirement, a court looks to whether  
23 the agency action represents the final administrative word to insure that judicial review  
24 will not interfere with the agency's decision-making process.” *Winter v. California Med.*  
25 *Review, Inc.*, 900 F.2d 1322, 1325 (9th Cir. 1989).

26 This case will benefit from further factual development after mining has  
27 commenced. The renewed permit requires E/M to submit a revised Waste Rock  
28 Management Plan (WRMP) within 180 days after it initiates the Project's construction



1 schedule. This updated WRMP must include a characterization plan that outlines  
2 sampling and analytical procedures for portions of the final pit wall that have not been  
3 characterized. The data collected from these samples will be inputted into PHREEQC  
4 model to further characterize the expected pit lake water quality after mining is  
5 completed. In addition, as part of this appeal process, NDEP will stipulate to revise  
6 Schedule of Compliance item 6 in the Permit to require E/M to obtain written NDEP  
7 approval of a revised groundwater flow model, predictive pit lake model, and ecological  
8 risk assessment, prior to E/M mining below the groundwater table. These revised studies  
9 will be submitted as a permit renewal or major modification to the permit, which will  
10 include an additional public comment period and possible appeal of any NDEP decision to  
11 allow E/M to continue mining below the groundwater table.

12 While NDEP considers the current data and modeling analyses substantial and  
13 credible evidence to support a decision to permit E/M to mine past the groundwater table,  
14 NDEP acknowledges that its conclusions will only become more certain with data  
15 collection conducted after mining of the Project has commenced. Clearly, GBRW cannot  
16 claim prejudice from such a decision since the crux of its argument is that E/M has not  
17 collected enough data and its modeling is too uncertain for NDEP to permit mining past  
18 the groundwater table. Such concerns are clearly remedied by NDEP's proposal. Further,  
19 to the extent GBRW argues that NDEP will be less inclined to deny E/M's permit renewal  
20 or major modification after mining has commenced, such argument is clearly speculative,  
21 and, in any case, the administrative appeals process obviates these concerns.

#### 22 23 **IV. CONCLUSION**

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

1 and possible appeal of any NDEP decision to allow E/M to continue mining below the  
2 groundwater table

3 DATED this 10th day of April, 2019.

4 AARON D. FORD  
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16 **CERTIFICATE OF SERVICE**

17 I hereby certify that I am an employee of the State of Nevada, Office of the  
18 Attorney General, and on this 10th day of April, 2019, I served a copy of the foregoing,  
19 NEVADA DIVISION OF ENVIRONMENTAL PROTECTION'S MOTION TO DISMISS,  
20 via email to:

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22 Executive Secretary  
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