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9 **UNITED STATES DISTRICT COURT**
10 **DISTRICT OF NEVADA**

11 PETER J. VOGGENTHALER, at al.,) Case No. 2:08-cv-01618-RCJ-GWF
12 Plaintiffs,)
13 v.) (consolidated with 3:09-cv-231-RCJ-
14) GWF)

15 MARYLAND SQUARE, LLC, et al.,)
16 Defendants,)
17 **PLAINTIFF STATE OF NEVADA,
DEPARTMENT OF CONSERVATION
AND NATURAL RESOURCES AND
DEFENDANTS MARYLAND SQUARE
SHOPPING CENTER, LLC, THE
HERMAN KISHNER TRUST DBA
MARYLAND SQUARE SHOPPING
CENTER, IRWIN KISHNER, JERRY
ENGEL, AND PREMIER TRUST'S
JOINT MOTION TO APPROVE
CORRECTIVE ACTION REPORT**

18 AND RELATED CROSS CLAIMS AND THIRD
PARTY CLAIMS

19 STATE OF NEVADA, DEPARTMENT OF
20 CONSERVATION AND NATURAL
RESOURCES, et al.,)

21 Plaintiffs,)

22 v.)

23 MARYLAND SQUARE SHOPPING CENTER,)
et al.,)

24 Defendants)

25 **AND RELATED THIRD PARTY CLAIMS**

26 Plaintiff, the Nevada Division of Environmental Protection, Bureau of Corrective
27 Actions ("NDEP"), by and through its counsel, Catherine Cortez Masto, Attorney General for
the State of Nevada, Wayne Klomp, Deputy Attorney General, together with Defendants,
28 Maryland Square Shopping Center, LLC, the Herman Kushner Trust dba Maryland Square

1 Shopping Center, Irwin Kishner, Jerry Engel, and Premier Trust, as Trustees for The Herman
2 Kishner Trust (“Kishner Defendants”), by and through their attorneys, Dongell Lawrence
3 Finney LLP and Steven J. Parsons submit the Corrective Action Report to this Court for
4 approval pursuant to the Permanent Injunction (Dkt. #592).

5 **I. Background**

6 **A. The Permanent Injunction and Legal Requirements**

7 This Court issued a Permanent Injunction against certain Defendants, including the
8 Kishner Defendants, on December 27, 2010. The Injunction to Undertake Mitigation and
9 Corrective Actions is structured such that the Work anticipated by the Injunction and
10 performed by Defendants will not be inconsistent with Nevada law and the National
11 Contingency Plan (“NCP”), 40 CFR part 300. Injunction at § V (Dkt. #592). The purpose of
12 the NCP is not different from that of the Injunction, “to provide the organizational structure and
13 procedures for . . . responding to discharges of oil and releases of hazardous substances . . .
14 .” 40 CFR § 300.1. Both the Injunction and NCP are designed to provide procedures which
15 lead to substantive remediation of contamination by the selection of a final remedy by the
16 lead agency, NDEP. The procedure employed by NDEP and the NCP for selection of a final
17 remedy is to conduct an investigation, prepare a proposed plan, and finally for NDEP to issue
18 a Record of Decision selecting the final remedy.

19 **1. Investigation of contaminated site and review of potential remedies.**

20 First, the Injunction requires the Defendants to prepare a Corrective Action Report
21 (“CAR”) consistent with Nevada law and the NCP and submit the draft CAR for review. Id. at
22 § III.C.2. The requirement for a CAR is equivalent to the NCP’s requirement for the
23 preparation of a Remedial Investigation/Feasibility Study (“RI/FS”) to “assess site conditions
24 and evaluate alternatives to the extent necessary to select a remedy.” 40 CFR §
25 300.430(a)(2).

26 After the Defendants submit the CAR, the Injunction anticipates that the CAR would be
27 reviewed and approved by both NDEP and the Court. Id. at § III.C.2, 3. Once the CAR is
28 approved by NDEP and the Court, the Injunction provides that “Defendants shall prepare and

1 submit to NDEP and the Court, a Proposed Plan no later than thirty (30) days after approval
2 of the RAS Report [CAR] by NDEP and the Court.”¹ Id. at § III.C.3.

3 **2. Preparation of proposed plan by NDEP and consideration of preferred**
4 **remedies.**

5 The next step in NDEP’s selection of a final remedy is the preparation of a Proposed
6 Plan as called for by both the Injunction and the NCP. Injunction at § III.C.III; 40 CFR §
7 300.430(f)(1)(ii). Although the Injunction calls for the Defendants to prepare the Proposed
8 Plan, that document is typically prepared by NDEP. Decl. of S. Smale at ¶ 4, attached hereto
9 as **Exhibit 1**. Based on NDEP’s practice, it has prepared the Proposed Plan rather than
10 Defendants and a stipulation to that effect has been submitted to the Court.

11 According to the NCP, NDEP as the lead agency is to prepare a Proposed Plan “that
12 briefly describes the remedial alternatives analyzed by the lead agency, proposes a preferred
13 remedial action alternative, and summarizes the information relied upon to select the
14 preferred alternative.” 40 CFR § 300.430(f)(2). NDEP then releases the Proposed Plan to
15 the public for a comment period of not less than 30 days and holds a public meeting to
16 present the information and respond to comments. Id. at § 300.430(f)(3). NDEP then
17 prepares a summary of the comments, criticisms, and new information submitted during the
18 public comment period and a response to each issue. Id. at § 300.430(f)(3)(i)(F). The
19 Proposed Plan is neither a final agency decision nor selection of a final remedy. Any
20 significant changes in the preferred remedy are addressed in the Record of Decision (“ROD”)
21 or a revised proposed plan followed by a ROD. Id. at § 300.430(f)(3)(ii).

22 **3. NDEP’s final remedy selection will be documented in the Record of**
23 **Decision.**

24 Once the public comments have been received and either a summary of the comments
25 or a revised proposed plan prepared, NDEP will select the final remedy and memorialize the
26

27 ¹ From the language of the Injunction, it is clear that the reference to the “RAS Report” should
28 be a reference to the CAR instead. Compare Injunction at § III.C.3 with § IX (providing that
Proposed Plan be submitted within 30 days of approval of the CAR).

1 selection in a ROD. Injunction at § III.C.4; 40 CFR § 300.430(f)(4)-(5). As an administrative
2 order, a ROD may be appealed to the State Environmental Commission (“SEC”) as a
3 statutory-prescribed, administrative remedy. NRS 445A.605; NAC 445A.22725. A decision
4 by the SEC is judicially reviewable under the Nevada Administrative Procedures Act, NRS
5 233B.

6 **B. Factual Background**

7 In the course of implementing the Injunction, the Kishner Defendants, by way of
8 agreement with the other enjoined Defendants (Maryland Square, LLC and the Shapiro
9 Brothers Investment Co.), took the lead in investigation and remediation efforts,
10 commissioning and paying for the CAR. After several revisions incorporating NDEP
11 comments, the Kishner Defendants submitted a final draft of the CAR to NDEP in August
12 2013 for review and approval. See Final CAR, attached hereto as **Exhibit 2**. On August 20,
13 2013, NDEP approved the CAR subject to the comments issued in the approval letter. Letter
14 from M. Siders to Kishner Counsel, Aug. 20, 2013, attached hereto as **Exhibit 3**.

15 **II. Request for Approval**

16 NDEP along with the Kishner Defendants request this Court approve the CAR attached
17 as **Exhibit 2**.² Once the CAR is approved, NDEP will release the Proposed Plan for public
18 comment and further procedures outlined above and as required by the Injunction and NCP.

19 The Court has set a status conference for September 25, 2014, at which time the
20 Court will hear objections to the Proposed Plan, if any. Because the NCP provides for a
21 public comment period for any individual or party to provide comments on the Proposed Plan;
22 and because the NCP further requires NDEP to prepare a summary or revised proposed plan
23 incorporating and responding to public comments, NDEP and the Kishner Defendants request
24 approval of the CAR so that the public comment period on the Proposed Plan can be initiated
25 as quickly as possible and run in tandem with the briefing periods set forth in the Stipulation

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27 ² The attached CAR includes the body of the document along with tables and figures. Due to
28 the volume of the Appendices, those have not been filed with the Court. However, the
content of the Appendices (comprising more than 1000 pages) are identified in the Table of
Contents. The Appendices will be provided to the Court or any Party upon request.

1 and Order Regarding Permanent Injunction (Dkt. #1045).

2 **III. Conclusion**

3 NDEP together with the Kishner Defendants request this Court issue an order pursuant
4 to the Permanent Injunction approving the CAR attached as **Exhibit 2**.

5 DATED this 18th day of July, 2014.

6 CATHERINE CORTEZ MASTO
7 Attorney General

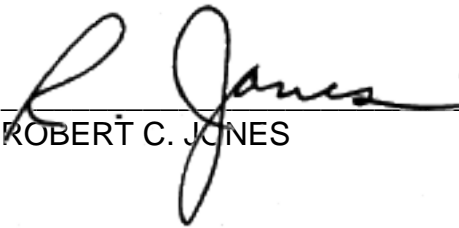
8 By: /s/ Wayne Klomp
9 Wayne Klomp
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11 *of Environmental Protection*

12 DONGELL LAWRENCE FINNEY LLP

13 By: /s/ Tomas F. Vandenburg
14 Thomas F. Vandenburg
15 *Attorneys for Defendants Maryland*
16 *Square Shopping Center, LLC, the*
17 *Herman Kishner Trust d/b/a Maryland*
18 *Square Shopping Center, Irwin Kishner,*
19 *Jerry Engel, and Premier Trust as*
20 *trustees for The Herman Kishner Trust*

21 ORDER

22 IT IS SO ORDERED this 25th day of March, 2015.

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ROBERT C. JONES