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6 APPEAL HEARING
BEFORE THE STATE ENVIRONMENTAL COMMISSION
7 STATE OF NEVADA

8 In Re:)
9 Appeal of Water Pollution Control Permit:)
10 **NEV0087001, Big Springs Mine**)
11)
12)

**REPLY TO
MEMORANDUM IN
SUPPORT OF APPEAL**

13 The State of Nevada, Division of Environmental Protection (“NDEP”), by and through its
14 counsel of record, GEORGE J. CHANOS, Attorney General, and WILLIAM FREY, Senior
15 Deputy Attorney General, submit the following reply to appellant Great Basin Mine Watch’s
16 (“GBMW”) Memorandum in Support of Appeal (“MSA”) before the State Environmental
17 Commission (“Commission”).

18 **INTRODUCTION**

19 This appeal challenges NDEP’s renewal of Water Pollution Control Permit
20 NEV0087001 (the “Permit” or the “WPCP”) as issued to AngloGold Ashanti (Nevada)
21 Corporation (“AngloGold”). The WPCP is for the permanent closure of the Big Springs Mine
22 (“Mine”).

23 The WPCP for the Mine was first issued in 1987. The mine operated between 1987
24 and 1995. Closure and final reclamation began in 1995. AngloGold continues to monitor and
25 address environmental conditions and concerns at the Mine.

26 AngloGold timely applied for renewal of its WPCP. NDEP issued a draft renewal permit on
27 March 2, 2005. GBMW submitted comments on March 31, 2005. NDEP responded to the

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1 comments and issued the WPCP on July 26, 2005. The WPCP was issued pursuant to
2 NAC 445A.350-447, and became effective August 15, 2005. This appeal followed.

3 **DISCUSSION**

4 A primary duty of NDEP is “to protect the waters of the State of Nevada,” see *Helms v.*
5 *Nevada*, 109 Nev. 310, 313 (1993); therefore, NDEP is granted broad statutory and regulatory
6 authority over water pollution controls and mining operations in the state. See NRS 445A.300
7 to 445A.700, inclusive; NAC 445A.350 to 445A.447, inclusive. To this effect, the Nevada
8 Supreme Court has recognized that “great weight” should be given to NDEP’s interpretation of
9 its own regulations. See *Helms*, 109 Nev. at 313. Meaning, NDEP’s exercise of discretion
10 regarding decisions on questions of fact should be affirmed on appeal if supported by
11 substantial evidence. See *id.* “Substantial evidence is that which ‘a reasonable mind might
12 accept as adequate to support a conclusion.’” *Id.* (quoting *State Employment Sec. Dep’t v.*
13 *Hilton Hotels Corp.*, 102 Nev. 606, 608 (1986)). Therefore, a decision by NDEP should only
14 be reversed by the Commission on appeal if it is “arbitrary or capricious,” and constitutes an
15 abuse by NDEP of its decision-making discretion. See *Helms*, 109 Nev. at 313.

16 **SUMMARY OF GBMW’S ARGUMENT AND NDEP’S REPLY**

17 On appeal, GBMW makes the following five allegations: (1) NDEP improperly renewed
18 the WPCP because NDEP failed to issue a National Pollution Discharge Elimination System
19 (NPDES) permit which is allegedly needed because the rock disposal areas (RDAs), pit lakes,
20 and ground water diversion systems are point sources; (2) Discharges from the mine are
21 causing exceedances of water quality standards; (3) NDEP failed to establish Total Maximum
22 Daily Load (“TMDL”) standards prior to issuing the WPCP; (4) The Endangered Species Act
23 (“ESA”) prohibits issuing the WPCP; and (5) The pit lakes and ground water diversion system
24 is degrading waters of the state.

25 None of GBMW’s allegations warrant modifying or setting aside the WPCP. GBMW’s
26 premier argument is that conditions at the site warrant an NPDES permit. Even if the
27 commission accepts this argument, it does not provide a basis for setting aside or modifying
28 the WPCP. More importantly, none of the flows or areas identified by GBMW in its first

1 allegation constitute a point source requiring an NPDES permit. As an additional matter, even
2 if they did it would not constitute a legal basis for setting aside or modifying the WPCP. Since
3 the RDAs, pit lakes, and ground water diversion systems are not point sources, GBMW's
4 allegation regarding water quality standards and TMDL are inapplicable. As to GBMW's
5 allegations regarding the ESA, this Commission is without jurisdiction to act. Finally, the pit
6 lakes and ground water diversion system are flow-through systems that do not add
7 contaminants to the water and therefore do not degrade waters of the state.

8 NDEP respectfully requests the Commission to affirm the issuance of WPCP
9 NEV0087001 and deny GBMW's appeal.

10 **ARGUMENT**

11 **I. GBMW Misinterprets the Meaning of "Point Source" and "Addition of a Pollutant"**

12 GBMW argues that the NDEP issued the wrong permit to AngloGold. This argument,
13 even if true, does not form a legal basis for modifying or reversing the Permit. In this case,
14 even if GBMW's analysis is correct, the Commission lacks the jurisdiction to order the NDEP
15 to issue an NPDES permit. The Commission can only affirm, modify, or reverse NDEP's
16 action which is appealed to it. The need to issue an NPDES permit is a wholly separate issue
17 from challenging the basis for the issuance of the WPCP.

18 GBMW fails to explain why a permittee can not have both types of permits (NPDES
19 and a state permit), or why having one would preclude having the other. GBMW argues that
20 since it believes an NPDES permit is necessary, the Commission must require the NDEP to
21 issue one. Such an outcome is outside the Commission's statutory remedies.
22 See NRS 445A.605.

23 GBMW's first three claims are all premised on the mistaken belief that the mine is a
24 point source and therefore AngloGold needs a NPDES permit.

25 a. Seepage from RDAs Does Not Constitute A Discharge From a Point Source

26 GBMW states that rock disposal areas (RDAs) "are identifiable sources and are thus,
27 point sources, within the meaning of the Clean Water Act and Nevada's Water Pollution
28 Control Law." (GBMW's MSA at 14.) This is a misstatement of the law. The fact that a

1 source is identifiable is insufficient to conclude that it is a point source. Highways are
2 identifiable but runoff from rainfall on highways is the premier example of a diffuse source or
3 non-point source. Agricultural fields are identifiable but they too are not point sources.

4 After this misstatement, GBMW goes on to cite several cases for the proposition that
5 the RDAs are point sources and therefore require NPDES' permits. This argument of course
6 does not support modifying or reversing the issuance of the Permit. However, a review of the
7 cases cited by GBMW reveals that they are supportive of the NDEP's position that the RDAs
8 are not point sources requiring the issuance of NPDES' permits.

9 The lead case GBMW relies on is *Sierra Club v. Abston Construction Co. Inc.*,
10 620 F.2d 41, 44-45 (5th Cir. 1980). In *Abston* the court discusses three positions put forth by
11 the parties in that litigation, as to whether point sources existed under the facts of that case.
12 The first position required a mere showing of the original source of the pollution to find a
13 statutory point source. This is essentially the same argument being advanced by GBMW.
14 The court reasoned this position would construe drainage of rainwater from a roadway or
15 drainage of animal pollutants from a grazing field, if either were near a waterway, as
16 constituting a point source. The court rejected this position.

17 The second position advocated that point sources could not include gullies or ditches
18 created by natural erosion even though the pollutant was created by mine operations. The
19 court likewise rejected this position.

20 The third position, and the position adopted by the court, found that surface runoff
21 collected or channeled by the operator constituted a point source discharge. Simple erosion
22 over the material surface resulting in a discharge of water and other materials does not
23 constitute a point source discharge, "absent some effort to change the surface, to direct the
24 water flow or otherwise impede its progress." *Abston*, 620 F.2d at 45-46. In *Abston*, the
25 operator collected and channeled the water. The *Abston* court found there could be a point
26 source discharge "if the miner at least initially collected or channeled the water and other
27 materials." No such initial collection or channeling of water by the miner occurred at the
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1 RDAs. Whatever channeling occurs is up gradient of the RDAs and done solely to divert
2 surface water prior to it ever reaching the RDAs.

3 Any water seeping from the RDAs is the result of natural seeps under the RDAs or
4 meteoric water percolating through the RDAs. Courts have held that the definition of point
5 source “excludes unchanneled and uncollected surface waters.” *Abston*, 620 F.2d at 45 citing
6 *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976). Meteoric water, rain,
7 and snow percolating through the RDAs are certainly uncollected waters. As the court in
8 *Santa Fe County v. Lac Minerals, Inc.*, 892 F. Supp. 1333, 1358-59 (D. N.M. 1995) noted,
9 “seepages are non-point source carriers of pollutants similar to stormwater, and are therefore
10 not subject to the [CWA’s] permitting requirements.”

11 b. Subsurface Migration of Groundwater from Pit Lakes Does Not Require a Permit

12 The Mine has two pit lakes which formed when mining operations ceased. GBMW
13 recognizes that these pit lakes are “flow-through systems, i.e. water flows into the pits from
14 up-gradient and out of the pits into the adjoining bedrock aquifer.” (GBMW’s MSA at 16.)
15 However, GBMW does not argue, nor is there any evidence to support, that the groundwater
16 flowing into and out of the pits is contaminated by virtue of the fact it flows through the pit.
17 There is no suggestion that there is the addition of a pollutant to the water. After reviewing the
18 available data, the NDEP concluded that mass of constituents exiting the pits were primarily
19 derived from upgradient groundwater. Lacking the required “addition of a pollutant,” the pit
20 lakes are not point sources that require a permit.

21 c. NDEP Is Not Required To Issue a Permit for the Groundwater Diversion Program

22 In an attempt to prevent groundwater from overflowing the pit lakes or damaging the
23 integrity of the lake walls, AngloGold installed groundwater interceptor wells up gradient of the
24 pit lakes. (Fact Sheet at 4.) The wells are designed to intercept groundwater that might
25 otherwise flow into the pits and divert the water down gradient to an infiltration trench. The
26 infiltration trench is designed so that water is returned to the shallow alluvium.

27 GBMW notes that the groundwater which is intercepted has elevated levels of arsenic.
28 What GBMW does not state is that the water which is intercepted already contains arsenic.

1 Nothing is added to the water by the process of intercepting and diverting the water to the
2 infiltration trench. It is a closed system. GBMW is concerned that somehow a point source
3 discharge has occurred since there is a surface expression of the intercepted water down
4 gradient of the infiltration trench. This was specifically rejected in *Friends of Santa Fe County*
5 *v. Lac Minerals, Inc.*, 892 F. Supp. 1333, 1358-59 (D.N.M. 1995). In *Lac Mineral* the court
6 held that seepages are nothing more than points at which shallow subsurface water emerges
7 through the soil. The court stated, “the seeps, merely represent evidence that AMD has at
8 some time in the past entered subsurface waters, possibly from the overburden pile or the
9 remediation system. In other words, the seepages are non-point source carriers of pollutants
10 similar to storm water, and are therefore not subject to the [CWA’s] permitting requirements.”

11 In this appeal the facts are even less helpful to GBMW’s argument. It is undisputed
12 that arsenic is in the water prior to it being intercepted and transferred to the infiltration trench.
13 Contrary to *Lac Mineral*, the seepages at the Mine do not even represent evidence that
14 arsenic has entered the subsurface water at some time in the past. The arsenic is naturally
15 occurring. As such the seepages are evidence of nothing that could be construed as requiring
16 a permit.

17 **II. GBMW’s Argues that the Permit Allows Violations of Water Quality Standards**

18 GBMW’s next argument is also based on the mistaken belief that the RDAs, diversion
19 structures, and pit lakes are point sources. GBMW alleges that since point sources must
20 comply with water quality standards, then the RDAs, diversion structures, and pit lakes must
21 comply as well. This argument should be rejected as it is premised on first determining that
22 point sources exist.

23 **III. Renewal of the Permit Does Not Violate the CWA 303 (D) Provisions**

24 GBMW argues that NDEP cannot issue a permit until TMDLs are established for the
25 North Fork of the Humboldt River (NFHR) pursuant to section 303(d) of the CWA. This
26 argument is wholly unsupported by any language in the CWA. Notably absent from GBMW’s
27 MSA is any citation to the CWA where such a prohibition can be found. The reason GBMW

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1 fails to cite the plain language of the CWA is because the CWA contains no prohibition
2 preventing the NDEP from issuing or renewing a permit.

3 **IV. The Endangered Species Act (ESA) Contains No Prohibition to NDEP's Issuance**
4 **Of a Permit AND The Commission Does Not Have Jurisdiction to Decide Issues**
5 **Regarding Enforcement of the ESA**

6 GBMW does not cite to any language in the ESA, or any other federal or state law,
7 conferring on the Commission the jurisdiction to decide whether or not a "take" has occurred
8 as defined by the ESA. In addition, GBMW fails to cite to any law for the proposition that a
9 WPCP cannot be issued because of the alleged "take." The reason GBMW does not cite to a
10 statute either to establish jurisdiction or for the notion that a permit cannot be issued is
11 because no such statute exists.

12 **V. Pit Lakes and Groundwater Diversion Program Do Not Degrade State Waters**

13 Finally, GBMW raises two very speculative and contradictory reasons for challenging
14 the Permit. GBMW states "the pit lake water is likely causing groundwater levels to exceed
15 drinking water standards . . . and is, therefore, degrading waters in violation of state law."
16 GBMW has to do better than this. Mere speculation is insufficient to contradict the
17 determination made by NDEP to issue the Permit. Further, GBMW has already argued and
18 repeatedly argues that the pit lakes are "flow-through" systems. The groundwater that flows
19 into the pit becomes the groundwater flowing out of the pit. There is no evidence that the "pit"
20 is causing degradation of the groundwater. There is no evidence that the pit is altering the
21 ground water. Without the pit, the preexisting groundwater would still flow down gradient to
22 the NFHR.

23 The same holds true as to the groundwater diversion system. Groundwater is
24 intercepted prior to it reaching the pits. Nothing is added to the intercepted groundwater. The
25 water is then piped to a subsurface trench where it infiltrates into the shallow alluvium. The
26 water remains groundwater. It is never exposed to any surface conditions. The water
27 contains whatever constituents it had prior to being redirected.

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CONCLUSION

NDEP's actions and decisions regarding the renewal of WPC Permit NEV0087001 have been reasonable and consistent with the governing regulations and statutes, such that GBMW has failed to show in its allegations on appeal that the permit renewal process is arbitrary or capricious, nor have they shown that NDEP has acted arbitrarily or capriciously in any way. Therefore, any relief requested by GBMW in this appeal is without merit and should accordingly be denied by the Commission and the WPCP be affirmed.

DATED this ____ day of November, 2005.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this _____ day of November 2005, I deposited for mailing a true and correct copy of the foregoing **REPLY TO MOTION IN SUPPORT OF APPEAL** on the following parties by first class mail, postage prepaid:

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