APPEAL HEARING
BEFORE THE STATE ENVIRONMENTAL COMMISSION
STATE OF NEVADA

In Re:	)	
	)	
Appeal of Water Pollution Control Permit:	)	**RESPONSE BRIEF OF INTERVENOR**
NEV0087001, Big Springs Mine	)	**ANGLOGOLD ASHANTI (NEVADA)**
	)	**CORP.**
	)	

INTRODUCTION AND SUMMARY OF ARGUMENT

This action concerns the Big Springs Mine ("Mine") located approximately 60 miles north of the town of Elko, Nevada. The Mine is situated on the eastern side of the Independence Mountains on public lands within the Humboldt-Toiyabee National Forest.

Development of the Mine was initiated in May 1987 after extensive review and analysis by both state and federal regulatory agencies during, for example, the environmental assessment, plan of operations, and water pollution control permit approval processes. Reclamation was conducted concurrent with mining operations. Closure of the Mine and final reclamation began in 1995. At the present time, the Mine is closed with AngloGold Ashanti (Nevada) Corp. ("AngloGold Ashanti") continuing to monitor the aquatic environment and the effectiveness of the reclamation and closure activities.

The final reclamation and closure measures implemented at the Mine are substantially more robust than the approach envisioned in the original approvals for the Mine. For example:

a. The covers over the three principal rock disposal areas ("RDAs") are at least twice as thick as originally planned and include a compacted low permeability layer;

b. Surface water diversion channels (one with a low permeable synthetic liner) have been constructed around the RDAs;

c. Ten of the twelve surface mines have been fully or partially backfilled; and

d. Intensive aquatic life studies have continued for over a decade since mining ceased.

These additional measures were implemented to address certain unanticipated water quality changes that were observed in about 1992. The purpose of the first two measures was to further reduce the potential for water-rock interaction within the RDAs. The third measure was to further reduce the potential for water-rock interaction within the surface mines. As for the fourth measure, the aquatic life studies are being conducted to verify, among other items, that there are no adverse effects to the threatened Lahontan Cutthroat Trout ("LCT") in the North Fork of the Humboldt River ("NFHR").[1]

In January 2002, AngloGold Ashanti submitted a major modification to the water pollution control permit for the Mine which also included a renewal request. After careful and thorough consideration, the Nevada Department of Conservation and Natural Resources, Division of Environmental Protection ("NDEP") through its Bureau of Mining Regulation and Reclamation issued a draft renewal permit for public comment on or about March 2, 2005. Appellant Great Basin Mine Watch ("GBMW") submitted a review of that draft permit which consisted of a number of observations and seven specific recommendations. Before issuing a final renewal permit, NDEP carefully evaluated and responded to each of GBMW's observations

[1] As explained in this Response Brief at Section II of the "Argument," these studies have documented the lack of any adverse effect to aquatic life including the LCT.

and recommendations. NDEP's responses are included in its July 6, 2005 Notice of Decision to issue the renewal Water Pollution Control Permit for the Big Springs Mine ("WPCP").

The WPCP became effective on August 15, 2005 and is intended to remain in effect until August 15, 2010. The permit was issued pursuant to the "Mining Facility" regulations found at NAC §§ 445A.350-447. Thus, it is the criteria within those regulations against which the WPCP is to be measured.

GBMW appealed the issued WPCP. In its appeal, GBMW argues that the WPCP should be set aside because, according to GBMW:

a. A point source discharge permit pursuant to the National Pollutant Discharge Elimination System ("NPDES") of the federal Clean Water Act ("CWA") and the state counterpart is required for certain flows at the Mine;

b. The NPDES point source discharge permit for those flows must contain water quality standards-based effluent limits;

c. The CWA prohibits issuance of the NPDES permit until total maximum daily loads ("TMDLs") are established for water quality limited streams like the NFHR;

d. A "take" permit under the federal Endangered Species Act ("ESA") is required because discharges from the Mine are adversely affecting the LCT;

e. The lakes created by the surface mining ("mine lakes") are degrading ground water; and

f. The ground water diversion program is degrading waters of the state.

GBMW's challenges are without merit for the following reasons. First, none of the flows about which GBMW complains are point source discharges requiring a NPDES permit. Thus, no NPDES point source discharge permit is required; no water quality standards-based effluent limits are required; and, to the extent the CWA actually prohibits issuance of NPDES permits until TMDLs are established as GBMW claims, that prohibition is inapplicable here. Moreover, even if a NPDES permit is required for any of the flows identified by GBMW, obtaining such a permit is not a prerequisite to issuing the WPCP. The fact that other permits might be required for the Mine does not invalidate the issued WPCP. Second, there is no credible evidence of a "take" of the LCT. Further, even if the U.S. Fish and Wildlife Service ("USFWS") thought the Mine might be effecting a "take" of the LCT and was requiring AngloGold Ashanti to obtain a permit for such "take," the absence of that permit does not invalidate the issued WPCP. As with GBMW's claim about a NPDES permit, obtaining a "take" permit is not a prerequisite to NDEP's issuance of the WPCP. Third, there is no credible evidence that the mine lakes or the ground water diversion program are degrading state waters. Accordingly, NDEP's decision in issuing the WPCP should be affirmed.

STANDARD OF REVIEW AND BURDEN OF PROOF

NDEP's interpretation of the regulations is to be given "great weight." *See Helms v. Nevada*, 109 Nev. 310, 313 (1993). A decision by NDEP should only be reversed if it is arbitrary, capricious, or constitutes an abuse by NDEP of its decision-making discretion. *Id.* Thus, since GBMW is the appellant in this matter and is seeking reversal of an NDEP decision, GBMW bears the burden of proving that NDEP's issuance of the WPCP is arbitrary, capricious,

or constitutes an abuse of discretion. *See also Diamond v. Swick*, 117 Nev. 671, 674 (2001) (the burden of proof is on the party attacking or resisting an agency's decision).

ARGUMENT

I. GBMW'S POINT SOURCE DISCHARGE CLAIMS (CLAIMS 1-3).

GBMW's first three challenges to the issued WPCP are all based on GBMW's assertion that certain flows at the Mine are subject to NPDES permitting requirements. Specifically, GBMW argues that: (a) the flows observed in the natural stream channels below three RDAs, the ground water flow from the mine lakes, and the diversion of ground water into the Sammy Creek alluvium are all point source discharges that require a NPDES permit (Claim 1); (b) the NPDES permit must contain water quality standards-based effluent limits for selenium ("Se"), total dissolved solids ("TDS"), manganese ("Mn"), and/or arsenic ("As") (Claim 2); but (c) NDEP is prohibited from issuing the NPDES permit GBMW argues is necessary because NDEP has yet to complete the TMDL process for the NFHR.[2]

As explained below, the flows at issue are not point source discharges. As a result, no NPDES point source discharge permit is required for the Mine and, in turn, GBMW's water quality standards-based effluent limit and TMDL arguments fail. Moreover, even if a NPDES point source discharge permit for the Mine was required, that fact does not invalidate the WPCP.

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[2] It should be noted that GBMW's point source discharge argument creates an impossible situation. According to GBMW, the flows observed below the RDAs and the ground water flow from the mine lakes are not authorized. These flows must be discontinued until NDEP issues a NPDES permit for them, but NDEP is prohibited from issuing such a permit until the TMDL process for the NFHR is completed. This argument begs the question of what to do with the water until the TMDL process is completed. The flows are not generated by industrial processes that can be shut off. Instead, the flows are derived from meteoric water — precipitation falling on the watershed — over which neither NDEP nor AngloGold Ashanti have any control.

A. The Flows at Issue are Not Point Source Discharges (Claim 1).

1. General Statement of the Law.

The underlying basis for GBMW's NPDES permit allegation is Section 301(a) of the CWA which prohibits the "discharge of any pollutant by any person" without a permit. 33 U.S.C. § 1311(a). As relevant here, the CWA defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Thus, in order to prevail on its NPDES permit claim, GBMW must prove that AngloGold Ashanti is (1) adding, (2) a pollutant, (3) to navigable (or state) waters, (4) from a point source. *See, e.g., National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982). Each element is further explained below.

a. "Adding" or "Addition"

The CWA does not define "adding" or "addition." The term has been interpreted judicially to mean the "introduction from the outside world" where the "outside world" means any place outside of the particular water body to which the pollutants are introduced. *See, e.g., Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2nd Cir. 2001). Thus:

- The flow of "polluted" water down a drainage does not constitute the addition of a pollutant. *See, e.g., Froebel v. Meyer*, 217 F.3d 928 (7th Cir. 2000), *cert. denied*, 531 U.S. 1075 (2001); *see also Gorsuch*, 693 F.2d 156; and *National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580 (6th Cir. 1988) (release of polluted water from a storage reservoir to the stream below does not constitute the addition of a pollutant).

- The transfer of water (via pumping or otherwise) from one water body into another that is not "meaningfully distinct" does not constitute the addition of a pollutant. *See Micosukee Tribe of Indians of Florida v. South Florida Water Management District*, 124 S.Ct. 1537, 1547 (2004); *see also* Memorandum from Ann R. Klee (EPA General Counsel) and Benjamin H. Grumbles (EPA Assistant Administrator for Water) to Regional Administrators dated August 5, 2005 regarding "Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers" (attached hereto as Exhibit A and hereinafter "Water Transfer Memo").

In contrast:

- The transfer of water from a process or waste water impoundment to a navigable water, intentionally or otherwise, does constitute the addition of a pollutant because such impoundments are "outside of" and not part of the navigable water system. *See, e.g., U.S. v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979) (overflow from a process water impoundment -- the pregnant solution collection sump that was an integral part of the gold heap leach operation); *Committee to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305 (9th Cir. 1993) (overflow from a treatment facility into which acid drainage from an abandoned mine site had been channeled).[3]

[3] *See also Sierra Club v. Abston Construction Co.*, 620 F.2d 41 (5th Cir. 1980) (overflow from sediment control basins, and precipitation-induced erosion runoff from unreclaimed overburden spoil piles); *Consolidation Coal Company v. Costle*, 604 F.2d 239 (4th Cir. 1979), *portions reversed, EPA v. National Crushed Stone Ass'n.*, 449 U.S. 64 (1980) (overflow from a coal mine slurry pond); *Trustees for Alaska v. EPA*, 749 F.2d 549 (9th Cir. 1984) (flow of waste water from a placer gold mining sluice box); *Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F.Supp. 983 (E.D. Wash. 1994) (overflow from tailings ponds containing cyanide, heavy metals and other

b. A Pollutant.

"Pollutant" is specifically defined by the CWA. It means:

> dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

33 U.S.C. § 1362(6). Due to the structure of the definition, courts have been "cautious in adding new terms to the definition." *Gorsuch*, 693 F.2d at 172 (as a general rule, a definition that declares what a term "means" excludes any meaning that is not stated).

c. To Navigable (or State) Waters.

"Navigable waters" is generically defined by the CWA to mean "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Judicial interpretation of this term is currently unsettled. In 2001, the United States Supreme Court issued its opinion in *Solid Waste Agency of Northern Cook County v. Corps of Engineers*, 531 U.S. 159 (2001) which limited the reach of the federal government's jurisdiction under the CWA. Despite the uncertainty under federal law, Nevada's definition of "state waters" is broader than "navigable waters" and would include the NFHR and the tributaries at issue here. Thus, if all of the other elements of a point source discharge are satisfied, a state point source discharge permit would be required.

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chemical agents); *United States v. Law*, 979 F.2d 977 (4th Cir. 1992), *cert. denied, Law v. United States*, 507 U.S. 1030 (1993) (discharge from a treatment facility that had been installed to treat acid mine drainage runoff and leachate from a gob pile); and *Umatilla Waterquality Prot. Assoc. v. Smith Frozen Foods*, 962 F.Supp. 1312 (D. Ore. 1999) (discharge from a waste brine pond).

d. From a Point Source.

"Point source" is defined by the CWA to mean:

> any discernable, confined and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

33 U.S.C. § 1362(14). A CWA "point source" also must be "the terminal end of an artificial system for moving water, waste, or other materials." *Froebel*, 217 F.3d at 937-38, *citing United States v. Plaza Health Laboratories*, 3 F.3d 643, 646 (2nd Cir. 1993) (noting that the definition "evokes images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waterways"). It must be underscored, however, that the point at which water flows from one water body to another into which it would flow naturally is not a CWA "point source" even though that flow point would satisfy the discernable, confined, and discrete conveyance criteria. *Froebel*, 217 F.3d at 938.

e. Determination of the Source.

Given how the elements of a CWA point source discharge are defined, one must first determine the source of the material/constituent that is allegedly being added to the navigable (or state) water. Otherwise, it is impossible to determine:

- Whether the material/constituent is dredged spoil, solid waste, or some other "pollutant" that is specifically defined in the CWA;
- Whether the material/constituent in the water is being "added/introduced" from the outside world, or is a material/constituent that is naturally picked up by water that flows from one place to another; and
- Whether the conveyance is "from the terminal end of an artificial system for

moving water, wastes, or other materials" or is merely a flow point in a watershed.[4]

2. The Flows in the Natural Channels Below the RDAs are not Point Source Discharges.

As discussed above, determining the source of the material/constituent at issue is a necessary and critical first step in the "point source discharge" analysis. With regard to the RDAs, the actual source of the water and the constituents in the water have not been clearly identified. Instead, there are four potential sources of the surface water flows in the natural stream channels below the RDAs. They are: (a) water that is in the natural stream channel above the RDAs that flows through the rock underdrain placed in that natural stream channel as part of the RDA construction; (b) ground water contribution to the natural stream channel through seeps, springs, or gaining reaches of the natural stream channel that is now beneath the RDAs; (c) meteoric water that has flowed downward through the RDAs to the natural stream channel; and/or (d) water that has been diverted around the RDAs through the constructed surface water diversion channels.[5] Given these potential sources, one cannot determine the "actual" source simply by comparing upstream and down-stream water quality data. It is possible, given the hydrogeology of the area, that the quantity and quality of the water observed

[4] It should be noted that in those cases where the courts have determined that a NPDES point source discharge exists, the source of the material/constituent being added was known. *See, e.g., Earth Sciences,* 599 F.2d 368 (the material added was overflow from a process water impoundment -- the pregnant solution collection sump that was an integral part of the gold heap leach operation); *Abston Construction Co.*, 620 F.2d 41 (the material added was overflow from sediment control basins, and precipitation-induced erosion runoff from unreclaimed overburden spoil piles); *Mokelumne*, 13 F.3d 305 (the material added was overflow from a treatment facility into which acid drainage from an abandoned mine site had been channeled for treatment); *Hecla Mining Co.*, 870 F.Supp. 983 (the material added was overflow from tailings ponds containing cyanide, heavy metals, and other chemical agents); and *Consolidation Coal*, 604 F.2d 239 (the material added was overflow from a coal mine slurry pond).

[5] The water collected by the diversion channels generally is directed back to the natural stream channel before the sampling locations downgradient of the RDAs.

below the RDAs is solely a function of ground water seeps that emerge in the stream channel beneath the RDAs.[6]

Nevertheless, even if we assume that the source of the flow is surface water in the natural stream channel that flows through the rock underdrains or meteoric water that flows downward through the RDAs, those flows are not additions of pollutants from point sources. Rather, such flows would be nonpoint source (or diffuse) pollution that are not subject to the CWA point source discharge permit requirements. A recent Tenth Circuit Court of Appeals case makes this clear.

In *Sierra Club and Mineral Policy Center v. El Paso Gold Mines, Inc.*, No. 03-1105 (10th Cir. 2005) (copy attached hereto as Exhibit C) the court explained that it is the "dumping of waste rock" that constitutes the discharge from a point source. Once that point source discharge — dumping of waste rock — ceases, all that remains, if anything, is "the migration, decomposition, or diffusion of the pollutants into a waterway," which does not constitute a point source discharge. *Id.* at 14. This is not to say that such "migration, decomposition, or diffusion" is unregulated. The court acknowledged that the CWA also regulates nonpoint source discharges, but not through the NPDES point source discharge program. *Id.* at 15, n. 4. And, although nonpoint source pollution is not statutorily defined, it is commonly understood to be pollution arising from dispersed activities over large areas that is not traceable to a single, identifiable source or conveyance. Significantly, the Tenth Circuit explained that

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[6] In this regard it should be noted that seeps have been observed in the Independence Mountain Range in areas unaffected by mining activity which have elevated levels of TDS, sulfate, selenium, and manganese. *See, e.g.,* DASH Mining Project Final Environmental Impact Statement completed by the U.S. Forest Service during 1996 in cooperation with the U.S. Bureau of Land Management, U.S. Army Corps of Engineers, Nevada Division of Wildlife, NDEP, and Elko County Commissioners at 3-19, 3-23, and C-7 through C-22 (attached hereto as Exhibit B).

"[g]roundwater seepage that travels through fractured rock would be nonpoint source pollution, which is *not* subject to NPDES permitting." *Id.* (emphasis added).[7]

Here, the point source discharge — the disposal of waste rock — has ceased. Consistent with the decision in *El Paso Gold Mines*, AngloGold Ashanti's predecessor obtained discharge permits for rock disposal at the RDAs in accordance with the requirements of Section 404 of the CWA. Rock disposal is complete and, as such, there is no ongoing discharge from a point source. Instead, what remains, if anything, is seepage through the rock in the RDAs — either as flow in the natural stream channel through the rock underdrain placed in that natural channel as part of the RDA construction, or meteoric water seepage downward through the RDAs to the natural stream channel.[8] As the Tenth Circuit explained in *El Paso Gold Mines*, this seepage traveling through the rock "is nonpoint source pollution, which is not subject to NPDES permitting." *Id.*; *see also Friends of Santa Fe County v LAC Minerals, Inc.*, 892 F.Supp. 1333, 1358-59 (D. N.M. 1995) (seeps are more accurately described as carriers of water from the alluvium to the surface; seeps merely represent evidence that constituents have at some time in the past entered subsurface waters, possibly from rock disposal areas, but they are nonpoint source carriers of pollutants and not subject to NPDES permitting requirements).

Importantly, neither NDEP nor AngloGold Ashanti are ignoring the potential nonpoint sources of pollution at the Mine. Site specific cover systems and water diversion channels already have been implemented at each of the RDAs at issue in an effort to reduce water-rock

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[7] The Tenth Circuit's decision in *El Paso Gold Mines* is consistent with state law which specifically defines non-point or "diffuse" sources to include mining activities. *See* NAC § 445A.309(3).

[8] As explained above, the observed water may not be related to the RDAs at all. It may simply be ground water contribution to the natural stream channel through seeps, springs, or gaining reaches of the natural stream channel beneath the RDAs, and/or water diverted around the RDAs through the constructed surface water diversion channels.

interaction. AngloGold Ashanti has completed the reclamation activities but, as NDEP correctly points out, the revegetation efforts need additional time to mature. Through the WPCP, AngloGold Ashanti is required to continue to monitor the flows in the stream channels below the RDAs and to implement a mass balance accounting of the constituents of concern. This is a necessary step in order to better assess the potential sources that may be contributing to the surface water flow and to determine whether any additional actions are necessary to better manage any nonpoint source pollution attributable to the RDAs.

3. The Ground Water Flow From the Mine Lakes is not a Point Source Discharge.

When the surface mines were developed at the Mine, several intersected the pre-mining ground water table and required dewatering during ore recovery. Now that the Mine is closed, two of those surface mines intersect the very same pre-mining ground water table. And, as GBMW acknowledges, the areas created by the two surface mines are now "flow-through lakes;" both lakes are "flow-through systems." Appellant Brief at 4 and 16. As such, the amount of flow through the lakes is governed and controlled solely by the aquifer characteristics upgradient and down-gradient of the lakes. Further, nothing is being added from the outside world. No waste process water or wastewater of any kind is being directed to the mine lakes. Instead, the lakes are simply constructed in a place where they intersect the pre-mining ground water table which naturally flows in a downgradient direction.

Further, the water in the mine lakes is not "wastewater" as GBMW claims. *See* Appellant Brief at 18. Instead, the water in the mine lakes is derived solely from meteoric water that falls on the lakes and that flows through the upgradient ground water system into the lakes. GBMW's characterization of this water as "wastewater" is, in fact, fundamentally inconsistent

with GBMW's characterization that "both lakes are flow-through systems, i.e. water flows into the pits from up-gradient and out of the pits into the adjoining bedrock aquifer." Appellant Brief at 16. Further, given the "flow through" nature of the system, there is no "meaningful distinction" between the water in the mine lakes and the ground water upgradient and down gradient of the lakes. Thus, no NPDES point source discharge permit is required for the ground water flow from the mine lakes. *See Micosukee Tribe,* 124 S.Ct. at 1547 (the transfer of water from one water body into another that is not "meaningfully distinct" does not constitute the addition of the pollutant).

4. The Ground Water Diversion Program is not a Point Source Discharge.

The ground water diversion program was installed to ensure that the exposed ground water in the mine lake designated "SWX" does not overtop the embankment on the northwest side of that lake. During periods of high ground water table, the water in this mine lake could rise to levels that would overtop the embankment and thereby allow the water to flow naturally into the Sammy Creek alluvium. The ground water diversion program uses the artesian pressure created during these periods of high ground water levels to mimic what would occur naturally without jeopardizing the structural integrity of the mine lake embankment. As such, there are no pollutants being added from the outside world to the Sammy Creek alluvium. This water would flow into the alluvium naturally without the ground water diversion program. As such, no NPDES point source discharge permit is required because there is no meaningful distinction

between the ground water system intercepted by the mine lake and the Sammy Creek alluvium.[9] *See Micosukee Tribe*, 124 S.Ct. at 1547.

Moreover, this diversion of ground water falls within the Water Transfer Memo (Exhibit A) that EPA recently issued. In that policy document, EPA "confirms" its longstanding practice consistent with Congressional intent that "water transfers [are] to be subject to oversight by water resource management agencies and State non-NPDES authorities, rather than the permitting program under Section 402 of the CWA." *Id* at 3. Thus, to the extent that the ground water diversion program actually diverts water from one water body to another where such diversion would not occur naturally, such diversion would not constitute a point source discharge subject to NPDES permitting requirements.

5. Summary of AngloGold Ashanti's Response to GBMW's Claim 1.

GBMW does not specifically address the elements necessary for a NPDES point source discharge permit. Instead, GBMW simply asserts that point source discharges exist (and, therefore, a NPDES point source discharge permit is required) because there is "a plethora of data." Appellant Brief at 14. This assertion misses the mark. The CWA does not require point source discharge permits for waters that contain constituents. Rather, in order for GBMW to prevail in its point source discharge claims, it must prove that AngloGold Ashanti is: (1) adding/introducing from the outside world, (2) pollutants as defined by the CWA, (3) to navigable (or state) waters, (4) from a point source that is the terminal end of an artificial system

[9] Proximally downgradient of the SWX mine lake is a second mine lake designated "303." The 303 mine lake intersects the same ground water regime that is intersected by the upgradient SWX mine lake, As such, the ground water diversion program using the artesian pressure regulates not only the SWX mine lake but also the 303 mine lake.

for moving water, waste, or other materials. As explained above, GBMW cannot meet its burden of proving that these elements exist here.

The cases GBMW cites do not rehabilitate GBMW's assertions. None of those cases addressed nonpoint source pollution from reclaimed rock disposal areas, ground water flows from mine lakes, or diversion of ground water. Instead:

a. In *Abston Construction,* 620 F.2d 41, the discharge at issue was surface overflow from sediment control basins, and precipitation-induced erosion runoff from unreclaimed overburden spoil piles;

b. In *Consolidation Coal*, 604 F.2d 239, the discharge at issue was surface overflow from a coal mine slurry pond;

c. In *Earth Sciences,* 599 F.2d 368, the discharge at issue was the overflow from a process water impoundment — the pregnant solution collection sump that was an integral part of the gold heap leach operation; and

d. In *Hecla Mining*, 870 F.Supp. 983, the discharge at issue was overflow from tailings ponds containing cyanide, heavy metals, and other chemical agents.[10]

In sum, neither the data nor the cases on which GBMW rely support GBMW's claim that the flows in the natural stream channels below the RDAs, the ground water flow from the mine lakes, and the ground water diversion program are point source discharges that require a NPDES permit.

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[10] GBMW's reliance on *LAC Minerals,* 892 F.Supp. 1333, is misplaced because GBMW's interpretation of that case is not consistent with the Tenth Circuit's recent decision in *El Paso Gold Mines*. According to the court, *LAC Minerals* stands for the proposition that the "dumping of waste rock at a mine" is a point source discharge that ceases when the dumping stops. The "migration, decomposition, or diffusion of the pollutants into the waterway" that may remain is nonpoint source pollution which is not subject to NPDES point source discharge permitting. *See El Paso Gold Mines* at 14 and 15, n. 4.

B. GBMW's Water Quality Standards-Based Effluent Limits and TMDL Claims are Not Applicable to the Flows at Issue.

1. Water Quality Standards-Based Effluent Limits (Claim 2).

For its second challenge, GBMW relies on the statutory provision requiring point source discharges to comply with water quality standards. Specifically, GBMW alleges that a NPDES point source discharge permit must contain "any more stringent limitation including any necessary to meet or effectuate standards of water quality." NRS § 445A.500. Reliance on this provision is misplaced because, as explained above, there is no point source discharge. Thus, there is no requirement for a NPDES point source discharge permit with water quality standards-based effluent limits.

2. TMDL Claim (Claim 3).

For its third challenge, GBMW argues that NDEP is prohibited from issuing a new NPDES point source discharge permit until TMDLs are established for the NFHR — a 303(d)-listed water. There are three shortcomings with this argument.

First, this argument fails for the same reason as GBMW's water quality standards-based effluent limit argument fails. There are no point source discharges. Thus, whatever prohibition exists with regard to issuing point source discharge permits, that prohibition is inapplicable here.

Second, there is no statutory or regulatory prohibition on issuing point source discharge permits as GBMW claims. GBMW's challenge is derived solely from *Friends of the Wild Swan v. EPA,* 74 Fed. Appx. 718 (9th Cir. 2003). That case is inapposite because it concerned the equitable powers of a federal district court with regard to EPA's approval of Montana's 303(d) list. Under the specific facts of that case, the Ninth Circuit concluded that the injunctive relief ordered by the district court — a prohibition on the issuance of "new permits or increases in

permitted discharges" until the TMDLs were promulgated — was not an abuse of discretion. The court did not conclude as a matter of law, as GBMW suggests, that the CWA itself contains such a prohibition. The opinion only concluded that the district court did not abuse its discretion in entering injunctive relief in that particular case that included such a prohibition.

Finally, even if the CWA did contain a provision similar to the injunctive relief ordered by the district court in *Wild Swan*, it would be inapplicable in this case because there are no new permits and no increases in discharges. Instead, at issue in this case is the renewal permit for the closure of the Big Springs Mine. No additional flows are being introduced into the NFHR. Instead, the renewal permit maintains the status quo of monitoring the various meteoric-derived water within the NFHR basin.

C. None of GBMW's Point Source Discharge Claims are Relevant to the Validity of the WPCP.

As a final matter, it must be underscored that even if GBMW's point source discharge arguments were valid, they are not relevant in this appeal. As GBMW acknowledges, the WPCP was issued pursuant to the "Mining Facility" regulations at NAC §§ 445A.350-447. Appellant Brief at 15. There is nothing in the applicable regulatory provisions that either: (a) require denial of the WPCP if all other permits that might potentially be necessary for the activity are not first obtained; or (b) restrict issuance of WPCPs to only those circumstances for which NDEP has concluded that all other state (or federal and local) permits/authorizations have been obtained. To the contrary, both the regulations and the permit make it clear that AngloGold Ashanti must obtain whatever other permits are necessary. *See* NAC § 445A.387(2); and WPCP at 10, § II.C.7; *see also Helms,* 109 Nev. at 314 (NDEP is entitled to presume that other approvals have been obtained and are valid).

In short, there is no legal basis for setting aside the WPCP just because GBMW believes that a NPDES point source discharge permit is necessary. The WPCP is a separate and distinct authorization and issuing it as NDEP has done here was neither unauthorized nor arbitrary and capricious.

II. GBMW'S ESA CLAIM (CLAIM 4).

For its fourth challenge, GBMW argues that the WPCP should be set aside because, according to GBMW, the Mine is effecting a "take" of the LCT which is not authorized under the ESA. In support of this argument, GBMW relies on Section 1536(a)(2) of the ESA (a/k/a "Section 7"). GBMW's reliance on this section is misplaced. Section 7 requires federal agencies to consult with the USFWS to ensure that any federal agency action is not likely to jeopardize the continued existence of any endangered or threatened species. *See* 16 U.S.C. § 1536(a)(2). Since NDEP is not a federal agency, there is nothing about NDEP's issuance of the WPCP that implicates Section 7 of the ESA.

Nevertheless, there is a provision in the ESA — Section 9[11] — that addresses the "taking" of endangered and threatened species. However, if GBMW intended to rely on Section 9 for its argument, no relief is appropriate here because: (a) there is no credible evidence to substantively support GBMW's claim of a take of the LCT; and (b) even if there was credible evidence of such a take, it would not be a legitimate challenge to the issued WPCP.

[11] 16 U.S.C. §1538

A. There is No Credible Evidence of a Take.

GBMW does not provide any evidence that the LCT population in the NFHR actually has been injured as a result of selenium or any other constituent.[12] Instead, GBMW argues that selenium is effecting a "take" of the LCT because EPA has explained that "selenium can be toxic to aquatic life . . . where concentrations are excessive." Appellant Brief at 32. The critical omission from GBMW's argument is species specific information. EPA's conclusion that selenium can be toxic to aquatic life when the concentrations are excessive is not sufficient to demonstrate that the actual selenium concentrations in the NFHR are affecting the existing population of LCT, let alone effecting a take of the LCT under the ESA. GBMW has provided no explanation on what "excessive" concentrations are, nor has GBMW provided any information on species specific toxicity, if any, of selenium (or any other constituent) on LCT.

GBMW's reliance on the USFWS' preliminary assessment is similarly misplaced. *See* Appellant Brief at 33-34. That assessment, which is based on a single sampling episode, simply reported that LCT fish tissues contain selenium. It is irrelevant if the levels of selenium observed in the LCT are greater than a general EPA-proposed criteria for whole body tissue in aquatic life. To ascertain the actual toxicity and/or harm of selenium to the LCT, if any, one must look at fish population studies which, due to AngloGold Ashanti's efforts, continue to the present day. As explained in Mr. Canton's Report, attached hereto as Exhibit D, there is a robust population of LCT in the NFHR regardless of selenium concentrations in the water and in the fish tissues. There are simply no empirical data of any actual adverse impact to the LCT as a

[12] As explained in this Response Brief at Section I.A.2 of the "Argument," GBMW also has not provided any evidence as to the actual source of the selenium or other constituents.

result of the instream selenium concentrations which would justify a finding that those concentrations are effecting a "take" of the LCT. According to Mr. Canton:

- The conclusions reached by Dr. Myers — GBMW's expert — regarding the potential harm to LCT from selenium are not supported by the data. Fish tissue levels are below reported adverse effects thresholds, and multiple generations of LCT are present in the NFHR.
- Dr. Myers ignores the strongly decreasing trend in selenium concentrations in the NFHR over time, especially during the last ten years. These downward trends in selenium concentrations are occurring post-reclamation, indicating that the reclamation activities are having a positive effect on down-stream water quality.
- Dr. Myers' conclusions of harm to aquatic life in the NFHR from TDS/sulfate concentrations are also not supported by the data. Long-term monitoring of the aquatic biota show no negative effect on either the fish communities or benthic invertebrate populations.

Additionally, it must be highlighted that all of the fish population studies have been submitted to and reviewed by the USFWS. To date, that agency has not taken any action that would indicate a concern about the selenium concentrations in the NFHR on the LCT. It is particularly noteworthy that NDEP solicited comments from the USFWS on the draft renewal permit. In its comments, the USFWS provided no indication that it was at all concerned about the potential for the instream selenium concentrations (or the concentrations of any other constituents) to effect a take of the LCT. This is significant given the fact that the USFWS is the federal agency responsible for implementing and enforcing the ESA.

B. GBMW's "Take" Claim is not Relevant to the Validity of the WPCP.

Even if there were credible evidence that the instream concentrations of selenium (or any other constituent) were effecting a "take" of the LCT, that evidence would only trigger a requirement for an ESA Section 9 Take Permit; it would not invalidate the WPCP.

The WPCP regulations do not prohibit NDEP from issuing a permit simply because some other permit — here a Section 9 Take Permit under the ESA — may be required. Rather, the regulations and the permit make it clear that AngloGold Ashanti is responsible for obtaining any other permits/authorizations that might be necessary. *See* NAC § 445A.387(2); and WPCP at 10, § II.C.7; *see also Helms,* 109 Nev. at 314 (NDEP is entitled to presume that other approvals have been obtained and are valid). Further, the ESA does not prohibit issuance of the WPCP. As explained above, the ESA only restricts federal authorizations under Section 7. Here, there is no federal authorization. Instead, NDEP has renewed the WPCP for the Big Springs Mine. Thus, there is no legal basis to set aside the WPCP even if GBMW could produce credible evidence that the mine closure activity is effecting a take of the LCT.

III. GBMW'S CLAIMS ABOUT WATER QUALITY DEGRADATION (CLAIMS 5 AND 6).

A. The Mine Lakes are Not Degrading Water Quality (Claim 5).

According to GBMW, the mine lake water "is *likely causing* ground water levels to exceed drinking water standards for several constituents ... and is, therefore, degrading waters in violation of state law." Appellant Brief at 35-36 (emphasis added).[13] As an initial matter, it must be remembered that in order for GBMW to prevail, it has the burden of proving that the

[13] GBMW appears to acknowledge that the mine lakes do not have "the potential to affect adversely the health of human, terrestrial or avian life." *See* Appellant Brief at 35. This is appropriate given the "Risk Assessment, Big Springs SWX and 303 Pits," prepared for Independence Mining Company Inc. by ENSR, Fort Collins, Colorado (March 1998) which demonstrated the lack of any potential adverse effects.

mine lakes are in fact degrading waters of the state. It is insufficient for GBMW to simply assert that the lake water "is likely causing" the degradation.

Moreover, GBMW's attempt to justify this assertion consists solely of a comparison of water quality in the lakes to drinking water standards. This is insufficient. GBMW has acknowledged that these lakes are "flow-through systems." Appellant Brief at 16. As a result, the quality of the water in the mine lakes is governed by the quality of the ground water that the mine lakes intercept. It is that ground water quality that is controlling the quality of the ground water flow from the mine lakes, not the mine lakes themselves. GBMW has provided no information that the lakes themselves degrade ground water of the state. Thus, GBMW's assertions about water quality degradation provide no legal basis to set aside the WPCP.

B. The Ground Water Diversion Program is Not Degrading Water Quality (Claim 6).

GBMW's argument with regard to the water diversion program is similarly flawed. The water being diverted into the Sammy Creek alluvium is water that would flow to that alluvium naturally during periods of high ground water levels. The purpose for the diversion program is to protect the structural integrity of the embankment for the "SWX" designated mine lake. Without the diversion program, the mine lake would fill up, the water would overtop the embankment, and the overflow water (the same as the diverted ground water) would run into the Sammy Creek alluvium. Thus, the quality of the ground water being diverted is irrelevant because it would make its way to the Sammy Creek alluvium without the diversion program. The diversion program simply mimics the natural system.[14] As a result, it is maintaining the

[14] As previously noted, the ground water diversion program also regulates the 303 mine lake.

status quo; it is not degrading the Sammy Creek alluvium. Therefore, there is no basis for setting aside the WPCP.

CONCLUSION

As discussed above, there is no basis to set aside the WPCP. None of the flows about which GBMW complains are point source discharges requiring a NPDES permit; there is no credible evidence of a "take" of the LCT; and there is no credible evidence that the mine lakes or the ground water diversion program are degrading state waters. Issuance of the WPCP was neither a violation of law nor arbitrary and capricious. Accordingly, the WPCP must be affirmed.

Respectfully submitted this 16th day of November, 2005.

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