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BEFORE THE STATE OF NEVADA ENVIRONMENTAL COMMISSION

In Re:)	
)	
Appeal of Water Pollution Control Permit)	APPELLANT GREAT
)	BASIN MINE WATCH'S
NV0022269, Big Springs Mine)	REPLY TO NDEP'S AND
)	INTERVENOR
)	ANGLOGOLD'S
)	RESPONSE BRIEFS
)	
)	
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TABLE OF CONTENTS

I STANDARD OF REVIEW.....1

II. NDEP IS REQUIRED TO ISSUE A DISCHARGE PERMIT FOR THE POINT SOURCES AT THE BIG SPRINGS MINE2

A. NDEP is required to issue a discharge permit for the RDAs, the pits and the groundwater diversion program at the Big Springs Mine.2

1. **The RDA’s are point sources that are discharging pollutants into waters of the state.....3**

a. *The RDAs are “adding” pollutants.7*

b. *The RDAs are adding “pollutants” to the NFHR and its tributaries.7*

c. *The RDA’s discharge pollutants into state waters.....8*

d. *The RDAs constitute a point source.....8*

1. *The issue at hand is not whether the flows in the drainages are point sources..... 11*

2. *A point source need not be the terminal end of an artificial system for moving water, waste or other materials..... 11*

3. *The source of the **flows** is irrelevant..... 13*

4. *The Source of the pollutants is known. 13*

5. *Mining activities include both point and non-point sources of pollution..... 15*

6. *Mineral Policy Center v. El Paso Gold does not support the conclusion that the RDAs are diffuse sources..... 16*

7. *Abston Construction does not stand for the proposition that the RDAs are not point sources..... 20*

2.	The discharge from the pit lakes via the groundwater to surface waters requires a discharge permit.	21
a.	The Pits are “adding” pollutants.	21
b.	The pits are adding “pollutants.”	23
c.	The pits are discharging pollutants into state waters.	23
d.	The RDAs constitute a point source.	24
	1. <i>The pits are meaningfully distinct from the ultimate receiving waters.</i>	24
	2. <i>The pits, not the groundwater flows, are the point source that trigger the requirement for the NPDES permit.</i>	27
3.	NDEP is required to issue a discharge permit for the groundwater diversion program.	29
a.	The groundwater diversion system is “adding” pollutants to Sammy Creek.	29
b.	The groundwater diversion program is adding “pollutants”..	31
c.	The groundwater diversion program is adding pollutants to state waters.....	32
d.	The groundwater diversion program is a point source.....	32
B.	Whether a discharge permit is required is relevant to the validity of the WPCP.	32
III.	THE DISCHARGES FROM THE MINE ARE CAUSING EXCEEDANCES OF APPLICABLE WATER QUALITY STANDARDS IN THE NFHR AND ITS TRIBUTARIES IN VIOLATION OF STATE AND FEDERAL LAW.	34
IV.	NDEP’S RENEWAL OF THE PERMIT VIOLATES THE CWA’S 303(D) PROVISION.	36
V.	THE DISCHARGES ARE ADVERSELY AFFECTING LAHONTAN CUTTHROAT TROUT SPECIES IN THE NFHR IN VIOLATION OF THE FEDERAL ENDANGERED SPECIES ACT.	41

A.	The Big Springs Mine is causing a take of LCT.....	41
B.	The WPCP issued by NDEP is subject to the requirements of the ESA.....	46
VI.	THE PITS ARE DEGRADING GROUNDWATER IN VIOLATION OF STATE LAW.....	48
VII.	THE WATER DIVERSION PROGRAM IMPLEMENTED BY ANGLOGOLD IS DEGRADING WATERS OF THE STATE IN VIOLATION OF STATE LAW.....	50
CONCLUSION		51
APPENDIX.....		52
Certificate of Service.....		56

Attachments

Letter from Max H. Dodson, Director Water Management Division, EPA Region VIII, to Dan Fraser, Chief Water Quality Bureau, Montana Dept. of Health and Environmental Sciences

GBMW v. State, Order Granting In Part and Denying In Part Petition for Judicial Review, Case No. 03-01140A (1st Judicial District Court of Nevada, August 19, 2004)

Great Basin Mine Watch (GBMW), by and through its undersigned attorney, Nicole U. Rinke, hereby submits the following consolidated reply to the Nevada Division of Environmental Protection (NDEP)'s and Intervenor AngloGold's response submitted November 16, 2005, regarding GBMW's appeal of Water Pollution Control Permit (WPCP) NEV0087001 for the Big Springs Mine. In their response briefs, AngloGold and the NDEP make several misleading and erroneous arguments in an attempt to escape the strict requirements of Nevada's Water Pollution Control law and the Federal Clean Water Act (CWA). These arguments, as will be explained herein, are contrary to the intent of the Nevada Water Pollution Control Law and the CWA and must be rejected.

I. STANDARD OF REVIEW

AngloGold correctly argues that the SEC must evaluate NDEP's decision to determine if it is arbitrary, capricious or an abuse of discretion. Anlgo, at 4. An agency's abuse of discretion "is most often found in an apparent absence of any grounds or reasons for the decision – 'We did it just because we did it.'" City Council of City of Reno v. Irvine, 102 Nev. 277, 278-80 (1986). An agency must have a basis for its decision; otherwise its decision is an arbitrary abuse of discretion. Id. at 279 n.4; see also City Council of City of Reno v. Irvine, 102 Nev. 277, 278-79 (1986) (defining arbitrary agency action as "baseless"). As such, while GBMW bears the burden of showing why NDEP's decision is arbitrary, capricious or otherwise an abuse of discretion, NDEP must identify a supportive basis for its decision, otherwise that burden is easily met. As will be shown herein and was explained in GBMW's Opening Brief (Appellants Opening Brief (AOB)), NDEP has not established a credible basis for its decision. As such, the issuance of WPCP NEV0087001 was arbitrary and capricious.

II. NDEP IS REQUIRED TO ISSUE A DISCHARGE PERMIT FOR THE POINT SOURCES AT THE BIG SPRINGS MINE.

NDEP and AngloGold do not dispute that Nevada and federal law prohibit the discharge of pollutants from any point sources into waters of the state or navigable waters respectively, without a permit. NRS 445A.465; 33 U.S.C. § 1311(a); AngloGold's Response Brief (AngloGold), at 6; NDEP's Response Brief (NDEP), at 3-6. Rather, NDEP and AngloGold dispute whether or not the discharges from the Rock Disposal Area's (RDA's), pit lakes, and groundwater diversion program are in fact discharges from point sources that require discharge permits. AngloGold, at 5-16; NDEP, at 3-6. In addition, AngloGold and NDEP argue that, even if a discharge permit is required, that is not relevant to the validity of the WPCP at issue in this appeal. AngloGold, at 5, 18-19; NDEP, at 2-3. Each argument will be addressed in turn.

A. NDEP is required to issue a discharge permit for the RDAs, the pits and the groundwater diversion program at the Big Springs Mine.

AngloGold, and to a lesser extent NDEP, walk through the individual requirements for a discharge permit and, focusing narrowly and singularly on each requirement, attempt to argue that the various discharges at the Big Springs Mine do not require discharge permits under the state or federal law. This sort of narrow argument undermines the intent of the Clean Water Act and Nevada's Water Pollution Control Law. See Friends of Sakonnet v. Dutra, 738 F.Supp. 623 (D.C.R.I., 1990) (holding that the words "point source" should not be separated from the words addition of any pollutant because dwelling on the word point source in isolation can lead to absurd results).

However, even looking at the individual requirements in isolation, as AngloGold and NDEP urge this Commission to do, the conclusion remains the same – the RDAs, pit lakes, and groundwater diversion program at the Big Springs Mine constitute point sources that are unlawfully adding pollutants to waters of the state without a discharge permit. Each of the legal requirements and how they apply to the three sources will be addressed below.¹

1. **The RDA's are point sources that are discharging pollutant into waters of the state.**

As was explained in GBMW's Opening Brief, and as will be explained herein, the RDAs are identifiable, discrete point sources that are adding pollutants to the North Fork Humboldt River (NFHR) and its tributaries and, therefore, require a discharge permit under state and federal law. It is important to emphasize that it is the RDAs, not the "flows in the natural channels below the RDAs," as AngloGold and NDEP otherwise suggests, that trigger the requirement for a discharge permit. See AngloGold, at 10; NDEP, at 5. The remainder of the points raised by AngloGold and NDEP will be addressed below.

a. **The RDAs are "adding" pollutants.**

As correctly explained by AngloGold, "addition" is not defined by the CWA or the Nevada WPCL. The term has, however, been interpreted by the courts as the introduction of pollutants from outside of the receiving water body. As a result, the transfer of water from one water body to another separate body is considered an addition.

¹ AngloGold also argues that the cases GBMW cites do not support its position that these sources require discharge permits. AngloGold, at 16. Anglo's characterization of these cases and their outcomes is far too narrow. The relevancy of these cases was already addressed in GBMW's Opening brief and will not be reiterated here in list form, but will be addressed, where relevant, throughout the reply.

See e.g., South Florida Water Management Dist. v. Miccosukee Tribe, 124 S.Ct. 1537 (2004)(discharges of pollutants includes point sources which do not themselves generate the pollutants; a point source need only convey the pollutant to navigable waters); Northern Plains Resource Council v. Fidelity Expl. and Dev. Company, 325 F.3d 1155, 1162 (9th Cir. 2003) (“The requirement that the physical, biological, or chemical integrity of the water be “man-induced” alteration refers to the effect of the discharge on the receiving water; it does not require that the discharged water be altered by man.”); Catskill Mtns Chapter of Trout Unlimited v. City of New York, 273 F.3d 481 (2nd Cir. 2001) (same – transfer of water from one body to another is an addition of a pollutant that requires a discharge permit).

As explained in detail in GBMW’s Opening Brief, the RDAs are plainly “adding” pollutants from the RDA’s to the NFHR and its tributaries. See AOB, at 10-15. Specifically, the data indicates that the RDAs are adding TDS, sulfate, and selenium. AOB, at 10-15. Importantly, NDEP and AngloGold’s own consultant have repeatedly recognized this fact. See e.g. Mine Site Closure Study for Independence Mining Company, Inc., Big Springs Project, Elko County, Nevada, at 30 (Schafer and Associates, 1996) (“water infiltrating through the waste rock dumps appears to be the primary mechanism for transport of the elevated and dissolved constituents”); Fact Sheet, at 6 (“the interaction of meteoric waters with the sulfide minerals in the waste rock is considered at least a significant source of the higher TDS, sulfate, and selenium values as compared to the receiving North Fork of the Humboldt River”). As such, it is entirely disingenuous for NDEP and AngloGold to now agree that the RDAs are not somehow adding pollutants to the NFHR and its tributaries.

AngloGold argues, as a matter of law, that the flow of polluted water down the drainages does not constitute the addition of a pollutant. Anglo Gold at 6. For this proposition, AngloGold relies on three cases: Froebel v. Meyer, 217 F.3d 928 (7th Cir. 2000), NWF v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982), and NWF v. Consumers Power, 862 F.2d 580 (6th Cir. 1988). None of these cases, however, supports AngloGold's argument.

First, the issue here is not “the flow of polluted water down the drainages.” Rather, it is whether the RDA's and other AngloGold facilities discharge pollution into the North Fork Humboldt River.

Froebel is in no way relevant to the case at hand. First, Froebel dealt with a narrow issue clearly distinct from the issue at hand. The issue in Froebel was whether or not a former dam impoundment, that had been removed, and a portion of a river channel through the old damn site could be a point source. 217 F.3d at 930, 937. On the other hand, the issue here is whether the RDAs, which have not been removed, are point sources that are currently adding pollutants to the NFHR and its tributaries. In addition, the question in Froebel had nothing to do with whether or not the site was “adding” pollutants, as it is relied on by AngloGold, but rather whether or not the site of the removed impoundment could be a “point source.” Id., at 937-38. For both of these reasons, Froebel simply does not stand for the proposition that the RDA's are not discharging pollutants into the NFHR.

Here, it is not the flow of polluted water down the drainages that constitutes the addition of pollutants, but rather, in NDEP's own words, “the interaction of meteoric waters with the sulfide minerals in the waste rock.” Fact Sheet, at 6. The “addition” is

from the RDAs which were constructed in the drainages, not from the drainages themselves.

NWF v. Gorsuch, also fails to support AngloGold's argument that the RDAs are not adding pollutants to the NFHR and its tributaries. The issue, in relevant part, in Gorsuch was whether or not the passage of water through a dam, that resulted in low dissolved oxygen, cold, and supersaturation in the water, constituted the addition of pollutants. 693 F.2d at 171-72. The Court, relying on EPA's interpretation, held that water quality changes caused by dams would only require NPDES permits if the dam physically introduced the pollutant to the water from the outside world. Id., at 175. In Gorsuch, the dam did not actually introduce "substances" to the water, but merely altered the "condition" of the water. Id., at 172. In contrast, here, the RDAs are actually introducing substances to the water, including salts, selenium and sulfates, not merely changing the water's condition. As such, even under the holding in Gorsuch, the RDAs' addition of these pollutants to the NFHR and its tributaries would, in fact, constitute an addition of pollutants.

The holding in NWF v. Consumers Power was very similar to the holding in Gorsuch and is, likewise, inapposite to the case at hand. Consumer Power involved a hydroelectric dam that was constructed in Lake Michigan to move water between a manmade reservoir and the Lake. 862 F.2d 580, 581. When moving water, the dam destroyed a substantial number of fish and other aquatic organisms already present in the water. Id., at 581-82. NWF sued the Power Company alleging that it was required to have an NPDES permit for its discharge of pollutants, i.e. dead fish, into the Lake. The Court, relying in large part on Gorsuch and EPA's interpretation, held that while the dam

changes the form of the pollutants, it does not add any pollutants to the water. Id., at 585-86. The court explained that the fish originate in the Lake and are not added to the lake by the dam. Id., at 586. Here, in contrast, the RDAs are not moving pollutants already in the water, but are, as already explained, introducing pollutants to the NFHR and its tributaries.

Again, as explained above and in GBMW's Opening brief, the RDAs are adding pollutants to the NFHR and its tributaries. The cases relied upon by AngloGold cannot be used to exempt the RDA's from CWA regulation.

b. The RDAs are adding "pollutants" to the NFHR and its tributaries.

AngloGold, nor NDEP, seem to dispute that the TDS, sulfates and selenium released by the RDAs constitute pollutants. See AngloGold, at 8, 10-13; NDEP, at 3-5. The RDAs were constructed of waste rock, i.e. rock that was removed from the ore body during the mining process. When exposed to air and water, the disturbed rock oxidizes forming acid mine drainage and mobilizing various constituents, including selenium, TDS and sulfates. See e.g. Fact Sheet, at 6 ("the interaction of meteoric waters with the sulfide minerals in the waste rock is considered at least a significant source of the higher TDS, sulfate, and selenium values as compared to the receiving North Fork of the Humboldt River").

It is well accepted that this sort of acid mine drainage falls within the term "pollutant" as it is "broadly defined under the CWA." Beartooth Alliance v. Crown Butte Mines, 904 F.Supp 1168, 1172 (D.Mont. 1995).² As the Federal Court explained in

² While AngloGold argues that the courts have been cautious in adding new terms to the definition of pollutant, the definition is, in fact, not intended to be exhaustive. See e.g. Sierra Club v. Cedar Point, 73 F.3d 546, 566 (5th Cir. 1996)("while the existence of a

Beartooth Alliance,

The Ninth Circuit has already found that the discharge of acid mine drainage is sufficient to satisfy the "pollutant" prong of the test. See Mokelumne River, 13 F.3d at 309. See also United States v. Iron Mountain Mines, 881 F.Supp. 1432, 1435 (E.D. Cal. 1995) (noting in CERCLA context that acid mine drainage is "a pollutant harmful to fish").

Id., at 1172-73. The constituents being released by the RDAs, therefore, constitute "pollutants" within the requirements for a discharge permit.

c. The RDA's discharge pollutants into state waters.

AngloGold expressly (and NDEP implicitly) acknowledges that the discharge from the RDAs is to state waters and, "[t]hus, if all of the other elements of a point source discharge are satisfied, a state point source discharge permit would be required." Anglo, at 8; NDEP, at 3-6.³ Because the State requirement for discharge permits mirrors the federal requirement, the SEC need not decide whether or not the discharge is to navigable waters as more narrowly required under the federal CWA.

d. The RDAs constitute a point source.

Sources of water pollution are, under both federal and Nevada law, divided into two categories: point sources and non-point sources. Point sources are defined as "any discernible, 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." NRS 445A.395, see also 33 U.S.C. § 1362(14).

specific substance in the definition of pollutant may be significant, the fact that a substance is not specifically included does not remove it from the coverage of the statute.")

³ Notably, this admission refutes Anglo's other claim that NDEP is not even required to issue a discharge permit even if the statutory conditions are met. Anglo, at 18-19.

Non-point sources, or diffuse sources, on the other hand, are defined as any source of water pollution which is diffused to the extent that it is not readily discernible and cannot be confined to a discrete conveyance. NRS 445A.355. The definition of diffuse sources under Nevada law is expressly intended to mirror that for non-point sources under the federal law. Id.

In addition to these statutory definitions, several courts have fleshed out in more detail the distinction between point and non-point sources of pollution. Non-point sources generally include those sources that are not susceptible to control, Sierra Club v. Abston Construction, 620 F.2d 41, 43 (5th Cir. 1980), and “cannot be traced to any identifiable point of discharge,” Trustees for Alaska v. EPA, 749 F.2d 549, 558 (9th Cir. 1984); see also United States v. Earth Sciences, 599 F.2d 368, 371 (10th Cir. 1979) (nonpoint sources of pollution “are virtually impossible to isolate to one polluter”). As the Court explained in Washington Wilderness Coalition v. Hecla Mining:

The touchstone for finding a point sources is the ability to identify a discrete facility from which pollutants have escaped . . . the non-point source designation is limited to uncollected runoff water from, for example, oil and gasoline on a highway, which is difficult to ascribe to a single polluter. Discharges from a pond or refuse pile can easily be traced to their source. Thus, even though runoff may be caused by rainfall or snow melt percolating through a pond or **refuse pile**, the discharge is from a point source.

Id., 870 F.Supp. 983, 988 (E.D. Wa. 1994) (internal citations omitted) (emphasis added).⁴

Here, the RDAs plainly fall within the meaning of the term point source as it has been interpreted by the Courts:

- The RDAs, as previously recognized by AngloGold's own consultants and NDEP

⁴ AngloGold does not appear to disagree with this characterization of non-point sources. Anglo, at 11 (“although non-point sources 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”).

are identifiable sources of pollutants See e.g. Mine Site Closure Study for Independence Mining Company, Inc., Big Springs Project, Elko County, Nevada, at 30 (Schafer and Associates, 1996) (“water infiltrating through the waste rock dumps appears to be the primary mechanism for transport of the elevated and dissolved constituents”); Fact Sheet, at 6 (“the interaction of meteoric waters with the sulfide minerals in the waste rock is considered at least a significant source of the higher TDS, sulfate, and selenium values as compared to the receiving North Fork of the Humboldt River”).

- The RDAs are discrete conveyances. As explained by AngloGold’s own consultants, the RDAs were specifically designed with under-dump drainage systems that “are intended to allow surface runoff from the contributing watershed to flow through the base of the dumps.” Final Closure Plan, at 14 (IMC); see e.g., Myers Report (attached to GBMW’s Opening Brief), at 26 (“they were designed to convey drainage water from above the dump through the dump and to downstream channels”).
- The RDAs are susceptible to control. As AngloGold itself explains in its response, it has physically manipulated the site which has resulted in pollutant loading from the RDA’s. “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 interaction.” Anglo Response, at 12-13.

For these reasons, and for the reasons already set-forth in GBMW’s Opening Brief, AOB at 10-15, the RDAs are point sources and must be permitted as such. In an attempt to escape this conclusion, Anglo and NDEP makes several specific arguments in

their briefs, each of which will be addressed in turn.

1. *The issue at hand is not whether the flows in the drainages are point sources.*

In an attempt to sidestep its responsibilities under the federal CWA and the Nevada Water Pollution Control Law, AngloGold misleadingly attempts to shift this Commission's attention away from the RDAs by arguing that the "flows in the natural channels below the RDA are not point source discharges." AngloGold, at 10 (emphasis added). The issue here is not, however, whether the flows in the natural channels, in and of themselves, unaltered by the activities at the Big Springs Mine, are polluting the NFHR and its tributaries. Rather, the issue is whether the RDAs, which were constructed by AngloGold and its predecessors in the natural drainages around the mine site are polluting the NFHR and its tributaries. The distinction is critical. As shown by GBMW, the issue is whether the RDA's are responsible for pollutant discharged to the streams. Since there is no real dispute that this is the case, AngloGold's attempt to divert attention away from its RDA's must be rejected.

2. *A point source need not be the terminal end of an artificial system for moving water, waste or other materials.*

Citing Froebel, Anglo Gold argues that a point source must be the terminal end of an artificial system for moving water. See AngloGold, at 9. AngloGold again misrepresents the holding in Froebel. Froebel held that the definition of point source "connotes the terminal end of an artificial system for moving water, waste or other materials." Froebel, 217 F.3d at 937 (emphasis added). Connote means to "suggest or imply in addition to literal meaning." Dictionary.com, (viewed on December 9, 2005) <http://dictionary.reference.com/search?q=connote>. As such, it is a stretch to assert, as

Anglo does, that a point source “must be” the terminal end of an artificial system for moving water, waste or other materials.

In addition, countless cases have found a point source to exist where there was not a terminal end of an artificial system for moving water, waste or other materials. See e.g., Abston Constr., 620 F.2d at 45-46 (spoil piles are point sources where during period of precipitation, pollutants are carried by rainfall runoff from the spoil piles through ditches and ultimately to navigable waters. The mine operator is responsible for the discharge even though he did nothing more than design and create the spoil pile itself); Friends of Santa Fe County v. LAC Minerals, Inc., 892 F.Supp.1333, 1359 (D.N.M 1995) (holding that overburden piles are point sources); Earth Sciences, 599 F.2d at 374 (rejecting the argument that a point source must be a conveyance – “we believe it contravenes the intent of FWPCA and the structure of the statute to exempt from regulation any activity that emits pollution from an identifiable point”); Consolidated Coal v. Costle, 604 F.2d 239, 249 (4th Cir., 1979)(point sources include refuse piles); Hecla Mining Co., 870 F.Supp.983 (holding that discharges from refuse piles can be easily traced to their source such that they are point sources).

However, even if the term “point source” were interpreted to require the terminal end of a system for moving water or other materials, the RDAs at the Big Springs Mine would, nevertheless, qualify as point sources. The RDAs as explained by AngloGold’s own consultants “were specifically designed with under-dump drainage systems that are intended to allow surface runoff from the contributing watershed to flow through the base of the dumps.” Final Closure Plan, at 14 (IMC); see also Myers, at 26 (“they were designed to convey drainage water from above the dump through the dump and to

downstream channels”). As such the outlet, or down-gradient end of the RDAs, are the “terminal end” of the RDAs, which were constructed to move water through them.

3. *The source of the flows is irrelevant.*

AngloGold explains in its response that, “[i]t 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.” AngloGold, at 10, n.4. AngloGold goes on to argue that here, the source of the flows is unknown. Again, however, the flows themselves are not the issue. The issue is the pollutants being added to the streams from the RDAs. Although the exact source of the water may not be known, the source of the pollutants is clearly from the RDAs. As explained by NDEP itself “the interaction of meteoric waters with the sulfide minerals in the waste rock is considered at least a significant source of the higher TDS, sulfate, and selenium values as compared to the receiving North Fork of the Humboldt River.” Fact Sheet, at 6; See also, *Mine Site Closure Study for Independence Mining Company, Inc., Big Springs Project, Elko County, Nevada*, at 30 (Schafer and Associates, 1996) (“water infiltrating through the waste rock dumps appears to be the primary mechanism for transport of the elevated and dissolved constituents”). Given that the source of the pollutants is the RDAs, it is irrelevant where the upstream water is coming from.

4. *The Source of the pollutants is known.*

As explained above, the source of the pollutants are the RDAs. NDEP and AngloGold's own consultants, as well as Dr. Myers, have previously confirmed that.⁵

⁵ AngloGold’s argument that the source of the pollutants is unknown is an impermissible post-hoc rationalization. A post-hoc rationalization is an argument, which does not appear in the record, that an agency advances after-the-fact in order to defend its

Nevertheless, in its response brief, AngloGold attempts to argue that, not only is the source of the flows unknown, an irrelevant argument, but that the source of the pollutants is also unknown. AngloGold, at 9-11. Specifically AngloGold argues that, “it is possible, given the hydrogeology of the area, that the quantity and quality of the water observed below the RDAs is solely a function of groundwater seeps that emerge in the stream channel beneath the RDAs.” Anglo at 10-11. Notably, Anglo cites no site-specific information for this proposition and instead relies on data from another mine site to speculate about groundwater conditions in the area of the Big Springs Mine.⁶

This speculation cannot stand. AngloGold’s argument is not supported by any evidence in the record for the Big Springs Mine and, in fact, plainly contradicts the pre-RDA data for the tributaries. See Myers Report, Figures 5 and 7 (showing low pre-RDA (pre-1989) sulfate levels in Dry Canyon and Water Canyon). In addition, as already explained, this argument contravenes previous explanations made by Anglo’s own consultants and NDEP. See supra 13. Finally, AngloGold’s own previous activities do not support this argument. If the source of the pollutants is groundwater entering the

past actions against attack or to remedy inadequacies in its record. Bowen v. Georgetown University Hospital, 488 US 204, 212 (1988); Vincent Industrial Plastics Inc v. NLRB, 209 F.3d 727, 739 (D.C. Cir. 2000). Courts universally reject post-hoc rationalizations as justification for an agency’s actions. Bowen, 488 US at 212, Motor Vehicle Manufacturers Association of US, Inc v. State Farm Mutual Auto Ins, Co., 463 US 29, 50 (1983); American Textile Manufacturers Institute v. Donovan, 452 US 490, 539 (1981); Pinto v. Massanari, 249 F.3d 840, 847 (9th Cir. 2001); NRDC v. USDOJ, 113 F.3d 1121, 1127 (9th Cir. 1997).

⁶ Anglo does not attach the entire EIS to its brief, such that it is impossible to know if there is some explanation in the EIS for the allegedly degraded groundwater quality present in the area of the Dash Mine. In addition, the Dash Mine is located at least twenty miles from the Big Springs Mine. As such, it is a major stretch to argue that the groundwater quality between the two areas would be comparable. The geology in the area is characterized by a large number of faults, and a resulting highly stratified, complex groundwater system.

drainages below the RDAs why did AnlgoGold allegedly construct diversion channels around the RDAs? See AngloGold, at 12. This argument appears to be nothing more than an impermissible post-hoc rationalization, unsupported by the record in this case and advanced by counsel after-the-fact during litigation to avoid responsibility for the pollution emanating from the RDAs.

5. *Mining activities include both point and non-point sources of pollution*

AngloGold argues that mining activities are defined in Nevada as diffuse sources. Anglo, at 12 n.7. However, it is well-understood that mining can involve both point and non-point sources of pollution. See e.g. Abston Construction, 620 F.2d at 44 (“the district court correctly concludes that mining activities, although embracing at time nonpoint sources of pollution . . . may also implicate points source of pollution”); Earth Sciences, 599 F.2d at 372-73(same); Hecla Mining, 870 F.Supp. at 988 (holding that rainfall or snowmelt percolating though a pond or refuse pile at a mine is a point source). In fact, in the recent United States Court of Appeals for the Tenth Circuit decision relied heavily upon by AngloGold, the Tenth Circuit explained that there is:

ample authority from case law for the proposition that discharges from inactive mines can violate the clean Water Act. See Comm. To Save Mokelumne River v. East Bay Mun. Util. Dist., 13 F.3d 305, 308 (9th Cir. 1993) (holding that the collecting and channeling of surface runoff form inactive mine is ‘discharge of pollutants’); American Mining Congress v. EPA, 965 F.2d 759, 764-66 (9th Cir. 1992) (holding EPA regulation requiring discharge permit for storm water runoff from inactive mine is reasonable); Beartooth Alliance v. Crown Butte Mines, 904 F. Supp. 1168, 1172-74 (D. Mont. 1995) (holding defendants liable for discharges from inactive mine).

Administrative regulations and an EPA policy statement provide further support for this view. See 40 CFR 122.26(b)(14)(iii) (stating ‘active or inactive mining operations; are among the industrial activities that requires a storm water discharge permit under 33 USC 1342(p)); EPA Region VIII Policy Statement, Ref. 8WM-C (Dec. 22, 1993) (stating ‘discharges from abandoned mine adits are point sources which require a traditional NPDES permit’).

Sierra Club v. El Paso Gold Mines, Inc., 421 F.3d 1133, 1142 (10th Cir. 2005)(also attached to Anglo’s Brief as Exhibit C).

The EPA policy statement referred to with approval in El Paso Gold Mines, likewise, in no uncertain terms declares that various aspects of mines, active and inactive, are point sources including mine adits and “seeps and other ground water discharges hydrologically connected to surface water from mines, either active or abandoned.” Letter from Max H. Dodson, Director Water Management Division, EPA Region VIII, to Dan Fraser, Chief Water Quality Bureau, Montana Dept. of Health and Environmental Sciences (Dec. 22, 1993)(EPA Letter) (attached), at 1-2.

As such, there is no support for AngloGold’s argument that all discharges associated with mining are non-point sources of pollution exempt from NPDES or discharge permit requirements of federal and state law.

6. *Sierra Club v. El Paso Gold does not support the conclusion that the RDAs are diffuse sources.*

AngloGold relies on the recent case decided by the Tenth Circuit, Sierra Club v. El Paso Gold, to argue that the RDAs are non-point sources of pollution. AngloGold, at 11-13. Specifically, AngloGold argues that El Paso Gold stands for the proposition that the dumping of the waste rock, not the ongoing pollution emanating from the waste rock, is the relevant point source, and that the latter is not subject to regulation by an NPDES or discharge permit. AngloGold, at 11. AngloGold’s argument entirely misrepresents the holding in that case.

As an initial matter, the discussion AngloGold points to in El Paso Gold occurred as part of the Court’s determination of whether or not, for purposes of jurisdiction over a

CWA citizen suit, there were “ongoing” discharges. Id., at 10-16. The instant case is not a citizen’s suit and, therefore, does not invoke the jurisdictional question of ongoing violations. In addition, the issue in that case was whether or not a mine shaft from an abandoned mine was a point source. The courts discussion of waste rock was, therefore, mere dicta.

Finally and most importantly, the decision in El Paso Gold Mines in no way stands for the proposition that seepage from waste rock is not a point source. Although AngloGold selectively and deceptively quotes from that decision to try to support its argument, a close look at the decision reveals that, contrary to Anglo’s argument, seepage through waste rock is indeed a point source discharge.

As explained, the issue in El Paso Gold involved pollution from an abandoned mine discharging through a mine shaft on El Paso Gold Mines’ property to surface waters. In determining whether there was an ongoing discharge from the shaft, the Court distinguished between cases where, at the time of suit, the discharging activity from a point sources had ceased, versus those that presented an ongoing discharge.⁷ The Court found that although the pollution was obviously created some time in the past, the El Paso shaft represented an ongoing point source discharge. The Court explained that:

the hydrology of the El Paso shaft and Roosevelt tunnel is such that pollutants continually flow through the rock and mine workings until they reach the shaft, where they are discharged into the tunnel . . . El Paso has yet to put forth any evidence to rebut the allegation that pollutants are currently discharging and will

⁷ For example, the Court, as AngloGold points out, discussed LAC Minerals, where the court concluded that there were not ongoing discharges from a waste rock dump. Importantly, however, the Court in LAC Minerals did not foreclose the possibility that there could be ongoing discharges from waste rock. Rather, based on the facts in that case, the Court concluded, that there was not “any continuing release of [AMD] from the waste rock pile.” (emphasis added) Santa Fe County v. LAC Minerals, 892 F.Supp. 1333, 1353 (D.N.M. 1995).

continue to discharge into the future.

421 F.3d at 1141 (emphasis added). Here, like in El Paso Gold, the RDAs, despite their creation years ago, continue to discharge pollutants, on an ongoing basis, to the NFHR and its tributaries.

Contrary then to Anglo Gold's representation of the holding in El Paso Gold, that case does not stand for the proposition that the past dumping of waste rock at a mine obviates the conclusion that ongoing releases from the rock are a point source of pollution. Once the rock is dumped, a CWA section 404 dredge-and-fill permit is no longer required, but that in no way means that a CWA 402 discharge permit is not required in the event that there are ongoing discharges emanating from the rock dumps, as is the case here. The court in El Paso Gold, as well as in LAC Minerals simply did not conclude that, as a matter of law, once the dumping of waste rock ceases there can no longer be a point source discharge from the waste rock.

The Court in El Paso Gold also distinguished between random, anonymous seepage traveling through rock, which would not be a point source, and seepage that has perhaps flowed through rock, but was then collected in some way and was then emanating from an identifiable source, which would be a point source. Allegedly relying on that distinction, AngloGold argues, with reference to the RDAs that “[a]s the Tenth Circuit explained in El Paso Gold, this seepage traveling through the rock is nonpoint source pollution.” Anglo, at 11-12. This statement by AngloGold completely misrepresents the Court's holding.

The Court, at that point in its discussion, was distinguishing between non-point or dispersed, unidentifiable sources of pollution, like the flow of polluted groundwater

beneath an abandoned mine site from no particular source; and defined, identifiable, point sources, such as the El Paso shaft, which served to collect and channel the polluted groundwater that would otherwise randomly flow through rock. As the Court explained more fully than the selected portion quoted by AngloGold:

Nonpoint sources pollution is not statutorily defined, although it is commonly understood to be pollution arising from disperse activities over large areas that is not traceable to a single identifiable source or conveyance. Groundwater seepage that travels through fractured rock would be nonpoint sources pollution, which is not subject to NPDES permitting. Thus, absent the El Paso Shaft, which is undoubtedly a point source, this case would implicate a different set of issues altogether.

421 F.3d at 1140-1141, n.4. Like the shaft in El Paso Gold, the RDAs are identifiable sources that are “undoubtedly” point sources.

Finally, as the Court explained in El Paso Gold, the shaft is “working as originally intended, with the unfortunate byproduct being that water which is discharged from the shaft apparently contains some pollutants.” At 16. Likewise, here, the RDAs are functioning as designed. The RDAs were “specifically designed with under-dump drainage systems that ‘are intended to allow surface runoff from the contributing watershed to flow through the base of the dumps.’” Final Closure Plan, at 14 (IMC). Like the shaft in El Paso Gold, the RDAs, are functioning as designed and are continually discharging pollutants to the NFHR and its tributaries and are, thus, point sources.

This conclusion is consistent with previous cases evaluating whether or not RDAs are point sources for purposes of the NPDES permitting program. See e.g., Abston Construction, 620 F.2d 41 (spoil piles are point sources where during period of precipitation pollutant are carried by rainfall runoff from the spoil piles through ditches and ultimately to navigable waters. The mine operator is responsible for the discharge

even though he did nothing more than design and create the spoil pile itself);

Consolidated Coal, 604 F.2d at 249 (point sources include refuse piles); Hecla Mining Co., 870 F.Supp.983 (discharges from mine waste pile can be easily traced to their source, thus they are a point source).

The Court's conclusion in El Paso Gold is also consistent with EPA's stated policy. See EPA Letter. El Paso Gold, cited with approval EPA's guidance document regarding NPDES permit issues at hard rock mines. See El Paso Gold Mines, 421 F.3d at 1142. In that document EPA explains that :

Current EPA policy, as augmented by several lawsuits, indicates that it is more the mine or the facility itself that is subject to NPDES regulations. Therefore, any seeps coming from identifiable sources of pollution (i.e., mine workings, land application sites, ponds, pits, etc.,) would need to be regulated by discharge permits.

EPA Letter, at 2. Despite Anglo's attempt to suggest otherwise, then, there is no question that under the authority of El Paso Gold, the long line of cases leading up to that decision, and the EPA guidance document, that the RDAs are point sources that require regulation by a discharge permit.

7. *Abston Construction does not stand for the proposition that the RDAs are not point sources.*

In a similar argument to AngloGold's argument regarding El Paso Gold, NDEP argues that Abston Construction supports its position that the RDAs are not point sources.

NDEP, at 4-5. Despite NDEP's characterization of the case, the Court in Abston Construction plainly held that RDAs are point sources -

We agree with the Government's argument. Gravity flow, resulting in a discharge into a navigable body of water, may be part of a point source discharge if the miner at least initially collected or channeled the water and other materials. A point source of pollution may also be present where miners dredge spoil piles from discarded overburden such that during periods of precipitation, erosion of

spoil pile walls results in discharges into a navigable body of water by means of ditches, gullies and similar conveyances, even if the miners have done nothing beyond the mere collection of rock and other materials.

Abston Construction, 620 F.2d at 45. The description could not possibly be any more akin to what is occurring here with the RDAs.

NDEP argues that here “no such initial collection or channeling of water by the miners occurred at the RDAs.” NDEP, at 4. NDEP’s argument misses the mark. Nothing in Abston Construction requires the collection or channeling of “water” in order to find a point source. To the contrary, the Court in Abston Construction specifically found that a point source exists “even if the miners have done nothing beyond the mere collection of rock and other materials.” 620 F.2d at 45 (emphasis added). Here, that is precisely what occurred.

2. The discharge from the pit lakes via the groundwater to surface waters requires a discharge permit.

As was explained in GBMW’s Opening Brief, and herein, the pits are identifiable point sources that are adding pollutants to the NFHR and its tributaries. AOB, at 15-18. Notably, neither AngloGold nor NDEP addresses the possibility, raised by Myers, that the pit lakes could be backfilled, thus eliminating the point source and the transmission of pollutants to the NFHR and its tributaries. Myers Report, at 32, 38

a. The Pits are “adding” pollutants.

AngloGold and NDEP argue that the pit lakes do not add any pollutants from the outside world, but are merely constructed in a place where they intersect the pre-mining water table.⁸ This is a completely erroneous argument that grossly mischaracterizes the

⁸ In Hecla Mining Co., the court squarely rejected a similar argument. The Court found that a point source existed even though the mining company argued that “its tailing

well-accepted geochemistry of pits and pit lakes, and ignores the relevant available data for the surrounding groundwater quality.

As is well understood, the water quality in mining pit lakes is dependent on interactions between existing groundwater and meteoric water with pit walls and the rock contained in the dewatered cone of depression during mining. With very few exceptions, pit lakes contain elevated sulfates, and other substances that dissolve from the disturbed rock during and after mining. See G.C. Miller, W.B. Lyons and A. Davis, “Understanding the Water Quality of Pit Lakes” Environmental Science and Technology. 30:118A-123A (1996).

Consistent with the usual phenomena, the Pit lakes at Big Springs have elevated levels of sulfates, TDS, manganese, and selenium, at much greater levels than what otherwise occurs in the area’s groundwater. See Appendix, Figures 1-3 (Appendix) (water quality for the SWX Pit, the 303 Pit, and MW-2, the upgradient groundwater monitoring well). For example, sulfate in the SWX and 303 Pits, averages 773 and 739 mg/L, whereas sulfate in upgradient monitoring well MW-2 averages 133 mg/L.⁹ As explained by Myers, the elevated level of constituents in the pit is, in fact, a result of the exposure of the disturbed rock to air and water. Myers at 31. (“the MW-2 sulfate concentrations are less than 25% of those in the pit lakes,” thus indicating that “the pit

ponds are not point sources, but merely “areas of low topography into which mining tailing from mineral processing activated have been deposited and through which water may percolate.” 870 F.Supp. at 988.

⁹ The levels of the other constituents present in the pits are also markedly higher than at MW 2. Average concentrations for TDS is 1214 mg/L in the SWX pit and 1167 mg/L in the 303 pit, while it is 334 mg/L in MW2. For Manganese the average concentration in SWX is .19 and for 303 .05; whereas for MW-2 it is .02. Finally, for selenium, average concentration in SWX are .004; .007 in 303; and for MW2 it is .002. Appendix, figures 1-3.

lake sulfate results from oxidation in the pit walls.”).¹⁰ It is, therefore, inaccurate to argue, as AngloGold does, that the pits are not adding anything to the water.¹¹

Finally, as already explained in GBMW’s Opening Brief, these pollutants are then added, via groundwater flow, to the NFHR and its tributaries. These pollutants are not otherwise present, at least not in such elevated concentrations, in the NFHR and its tributaries. As NDEP itself explained in its response to GBMW’s comments on the permit renewal, “[t]he pit lakes . . . do appear to provide a mass loading input to the North Fork of the Humboldt River (NFHR).” Notice of Decision, at 3. As a result, the pits are adding pollutants to the groundwater, and ultimately, to the NFHR and its tributaries, such that an NPDES Permit is required for the flow from the pits.

b. The pits are adding “pollutants.”

Constituents, such as selenium, manganese sulfates, and salts, leached from rock disturbed as part of the mining process are, again, pollutants for the purposes of the NPDES permit requirements. See *supra*, 7-8.

c. The pits are discharging pollutants into state waters.

Again, the parties do not disagree that the NFHR and its tributaries constitute state waters. As set forth in GBMW’s Opening Brief, pollutants are flowing from the pits into the NFHR and its tributaries, via groundwater flow. AOB, at 15-18. NDEP and

¹⁰ NDEP alleges, with no supporting data and no explanation that “[a]fter reviewing the available data, the NDEP concluded that mass of constituents exiting the pits were primarily derived from upgradient groundwater.” NDEP, at 5. An agency decision that provides no support for its conclusions is the very definition of arbitrary and capricious agency action. See *supra*, at 1.

¹¹ Although the water in the pits may not be process water, it is not accurate to, as Anglo does, characterize the water as non-wastewater. AngloGold, at 13. The water in the pits is water that accumulated after Anglo stopped mining and has, as a result of coming into contact with the disturbed rock exposed in the pit walls, become polluted. See *supra*, 21-22.

AnlgoGold, do not dispute that the pits are leaching pollutants into the NFHR and its tributaries.

d. The RDAs constitute a point source.

AnlgoGold argues that the pits are not point sources because: (1) they are not meaningfully distinct from the surrounding groundwater; and (2) the flow of groundwater seepage through fractured rock is not a point source. Each argument, for the reasons explained below, is without merit.

1. The pits are meaningfully distinct from the ultimate receiving waters.

While NDEP and AngloGold do not deny that the water from the pits is reaching the NFHR and its tributaries via groundwater flows, Anglo argues that the pit lake water is not meaningfully distinct from the surrounding groundwater such that the pits are not a point source. Anglo, at 14. As an initial matter, the ultimate receiving water of the discharge is the NFHR and its tributaries. Thus, the question is whether the pits are meaningfully distinct from the NFHR and its tributaries, not whether the pits are distinct from the surrounding groundwater.

While groundwater naturally flows into the NFHR and its tributaries, the pits, not the natural groundwater flows, are the point sources that require regulation. The pits, as explained above, would not exist in a natural system and are responsible for adding pollutants to the groundwater. This polluted groundwater than flows, as it otherwise would less the pollutants, to the NFHR and its tributaries. Absent the pits, the pollutants simply would not be entering the NFHR and its tributaries.

Anglo relies on Micosukee Tribe to argue that because, in its view, there is no meaningful distinction between the pits and the groundwater, the pits are not a point

source for purposes of the NPDES permitting requirements. Anglo, at 14. Miccosukee, however, is distinct from the case at hand. Miccosukee involved the transfer of water from one body to another within the Everglades. The soil in the Everglades, the Court explained, is “extremely porous” such that “water flows easily between ground and surface waters so much so that “ground and surface waters are essentially the same thing.”” Miccosukee, 124 S.Ct at 1546. The question, then, was whether or not the manual transfer of water from one part of the Everglades to another was any different than what would otherwise occur naturally in the Everglades. The Court explained that, “if one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not ‘added’ soup or anything else to the pot.”” Id. at 1545.

Here, the situation is markedly different. While Miccosukee involved the mere transfer of unaltered water, this case involves the input of pollutants to the groundwater, and ultimately the NFHR and its tributaries, from the open pits constructed within the groundwater table. In addition, the pits are not at all the same water body as the receiving surface waters. As such, the construction of the pits, their accumulation of water and resulting leaching of pollutants, is not at all analogous to what would otherwise naturally occur in the hydrology of the area and is not at all analogous to the simple transfer of unaltered water between two indistinct water bodies.

As explained in BMW’s opening brief, several courts have found that where a ground-to-surface water connection exists through which pollutants flow from a point source, such as the open pits in this case, a NPDES permit is required. See AOB at 15-18. For example, in Hecla Mining, the Court found that an NPDES permit was required where there was “a large volume of discharge ‘seeps and leaks’ from the ponds into the

soil and groundwater, and thereafter into the surface waters.” Hecla 870 F.Supp. at 989-991. As explained by the Court in that case, “a hydrological connection between seepage into groundwater and the nearby surface waters “ is sufficient to support a claim under the CWA. Id., 991. Likewise, the EPA has plainly articulated the same policy:

It is therefore, EPA’s position that seeps and other ground water discharges hydrologically connected to surface water from mines, either active or abandoned, are discharges from point sources and are subject to regulation through an NPDES permit.

EPA Letter, at 2.

It is also well established that mine pits specifically are point sources for purposes of the NPDES permitting requirements. In Abston Construction for example, the court held that “gravity flow, resulting in a discharge into a navigable body of water, may be part of a point source discharge if the miner at least initially collected or channeled the water.” Abston, 620 F.2d at 45. The court explained that “rainwater trapped in the mine pits themselves also eventually percolated through the banks and flowed toward the creek, carrying with it acid and chemicals from the pit.” Id., at 46-47. Likewise, in Hecla Mining, the Court held that “[d]ischarges from a pond or refuse pile can easily be traced to their sources. Thus even though runoff may be caused by rainfall or snow melt percolating through a pond or refuse pile, the discharge is from a point source because the pond or pile acts to collect and channel contaminated water.” 870 F.Supp. at 989; See also AOB, at 15-18. Finally, again, EPA has reiterated the same policy – “any seeps coming from identifiable sources of pollution (i.e., mine workings, land application sites, ponds, pits, etc.,) would need to be regulated by discharge permits.” EPA Letter, at 2.

Therefore, despite AngloGold’s attempt to confuse the issue, the open pits and the movement of polluted water from the open pits, through the groundwater to the NFHR

and its tributaries, involves more than the mere transfer of unaltered water from two indistinct bodies of water. The situation here, the discharge of pollutants from a point source via the groundwater to connected surface waters, has already been addressed by several courts and EPA and has, universally, been found to require a NPDES permit.

2. *The pits, not the groundwater flows, are the point source that trigger the requirement for the NPDES permit.*

AngloGold, again mischaracterizing the issue at hand, argues that groundwater seepage that travels through fractured rock is not a point source subject to NPDES permitting. AngloGold, at 12. Anglo's argument overlooks the fact that this is not a case of mere groundwater seepage. To the contrary, it is the open pits, which AngloGold and its predecessors constructed and allowed to fill with water, that are triggering the requirement for an NPDES permit. As explained above, open pits that cause and impound polluted water and discharge that water to surface waters via hydrologically connected groundwater, are point sources for the purposes of the CWA. See supra 24-27. Again, as EPA has explained, "any seeps coming from identifiable sources of pollution (i.e., mine workings, land application sites, ponds, pits, etc.,) would need to be regulated by discharge permits." EPA Letter, at 2 (emphasis added).

The cases relied on by AngloGold to argue otherwise, El Paso Gold and LAC Minerals, are of no avail. AngloGold, at 12. In El Paso Gold, the El Paso shaft connected with a mine drainage tunnel that essentially collected snowmelt and groundwater that had percolated through the mine site, becoming polluted, and was ultimately discharged to the Arkansas River. The Court explained that:

[g]roundwater seepage that travels through fractured rock would be nonpoint sources pollution, which is not subject to NPDES permitting. Absent the El Paso shaft, which is undoubtedly a point source, this case would implicate a different

set of issues all together.

421 F.3d at 1140-1141, n.4.

In that case, like here, groundwater flows were occurring through fractured rock. However, the percolating flows were ultimately collected and channeled by the El Paso shaft and then discharged to Cripple Creek. As such, the case involved more than just mere unidentifiable percolation. Likewise, here the pits serve to collect and channel the groundwater flows – as well as adding pollutants from the chemical interaction with the pit walls. Once collected, the water comes into contact with the disturbed rock, leaching various contaminants into the water. This polluted water then flows, via groundwater seeps, to the NFHR and its tributaries. As such, while this case, like the case in El Paso Gold involves some unidentified groundwater flows, there is, as there was in El Paso Gold, a plain, identifiable point source – the SWX and 303 Pits – from which pollution ultimately discharges.

LAC Minerals is likewise distinguishable from the case at hand. In that case the issue was whether or not groundwater flows carrying past acid mine drainage to surface waters were point sources for the purposes of the CWA. 892 F.Supp. at 1337. The Court held that they were not. LAC Minerals, at 1358-59. The court explained that “[r]ather than constituting human-originated or –derived point sources of pollutants, these seeps are more accurately described as carriers of water from the alluvium to the surface. Defendants had nothing to do with their creation.” Id., at 1359. Again, here, the issue is not whether the groundwater seeps are point sources, but rather whether the open pits, constructed by and allowed to fill with water by AngloGold and its predecessors, are point sources. Clearly, unlike the seeps in LAC Minerals, AngloGold had everything to

do with the creation of the pits.

In addition, the Court in LAC Minerals was also influenced by the fact that the source of the seeps was not known. The court explained that, “the seeps merely represent evidence that AMD had at some time in the past entered subsurface waters, possibly from the overburden pile or the remediation system.” Id. Notably, the Court found that the overburden piles and remediation system were point sources, but found that the unidentifiable seeps were not. Id. Here the source of the groundwater seeps – the open pits – are plain and clear and far more akin to the “human-made” overburden piles and remediation system found by the Court in LAC Minerals to be point sources, than the unidentifiable, non-human-made seeps. As such, contrary to AnlgoGold’s argument, LAC Minerals actually supports the conclusion that the pits are points sources that require an NPDES permit.

3. NDEP is required to issue a discharge permit for the groundwater diversion program.

AngloGold and NDEP do not dispute that the groundwater diversion program is discharging water high in arsenic to Sammy Creek. As was explained in GBMW’s opening brief, and herein, the diversion program is an identifiable point source that is adding pollutants to Sammy Creek, and ultimately, the NFHR. AOB, 19-20. Again, neither AngloGold or NDEP address the suggestion by Myers that the pits could be backfilled, thereby eliminating the need for the diversion to Sammy Creek. See Myers, at 32, 38.

a. The groundwater diversion system is adding pollutants to Sammy Creek.

As explained by AngloGold, “addition” is not defined by the CWA or the Nevada Water Pollution Control Law. Anlgo, at 6. The term has, however, been interpreted by

the courts as the introduction of pollutants from outside of the receiving water body. See Anglo, at 6. As result, the transfer of water from one water body to another separate body is considered an addition. See e.g., South Florida Water Management Dist. V. Miccosukee Tribe, 124 S.Ct. 1537 (2004)(discharged of pollutants includes point sources which do not themselves generate the pollutants; a point source need only convey the pollutant to navigable waters); Northern Plains Resource Council v. Fidelity Expl. and Dev. Company, 325 F.3d 1155, 1162 (9th Cir. 2003) (“The requirement that the physical, biological, or chemical integrity of the water be “man-induced” alteration refers to the effect of the discharge on the receiving water; it does not require that the discharged water be altered by man.”); Catskill Mtns Chapter of Trout unlimited v. City of New York, 273 F.3d 481 (2nd Cir. 2001) (same – transfer of water from one body to another is an addition of a pollutant that requires a discharge permit).

AngloGold argues that, here, the diversion system was installed to mimic what would otherwise occur naturally, such that there is not an addition of a pollutants to Sammy Creek. Less the diversion program, AngloGold argues that “[d]uring periods of high ground water table, the water in this mine lake [SWX] could rise to levels that would overtop the embankment and thereby allow the water to flow naturally into the Sammy Creek alluvium.” Anglo, at 14 (emphasis added). Anglo’s argument ignores the inescapable fact that the SWX and 303 pit lakes, and any overflows that might occur from the SWX and 303 pits is not “natural.” The pits were constructed and allowed to fill with water by Anglo and its predecessors. The so called natural phenomena Anglo refers to simply does not exist.¹² Therefore, as explained in GBMW’s Opening Brief, the

¹² It is possible, that in a pre-mining, pre-pit lake scenario, the groundwater in the

diversion from MW-2 to the Sammy Creek Alluvium constitute an “addition” of pollutants subject to control by the CWA and the State Water pollution control Law.¹³

b. The groundwater diversion program is adding pollutants.

Neither NDEP or AngloGold dispute that arsenic is a pollutant. NDEP argues, however, that the groundwater has elevated levels of arsenic, such that Anglo is not adding any pollutants to the water. NDEP, at 6. Again, a point source need not create the pollutant. Rather, the requirement for an NPDES permit is triggered by the mere transportation of pollutants. See e.g., South Florida Water Management Dist. V. Miccosukee Tribe, 124 S.Ct. 1537 (2004)(discharge of pollutants includes point sources which do not themselves generate the pollutants; a point source need only convey the pollutant to navigable waters); Northern Plains Resource Council v. Fidelity Expl. and Dev. Company, 325 F.3d 1155, 1162 (9th Cir. 2003) (“The requirement that the physical, biological, or chemical integrity of the water be “man-induced” alteration refers to the effect of the discharge on the receiving water; it does not require that the discharged

area of MW-2 would ultimately flow towards the Sammy Creek alluvium. However, Anglo has referenced no pre-mining, pre-pit studies to indicate that that would occur. At the very least, absent the diversion program the groundwater in the area of MW-2 would take significantly longer to reach the Sammy Creek alluvium than it does via the diversion system..

¹³ AngloGold also argues that the diversion constitutes a transfer of water more properly governed by state requirements and not the CWA. Anglo, at 15. For its argument Anglo relies entirely on an EPA memo, attached to its brief as Exhibit A. Agency memoranda, however, have never undergone public notice and comment, do not have the force of law, and are not entitled to the normal deference afforded agency decisions. See Christensen v. Harris County, 529 U.S. 576, 587 (2000); U.S. v. Mead, 533 U.S. 218, 226-28 (2001); Southwest Ctr. for Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1450 (9th Cir. 1996); Western Radio Serv. Co. v. Espy, 79 F.3d 896, 901 (9th Cir. 1996). In addition and importantly, Nevada does not have a program for regulating water transfers. Although the State Engineer manages transfers in the context of water rights, other transfers, if Anglo’s argument were accepted, would be completely unregulated. This is clearly not what the EPA memo intended.

water be altered by man.”); Catskill Mtns Chapter of Trout unlimited v. City of New York, 273 F.3d 481 (2nd Cir. 2001) (same – transfer of water from one body to another is an addition of a pollutant that requires a discharge permit).

c. The groundwater diversion program is adding pollutants to state waters.

NDEP and AngloGold do not dispute that Sammy Creek is a state water, such that if all the other requirements for a discharge permit are met, one would be required for the diversions to Sammy Creek. See Anglo, at 8-9, 14-15; NDEP, at 3-6.

d. The groundwater diversion program is a point source

AngloGold and NDEP do not directly dispute that the groundwater diversion program is a point source. To the contrary, AngloGold argues in its brief that a point source must be the terminal end of an artificial system for moving water. Anglo at, 9. Although, as already explained herein, Anglo overstates this as a requirement, it is clear that the term point source encompasses within its definition the terminal end of an artificial system designed to move water. See Froebel, 217 F.3d at 937-38. The diversion system installed by AngloGold and the point at which it discharges into the Sammy Creek alluvium is precisely that - the terminal end of a system designed for moving water. Furthermore, the diversion system plainly fits within the express definition of a point source as it is a “discernible, confined, and discrete conveyance . . . from which pollutants are or may be discharged.” See 33 U.S.C. § 1362(14).

B. Whether a discharge permit is required is relevant to the validity of the WPCP.

As explained, herein and in GBMW’s Opening Brief, the RDAs, pits, and groundwater diversion system are point sources that are discharging pollutants to waters of the state and, therefore, require the issuance of a discharge permit. AngloGold and

NDEP argue, however, that whether or not a discharge permit is required for the Big Springs Mine is not relevant to the validity of NDEP's renewal of the WPCP. Anglo, at 5, 18; NDEP, at 2. Similarly, In a related argument, NDEP alleges that the SEC does not have the jurisdiction to consider whether or not a discharge permit is required. NDEP, at 3.

To the contrary, however, NDEP has made an express choice to use the WPCP as the vehicle for regulating the discharges from the Big Springs Mine. See NDEP's Response to GBMW's comments on the permit renewal, at 18 (“[f]lows from the RDAs and pit lakes are regulated under this Water Pollution Control Permit”). It is, therefore, disingenuous to argue that issues regarding proper regulation of the discharges are irrelevant to this appeal. NDEP, cannot on the one hand, argue, as it did in its response to GBMW's comments that WPCP NEV0087001 is functioning as a discharge permit; but then turn around and argue that issues regarding state and federal requirements for discharge permits are irrelevant to this appeal.

In addition, regardless of the requirement for an NPDES or discharge permit the current permit violates state law because, as set forth in GBMW's Opening brief, it is causing exceedances of water quality standards in the NFHR and its tributaries in violation of state and federal law. As will be explained further in this reply, regardless of whether or not a discharge permit is required, NDEP must enforce and Anglo Gold must comply with state water quality standards. See GBMW v. State, Order Granting In Part and Denying In Part Petition for Judicial Review, Case No. 03-01140A (1st Judicial District Court of Nevada, August 19, 2004) (“Nevada's water quality standards are mandatory and NDEP must enforce them”)(attached). Likewise, the issues raised in

GBMW's Opening Brief (Section IV-VI) regarding the Mine's impacts on LCT and the Mine's degradation of state waters in violation of NAC 445A.424 apply regardless of whether or not a discharge permit is required.

III. THE DISCHARGES FROM THE MINE ARE CAUSING EXCEEDANCES OF APPLICABLE WATER QUALITY STANDARDS IN THE NFHR AND ITS TRIBUTARIES IN VIOLATION OF STATE AND FEDERAL LAW.

NDEP and AngloGold do not dispute that the RDAs, pit lakes, and groundwater diversion system are causing exceedances of water quality standards in the NFHR and its tributaries. Nor do they dispute that NDEP has a duty, under State and federal law, to ensure that discharges do not cause exceedances of water quality standards. Rather they argue that because the RDAs, pits and groundwater diversion program are not technically point source discharges they are exempt from the state's water quality standards. Anglo, at 17; NDEP, at 6.¹⁴ As an initial matter, for the reasons set-forth in GBMW's opening brief and herein, the RDAs, pit lakes, and diversion system are plainly point sources that require discharge permits within the meaning of the state WPCL and the federal CWA.

Second, and perhaps more importantly, and regardless of whether AngloGold's facilities are point sources, the argument advanced by NDEP and AngloGold completely undermines the intent of the Nevada Water Pollution Control Law and ignores NDEP's express statutory duty to "[a]dminister and enforce the provisions of [NRS 445A.300](#) to [445A.730](#), inclusive, all regulations adopted by the Commission, and all orders and permits issued by the Department." NRS 445A.445(1). The regulations adopted by the

¹⁴ Notably, this was not previously NDEP's position. See Notice of Decision (evaluating whether the discharges were causing exceedances of water quality standards). As such, this is an impermissible post-hoc rationalization that should be rejected by the SEC.

Commission plainly include the water quality standards the Commission has adopted for the NFHR and its tributaries. As the First District Court for Nevada held, “Nevada’s water quality standards are mandatory and NDEP must enforce them.” See supra, at 33.

Contrary to Anglo’s argument, the provisions of Nevada’s Water Pollution Control that require compliance with water quality standards are not limited to point source discharges.¹⁵ For example, NRS 445A.500(1) provides that:

Each permit issued by the Department must ensure compliance with the following factors whenever applicable to the discharge or the injection of fluids through a well for which the permit is sought:

- (a) Effluent limitations;
- (b) Standards of performance for new sources;
- (c) Standards for pretreatment;
- (d) Standards for injections of fluids through a well; and
- (e) Any more stringent limitations, including any necessary to meet or effectuate standards of water quality, standards of treatment or schedules of compliance developed by the Department as part of a continuing planning process or area wide plan for the management of the treatment of waste under [NRS 445A.580](#) or in furthering the purposes and goals of [NRS 445A.300](#) to [445A.730](#), inclusive.

(emphasis added). Notably, discharge is defined by Nevada’s water pollution control law as “any addition of a pollutant or pollutants to water.” NRS 445A.345 . Pollutant, is in turn defined in part as “dredged soil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials,

¹⁵ In fact, the Nevada Water Pollution Control Law expressly includes both point and non-point sources of water pollution. See e.g. NRS 445A.335 (defining diffuse sources).

heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water.” NRS 445A.400.

NDEP's duty to enforce water quality standards, is therefore, not as AngloGold and NDEP attempt to argue limited to point source discharges. See also NRS 445A.530 (containing no such limitation, but again requiring the enforcement of any more stringent limitations including “those necessary to met water quality standards”); NRS 445A.490(5) (“no permit may be issued which authorizes any discharge . . . into any waters of the State . . . which the Director determines is inconsistent with the regulations and guidelines adopted by the Commission pursuant to [NRS 445A.300](#) to [445A.730](#), inclusive, including those relating to standards of water quality and injections of fluids through a well”).

IV. NDEP’S RENEWAL OF THE PERMIT VIOLATES THE CWA’S 303(D) PROVISION.

As explained in GBMW’s Opening Brief, the NFHR, Sammy Creek, Dry Canyon and Water Canyon are all listed on the State's 303(d) list of impaired waters. Once waters have been listed on the state's 303(d) list, the state is required to formulate total maximum daily loads (TMDLs) for the listed water bodies. 33 U.S.C. § 1311(d)(1)(c); Friends of the Wild Swan v. United States Environmental Protection Agency, 130 F.Supp.2d 1199, 1200 (2000). AngloGold and NDEP do not refute this requirement, nor do they dispute that NDEP has, thus far, failed to establish TMDLS for the NFHR and its tributaries. Rather Anglo and NDEP argue that: (1) the discharges from the RDAs, pit lakes, and groundwater diversion program are not point source discharges such that the requirements for TMDLs do not apply; (2) the CWA does not prohibit the issuance of discharge permits until TMDLs are established; (3) even if it does, WPCP NEV0087001

does not authorize any new discharges; and (4) GBMW's position regarding TMDLs is untenable. As already explained, the RDAs, pit lakes, and groundwater diversion program constitute point source discharges that fall within the federal CWA and the Nevada WPCL's requirements for discharge permits. See AOB10-20, supra 2-33. The remaining arguments will be addressed in turn.

Anlgo argues that the CWA does not include a restriction on issuing discharge permits until TMDLs are established for the receiving water body. Specifically Anglo argues that Wild Swan did not conclude that such a prohibition exists as a matter of law, but merely upheld the district court's exercise of its discretion to enter such a prohibition. Anglo downplays the importance of the District Court's opinion as well as the United States Court of Appeals for the Ninth Circuit's decision. Anglo, at 17-18.

As explained in GBMW's Opening brief, the court in Wild Swan articulated the importance of the establishment of TMDLs in achieving the CWA's goals and emphasized that "TMDLs must be developed quickly if they are to serve their intended purpose." Friends of the Wild Swan v. United States EPA, 2003 WL 21751849, *3 (9th Cir. 2003). Contrary to Anglo's assertions, the District Court based its injunction against new discharge permits pending completion of TMDLs squarely on the CWA's prohibition against discharges that do not comply with water quality standards. Anglo's argument that the court issued such an important injunction merely on its own, without a firm statutory bases, is simply unsupportable. The court's injunction could not have withstood appeal if such a prohibition was not part of the CWA's statutory scheme.

The TMDL process includes identifying existing sources of pollution that have caused or contributed to the degraded water quality, then establishing "wasteload

allocations” (for point sources of pollution) and “load allocations” (for nonpoint sources of pollution), for those sources which have caused or contributed to the degraded water. 40 C.F.R. § 130.2(g) and (h). The final TMDL represents a ratcheting down of the pollution sources via their respective pollutant loading allocations which, if properly adhered to, is intended to result in restoration of the stream to water quality standards. The TMDL reflects an impaired waterbody’s capacity to tolerate point source, nonpoint source, and natural background pollution, with a margin of error, while still meeting state water quality standards. “A TMDL defines the specified maximum amount of a pollutant which can be discharged or ‘loaded’ into the waters at issue from all combined sources.” Pronsolino v. Nastri, 291 F.3d 1123, 1127-28 (9th Cir. 2002).

Thus, the load and wasteload allocations and loading reductions detailed in a TMDL serve a purpose – getting the impaired waterbody back to health. “The basic purpose for which ... TMDLs are compiled [is] the eventual attainment of state-defined water quality standards.” Pronsolino, at 1137. “A TMDL is a specification of the maximum amount of a particular pollutant that can pass through a waterbody each day without water quality standards being violated.” Sierra Club v. Meiburg, 296 F.3d 1021, 1025 (11th Cir. 2002). The CWA requires:

that individual-discharge permits will be adjusted and other measures taken [such as reducing non-point source loadings] so that the sum of that pollutant in the waterbody is reduced to the level specified by the TMDL. As should be apparent, TMDLs are central to the Clean Water Act’s water-quality scheme because ... they tie together point-source and nonpoint-source pollution issues in a manner that addresses the whole health of the water.

...

Point-source discharges are regulated through the federal permit regime, with TMDLs incorporated into the effluent and technological-based limitations. 40 C.F.R. § 122.44(d)(1)(vii)(B).

Meiburg, at 1025 (emphasis added).

In Wild Swan, the Ninth Circuit held that the District Court correctly limited the issuance of any new discharge permits until all TMDLs were established in part because that prohibition “comports with the regulatory requirement precluding issuance of new permits for new sources that will cause or contribute to a violation of water quality standards.” Friends of the Wild Swan, 2003 WL 31751849, *4 (citing 40 CFR 122.4(i)). While Anglo can argue that TMDLs need not be established prior to renewal of the challenged WPCP it has failed to show how the discharges from the Big Springs Mine overcome the underlying regulatory bar on the issuance of permits for sources that will not comply with water quality standards.

Importantly, in Nevada, the prohibition is stated more broadly and applies to all permits not just new permits for new sources. NRS 445A.500 (“each permit issued by the Department must ensure compliance with . . . (e) Any more stringent limitations, including any necessary to meet or effectuate standards of water quality”); See also GBMW v. State, Order Granting In Part and Denying In Part Petition for Judicial Review, Case No. 03-01140A (1st Judicial District Court of Nevada, August 19, 2004) (“Nevada’s water quality standards are mandatory and NDEP must enforce them”)(attached). As such, Anglo’s argument that these are not new sources is, under Nevada law, irrelevant.

AngloGold argues in a footnote that GBMW’s position is untenable. Anglo at 5, n.2. That on the one hand, GBMW argues that AngloGold cannot discharge without a discharge permit; while on the other hand arguing that NDEP cannot issue a discharger permit until TMDLs are developed for the receiving waters. AngloGold argues that “the flows are derived from meteoric water – precipitation falling on the watershed – over

which neither NDEP nor AngloGold have any control.” Id. This argument is entirely without any merit.

First, it is disingenuous for AngloGold to imply that the problem is “precipitation falling on the watershed.” (emphasis added). To the contrary, the problem is precipitation falling on the watershed that has been significantly altered by AngloGold and its predecessors for the construction and operation of the Big Springs Mine. Specifically, as explained herein, it is the RDAs, the pits and, the groundwater diversion, not anonymous flows of meteoric water, that are the sources of pollutants. AngloGold is plainly in control of these sources. For example, as AngloGold has itself explained, it has allegedly built covers and diversion ditches on and around the RDAs and, likewise, has backfilled several of the other pits at the mine. It is, therefore, absurd for Anglo to argue that it is somehow not in control of the sources.

Second, is it disingenuous for AngloGold to suggest that GBMW is requesting something unreasonable or illogical. GBMW is simply requesting that NDEP enforce the federal CWA and the Nevada water pollution control law and accordingly: (1) issue a discharge permit for the various sources at the Big Springs Mine; (2) enforce the applicable water quality standards for the discharges, and (3) ensure compliance with state water quality standards by developing the required TMDLs for the NFHR and its tributaries. Importantly, GBMW does not expect AngloGold to come into compliance overnight. EPA’s TMDL regulations specifically provide for a compliance schedule so that the discharger has the opportunity to bring its discharge into compliance. As such, GBMW is merely requesting that NDEP issue a permit for the site; begin the TMDL process for the NFHR and its tributaries; and that in the meantime, AngloGold treat its

discharges to ensure compliance with water quality standards.

V. **THE DISCHARGES ARE ADVERSELY AFFECTING LAHONTAN CUTTHROAT TROUT SPECIES IN THE NFHR IN VIOLATION OF THE FEDERAL ENDANGERED SPECIES ACT.**

As explained in GBMW's Opening Brief, the federal Endangered Species Act (ESA), in relevant part, provides that it is unlawful for any person to take an endangered species of fish or wildlife. 16 U.S.C. § 1538.¹⁶ Anglo and NDEP do not dispute that there are elevated levels of selenium in the NFHR and its tributaries. Nor do they dispute that selenium, at elevated concentrations, is toxic to aquatic life. Nevertheless Anglo and NDEP argue that NDEP's renewal of the WPCP does not violate the ESA because: (1) GBMW has not presented any evidence of a take; and (2) even if a take is occurring, the ESA is not a legitimate challenge to the WPCP. Each argument will be addressed in turn.

A. **The Big Springs Mine is causing a take of LCT.**

As explained in GBMW's Opening Brief, "take" is defined in the ESA to include both harassing and harming wildlife. 16 U.S.C. § 1532(19). Harass, is defined broadly as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, which include but are not limited to breeding, feeding or sheltering." 50 CFR § 17.3 (emphasis added). Harm, on the other hand, has been defined as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 CFR § 17.3 (emphasis

¹⁶ As AngloGold correctly points out, GBMW's reliance on section 7 of the ESA was misplaced. Anglo, at 19. GBMW, in fact, intended to rely on Section 9 of the ESA, the section that prohibits takings. 16 U.S.C. § 1538

added). Accordingly, then, actually injury or death is not required to show that the Big Springs Mine has “harassed” LCT in the NFHR.¹⁷ Rather, it is sufficient to establish, as GBMW has in its opening brief, that the Big Springs Mine and its discharges present “the likelihood of injury” to LCT.

As explained in GBMW’s opening brief, the likelihood for injury to LCT arises from the following facts: (1) The Big Springs Mine is regularly causing the chronic aquatic life standard for selenium to be exceeded in the NFHR and its tributaries (in the NFHR at S-140, 46% of the time, and in the tributaries at their outlet to the NFHR, 91 % of the time); (2) EPA has determined that selenium at elevated levels is toxic to fish, i.e., “reducing survival” and causing reproductive problems and deformities; (3) All studies, the USFWS study, and the studies from AngloGold, indicate that LCT in the NFHR have elevated tissue levels of selenium. AOB, at 32-34.

AngloGold tries to minimize the importance of these facts by arguing that: (1) general toxicity information is not sufficient to establish a take under the ESA; and (2) GBMW’s reliance on the USFWS study is misplaced. Neither of these arguments, however, defeats the relevancy of the basic facts. First, Anglos’ argument that the information about selenium’s toxicity to aquatic life is not sufficient to establish a take assumes, incorrectly, that to establish a take GBMW must show actual death or injury to

¹⁷ Although the term “harass” has barely been litigated, some courts have even held that under the more narrowly defined term “harm,” a showing of actual injury or death is not required. See e.g., Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781, 784 (9th Cir. 1995) (rejecting the argument that actual death or injury must be shown to establish “harm”); Palila v. Hawaii Dept. of Land and Natural Resources, 852 F.2d 1106 (9th cir. 1988) (finding “harm” sufficient to establish a take where no actual death or injury was shown); Marbled Murelet v. Babbitt, 83 F.3d 1060 (9th Cir. 1996) (holding that “a reasonably certain threat of imminent harm to a protected species is sufficient” to establish harm for purposes of a take).

LCT. As explained, GBMW must only show likelihood of injury. The presence of selenium at levels above the water quality standard for aquatic life clearly shows “likelihood of injury” to LCT. See Sierra Club v. Yeutter, 926 F.2d 429, 438-39 (5th Cir. 1991) (finding a take “[b]ecause the dictates of the USFS's handbook were intended to preserve the dwindling Red-cockaded woodpecker population, it is not unreasonable to conclude that failure to observe the handbook would result in 'taking' of the RCW”); NRS 445A.520 (water quality standards are set to reflect water quality criteria which define the conditions necessary to support, protect and allow the propagation of fish, shellfish and other wildlife).

Second, GBMW’s argument does not, as Anglo suggests, hinge on the validity of the USFWS study.¹⁸ Rather, GBMW merely points out that all studies, the United States Fish and Wildlife Service (USFWS) study and those studies funded by AngloGold, have shown that the LCT in the NFHR have elevated tissue levels of selenium. See Opening Brief, at 32-34. Although the studies found different levels of selenium in LCT tissue (the USFWS study showing higher levels), both studies plainly found selenium to be present in LCT. Given the information regarding the toxicity of selenium to aquatic life, the presence of selenium in LCT is, again, sufficient to establish the likelihood of injury to LCT.¹⁹

¹⁸ Although Anglo challenges the validity of the USFWS study and suggests that the Anglo-funded studies are more reliable, AngloGold, at 20, it is important to note that the USFWS published its study well after the Anglo-funded studies were released, thus implying support for its findings regardless of the results of the Anglo-funded studies.

¹⁹ Anglo argues that the USFWS submitted comments on the draft renewal of WPCP NEV0087001 and did not raise any concerns about LCT. Anglo, at 21. GBMW attempted to obtain the letter from NDEP, but NDEP did not recall having received any comments from the USFWS. Anglo has, likewise, failed to attach the alleged letter to its brief or to cite the letter with any specificity. See Anglo, at 21.

The likelihood of injury to LCT from the discharges at the Big Springs Mines is unchanged by the “Canton Report” attached to AngloGold’s reply brief. Anglo relies on the report for three propositions: (1) The data does not, it alleges, support the potential for harm to LCT; (2) There is a decreased trend in selenium in the NFHR indicating that reclamation is working; and (3) TDS and sulfates are not having a negative effect on aquatic biota in the NFHR.²⁰ Anglo, at 20. Each will be addressed in turn.

Anglo relies on the Canton report to argue that there is no potential for harm to LCT from the BS mine because “[f]ish tissue levels are below reported adverse effects thresholds and multiple generation of LCT are present in the NFHR.” Anglo, at 21. As an initial matter, these allegations, regardless of their accuracy, do not indicate that the BS Mine presents no potential to harm LCT. Second, the allegation that fish tissue levels are below adverse effects thresholds is based on the EPA’s draft acute and chronic selenium standards. Canton, at 2-4. These standards have yet to be finalized and cannot be used to the exclusion of the current applicable standards. Again, regardless of which data or standards are relied on it is without dispute that selenium is present in elevated levels in LCT tissue and that selenium, at some level, is toxic to LCT. See Opening Brief 31-34.

Anglo also relies on the Canton report to argue that there is a decreasing trend in selenium in the NFHR. Anglo argues that Dr. Myers ignored this data in his report. However, at the time Myers completed his report, the latest data available to him, as well

²⁰ AngloGold and the Canton report, confusingly, state these points in terms of refuting conclusions allegedly reached by Myers. Anglo, at 20; Canton, at 1. The Myers Report did not, however, specifically address LCT or aquatic life issues, but rather addressed the impact of the Big Springs Mine on the NFHR and its tributaries in terms of water quality standards and generalized impacts. See Myers Report.

as to NDEP for that matter, was third quarter 2004 data. The Canton Report appears to extend, at least, through first quarter 2005. Importantly also Canton plots more frequent data, perhaps monthly, for 2004 and 2005; whereas the data for the previous years appears to only be quarterly. Data is generally reported to NDEP on a quarterly basis, such that the source of this data and its availability to NDEP is not clear. It is well accepted that administrative agencies cannot rely on evidence not before the agency when it made its decision. See NRS 233B.135(1)(b); Ayala v. Caesars Palace, 71 P.3d 490, 491 (2003); General Motors v. Jackson, 111 Nev.1026, 1029 (1995).

In addition, and more importantly, the trend analysis conducted by Canton to conclude that selenium concentrations are decreasing in the NFHR is of questionable validity. First and foremost, the trend analysis performed by Canton relies entirely on data from sample point S-150, Canton, at 4, rather than the more relevant data points at S-110, S-115, and S-120. These points are located at the outlets of the tributaries that feed the NFHR and show no downward trend in selenium concentrations. Myers Report, at 22, Fig. 13. As explained in GBMW's opening brief, S-150 is located in the NFHR two miles downstream from all mining activity. AOB, at 21. As such, it is subject to significant dilution and is not an effective monitoring point to determine the water quality impacts of the discharges from the Big Springs Mine. See Myers, 6, 16. Notably, Canton did not evaluate the trend in selenium concentrations at these far more relevant data points. Second, the type of regression analysis performed by Canton requires normally distributed data. Here, the data is bound by zeros, or non-detect values, and therefore violates the assumptions inherent in the analysis. Likewise, the frequency of data points are not evenly distributed, with far more data points towards the end of the analysis than

at the beginning, thereby skewing the trend.

Finally, Anglo relies on the Canton report for the suggestion that the elevated levels of TDS and sulfates are not showing negative effects on the aquatic biota in the NFHR.²¹ Anglo again argues that Dr. Myers concludes that the TDS and sulfate concentrations are harming aquatic life. To the contrary, Myers does not address the effect of TDS and sulfate on aquatic life, but merely evaluates the exceedances of water quality standards, including those for aquatic life. Actual harm to aquatic life is not required to show a violation of water quality standards, but rather is presumed, when water quality standards for aquatic life are exceeded. See NRS 445A.520 (water quality standards are set to reflect water quality criteria which define the conditions necessary to support, protect and allow the propagation of fish, shellfish and other wildlife).

B. The WPCP issued by NDEP is subject to the requirements of the ESA.

Anglo and NDEP argue that even if the Big Springs Mine is effectuating a take of LCT, the NDEP's renewal of the WPCP would not be prohibited. To the contrary, however, NDEP, as a government agency, is absolutely liable under the ESA for insuring that any permit it issues does not result in the taking of a threatened or endangered species. See e.g., National Wildlife Federation v. Hodel, 15 Env'tl L Rep 20891 (E.D. Cal 1985) (finding the USFWS liable for a take pursuant to section 9 of the ESA for its authorization of lead shot hunting of migratory birds including bald eagles); Sierra Club v. Yeutter, 926 F2d 429 (5th Cir 1991) (Finding the USFS liable for a take under section 9 of the ESA for its forest management practices); Defenders of Wildlife v.

²¹ It is unclear why Anglo is making this argument. The effect of the Big Springs mine on other aquatic life is irrelevant to the mine's effects on LCT. In addition, GBMW has not argued the potential for harm to LCT from TDS or sulfate, only from selenium.

Administrator, EPA, 882 F2d 1294 (8th Cir 1989) (holding EPA liable for take of the endangered black-footed ferret due to its pesticide registration program even though EPA was not actually responsible for distributing and using the pesticides); Strahan v. Coxe, 127 F3d 155(1st Cir 1997)(State of Massachusetts was liable under the ESA for authorizing private commercial gillnet and lobster pot fishing that harmed the endangered northern right whales). As explained by the United States Court of Appeals for the First Circuit, “[A] governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA.” Strahan, 127 F.3d at 163.

In a similar vein, NDEP argues, equally as unsuccessfully, that the SEC lacks jurisdiction to review the ESA challenge. The SEC is the final arbiter of NDEP’s actions and is, therefore, responsible for ensuring that NDEP is in compliance with state and federal law. The SEC, therefore, has the authority to review any final decisions made by NDEP. See NRS 445A.605(1) (“Any person aggrieved by:(a) The issuance, denial, renewal, suspension or revocation of a permit; or (b) The issuance, modification or rescission of any other order, by the Director may appeal to the Commission); NAC 445B.890 (Any person may request a hearing before the Commission concerning a final decision of the Department).

NDEP’s liability for complying with the ESA in its issuance of Permit NEV0087001 is likewise unaffected by Anglo’s and NDEP’s assertion that if the Big Springs Mine is effecting a take of LCT the ESA would only be triggered to the extent that it would require an “ESA Section 9 Take permit.” Anglo, at 22; see also NDEP, at 7. There is no such thing as a Section 9 take permit and Anglo cites no authority for the

proposition that a general take permit exists. The closest thing to what AngloGold describes is the provision within section 10 of the ESA, whereby a local government or a landowner can apply for an incidental take permit. 16 U.S.C. § 1539(a)(1)(B). To obtain an incidental take permit, the applicant must make certain showings and follow certain procedures, including most significantly, the development of a habitat conservation plan that is designed to minimize and mitigate the impacts of the taking sought to be authorized. 16 U.S.C. § 1539(a)(2)(A). The incidental take permit can only issue if the USFWS finds that the "take" will be incidental, will be satisfactorily mitigated, and will not appreciably reduce the species' chances for survival or recovery. Id.

Here, NDEP has not applied for an incidental take permit, and has not made the requisite showing to obtain an incidental take permit. The obligation is on the governmental agency or landowner to apply for an incidental take permit, not as Anglo and NDEP otherwise suggest, on the USFWS to issue one. See e.g., 16 U.S.C. § 1539 (a)(2)(A) (“[n]o permit may be issued . . . unless the applicant therefore submits”). As a result, contrary to AngloGold’s and NDEP’s argument, if the WPCP is effecting a take of LCT, the WPCP is invalid.

VI. THE PITS ARE DEGRADING GROUNDWATER IN VIOLATION OF STATE LAW.

AngloGold and NDEP do not dispute the poor quality of the water in the SWX and 303 pits, nor do they dispute the fact that the pits are flow-through-pits, such that the contaminated water will flow out of the pits and into the surrounding groundwater. See NDEP, at 7; Anglo, at 22-23. Rather Anglo and NDEP argue that: (1) GBMW has the burden of showing actual degradation, not just that degradation may occur; and (2) the quality of the pit lake water is based entirely on quality of the upgradient groundwater.

Anglo, at 22-23, NDEP, at 7. These arguments completely misrepresent NDEP's legal obligation and the established facts in the record, as set forth in GBMW's Opening Brief, and must, therefore, be rejected.

First, the legal standard for mine pits does not require that GBMW show actual degradation of groundwater. To the contrary, NRS 445A.429(3) plainly provides that "[b]odies of water which are a result of mine pits penetrating the water table must not create an impoundment which: (a) has the potential to degrade the groundwater of the state." (emphasis added). As such, GBMW need only show that the mine pits have the potential to degrade groundwater to establish that the pits are violating state law. The facts set forth in GBMW's Opening Brief easily surpass that showing.

Second, it is a blatant misrepresentation of the evidence in the record, thus far, to argue, as AngloGold and NDEP do, that the quality of the water in the pit lakes is entirely a function of the quality of the surrounding groundwater that flows into the pits. As already explained herein, the groundwater quality at MW-2, upgradient of both pits, is far better than the quality of water in the pits. See supra 21-23. In addition, the difference in water quality between MW-2 and the pits is clearly a result of the interaction of the water with the disturbed rock in the open pits. See Myers, at 31 ("the MW-2 sulfate concentrations are less than 25% of those in the pit lakes," thus indicating that "the pit lake sulfate results from oxidation in the pit walls."); G.C. Miller, W.B. Lyons and A. Davis, "Understanding the Water Quality of Pit Lakes," Environmental Science and Technology. 30:118A-123A (1996). It is, therefore, completely erroneous to argue, as AngloGold and NDEP do, that the "quality of the mine lakes is governed by the quality of the water that the mine lakes intercept." Anglo, at 23; see also NDEP, at 7.

VII. THE WATER DIVERSION PROGRAM IMPLEMENTED BY ANGLOGOLD IS DEGRADING WATERS OF THE STATE IN VIOLATION OF STATE LAW.

As explained in GBMW's Opening Brief, the water diverted from MW-2 to the Sammy Creek alluvium consistently violates drinking water standards. See Opening Brief, at 19-20. It is a violation of state law for a mining facility to degrade waters of the state. NAC 445A.424. Degrade, again is defined in relevant part as lowering the quality of groundwater below drinking water standards. NAC 445A.424. Because the water diverted from MW-2 consistently violates drinking water standards, the diversion of this water to Sammy Creek's alluvial aquifer violates state law.

AngloGold does not dispute that the diverted water violates drinking water standards. Rather Anglo merely argues that there is no violation of state law because absent the diversion program, the water would still reach Sammy Creek. Anglo, at 23. Specifically, Anglo argues that "[w]ithout the diversion program, the mine lake would fill up, the water would overtop the embankment and the overflow water (the same as the diverted groundwater) would run into on the Sammy Creek alluvium . . . The diversion program simply mimics the natural system." Anglo, at 23. Anglo's argument utterly mischaracterizes "the natural system." The pits are not natural. The pits were constructed and allowed to fill with water by Anglo and its predecessors. Absent the pits, the groundwater would not overflow and would not reach the Sammy Creek alluvium. Anglo's argument is simply without merit.

NDEP, in a similar vein does not dispute that the diverted water has high levels of arsenic, but emphasizes that "nothing is added to the intercepted water." NDEP, at 7. It is irrelevant whether or not AngloGold has added the arsenic to the diverted water.

Rather, it is sufficient that AngloGold moves this water to the Sammy Creek alluvium where it would not otherwise occur. The end result of Anglo's diversion is that two separate areas of groundwater, rather than one, contain high levels of arsenic in violation of drinking water standards - the groundwater located upgradient of the pits, in the area of MW-2; and the shallow alluvial aquifer on Sammy Creek. AngloGold is, therefore, plainly causing the degradation of waters of the state in violation of state law. See NAC 445A.424

CONCLUSION

For the foregoing reasons and the reasons set forth in GBMW's Opening Brief, GBMW requests that the SEC reverse and remand Permit NEV0087001 to NDEP with instructions to comply with all legal requirements and grant the relief requested in GBMW's Opening Brief.

Respectfully submitted this ____ day of December, 2005,

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APPENDIX

Figure 1: SWX Pit Data

Date	Sulfate	TDS	Mn	Se
6/13/97	780	1209	0.29	0.01
7/29/97				
9/18/97	914	1390	0.179	0.007
2/1/98				
6/8/98	845	1390	0.577	0.008
8/5/98	963	1520	0.328	0.007
11/11/98	770	1250	0.017	0.009
6/29/99	670	1130	0.26	0.009
9/23/99	888	1320	0.126	0.003
11/11/99	861	1380	0.182	0.004
2/4/00	400	780	0.258	0.004
5/1/00	651	1070	0.28	0.006
8/22/00	696	1270	0.071	0.007
12/8/00	810	1230	0.146	0.003
3/7/01	390	720	0.47	-0.001
6/25/01	770	1200	0.12	0.004
9/27/01	890	1200	0.082	0.006
10/29/01	890	1300	0.19	0.006
4/12/02	100	170	0.034	-0.006
5/20/02				
8/5/02	840	1300	0.1	0.006
10/18/02	920	1300	0.081	0.005
6/15/03	820	1300	0.2	0.009
8/11/03	920	1500	0.11	0.006
10/21/03	1000	1600	0.17	-0.01
5/5/04	980	1400	0.15	-0.01
AVERAGE	772.5217	1214.3	.192	.004

Figure 2: MW2 data

Date MW2	Sulfate	TDS	Mn	Se
06/26/98	129	362	0.013	-0.001
12/18/98	115	311	0.011	-0.001
04/16/99	101	281	0.016	-0.001
06/09/99	91	272	0.012	-0.001
05/01/00	115	326	0.015	0.001
08/08/00	125	318	0.034	-0.001
12/07/00	134	322	0.011	-0.001
02/16/01	110	290	0.01	-0.002
08/21/01	130	330	0.01	-0.002
10/29/01	140	320	0.012	-0.002
01/11/02	170	350	0.012	-0.004
03/30/03	140	340	0.011	-0.002
09/16/03	180	390	0.014	-0.002
05/05/04	120	330	0.025	-0.01
07/07/04	220	494	0.024	-0.001
08/31/04	120	300		
10/05/04	123			
11/19/04	123	343	0.01	-0.001
AVERAGE	132.55	334.06	.015	-.002

Figure 3: 303 Pit

Date	Sulfate	TDS	Mn	Se
6/13/97	590	970	0.025	0.011
7/29/97	710	1134	0.018	0.007
9/18/97				
2/1/98				
6/8/98	491	826	0.021	0.008
8/5/98	714	1140	0.01	0.008
11/11/98	936	1480	0.275	0.007
6/29/99	638	1040	0.011	0.01
9/23/99	799	1200	0.007	0.008
11/11/99	785	1270	0.006	0.007
2/4/00	737	1270	0.002	0.007
5/1/00	380	621	0.01	0.006
8/22/00	690	1280	0.011	0.01
12/8/00	868	1320	0.025	0.007
3/7/01	820	1300	0.04	0.006
6/25/01	740	1200	0.008	0.004
9/27/01	860	1200	0.016	0.01
10/29/01	890	1300	0.27	0.008
4/12/02				
5/20/02	680	1200	0.16	0.006
8/5/02	840	1200	0.059	0.008
10/18/02	900	1300	0.052	0.007
6/15/03	620	1000	0.031	0.011
8/11/03	820	1300	0.022	0.008
10/21/03	830	1300	0.025	-0.01
5/5/04	650	1000	0.022	0.01
AVERAGE	738.61	1167.44	.049	.007

CERTIFICATE OF SERVICE

I, Nicole Rinke, hereby certify that I served the foregoing **Appellant Great Basin Mine Watch's Reply to NDEP's and Intervenor AngloGold's Response Briefs** upon the following individuals via USPS, this _____ day of December, 2005:

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