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BEFORE THE STATE OF NEVADA
STATE ENVIRONMENTAL COMMISSION

In Re:

Appeal of Class I Permit to Operate a Municipal Waste Area-Fill Disposal Site
Permit No. SW 1722REV00
Bedrock Limited, LLC

INTERVENER'S ANSWERING BRIEF ON APPEAL

Intervener Bedroc Limited, LLC ("Bedroc") submits its Answering Brief as follows:

INTRODUCTION

There is no merit to any of the challenges raised by Appellant Coyote Springs Investment, LLC ("CSI") to the issuance to Bedroc of a Class I Permit by Respondent Nevada Department of Environmental Protection ("NDEP"). Appellant's complaints regarding the issuance all boil down to its unhappiness that Bedroc was granted a Special Use Permit by Lincoln County in 2003, years *prior* to the County's adoption of its current land use code or its Master Plan, and also years prior to the execution of the Development Agreement between CSI and Bedroc. While CSI may be displeased with Bedroc's operation of a Class I Landfill more than a mile from the north-western most section of the long-planned but never-realized Coyote Springs Development, such displeasure does not negate the County's approval of the operation, a matter over which, as NDEP

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properly noted, this agency does not even have any power of review. CSI's allegations of noncompliance with local zoning requirements ignore the fact that Bedroc obtained a variance from the provisions existing at the time of the grant, and that this variance remains in effect. Instead, CSI is attempting to apply later adopted standards, even though the standards themselves make clear they do not apply retroactively. Similarly, CSI claims that Bedroc failed to satisfy conditions prior to NDEP's issuance of the Class I Permit, ignoring the fact that the conditions in question did not apply until *after* the Permit was issued.

Evidence contained in the record rebuts each claim of statutory violations. Accordingly, Appellant has failed to establish any ground for reversal of the grant of the Class I Permit.

STATEMENT OF THE FACTS

The facts relevant to addressing CSI's claims stretch over the course of a decade.

The Grant of the SUP

In April, 2003, Lincoln County issued Special Use Permit 2003-5-2 (the "SUP"). That SUP states, as relevant here:

> A letter indicating the intent of BedRoc to pursue a Class 1 land fill has been submitted to the county. ***At the time the license is approved*** BedRoc will come back to the county and negotiate terms and conditions of operation, a use or tipping fee, proof of bonding, posting of an inspection bond, and annual or semi-annual review and report of progress. Failure to achieve the licensing through the state of Nevada nullifies this Special Use Permit.

Ex. A, Special Use Permit. As can be seen, the SUP does not require BedRoc to satisfy any conditions before NDEP issued the necessary license, *i.e.,* the Class I permit. Instead, the SUP states that "at the time the license is approved," Bedroc will do certain things, including negotiating with the County the terms and conditions involving certain specific items, including operations, a tipping fee, required proof of bonding issues, and periodic reviews of progress. These terms were consistent with the Letter of Intent referenced in the SUP. **Ex. B, Letter of Intent**.

The SUP also indicates that the ordinary regulatory nullification period existing under the Lincoln County Code provisions in 2003 would not be applicable. As can be seen, rather than indicating a time limitation for "nullification," the SUP provided that failure to obtain state

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licensing would nullify the SUP. **Ex. A.** The Letter of Intent clarifies the intent of the parties by stating:

> BedRoc Inc., confirms that the Special Use Permit granted by the Lincoln County Commission on May 19, 2003 is for the purpose of allowing BedRoc Inc., to apply to the State of Nevada for a Class I Landfill Permit for this land, and that if the Class I Permit is ultimately not issued by the State of Nevada, that the Special Use Permit granted by the Lincoln County Commission will be of no effect and will not run with the land.

Ex. B. Thus, the SUP was granted with the understanding it would be "nullified" only if the State Nevada "ultimately" denied issuance of the Class I Landfill Permit. Such a provision was necessary because the county code in effect in 2003 provided that an SUP would become "null and void" if it is "not actually established" within six months. **Ex. C, (former) LCC § 17.18.100.** However, the former code also provided that the Commission had the authority to grant extensions of time. ***Id.*, (former) LCC § 17.18.119.** Significantly, the SUP does not impose any time limitation within which Bedroc was to apply for the Class I permit.

The Coyote Springs Development

In June 2005, more than two years after the SUP was granted, Lincoln County and CSI entered into a Development Agreement. **Ex. D.** The Development Agreement envisioned construction of a planned community that was to include a golf course, approximately 150,000 homes, and accompanying infrastructure and recreational facilities. ***Id.*** The Development Agreement contemplated CSI supplementing the County's law enforcement budget, constructing satellite government facilities, and constructing at least 50 acres of parks for every 5,000 homes, with a minimum of ten acres of parks. ***Id.*** The Development Agreement provides a mechanism for dispute resolution between the parties to that Agreement; that process does *not* include collateral challenges to County permitting decisions. **Ex. D, § 9.**

Under the Development Agreement, the County agreed that it would not take certain actions, including, as CSI contends, permitting a "trash transfer or similar facilities" within ten miles of the planned communities. ***Id.* at § 4.07.** However, nothing in the Development Agreement required the County to negate any existing variances or special use permits. To the contrary, the County is expressly relieved of any obligation to take any action that "would in the

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reasoned opinion of the County Commission be imprudent given competing public needs and projects." **Ex. D, § 1.01(c)(1).** Indeed, in 2005, Bedroc was issued a Class III Landfill Permit, and pursuant to a 2006 Disposal Site Agreement with Norcal Waste Systems of Nevada, Inc. (the holder of the exclusive right to dispose of Solid Waste generated in Lincoln County), Bedroc was authorized to receive waste from the Coyote Springs Development pursuant to permits and authorizations granted in connection with that previously issued Class III Landfill Permit.. *See* Norcal/Bedroc Disposal Site Agreement attached hereto as **Ex. E.**

To date, nearly ten years from execution of the Development Agreement, not a single home has been constructed in Coyote Springs. ***See, e.g.,*** **Ex. F, "Pardee Homes gives up land in long stalled Coyote Springs Project," *Vegas Inc*, July 23, 2014** ("Besides site work such as utilities, the only thing built at Coyote Springs is a Jack Nicklaus-designed golf course, which opened in 2008."). In addition to delay caused by the economic downturn, the project has been plagued with a host of legal difficulties, including a scandal culminating in a conviction on federal charges of the individual who originally headed up the Coyote Springs Development. ***Id.***; **Ex. G, "Electricity will flow to Coyote Springs, but there are still no homes to power," *Las Vegas Sun*, Aug. 22, 2012.**

Lincoln County's Adoption of a New Code and a Master Plan

In late 2005, Lincoln County adopted an ordinance which completely revamped its zoning and land use regulatory scheme, including replacing former Title 17 with Title 13, entitled Lincoln County Planning and Development Code ("LCPDC"), which went into effect on January 3, 2006. **Ex. H**. The LCPDC replaced "the previous provisions of the county zoning and subdivision ordinance," and was adopted "to further the implementation of the county master plan." ***Id.*** **at § 13.2.2.(A).** However, *nothing* in the LCPDC indicates that it was intended to retroactively negate any existing special use permits granted under the previous code provisions, or to otherwise retroactively limit previously granted rights or privileges.

On September 4, 2007, Lincoln County adopted its current Master Plan. **Ex. I**. As relevant here, the Master Plan included "Goal SW-1" - "Increase the economic benefits to country

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residents from waste management activities in the county." ***Id.*, p. 62.** Among the policies adopted to further Goal SW -1 were:

> Policy SW-1D Revenues from landfill operations should be used to offset trash collection fees for residents and for developing recycling programs county-wide.
>
> Policy SW-1E Increased waste stream and associated revenue from outside sources should be utilized primary to improve waste management services, landfill, diversion and recycling efforts.

Id. While the Master Plan discusses policies relevant to future special use permits, nothing in the Master Plan indicates such policies retroactively negate any existing variances.

Bedroc's Application for a Class I Permit

Bedroc applied to NDEP for a Class I Permit in October, 2013, with revisions proffered in May 2014.[1] **Exs. J and K.** In making public comments, CSI made an assortment of allegations of violations of NAC 444.678 and 444.696. *See* Opening Brief, 5:12-14. NDEP responded to all such challenges in its Response to Public Comments. **Ex. L.** Specifically, NDEP noted that CSI's assorted complaints regarding alleged noncompliance with assorted county and state regulations are misplaced, because NDEP has no authority to determine the specific regulatory matters. **Ex. L, p. 6; 8; 17; 21**. On September 9, 2014, NDEP issued Permit No. **SW1722REV00 ("Permit") to Bedroc. Ex. M.** The Permit is conditioned upon Bedroc's compliance with NRS 444.440 through 444.620, and procurement of all necessary permits required by relevant local, state, and federal regulatory bodies. ***Id.* M, § 2.4 and 9 (2).**

STATEMENT OF THE ISSUES

I. NDEP IS AUTHORIZED TO ISSUE CONDITIONAL PERMITS.

II. THE CLASS I PERMIT WAS PROPERLY GRANTED BECAUSE CONDITIONS PLACED ON THE VALID SUP BECAME EFFECTIVE ONLY UPON ISSUANCE OF THE CLASS I PERMIT.

III. ISSUANCE OF THE PERMIT IS CONSISTENT WITH THE REQUIREMENTS OF NAC 444.678.

IV. NDEP APPROPRIATELY RELIES ON THE STATE ENGINEER'S OVERSIGHT OF WATER ISSUES.

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[1] An application had been submitted in 2010, but was withdrawn due to a need to relocate the site further from the highway.

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LEGAL ARGUMENT

Through CSI's challenge to the Permit, CSI attempts to place a burden upon NDEP and this Commission to exercise numerous oversight obligations that are, as recognized by NDEP, properly within the oversight of other local, state and federal agencies. As shown below, NDEP properly considered the issues within its regulatory powers, and conditioned Bedroc's Permit on compliance with all other application regulations. Thus, none of the challenges raised by CSI actually support a conclusion that the Permit was improperly issued.

I. NDEP IS AUTHORIZED TO ISSUE CONDITIONAL PERMITS.

CSI asserts that NDEP has no authority to issue a Permit containing conditions, citing NAC 444.6425 and NAC 444.643. Opening Brief, 13:28-14:1. CSI'this statement is simply wrong. While NAC 444.643 is silent as to conditions placed on permits, NAC 444.6425(2) expressly grants authority for such conditions. Specifically, that regulation states:

> The solid waste management authority may modify or place conditions on a permit issued pursuant to this section based on public comments received concerning the permit.

NAC 444.6425(2). Given this express regulatory authority to issue conditional permits, Appellant's contention regarding NDEP's authority is clearly without merit.

II. THE CLASS I PERMIT WAS PROPERLY GRANTED BECAUSE CONDITIONS PLACED ON THE VALID SUP BECAME EFFECTIVE ONLY UPON ISSUANCE OF THE CLASS I PERMIT.

CSI's assorted claims regarding the validity of the SUP, based on a purported expiration by operation of law or upon purported inconsistency with the later adopted Master Plan, are without merit. Similarly without merit is its claim that Bedroc failed to satisfy conditions placed on the SUP prior to NDEP's grant of the permit. NDEP properly indicated its reliance on the latest communications from Lincoln County indicating the continuing viability of the SUP, as well as its intention to rely on Lincoln County's determination that conditions are satisfied when applicable. **See Ex. L, p. 12** ("The Division will accept the final decision of Lincoln County regarding the SUP.") Accordingly, the Class I Permit was properly issued.

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A. Special Use Permit 2003-5-2 Continues in Effect.

There is no dispute that Bedroc was granted the SUP. **Ex. A.** While a county employee had apparently communicated to NDEP that CSI no longer had a Special Use Permit, the explanation provided for that conclusion, *i.e.*, award of a waste management franchise to another entity, did not actually support that conclusion. *See* CSI's Exhibit 15. Moreover, the *current* viability of the SUP was subsequently acknowledged by letter from the County's District Attorney to NDEP. **Ex. N.** The District Attorney's assertion that no difficulty is foreseen regarding Bedroc's abilty to satisfy conditions is a clear acknowledgement of the current status of the SUP. Accordingly, the evidence presented to NDEP established that the SUP existed and was in effect.

CSI's contention that NDEP has the obligation to determine the validity of the zoning approval issued by county commission has been expressly rejected by the Nevada Supreme Court *Helms v. State, Div. of Envtl. Prot.*, 109 Nev. 310, 314, 849 P.2d 279, 282 (1993). In *Helms*, where, like here, a disgruntled neighbor objected to a permit issued by NDEP, the Court not only stated that "NDEP was entitled to presume the County's approval was valid," but also noted that NDEP has no "authority to review the actions and decisions of local government entities." Accordingly, NDEP properly accepted Lincoln County's acknowledgement that the Special Use Permit remains in effect.

B. Bedroc Had Not Failed to Satisfy Any Conditions Prerequisite to the Issuance of the Permit.

Even if NDEP could review the County's decision, CSI's argument must fail. CSI's contention that Bedroc had not satisfied any necessary conditions in the SUP prior to issuance of a Permit is belied by the plain language of the SUP. Simple review of that document demonstrates that there were no conditions that Bedroc was expected to satisfy prior to receipt of the Permit. Instead, all conditions, save for acquisition of the Permit itself, came into effect only once the Permit was received. **Ex. A.** This fact was acknowledged by NDEP, who conditioned the continuing validity of the Permit on Bedroc's satisfaction of those now activated conditions prior to commencement of construction. **Ex. M, § 9.1.**

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C. Any Purported Inconsistency between the SUP and the Later Adopted Master Plan is Irrelevant.

CSI again attempts to force this body to determine the validity of the SUP, by contending that it is inconsistent with Lincoln County's current Master Plan. However, it is absurd to challenge the SUP here on such grounds. The SUP was granted more than four years prior to the adoption of the Master Plan cited by CSI. Essentially, CSI contends the SUP is invalid because in granting it, the Lincoln County Commission did not foresee the precise requirements that would be placed in a *future* Master Plan.

Newly enacted legislation is presumed to "operate prospectively, unless it is clear that the drafters intended the statute to be applied retroactively." *Sandpointe Apts. v. Eighth Jud. Dist. Ct.*, 129 Nev. Adv. Op. 87, 313 P.3d 849, 853 (2013). Such a presumption exists in order to ensure that "individuals . . . know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Id.*, *quoting Landgraf v. USI Film Prods.*, 511 U.S. 244, 265. *Id.* at 265, 114 S.Ct. 1483. Here, there is no indication that the Lincoln County Commission intended the Master Plan to retroactively nullify any existing variances that might be inconsistent with the Master Plan. Accordingly, any purported inconsistency between the SUP and Master Plan does not affect the validity of the SUP.

Furthermore, CSI's contention of inconsistency is itself quite thin. Contrary to CSI's suggestion, Nevada does not require strict conformity to Master Plans. Instead, the Nevada Supreme Court has described Master Plans as "a standard that commands deference and a presumption of applicability, rather than a legislative straightjacket from which no leave may be taken. *Nova Horizon, Inc. v. City Council of the City of Reno*, 105 Nev. 92, 96, 769 P.2d 721, 723 (1989). CSI relies on the 2007 Master Plan's stated policy that conditional use permits for solid waste faculties should be reviewed every 5 years. **Ex. H**. In contrast, the SUP provided that after issuance of the Permit, Bedroc would "come back to the county and negotiate terms and conditions of . . . annual or semi-annual review and report of progress." **Ex. A.** Given that the SUP does envision County review, there is substantive agreement with the Master Plan. Accordingly, even if

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the later adopted Master Plan were relevant to requirements imposed by the SUP, no substantive disagreement with the terms has been shown.

III. Issuance of the Permit is Consistent with the Requirements of NAC 444.678.

There is no merit to CSI's contention that NDEP failed to follow the requirements of NAC 444.678. The NDEP responses to the issues raised by CSI during the comment period demonstrate ample grounds to determine that the standards imposed in NAC 444. 678 have either been satisfied, or, where such satisfaction is dependent upon determinations of other agencies, must be satisfied to retain the validity of the Permit. Accordingly, the Permit satisfies the Requirements of NAC 444 678.

A. There is No Violation of Lincoln County's Height Requirements.

CSI's contention that the proposed landfill will, when fully completed, exceed the height requirements in Lincoln County's M-2 zoning district is nonsensical. Indeed, CSI first requires a convoluted combination of definitions to support its assertion, first saying buildings include all structures, then citing a broad definition of structure as any work artificially built up in order to call the landfill a building, and then applying the height limitations for buildings. All this effort is to no avail, however.

The Lincoln County Code does provide that the term "building" includes the term "structure," but *only* when such construction is consistent with the context. LCC 13.3.1(B). Here, the context clearly does not support the application of building heights to a structure that, when completed, will be underground. Second, CSI ignores the fact that when the proposed landfill is complete, while it may be 150 feet over the grade as it exists at this time, at the time of completion "grade" will be *on top of the landfill*. Accordingly, CSI's attempt to impose building height restrictions on the landfill borders on the frivolous

B. NDEP Properly Approved a Design Protective of Water.

CSI also contends that NDEP improperly approved the Permit despite its location near the Pahranagat Wash, citing NAC 444. 678(9). However, that provision states:

The Location of a Class I site must:

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* * *

> 9. Unless approved by the solid waste management authority, not be within 1,000 feet of any surface water or 100 feet of the uppermost aquifer if the site is approved after September 2, 1992.

NAC 444. 678(9). Thus, NDEP has express authority to approve a site even if it is located within 1000 feet of any surface water or within 100 feet of the uppermost aquifer. CSI wholly ignores the lengthy explanation provided by NDEP for its decision to approve the site, which included the following:

> The most current application (revision May 2014) presents the design for control of stormwater run on and run off in Sections 13.2 and 13.3 of the Design Report and on Drawings 4, 21, 22, and 23. The diversions designed to capture and divert all run on from watershed areas adjacent to the landfill have been designed to handle flows resulting from the 100-year, 24-hour storm event. This is an exceedance of the design requirements of NAC 444.6885(2)(a) which requires design for the 25-year, 24-hour storm event. The stormwater collection and conveyance design was modeled using SCS TR-20 within HydroCAD 8.0 (see Appendix V of the Design Report; reference to SCS TR-55 in the Design Report text is a typographical error). SCS TR-20 is intended for use on areas from 1 to 300 acres. The modeled area is 170 acres, therefore SCS TR-20 is appropriate for this application.

See Ex. L, p. 17. It is clear that NDEP carefully considered the potential risk arising from the water running through the wash, and the diversion to capture and divert that flow.

Rather than acknowledge such careful consideration of the water-related comments *made by CSI* during the comment period, or on NDEP's approval of a design that exceeds requirements, CSI focuses on NDEP's response to a comment made by another entity. Specifically, CSI objects to NDEP's interpretation of its own regulations:

> The Pahranagat Wash is not considered a surface water for regulatory purposes since it experiences flow only in response to precipitation events and is otherwise dry. NAC 444.678(9) refers to perennial water bodies.

Ex. L, p. 28. Thus, NDEP indicates that a provision that limits proximity to specific form of water refers only to water that is always present, rather than to water that is present only as a result of occasional rainfall.

Coyote Springs essentially argues that if water ever flows in an area which is otherwise dry, it is "surface water" because it is flowing on the "surface". This simplistic reasoning ignores the

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legal definition of surface water. The State of Nevada Division of Water Resources has published a "Water Words Dictionary to assist the State of Nevada, individuals and local governments in determining the meaning of words in common usage with respect to water matters. The Water Words Dictionary (http://water.nv.gov/programs/planning/dictionary) states as follows:

> Surface Water – (1) an open body of water such as a stream, lake or reservoir; (2) water that remains on the earth's surface; all waters whose surface is naturally exposed to the atmosphere; for example, rivers, lakes, reservoirs, ponds, streams, impoundments, seas, estuaries, etc., and all springs, wells or other collectors directly influenced by surface water…

Conspicuously absent from that definition is a wash, which term is defined as "a *dry* stream bed." *Id.*

CSI counters NDEP's interpretation only with a comparison to the definition of ground water, asserting that if water is not groundwater, it must be surface water. The administrative agency which adopted NAC 444.678(9) could have used the definition presented by CSI, but it did not. Instead, it chose to use the term "surface water" as defined by the State of Nevada, Division of Water Resources as an existing open body of water such as a stream, lake, or reservoir, which NDEP was clearly entitled to do.

Further, CSI's comparison of terms does not speak to the context of its use as a starting point for setting proximity limitations.

Despite the obvious logic of requiring a degree of permanence for a proximity location, CSI objects that NDEP did not provide any evidence for its interpretation. *Opening Brief,* 17. However, there is no requirement that an agency produce "evidence" to support its interpretation of its own rules. To the contrary, an agency has the authority to interpret the statutes and regulations outlining its duties. *Clark Co. Sch. Dist. v. Local Gov't,* 90 Nev. 442, 446, 530 P.2d 114, 117 (1974) ("[A]n agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action.")" Moreover, courts accord deference to that interpretation. *Id.*; *see also*, *State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988). As NDEP's interpretation is reasonable, particularly in light of the context, CSI's argument is not well founded.

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D. NDEP Properly Approved a Design with the Requisite Beautification Provisions.

CSI similarly disputes NDEP's expressly granted ability to approve a site within 1000 of a public highway where provisions for beautification are included in the design. NAC 678(6). NDEP determined that the required beautification provisions were present in the design, which provides for the creation of "a berm that will visually shield the operating face of the landfill from automotive traffic on Highway 93 as vehicles pass by the proposed Bedroc facility." **Ex. L, p. 3.**

CSI objects because the application did not provide photographs or drawings sufficient to establish precisely *how* beautiful the proposed berm to shield the site would be. Here, again, CSI's complaint borders on the frivolous. The regulations permits approval of a site within 1000 feet of a public highway when the design contains "special provisions for the beautification of the site and the control of litter and vectors" approved by the NDEP. NAC 678(6). NDEP properly determined that a berm blocking any sight of the facility was a sufficient beautification measure.

CSI also complains that NDEP did not consider the effect of the berm on native life or existing views. However, NDEP appropriately pointed out that such concerns are within the purview of the U.S. Fish and Wildlife Service, and the Permit was conditioned on conformance with regulations of that authority. **Ex. L, pp. 20-21.**

Finally, CSI complains that NDEP did not consider whether the berm would prevent emanation of bad smells. It is unclear why CSI contends that this issue should be relevant to the inclusion of "beautification plans." Nonetheless, NDEP did consider the prospect of odors from the facility in a more appropriate context: that the facility not create a health hazard or public nuisance. NDEP noted that the application provided waste would be covered daily; a measure that NDEP stated had been effective in other landfill sites in the state. **Ex. L, 18.** Accordingly, CSI's complaint regarding the prospect of odors is also without substance.

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IV. NDEP APPROPRIATELY RELIES ON THE STATE ENGINEER'S OVERSIGHT OF WATER ISSUES.

Finally, CSI contends that the Permit should not have been issued because it contends that Bedroc does not have sufficient water rights. Again, CSI's claims are without merit.

NRS 444.6296(2) requires that there be sufficient water for dust control and compaction of cover material for Class Permit locations. However, such water need not be obtained from any specific source; indeed, it could be trucked in. Accordingly, there is no requirement that an applicant for a Class 1 Permit have possession of water rights before a permit may be issued. Additionally, as with many of its others complaints, CSI's contention regarding Bedroc's possession of sufficient water rights would require NDEP to make determinations outside its own regulatory purview. CSI apparently concedes that Bedroc has obtained waters rights that would be sufficient for dust control and compaction, but contends that Bedroc has no right to use its water for that purpose. Opening Brief, pp. 19:26-20:3. However, interpretation of water rights regulations is a matter for the State Engineer.

Here, NDEP properly conditioned the Permit on Bedroc's compliance with the regulations of the State Engineer. **See Ex. L, p. 6.** As previously noted, NDEP is entitled to place conditions on a Permit. NAC 444. 6425. Additionally, NDEP is entitled to rely on decisions of other agencies as to matters within the regulatory authority of such agencies. *Helms v. Div. of Envtl. Prot.*, 109 Nev. at 314, 849 P.2d at 282.

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V. CONCLUSION

As set forth above, CSI's complaints are focused on NDEP's reliance on the determinations made by other agencies, regarding the issues outside the scope of NDEP's regulatory authority. NDEP's reliance was appropriate. Accordingly, CSI has failed to demonstrate any basis for overturning the issuance of the Permit.

DATED this 3RD day of February, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I served the forgoing Answering Brief on:

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the above-identified parties on the below date.

DATED this 3rd day of February 2015.

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