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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. SW1722REV00
Bedroc Limited, LLC.
_____/

APPELLANT'S REPLY IN SUPPORT OF OPENING BRIEF ON APPEAL

Appellant COYOTE SPRINGS INVESTMENT LLC's ("CSI") submits the following as and for its Reply In Support of Appellant's Opening Brief on appeal:

I. INTRODUCTION

In 35 pages of briefing, Respondent NEVADA DIVISION OF ENVIRONMENTAL PROTECTION ("NDEP") and Intervener BEDROC LIMITED, LLC ("BedRoc") failed to offer any meaningful opposition of CSI's appeal of Solid Waste Disposal Permit - Class I, Permit No. SW1722REV00 (the "Class I Permit"). Instead, BedRoc offers incomplete and misleading citation of legal authority, and NDEP feebly attempts to shirk its duty to require BedRoc to comply with the law.

In all, each of CSI's bases for the appeal remains applicable. NDEP's issuance of the Class I Permit was arbitrary and capricious, in excess of its authority, and constitutes action without substantial evidence for the following reasons:

1. The Class I site does not satisfy the location requirements of NAC 444.678(5), because Special Use Permit No. 2003-5-2 (the "Special Use Permit") expired over a decade ago;

2. The Class I site also does not satisfy the location requirements of NAC 444.678(5), because the conditions of the Special Use Permit are not satisfied;

3. Additionally, the location requirements of NAC 444.678(5) are not met, because the Special Use Permit does not comply with Lincoln County's master plan;

4. The location requirements of NAC 444.678(5) are further unsatisfied, because BedRoc's proposed Class I facility will exceed local height limitations;

5. The NAC 444.678(9) location requirements are unsatisfied, because the Class I site is located within the Pahranagat Wash;

6. The location requirements of NAC 444.678(6) are not met, because BedRoc's beautification plan was approved by the NDEP without substantial evidence; and

7. BedRoc does not have adequate water to meet the requirements of NAC 444.6769(2).

CSI is confident in its position, but must address some of NDEP and BedRoc's arguments to clarify the law and facts of this case. The weaknesses in NDEP and BedRoc's reasoning is further evidence that the NDEP improperly issued the Class I Permit. Accordingly, the Class I Permit must be invalidated and withdrawn.

II. NDEP HAS THE AUTHORITY AND—MORE IMPORTANTLY—THE DUTY TO ENSURE THAT THE CLASS I SITE IS IN CONFORMANCE WITH THE LAW.

A. NDEP Has Jurisdiction to Determine Conformance with Lincoln County Land Use Regulations and State Law.

BedRoc argues that NDEP is without jurisdiction to determine compliance with county ordinances. Citing to *Helms v. State, Div. of Envtl. Prot.*, 109 Nev. 310, 314, 849 P.2d 279, 282 (1993), BedRoc states that the "contention that NDEP has the obligation to determine the validity of a zoning approval issued by county commission [sic] has been expressly rejected by the Nevada Supreme Court." See BedRoc Brief, p. 7:10-12. This is a miscitation of *Helms* that must be addressed. In its brief, BedRoc selectively cites to *Helms*, asserting that "NDEP has no 'authority to review the actions and decisions of local government entities.'" See BedRoc Brief, p. 7:12-17. However, the full quotation of *Helms* opinion states that "*Nothing in NRS 445.201*

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(Powers and Duties of Environmental Commission) or the Water Pollution Control Act gives NEC [Nevada Environmental Commission] the power to review the actions and decisions of local governmental entities." *Helms*, *supra*, 109 Nev. at 314. Here, the permit in question was not issued pursuant to NRS 445.201 or the Water Pollution Control Act; it was issued pursuant to the sanitation provisions of Chapter 444 and its related regulations. Under these provisions, NDEP is required to ensure compliance to local land use regulations, not confirm county approval. See NAC 444.678(5).

Aside from selectively quoting from the *Helms* opinion, the facts in *Helms* are distinguishable from the facts in this case. In *Helms*, Douglas County sought to build a waste water treatment facility. Under NAC 445.181(2), the local government must approve of a waste water treatment project before NDEP may issue a waste water treatment permit. The applicant was Douglas County—the very same local government entity that was required to approve the project before a state waste water permit was issued. See *Helms*, *supra*, 109 Nev. at 311-12. Accordingly, NAC 445.181(2) was satisfied. However, the neighbors challenged the process by which Douglas County approved the waste water treatment facility project and brought these issues to the State Environmental Commission. Since mere approval of Douglas County was all that was required before NDEP could issue a permit, the Court held that "NDEP was entitled to presume that the County's approval was valid." *Id.* at 314.

Here, Lincoln County's approval of BedRoc's proposed solid waste disposal facility is *not* a requirement under NAC 444.678(5). Instead, BedRoc must conform to local land use planning. Therefore, it is NDEP's duty and obligation to ensure such conformance. The mere approval and acquiescence of Lincoln County does not prove land use conformance and does not justify issuance of the Class I Permit. NDEP is obligated to investigate and ensure BedRoc's regulatory compliance. The failure to do so demonstrates an abuse of discretion and action without substantial evidence.

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B. NDEP Is Not Empowered to Issue a Class I Permit that Is Conditioned upon Achieving Compliance with Local Land Use Law and State Law at a Later Date.

In their briefs, both NDEP and BedRoc argue that NDEP has the power to issue a conditional Class I Solid Waste Disposal Site Permit. However, both NDEP and BedRoc miss the issue. As noted at length in CSI's opening brief, NAC 444.678(5) states that "[t]he location of a Class I site *must* . . . [c]onform with land use planning of the area." (Emphasis added.) Under basic rules of statutory construction, use of the word "must" indicates that ensuring that there is conformance with local land use rules is a mandatory duty of NDEP when issuing a Class I permit. See, e.g., *Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002) ("Under the rules of statutory interpretation, use of words such as "shall" or "must" indicates the legislature's intent to enact a mandatory requirement."); *Bankers Ins. Co. v. Florida Residential Prop. & Cas. Joint Underwriting Ass'n*, 137 F.3d 1293, 1298 (11th Cir. 1998) ("The legislature's selection of the modal "may," rather than "shall," "will," or "must," shows that *all* of the first sentence of the section authorizing servicing contracts is permissive, not mandatory." (Emphasis in original)).

Rather than accepting its duty to ensure that the Class I Site conforms to Lincoln County's land use regulations, NDEP asserts inapposite statutory authority to avoid its regulatory responsibilities. See NDEP Brief, p. 9:1-28. In its brief, NDEP cites to NRS 444.556(4), which states that "[a] permit issues by a solid waste management authority must be conditioned upon all requirements necessary to *ensure continuing compliance* with . . . [r]estrictions on the location of such a landfill [and] [t]he applicable regulations of the State Environmental Commission." (Emphasis added.) NDEP emphasizes the phrase "must be conditioned" in NRS 444.556(4) in an effort to demonstrate that it is empowered to issue a conditional permit. See NDEP Brief, p. 9:17-19. This ignores the facts that under NRS 444.556 any conditions must be necessary to "ensure continuing compliance." Logically, in order for compliance to continue, compliance *must be achieved in the first place.*

The legislative and regulatory intent is clear: NDEP can condition a Class I permit upon compliance with location and regulatory requirements, but only to the extent that such location or regulatory requirements *have already been satisfied.* NDEP acts in excess of its authority if it

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conditions a Class I permit upon *achieving* compliance not *maintaining* "continuing compliance." Such is the case here. As discussed below, such compliance has yet to be achieved. Accordingly, NDEP abused its discretion when it conditionally issued the Class I permit.

Additionally, BedRoc asserts that NDEP has the right to issue a conditional Class I permit based upon NAC 444.6425(2), which 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.

See BedRoc Brief, p. 6:9-17. However, since NAC 444.6425(2) is set forth in regulations related to public comment on an application for a waste disposal permit, this provision is only reasonably understood as allowing NDEP to issue a permit with conditions above and beyond the minimum regulatory requirements. Such conditions are meant to satisfy the public interest or offset any economic externalities borne by the public. It is unreasonable to interpret NAC 444.6425(2) as exempting NDEP from first ensuring regulatory compliance. See, e.g., *J.E. Dunn Nw., Inc. v. Corus Const. Venture, LLC*, 127 Nev. Adv. Op. 5, 249 P.3d 501, 506 (2011) ("This court seeks to avoid interpretations that yield "unreasonable or absurd result [s].").

The authorities cited by BedRoc and NDEP do not allow NDEP to issue conditional Class I permits in abdication of its statutory and regulatory duty to ensure regulatory compliance. For this reason, NDEP acted in excess of its authority and abused its discretion.

III. BEDROC'S SPECIAL USE PERMIT IS INVALID.

A key issue in this appeal is whether BedRoc has a valid special use permit to operate a Class I solid waste disposal facility. CSI presented substantial analysis demonstrating how the Special Use Permit expired by operation of law and is null and void. See CSI Opening Brief, p. 6:19-14:10. However, neither NDEP nor BedRoc could refute that the Special Use Permit has been null and void for almost twelve (12) years. The briefs show their willful ignorance of this fact.

In NDEP's brief, it states that it was reasonable for NDEP to rely on a letter from Lincoln County District Attorney Daniel Hooge, who represented that the Special Use Permit was valid.

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NDEP Brief, p. 7:1-6. However, notably absent from this discussion is that NDEP *first* received a letter from Cory Lytle, the Director of the Lincoln County Planning Department. In Mr. Lytle's letter, he states that BedRoc does *not* have a special use permit and is required to apply for a new one. NDEP's brief contains absolutely no reference to Mr. Lytle's letter. Failure to explain why it was reasonable for NDEP to rely on Mr. Hooge's letter but not Mr. Lytle's letter demonstrates that NDEP abused its discretion and acted without substantial evidence when issuing the Class I Permit.

Similarly, BedRoc also conveniently ignores facts raised in CSI's opening brief that demonstrate that the Special Use Permit is null and void. In its brief, CSI carefully tracks former Title 17 of the Lincoln County Development Code to its recodification into Title 13 of the Lincoln County Code in 2005. See CSI Opening Brief, p. 9:26-11:1. Specifically, both Title 17 and Title 13 provide that special use permits expire by operation of law if the special use is not established within six months. Here, BedRoc implicitly concedes that the special use contemplated in the Special Use Permit (i.e., the operation of a Class I solid waste facility) was not established within six months following the approval of the Special Use Permit. Therefore, even though the Special Use Permit was issued in 2003 and was governed by former Title 17, the Special Use Permit was subject to six-month expiration date and is rendered invalid.

BedRoc cannot deny that a six-month expiration date has been a part of the Lincoln County Code for decades. Strangely, BedRoc argues that "*nothing* in the [Lincoln County Code] 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 and privileges." BedRoc Brief, p. 4:23-25 (emphasis in original). This statement misrepresents the effect of Lincoln County's reorganization of its code of ordinances. Nothing about the adoption of Title 13 "retroactively" negated the Special Use Permit. Indeed, the Special Use Permit had already expired by operation of law when Title 13 was promulgated. BedRoc's misleading statements have no weight.

BedRoc also argues that the Special Use Permit contains a "variance" from the six-month expiration date. BedRoc Brief, p. 2:25-7. The Special Use Permit states that "[f]ailure to

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achieve licensing through the state of Nevada nullifies this Special Use Permit." However, this is not a variance from the six-month expiration date; it is a condition of the Special Use Permit. If the Special Use Permit was still valid (which it is not), it would be conditioned upon receiving proper licensing from the state. However, this condition is irrelevant, because the Special Use Permit expired in 2003 by operation of law.

IV. THE PROPOSED CLASS I FACILITY WILL EXCEED LINCOLN COUNTY HEIGHT LIMITATIONS.

CSI also raises Lincoln County's height restriction as another basis upon which the Class I site does not conform with local land use law. CSI notes that the Class I Facility is a "building" under the plain terms of the Lincoln County Code and is subject to Lincoln County's 75-foot height restriction. All BedRoc can offer is contradiction unsupported by legal authority. See BedRoc Brief, p. 9:17-23.

NDEP implicitly recognizes that the Class I Facility will violate the height restriction. However, NDEP merely refuses to do anything about it. This is troubling. In its brief, NDEP states that it "has the authority to demand compliance or else the permittee risks losing its permit." NDEP Brief, p. 9:21-22. Rather than make excuses for BedRoc, NDEP should do its job and demand compliance.

V. THE PAHRANAGAT WASH IS "SURFACE WATER" UNDER NAC 444.678(9).

Under NAC 444.678(9), a Class I solid waste disposal facility shall "not be within 1,000 feet of any surface water," "[u]nless approved by the solid waste management authority . . ." CSI demonstrates that the Class I Site is located directly within the Pahranagat Wash. However, both NDEP and BedRoc argue that NAC 44.678(9) is inapplicable, because the Pahranagat Wash is not "surface water." In particular, BedRoc cites to the State of Nevada Division of Water Resources "Water Words Dictionary" for a definition of "surface water." See BedRoc Brief, p. 11:1-9. BedRoc's brief recites the definition of "surface water" 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,

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> estuaries, etc., and all springs, wells or other collectors directly influenced by surface water . . .

BedRoc Brief, p. 11:5-7. BedRoc goes on to state that "[c]onspicuously absent from the definition is a wash, which term is defined as 'a *dry* stream bed.'" BedRoc Brief, p. 8-9. Once again, BedRoc fails to accurately and completely cite to authority.

Conspicuously absent from BedRoc's citation is the Water Words Dictionary's *third* definition of "surface water," which defines that term as "(3) A source of drinking water that originates in rivers, lakes and *run-off* from melting snow. It is either drawn directly from a river or captured behind dams and stored in reservoirs." See http://water.nv.gov/progratns/planning/ dictionary (last visited Feb. 10, 2015) (emphasis added). Indeed, the definition of surface water includes "run-off," which is precisely the type of water that seasonably flows through the Pahranagat Wash. Further, CSI states that "[t]he Pahranagat Wash is a natural flow channel that flows through the Class I Site and is the main tributary to the Muddy River, which flows to the Colorado River through Lake Mead." Lake Mead is formed by the capturing the flow of the Colorado River and the Muddy river at the Hoover Dam. Moreover, Lake Mead is a source of Southern Nevada's drinking water. Thus, the Pahranagat Wash fits squarely within Nevada's third definition of surface water; it was deceptive of BedRoc not to include this definition in its briefing. Accordingly, NDEP and BedRoc's contention that the Pahranagat Wash is not "surface water" is without merit, and NAC 444.678(9) bars issuance of the Class I Permit.

VI. TRUCKING IN WATER DOES NOT DEMONSTRATE THAT BEDROC HAS ADEQUATE WATER TO SATISFY THE REQUIREMENTS OF NAC 444.696(2).

Under NAC 444.696(2), "[a]dequate water must be available at all times for dust control and for compaction of cover material." As CSI points out in its brief, BedRoc does not have sufficient water rights on the Class I Site to provide adequate water. See CSI Opening Brief, p. 18:26-20:12. Neither NDEP nor BedRoc address the fact that BedRoc has no water rights to meet the requirements of NAC 444.696(2). Both BedRoc and NDEP argue that BedRoc can simply have water trucked in. See BedRoc Brief, p. 13:6-7; NDEP Brief, p. 13:28-14:2.

This argument ignores the fact that BedRoc already contemplates using a water truck to provide dust control on the Class I Site; *however*, it intends to "pump[] water from the onsite

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well to the water truck, via the standpipes located strategically on the property." See Exh. 22 (BedRoc Landfill and Waste Management Facility, Operating Plan, p. 12.) NDEP and BedRoc's water truck argument is not persuasive given that BedRoc's application explicitly states that on-site wells—for which it has no water rights—are the intended source of water. BedRoc's proposal does not comply with NAC 444.696(2). Therefore, NDEP acted without substantial evidence when it issued the Class I Permit.

VII. CONCLUSION

NDEP and BedRoc fail to address numerous instances of regulatory noncompliance related to BedRoc's Class I Permit. These violations demonstrate that the NDEP's issuance of the Class I Permit was arbitrary and capricious. Further, there is not substantial evidence to support the issuance of the Class I Permit.

Beyond this, it is wholly unacceptable that NDEP opposes CSI's appeal *instead* of demanding that BedRoc comply with the law. Now is the time to finally require BedRoc's regulatory compliance. Accordingly, the Class I Permit must be invalidated and withdrawn.

DATED this 10th day of February, 2015.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of ROBISON, BELAUSTEGUI, SHARP & LOW, and that on this date I caused a true copy of **APPELLANT'S REPLY IN SUPPORT OF OPENING BRIEF ON APPEAL** to be served on all parties to this action by:

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