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8 **BEFORE THE STATE OF NEVADA, STATE ENVIRONMENTAL COMMISSION**

9
10 **In the Matter of:**

11 **NATHANIEL SELTENREICH'S APPEAL**
12 **OF NOTICE OF PROPOSED**
13 **REVOCATION, CERTIFICATE NV-876.**

SELTENREICH'S OPENING BRIEF

14
15 Nathaniel Seltenreich, by and through counsel, hereby files this Opening Brief in support
16 of his appeal of the Notice of Proposed Revocation, Certificate NV-876 ("Opening Brief"). This
17 Opening Brief is based upon the following Memorandum of Points and Authorities, the attached
18 exhibits, all pleadings and papers on file herein, and the evidence and argument to be presented at
19 the hearing on this matter.

20 **MEMORANDUM OF POINTS AND AUTHORITIES**

21 **I. INTRODUCTION**

22 The Nevada Division of Environmental Protection ("NDEP") decided to revoke Mr.
23 Seltenreich's Grade III wastewater operator certificate based on how he studied for the exam in
24 2011. In 2011, there was no law, regulation, or rule prohibiting Mr. Seltenreich from studying the
25 way that he did.¹ NDEP seeks to discipline Mr. Seltenreich based on a new regulation, ex post
26 facto. The Board of Certification for Wastewater Treatment Plant Operators ("Certification
27 Board") completed its investigation before the regulation even had been heard in public

28 ¹ As explained more fully below, there still is no law, regulation, or rule prohibiting the way Mr. Seltenreich studied.

1 workshop. During the investigation, Mr. Seltenreich was interviewed without notice of formal
2 charges against him and without the opportunity to confront the witnesses and evidence against
3 him.

4 Mr. Seltenreich took Utah's Grade III examination in 2011 and did not pass. Utah
5 permitted him to review his examination and the correct answers so that he could learn from his
6 mistakes. Mr. Seltenreich asked the proctor if he could take notes and was told that he could.
7 Consequently, Mr. Seltenreich took notes and used those notes to study for the Nevada
8 examination.

9 The Notice of Proposed Revocation, Certificate NV-876, alleges two theories for
10 revocation of Mr. Seltenreich's certificate: (1) the certification is invalid based on alleged
11 improperly obtaining and using answers to certain certification exams to take and pass Nevada
12 exams, including the Grade III exam, and (2) the certification was obtained allegedly in a manner
13 that demonstrates disregard for the health and safety of the public and the environment, citing
14 Regulation R155-17, section 11 (now codified as NAC 445A.293(3)), which became effective
15 May 16, 2018.

16 The Notice of Proposed Revocation should be dismissed for many reasons. First, the
17 process for "Notice of Proposed Revocation" violates Mr. Seltenreich's due process rights and his
18 rights under the Nevada Administrative Procedure Act (NRS Chapter 233B). NDEP effectively
19 revoked Mr. Seltenreich's certification without notice and opportunity to be heard and attempts to
20 shift the burden to Mr. Seltenreich to appeal a summary revocation. Additionally, NAC
21 445A.293(3) is unconstitutionally vague, overbroad, and ambiguous. Second, NAC 445A.293 is
22 a legislative regulation that provides substantive rights, duties, and remedies and therefore cannot
23 be applied retroactively. That regulation became effective **seven years after** Mr. Seltenreich took
24 the examination and **five months after** Mr. Seltenreich was interviewed by the Board. Third,
25 NDEP cannot discipline Mr. Seltenreich related to the Grade IV examination because it has
26 already levied discipline related to that examination. Finally, Mr. Seltenreich's Grade III
27 certification is not invalid, and to the extent NAC 445A.293 applies, Mr. Seltenreich did not
28 violate it. He studied hard for the examination, and he has worked as a Grade III wastewater

1 operator for over seven years with no disciplinary action or complaints regarding his performance
2 of his duties as an operator.

3 **II. BRIEF FACTUAL AND PROCEDURAL BACKGROUND**

4 Mr. Seltenreich entered the Marines about 22 years ago and spent 12 years in the Marines
5 and Army as a sniper and sniper trainer, and another 3 years active duty in Army National Guard.
6 During sniper training, the military encouraged trainees to take copious notes to maximize
7 retention of the training and as a reference for the future. In the National Guard, Mr. Seltenreich
8 was, among other things, a water purification specialist. After his honorable discharge from the
9 military, Mr. Seltenreich pursued a career in waste water treatment with the Clark County Water
10 Reclamation District ("CCWRD"). As part of the progression of his job and after elapse of the
11 required time working in the field of waste water management, Mr. Seltenreich took and passed
12 the Nevada Grade I and II tests for Wastewater Operation Certification with the Nevada Board of
13 Certification for Wastewater Treatment Plant Operators ("Certification Board").

14 To take the test for Grade III Wastewater Operation Certification, an applicant generally
15 must have been working in the field for three years. Due to his military service, Mr. Seltenreich
16 was credited 0.5 years of service and so was able to take the test after working with the CCWRD
17 for an additional 2.5 years. Rather than wait another six months for the test to be offered in
18 Nevada, Mr. Seltenreich learned through his employment that he could take the test administered
19 by the Utah Division of Environmental Quality ("Utah DEQ") and, if he passed, Nevada would
20 recognize reciprocity with the Utah test and grant Mr. Seltenreich a Grade III Wastewater
21 Operation Certificate. Mr. Seltenreich took the test in St. George, Utah in 2011 with two other
22 CCWRD employees, Tom McIntosh and Chris Bland. But, unfortunately, Mr. Seltenreich did not
23 pass the Utah exam.

24 The proctor of the exam, Paul Krauth, offered those who did not pass (between 10 and 20
25 individuals) the opportunity to review the exam results, including the questions the applicants
26 missed. Mr. Seltenreich asked if he could take notes of the exam and the questions missed. Mr.
27 Krauth answered in the affirmative. Thus, Mr. Seltenreich did what he was trained to do and took
28 careful notes of the exam and later transcribed them onto his computer. For the next several

1 months, he continued to study his notes and manuals, and conduct online research to assist him in
2 preparing for and passing the certification exam. He then applied to take the Grade III exam in
3 Nevada and passed.

4 NDEP renewed Mr. Seltenreich's Grade III Certification twice. It is alleged that in
5 September 2017, a co-worker of Mr. Seltenreich found exam notes and research alleged to be Mr.
6 Seltenreich's and provided them to LeAnna Risso, Operations Supervisor at CCWRD and
7 member of the Certification Board. **Ex. 1, Attachment A.**² The Certification Board alleges poor
8 quality photographs submitted in its packet as Attachment A were photos of portions of questions
9 and a scantron sheet. Mr. Seltenreich objects to the admission of these photographs. Among
10 other evidentiary deficiencies, these photographs have not been properly authenticated, and no
11 chain of custody has been established. Mr. Seltenreich does not remember taking any such
12 photographs or using any photographs to study.

13 The CCWRD conducted an internal investigation. The investigator was Jennifer Scharn.
14 **Ex. 1, Attachment F.** Mr. Seltenreich stated the notes were his and he had used them to study.
15 CCWRD notified NDEP and the Certification Board of its internal investigation, which union
16 representative Dan Grillett described as a witch hunt. **Ex. 1, Attachment D**, pp. 23-24.

17 Certification Board Chair Adrian Edwards contacted Judy Etherington of the Utah
18 Wastewater Certification Programs in or about November 2017. On November 13, Mr. Edwards
19 referenced two weeks of discussions and asked Ms. Etherington regarding the photographs and
20 the procedures and rules related to review of test procedures. **Ex. 1, Attachment I; Ex. 1,**
21 **Attachment G.** Ms. Etherington reported that they "did not have any written procedures for
22 reviews." **Ex. 1, Attachment G**, p. 1. She opined as to her own experiences as a proctor and
23 what she, personally understood, explaining they "would just verbally tell them that they couldn't
24 take any notes away with them." *Id.* This directly contradicted Mr. Seltenreich's personal
25 experience. Mr. Seltenreich specifically asked Mr. Krauth if he could take notes and if he could

26
27 ² Mr. Seltenreich objects to the admissibility of all of the documents and so-called evidence provided by NDEP and
28 the Certification Board. He has not previously had the opportunity to examine such evidence, including its
authenticity, chain of custody, veracity, and relevance. The exhibits are provided in aid of the brief and not as a
waiver of any objections to their admissibility.

1 take his notes with him, and Mr. Krauth answered affirmatively to both questions. **Ex. 1,**
2 **Attachment D**, pp. 4-5. The record does not indicate Mr. Edwards contacted Mr. Krauth. NDEP
3 failed to provide Mr. Seltenreich a copy of the communications with Ms. Etherington, and he did
4 not have an opportunity to cross-examine her before NDEP decided to rely on her statement to
5 invalidate his exam and revoke his certification.

6 The Certification Board contacted the Association of Boards of Certification (“ABC”)
7 regarding the materials found, including photographs allegedly of portions of the Utah test
8 booklet and scantron bubble sheet and typewritten notes from the Utah exam. **Ex. 1, Attachment**
9 **C.** ABC responded on November 16, 2017 and supported invalidation of Mr. Seltenreich’s
10 Nevada Grade III exam score and disciplinary action. *Id.* NDEP failed to provide Mr.
11 Seltenreich a copy of this document or an opportunity to cross-examine anyone from ABC before
12 it decided to invalidate his score and revoke his certificate.

13 On November 16, 2017, the Certification Board met in closed session regarding Mr.
14 Seltenreich. **Ex. 1**, p. 1; **Ex. 2**.³ On November 29, 2017, Adrian Edwards (Chair of the Board)
15 emailed Jennifer Scharn of the CCSRD regarding the documents found in the desk. **Ex. 1,**
16 **Attachment E.** Mr. Edwards informed Ms. Scharn the Certification Board was investigating Mr.
17 Seltenreich. *Id.* Mr. Seltenreich was not notified of this information.

18 On December 1, 2017, the Commission contacted the Legislative Counsel Bureau (“LCB”)
19 with a draft proposed regulation R155-17. This proposed regulation, *inter alia*, proposed
20 substantive duties and obligations for certification, and provided bases for professional discipline
21 including revocation of certification. **Ex. 3.**

22 On or about December 4, 2017, the Certification Board mailed a letter to Mr. Seltenreich
23 stating the following:

24 The Clark County Water Reclamation District has notified the Certification Board
25 of an apparent misuse of operator certification exam materials. You were named
26 in the communication as having been inappropriately in possession of exam
27 materials. The Certification Board is investigating this matter to determine if any
impropriety occurred, and whether any disciplinary actions would be appropriate.
The Certification Board is requesting to meet with you to discuss this matter.

28 ³ Counsel requested copies of the minutes to this closed session. None were provided, and NDEP responded it had provided everything it had related to that request. **Ex. 2.**

1
2 **Ex. 4.** The meeting was set for December 12, 2017. This letter failed to provide citation to legal
3 authority for the action, notice of charges, notice of an opportunity to confront witnesses or
4 examine evidence, or notice of a right to representation. This letter was received less than one
5 week before the meeting.

6 On December 12, 2017, the Certification Board interviewed Mr. Seltenreich regarding his
7 notetaking, study, and research for taking his Grade III Certification Exam. **Ex. 1, Attachment**
8 **D.** Mr. Seltenreich was not given a copy of the documents or any other information that the
9 Certification Board had accumulated or that it was using to interrogate him.

10 On January 9, 2018, LCB provided draft language for R155-17, describing section 11 as
11 setting “forth certain circumstances under which the Division may deny an application or suspend
12 or revoke a full certificate, provisional certificate or restricted certificate.” **Ex. 5**, p. 3.

13 On or about January 24, 2018, the Certification Board recommended disciplinary action
14 against Mr. Seltenreich in a letter sent to Joe Maez, P.E., of NDEP. **Ex. 1**, p. 6-14. The
15 Certification Board’s letter included 12 attachments. *Id.* The letter included a summary of the
16 Certification Board’s investigation, transcripts, copies of communications with ABC, CCWRD,
17 and Ms. Etherington of the Utah Division of Water Quality. Mr. Seltenreich was not provided a
18 copy of this packet until November 6, 2018, after he obtained counsel for this hearing.⁴ NDEP
19 failed to provide Mr. Seltenreich an opportunity to review or respond to this recommendation
20 from the Certification Board and the supporting documents, or to confront the witnesses against
21 him.

22 Public workshops for R155-17 were held on January 31, 2018 (Las Vegas), February 5,
23 2018 (Carson City), and February 8, 2018 (Elko) **Ex. 6**. R155-17 became effective May 16, 2018
24 and is now codified as NAC 445A.293. **Ex. 7**.

25 On September 26, 2018, NDEP notified Mr. Seltenreich of its decision to revoke his
26 Nevada Grade III Wastewater Operation Certificate NV-876. **Ex. 1**, p. 1. the only additional
27 documents provided were a copy of R155-17 and the appeal form. *Id.*

28 ⁴ The original briefing schedule set the deadline for Mr. Seltenreich’s opening brief at November 2, 2018. **Ex. 10**.

1 NDEP based revocation on the following allegations: (1) “[Mr. Seltenreich] improperly
2 obtained and used answers to certain certification exams to take and pass Nevada exams,
3 including the Nevada Grade III wastewater operation exam” and (2) “that [Mr. Seltenreich’s]
4 certification was obtained in a manner that demonstrates disregard for the health and safety of the
5 public and the environment (regulation R155-17, Section 11), which is separate cause for
6 revocation.” *Id.*

7 Regarding the first allegation, NDEP failed to identify any rules or laws with which Mr.
8 Seltenreich failed to comply. Regarding the use of “exams” in the plural, the Certification Board
9 previously invalidated Mr. Seltenreich’s score on the Grade IV exam and required him to retake
10 the exam based upon allegations that he had used notes from the Utah exam to study for the
11 Nevada exam. **Ex. 1, Attachment J.** At that time, Mr. Seltenreich chose not to appeal that
12 arbitrary decision. He did not study for the retaken exam and did not pass it. The Certification
13 Board subsequently has alleged that Mr. Seltenreich took a copy of Utah’s Grade IV exam
14 (although the copy was not in the materials CCRWD found and Mr. Seltenreich denied taking the
15 booklet) and used it to study for the Nevada Grade IV exam. As noted, NDEP already invalidated
16 that exam score.

17 Regarding the regulation (R155-17), it was not in effect when Mr. Seltenreich took notes
18 and studied for the exam, and that regulation does not prohibit such conduct. Mr. Seltenreich did
19 nothing contrary to the law and, in fact, proved himself to be conscientious in following his
20 military training by studying hard, learning from his failures, and passing the Nevada certification
21 exam. NDEP also failed to consider that Mr. Seltenreich has no history of professional discipline
22 and that his Certification has been renewed twice in the seven years since he obtained it.

23 It is important here to identify what NDEP did not do. It did not find that any laws were
24 broken—there weren’t any. NDEP did not conclude that Mr. Seltenreich is unqualified or
25 incompetent in his work—he has been an exemplary employee. His past and present supervisors
26 will testify that his knowledge base is at or above expectations for his certification level. These
27 are Douglas Jensen (immediate supervisor for the past 5 years) and Ross Hahn (past supervisor
28 for 3 years).

1 Mr. Seltenreich submitted the notice of appeal within the required time period. **Ex. 9.** The
2 appeal and briefing schedule were set, with the opening brief being due November 2, 2018. **Ex.**
3 **10.** Mr. Seltenreich obtained counsel. Upon being retained, counsel contacted NDEP's counsel to
4 request a new briefing schedule and copies of the relevant documents. The investigation binder,
5 which included the recommendation from the Certification Board, along with supporting
6 documents, transcripts, and communications from witnesses whom Mr. Seltenreich had not had
7 the opportunity to confront, were provided November 6, 2018.

8 **III. LEGAL STANDARD**

9 The revocation of a professional license is a "contested case" under the Nevada
10 Administrative Procedure Act. NRS 233B.032; NRS 233B.127. "No revocation, suspension,
11 annulment or withdrawal of any license is lawful unless, before the institution of agency
12 proceedings, the agency gave notice by certified mail to the licensee of facts or conduct which
13 warrant the intended action, and the licensee was given an opportunity to show compliance with
14 all lawful requirements for the retention of the license." NDEP's decision to revoke Mr.
15 Seltenreich's certificate must be based on facts it proves by a preponderance of the evidence.
16 NRS 233B.121. Therefore, NDEP must prove that "the contested fact is more probable than the
17 nonexistence of the contested fact." NRS 233B.0375. As the prosecutor, NDEP bears the burden
18 of proof. *See* NRS 622A.370 (prescribing burden and standard of proof in professional discipline
19 cases under that chapter); 53 C.J.S. *Licenses* § 101 (2018) ("When a board, officer, or
20 administrative agency initiates a license disciplinary proceeding, the burden of proving facts
21 necessary to support the action is on the board, officer, or agency making the allegations.").

22 **IV. LEGAL ARGUMENT**

23 NDEP's decision to revoke and invalidate Mr. Seltenreich's certificate and exam, should
24 be reversed for many reasons. First, the process which NDEP has created and implemented
25 violates constitutional due process and the Nevada Administrative Procedure Act. NDEP failed to
26 provide written notice of the charges, a hearing, and the opportunity to confront the evidence and
27 witnesses before revocation. After these failures, NDEP improperly tried to shift the burden to
28 Mr. Seltenreich to appeal the improper revocation. Regarding NDEP's reliance on Regulation

1 R155-17, Section 11, now codified as NAC 445A.293, that regulation does not apply
2 retroactively to proscribe behavior in 2011, and it is unconstitutionally vague, ambiguous, and
3 overbroad. Regarding the first ground listed above (using his notes from Utah to study for
4 Nevada), to the extent that NDEP seeks to discipline Mr. Seltenreich related to his Grade IV
5 exam, NDEP already invalidated his Grade IV exam. It cannot discipline him again for that same
6 act or omission, and any evidence related to the Grade IV exam should be excluded. Finally, Mr.
7 Seltenreich did not disregard the health and safety of the public, and his Grade III Certification
8 should not be invalidated or revoked.

9 **A. Due Process and the Administrative Procedure Act Require Reversal of the**
10 **Notice of Proposed Revocation.**

11 Mr. Seltenreich has a property right in his Grade III Certification, and NDEP failed to
12 comply with the Nevada Administrative Procedure Act (NRS Chapter 233B) and the
13 requirements of Due Process when it arbitrarily revoked his certification without notice and an
14 opportunity to be heard and to confront witnesses and evidence against him. It is an additional
15 due process violation for NDEP to shift the burden of proof to Mr. Seltenreich by labeling this
16 process an “appeal” when NDEP did not first provide a process where NDEP was required to
17 prove by a preponderance of the evidence that the certification should be revoked.

18 The State of Nevada shall not deprive a person of life, liberty, or property without due
19 process of law. U.S. Const., 14th Am.; Nevada Const. Art. I, S 8(5). A professional license is a
20 “valuable property right that cannot be arbitrarily abridged or revoked.” *Molnar v. State ex rel,*
21 *Bd. Medical Examiners*, 105 Nev. 213, 216, 773 P.2d 726 (1989). When an agency determines
22 whether to impose discipline, it must provide due process. *Matthews v. Eldridge*, 424 U.S. 319,
23 332 (1976).

24 In determining the amount of process that is due, the Court reviews several factors.
25 *Chudacoff v. Univ. Med. Center of Southern Nevada*, 609 F. Supp. 2d 1163, 1173 (2009). First, a
26 court will look to the private interests that are involved. *Id.* at 1173. Second, courts review the
27 procedures used by an agency to determine the risk of erroneously depriving the private interest.
28 *Id.* Third, the court reviews the government’s interest. *Id.* In *Chudacoff*, the court determined

1 that a hospital had violated a physician's procedural due process rights when it met secretly to
2 discuss the physician's level of care and ultimately revoked his privileges at the hospital without
3 providing notice or an opportunity to refute the allegations. *Id.*

4 Nevada Revised Statutes recognize the process that is due to a licensee when a state agency
5 proposes to revoke a professional license. NRS Chapter 622A applies to most professional
6 licenses. While it does not apply to the Grade III certification, it provides guidance for what
7 process is due. The Commission's regulations acknowledge that NRS Chapter 233B applies to its
8 hearings. *See, e.g.*, NAC 445.890 (referencing NRS 233B.050). As explained more fully below,
9 the Star Chamber process NDEP has devised does not comply with due process, NRS Chapter
10 233B or the revocation process the Legislature has already approved in NRS Chapter 622A.

11 **1. The law requires notice of the charges, a hearing, and the opportunity**
12 **to confront the evidence and the witnesses, and the opportunity to**
13 **refute the charges.**

14 Before NDEP decided to revoke Mr. Seltenreich's Grade III Certification, it failed to (a)
15 provide a charging document with written notice of the case, (b) allow Mr. Seltenreich to submit
16 an answer or response, (c) provide the opportunity for Mr. Seltenreich to view (and object to, if
17 appropriate) the evidence against him and produce evidence of his own, (d) allow Mr. Seltenreich
18 to cross-examine the witnesses against him, (e) engage in motion practice, or (f) defend himself in
19 any substantial way. Therefore, NDEP violated due process and NRS Chapter 233B.

20 It is axiomatic that the revocation of a professional license or certification "carries with it
21 dire consequences." *Smith v. Dep't of Registration & Ed.*, 412 Ill. 332, 344, 106 N.E.2d 722, 728
22 (1952). "It not only involves necessarily disgrace and humiliation[,] but it means the end of his
23 professional career. In a proceeding so serious, due process of law requires a definite charge,
24 adequate notice, and a full, fair and impartial hearing." *Id.* Revocation of a license is an
25 administrative penalty which requires due process and the procedure detailed in NRS Chapter
26 233B. *See* NRS 233B.032 (defining "contested case"); NRS 233B.127. The licensee must be
27 provided a charging document which provides written notice of the case. NRS 233B.121; NRS
28 233B.127 ("No revocation, suspension, annulment or withdrawal of any license is lawful unless,
before the institution of agency proceedings, the agency gave notice by certified mail to the

1 licensee of facts or conduct which warrant the intended action, and the licensee was given an
2 opportunity to show compliance with all lawful requirements for the retention of the license.”);
3 NRS 622A.300.

4 The notice must include the following:

- 5 (a) A statement of the time, place and nature of the hearing.
6 (b) A statement of the legal authority and jurisdiction under which the hearing is
7 to be held.
8 (c) A reference to the particular sections of the statutes and regulations involved.
9 (d) A short and plain statement of the matters asserted. If the agency or other
party is unable to state the matters in detail at the time the notice is served, the
initial notice may be limited to a statement of the issues involved. Thereafter, upon
application, a more definite and detailed statement must be furnished.

10 NRS 233B.121(2). A licensee has a right to respond to the written charging document and
11 “present evidence and argument on all issues involved.” NRS 233B.121(4); *accord* NRS
12 622A.320. During the hearing, the licensee has a right to “call and examine witnesses, introduce
13 exhibits, cross-examine opposing witnesses on any matter relevant to the issues even though the
14 matter was not covered in the direct examination, impeach any witness, regardless of which party
15 first called the witness to testify, and rebut the evidence against him or her.” NRS 233B.123(4).
16 Additionally, there must not be ex parte communication between one side and the decision maker,
17 in this case, between the Certification Board and NDEP. NRS 233B.126.

18 Here, neither the Certification Board nor NDEP afforded Mr. Seltenreich these rights, in
19 violation of due process and NRS Chapter 233B. The Certification Board notified Mr.
20 Seltenreich less than one week before a December 12, 2017 meeting, stating the following:

21 The Clark County Water Reclamation District has notified the Certification Board
22 of an apparent misuse of operator certification exam materials. You were named
23 in the communication as having been inappropriately in possession of exam
24 materials. The Certification Board is investigating this matter to determine if any
impropriety occurred, and whether any disciplinary actions would be appropriate.
The Certification Board is requesting to meet with you to discuss this matter.

25 **Ex. 4.** This failed to meet the requirements of NRS 233B.121 or due process for a charging
26 document and sufficient notice. There was no notice of a charge, the statutes or regulations
27 involved, or a plain statement of the matters asserted.

28 Before the Certification Board met with Mr. Seltenreich, it set up a “strategy meeting” with

1 members of NDEP. **Ex. 12.** The Certification Board invited Mr. Seltenreich to “talk” with it at a
2 December 12, 2017 meeting, during which the Certification Board interrogated Mr. Seltenreich
3 about the Utah exam and his review session there. **Ex. 1, Attachment D.** Mr. Edwards described
4 the interrogation as “fact finding” and explained that the Certification Board would make a
5 recommendation to NDEP, who would “look at all the facts [the Certification Board] assemble[s],
6 and decide one way or another which way to go. They can take the certification for a
7 recommendation as it sits or they can, they can decide to do higher, lower, nothing.” *Id.* at p. 22.

8 Mr. Seltenreich asked about an appeal process, and John Solvie (Certification Board
9 member) responded, “That would be through the State of Nevada, and that would follow along
10 whatever the AG does on most things. We don’t have any knowledge of that.” *Id.* Nikita
11 Lingenfelter (NDEP) stated there was an appeals process. *Id.* Katrina Pasqual opined, “...I don’t
12 know if this falls under that, the specific rules that I know.” *Id.* Mr. Edwards reiterated that this
13 was fact finding. No charges were provided to Mr. Seltenreich. The Certification Board and
14 NDEP personnel present did not provide a timeline, and there was no opportunity for Mr.
15 Seltenreich to review or respond to the various evidence the Certification Board had accumulated
16 before interrogating Mr. Seltenreich.

17 NDEP failed to provide Mr. Seltenreich any notice of a charging document or an
18 opportunity to be heard, present evidence, or confront evidence or witnesses. NDEP received the
19 Certification Board’s one-sided recommendation via an ex parte communication that was not
20 provided to Mr. Seltenreich, in January 2018, in violation of NRS 233B.126. **Ex. 1**, p. 6-14; **Ex.**
21 **11; Ex. 12** (Discussing “strategy meeting” before December 12, 2017 Interrogation). NDEP
22 failed to provide Mr. Seltenreich the opportunity to challenge the evidence, including its
23 authenticity, the chain of custody, credibility, and relevance. NDEP denied Mr. Seltenreich the
24 opportunity to voir dire any of the witnesses or to present his own witnesses. NDEP then decided
25 to revoke his Grade III certification in September 2018 without notice and a hearing. NDEP
26 violated due process and NRS Chapter 233B. Accordingly, Mr. Seltenreich respectfully requests
27 that the Commission reverse NDEP’s decision to invalidate and revoke his Grade III
28 Certification.

1 **2. NDEP cannot revoke Mr. Seltenreich’s license without a hearing and**
2 **then shift the burden to Mr. Seltenreich to appeal it.**

3 As previously explained, Mr. Seltenreich has a property interest in his Grade III
4 Certification, which NDEP cannot revoke without due process of law and then place the burden
5 on Mr. Seltenreich to appeal it.

6 The burden to prove the facts necessary to support revocation is on the agency, in this case
7 NDEP. *E.g.*, 53 C.J.S. *Licenses* § 101 (2018) (“When a board, officer, or administrative agency
8 initiates a license disciplinary proceeding, the burden of proving facts necessary to support the
9 action is on the board, officer, or agency making the allegations.”); NRS 622A.370. In other
10 words, the agency is the prosecutor. The agency cannot revoke the license without due process
11 and then place the burden on the licensee to appeal it. That would be a violation of due process.

12 Here, NDEP attempts just that. It revoked Mr. Seltenreich’s Grade III certification without
13 due process and then challenged him to appeal it. NDEP provided a form for appeal, which
14 instructed him to specify grounds for appeal, list legal authority for the appeal and provide a
15 statement of facts supporting the appeal, all within 10 calendar days from receipt of the decision.
16 **Ex. 1**, p. 2-3. This form requested more information from Mr. Seltenreich than NDEP had
17 provided in its decision. **Ex. 8**. A reasonable person may wonder how a licensee can be expected
18 to articulate such information when NDEP fails to provide a charging document before its
19 decision, the evidence on which the decision relies, an opportunity to prepare a defense, an
20 opportunity to confront witnesses, or an opportunity to be heard. This process is designed to
21 place the licensee at a disadvantage, and it is a violation of due process.

22 Indeed, in this matter, the appeal was set for hearing, and the deadline was set for Mr.
23 Seltenreich’s opening brief to be due November 2, 2018, before Mr. Seltenreich had a copy of the
24 investigative file, which NDEP did not provide until November 6, 2018, until after he retained
25 counsel, who contacted NDEP’s counsel. One may wonder how NDEP had expected Mr.
26 Seltenreich to prepare his opening brief without access to these materials. For example, how
27 could he argue against the evidence on which NDEP relied without a copy (let alone any actual
28 knowledge) of such evidence? Until his counsel received the packet, Mr. Seltenreich had never

1 seen the communications from the Certification Board, ABC, or Ms. Etherington. While he has
2 this information now, the due process violation is not cured. Due process required him to have
3 this information **before** NDEP decided his certification should be revoked. Due process required
4 him to have the opportunity to respond to this evidence and cross-examine these witnesses.
5 NDEP cannot create this secretive, abusive, tyrannical process and then place the burden on Mr.
6 Seltenreich to appeal it. NDEP must first meet its burden to prove revocation. It failed to do so
7 in this matter, and Mr. Seltenreich respectfully requests reversal of NDEP's decision to revoke his
8 certification.

9 **B. NAC 445A.293 does not apply retroactively.**

10 NDEP based the effective revocation on alleged conduct it argues violated a regulation that
11 was not effective when the conduct occurred (or even when Mr. Seltenreich was interrogated by
12 the Certification Board, or even when the Certification Board made its recommendation). NAC
13 445A.293 is not retroactive.

14 “Retroactivity is not favored in the law.” *Cnty. of Clark v. LB Props., Inc.*, 129 Nev. 909,
15 912, 315 P.3d 294, 296 (2013) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208
16 (1988)); *accord* Nev. Const., Art. I, §15 (prohibiting ex-post-facto laws). Accordingly,
17 regulations operate prospectively only, “unless an intent to apply them retroactively is clearly
18 manifested.” *LB Props., Inc.*, 129 Nev. at 912, 315 P.3d at 296 (quotation omitted). The
19 language must explicitly require the regulation to apply retroactively; otherwise it must be applied
20 prospectively only. Moreover, substantive regulations that are not explicitly retroactive cannot be
21 applied retroactively. *Id.* at 912-13, 315 P.3d at 296-97. A substantive regulation establishes a
22 controlling standard of conduct, imposing new rights or duties. *Id.* Therefore, a regulation
23 providing grounds for professional discipline is substantive.

24 NAC 445A.293 is a substantive regulation providing grounds for professional discipline,
25 imposing new duties and standards of conduct. This does not contain any language manifesting a
26 clear intent to apply retroactively, and it states it became effective May 16, 2018. The conduct on
27 which NDEP based revocation allegedly occurred in 2011. NDEP is not permitted to apply NAC
28 445A.293 retroactively to discipline him for alleged conduct seven years ago. Accordingly,

1 NDEP’s reliance on NAC 445A.293 is misplaced, and revocation based upon that regulation
2 should be reversed.

3 **C. NAC 445A.293 is unconstitutionally vague, ambiguous, and overbroad.**

4 Even if NAC 445A.293 were applied retroactively, which it should not be, NDEP may not
5 rely upon it because it is unconstitutionally vague, ambiguous, and overbroad.

6 A “rule is impermissibly vague if it ‘either forbids or requires the doing of an act in terms
7 so vague that men of common intelligence must necessarily guess at its meaning and differ as to
8 its application.’” *In re Discipline of Schaefer*, 117 Nev. 496, 511, 25 P.3d 191, 201 (2001)
9 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). The rule must make it
10 reasonably clear at the relevant time what conduct is prohibited. *Id.* at 512, 25 P.3d at 202. The
11 rule must provide “fair notice” of what behavior is proscribed. *Pines v. Idaho State Bd. of*
12 *Medicine*, 158 Idaho 745, 756, 351 P.3d 1203, 1214 (2015); *Tuma v. Bd. of Nursing*, 100 Idaho
13 74, 79-80, 593 P.2d 711, 716-17 (1979).

14 Here, NDEP relies upon NAC 445A.293(3): “The Division may deny an application for a
15 certificate as an operator of a plant for sewage treatment or suspend or revoke a certificate,
16 provisional certificate or restricted certificate of the applicant or holder of the certificate: ... (3)
17 Has demonstrated disregard for the health and safety of the public and the environment.” A
18 Westlaw search revealed no case law from any court (in any state) interpreting “demonstrated
19 disregard for the health and safety of the public and the environment,” or a combination of those
20 words. To the extent that “unprofessional conduct” may be analogous, courts have held that such
21 language, standing alone, is vague and ambiguous. *Tuma*, 100 Idaho at 80, 593 P.2d at 717.
22 Such a rule may be saved where an agency has established a set of standards to guide licensees.
23 *Id.*

24 Here, there were no standards, no regulation, no code of conduct in 2011 that provided Mr.
25 Seltenreich fair notice or warning that studying with notes from another state’s exam would
26 demonstrate a “disregard for the health and safety of the public and the environment.” See NAC
27 445A.293(3). Putting aside that this regulation was promulgated **after** the conduct in question,
28 this regulation fails to provide a sufficiently definite warning to place a person of ordinary

1 intelligence on fair notice of what it means. It is vague, ambiguous, and overbroad on its face,
2 and it is vague, ambiguous, and overbroad as applied to Mr. Seltenreich. Accordingly, it is void
3 and cannot form the basis for professional discipline against Mr. Seltenreich.

4 **D. NDEP cannot discipline Mr. Seltenreich again in relation to the Grade IV**
5 **examination, and any evidence related to the Grade IV examination should be**
6 **excluded.**

7 In the Notice of Proposed Revocation, NDEP references Nevada exams, in the plural. To
8 the extent that NDEP bases revocation on Mr. Seltenreich's alleged conduct in studying for the
9 Grade IV exam, such reliance is improper, and evidence related to that exam should be excluded.

10 In relation to the Grade IV exam, NDEP recognized no one in Utah had told him he could
11 not take notes on the exam. **Ex. 1, Attachment J.** Mr. Seltenreich chose not to appeal the
12 invalidation of that exam score. Thus, he has already been punished for the alleged act or
13 omission related to that exam. *Id.* NDEP cannot punish him again for the same act or omission.
14 This is akin to double jeopardy.⁵ Evidence related to the Grade IV exam should be excluded as
15 irrelevant and immaterial. *See* NRS 233B.123. It is not probative of how Mr. Seltenreich studied
16 for the Grade III exam, which is at issue here.

17 Alternatively, to the extent that the Commission overrules these objections and considers
18 evidence related to the Grade IV exam, the same arguments as applied to the Grade III exam
19 apply with equal force to the Grade IV exam.

20 **E. Mr. Seltenreich did not disregard the health and safety of the public and the**
21 **environment, and his Grade III Certification is not invalid.**

22 The evidence does not support invalidation of the Grade III Certification or revocation of
23 the same.

24 There must be a rule or statute to authorize the revocation and the grounds for revocation.
25 *Leavitt v. Pitt*, 86 Nev. 634, 638-39, 472 P.2d 526, 530 (1970) ("It is a well-established rule that,
26 where a statute authorizes the revocation of a license for certain named reasons, a license cannot
27 be revoked upon grounds other than the reasons specified.") (quotation omitted). The only

28 ⁵ While counsel was unable to locate a case applying double jeopardy to punishment by an administrative board, the
concept of not being exposed to double jeopardy is engrained in the constitutional protections of this state and nation.

1 regulation on which NDEP relies is NAC 445A.293, which is void and does not apply to Mr.
2 Seltenreich or his alleged conduct in this matter. NDEP fails to cite to any other statute or
3 regulation to support its decision. Indeed, there were no regulations in place when Mr.
4 Seltenreich took and passed the Grade III exam in 2011 that prohibited using notes from another
5 state's exam to study for the Nevada exam.⁶ As noted, revocation cannot be based on any activity
6 not prohibited by statute or regulation. *See Leavitt*, 86 Nev. at 638-39, 472 P.2d at 530. Mr.
7 Seltenreich's conduct did not violate any statute or regulation.

8 NDEP advocates a new standard of general applicability that a wastewater operator cannot
9 study for the exam using notes from another state's exam. In doing so, NDEP engages in ad hoc
10 rulemaking in violation of NRS Chapter 233B. NRS 233B.038 defines "regulation" as "agency
11 rule, standard, directive or statement of general applicability which effectuates or interprets law or
12 policy, describes the organization, procedure or practice requirements of an agency." Adoption
13 of regulations requires strict adherence to NRS Chapter 233B. The Nevada Supreme Court has
14 held that "where an interpretive ruling affects other market participants, appears to be part of a
15 general policy, and is of such major policy concern and of such significance that it may be
16 characterized as being of general applicability, the ruling is a regulation subject to [NRS Chapter
17 233B]." *Dunning v. Nevada State Board of Physical Therapy Examiners*, 2016 WL 3033742, *3
18 (Nev. May 26, 2016) (unpublished)⁷ (citing *State Farm Mut. Auto. Ins. Co. v. Commissioner of*
19 *Ins.*, 114 Nev. 535, 544, 958 P.2d 733, 738 (1995)). A policy that is applicable to all licensees
20 and affects agency policy is a regulation subject to the requirements of NRS Chapter 233B. Even
21 where an agency directs a policy at a single entity, such policy may constitute a regulation subject
22 to NRS Chapter 233B. *Pub. Serv. Comm'n of Nev. v. Sw. Gas Corp.*, 99 Nev. 268, 273, 662 P.2d
23 624, 627 (1983) ("Although the order changing Southwest's rate design is directed to Southwest
24

25 _____
26 ⁶ Counsel submitted a public records request for, *inter alia*, instructions and other packets provided to applicants for
27 the Grade III exam from January 1, 2011 to December 31, 2011 as well as the standards for professional discipline
28 during that time. No instructions or regulations addressed taking notes on another state's exam and using those notes
to study. **Ex. 13.** Moreover, any disciplinary standards and procedures provided in exam packets or pamphlets, as
opposed to properly promulgated regulations, would be unenforceable as ad hoc rulemaking.

⁷ Pursuant to NRAP 36(c)(3), a party may cite an unpublished opinion issued after January 1, 2016 for persuasive
value.

1 only, it certainly has a ‘general applicability’ which affects other gas utilities and their
2 customers.”).

3 Mr. Seltenreich took notes on the Utah exam because Mr. Krauth told him he could; there
4 was no rule, regulation, or law that prohibited him from doing so; and he wanted to learn from his
5 exam and do better the next time. It was precisely because he valued health and safety of the
6 public and the environment that he wanted to learn and do better. NDEP’s decision that note
7 taking (even where allowed by the other state) and using those notes to study is cause for
8 revocation, is a standard of general application that must be promulgated as a regulation under
9 NRS Chapter 233B.

10 NDEP failed to prove the facts necessary to establish revocation. NDEP does not allege
11 that Mr. Seltenreich took his notes with him to the Nevada exam or that he somehow used notes
12 or photographs⁸ while taking the examination. It is undisputed that Mr. Seltenreich only studied
13 with the notes, and he did not take them into the exam. Mr. Seltenreich passed the examination
14 based on his knowledge and training. He has worked as a Grade III operator for over seven years
15 without incident. At the hearing, Mr. Seltenreich intends to present evidence of his exemplary
16 work at CCWRD.

17 Alternatively, indefinite revocation is too severe a penalty. For example, NRS 622A.410
18 sets the limit for revocations at one to ten years. However, the Notice of Proposed Revocation
19 fails to provide a time period. Mr. Seltenreich has been a successful Grade III operator for over
20 seven years. He served his country in the Marines, Army, and Reserves for fifteen years. He
21 cooperated fully with the Certification Board’s investigation, one-sided and arbitrary as it was.
22 NDEP failed to consider these mitigating factors, which militate against revocation.

23 ///

24 ///

25 ///

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27 ///

28 ⁸ As previously noted, NDEP failed to authenticate the photographs or establish a chain of custody.

1 **V. CONCLUSION**

2 Based upon the above and foregoing, Mr. Seltenreich respectfully requests that the
3 Commission reverse NDEP's decision to revoke his Grade III certification and invalidate his
4 exam. A list of exhibits and witnesses will be provided according to the timeline set forth in the
5 briefing schedule.

6 Dated: November 26, 2018



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I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing **SELTENREICH'S OPENING BRIEF** by the method indicated:

- _____ by Court's CM/ECF Program
- _____ by U. S. Mail
- _____ by Facsimile Transmission
- _____ by Overnight Mail
- _____ by Federal Express
- xxxxxxxxxxx by Electronic Service
- _____ by Hand Delivery

and addressed to the following:

Katie S. Armstrong
Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701
KArmstrong@ag.nv.gov

Valerie King
Executive Secretary
State Environmental Commission
vking@ndep.nv.gov

Dated this 26th day of November, 2018.

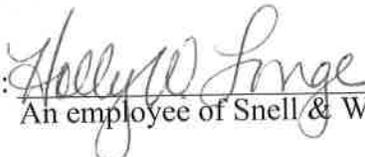
By: 
An employee of Snell & Wilmer L.L.P.

Exhibit List⁹

	Description
Exhibit 1	Binder: Attachment A: CCWRD letter Attachment B: Board timeline for Seltenreich Attachment C: ABC letter Attachment D: Transcription of Board interview Attachment E: Scharn Email (November 29, 2017) Attachment F: Transcription of CCWRD interview Attachment G: Etherington Email (November 15, 2017) Attachment H: Original Scantron Attachment I: Etherington Email (November 15, 2017) Attachment J: Invalidation of Seltenreich's Grade IV Attachment K: Code of Conduct Attachment L: Seltenreich's 2017 Renewal of Grade III
Exhibit 2	Email re Certification Board Minutes (November 16, 2017)
Exhibit 3	Transmittal letter with proposed regulation (December 1, 2017)
Exhibit 4	Certification Board letter to Seltenreich re: December 12, 2017 meeting
Exhibit 5	LCB Transmittal letter (January 9, 2018) and R155-17 (January 9, 2018)
Exhibit 6	R155-17 Workshop summary
Exhibit 7	R155-17 (effective)
Exhibit 8	Email re: Form # 3
Exhibit 9	Notice of Appeal Hearing (October 23, 2018)
Exhibit 10	Order Regarding Briefing Schedule (October 19, 2018)
Exhibit 11	Email string between Certification Board and NDEP (November 27-28, 2017)
Exhibit 12	Email string between NDEP and Certification Board (December 11-12, 2018)
Exhibit 13	Response to Public Records Request (received November 20, 2018)
Exhibit 14	Response to Public Records Request (received November 14, 2018 and November 15, 2018) with privilege log

⁹ Mr. Seltenreich objects to the admissibility of all of the documents and so-called evidence provided by NDEP and the Certification Board. He has not previously had the opportunity to examine such evidence, including its authenticity, chain of custody, veracity, and relevance. The exhibits are provided in aid of the brief and not as a waiver of any objections to their admissibility.