

#### **COMMENT NO. 4: KELLY PAYNE**

**Kelly Payne, representing Rio Tinto Kennecott Utah Copper, read his comment as follows:**

Good evening. My name is Kelly Payne. I represent Rio Tinto Kennecott Utah Copper. First, I'd like to express appreciation to the Board and the Division for the opportunity to offer comment tonight on these amendments that Dr. Moellmer has discussed. And, we'd also like to recognize the Division for its diligence in pursuing this process in a very transparent and open way. Kennecott is also supportive of the broader initiative which Lynn de Freitas has just spoken of, of establishing numeric standards for the Lake and for protecting the Lake. We do have some comments that we'd like to make tonight about the specific standards that are being changed or amended with this process. First, Kennecott urges the Board to adopt the proposed selenium standards for Great Salt Lake's Gilbert Bay of 12.5 milligrams per kilogram dry weight in eggs. This is a scientifically based standard that provides broad protection for bird populations using the Lake. It is consistent with the Environmental Protection Agency's framework for the derivation of National Water Quality Criteria. It is derived from a more conservative assumption than EPA's National Selenium Criterion. As Dr. Moellmer has noted, it was a value that was recommended by a vast majority of the Science Panel Members and it also incorporates multiple levels of conservatism. The Board may receive comment from others arguing for a much more stringent standard. These arguments seem to be emotion rather than technically based and if accepted, might unduly place constraints on dischargers without any measurable ecological benefit. The Board may also receive comments from the Great Salt Lake Brine Shrimp Industry advocating a slightly lower standard than what is proposed in the Rule. Kennecott recognizes the importance of the Great Salt Lake Brine Shrimp Industry as both a contributor to the State's economy as a component of the world's food supply. And water quality rules should protect the beneficial use of the Lake. However, we caution the Board and the Division to consult with selenium and other experts before proposing any alteration of the selenium standard. In the process of developing the selenium standard for Great Salt Lake, the views of the Brine Shrimp Industry were submitted after the Science Panel had disbanded. They lack a technical basis and are not consistent with the determinations of the Science Panel. The Board should recognize that as additional data gathered. The conclusions of the experts will continue to be the subject of scrutiny and there will be ongoing opportunities to further address the Standard or as referenced below, water quality guidance aimed at insuring continued protection of beneficial uses of the Lake.

Second, Kennecott is here today to express concern about the assessment methodology that has been proposed and is included with the selenium standard as a footnote. While we certainly concur that it is appropriate and wise to implement a monitoring approach to assure that any trends in the Lake are detected and addressed. We believe that the proposed regulatory responses dictated by this assessment methodology are problematic and may be better placed in a revolving guidance document subject to public comment. Despite nearly four years dedicated to development of a Standard, the proposed assessment methodology was developed only days before the process concluded and has not been subject to the level of scrutiny that is warranted. A handful of our concerns with the proposed assessment methodology include the fact that it establishes a de facto second Standard. As drafted, it would propose a cap on point source discharges at 60% of the Standard. Such an approach is virtually unprecedented in the State and nationally. The cap would inflexibly mandate controls at end of the pipe and could preclude reliance on trading or other more effective mechanisms for controlling constituent loading to the Lake. It is also possible that establishing such a cap would have anti-backsliding implications and there may be certain circumstances where an expansion process change or other discharge-related impact could warrant relaxation from the cap. These issues surely require further considerations before formally adoption into Rule or guidance. We're concerned that this is a

potentially a more stringent application of antidegradation. As you know, Utah's Water Quality Act prohibits the State from promulgating rules that are more stringent than those established by federal regulation and addressing the same circumstances. Unless specifically justified in a written finding that is subject to notice and comment. Extension of the antidegradation program to cap loading at some percentage of the established site-specific water quality standard could be viewed as promulgation of a rule that is unlawfully more stringent than required by federal programs.

Third, the trigger levels in the proposed assessment methodology have neither a technical basis nor are tied to water quality regulations. Indeed, when first presented by Division staff to the Steering Committee, staff noted that they were arbitrary. The prescribed regulatory actions based on these arbitrary trigger levels do not preserve the flexibility DWQ already has and should maintain to insure best protection of the Lake. The actions contemplated in the proposed assessment methodology are triggered at some future date. Conditions of the Lake or understanding of selenium are likely to be different from today thus demanding flexibility implementation. While there's a clear case for a site-specific selenium standard, the currently contemplated one-size-fits-all trigger levels for implementation fail to incorporate any justification for the corresponding regulatory actions. There is inconsistency between the assessment methodology and existing State Rule. The fact that the assessment methodology itself is being included as part of the Rule is inconsistent with the State's approach to antidegradation. The thresholds and conditions for triggering a Level 2 antidegradation review under the methodology stray from the antidegradation requirements and thresholds being considered by the Board as part as other aspects of this rulemaking. It is unclear what, if any, basis exists for the inconsistencies in program implementation. Additionally, the contemplated implementation methodology does not incorporate feed-back from the Level 2 review into any aspect of follow-up decision making. In other words, it requires a cap but it doesn't tell us what to do with that. Or, it requires a review; it doesn't tell us how it will use that review. The assessment methodology as currently proposed potentially make an end-run, it could end-run the considerations and balance decision making mandated by a Level 2 review. A Level 2 review requirements under the antidegradation program direct careful consideration of economic issues. The contemplative cap is, on the other hand, not formulated with any such considerations.

And last, there is, as drafted, the assessment methodology calls for a Level 2 antidegradation review for all new and existing permits if 40% of the Standard is achieved. The fundamental concern with this response is that it would focus solely on the ability of the discharger to reduce or eliminate loading rather than examine the causes of an upward trend in the receiving waterbody. Moreover, as drafted, the intensive and expensive level to review would be required as permit renewal even if the Rule does not include changes in the permit that would increase loading. The approach suggested in the currently drafted assessment methodology would therefore, be an inadequate and unjustified initial response to increasing selenium levels in the Lake.

Thank you.