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5 **BEFORE THE STATE ENVIRONMENTAL COMMISSION**
6 **STATE OF NEVADA**

7 In Re:)
8 Appeal of Air Quality Operating Permit:)
9 **AP4953-2525, Jungo Land and Investments, Inc.**) **RESPONSIVE BRIEF**

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11 Respondent, the Division of Environmental Protection, Bureau of Air Pollution Control
12 (NDEP), by and through Catherine Cortez Masto, Attorney General of the State of Nevada,
13 and Nhu Q. Nguyen, Senior Deputy Attorney General, files this Responsive Brief to the Brief
14 filed on April 28, 2010, by Robert E. Dolan and Massey K. Mayo (collectively "Appellants") and
15 Appellants' First Supplement (Supplement) to Appellants' Brief, filed on May 6, 2010. This
16 Responsive Brief is also filed pursuant to the State Environmental Commission's (SEC)
17 April 14, 2010, Order.¹

18 **I. Appellants Misstate the Facts Regarding the Status of the Conditional Use Permit**
19 **(CUP)**

20 In Appellants' Supplement, they represent that the effectiveness of the CUP is "up in
21 the air." Supplement at 3:14. This is a misrepresentation of the facts. On April 29, 2010, the
22 Sixth Judicial District Court granted Jungo Land and Investments' (Jungo) request for a stay,
23 pending judicial review, of the Humboldt Board of Commissioners' (Commissioners) decision
24 to reverse the five-year extension on the CUP. Accordingly, the Commissioners'
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27 ¹ NDEP notes that Appellants' Brief was due on April 28, 2010, and there was no provision in the SEC's
28 Order allowing Appellants to supplement their brief less than a week before the due date of NDEP's brief. However, in the interest of time, and because Appellants' Supplement filed on May 6, 2010, does not add any substantive arguments to their appeals, NDEP waives its objection to the untimely filing of the Supplement.

1 decision is not currently in force, making the CUP valid, during the pendency of the Court's
2 review. Appellants' representation that there is any doubt as to the current effectiveness of
3 the CUP is incorrect. While the CUP is currently effective, NDEP notes that, the effectiveness
4 of the CUP is irrelevant to the issuance of the Air Permit.

5 **II. The CUP and Air Permit are Two Independent Processes and the Status of the**
6 **CUP Has No Effect on the Issuance of the Air Permit**

7 Air pollution control is the province of the State of Nevada. Enforcement power lies
8 with the SEC and NDEP. NRS 445B.230; NRS 445B.210. NDEP is solely authorized to issue
9 air permits. NRS 445B.300. The SEC, by statute, has also promulgated regulations to guide
10 NDEP in its review and processing of applications for air permits. NAC Chapter 445B. None
11 of these requirements are contingent on the effectiveness of the CUP. Furthermore, the Air
12 Quality Operating Permit to Construct (Air Permit) issued to Jungo does not convey any
13 property rights or any exclusive privilege, which means that Jungo must still obtain all other
14 necessary permits and authorizations. See NAC 445B.3365(2)(g).

15 The Air Permit process and the CUP process are two distinct processes that are
16 independent of each other. NDEP and Humboldt County serve different purposes and have
17 different, but sovereign authorities, to issue their respective permits. NDEP serves to enforce
18 the state laws governing air pollution. Humboldt County serves to enforce the local zoning
19 and land use plan.

20 The statutes do not require the applicant for an air permit to obtain a CUP prior to
21 applying for an air permit. The statutes also do not require that an air permit applicant obtain
22 a CUP prior to NDEP issuing an air permit. Similarly, the county ordinances do not require a
23 CUP applicant to obtain an air permit prior to applying for the CUP. The county ordinances
24 also do not require a CUP applicant obtain an air permit prior to applying for a CUP.

25 The status of Jungo's CUP has no effect on the issuance of the Air Permit by NDEP.
26 NDEP's authority to issue the Air Permit is not affected by Humboldt County's decision on the
27 CUP. Similarly, the issuance of NDEP's Air Permit should have no influence on the County's
28 authority to make determinations with respect to Jungo's application for a CUP. Appellants

1 Appellants fail to cite to any legal authority to support their argument that an effective CUP is
2 required before the issuance of an Air Permit.

3 **III. Statutory Requirements for Issuance of an Air Permit**

4 **A. NDEP Complied with the Statutes and Regulations in Issuing**
5 **the Air Permit**

6 Appellants state that issuance of the Air Permit “was clearly erroneous in view of
7 reliable, probative and substantial evidence on the whole, and was arbitrary and capricious
8 and constitutes an abuse of discretion, and was violative the declared public policy.” Brief
9 at 2:1-5. Appellants do not allege any specific statutes or regulations in which NDEP violated
10 in issuing the Air Permit.

11 The Legislature has declared it is the public policy of the State of Nevada to achieve
12 and maintain levels of air quality that will protect human health and safety, prevent injury to
13 plant and animal life, prevent damage to property, and preserve visibility and scenic, esthetic,
14 and historic values. NRS 445B.100. The process for reviewing an application for an Air
15 Permit to Construct is found in NAC Chapter 445B. Because Appellants’ Brief and
16 Supplement do not clarify the issues on appeal, NDEP will address some of the issues
17 identified by the SEC in its April 15, 2010, Notice of Hearing.

18 **i. Ambient Air Impact and Monitoring**

19 Appellants contend NDEP acted inconsistently with public policy by not doing any
20 modeling to determine the quantity of fugitive dust and/or particulate matter and not requiring
21 Jungo to conduct any modeling. Appellants misconstrue the public policy and the statutory
22 scheme regarding the modeling of fugitive dust.

23 Pursuant to NAC 445B.22037, no person may cause or permit the handling,
24 transporting or storing of any material in a manner that allows or may allow controllable
25 particulate matter to become airborne. This is a specific emissions standard that governs the
26 control of fugitive dust and it absolutely prohibits any fugitive emission of a particulate matter.
27 *See id.* NDEP incorporated this specific emissions standard in the Air Permit and Jungo is
28 prohibited from emitting any fugitive dust and/or particulate matter. Air Permit at I-6. Thus,

1 Appellants' contention that NDEP erred in not requiring the modeling of fugitive dust is
2 nonsensical. Because Jungo can have no fugitive emissions of particulates, NDEP did not
3 require any modeling. NDEP's action is wholly consistent with NAC 445B.22037 and the
4 public policy to achieve and maintain levels of air quality that is beneficial to the State. See
5 NRS 445B.100.

6 In addition to misconstruing the statutory scheme, Appellants make no argument as to
7 what purpose is served by requiring modeling and cite to no authority that requires Jungo to
8 provide any modeling. NDEP must abide by the statutory requirements and cannot require
9 Jungo to provide modeling, in contravention of the law, just to appease Appellants.
10 Accordingly, Appellants' contention that NDEP erred in not requiring any modeling has no
11 merit.

12 **ii. The Dust Control Plan Complies with the Regulations**

13 NAC 445B.22037 provides that no person may cause or permit the handling,
14 transporting or storing of any material in a manner which allows or may allow controllable
15 particulate matter to become airborne. It further provides that no person may cause or permit
16 the construction, repair, demolition, or use of unpaved or untreated areas without first putting
17 into effect an ongoing program using the best practical methods to prevent particulate matter
18 from becoming airborne. As used in this subsection, "best practical methods" includes, but is
19 not limited to, paving, chemical stabilization, watering, phased construction and revegetation.

20 *Id.*

21 Appellants contend that NDEP erred by not requiring Jungo to include in its Dust Plan a
22 slew of other techniques. Brief at Form 3:2. Appellants allege the exclusion of these other
23 techniques by NDEP was erroneous and in contravention of the public policy. However,
24 Appellants provide no factual basis as to how the Dust Control Plan is faulty and how those
25 other techniques would further compliance with NAC 445B.22037.

26 Appellants are under the mistaken belief that all the techniques need to be utilized in
27 order to comply with the Regulation. NAC 445B.22037 clearly states that "best practical
28 methods" *includes, but is not limited to,* paving, chemical stabilization, watering, phased

1 construction and revegetation. (Emphasis added.) It does not require that all the techniques
2 identified by Appellants be included in a Dust Plan in order for the Dust Plan to comply with
3 the regulations. The objective of NAC 445B.22037 is to prevent controllable particulate
4 matter to become airborne. A condition in the Air Permit is that Jungo “may not cause or
5 permit the construction, repair, demolition, or use of unpaved or untreated areas without first
6 putting into effect an ongoing program using the best practical methods to prevent particulate
7 matter from becoming airborne . . . ‘best practical methods’ includes, but is not limited to,
8 paving chemical stabilization, watering, phased construction and re-vegetation.” Air Permit at
9 I-6. Thus, the objective of NAC 445B.22037 is achieved by the condition NDEP imposed in
10 the Air Permit.

11 NDEP notes that a similar condition imposed by NDEP was upheld by the Nevada
12 Supreme Court as “sufficiently clear” to enforce the air pollution laws. *See State*
13 *Environmental Commission v. John Lawrence Nevada*, 108 Nev. 431, 434, 834 P.2d 408
14 (1992). In *John Lawrence Nevada*, NDEP granted an Air Permit to Construct to a developer
15 and subsequently issued twelve Notices of Alleged Violation (NOAVs) to the developer for
16 dust disturbances. The NOAVs were issued pursuant to the condition in the air permit, which
17 states that “fugitive dust from all disturbed areas must be controlled by an ongoing program
18 using best practical methods such as watering, chemical stabilization or other controls
19 approved by the Air Quality Officer.” This condition is nearly identical to the condition
20 contained in Jungo’s Air Permit. The Supreme Court held that this condition was sufficiently
21 clear and achieved the purpose of the Regulation governing fugitive dust. *See id.*

22 Appellants present no factual basis or legal authority to support their contention that
23 controllable particulate matter will become airborne if the other techniques are not utilized.
24 Furthermore, Appellants cite to no authority where NDEP is required to include all the other
25 techniques on its checklist in approving a dust plan. Accordingly, Appellants’ argument with
26 respect to NDEP’s review and approval of Jungo’s Dust Control Plan has no merit.

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1 **iii. NDEP Retains Enforcement Power of the Air Permit**

2 Appellants suggest that the Air Permit was issued erroneously and arbitrarily because
3 there was no requirement to monitor and that Jungo will violate the Air Permit without any
4 repercussions. This suggestion ignores the numerous conditions in the Air Permit and the
5 statutory scheme for enforcement of the Air Permit.

6 Jungo is required to comply with each and every provision of the Air Permit and any
7 noncompliance is a ground for revoking the Air Permit. Air Permit at I-2; NAC 445B.3365.
8 Jungo is also required to submit yearly reports including, but not limited to, throughput,
9 production, fuel consumption, hours of operation, and emissions. Air Permit at IV-1;
10 NAC 445B.3365.

11 In addition to the self-reporting by Jungo, NDEP has authority to enter Jungo's
12 premises at any reasonable time to inspect for compliance. NRS 445B.240. NDEP may
13 modify, revoke and reissue, reopen and revise or terminate the Air Permit for cause. Air
14 Permit at I-3; NAC 445B.3265. Thus, contrary to Appellants' suggestion that there are no
15 controls in place to enforce the provisions in the Air Permit, there are numerous controls and
16 NDEP retains statutory authority to enforce the provisions of the Air Permit.

17 **B. Conclusion**

18 NDEP correctly issued the Air Permit pursuant to the air pollution laws of Nevada.
19 Appellants disagree that the Air Permit should have been issued. However, Appellants
20 provide no legal or factual argument for their allegations that NDEP acted arbitrarily and
21 capriciously, and in contravention of the public policy. Accordingly, NDEP respectfully

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1 requests the SEC deny the appeals. Alternatively, NDEP requests that the SEC dismiss the
2 appeals for Appellants' failure to cite to any legal authority within which NDEP failed to
3 comply.

4 DATED this 12th day of May, 2010.

5 CATHERINE CORTEZ MASTO
6 Nevada Attorney General

7 By:


8 NHU Q. NGUYEN
9 Senior Deputy Attorney General
10 State Bar No. 7844
11 100 North Carson Street
12 Carson City, Nevada 89701
13 Tele: (775) 684-1232
14 FAX: (775) 684-1103
15 Email: nnguyen@ag.nv.gov
16 *Attorneys for Nevada Division of*
17 *Environmental Protection, Bureau of Air*
18 *Pollution Control*

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26
27
28
Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

CERTIFICATE OF SERVICE

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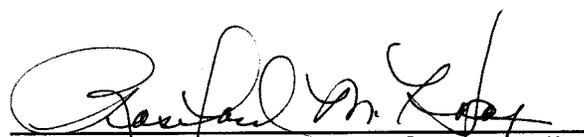
I, Rosiland M. Hooper, certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 12th day of May, 2010, I deposited for mailing a true and correct copy of the foregoing **RESPONSIVE BRIEF**, via United States Postal Service in Carson City, Nevada, by first class mail, postage prepaid, to the following parties:

John Frankovich, Esq.
Debbie A. Leonard, Esq.
MCDONALD CARANO WILSON LLP
P. O. Box 2670
Reno, Nevada 89505

Robert Dolan, Esq.
311 South Bridge Street, Suite E
Winnemucca, Nevada 89445

Massey K. Mayo, Esq.
311 South Bridge Street, Suite E
Winnemucca, Nevada 89445

Phil Jacka
P. O. Box 851
Winnemucca, NV 89446


Rosiland M. Hooper, Legal Secretary II
Office of the Nevada Attorney General