

1 **BEFORE THE STATE ENVIRONMENTAL COMMISSION**
2 **STATE OF NEVADA**

3 In Re:)
4 Appeal of Water Pollution Control Permit:)
5 **Groundwater Permit NEV91022,**)
6 **Reid Gardner Station**)
7)
8)
9)
10)

- NDEP'S**
1) **REPLY TO SIERRA CLUB'S NOTICE OF NDEP AND NV ENERGY'S FAILURE TO COMPLY WITH SEC ORDER TO PRODUCE DOCUMENTS, AND OFFER TO CONTINUE THE HEARING WITH CERTAIN CONDITIONS, and**
2) **OPPOSITION TO MOTION TO SPECIFY ISSUES AND FOR SUBPOENAS TO PRODUCE WITNESSES AT HEARING.**

11 The Nevada Division of Environmental Protection (NDEP), by and through Attorney
12 General, Catherine Cortez Masto, and Senior Deputy William Frey, hereby files this Reply to
13 Sierra Club's Notice of NDEP and NV Energy's Failure to Comply With SEC Order to
14 Produce Documents, and Offer to Continue the Hearing with Certain Conditions (hereinafter
15 "Failure to Comply") and Opposition to Sierra Club's Motion to Specify Issues and for
16 Subpoenas to Produce Witnesses at Hearing (Motion to Produce).

17 As an initial matter, all of the subpoenas requested by the Motion to Produce could
18 and probably should have been raised at the Preliminary Hearing of October 21, 2010, rather
19 than this more wasteful, time consuming, and piecemeal approach.

20 The Motion to Produce was filed late on October 29, 1010. In the Motion to Produce
21 Appellant demands the attendance of certain NDEP personnel at the permit appeal hearing
22 scheduled for November 4-5, 2010. Those individuals are Al Tinney, Jeryl Gardner, Diana
23 Silsby, Shannon Harbor, and Cliff Lawson. Currently Diana Silsby is on sick leave which may
24 continue through the hearing. NDEP will have these individuals present at the hearing so
25 they may be called as witnesses. NDEP reserves the right to object to their testimony on
26 various grounds including relevance and duplication of other testimony.
27 It is laughably ridiculous that the Sierra Club needs a subpoena to compel the attendance of
28 its own expert witness.

1 Therefore, based on NDEP's unlimited commitment to have the people who the Sierra
2 Club has identified present at the November 4-5, 2010, contested case, no subpoena is
3 necessary.

4 The Motion to Produce then lists seven issues for consideration by the State
5 Environmental Commission. For simplicity, NDEP will provide a summary to of each of the
6 seven items consistent with the Sierra Club's numbering and will not restate the Sierra Clubs
7 statements.

8 1. NDEP's issuance of the 2010 Permit renewal is in full compliance with all
9 applicable law. Any potential future violation of the 2010 Permit as alleged by Sierra Club is
10 purely speculative and irrelevant. Sierra Club cites no statute that requires denial of the
11 issuance of a permit based on purported or actual noncompliance.

12 2. The 2010 Permit is lawfully issued and consistent with the complete application
13 that was submitted.

14 3. "Lax" is not a legal ground for denying the Permit. Appellant's use of the word
15 "lax" in this content is meaningless.

16 4. Sierra Club makes an assumption that the 2010 Permit fails to protect against
17 degradation of underground sources of drinking water. Sierra Club acknowledges that brand
18 new ponds using double synthetic liners are a significant improvement over the existing
19 single-lined ponds or even older double-lined ponds. Secondly, the Sierra Club fails to make
20 a connection between the ponds' potential failure and drinking water.

21 5. The Permit does not allow a discharge to the Muddy River or any other surface
22 waters of the state.

23 6. Sierra Club provides no evidence that the permit was issued in violation of any
24 law or regulation.

25 7. The 2010 permit is both coherent and enforceable. More importantly, and what
26 Sierra Club ignores throughout this appeal, is that it has the burden of proof of showing
27 NDEP's failure to comply with its legal mandates. The burden of proof is on the party
28 opposing the administrative decision to show that it is erroneous in view of the record as a

1 whole, or that it was arbitrary or capricious. *Weaver v. State, Dept. of Motor Vehicles*, 2005,
2 117 P.3d 193. To show a decision is erroneous requires a review of the agency decision and
3 determining whether the agency's decision is based on substantial evidence or not.
4 NRS 233B.140, subd. 5; *State ex rel. Employment Sec. Dept. v. Taylor*, 1984, 683 P.2d 1,
5 100 Nev. 318.

6 Finally, Sierra Club by way of these late filed motions seeks to reopen its request for a
7 continuance. NDEP offers no opposition related to the continuance as long as it is for a
8 limited duration and is specifically for a limited purpose. NDEP has repeatedly taken the
9 position that Sierra Club can review any non-privileged document in NDEP's possession and
10 arrange for copying. Also, NDEP has argued that Sierra Club has wasted vast amounts of
11 NDEP's time and resources in having to respond to these last minute filings. On its surface, it
12 is easy to conclude that Sierra Club is more interested in creating appealable issues than
13 challenging the permit on its merits.

14 **NDEP Retains Enforcement Power of the Water Permit**

15 Appellants suggest that the Permit is incoherent and unenforceable. This suggestion
16 ignores the numerous conditions in the Permit and the statutory scheme for enforcement of
17 the Permit.

18 NV Energy is required to comply with each and every provision of the Permit and any
19 noncompliance may be grounds for an enforcement action which may include revoking the
20 Permit. NV Energy is also required to submit yearly reports including, but not limited to flow
21 rate, total petroleum hydrocarbon, leakage rates, and various sampling, throughput,
22 production, fuel consumption, hours of operation, and emissions.

23 In addition to the self-reporting by NV Energy, NDEP has authority to enter NV
24 Energy's premises at any reasonable time to inspect for compliance. NDEP may take an
25 enforcement action which could lead NDEP to modify, reissue, reopen and/or revise Permit
26 for cause. Thus, contrary to Appellants' suggestion that the Permit is unenforceable, there
27 are numerous controls and NDEP retains statutory authority to enforce the provisions of the
28 Permit.

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Conclusion

NDEP correctly issued the Permit pursuant to the water pollution control laws of Nevada. The Appellants provide no legal or factual argument for their allegations that the issued permit is unlawful, lacks enforceability, and in contravention of the public policy. Nor have they demonstrated NDEP acted arbitrarily or capriciously. Accordingly, NDEP respectfully requests the SEC deny the appeal.

DATED this 3rd day of November, 2010.

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CERTIFICATE OF SERVICE

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I, Rosiland M. Hooper, hereby certify that I am an employee of the Office of the Nevada Attorney General, and on this 3rd day of November, 2010, I filed the foregoing **NDEP'S 1) REPLY TO SIERRA CLUB'S NOTICE OF NDEP AND NV ENERGY 'S FAILURE TO COMPLY WITH SEC ORDER TO PRODUCE DOCUMENTS, AND OFFER TO CONTINUE THE HEARING WITH CERTAIN CONDITIONS, and 2) OPPOSITION TO MOTION TO SPECIFY ISSUES AND FOR SUBPOENAS TO PRODUCE WITNESSES AT HEARING**, to the following individuals via email:

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