



RECEIVED

JUN 09 2009

ENVIRONMENTAL PROTECTION

STATE OF NEVADA  
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street  
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO  
*Attorney General*

KEITH G. MUNRO  
*Assistant Attorney General*

JIM SPENCER  
*Chief of Staff*

**MEMORANDUM**

**DATE:** June 4, 2009  
**TO:** Leo Drozdoff, Administrator, Nevada Division of Environmental Protection  
**FROM:** Bill Frey, Senior Deputy Attorney General   
**SUBJECT:** Nevada Administrative Code 445A.107 interpretation

=====

You have requested that I research the interpretation of Nevada Administrative Code (NAC) 445A.107. Your request was made in the context of reviewing the petition from the Amargosa Citizens for the Environment (ACE), which requests, in part, that the State Environmental Commission (SEC) issue a declaratory order that "sewage as defined in NAC 445A.107 includes dairy feedlots." (ACE petition pp. 1-2). As part of my review, I considered if a regulation, plain on its face, requires further interpretation by the agency. In conducting this review I believe case law applicable to courts is also applicable to the SEC and case interpreting statutes are similar to case interpreting regulations.

///

///

### SUMMARY

Ace's petition should be denied because it will have no legal impact on NAC 445A.107 or the NDEP's program regulating animal feed operations. ACE's use of the word "dairy" appears to modify the type of feedlot. But, no such limitation or description of feedlot is necessary or required by the regulations. Alternatively, if ACE is using "dairy" to modify the type of animal waste no further interpretation is required. The regulation includes all water carried animal waste from all feedlots. That is as clear as a regulation can be written.

As an initial and critical matter 445A.107 is a regulation of general applicability. To the extent that ACE's petition refers to Ponderosa Dairy, those comments should be summarily disregarded. The regulation applies to everyone not just to the ongoing dispute between ACE and Ponderosa Dairy. Second, even if you ignore the Ponderosa Dairy comments, it is apparent from the petition that ACE is making a collateral attack on the Ponderosa Dairy permit by arguing in its petition the need for additional monitoring wells at Ponderosa Dairy. The SEC should ignore and disregard all reference to this as it is the subject of a pending contested case between ACE, Ponderosa Dairy and NDEP.

### ANALYSIS

ACE has filed a petition seeking a declaratory order the definition of sewage in NAC 445A.107 to include "dairy" feedlots. ACE suggests that dairy wastewater constitutes "sewage" as defined by NAC 445A.107. ACE suggested at the February 2009 SEC meeting that "dairy" waste should be treated to secondary or tertiary standards. ACE's petition should be denied because, 1) the regulation specifically

includes water-carried animal waste from feedlots, according to a plain language interpretation; and 2) the interpretation that ACE seeks does not change the current regulation of animal waste or require it to be treated to secondary or tertiary standards.

ACE determined that the definition of sewage under NAC 445A.107 does not include dairy feedlot waste and needs to be added. However, according to a plain language interpretation of the regulation any feedlot waste is already included in NAC 445A.107. Therefore, a further interpretation of the regulation is not needed and a declaratory order on issue C of ACE's petition should be denied.

The intent of NAC 445A.107 can be determined according to its plain language. "When the language of a statute is plain, its intention must be deduced from such language, and the court has no right to go beyond it." *Cirac v. Lander County*, 602 P.2d 1012, 1015 (Nev. 1979) citing *Hess v. Washoe County*, 6 Nev. 104, 107 (1870), *see also McKay v. Board of Supervisors of Carson City*, 730 P.2d 438,441 (Nev. 1986) (It is well settled in Nevada that words in a statute should be given their plain meaning unless this violates the spirit of the act.). Additionally, if the words of a statute are clear, we should not add to or alter them to accomplish a purpose not on the face of the statute or apparent from permissible extrinsic aids such as legislative history or committee reports. *Id.* at 1016 citing *Lauritzen v. Casady*, 261 P.2d 145, 146 (Nev. 1953), *see also Thompson v. District Court*, 683 P.2d 17, 19 (Nev. 1984) (Where a statute is clear on its face, a court may not go beyond the language of the statute in determining the Legislature's intent); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (As in any case of statutory construction our analysis begins with the language of the statute. . . and where the statutory language provides a clear

answer, it ends there as well.) Therefore, if the language of NAC 445A.107 is plain then no further interpretation is required.

NAC 445A.107 "Sewage" defined.

1. "Sewage" means the water-carried human or animal waste from residences, buildings, industrial establishments, feedlots or other places, together with such groundwater infiltration and surface water as may be present.
2. The term includes the mixture of sewage with wastes or industrial wastes.

Under a plain reading of this regulation, the definition of sewage contains three main parts with an ordinary meaning: water-carried, human, or animal waste, and from any place. According to this interpretation, if manure or wastewater from a feedlot is considered water-carried and an animal waste, it is already included in the definition of sewage. Therefore, under a strict interpretation of this regulation all feedlots are included and no additional interpretation is required. ACE's use of the word "dairy" appears to modify the type of feedlot. But, no such limitation or description of feedlot is necessary or required by the regulations. Alternatively, if ACE is using "dairy" to modify the type of animal waste again, no further interpretation is required. The regulation includes all water carried animal waste from all feedlots.

The SEC does have some interpretive powers under NRS 233B.120 but those interpretive powers relate only to the applicability of statutes, regulations or decisions of the NDEP. ACE's petition seeks an interpretation of a regulation but this practice is not allowed under the guidelines for interpretation found in NRS 233B.120.

NRS 233B.120:

Each agency shall provide by regulation for the filing and prompt disposition of petitions for declaratory orders and advisory opinions as to the applicability of any statutory provision, agency regulation, or decision of the agency. Declaratory orders disposing of petitions in such cases shall have the same status as agency decisions. A copy of the declaratory order or advisory opinion shall be mailed to the petitioner.

The SEC has some interpretative power but it is limited by this statute to the applicability of regulatory provisions as they currently exist and not as they could be amended. ACE is asking for a declaratory order to interpret a regulation and therefore, they are not asking for an opinion as to the applicability of any regulatory provision or agency regulation. Therefore, ACE's interpretation request is not within the acceptable bounds of NRS 233B.120.

ACE's petition implies that it's interpretation of the definition of sewage, under NAC 445A.107, if issued, would require a different regulatory approach for "dairy" feedlots. But no such change in approach would result.

CONCLUSION

ACE's petition to include "dairy" feedlots in the definition of sewage under NAC 445A.107 is not necessary. The plain language of NAC 445A.107 includes wastewater from feedlots and therefore, no further interpretation is needed. ACE implies that if "dairy" feedlots are included in the definition of sewage then there will be a different regulatory approach. However, there is no necessary change to the regulations or to NDEP regulatory process as a result of this interpretation. Issue C of ACE's petition is a moot point and should be dismissed.