

1 **BEFORE THE STATE ENVIRONMENTAL COMMISSION**

2 **STATE OF NEVADA**

3 In Re:)

4 Appeal of Air Operating Permit: Class I)
5 Operating Permit No. AP4953-1148.01 by)
6 Refuse, Inc.)

**NEVADA DIVISION OF
ENVIRONMENTAL PROTECTION'S
OPPOSITION TO REQUEST FOR
SUBPOENA**

7 The Nevada Division of Environmental Protection, Bureau of Air Pollution Control
8 ("NDEP-BAPC"), by and through counsel, Catherine Cortez Masto, Attorney General for the
9 State of Nevada, William Frey, Senior Deputy Attorney General, and Jasmine K. Mehta,
10 Deputy Attorney General, hereby partially opposes Refuse, Inc.'s request for subpoena.

11 Refuse, Inc. seeks four categories of documents. First, it seeks documents relating to
12 the decision-making that NDEP employed in issuing this permit. Its request includes "[a]ll
13 documents reflecting the basis, which necessarily includes all notes, analyses and
14 evaluations, for the NDEP-BAPC's decision in issuing the above-referenced permit"
15 NDEP objects to this request insofar as it encompasses any privileged communications,
16 including the deliberative-process privilege. Nevada recognizes a common law deliberative
17 process privilege. *DR Partners v. Bd. of County Comm'rs*, 116 Nev. 616, 622, 6 p.3d 465,
18 469 (2000). "The deliberative process privilege protects the decision-making processes of
19 government agencies and covers 'documents reflecting advisory opinions, recommendations
20 and deliberations comprising part of a process by which governmental decisions and policies
21 are formulated.'" *Margolin v. National Aeronautics and Space Admin.*, 2011 WL 1303221 (D.
22 Nev. 2011) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)). The purpose
23 of the deliberative-process privilege is to allow officials to communicate candidly among
24 themselves - which they will not do "if each remark is a potential item of discovery and front
25 page news" - in an attempt to enhance the "quality of agency decisions." *Dep't of the*
26 *Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (quoting *Sears,*
27 *Roebuck & Co.*, 421 U.S. at 151).

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1 The NDEP's predecisional drafts and notes "reflecting the basis" of the NDEP's
2 permitting decision regarding the permit at issue fall squarely within the deliberative-process
3 privilege. The Nevada Supreme Court has previously applied the Nevada Rules of Civil
4 Procedure to administrative proceedings to fill in regulatory gaps. See *Nyberg v. Nevada*
5 *Indus. Com'n*, 100 Nev. 322, 324, 683 P.2d 3, 5 (Nev. 1984). Nevada Rule of Civil Procedure
6 26 does not allow the discovery of privileged matters and limits discovery to information
7 "reasonably calculated to lead to the discovery of admissible evidence." NRCP 26(b). Here,
8 NDEP's notes and drafts relating to its decision-making process regarding the permit at issue
9 are privileged, and, under NRCP 26, not discoverable. The NDEP requests that the subpoena
10 be limited in scope to exclude documents or those portions of documents that fall within this
11 privilege.¹

12 Second, Refuse, Inc. seeks all documents relating to any instances where the NDEP
13 has required continuous emissions monitoring systems ("CEMS") in an air quality permit. This
14 request is overly broad and not reasonably calculated to lead to the discovery of admissible
15 evidence. NRCP 26(b)(1) and NRCP 45(c). It is overly broad in that it is not limited in time
16 and would require the agency to comb through its records dating back to the inception of its
17 permitting program. Nor is it limited in scope to air basins that are similar to the one in which
18 Appellant's project is located. Rather, Refuse, Inc. seeks all permits statewide. It is also
19 overly broad in that it seeks legal authority for requiring monitoring, which legal authority is
20 equally available to the appellant on legal research sites. Similarly, it seeks information
21 regarding NDEP's decision-making with respect to those permits, which information is subject
22 to the deliberative process privilege.

23 The NDEP requests that the request be limited to exclude documents or portions
24 thereof subject to the deliberative process privilege and that it be limited in scope to permits
25 with CEMS requirements issued in the last ten years in PSD-triggered air basins. The NDEP
26 also requests that the request be limited to the agency's technical review document of the

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28 ¹ The NDEP reserves its right to assert its privileges regarding other privileged documents that are
encompassed within Refuse, Inc.'s subpoena requests, including but not limited to attorney-client
communications and attorney work product.

1 permit application, the draft permit that is noticed for public comment, comments and
2 responses to comments, and the final permit. Such information will encompass the majority of
3 the numbered items in request B that Refuse, Inc. seeks.

4 Third, Refuse, Inc. seeks a list of all sources in the Truckee River Corridor subject to an
5 air quality permit and the relevant permit for each source. The NDEP objects to this request
6 on several grounds. First, Washoe County is the permitting authority for a significant portion
7 of the Truckee River Corridor. Appellant needs to obtain the documents it seeks from that
8 agency. Second, as above, this request is not limited in time. The NDEP requests that this
9 request be limited to those permits that the NDEP has issued within the last ten years. Third,
10 the request is not reasonably calculated to lead to the discovery of admissible evidence. The
11 issue presented in Refuse, Inc.'s appeal is whether the NDEP has abused its discretion in
12 requiring CEMS in Refuse, Inc.'s permit. A list of all sources in the Truckee River Corridor
13 and their permits is not reasonably calculated to lead to information regarding the NDEP's
14 exercise of discretion with respect to the Appellant.

15 Finally, Refuse, Inc. seeks each and every Class I air permit that the NDEP has ever
16 issued for any source located in the State. Again, this request is overly broad, unduly
17 burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.
18 NRCP 26(b)(1) and (2) and NRCP 45(c). It is not limited in time. Nor is it limited in scope to
19 PSD-triggered air basins like the basin in which Refuse, Inc.'s project is located. Moreover, to
20 the extent such permits would be relevant to Refuse, Inc.'s appeal, those permits are already
21 encompassed in its prior two requests. The request is, therefore, unreasonably cumulative
22 and duplicative. NRCP 26(b)(2). NDEP requests that Refuse, Inc.'s fourth subpoena request
23 be denied.²

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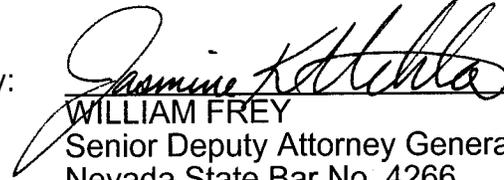
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28 ² Counsel for NDEP and counsel for Refuse, Inc. conferred telephonically on these issues on June 30,
2011. To the extent that counsel can agree on some of the issues raised herein, counsel for the parties will
inform the SEC accordingly.

1 DATED this 30th day of June 2011.

2 CATHERINE CORTEZ MASTO
3 Attorney General

4 By:


5 ~~WILLIAM FREY~~
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CERTIFICATE OF SERVICE

I, Sandra L. Geyer, certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 30th day of June 2011, I deposited for mailing a true and correct copy of the foregoing **NEVADA DIVISION OF ENVIRONMENTAL PROTECTION'S OPPOSITION TO REQUEST FOR SUBPOENA**, via electronic mail and United States Postal Service in Carson City, Nevada, by first class mail, postage prepaid, to the following:

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