APPEAL HEARING
BEFORE THE STATE ENVIRONMENTAL COMMISSION
STATE OF NEVADA

In Re:	)	
	)	
Appeal of Water Pollution Control Permit	)	OPPOSITION TO NDEP'S
Permit No. NEV2006504, Beverly Hills	)	MOTION TO DISMISS
Dairy (A.K. Coral Cay Trust)	)	
_____	)	

INTRODUCTION

Appellant Bill Barrackman, through counsel, opposes the "Motion to Dismiss Pursuant to NRS 233B.127(4)" filed by the Nevada Division of Environmental Protection ("NDEP"). Mr. Barrackman acknowledges the Commission's recent decision dismissing Great Basin Mine Watch's appeal of NDEP Permit No. NV0022269 (Big Springs Mine), but respectfully submits that the Commission erred in its concurrence with the opinion of the Nevada Attorney General on the impact of NRS 233B.127(4) on appeals of water quality permits to the Commission. For the reasons set forth in this memorandum, Barrackman requests that NDEP's Motion to Dismiss be denied, and this matter set for hearing on the merits.

I. MR. BARRACKMAN IS AGGRIEVED BY THE PERMIT

Filed herewith is the Affidavit of Bill Barrackman, which sets forth his interests in Permit No. NEV2006504. Mr. Barrackman owns and resides on real property less than one mile from the site proposed for construction of the Beverly Hills Dairy ("Dairy"). In addition to serving as his primary residence, Mr. Barrackman's family operates a commercial organic pistachio farm on this property. To serve the needs of his farm and his home, Mr. Barrackman pumps groundwater from the same aquifer threatened with pollution by the Beverly Hills Dairy.

It is commonly known that confined animal feeding operations in general, and dairies in particular, can pollute both groundwater and surface water with nutrients (nitrate, ammonia, and phosphorus) as well as bacteria. *See, e.g.* <http://www.epa.gov/Region9/animalwaste/problem.html>. The specific risks posed by the Beverly Hills Dairy will be presented at the hearing on the merits in this case. But in light of the inadequate protections for groundwater included in the Permit challenged herein, Mr. Barrackman's concern that his property and his water will be contaminated by this Dairy are well-founded. For these reasons, he filed the above-captioned appeal.

II. A HARMONIOUS READING OF NEVADA STATUTES DEMONSTRATES THE ATTORNEY GENERAL ERRED.

Mr. Barrackman concedes that he is does not fit the profile that NRS 233B.127(4)(a) or (b) would require for a prospective party in a contested case, if that statute were applicable and enforceable here. Mr. Barrackman's "financial situation" is likely to "be maintained or improved" if the Permit at issue here were denied; and Mr. Barrackman's financial situation is likely to deteriorate because the Permit was granted. But as set forth below, NRS 233B.127(4) is neither applicable nor enforceable, and therefore Mr. Barrackman's appeal must go forward.

In the context of Great Basin Mine Watch's appeal, the Nevada Attorney General opined that both NRS 233B.127(4) and NRS 445A.605(1) must be harmonized. As the Commission is well-aware, NRS 233B.127(4) is a general statute applying to administrative procedures that purports to limit the right of appeal; while NRS 445A.605(1) governs appeals specifically to the Commission, and allows appeal for "any person aggrieved" by a permit.

The courts have interpreted the term "aggrieved person" to include those with any legitimate, substantial (not merely financial) interests. See, e.g., Valley Bank of Nevada v. Ginsburg, 110 Nev. 440, 446 (1994) (an aggrieved party includes one whose personal right or property right is injuriously affected); Kenney v. Hickey, 60 Nev. 187, 105 P.2d 192, 193 (1940) (same); Kondas v. Washoe County Bank, 50 Nev. 181, 254 P. 1080, 1081 (1927) ("aggrieved party" is one injured).

This rubric is not unlike the "standing" analyses routinely employed by state and federal courts around the county – and it is unquestionable that Mr. Barrackman's interests in the permit at issue here are more than sufficient to satisfy those requirements. See, e.g., Friends of the Earth v. Laidlaw, 528 U.S. 167 (2000) (discussion of standing law in context of Clean Water Act). Nevada law also confirms that adjacent property owners are proper parties to challenge NDEP-issue wastewater discharge permits. Helms v.State, 109 Nev. 310, 311 (1993) (reviewing appeal of wastewater discharge permit filed by adjacent property owner before the SEC).

The Attorney General's chief error is that he simply failed in his effort to harmonize these statutes. The Attorney General allowed the general provisions of NRS 233B.127(4) to trump the Commission's specific governing statute in NRS 445A.605(1) allowing "any person aggrieved" to appeal to the Commission. Specifically, the Attorney General's attempt to harmonize the statutes would cause the word "any" in the phrase "any person aggrieved" to be utterly stripped of its ordinary meaning, or "rendered nugatory" under Rodgers v. Rodgers, 110 Nev. 1370, 1373, 887 P.2d 269, 271 (1994) (internal citations omitted).

Indeed, under the Attorney General's construction, "any" does not mean "any"; instead "any" is distorted to mean "some." The Attorney General thus violated the very canon of statutory construction – *i.e.* that conflicting statutes should be construed so as to preserve the meaning of all terms – that was cited in support of his ultimate conclusion that Great Basin Mine Watch lacked standing. [1]

Since the Attorney General's conclusion is impermissible under the very approach he attempted to utilize, the SEC must look elsewhere in an attempt to harmonize the two competing statutes at issue here. Mr. Barrackman submits the two statutes can be easily harmonized. The more appropriate canon of construction to employ in this case is that the specific statute applicable to appeals at the SEC (NRS 445A.605(1)) takes precedence over the statute of general applicability (NRS 233B.127(4)). See Mineral County v. State, Bd. of Equalization, 2005 WL 2233558, *4 (Nev.) (2005) (discussing and applying the "canon of statutory construction that requires statutes to be read in harmony but promotes the use of a specific statute over that of a general statute where they pertain to the same topic"); Western Realty Co. v. City of Reno, 63 Nev. 330, 337, 172 P.2d 158, 161 (1946) ("[i]t is a well settled rule of statutory construction that a special provision, dealing expressly and in detail with a particular subject, is controlling, in preference to a general provision relating only in general terms to the same subject").

[1] Legislative history does not help the Attorney General's conclusion. The Attorney General specifically felt that Assemblyman Goicochea's statements were a "strong indication of the legislative policy underlying NRS 233B.127(4)." See Opinion at pp. 5-6 (Assemblyman Goicochea stating: "This would exempt, for example, the Sierra Club or some other group that didn't really have standing from coming in and having standing in administrative appeals . . . ."). While his comments are not representative of the hearings held on this statute, nevertheless Assembly Goicochea's statements only support Mr. Barrackman's appeal here. Mr. Barrackman is not "the Sierra Club or some other group;" rather Mr. Barrackman is an neighboring property owner who "really" has standing.

In this same vein, the Attorney General failed to construe any meaning in the statement of purpose for the general Nevada Administrative Procedures Act: "By this chapter, the Legislature intends to establish **minimum** procedural requirements for the regulation-making and adjudication procedure of all agencies . . . ." NRS 233B.020 (emphasis added). The Legislature thus left itself and the agencies the freedom to allow additional procedures – such as by allowing additional persons the right to appeal than would otherwise be allowed under the general procedures. The Legislature in fact did so by enacting the NRS 445A.605(1) to provide "any person aggrieved" by a permit the right of appeal to the Commission. In enacting NRS 233B.127(4), the Legislature did not disturb the specific statutes governing appeals at the Commission. As the Attorney General correctly pointed out, the Legislature "is presumed to have 'acted with full knowledge of statutes already existing and relating to the same subject.'" Opinion at p. 5 (citing Ronnow v. City of Las Vegas, 57 Nev. 332, 366, 65 P.2d 133, 146 (1937)).

Moreover, the APA, by its plain terms, does not supersede or abrogate other jurisdictional statutes that apply to specific agencies. The APA expressly provides:

> The provisions of this chapter are intended to supplement statutes applicable to specific agencies. This chapter does not abrogate or limit additional requirements imposed on such agencies by statute or otherwise recognized by law.

NRS 233B.020(2).

The Legislature's specific direction providing the right of appeal to any person aggrieved is an additional requirement imposed on the Commission, which was not abrogated or limited by NRS 233B.127(4).

In short, the Attorney General's opinion unnecessarily creates dissonance, not harmony in Nevada law. The SEC should deny NDEP's Motion to Dismiss under the harmonious reading of Nevada law set forth above. [2]

III. NRS 233B.127(4) VIOLATES THE U.S. CONSTITUTION AS THE SEC HAS APPLIED IT.

If applied to Mr. Barrackman, the SEC's interpretation of NRS 233B.127(4) reflected in its dismissal of Great Basin Mine Watch's Big Springs Mine appeal would violate the U.S. Constitution.

The SEC's interpretation creates two classes of persons, both of which have a financial interest in NDEP permitting decisions. The Beverly Hills Dairy could be viewed as having a *positive* financial interest in the permit because its financial position is benefited by the permit's issuance; while Mr. Barrackman has a *negative* financial interest, because his property and business are at risk of harm from the permit's issuance.

The class of persons with a positive interest in NDEP permitting decisions would continue to enjoy the right of an appeal hearing at the SEC. The benefits of this right include, without limitation: (1) the right to conduct discovery of NDEP's permitting decisions, (2) the right to present witnesses and examine NDEP staff at hearing, and (3) generally the right to defend one's interests without resort to litigation. Indeed, the

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[2] Mr. Barrackman also questions the fundamental fairness of this adjudicatory process. As an impartial arbiter, the SEC must avoid even the appearance of bias. See generally, In Re Ross, 99 Nev. 1 (1983). In this case, the attorney advising the SEC in its review capacity is the attorney who authored Attorney General's opinion at issue. The Attorney General also supplies the attorney for the NDEP. Thus, it is unlikely that the SEC will receive impartial legal advice regarding the Attorney General's opinion. As a consequence, Mr. Barrackman will be denied his due process rights to an unbiased forum. See e.g., Quintero v. City of Santa Ana, 114 Cal.App.4th 810, 7 Cal.Rptr.3d 896 (2004) (due process violated where same attorney acts in advocacy and advisory roles).

SEC's appeal hearing process allows for permit errors to be corrected much more efficiently and cheaply than the other alternative: a direct challenge to the permit in court.

The SEC appeal process itself confers the protection of Nevada's health and environmental protection laws – and a financial and procedural benefit – for those who can utilize it. The class of persons with a negative interest in NDEP permits would not enjoy any of the benefits of the process, and therefore would be at a significant disadvantage in seeking to protect their financial interests from erroneous NDEP permitting decisions.

Mr. Barrackman requests the Commission recognize in any decision resolving NDEP's Motion to Dismiss that its prior interpretation of NRS 233B.127(4) (as reflected in the Big Springs Mine appeal dismissal decision) has the impact of depriving property and business owners of the ability to use the administrative appeal process to protect their interests from pollution and degradation by the activities of their neighbors.

The State of Nevada (including the Commission) has never articulated a rational basis for the distinction set forth above; and indeed, none can exist. Yet the State must make that showing in order to demonstrate it is providing the equal protection of its laws to Nevada citizens. The Equal Protection clause of the Fourteenth Amendment commands that "no state shall deny any person within its jurisdiction the equal protection of the laws." Nordlinger v. Hahn, 505 US 1, 10 (1992) (internal quotations omitted). As the United States Supreme Court has explained, "[i]n considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, U.S. Const., Amdt. 14, § 1, we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a

legitimate governmental purpose." Clark v. Jeter, 486 U.S. 456, 461 (1988). Statutes that classify individuals based on fundamental rights, receive strict-scrutiny review, whereas all other statutes are subject to rational-basis review. Nordlinger, 505 U.S. at 10.

Rational Basis review requires that that a statutory classification be rationally related to a legitimate government purpose. U.S. R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 183-184 (1980). Such a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Johnson v. Robison, 415 U.S. 361, 374-375 (1974) (internal quotations omitted). A legitimate government purpose is said to exist if "there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision maker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103, 107 (2003).

Animosity towards a particular class of people holding a particular viewpoint, does not, however, constitute a rational basis. See Cleburne v. Cleburne Living Center, 473 U.S. 432, 447 (1985); Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973). To the contrary, the United States Supreme Court has expressly held that "a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications." Kelo v. City of New London, Conn., 125 S.Ct. 2655, 2669 (2005).

The question of whether the Commission's previous interpretation of NRS 233B.127(4) passes constitutional muster can and should be avoided. It is well-established that if the plain language of a statute yields a result that is of questionable constitutional validity, a strict plain language reading of that statute should be rejected. See United States v. Witkovich, 353 U.S. 194, 197-98 (1957) (rejecting the literal reading of a statute because it would generate constitutional doubts as to the validity of the statute); Flores by Galvez-Maldonado v. Meese, 934 F.2d 991, 1017 (9th Cir. 1990) (an interpretation "that would infuse a statute with an unconstitutional cast should be read suspiciously and narrowly").[3]

The Commission can and should avoid unnecessary litigation over the validity of NRS 233B.127(4), and find Mr. Barrackman has standing to pursue his appeal in this case under the analysis provided in Section II of this brief.

IV. CONCLUSION

In summary, Mr. Barrackman believes that the Commission's decision to dismiss Great Basin Mine Watch's appeal of the Big Springs Mine permit was not only erroneous as a matter of law, but also potentially damaging to the financial, environmental, and health interests of Nevada citizens. Mr. Barrackman requests the Commission deny NDEP's Motion to Dismiss under the analysis set forth above. Mr. Barrackman further requests the Commission specifically acknowledge in any decision resolving NDEP's Motion to Dismiss that its prior statutory interpretation would deprive property and

[3] To the extent they are not inconsistent with the foregoing and not already stated, Mr. Barrackman incorporates by reference the briefing of Great Basin Mine Watch in opposition to NDEP's motion to dismiss the appeal of NDEP Permit No. NV0022269 (Big Springs Mine), as well as Great Basin Mine Watch's brief seeking reconsideration of the Commission's Order of July 10, 2006.

business owners of the protections afforded by the appeal process before the Commission.

Dated this 18th day of October, 2006.

Submitted by:

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John L. Marshall (NV 6733)
570 Marsh Ave.
Reno, Nevada, 89509
(775) 322-5668

William M. Eddie
610 SW Alder Street, Suite 910
Portland, Oregon 97205
(503) 542-5245

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October 2006, true and correct copies of the OPPPOSITION TO NDEP'S MOTION TO DISMISS, and the AFFIDAVIT OF BILL BARRACKMAN were delivered to the following persons via First Class U.S. Mail:

Nevada Division of Environmental Protection
801 South Stewart Street, Suite 4001
Carson City, Nevada, 89701-5249

Linda Bowman
540 Hammill Lane
Reno, NV 89511

Mary Hachigiah Crater
HCR 69- 449A
Amargosa Valley, NV, 89020

Bruce Crater
HCR 69-450
Amargosa Valley, NV, 89020

Annabell Bell
P.O. Box 312
Amargosa Valley, NV 89020

Annie Bell
P.O. Box 312
Amargosa Valley, NV, 89020

Chip Bell
P.O. Box 312
Amargosa Valley, NV, 89020

Curtis Stengel
127 N. Diablo
HC 69, Box 454 J
Amargosa Valley, NV 89020

David Steele
HCR 69, Box 454 B
Amargosa Valley, NV 89020

Christie Terraneo
P.O. Box 129
Amargosa Valley, NV 89020

Beverly Hills Dairy
A.K Coral Cay Trust
P.O. Box 357
Amargosa Valley, NV 89020

William Frey
NV Attorney General
100 N. Carson Street
Carson City, NV 89701-4717

_____
John L. Marshall