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October 26, 2006

John B. Walker
Executive Secretary
State Environmental Commission
901 S. Stewart Street, Ste. 4001
Carson City, Nevada 89701-5249

**Re: SEC Appeal Hearing - Water Pollution Control Permit NEV2006504,
Beverly Hills Dairy**

Dear Mr. Walker:

Enclosed for filing in this appeal before the State Environmental Commission is the Response of Beverly Hills Dairy to Appellant's Opposition to NDEP's Motion to Dismiss.

Sincerely,

Parsons Behle & Latimer

A handwritten signature in cursive script that reads "Jim Butler".

Jim Butler

Enclosure

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A.K. Coral Cay Trust.
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8 APPEAL HEARING
9 BEFORE THE STATE ENVIRONMENTAL COMMISSION
STATE OF NEVADA

10 In Re:

11 Appeal of Water Pollution Control Permit:
12 **Permit No. NEV2006504**
Beverly Hills Dairy

RESPONSE OF BEVERLY HILLS DAIRY
TO APPELLANT'S OPPOSITION TO
NDEP'S MOTION TO DISMISS

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15 **INTRODUCTION**

16 Intervener Beverly Hills Dairy, by and through its attorneys, Parsons Behle & Latimer,
17 hereby responds to the Opposition of appellant Bill Barrackman to the Motion to Dismiss filed in
18 this proceeding by the Nevada Division of Environmental Protection ("NDEP"). NDEP's motion
19 to dismiss was filed with the Commission on or about August 21, 2006. Appellant's opposition
20 to the motion was filed with the Commission on October 18, 2006. The Commission has
21 scheduled a hearing to determine the standing of Mr. Barrackman and other appellants in this
22 matter on October 30, 2006.
23

24
25 **BACKGROUND**

26 Appellants seek to challenge the decision by the Bureau of Water Pollution Control to
27 issue a water pollution control permit for the proposed Beverly Hills Dairy in Amargosa Valley.
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1 The Bureau determined, in accordance with Nevada Administrative Code (“NAC”) 445A.228
2 through NAC 445A.263, “that the waters of the State will not be degraded from this operation
3 and that public health and safety will be protected.” Notice of Decision, Permit Number NEV
4 2006504 (March 3, 2006). The Bureau reached its decision after evaluating and responding to
5 written comments and comments made at a December 13, 2005 public hearing. The permit
6 requirements are designed to protect water quality and include a 60-mil HDPE-lined process
7 wastewater lagoon and limitations on the use of process wastewater for irrigation of cropland.
8 According to the terms of the permit, the manure and/or process wastewater application rate will
9 be limited by the nitrogen and phosphorous application rates specified in the approved nutrient
10 management plan for the facility.
11

12 In his opposition to NDEP’s motion to dismiss, Mr. Barrackman asks the Commission to
13 find that NRS 233B.127(4) is “neither applicable nor enforceable.” Barrackman Opposition to
14 NDEP’s Motion to Dismiss at p. 2. Beverly Hills Dairy will respond to both arguments.
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16

17 **I. NRS 233B.127(4) is Applicable to this Appeal and Requires that the Appeal be**
18 **Dismissed.**

19 Application of the standing limitation in NRS 233B.127(4) is straightforward: “a person
20 may not be admitted as a party to an administrative proceeding in a contested case involving the
21 grant, denial or renewal of a license” except where specified conditions are met. In an opinion
22 issued earlier this year to the Commission, the Attorney General concluded that the statutory
23 limitation is applicable to an appeal of a Bureau decision to grant a water pollution control permit.
24 The Commission acted in accordance with that opinion and dismissed an appeal based on the
25 appellant’s lack of standing.
26

27 Mr. Barrackman now asks the Commission to reject the Attorney General’s Opinion and
28

1 the earlier Commission decision based on his claim that the Attorney General failed to
2 “harmonize” NRS 233B.127(4) with NRS 445A.605(1). But Mr. Barrackman asks the
3 Commission to reconcile the two statutes by pretending that the Legislature never enacted Senate
4 Bill 428 and never amended the Administrative Procedures Act. That argument ignores an
5 important rule of statutory construction cited in the Attorney General’s Opinion, for the Nevada
6 Supreme Court has stated that “[n]o part of a statute should be rendered nugatory, nor any
7 language turned into mere surplusage, if such consequences can be properly avoided.” Rodgers
8 v. Rodgers, 110 Nev. 1370, 1373, 887 P.2d 269, 271 (1994). The Attorney General’s opinion
9 explicitly considered the argument that the appellant raises now to the Commission and
10 concluded that the two statutes were best reconciled by “allowing the State Environmental
11 Commission to hear appeals as outlined in NRS 445A.605(1), but limiting the parties who can file
12 such an appeal to those who can satisfy the requirements outlined in NRS 233B.127(4).¹

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15 Mr. Barrackman also argues that NRS 233B.127(4) is unconstitutional, but those
16 arguments are inapplicable in this forum because the Commission does not have the authority to
17 rule on the constitutionality of a legislative enactment. See Weinberger v. Salfi, 422 U.S. 749,
18 765 (1975) (constitutionality of a statutory requirement is beyond the jurisdiction of an
19 administrative agency); Reid v. Engen, 765 F.2d 1457, 1461 (9th Cir. 1985) (same). The
20 argument is couched in a request to have the Commission “avoid” a constitutional issue by
21 refusing to apply NRS 233B.127(4) according to its plain terms—but the end result is the same.
22 An administrative agency lacks the authority to pick and choose which statutes it will enforce
23 based on perceived constitutional infirmities.
24

25 CONCLUSION

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27 ¹ Appellant strains to argue that the Attorney General’s reading of the statute renders the APA provision meaningless
28 by turning “any” into “some.” Opposition to Motion to Dismiss at p. 4. But the later enacted statute is more properly
read to modify the term “aggrieved” in the APA rather than “any.”

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The statutory provisions applicable to this appeal are clear: a person may not be admitted as a party unless he or she can demonstrate the financial interests specified by law. Mr. Barrackman has conceded that he cannot make that showing, so his appeal should be dismissed.

Respectfully submitted,

Dated: October 26 2006

Parsons Behle & Latimer

By: 

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John R. Zimmerman, Bar No. 9729
Attorneys for Beverly Hills Dairy,
A.K. Coral Cay Trust.

1
2 **CERTIFICATE OF SERVICE**

3 I hereby certify that I did serve the above **Response of Beverly Hills Dairy to**
4 **Appellant's Opposition to NDEP's Motion to Dismiss** on the following addresses by first class
5 U.S. mail on this 26th day of October, 2006.

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