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Moapa Band of Paiutes & Sierra Club

STATE ENVIRONMENTAL COMMISSION

CARSON CITY, NEVADA

MOAPA BAND OF PAIUTES, a federally
recognized Tribe of Indians,

&

SIERRA CLUB, a California non-profit
Corporation,

Appellants,

vs.

Southern Nevada Health District

&

Southern Nevada District Board of Health,

Appellees

**APPLICATION REQUESTING
SUBMISSION**

AND

**APPELLANTS' MORE DEFINITE AND
DETAILED STATEMENT OF MATTERS
ASSERTED**

Appellants Moapa Band of Paiutes and Sierra Club, by and through their counsel, with such action supported by member declarations, here appeal decisions by the Respondents Southern Nevada Health District and its governing body, the Southern Nevada District Board of Health (together, SNHD), to approve an application for a permit and to issue that requested Permit. Appellants previously submitted SEC Form #3, a request for an appeal hearing before this Commission, and now herewith seek the Commission's leave to submit a "more definite and detailed statement [of the matters asserted]," pursuant to NRS 233B.121(2)(d).

STATEMENT OF MATTERS ASSERTED

Pursuant to NRS 233B.121(2)(d), Appellants hereby submit a more definite and detailed statement of the matters being appealed to the SEC. This supplements and amends Appellants' Updated Form Requesting an Appeal Hearing, submitted to the SEC on Nov. 8, 2010 (attached hereto as Exhibit 1).

INTRODUCTION

Under Landfill Permit LF006-CMF-01 (the Permit), the SNHD authorized NV Energy to expand by an order of magnitude its disposal of coal ash waste in its Class III landfill at its Reid Gardner Station in Moapa, Nevada. The Permit was issued by SNHD on September 9, 2011. The Permit expressly incorporates as conditions several documents by reference, including a Mesa Landfill Sampling Plan (MLSP) denoted in the Permit as "received" on August 31, 2011.

STATUTORY AND REGULATORY ISSUES INVOLVED IN THE APPEAL

In addition to those cited in Ex. 1, Appellants anticipate that the following regulatory sections and statutes will be involved in the appeal: NRS 444.440, NRS 241.020, NAC 444.333, and NAC 444.7481 – 7499.

LEGAL ISSUES

1. Violation of NAC 444.333 and NAC 444.737

The SNHD's approval of the application violated NAC 444.333 and 444.737(2) (requiring that a plan to characterize solid waste for a Class III site must be sufficient to identify physical and chemical characteristics of the waste which may create an environmental hazard or threaten public health) because the application failed to include a characterization and analysis of the solid waste sufficient to identify the physical and chemical characteristics of the waste that may create an environmental hazard or threaten human health.

2. Violation of NAC 444.333 and NAC 444.739

The SNHD's approval of the application violated NAC 444.333 and NAC 444.739(5)

(requiring that a report for the design of a Class III site must demonstrate the design is sufficient to protect the waters of the State from degradation by pollutants or contaminants; the demonstration must consider the volume of predicted leachate generation), because the application failed to include an analysis of the volume, or chemical and physical composition, of leachate, and thus, failed to demonstrate that the design is sufficient to protect the waters of the State from degradation.

3. Violation of NAC 444.7484

The SNHD issued the Permit in violation of NAC 444.7484(3) (requiring that the procedures for and frequency of groundwater sampling must be protective of public health and the environment), because the analysis of groundwater required under the Permit does not specify or require analysis of toxic metals which are known to be present in coal combustion waste. Notably absent from the required groundwater sampling is analysis of aluminum, hexavalent chromium, cobalt, nickel, silver, strontium, and vanadium. These exclusions contribute to the failure of the groundwater sampling under the permit to be protective of public health and the environment.

The Permit also violates NAC 444.7484(3) because the analysis of solid waste disposed of at the landfill required under the Permit does not specify or require analysis of toxic metals which are known to be present in coal combustion waste. Notably absent from the required solid waste analysis is aluminum, hexavalent chromium, cobalt, nickel, silver, strontium, and vanadium. This exclusion contributes to the failure of the groundwater sampling under the permit to be protective of public health and the environment. The Permit further violates NAC 444.7484(3) because the technique specified in the Permit for use in analysis of solid waste to be disposed of is scientifically improper and will fail to produce information necessary to assess the risk to human health and the environment from operations under the Permit.

The SNHD issued the Permit in violation of NAC 444.7484(3) because the Mesa Landfill Sampling Plan (MLSP), incorporated as a condition within the Permit, is predicated on unsupported and erroneous assumptions of what constitutes up-gradient, cross-gradient, and

down-gradient wells in the vicinity of the landfill, and relies on statistical analysis based on these assumptions. Notably, the MLSP ignores decades of groundwater monitoring data that demonstrate that contamination has occurred in what NV Energy classifies as up-gradient wells, and thus, fails to ensure that the MLSP will be protective of public health and the environment.

The Permit and MLSP also violate NAC 444.7484(3) because the MLSP fails to establish background conditions in the uppermost aquifer and instead grandfathers-in historical contamination of the groundwater. This failure to assess contamination from the existing operations biases all analysis of future groundwater monitoring data, and thus fails to ensure that the MLSP will be protective of public health and the environment.

The Permit and MLSP also violate NAC 444.7484(3) because the MLSP only considers potential increases in select water quality parameters as constituting an impact of concern to groundwater. There is no requirement in the MLSP or Permit to report on the *total load of contaminants* to groundwater through the quantification of the volume delivered by leachate from the landfill, and accordingly, no requirement to report water elevation data to the SNHD, thus preventing the evaluation and validation of what constitutes up-gradient and down-gradient wells (and how that condition might change in the future), and precluding analysis of the quantity of leachate being added to the ground water system. These exclusions and omissions cause the MLSP to fail to protect public health and the environment.

The Permit and MLSP also violate NAC 444.7484(3) because the MLSP allows NV Energy, without justification, to eliminate groundwater monitoring for any specific parameter in an individual well if certain conditions exist; for instance, if a well fails to show a worsening trend in the short term for a particular parameter. The option to eliminate key parameters in groundwater monitoring causes the MLSP to fail to protect public health and the environment.

The Permit and MLSP violate NAC 444.7484(3) because the statistical analysis of the groundwater monitoring data that it specifies for use is not designed to detect the added contamination resulting from the placement of new wastes in the landfill, preventing full evaluation as to additional degradation of waters of the state and risks to human health.

4. Violation of NAC 444.7481–7499

The SNHD issued the Permit in violation of NAC 444.7481–7499 (describing groundwater monitoring and corrective action and requiring, among other things, that the monitoring system must be installed to ensure detection of contaminants in the uppermost aquifer), because the Permit fails to ensure detection of contamination of groundwater in the uppermost aquifer. Without requiring detection of contamination of groundwater in the uppermost aquifer, there is no assurance that operations under the Permit will not cause or contribute to pollution of waters of the State.

The Permit also violates NAC 444.7481–7499 (describing groundwater monitoring and corrective action and requiring, among other things, that the monitoring system consist of a sufficient number and location of wells to yield samples from the uppermost aquifer which represent the quality of background groundwater which has not been affected by leakage from the unit), because it fails to require an assessment of the quality of background groundwater which has not been affected by leakage from the landfill. (See especially NAC 444.7483(1)(a)). Without such a requirement, there is no assurance that operations under the Permit will not cause or contribute to pollution of waters of the State.

5. Violation of NAC 444.644

The SNHD issued the Permit in violation of NAC 444.644(1)(a) (requiring that all solid wastes must, among other things, be stored and disposed of by means that do not create a health hazard, public nuisance, or impairment of the environment) because, while the Permit requires the operator to ensure that an adequate amount of water is available for dust control, the Permit fails to require the operator to actually apply water for dust control. Without such a requirement, this condition fails to protect public health and the environment.

The SNHD also issued the Permit in violation of NAC 444.644(2)(a) (requiring that all solid waste systems must be operated in a manner that will not cause or contribute to pollution of the atmosphere), because the Permit does not specify any performance standards for air quality monitoring and does not specify any actions required for exceedance of performance standards.

Furthermore, the Permit fails to require an evaluation of the composition of the coal ash disposed of on the landfill, and so fails to protect against pollution of the atmosphere.

The SNHD issued the Permit in violation of NAC 444.644(2)(b) because the Permit was issued without SNHD's receipt and approval of design drawings and specifications for the landfill expansion (including the liner system), and the contact water ponds and collection system. Without reviewing and approving these designs *prior to issuing* the Permit, the SNHD cannot have assured itself that the expanded landfill would not cause or contribute to pollution of surface or groundwaters of the State.

The SNHD issued the Permit in violation of NAC 444.644(1)(a) (requiring that all solid wastes must, among other things, be stored and disposed of by means that do not create a health hazard, public nuisance, or impairment of the environment), because the Permit allows, without justification, the use of bottom ash as an alternative daily cover for up to one year. Given the nature and history of coal combustion wastes as contaminants of health and the environment the use of such material must be disallowed until such time as it can be demonstrated that the bottom ash constitutes no threat to public health, safety, and the environment.

6. Violation of NRS 444.440

The SNHD violated NRS 444.440 (declaring it state policy to regulate the collection and disposal of solid waste in a manner that will protect the public health and welfare, prevent water or air pollution, prevent the spread of disease and the creation of nuisances, conserve natural resources, and enhance the beauty and quality of the environment) because it based its decision to issue the permit on an application which failed to properly characterize and analyze the solid waste to be disposed of in the proposed landfill expansion, as required by NAC 444.333 and NAC 444.737 (see Legal Issue 1, *supra*) and which failed to include an analysis of the volume or chemical and physical composition of the predicted leachate generation, as required by NAC 444.333 and NAC 444.739 (see Legal Issue 2, *supra*). A decision to issue the permit on the basis of an application that is incomplete in these essential ways, where the terms of that application constitute binding conditions of the permit, is flatly inconsistent with NRS 444.440.

Additionally, SNHD violated NRS 444.440 by issuing a deficient permit. The permit omits from groundwater analysis and solid waste analysis certain toxic metals known to be present in coal combustion waste, in violation of NAC 444.7484 (see Legal Issue 3, *supra*). The MLSP, incorporated into the Permit, ignores groundwater monitoring data that demonstrate that contamination has occurred in wells which NV Energy has denoted as “up-gradient,” and fails to assess background conditions in the uppermost aquifer, in violation of NAC 444.7483(1)(a) and 444.7484 (see Legal Issue 3, *supra*, and Legal Issue 4, *supra*). The MLSP only considers potential increases in select parameters as constituting an impact of concern, but includes no requirement to report total load of contaminants or water elevation data, thus precluding analysis of quantity of leachate being added to the system. (see Legal Issue 3, *supra*). The Permit and MLSP allow NV Energy to eliminate groundwater monitoring for any specific parameter if certain conditions exist, and prevent full evaluation as to additional degradation of waters of the State and additional risks to public health (see Legal Issue 3, *supra*).

Finally, while the Permit requires availability of adequate water for dust control, it fails to require the operator to actually apply water for dust control, in violation of NAC 444.644(1)(a). (see Legal Issue 5, *supra*). The Permit fails to specify any performance standards for air quality monitoring, and fails to require an evaluation of the composition of the coal ash disposed of on the landfill, thus failing to protect against air pollution and violating NAC 444.644(2)(a). The Permit also not only fails to prevent, but affirmatively allows, without supporting justification, the use of bottom ash as an alternative daily cover for up to one year, in violation of NAC 444.644(1)(a) (see Legal Issue 5, *supra*). Further, the SNHD issued the Permit prior to reviewing and approving design drawings and specifications for the landfill system, contact water ponds, and collection system; it accordingly cannot have assured itself that the landfill expansion will adhere to the policy of NRS 444.440.

Taken together, the above-denoted defects in the permit application and Permit conflict with NRS 444.440, because the SNHD’s regulation of the collection and disposal of solid waste under this Permit – with adherence to the terms of the application constituting adherence to a

central set of conditions of that permit – can not and will not protect public health, prevent pollution and nuisances, conserve natural resources, or enhance the beauty and quality of the environment.

7. Violation of NRS 241.020

The SNHD violated NRS 241.020 (requiring that upon any request, a public body shall provide supporting material to the requestor, with limited exceptions) by approving the Permit application after failing to provide, despite Appellants’ requests and objections, documents originating from NV Energy or its contractors, which documents were provided to, cited by, and/or relied upon by, SNHD staff in its recommendation to the SNHD Board of Health for the Board’s October 28, 2010 public hearing.

The SNHD also violated NRS 241.020 when the Board decided at a public hearing to allow SNHD staff to issue the Permit without public access to and review of the Mesa Landfill Sampling Plan (MLSP). The MLSP is incorporated into the Permit by reference, and drafts of this document were withheld from Appellants in violation of Appellants’ right to be provided these materials upon request. The SNHD violated NRS 241.020 by failing to provide Appellants with a copy of the MLSP before issuance of the Permit, thereby preventing Appellants from commenting on the plan.

The SNHD further violated NRS 241.020 when it failed to provide for review of the plan for testing and monitoring for Radium 266 and Radium 228 before issuing the Permit. This plan is incorporated into the Permit by reference.

Respectfully submitted this 20th day of October, 2011.

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Attorneys for Appellants Moapa Band of Paiutes & Sierra Club

EXHIBIT 1

SEC FORM # 3
FORM FOR REQUESTING AN APPEAL HEARING

UPDATED ON NOV. 8, 2010

BEFORE THE STATE ENVIRONMENTAL COMMISSION

1. Name, address, telephone number, and signature of applicant:

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Representing the Moapa Band of Paiutes and the Sierra Club

2. Specify type of applicant: Individual, Partnership, Corporation, or Other:

(1) Moapa Band of Paiutes, a recognized Indian tribe organized under a Constitution approved by the Secretary of the Interior on April 17, 1942 and governed by a Tribal Council.

(2) Sierra Club: A nonprofit public benefit corporation organized in part to protect and restore the quality of the natural and human environment.

Together, the Moapa and the Sierra Club are herein referred to as "Appellants."

3. Other person or persons authorized to receive service of notice: **None, subject to amendment**

Complete description of the business or activity and the location of the activity involved in the request:

Nevada Energy (NVE) sought a permit from the Southern Nevada Health District to modify a Class III Disposal Site, including a lateral expansion, at its Reid Gardner power generating facility. A Class III Disposal Site is a landfill that accepts only industrial solid waste. The Reid Gardner landfill disposes of waste materials generated by its coal-fired power plant at Reid Gardner, as well as asbestos generated at NV Energy facilities statewide. The proposed expansion would substantially expand capacity to dispose of wastes in the existing unlined landfill, including disposal of wastes dredged from the current edifice of wastewater ponds in the flood plain of the Muddy River.

5. Nature of the appeal and grounds thereof:

This is an appeal from a solid waste management authority's grant of a permit to NV Energy to modify and expand its coal ash landfill. On Oct. 28, the Southern Nevada Health District Board of Health, on an 8-4 vote, approved an application by NV Energy to modify and expand its Class III landfill.

This appeal is filed pursuant to NAC 444.748 (2) ["Any person who wishes to appeal from a decision or action of the solid waste management authority may do so. Such an appeal must be made in writing in accordance with the State Environmental Commission's procedural rules."] Appellants reserve the right to supplement the authorities under which this Appeal is submitted.

Appellants also intend to further specify the grounds for the appeal in their opening brief in this matter or, if no briefing is granted, then at the commencement of a hearing of this Appeal before the SNHD or other appropriate authority. Subject to amendment, Appellants here denote that the SNHD's decision to grant the landfill permit was not based on substantial evidence, was clearly erroneous, was arbitrary or capricious, and was contrary to law, because, *inter alia*:

[1] NVE's application failed to establish a need for the expanded landfill.

[2] NVE failed to establish that its proposal to modify and expand its landfill will neither "create a health hazard, public nuisance or impairment of the environment" nor "cause or contribute" to

air pollution or pollution of surface or groundwater, thus requiring a denial of the permit modification, while the evidence provided by Appellants and other comments established that the landfill is presently causing such a hazard, nuisance, impairment, and contribution, and that operations under the application for a permit to modify and expand the landfill will exacerbate these problems substantially.

[3] NVE failed in its application to provide an adequate characterization of the wastes it proposes to dump in the expanded landfill.

[4] NVE failed in its application to provide required landfill leachate analysis in its application.

[5] Monitoring data establishes that the existing landfill is presently leaching contaminants into the soil and groundwater. The Nevada Division of Environmental Protection seeks to eliminate the current ground water monitoring program. This will render it far more difficult for citizens, or the SNHD to ascertain the extent of additional contamination that would result from the proposed expansion.

[6] SNHD's approval of the landfill permit violated Nevada law in that the decision was based, in part, on:

- (a) Materials supplied by NV Energy that were unlawfully withheld from public review and the possibility of meaningful public comment,
- (b) SNHD staff recommendations that were based on (a),
- (c) A judgment that NV Energy's Application was complete, because it had been supplemented by materials referred to in (a), even though those were withheld from public review without lawful justification,
- (d) A judgment that the materials referred to in (a) answered challenges to the adequacy under the law of the application that had earlier been raised by commentators, even though these materials were withheld from public review.

6. Section or sections of the State Air Quality Regulations, Water Pollution Control Regulations, Hazardous Waste Regulations, Solid Waste Management Regulations, or NRS section involved in the appeal:

Appellants reserves the right, in their opening brief or at hearing, to supplement or modify the following list of sections involved in the appeal.

**NRS 233B (Administrative Procedure Act)
NRS 239.010 [inspection of public records],
NRS 439.366 [duties of board of health],
NRS 444.556(3) [landfill permit application documents are public records],
NRS 444.560(4) [landfill operations in violation of regulations prohibited],
NAC 444.643(5) [board of health may revoke permit for noncompliance],
NAC 444.644 [solid wastes must not create health hazard, public nuisance or environmental impairment],
NAC 444.737(2) [solid waste characterization must identify properties that may create environmental hazards or threaten public health],
NAC 444.739 [requirements of report of landfill design], *inter alia*.**

7. Approximate time in hours and minutes necessary for delivery of oral testimony and reading of prepared statements as admissible evidence to be entered in the record:

Approximately 6 hours (sans time for motions):

45 minutes for opening statement, 30 minutes to rebut argument of SNHD and intervenors if any; 15 minutes to cross-examine each intervenor, if any; 2.5 hours for expert witness testimony on direct examination; 60 minutes for expert witness testimony on rebuttal testimony; 30 minutes for closing argument.

Date of Request: **November 6, 2010 – UPDATED ON NOV. 8, 2010**

Sent by Email on Nov. 6, 2010, with update on Nov. 8, to John B. Walker on Nov. 8, 2010, with copy to be mailed on Nov. 8 in c/o State Environmental Commission, 901 South Stewart Street, Suite 4001, Carson City, NV 89701-5249.