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BEFORE THE STATE ENVIRONMENTAL COMMISSION
STATE OF NEVADA
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In Re:

Appeal of Air Operating Permit:
Class 1 Operating Permit No.
AP4953-1148.01 by Refuse, Inc.

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TRANSCRIPT OF PROCEEDINGS
APPEAL HEARING
THURSDAY, OCTOBER 6, 2011
RENO, NEVADA

REPORTED BY:

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A P P E A R A N C E S

The Commission:	JIM GANS, Chairman KATHRYN LANDRETH, Member TOM PORTA, Member
For the Commission:	ROSEMARIE REYNOLDS, ESQ. JOHN WALKER, Executive Secretary
For NDEP:	JASMINE K. MEHTA, ESQ. Deputy Attorney General CAROLYN TANNER, ESQ. Deputy Attorney General
For Refuse, Inc.:	RICHARD J. ANGELL, ESQ. Attorney at Law MICHAEL TOMKO, ESQ. Attorney at Law

1 THURSDAY, OCTOBER 6, 2011, 9:00 A.M.

2 ---oOo---

3 CHAIRMAN GANS: Good morning, everyone. We'll
4 start this hearing. My name is Jim Gans. I'm the Chairman
5 of the State Environmental Commission. Joining me today are
6 two members of our panel, Kathryn Landreth and Tom Porta.
7 I'm glad to have their names in front of them, so you don't
8 listen to my pronunciation.

9 For the record, this appeal is being held this
10 morning at 9:00 a.m. on Thursday, October 6th 2011, Nevada
11 Department of Wildlife in Reno, Nevada. The hearing is open
12 to the public and written notice pursuant to NRS 233B and 241
13 was provided to the affected parties. An agenda for today's
14 hearing was also posted and made available for the parties
15 and the public.

16 Today we will be acting as your appeal panel for
17 the appeal filed by Refuse Incorporated.

18 As a way of background, on May 23rd, 2011, Refuse
19 Incorporated filed an appeal of a revised Class 1 Title 5 Air
20 Operating Permit decision that was issued on May 12th 2011 by
21 the Nevada Department of Environmental Protection. I'll
22 probably say NDEP most of the time. NDEP's decision
23 concerning the air permit, Number AP4953-1148.01. For the
24 record, this permit authorized the construction and operation
25 of three internal combustion engines at the Lockwood Landfill

1 facility located in Storey County, Nevada. These engines
2 would generate renewable energy by burning landfill gas.

3 Refuse Incorporated is opposing the revisions of
4 the permit that require installation of continuous emission
5 monitoring systems, CEMS, for these engines.

6 With that background, I would like the parties to
7 introduce themselves.

8 MR. ANGELL: Rick Angell on behalf of Refuse,
9 Inc.

10 MR. TOMKO: Mike Tomko on behalf of Refuse, Inc.

11 MS. MEHTA: Jasmine Mehta on behalf of NDEP.

12 MS. TANNER: Caroline Tanner on behalf of NDEP.

13 MS. CRIPPS: Colleen Cripps, administrator of
14 NDEP.

15 MR. ELGES: Mike Elges, deputy administrator of
16 NDEP.

17 MS. ARMSTRONG: Katy Armstrong on behalf of NDEP.

18 CHAIRMAN GANS: Gentlemen, if my wife were here
19 today she would tell you you're already beat. Look at all of
20 these women over here.

21 MR. TOMKO: Can we maybe trade a couple of
22 players? For the record, I have a daughter and a wife.

23 CHAIRMAN GANS: Before we start, I want to
24 outline the format we're going to follow for today's hearing.
25 First I would advise everyone that today's proceedings are

1 being recorded by a court reporter, Christy. I would also

2 remind you that all testimony is given under oath and that I
3 may at my discretion limit repetitive testimony and evidence.

4 And with that comment, I want everybody to know
5 that your panel has to leave at 4:00 o'clock, okay. And
6 obviously we would love to get this done today if possible
7 and that's again why let's not repeat ourselves. We hear.
8 we listen. We would like to get done. If not, I'm not sure
9 when we're going to be able to get everybody back together,
10 the attorneys and everyone. And I would hope it would be
11 right away, but it may not be until after the holiday season.
12 So it may be quite a resulting delay. But that's up to you
13 guys. We depend on you to present your cases as quickly as
14 possible for our deliberations.

15 Okay. The first thing we have this morning under
16 our new legislative actions of last session is public
17 comment. We start with public comment first. We will begin
18 the appeal hearing today with public comment. However, if a
19 member of the public wants to speak about the Lockwood
20 Landfill facility general or this case specifically, you will
21 have to hold your comments until after the panel has finished
22 its deliberation and announced its decision. There will be
23 another public comment period at the end of our hearing
24 today. So please note that no action may be taken on any
25 matter during the public comment period that has not been

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1 noticed and posted. It will have to come at another meeting,
2 but we will listen.

3 Okay. With that we will begin if there's nothing
4 else anybody wants to say with our preliminary matters. I
5 want to ask the parties if there are any preliminary matters
6 that we need to address first before we begin.

7 MS. MEHTA: Yes, Mr. Chairman, we do have a few
8 preliminary matters. First, just because we do suspect that
9 however this hearing comes out there's a likelihood that it
10 will be up on petition for judicial review and to preserve
11 our record we do have an objection to the extent that
12 Mr. Tomko is not a Nevada licensed attorney intends to
13 present any evidence or elicit testimony. I don't believe
14 that Mr. Tomko applied for admission pro hac vice and for the
15 record we object to that.

16 In addition, we also have our motion to dismiss
17 and motion for summary judgment that we would like to argue
18 as well as we would like to argue the standard of review so
19 that going forward everybody understands the scope and
20 standard of review that we're all on the same page.

21 CHAIRMAN GANS: Let's take one item at a time.

22 MS. MEHTA: Absolutely.

23 CHAIRMAN GANS: So do you want to start with
24 something? Do you want to start with one of these
25 preliminary matters and explain a little further or is that

1 it?

2 MS. MEHTA: Well, I was just outlining the
3 preliminary matters themselves. You know, the objection for

4 failure to be admitted pro hac vice, we can address that one
5 first.

6 I don't have much more than I've already said. I
7 believe that the Commission has in the past required
8 out-of-state attorneys to be admitted pro hac vice and so we
9 just want to preserve the record if it goes up on judicial
10 review.

11 CHAIRMAN GANS: Response?

12 MR. TOMKO: Yeah, I would like to respond. I
13 would have appreciated if counsel for NDEP would have raised
14 that issue sooner if that was objectionable. Additionally,
15 the rules of the Commission, I believe, indicate that parties
16 may represent themselves without an attorney. So I think the
17 fact that I don't have a Nevada license is immaterial under
18 the SEC's rules.

19 CHAIRMAN GANS: Okay.

20 MS. MEHTA: If I may respond. In any court in
21 Nevada a party may represent themselves. But if they are
22 going to be represented in a court, for example, they have to
23 have a Nevada licensed attorney or somebody who has been
24 admitted pro hac vice. But anybody can represent themselves
25 at any time.

1 CHAIRMAN GANS: You mentioned court a couple
2 times. Does that include the SEC since we're not a court?

3 MS. MEHTA: I believe that the SEC can look to
4 court rules in order to guide -- if there is not a specific

5 rule on point for guidance, the SEC can look to the court's
6 rules, the Rules of Civil Procedure, if it needs to for
7 guidance.

8 MR. TOMKO: With all due respect, the fact that a
9 party need not be represented by an attorney I think is quite
10 persuasive. Additionally, I think the question that counsel
11 raises is one for the courts and not for the Commission, with
12 all due respect.

13 CHAIRMAN GANS: Do you have any advice for us?

14 MS. REYNOLDS: To my knowledge, the Commission
15 has never excluded an attorney from participating as far as
16 representation goes. If NDEP feels strongly about that, I
17 believe it's a matter for the state bar if they want to refer
18 it to the state bar for possible investigation. I don't
19 think that that's a reason to preclude Mr. Tomko from
20 participating.

21 CHAIRMAN GANS: Panel, any comments?

22 MEMBER LANDRETH: I would refer to our attorney's
23 advice on this.

24 MEMBER PORTA: I would too. But they did, NDEP
25 did bring up the fact that under judicial review could this

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1 issue come up in our proceedings here today be nullified
2 under judicial review because Mr. Tomko is representing
3 Refuse, Inc. and not licensed in Nevada?

4 MS. REYNOLDS: I suppose it's possible a court
5 could do something like that. But I can't foresee them

6 setting aside your decision because one of the attorneys
7 that's representing the appellant is not Nevada licensed.
8 Mr. Angell is?

9 MR. ANGELL: I am admitted in Nevada. I am
10 working closely with Mr. Tomko in this matter. I'm certainly
11 comfortable working to cover for the admission of the
12 presentation of evidence by Mr. Tomko. It's as if it's being
13 presented by me. We are partners in the same firm. We've
14 worked closely on this case together.

15 MS. REYNOLDS: Right. I think depending on what
16 the outcome of the decision was here today if this were to go
17 up on a decision for judicial review and was to be heard in
18 court, my understanding of the rules is that Mr. Tomko even
19 if he had applied for pro hac vice to practice before this
20 court would have to file a subsequent application to practice
21 before whatever district court in Nevada would hear this
22 case, so that's out there.

23 MR. ANGELL: I'm not aware of a pro hac
24 application process for commission hearings honestly.

25 MS. REYNOLDS: I can speak to what's been

1 entitled in the past. They simply filed the standard papers
2 with the state bar and had been admitted, you know, had
3 cleared that admission process.

4 But as I said, no one to my knowledge has ever
5 come before the SEC and protested that someone hasn't been
6 admitted.

7 CHAIRMAN GANS: Do we need to vote on this?
8 MS. REYNOLDS: Yes, you need to vote on this.
9 MR. TOMKO: May I make just one more comment? In
10 the rules, Nevada Administrative Code 445B.8915 --
11 CHAIRMAN GANS: Mr. Tomko, I think we've done
12 enough.
13 Motion?
14 MEMBER PORTA: I would move that we go ahead and
15 accept Mr. Tomko as a representative in this hearing with the
16 understanding that there shouldn't be any implication under
17 judicial review.
18 MEMBER LANDRETH: I second that.
19 CHAIRMAN GANS: It's been a motion made and
20 second. All in favor say aye.
21 (The vote was unanimously in favor of the motion)
22 CHAIRMAN GANS: Opposed? Okay. Motion carries.
23 MS. MEHTA: Our next matter was our motion to
24 dismiss or in the alternative motion for summary judgment
25 which we briefed as part of our answering brief.

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1 with respect to the motion to dismiss, if I may
2 proceed in to argument. The standard is a failure to state a
3 claim upon which relief can be granted. And we don't believe
4 that Refuse has stated a claim upon which relief can be
5 granted. It only argues that NDEP has acted arbitrarily and
6 capriciously by requiring continuous emissions monitoring
7 systems or CEMS.

8 But the very regulation that makes NDEP require
9 monitoring provides for discretion. And it says that NAC
10 445B.3405 says that NDEP must write in to the permit
11 requirements for monitoring that are sufficient to ensure
12 compliance with the conditions of the operating permit. That
13 statute or that regulation in and of itself gives the agency
14 discretion. But they've been very careful not to argue an
15 abusive discretion. In fact, their complaint is that the
16 agency imposed too much monitoring, not enough. But they
17 haven't alleged any violation of the rule or any other
18 regulation and therefore they haven't stated a claim for
19 relief.

20 The second point in the motion to dismiss is that
21 the relief that they've requested is improper. They've
22 requested that you open up the permit, write your own
23 conditions in it and send it back. But that would be a major
24 modification of this permit.

25 And because this is a Title 5 permit, it needs to

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1 go through the entire process. It needs to be issued for
2 public comment, for EPA comment and then a final decision by
3 the agency. It also requires the Commission to engage in ad
4 hoc rule making. What they want the rule to say is that the
5 conditions should be minimally sufficient, but that's not
6 what the rule says. And without going through public notice
7 and comment in the rule making process, they're asking the
8 Commission to rewrite the rule. That's improper. And

9 because of that, we request -- the relief that they've
10 requested cannot be granted. So we move to dismiss on that
11 ground as well.

12 Alternatively we moved for summary judgment.
13 Summary judgment is a different standard. It's that there is
14 no genuine issue of material fact in dispute so judgment can
15 be granted as a matter of law. Basically what it means is if
16 the facts aren't in dispute why go through this whole lengthy
17 trial process if you don't have to, if you can make a
18 judgment as a matter of law.

19 And we don't think that there are any material
20 facts in dispute. There's no dispute that Refuse wanted a
21 cap for carbon monoxide emissions of 249 tons per year.
22 There's no dispute that it did that because it wanted to
23 avoid PSD permitting, which is permitting under prevention of
24 significant deterioration so that it didn't have to implement
25 best available control technologies.

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1 There's no dispute that it's emitting nitrogen
2 oxides or NOx in a basin that is PSD-triggered for NOx and
3 there's no dispute that there's very little NOx left in the
4 basin.

5 There's no dispute, no genuine dispute that
6 they're burning a dirty variable fuel. It's not like
7 pipeline quality natural gas, which burns cleanly and
8 predictably.

9 There's no dispute that it wanted maximum

10 flexibility. It wanted to be able to shuttle emissions
11 between all of the sources at the facility so long as it
12 didn't exceed its cap and it wants to be able to use all of
13 those sources at the facility without any operational limits,
14 you know, hourly limits on what the internal combustion
15 engines or the flare can run.

16 And there's no dispute that it also wanted
17 flexibility to be able to overhaul or swap out its engines
18 without doing a permit modification or doing stack testing.

19 So really there are no genuine issues of material
20 fact in dispute. And to the extent that there are, the
21 Commission can always grant partial summary judgment. If
22 there is a fact in your mind that you think you need more
23 evidence on in order to determine the law, certainly you can
24 grant summary judgment as to part of what Refuse has asked
25 for or our motion for summary judgment.

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1 So with that, because we don't believe that there
2 are any material facts that are in genuine dispute in this
3 case, we think that certainly this process could be much
4 shorter if the Commission were to grant that in whole or in
5 part. Thank you.

6 MR. ANGELL: I will address the motion to dismiss
7 and the motion for summary judgment. As an opening matter, I
8 would like to point out that I don't think either the motion
9 to dismiss or the motion for summary judgment is properly
10 brought. Rule 12 and Rule 56 of Nevada Rules of Civil

11 Procedure require these pleadings to be brought in a case of
12 a motion to dismiss as the first responsive pleading. In the
13 case of summary judgment, it would involve a specific number
14 of paragraphs and the ability of both parties to provide in a
15 clear record for the Commission the facts upon which that
16 motion is based, not a narrative in a brief or an oral
17 presentation at hearing.

18 And as this hearing today will demonstrate, this
19 is a fact-intensive issue and it's going to be one that we
20 will certainly be presenting evidence on, disputing and
21 rebutting nearly every fact raised by counsel for NDEP.

22 And I'll start by pointing out as far as the
23 motion for dismissal, NDEP has stated that there has not been
24 a claim upon which relief can be granted. That is not
25 correct. We interpret the rule as, for the rule for

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1 monitoring to contain requirements for monitoring that are
2 sufficient to ensure compliance with conditions of the
3 operating permit, including. And then it goes on to say as
4 necessary.

5 And so what this case comes down to and what
6 we're here to talk about today is what's sufficient and
7 what's necessary and whether to require continuous emission
8 monitoring systems, CEMS, to be placed on this facility,
9 which is unusual for really any facility in the country with
10 very rare exception, is not -- it's far beyond sufficient and
11 it's far beyond necessary. It's overburdensome and creates

12 something that rises to the level of abuse of discretion,
13 which, as RI pointed out in its opening brief, to proceed
14 with this CEMS requirement would be an abuse of that
15 discretion.

16 RI, as counsel has referred to, has not asserted
17 that this is a direct abuse of discretion because it is still
18 an agency to be made by the Department of Conservation and
19 Natural Resources of which the SEC is a part of. So abuse of
20 discretion is really the same as applied at the judicial
21 review stage, not at the agency review stage. We're here to
22 hear facts and we're here to discuss what's sufficient and
23 what's reasonable and what's necessary.

24 And so on the issue of summary judgment just on
25 the matter of facts and what's in dispute or not, I'll

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1 quickly address a few items raised by counsel.

2 First off, the status of the increment for
3 nitrogen -- oxides of nitrogen in the air shed where this
4 facility is located is or at least what the meaning of that
5 increment consumption is is very much disputed by the
6 parties.

7 The increment consumption attributable, as we
8 will present in evidence today, that increment consumption
9 attributable to the Lockwood Landfill owned by RI, Refuse,
10 Inc., is a mere sliver. We will have data that shows that
11 there is no realistic threat to increment in that air basin.

12 Regarding the cap, the carbon monoxide cap to

13 maintain minor source status, the issues related to that cap
14 and carbon monoxide emissions from these engines and how they
15 can be managed to preserve that cap with the existing permit
16 terms without continuous emission monitoring systems is also
17 in dispute.

18 Counsel mentioned that that is dirty and variable
19 landfill gas. Every one, I think, landfills are landfills,
20 they receive garbage, but they do create gas by the
21 decomposition of that waste. That gas is clean prior to
22 consumption of these engines and as we will hear evidence
23 today is not variable in the context of short term spikes
24 that will surge up and down and create the type of variances
25 and emissions that a CEMS unit may if that were the case, may

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1 be appropriate to monitor. We're talking about something
2 that happens in the order of months and years, not in the
3 order of minutes and hours.

4 So there is I think a lot of factual issues that
5 preclude any consideration for summary judgment here and not
6 any basis to say there is undisputed facts by which we can
7 proceed on summary judgment. Thank you.

8 MS. MEHTA: May I respond?

9 CHAIRMAN GANS: Uh-huh.

10 MS. MEHTA: Just a few points. And I'll start
11 with the summary judgment first because that's most recent on
12 my mind. There is no dispute and their application will show
13 that their potential to emit in terms of the cap is over 350

14 tons per year. So to say that the cap is not or the cap is
15 an issue of material dispute I don't think is appropriate.

16 Next, with respect to the gas, we just heard
17 Mr. Angell say that they have, it's variable, they have short
18 term spikes. And the important thing here is that the permit
19 itself has hourly emission limits, pounds per hour, not just
20 tons per year. So they have to comply with both the hourly
21 emission limits as well as a cap, which is a 12-month rolling
22 annual emission limit.

23 To the extent that the meaning of the increment
24 is disputed, nobody disputes that the basin is PSD-triggered.
25 The meaning of that increment is squarely within your

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1 judgment, the application of the law to the facts.

2 And so I think again it's appropriate for you to
3 grant summary judgment and we would request that you do so in
4 our favor. Thank you.

5 CHAIRMAN GANS: Do you want to say more?

6 MR. ANGELL: I would just like to correct one
7 item for the record. I apologize if I misspoke. Counsel for
8 NDEP described my factual dispute as saying that there were
9 spikes in quality or quantity of landfill gas. That is not
10 the case. Landfill gas is generated on a very gradual trend.
11 There are no surges. There are no changes, dramatic changes
12 in composition or volume, as I thought I said and intended to
13 say. This is something that occurs in the order of months
14 and years, not on minutes and hours. Thank you.

15 CHAIRMAN GANS: Okay. Panel, any comments or
16 questions of either party?

17 MEMBER PORTA: One of the issues that NDEP raised
18 and I did read it in the brief was the pound per hour issue
19 with regard to emission. We were strictly talking about the
20 increment in the cap. And so that causes me concern as well,
21 because I think we're only here to hear the cap and the
22 requirement of how to measure that number, if you will, and
23 then the NOx increment.

24 I also think that, you know, reading the statutes
25 that any party agreed by a decision of the agency is entitled

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1 to a hearing. And as much as I would love to dismiss this
2 and go home early today, I think that they are entitled to
3 their presentation to put before us today to hear the facts
4 of this case. And so I'm at this point not inclined to
5 approve or grant the summary judgment, in my opinion.

6 CHAIRMAN GANS: Or dismissal?

7 MEMBER PORTA: Or dismissal.

8 MEMBER LANDRETH: I think there are material
9 issues of fact in dispute. I'm inclined to deny both
10 requests for summary judgment and for dismissal because I
11 believe there are material facts in dispute and I don't think
12 that -- If I can put it the other way. I do think that a
13 pray for relief has been stated.

14 CHAIRMAN GANS: Again for the record for both
15 parties, for me to be able to intelligently respond to a

16 motion for dismissal or summary judgment, I really have to
17 have more information, which means getting in to the appeal
18 hearing itself. And if we're going to do that, we might as
19 well go ahead with the appeal hearing.

20 Based on just what I hear, what I hear is two
21 parties disagreeing. I don't know the substance of that
22 disagreement. And I have a tough time then making a decision
23 until I hear more of the information. So I guess from a
24 different standpoint, Tom and Kathryn, I'm with you. Do we
25 need a motion?

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1 MS. REYNOLDS: Yes.

2 CHAIRMAN GANS: So can we have a motion?

3 MEMBER LANDRETH: I would move to deny the motion
4 for summary judgment and alternatively the motion to dismiss.

5 MEMBER PORTA: I'll second.

6 CHAIRMAN GANS: It's been moved and seconded that
7 we deny summary judgment and dismissal. All those in favor
8 signify by aye.

9 (The vote was unanimously in favor of the motion)

10 CHAIRMAN GANS: Opposed? None. The motion
11 carries.

12 Are there any other preliminary matters?

13 MS. TANNER: I believe so. Caroline Tanner for
14 NDEP. There are a couple of issues I think that need to get
15 resolved, one of which was raised in the opening briefs under
16 the title of standard of review and the second one was the

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17 recently filed request for judicial notice.

18 The reason why I think the standard of review
19 issue needs to be resolved prior is because it will be --
20 whatever decision you make will put the appropriate filter on
21 how you look at this evidence and what scope you would allow
22 in addressing the evidence that comes in because there will
23 be evidentiary objections.

24 And so if I may, I would like to argue our
25 position on both the request for judicial notice as well as

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1 the standard of review issue.

2 CHAIRMAN GANS: But try to keep them a little
3 separate for us.

4 MS. TANNER: Yes, I will. And in fact, I
5 apologize. I don't want to be too lengthy. I want to try to
6 keep it simple. But there's actually four different points
7 that need to get covered, so if you'll bear with me, I think
8 can I make it clear.

9 Just as an introductory matter, I want to just
10 kind of get down to brass tacks about the structure of DCNR
11 and NDEP and SEC within DCNR because in coming to this appeal
12 case late to the game I find the tenor of appellant's brief a
13 little bit unfortunate. And I think that we all who practice
14 before you, the SEC, that represent NDEP that deal with these
15 issues in the State of Nevada, we understand how DCNR works.
16 I'm not sure that the appellants do so I want to break it
17 down for our record that we're very clear about what the

18 relative powers are of the various players that are before
19 you today.

20 First of all, in their opening brief and in this
21 sort of curious request for judicial notice, appellants seem
22 to want us to believe that SEC and NDEP are essentially the
23 same entity presumably because they happen to fall under the
24 Department of Conservation and Natural Resources. And I
25 would submit to you that this is not supported by the

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1 statutes.

2 So looking at those. NRS 232.090 describes the
3 composition of the Department of Conservation and Natural
4 Resources, what we refer to as DCNR. That statute
5 specifically states there are six different divisions, three
6 independent commissions, one board and one program, the
7 Natural Heritage Program.

8 NRS 232.070 specifically outlines what the powers
9 of the director of DCNR are. I'm not going to go through
10 them all, but what's relevant to today is Subsection 1F which
11 allows the director the full power to delegate to any
12 division within the department all authorities and powers
13 deemed necessary to accomplish the purpose of that division.

14 The paragraph four specifically separates out
15 from the director's duties those delegated by law to the
16 various commissions, the three commissions that fall within
17 the department including the SEC.

18 Thus, the SEC by looking at that statute is an

19 independent commission. It is not affiliated with NDEP other
20 than its role, other than its statutory roles to impose, to
21 create regulations and as the administrative appellate board.

22 Refuse's argument if you're following them down
23 the rabbit hole would be that the SEC if you take it to an
24 illogical conclusion, the SEC also controls say the State
25 Engineer, while we know that the State Engineer actually has

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1 its own independent administrative review process. Simply
2 because they're within the same department does not mean that
3 they have the same powers and duties.

4 So if I can do kind of an old school diagram if
5 it makes it clear. This is how the statute reads. Here's
6 DCNR and within it, one, two, three, four, five, six
7 divisions. One, two, three commissions. One board and one
8 program. That's what the statute reads.

9 This is what Refuse wants you to believe. One,
10 two, three, four, five, six and over all of them is the SEC.
11 The statute doesn't read that way. It doesn't make sense.

12 In this case I believe it's undisputed that the
13 director of DCNR has fully delegated all matters in regards
14 to the Clean Air Act to NDEP. And we have for you in the
15 opening brief we did ask that the Court take notice of,
16 judicial notice of a letter from Allen Biaggi dated May 30th
17 2007, who at that time was the director of the Department of
18 Conservation and Natural Resources, to Wayne Nasty, at that
19 time the regional administrator for region nine indicating

20 that all authority under the Clean Air Act have in fact been
21 delegated to NDEP. I don't believe that's a disputed fact in
22 that the reply brief actually indicates that as well.

23 So I would ask that the Court take judicial
24 notice of our Exhibit Q. I'll hand out copies. I'm sorry.
25 The Commission. Did I say Commission? I don't know if you

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1 need to take a second to address that issue.

2 CHAIRMAN GANS: I just want to make sure we mark
3 it.

4 MS. REYNOLDS: You refer to it as Exhibit Q. For
5 purposes of this hearing we're going to, unless you're going
6 to be introducing later exhibits, can we call this Exhibit A?

7 MS. TANNER: It's going to get confusing.

8 MS. REYNOLDS: It's going to be confusing to
9 compile this record.

10 MS. MEHTA: I think that's appropriate. It's
11 however you would prefer to do it. We're referring to it as
12 Exhibit Q because it was Exhibit Q to the brief. But for the
13 purposes of the hearing and the introduction of evidence in
14 the hearing, if you want to call it Exhibit A, I'm fine with
15 that.

16 MS. REYNOLDS: Okay. Are the exhibits that
17 you're going to be introducing later are they already
18 labeled?

19 MS. MEHTA: No.

20 MS. REYNOLDS: Okay. We'll call it Exhibit A.

21 MS. TANNER: So we would simply ask that the
22 Commission take judicial notice of that and we would ask that
23 it be moved in to evidence.

24 I have additional copies if you want. Is it
25 accepted?

24

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1 CHAIRMAN GANS: Uh-huh.

2 MS. TANNER: Okay. Thank you. And just to note
3 on that particular letter, I think it's clear that despite
4 the curious statement in the reply brief that not all of the
5 Clean Air Act authority was delegated, it's clear that the
6 director had delegated all of the authority to both for
7 implementation and enforcement of the Clean Air Act and NDEP
8 and specifically not to the SEC.

9 Now, if you look at the composition and creation
10 of the SEC in contrast to DCNR, you'll note statutorily there
11 are requirements of the various department and agency heads,
12 the members of the Commission, that the governor in addition
13 gets appointees in the amount of five. And of note, there is
14 no statutory requirement that any member of the Commission be
15 an employee or an agency head of the Division of
16 Environmental Protection.

17 Also within NRS 445B.200 is the statement that
18 the DCNR including its division is statutorily mandated to
19 provide technical advice to the SEC.

20 Now, let's look at the powers of the SEC versus
21 is NDEP under the Clean Air Act. I'm going to discuss this

22 in a little more detail down the line, but in sum, when you
23 look at those powers, there is powers in the statutes and
24 regulations in regard to the SEC versus the division as
25 delegated from the director. It is apparent that the powers

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1 of the SEC are very broad as far as the creation of rules and
2 regulations that relate to the various programs that fall
3 under the NDEP. But the NDEP through its delegation also has
4 very broad powers to implement and enforce those regulations
5 down to the individual facilities, not the SEC. So there are
6 two different tracks.

7 The SEC of course is the administrative reviewing
8 entity for these contested cases under the EPA. These
9 contested cases could include permanent appeals or appeals of
10 enforcement orders, for instance. It does not, however, the
11 SEC does not have the authority to place itself in the shoes
12 of the NDEP and issue significant modifications of Clean Air
13 Act permits in a hearing. And that's the difference. That's
14 what Refuse, Inc. wants you to believe today, but that is not
15 your statutory delegated duty.

16 CHAIRMAN GANS: will you repeat that please?

17 MS. TANNER: Pardon.

18 CHAIRMAN GANS: will you repeat that please?

19 MS. TANNER: Yes. My position is that I think
20 that the statutes are clear that although the SEC is the
21 administrative body to review contested cases including
22 permanent appeals and enforcement orders, it does not have

23 the authority to place itself in the shoes of the division
24 and issue significant modifications to Clean Air Act permits
25 as is requested by Refuse in their opening and reply brief.

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1 So Refuse's position that NDEP and the SEC are
2 virtually the same for this purpose is clearly erroneous.

3 And this brings me first to their request for
4 judicial notice. I think this one we can kind of knock out
5 of the park. When you look at that notice, they cite to you
6 the APA, the Nevada APA 233B.123 Subsection 5, which allows
7 an administrative review body, in this case the SEC, to take
8 notice of and I quote "judicially cognizable facts and of
9 generally recognized technical or scientific facts within the
10 specialized knowledge of the agency," here the NDEP.

11 Surprisingly, appellants in their motion or
12 request simply substitute the word "agency" for the word
13 "commission" as if the Commission is the agency. And if you
14 go back and think about all of those preliminary implementing
15 statutes that I just read to you, that makes no sense.

16 So they then ask, and I'm not here to criticize
17 or comment upon anybody's individual experience, but under
18 the statute they cannot say that the SEC is the body that has
19 the technical experience that then can take judicial notice
20 of that technical experience. They take the statute and they
21 literally turn it on its head. It doesn't make sense.

22 So they ask that these various documents that
23 they've listed out, including an air quality district out of

24 southern California's rules and say you because you have the
25 technical knowledge as the agency/commission can take

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1 judicial notice of this. That's not what that statute is
2 meant for.

3 If you look back at the implementing statute for
4 the department or I'm sorry, for the Commission, that allows
5 the Commission -- I'm sorry. That statutorily mandates the
6 agency to provide guidance to the Commission, you read that
7 in accordance with the APA that says that the Commission can
8 take judicial notice of that guidance, that's not what the
9 statute is for. It's actually a statute for NDEP to use 99
10 percent of the time. I can maybe envision a scenario where a
11 permittee could use that statute. But that's not the case
12 here.

13 So to just make it simple, in short, this is not
14 a shortcut to introduce objectionable evidence not included
15 within the administrative record. It is not a shortcut to
16 introduce objectionable evidence of other state's irrelevant
17 regulations. It is the position and will be our position
18 throughout this hearing that this evidence is inadmissible.

19 Now, they can still bring it up. Depending on
20 how you rule on the scope of review, they can still bring it
21 up in their case in chief and ask that it be admitted, but
22 it's not proper topic for judicial notice. And so we would
23 ask that you deny their request for judicial notice of those
24 documents.

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1 with the next one or if we want to --

2 CHAIRMAN GANS: No. I think we should stop
3 there. I have a question of counsel first. Is the judicial
4 review something that we should determine now or if we go to
5 a hearing at the conclusion of the hearing?

6 MS. REYNOLDS: I think at this point the argument
7 is on -- it seems to be -- you've got the standard of review
8 issue and then you've got whether or not you're going to take
9 judicial notice pursuant to Refuse's petition. Did I
10 understand that she has additional arguments she wants to
11 make?

12 MS. TANNER: Yeah. I actually haven't really
13 gotten there yet. And judicial notice is kind of a misnomer
14 in this context. And basically it's saying that the
15 reviewing body can take notice. They call it judicial notice
16 because that's how we usually call it under the rules of
17 evidence. But I don't want to confuse you with judicial
18 review and judicial notice. We can take the word "judicial"
19 out of it. But that's how the statute reads.

20 MS. REYNOLDS: So I think at this point what
21 Ms. Tanner is saying is she has presented all the arguments
22 she wants to with regards to their petition for taking
23 judicial notice of these facts.

24 MS. TANNER: Correct.

25 MS. REYNOLDS: And so yes you can go ahead and

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1 hear the appellant's response and just rule on that issue on
2 you only, not on the standard of review.

3 MS. TANNER: Thank you.

4 CHAIRMAN GANS: Excuse the interruption.

5 MR. ANGELL: No. No worries at all. I'm just
6 fast forwarding ahead to a portion of the power point just to
7 help make some things I think clear as to what the statute
8 says and to what the scope of the Commission authority is and
9 what petitioners and appellants or I hear today under the law
10 to be and are prepared to explain.

11 First off, with the lighting is that readable at
12 all? Is there one row we can turn off maybe?

13 MR. WALKER: It's at that end over there.

14 MR. ANGELL: I apologize in advance if I put
15 everybody in the dark.

16 This line is a paraphrase of the statutory
17 provisions that Ms. Tanner was talking about and also as
18 Commissioner Porta mentioned earlier today.

19 And for starters, the RI is not advocating that
20 the Commission do anything out of the ordinary here. We just
21 wanted to be clear as to the standard of review and to the
22 weight of evidence given here today.

23 And as far as making motion -- as far as the
24 characterization of RI's position as seeking to have the
25 Commission insert itself and usurp authority from NDEP, we

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1 feel nothing could be further from the truth. In fact,
2 Nevada statute 445B.360 simply says with regard to first the
3 fact that a person aggrieved by the issuance of an operating
4 permit or the modification of an operating permit may appeal
5 to the Commission. The Commission shall affirm, modify or
6 reverse any action taken by the director. And the director
7 also includes the director's designees, in this case NDEP.

8 So if in fact the director has delegated all of
9 its Clean Air Act authority to NDEP, it's still the statutory
10 role of the Commission to review that decision and make a
11 decision as to whether that action should be affirmed,
12 modified or reversed.

13 And the question of the standard of review we'll
14 get to in a minute. But just to also be clear, this still is
15 all within the Department of Conservation and Natural
16 Resources' jurisdiction because the Commission, as the
17 statute also says, is within the Department. And the
18 Department is the statutorily designated air quality agency
19 for the State of Nevada and its relationship with the federal
20 government for the federal Clean Air Act.

21 So there really isn't anything complicated about
22 this. RI has never taken the position that the SEC is
23 somehow asserting jurisdiction over the State Engineer.
24 We're simply saying that the SEC has jurisdiction in this
25 case to make its own de novo review of decisions made by NDEP

1 with regard to air quality, which is expressly contemplated
2 by 445B.360.

3 Moving on to the next slide, the Commission's
4 very own rules as well as the APA contemplate this. So here
5 we have the Nevada APA mentioned by counsel for NDEP. NRS
6 233B.123 makes provisions for the acceptance and weighing of
7 evidence.

8 MS. TANNER: I'm sorry to interrupt your
9 argument, Counsel, but I thought we were limiting this
10 particular section to the request for judicial notice.
11 Because I yet have got to the standard of review. So you're
12 not rebutting anything at this point. I thought that was the
13 ruling.

14 CHAIRMAN GANS: I don't want to confuse these
15 issues. I want to take them one at a time.

16 MR. ANGELL: So purely the notice question?

17 CHAIRMAN GANS: Yes.

18 MR. ANGELL: Okay. As far as notice, judicial
19 notice is appropriate. I don't think -- Let me point out to
20 address the issue raised by counsel where it was indicated
21 that we were improperly asserting that the Commission has
22 inserted itself for NDEP. This hearing is obviously a State
23 Environmental Commission hearing, not a NDEP hearing. The
24 APA defines agency under Section 233B.031 to mean any
25 Commission as well as agency, bureau, board, department,

1 division, office or employee of the executive department
2 authorized by law, which we just discussed about the
3 Commission's authority to determine this case, to make
4 regulations or to determine contested cases. So that's the
5 APA definition of agency, which clearly encompasses the
6 Commission here. And the judicial notice provision which
7 then states that the agency may utilize its expertise in
8 weighing evidence.

9 As was explained in RI's motion regarding taking
10 notice of this information, the Commission is the, and as
11 explained a moment ago, so actually my first five minutes was
12 not lost, the Commission is the agency which has the
13 authority here to make its decisions as to whether to affirm,
14 revoke or modify the NDEP's decision. The Commission can use
15 its expertise to determine whether it would like to take
16 notice of that information.

17 RI's proposal and request for notice of that
18 information, which includes stack test data that was
19 submitted with its opening brief back in August, is simply to
20 help streamline the provisions of the evidentiary processes
21 we're going to go through here today to keep us on a faster
22 timeline. This is technical data. We also have individuals
23 here today to help explain that data and answer whatever
24 questions the SEC may have about that data.

25 And it's appropriate for the SEC to use its

1 expertise and take notice of that information as a way of
2 expediting and getting this information in to the record.
3 The weight of that information is for the Commission to
4 decide how it will weigh it and how it will use it.

5 As far as the Commission's -- I'm sorry. As far
6 as NDEP's position that the Commission is not in a position
7 or this rule does not apply to the Commission as evidenced by
8 the APA where the Commission accepts evidence and as
9 evidenced by the Commission's own rules which acknowledge
10 gathering evidence and include reference to taking notice,
11 it's appropriate for the Commission to apply its own
12 expertise and determine if it wants to take that evidence.
13 It's certainly not -- NDEP's argument should not be construed
14 to mean that they are the ones who weigh this evidence in
15 this case. This is now before the Commission. It's not
16 before NDEP.

17 So it's really up to the Commission as to how you
18 weigh this evidence, what information you learn from this
19 hearing and how that proceeds. But it does not mean that
20 NDEP's decisions coming in here are a court of any special
21 deference. This is judicial notice -- And I'll admit the
22 word judicial notice is an evidently procedure, not a
23 standard of review term or anything that relates to if
24 something comes from NDEP it's a court of special deference.
25 The expertise of the agency here is referring to the

1 expertise of the Commission and the Commission's ability to
2 determine whether it finds that information helpful. Thanks.

3 MS. TANNER: If I may. The issue is not whether
4 or not they can present this evidence. The issue is whether
5 or not you can take notice of it now as a means of a default
6 essentially to get this evidence in without our arguing about
7 it. It does in some sense play in to the standard of review
8 and scope of review argument that I'm going to go in to in
9 that what they're trying to admit are a permit from another
10 facility, a permit from a facility out of state, rules and
11 regulations from other states, stack tests that were never
12 provided to the agency in the deliberation of this permit.
13 All of those things are scope-related and we would be
14 objecting to.

15 But by allowing them to -- by giving notice of it
16 beforehand, you're essentially saying okay, you know, this is
17 admissible and we will consider this in our deliberations,
18 yet this is a pivotal aspect of this case. And I would
19 respectfully say that again if you go back and look at the
20 creation of the SEC, yes, members of the SEC have interest
21 and experience within Natural Resources and Conservation, but
22 again, there is no requirement that there be any technical
23 person on the SEC. We're blessed to have Mr. Porta here who
24 is a retiree of NDEP and I'm sure has -- I'm not saying that
25 you don't have the capability to understand the evidence.

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2 If they want to try to present it in their case in chief and
3 we make an objection saying it's outside the scope, fine.
4 But to take notice of it now is essentially defaulting that
5 evidence in without us having the opportunity to truly
6 examine it. And that is what is inappropriate and so we
7 would ask that you deny the request.

8 CHAIRMAN GANS: Comments? Discussion?

9 MEMBER PORTA: I had one question to ask. And
10 the information that was included in the items that they want
11 to notice, those items, such as the source test data and
12 other things, they weren't presented during the permit
13 application, were they?

14 MS. TANNER: No.

15 MS. MEHTA: They were not.

16 CHAIRMAN GANS: I have a question to follow up on
17 Tom's. I'm going to really simplify this, so either party
18 can correct me. What it sounds like you're saying is that
19 they are now presenting evidence that would give us some type
20 of grounds to change the permit that NDEP did not have when
21 it figured out what it wanted to do with the permit.

22 MS. TANNER: Correct.

23 CHAIRMAN GANS: So it seems to me like what
24 you're saying is that -- what they're trying to do is give us
25 information upon which to base our decision that NDEP did not

1 have to base its decision for the permit.

2 MS. TANNER: Exactly.
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3 CHAIRMAN GANS: So then I'm wondering, this is
4 just a wonder, you guys, why are not the appellant and the
5 Division getting back and saying with this new information do
6 we need to do something with the permit? Why are we going
7 through all of this?

8 MS. MEHTA: If I may respond to that? The reason
9 being is that the permit has already been issued. If they
10 wanted that information to come back before the Division for
11 the Division to consider it, there's a way for them to do
12 that. It's called an application for permit modification.
13 But since the permit is already issued, the permit terms are
14 already issued, it's inappropriate to come back and say, "Oh,
15 by the way, we don't like the permit. Here's all of this
16 other stuff that was in our sole possession and custody the
17 entire time but we didn't give it to you while you had the
18 opportunity to take it in to account before you issued the
19 permit."

20 MS. TANNER: And I think it's important that we
21 note that for this very precise issue of notice, I think
22 you're getting to the heart of the matter and we're going to
23 get in to that more on the scope of review, standard of
24 review argument. But on this particular issue that was
25 noted, essentially that mechanism lets them get that evidence

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1 in without fully vetting it at the hearing. So that's what
2 we're objecting to.

3 MEMBER LANDRETH: And I just want to clarify that
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4 they did have the opportunity under your rules of operation
5 we could have come back and said, say we would like to reopen
6 the permit and present you with this evidence that for one
7 reason or another was not made available to NDEP during the
8 permit application process. Did they have an opportunity or
9 was their only resource to try to raise this issue on appeal?

10 MS. MEHTA: No. What you stated is exactly
11 correct. An applicant can always apply to modify its permit.
12 So absolutely, there is a mechanism for Refuse to bring that
13 information back to the agency so that the agency can
14 consider it going through the process. But it is a process.
15 It requires the agency to conduct a technical review,
16 reviewing all of that evidence, draft a permit, the permit
17 engineer drafts a draft permit that is then issued for public
18 notice and comment. And since this is a Title 5 permit, it's
19 also issued to the EPA for notice and comment. Absolutely
20 there is that procedure to have the agency consider that
21 information.

22 MR. ANGELL: If I may address that point. First
23 off, as a preliminary matter, RI with regard to this request
24 for notice is not, is willing to not pursue the request for
25 notice, but RI certainly, while we're all talking about this

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1 would like to address the ability to introduce this evidence
2 if not now later in the hearing.

3 MS. TANNER: And I think that's appropriate for
4 the standard of review argument.

5 MR. ANGELL: Okay. While we are on the issue of
6 whether this information, which I think has been spoken about
7 squarely here, was available to NDEP before the permit was
8 issued, the particular items in the request for notice were
9 not. I would like to -- And this skips ahead a little bit
10 and I don't want to dwell on it. But we will be able to
11 explain today that we got to where we are because the permit
12 issued before RI thought it was going to issue. RI thought
13 there was still a dialogue ongoing. And we have people who
14 can explain that here today between RI and NDEP regarding
15 terms of Lockwood Landfill.

16 Once that permit issued is final, we have ten
17 days to initiate the appeal. The appeal was initiated.
18 Discussions, and we won't get in to that, but we're here
19 because things happened in an order and in a timeline that
20 was, I suppose, a little shorter than RI envisioned it was
21 going to be. And I think the provisions once again regarding
22 this information about accepting evidence contemplate that
23 that is appropriate in a situation like this to accept that
24 kind of evidence. Otherwise, these provisions wouldn't be
25 here and to rule them otherwise would be meaningless. If

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1 this were a purely record review case, it would say such. It
2 would say such regarding the Commission's authority. And it
3 not only says that by judicial review by the courts.

4 MS. REYNOLDS: I agree with NDEP in terms of it
5 seems like they're trying to short-circuit the admission

6 process by presenting these documents through this manner. I
7 do think that there are things that this Commission can take
8 judicial notice of. I do think it's appropriate under
9 233B.123(3) for this Commission to take judicial notice of
10 some things. I mean, after all, NDEP has asked you to take
11 judicial notice of the fact that the -- through Exhibit A
12 that the director of DCNR delegated authority for the Clean
13 Air Act to NDEP. And I think that is appropriate to take
14 judicial notice of.

15 I'm a little bit leery of what they have asked
16 you to take judicial notice of, what RI has. In looking at
17 the six items that they outlined on page two of their brief,
18 most of these are things that happened outside the State of
19 Nevada. I think that's kind of a stretch. I mean the first
20 item on their list is an operating permit that was issued by
21 NDEP to another facility. That one I think it's possible
22 that perhaps you could take judicial notice of. Because that
23 is something that NDEP has issued. But as far as the other,
24 I have questions about.

25 MEMBER PORTA: If we deny the judicial notice,

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1 nothing prevents them as we continue on in this hearing from
2 introducing each of those individually and gives the chance
3 for the Division to make the argument for or against to
4 accept those.

5 MS. REYNOLDS: Correct, correct. So yes, you
6 could do that with respect to all six items.

7 MEMBER PORTA: I'm in favor of denying the notice
8 and if RI wants to bring these up as we proceed in the
9 hearing then we can hear them at that time and then the
10 Division can then make their comments or suggestions or
11 recommendations depending on whatever objections to that.

12 CHAIRMAN GANS: Do you want to make that in the
13 form of a motion?

14 MEMBER PORTA: I will.

15 MEMBER LANDRETH: And I second.

16 CHAIRMAN GANS: A motion has been made and
17 seconded. All those in favor signify by saying aye.

18 (The vote was unanimously in favor of the motion)

19 CHAIRMAN GANS: Opposed? No. The motion carries

20 MS. TANNER: Thank you. If I can continue. Next
21 and finally, I'm going to move in to what's been
22 characterized as the standard of review argument. And I know
23 there's overlap here, and I apologize if there's confusion.
24 I'm going to try to make this as simple as possible. And I
25 think the way to do that is to actually break it down in to

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1 three different issues. One is the standard of review. The
2 second is the scope of the review. And the third is the
3 remedy.

4 I believe contrary to some of the statements made
5 by counsel that the standard of review is actually undisputed
6 in this case. Refuse, Inc. brings their appeal under a claim
7 that the agency acted in an arbitrary and capricious manner

8 by requiring CEMS on these engines at this facility.

9 The standard of review of arbitrary and
10 capricious agency action is in and of itself a highly
11 deferential standard. And so in this instance to say that
12 the SEC cannot give any deference to the agency in
13 determining the appropriate conditions of this permit is
14 untrue.

15 In looking at some of their cases, and I
16 apologize, I forget which one this came out of in
17 jeopardizing. City of Sausalito versus O'Neil, which is a
18 Ninth Circuit Case, gave a good definition of what arbitrary
19 and capricious means of an agency's actions.

20 In that case, and I'm just going to put in the
21 words NDEP where appropriate. An agency's action, NDEP's
22 action is arbitrary and capricious if the NDEP has relied on
23 factors which the legislature has not intended it to
24 consider, entirely failed to consider an important aspect of
25 the problem, offered an explanation for its decision that

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1 runs counter to the evidence before the NDEP or is so
2 implausible that it could not be ascribed to a difference in
3 view for the product of agency expertise.

4 And the Court went on to say that while we must
5 be searching and careful in our inquiry, we may not
6 substitute our own judgment for that of the agency.

7 Accordingly, Refuse's claim that you may give no
8 deference to the decision of NDEP in determining whether or

9 not the agency acted arbitrarily holds no weight. It is in
10 and of itself a highly deferential standard.

11 what's more at issue here is the scope of review.
12 There's been some discussion already about judicial review of
13 agency action and administrative review of agency action.
14 And Refuse likes to mix and match those two at their
15 convenience when it suits them.

16 Refuse goes to great pain to distinguish the
17 statistic statutes that apply to the SEC powers and the
18 procedures at an SEC hearing to conclude that it is a de novo
19 review process. And by de novo review, they want you to
20 think that that means that they can bring in anything and
21 everything for you to consider as far as whether or not NDEP
22 abused its discretion.

23 Refuse acknowledges that under our Administrative
24 Procedure Act that a district court review precludes de novo
25 review. A district court is bound by the administrative

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1 record. And they cite -- And yet in their brief they cite
2 you a definition for de novo review, of judicial de novo
3 review, which is in fact precluded under APA.

4 In contrast, I note that the SEC is bound by our
5 APA. The SEC rules of practice are specifically promulgated
6 under our APA authority. None of the statutes cited by
7 Refuse in their briefs indicate that they can bring in
8 evidence outside of the administrative record in this case.

9 The statutes cited in support of their position

10 are in fact limited. Specifically NRS 455B.895, which is
11 under the rules of SEC practice, states that the SEC may
12 determine the order and presentation of the evidence. That
13 does not mean what they want you to think it means, which is
14 they can introduce any evidence we want.

15 The SEC is clearly an independent body. It does
16 not have the administrative record before it as you come in
17 to this hearing. You rely on us as counsel, as the parties
18 to introduce the relevant portions of the record for your
19 consideration and thus those documents have to be introduced
20 in a specific way under the APA according to NRS 233B.123.
21 Again, that doesn't mean that you can introduce any document
22 you want.

23 Also, the rules of practice before the SEC or
24 under the Nevada APA dis -- there is no allowance for
25 pretrial discovery and I would submit to you that that's also

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1 a limiting factor. They can't do depositions. They can't do
2 interrogatories. They can't go on a fishing expedition.
3 This is an expedited informal, less formal should I say, than
4 a court proceeding manner.

5 Finally, and I think most importantly for our
6 purposes here today is that the APA in 233B.123 precludes the
7 consideration of irrelevant and immaterial evidence. And I
8 know in administrative proceedings there is a loose
9 evidentiary standard, lots of things can come in. But you
10 have that threshold of relevant and material. And I submit

11 to you that when you're making a decision as to whether or
12 not the agency abused its discretion in issuing a permit, the
13 only evidence that's relevant and material is the evidence
14 that was presented to the NDEP in making that decision.
15 Evidence that they chose to bring forward after the permit is
16 issued is irrelevant and immaterial to a decision. And it is
17 the decision that you have the ability to deny, affirm or
18 modify.

19 Now, the case law cited by appellant also does
20 not support their position. They argue that this
21 administrative appeal requires this de novo review. And in
22 support of that, they cite to you nothing but cases that are
23 in fact judicial review of agency actions.

24 That being said, let's go with that, let's look
25 at the cases that they cited. Pacillas, the first one,

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1 defines judicial de novo review. Fine. It is what it is.

2 Davis is not for your consideration.

3 Unfortunately counsel, who should know better, has cited to
4 you an unreported case without noting to you that it is
5 unreported and thus not controlling in any fashion before
6 this Commission.

7 Now, in looking at Davis, however, there are
8 cases that are reported and we can go a little bit deeper in
9 to that. And Davis and those cases that are reported within
10 in it that it cites its authority are Erisa cases, E-r-i-s-a.
11 And I'm sorry, it's not my line of work. It's insurance, I

12 believe, medical insurance, retirement insurance. And they
13 focus on that particular administrative scheme.

14 At any rate, regardless, even though they do note
15 that a de novo review may be appropriate, it is appropriate
16 in very limited circumstances.

17 Most I think relevant to our proceeding today is
18 the case of ASARCO that they cite, mainly because it actually
19 addresses a Clean Air Act permit. And in that case it is
20 interesting to note that it is a Ninth Circuit case. And
21 that held that while under very limited circumstances a
22 reviewing court could go outside the administrative record.
23 In that particular case, the district court did in fact go
24 too far. Moreover, it notes in a long line of cases
25 beginning from the US Supreme Court's Seminole case of

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1 Citizens to Preserve Overton Park versus Volpe, it held that
2 a de novo review is not appropriate at all when the standard
3 is arbitrary and capricious, as we have here.

4 And finally and getting to the final topic of
5 remedy, the ASARCO case also said the following, and I quote,
6 "If the Court determines that the agency's course of inquiry
7 was insufficient or inadequate, it should remand the matter
8 back to the agency for further consideration and not
9 compensate for the agency's dereliction by undertaking its
10 own inquiry on the merits."

11 So finally before we -- But before we get to that
12 final topic, I just want to say, if we are going to examine

13 what judicial de novo review or judicial review of agency
14 action means, we should actually look at how Nevada treats
15 that. So as they've acknowledged under the APA, Nevada
16 specifically precludes judicial de novo review of agency
17 action. And further in the case law I'll cite to you one of
18 many, Weaver versus Nevada DMV, the Nevada Supreme Court held
19 that it was improper to go outside of the administrative
20 record to address questions of fact. Only questions of law
21 may be reviewed de novo.

22 In this case, even based upon the argument that
23 you've heard thus far today, this is fact-intensive. The law
24 is not disputed. They have not said that we have violated
25 the law. What I hear them saying is somehow NDEP has

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1 misapplied the law to the set of facts.

2 Accordingly, arbitrary and capricious precludes
3 de novo review. Questions of fact are not allowed. De novo
4 review is not appropriate. This Commission should confine
5 itself to the record.

6 Now, finally, we get to the remedy portion. So
7 what happens if this Commission says okay, after hearing what
8 evidence we feel is relevant within the record, outside the
9 record, however you rule, and we find that NDEP did in fact
10 act arbitrarily and capriciously in issuing this permit, what
11 do we do about it.

12 Refuse asks you to simply insert their suggested
13 technical language in to the permit and essentially be done

14 with it. They acknowledge that it is a significant
15 modification of a permit, that that significant modification
16 requires the NDEP to defend it to the public, to defend it to
17 EPA. Refuse asks that you order the NDEP to defend that
18 permit that you modify here today to the public and to the
19 EPA. Our position is it's not our permit anymore if you make
20 that modification. It's now yours. And we don't have the
21 authority to defend it.

22 Refuse bases their argument on the very narrow
23 view that the statutes and regulations that address the
24 authority of the SEC and these, like I said in my initial
25 comments, you can't look at in a vacuum. And I'm not going

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1 to go in to too much detail. I'm sorry. But let me give
2 you a couple of examples.

3 NRS 445B.210 addresses the powers of the
4 Commission. And 445B.230 address the powers and duties of
5 the department in regards to the Clean Air Act. So for
6 example, Subsection 4 of the Commission's duty says that the
7 Commission shall cooperate with other governmental agencies
8 including state and federal governments. Contrast that with
9 the powers of the department that allows the department to
10 actually contract with those agencies.

11 Subsection 3 requires records relating to
12 admissions. I'm sorry. That the SEC may require access to
13 records relating to emission that cause or contribute to air
14 pollution. Contrast that with the Department's duties to

15 require access to records relating to emissions which cause
16 or contribute to air pollution.

17 Subsection 5 allows the Commission to establish
18 such requirements for the control of emissions as may be
19 necessary to prevent, abate or control air pollution. More
20 importantly contrast that with the powers of the Department
21 that they may take such action in accordance with the rules
22 and regulations and orders promulgated by the Commission as
23 may be necessary to prevent and abate and control air
24 pollution.

25 I think I can go on. I don't want to waste your

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1 time on making comparisons to the multiple different
2 statutory schemes. But essentially, as I said initially, the
3 SEC has the broad power to create the regulations and the
4 rules and the division has the broad power to enforce that
5 down to the specific facility, in this case Refuse, Inc.

6 So if you follow Refuse, Inc. down this
7 particular rabbit hole, what we believe is that you will
8 effectively usurp NDEP's role as the permitting authority
9 under the CAA and that that position could very well
10 jeopardize Nevada's delegated authority to implement the CAA
11 in the state.

12 In addition, some of the arguments that you've
13 heard thus far I think highlight it. It's actually a very
14 disingenuous argument in that if you modify this permit today
15 in the manner in which they ask you to, you would in fact be

16 acting as an expert in air permitting here today, and in the
17 future it will set a very bad precedent.

18 And again, with due respect to your background
19 and education, I'm not saying you don't understand it. I'm
20 not saying you're not necessarily qualified. But we have a
21 statutory scheme that deals with modification of permits and
22 we have a statutory scheme that deals with the implementation
23 of permits, which is a year-long process. What they're
24 asking you to do is to make a significant modification in a
25 matter of hours.

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1 Refuse can't do that. They have failed to offer
2 any explanation, much less show any good cause as to why they
3 did not offer this information during the permitting process.
4 They stand up and say, gee, this permit got issued really
5 quickly and we didn't have enough time and we don't
6 understand. Completely disingenuous. It got issued quickly
7 at their insistence. This permit got issued in a matter of
8 five months instead of a year at their insistence. So
9 something had to give. I'm sorry that you got the permit at
10 the same time that it went to public notice. But you want
11 this permit now. Here you go, comment on it.

12 During that period of time they had every
13 opportunity to present this evidence and they failed to do
14 so. Instead they come to you now on appeal and what they
15 very well could have done is apply for a modification. It's
16 disingenuous.

17 So our position is first deny the request that
18 this be an appeal de novo. You have every power to limit the
19 evidence that is presented before you today. That's clear
20 within your rules. This should be limited to the review of
21 the record. This should be limited to the information that
22 the Division had at the time that the permit was issued.

23 And if for some reason you find that the Division
24 acted arbitrarily and capriciously, the proper course of
25 action is to remand this matter back down to NDEP with

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1 specific findings of fact and recommendation as to how the
2 NDEP should view this permit and whether or not a
3 modification would then be appropriate. It is not
4 appropriate for this body to modify a permit in this hearing
5 today.

6 And just one final comment. I think if you look
7 at the statute, and I understand that some of our statutes
8 and regulations need some work. I'm the first to admit it.
9 But if you look at the statute that says any person can
10 appeal a permit who is aggrieved or any other order of NDEP
11 to the SEC and the SEC has the power under both of those to
12 deny, affirm or modify, I would say that the SEC has to look
13 at that and say what is it exactly that's being asked to be
14 modified. Because making a significant modification to a
15 permit is an entirely different process than say were we here
16 on an enforcement order and they did something very minor and
17 NDEP said I'm sick of you guys and we're issuing \$25,000 a

18 day fines for the last five days because we can. And they
19 appeal that and they say, SEC, that's just not fair. That
20 penalty is just not fair.

21 You absolutely have the authority to modify that.
22 You have the authority to usurp the Clean Air Act and issue a
23 significant modification without going to public comment or
24 forcing the NDEP to impose a significant modification that
25 they don't agree with and then defend it to NGO, to defend it

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1 to the public in general, to defend it to the EPA? I say no.

2 Under this particular scenario, the only issue
3 that would make any sense if you do find, and I submit you
4 will not, that NDEP acted arbitrarily and capriciously is to
5 remand it back with findings of fact. Thank you.

6 CHAIRMAN GANS: Go ahead, Gentlemen.

7 MR. ANGELL: Thank you. I think as an opening
8 matter to simplify this and bring it back to some pretty
9 clear statutory terms and a pretty clear description of why
10 we're here today. Waste Management and Refuse, Inc. are not
11 here to ask the Commission, the SEC, to get out its pencils
12 and pens and write a new permit.

13 Yes, proposed language was provided, proposed
14 language was requested by NDEP in its briefs. The simplest
15 description of the relief we're here for today, however, has
16 nothing to do with usurping the authority, has nothing to do
17 with rewriting permits. It has to do with the Commission
18 using its expertise and information that both was available

19 to NDEP and to the extent it was helpful to the Commission to
20 make its decision here today, additional information that the
21 continuous emission monitoring systems, the CEMS, which as
22 we'll hear today are very expensive and very difficult to
23 operate and make projects like this essentially unfeasible,
24 that CEMS are not necessary in a situation like this and that
25 alternative monitoring provisions that accomplish and satisfy

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1 the needs of the Clean Air Act are sufficient in getting back
2 to that term I think that was mentioned here earlier today,
3 what's sufficient to ensure compliance with permit
4 conditions.

5 So all the other issues of we're asking SEC to
6 write the permit and place that to NDEP, that's not the
7 relief that Refuse, Inc. is seeking. Refuse, Inc. is seeking
8 a determination as to what is sufficient monitoring. CEMS
9 are not sufficient monitoring. The alternatives that have
10 already been discussed and were discussed and given that
11 information given to NDEP during and prior to the issuance of
12 the permit are sufficient.

13 Getting on to, just to wrap up some of the other
14 points that were raised by counsel, the SEC plainly has the
15 authority to affirm, reverse or modify permits. But it seems
16 as if that is now being constrained to information or
17 constrained in a way that we can only affirm, revise or
18 modify in a deferential matter. Well, that's not in the
19 statute. The statute talks about and provides very -- And

20 now we're talking about judicial review standards versus
21 administrative review standards. The definition of de novo
22 is the definition. I don't think there's an administrative
23 de novo definition and a judicial de novo definition. De
24 novo is simply a term for a fresh look.

25 The Commission is here today with the authority

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1 that clearly says it can do this. It can decide what in its
2 mind based on the information it receives in to evidence with
3 no limitations on what that evidence is, what's sufficient as
4 far as monitoring goes.

5 The difference there, and to address some of the
6 items that were raised by NDEP, is that in the judicial
7 context the courts then as the statute expressly says and the
8 Nevada legislature clearly stated, so obviously it knows how
9 to use the words and the legislature wants to is confined to
10 the record and provides those several criteria for what the
11 Court's basis for making its decisions are. Those do not
12 apply to the Commission as evidence from the statute.

13 So there's really, I think, a very clear as
14 evidenced by the prior slide as to what the Commission's
15 roles are. There's nothing here that's going to usurp
16 authority from NDEP. These are all statutes that have been
17 on the books and I don't think these are exceptionally
18 unusual interpretations or narrow interpretations. They're
19 simply applying plain language as to what the Commission's
20 role is and what the Division's role, what NDEP's role is as

21 the first round of issuing the permit.

22 In fact, a case that was also cited by RI in its
23 opening brief, Las Vegas versus Clark County. The SEC -- I'm
24 sorry. The Court summarized Nevada administrative and
25 judicial review program and stated succinctly, a permit

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1 applicant is entitled to a pre-permit departmental decision
2 followed by a de novo hearing before the State Environmental
3 Commission. This decision satisfies the contested case
4 definition of Nevada APA and makes it the right for judicial
5 review. A judicial review is available in the Nevada state
6 board under and it provides the requisite statute. That was
7 actually a water quality permit, not an air quality permit,
8 but relating to the same standards of the SEC applies.

9 So without going in to more detail about the
10 SEC's standards or practice, certainly as I was starting to
11 describe before, the SEC has been given the tools by statute
12 with its own regulations regarding subpoenas and witnesses
13 and most notably findings of fact. If the SEC isn't supposed
14 to be hearing evidence of all types, it seems very unusual
15 that the SEC would contemplate findings of fact. Those would
16 have already been determined by what is in the record, so to
17 speak.

18 So I don't want to belabor any points. If
19 there's any questions or if you would like to consider that,
20 please do.

21 CHAIRMAN GANS: You do have the opportunity to
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22 say more if you would like.

23 MS. TANNER: Just briefly. I guess I am -- part
24 of it just confuses me. But I will note that Las Vegas
25 versus Clark County, the reference that he makes is there,

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1 however, it was not anything that was vetted by the Court.
2 It's a footnote. It's basically a blanket statement in a
3 footnote. It was not something that was ever argued or it
4 didn't seem like there was any opposing opinion from a case
5 from 1985.

6 we disagree with it. we don't believe that the
7 Commission has the authority or has ever exercised the
8 authority to issue a significant modification for permit
9 based upon an appeal.

10 I don't believe that these statutes give the
11 Commission the authority to basically look at everything but
12 the kitchen sink. Findings of fact are findings of fact.
13 You make findings of fact based upon the administrative
14 record. It's a contorted argument. Again, I think that it's
15 clear. Refuse can't really have it both ways. The cases
16 that they cite in regards to de novo review are very clear,
17 that even if you were allowed de novo review it would be in
18 limited circumstances. And an arbitrary and capricious
19 standard. In the very case that they cite, it states if it's
20 an arbitrary and capricious standard, you don't get it. You
21 don't get de novo review.

22 So I think that's where we're at. And more
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23 importantly, again, I would focus on the fact that what is
24 relevant before this Court is what is material and relevant
25 evidence. You have the authority to keep out evidence that

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1 is immaterial and irrelevant. And any evidence that was not
2 presented to the Division in making their decision on the
3 permit is immaterial and irrelevant.

4 They're not talking -- The statement, the
5 determination here is to determine here today is to figure
6 out whether or not there was sufficient monitoring. I don't
7 think there's any dispute that CEMS is sufficient monitoring.
8 What they're saying is it's too much. That decision is made.

9 So I think it's just you have every ability to
10 limit this evidence and I think it's important that you do.
11 It's important as far as precedent is concerned for
12 industries to have comfort that when a permit is issued that
13 they, anybody, an NGO, a permittee, can't just come in and
14 say, "Hey, by the way, you know, we didn't show the NDEP this
15 evidence but we want to show it to you. So can you please
16 modify our permit?" That is disastrous. That is disastrous
17 and we would ask that you limit the scope of this.

18 CHAIRMAN GANS: Questions of the panel, the
19 parties please. I have a number of questions. First of all,
20 to NDEP, your assertion about us usurping the authority of
21 the Division, have you talked to EPA about that? Is that how
22 EPA would look at it or is that just how you would look at
23 it?

24 MS. TANNER: I know that EPA was involved, and
25 Ms. Mehta can interrupt because she knows more about this

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1 issue than I do. As I understand it, I think it's clear in
2 the brief and I don't want to weigh in to evidence issues,
3 that the EPA was consulted and there were concerns about what
4 Refuse, Inc. was asking for, the broad scope of this permit.
5 And what helped them with that concern was the CEMS.

6 Now, if we take the CEMS out --

7 CHAIRMAN GANS: That's not my question. My
8 question is about usurping the Division's authority if we
9 make a decision. I mean did you talk to EPA and did they
10 tell you, "Okay. It's over. SEC is now the air pollution
11 authority. They're doing this. We can't defend it. You
12 can't defend it." You have to understand, I worked under EPA
13 for 40 years and I think it's very pertinent that I know what
14 EPA, where they weigh in on this.

15 MS. MEHTA: I don't believe that the agency has
16 made that particular inquiry because it's clear in the
17 statute. The statute says that the Department which was then
18 delegated to NDEP is the authority for the purposes of
19 implementing the Clean Air Act in this state.

20 That being said, however, I am aware that EPA is
21 looking very closely at what happens in this proceeding. But
22 as to that particular question, no, I don't believe that
23 conversation has been had.

24 MEMBER PORTA: But I mean as part of the whole
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25 statute and regulatory process that EPA is approved for NDEP,

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1 they recognize that the Commission is an appealing body. And
2 I guess the question here today is under this review process
3 how far can we go with making a determination, a permanent
4 modification? Or do we simply rule yes or no on the action
5 that requires CEMS? So that's a question. And I would like
6 to ask Rosemarie about the arguments that the Division has
7 raised about de novo and its applicability to an
8 administrative body like we are.

9 MS. REYNOLDS: I think both parties have very
10 thoroughly briefed this particular issues. And we don't
11 really have any items from our statutes as to what standard
12 of review you're going to apply. We don't really have any
13 guidance from 233B. There is nothing explicit that says the
14 SEC shall only do a record review or the SEC shall entertain
15 all manners of evidence. We don't have anything like that.
16 All we've got is what it says in NRS 445B.360 about the
17 Commission affirming, modifying or reversing any action.
18 Now, there is a no qualifying language on modification. I
19 think NDEP is suggesting significant modification.

20 I can kind of give you a sense, in the past I
21 think the Commission has been, has ruled without taking this
22 issue up on what standard of review we're going to apply.
23 They have ruled, when the parties have presented evidence
24 that wasn't considered by NDEP at the time the permit was
25 issued, they consider that irrelevant. They don't want to

1 entertain it. They want to look at what NDEP relied on in
2 reaching its decision and that's what they base their
3 decision on. And I think that that's the way to go. And I
4 don't know whether you want to put a label on that. But be
5 that as it may, when they're only looking at the evidence
6 that NDEP has relied upon, the Commission has allowed in
7 instances parties to supplement that record kind of on a good
8 cause basis.

9 And for example, I don't believe any of you were
10 on the panel that heard the Ponderosa Dairy appeal. And in
11 that particular case it was a water permit and there was a
12 modification issued and that was because the monitoring wells
13 that NDEP had specified for the dairy had gone dry.

14 Now, the Commission didn't step in and specify
15 exactly where those new monitoring wells were to be set up.
16 That was left to the parties to negotiate. But they did
17 modify the permit to require some additional monitoring
18 wells. And to a certain extent that was based on some
19 additional evidence.

20 MEMBER PORTA: Okay. So if we were to deny the
21 de novo review, that doesn't preclude us from making a
22 similar decision as we proceed in this case?

23 MS. REYNOLDS: Correct.

24 MEMBER PORTA: Because it wasn't brought up in
25 that particular case.

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1 MS. REYNOLDS: Right. I think what -- If you say
2 we're going to do a record -- we are more or less going to do
3 a record review, that you give the appellants the opportunity
4 to argue evidence that wasn't presented and perhaps ask them
5 to show, you know, good cause for why this wasn't presented
6 and rule on its admissibility of whether it's irrelevant or
7 not to go that route. And perhaps the evidence is something
8 that you feel should have been presented and perhaps you do
9 want to give NDEP that first opportunity to weigh in on that
10 evidence. And so you would send it back in that case. Or
11 maybe it's something that you feel that you could take that
12 evidence and based on the testimony perhaps depending on what
13 kind of modification is asked for you might be able to do
14 that.

15 And to a certain extent, in terms of the evidence
16 that they're introducing that has come outside the record,
17 some evidence, for example, that they've addressed here
18 that's coming from out of state, I don't know if that would,
19 where that stacks on the irrelevant scale, but some evidence
20 NDEP would almost already be aware of it if they've already
21 issued the permit or if they've issued other permits for that
22 particular basin they may not have addressed that
23 specifically in the record but they should be aware that when
24 they're making their determination. So I would think if they
25 want to come in and argue what has been done elsewhere in the

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1 state that that might not necessarily be considered outside
2 the report because those were permits that were issued by
3 NDEP. So I'm not sure if I really answered your question.

4 MEMBER PORTA: No. I think so. I believe so.

5 MS. TANNER: I'm sorry. May I just make a
6 comment? Because you did raise the issue of Ponderosa Dairy
7 and that was not something that we had talked about before.
8 But I just wanted to highlight why I think that case is
9 distinctive if I may.

10 I was actually counsel on that case, as was
11 Parsons, Behle and Latimer for the real party and interest.
12 In that case I agree that a modification of the permit did
13 occur. I will note that it did so over the objection of
14 NDEP, the strenuous objection of NDEP. But it was very
15 different from this case. In that particular modification,
16 in that case it was an NGO appeal. There was a long history
17 between the dairy and the NGO. And the dairy, as I
18 understand it, knowing that that appeal was coming put forth
19 the voluntary groundwater monitoring plan. This was an STDS
20 permit. It was not a Title 5 permit that needed to go back
21 to EPA. It was an STDS permit. In that case they put forth
22 a voluntary ground monitoring water plan that they offered as
23 a way, as a means to settle that case. The NGO refused that
24 offer. But at the end of the day that's exactly what the SEC
25 implemented plus one, plus one additional groundwater

1 monitoring well.

2 Now, we didn't appeal that. We didn't object.
3 There's reasons why people don't appeal. Cost, whatever. I
4 understand that. But it was very different. In this case
5 what's being asked of you in the briefs and then backing away
6 from that today in the briefs what's being asked of you is
7 that you issue a major modification and that major
8 modification has statutory requirements, has requirements
9 under the EPA that that modification be subject to public
10 comment, that it be subject to EPA review. That was not the
11 case in Ponderosa Dairy. I would submit that this is very
12 different.

13 CHAIRMAN GANS: Okay. And I think what I heard
14 both of you say is that it becomes a matter of opinion, was
15 that a significant modification or not. It didn't seem
16 unreasonable to me. It may have been illegal. But that
17 again is an opinion. So I take what you said. But I also am
18 listening to counsel and it seemed to make sense to me.

19 MS. TANNER: Actually I think in Ponderosa there
20 are requirements within the -- there's explanations within
21 the permit about what does constitute a significant
22 modification versus a minor modification. And everybody
23 agreed that what was ordered was a minor modification. It's
24 even in the record where the SEC actually deliberates over
25 that fact that this is a minor modification, you don't need

1 to go back to public comment, we can do this. And at the end
2 of the day it was what we offered to settle the case because
3 we didn't appeal it.

4 But regardless, I think that the precedent of
5 having the SEC issue a major modification of a permit is
6 unprecedented.

7 CHAIRMAN GANS: We understand.

8 MEMBER PORTA: And I have one question. In that
9 Ponderosa case you brought up earlier that potentially if we
10 made such a determination of adjusting the permit of the
11 language that we then become the permitting agency. Did EPA
12 raise that case with Ponderosa even though it was a minor
13 change to the permit that the Commission made?

14 MS. TANNER: You know, with that STDS permit, I
15 don't believe that it required EPA to sign off. I believe
16 there was consultation with EPA but I don't believe we ever
17 had to go back to them and consult with them. So I don't
18 think that was an issue. I can't say 100 percent because
19 it's a little bit outside of my technical expertise. But
20 that was my understanding. Essentially it's an STDS permit
21 but it's our state creation. It does deal with ground water
22 so it's a little bit different.

23 MEMBER PORTA: So the EPA's authority under the
24 water program, I believe, is simply to review the permit,
25 there's no official sign-off, unlike Title 5 where the EPA

1 specifically has to sign off and approve.

2 MS. TANNER: Absolutely.

3 MR. ANGELL: I would like to actually clarify
4 something on that point. First to your point, my
5 understanding is -- well, let me back up. The relief that RI
6 sought here, and yes, the language was suggested in the
7 interest of RI in providing useful information to the
8 Commission. The request was that the Commission would
9 instruct NDEP to then make the necessary permit modification
10 and it would run through the necessary permit modification
11 channels, including an opportunity for public comment as well
12 as EPA review and comment. There's not an actual EPA
13 sign-off. There's only an opportunity to comment. Whether
14 or not EPA would comment on this, I don't think any of the
15 parties know.

16 CHAIRMAN GANS: well, no. I'm asking if they
17 did. I'm troubled by that. That was my question.

18 MR. ANGELL: Yeah. Right. But there's not a --
19 There would be no short-circuiting. There would be no
20 endangerment of the federal ability of the program. I think
21 as Commissioner Porta noted that all of these statutes, all
22 of this structure in place and is reviewed by EPA when a
23 delegation is made. If the Nevada legislature were
24 contemplating changing the APA or the Air Quality Act or the
25 Commission were contemplating changing its rules in a context

1 of reorganizing the authority that EPA determined that it was
2 comfortable with, I think there would be a risk. This is
3 simply working within the boundaries of the program we have.

4 And while I'm discussing this, I would like just
5 to clarify, the arbitrary and capricious arguments presented
6 by RI in its opening brief and its reply brief were
7 explaining that it is an arbitrary and capricious action for
8 this to go final. If the Commission were to affirm NDEP's
9 requirement of CEMS in the Lockwood Landfill permit, that
10 would be subject to an arbitrary and capricious review. We
11 would challenge that as an arbitrary and capricious action.

12 But at this stage because that word is used to
13 help inform the Commission about where this is ultimately
14 headed does not mean that RI concedes that it is an arbitrary
15 and capricious standard and then suddenly the door is slammed
16 on the standard of review.

17 CHAIRMAN GANS: I have an equally troubling
18 question for you as I had for this group over here. At this
19 point in time I don't know whether CEMS is needed or not
20 needed or should be or shouldn't be. But what bothers me
21 about this is what I consider fairness. And if you're going
22 to present us and you say a fresh look, de novo is fresh
23 look. It seems to me that it's new information but I'm not
24 sure of this. Okay.

25 what bothers me about the fairness part of it is,

1 if you're going to present us with new information that they

2 didn't have when they made their decision so that we can make
3 a different decision or at least have that information on
4 what might make a decision, it doesn't seem quite right to me
5 that we're getting new information. And now we're going to
6 then substitute our judgment for a determination that they
7 couldn't make because they didn't have that information. I
8 don't know how far we're going with this.

9 But that's what seems to me at this point in
10 time, I'm concerned about that. I'm troubled by that. I
11 don't know whether CEMS is good, bad or indifferent. So
12 that's a question for you. Is it a fresh look? Is it new
13 information? And are you then giving us this information so
14 that we can make a different determination than they made
15 with their information?

16 MR. ANGELL: Okay. The direct answer to your
17 question is there is new information. As you can tell, there
18 are disagreements between the parties as to when that new
19 information should have been provided.

20 And not to jump ahead, but I think many of your
21 questions will be answered and the appropriateness and the
22 answer to that question will help the Commission determine
23 whether or not it is willing to accept that data as far as
24 the relevancy to this determination.

25 RI's position is that it is relevant and RI will

1 present evidence that it thought it was still in a dialogue
2 when the permit issued. And the dialogue stopped abruptly

3 with permit issues. Some of the information that we have is
4 information that was gathered from other similar engines that
5 operate around the country. So it wouldn't be necessarily
6 something for a permit application of this type, which is not
7 extraordinary. It's not a big facility. To gather
8 information from different points all around the country and
9 assemble it in to a very large binder to say -- In our eyes'
10 perception it was overkill and we'll here about this. I'm
11 not here to testify on behalf of the client. But as far as
12 how that is interpreted, you know, that's really -- we'll
13 present facts on that.

14 CHAIRMAN GANS: But you haven't answered my
15 question.

16 MR. ANGELL: Could you rephrase it? I'm sorry.

17 CHAIRMAN GANS: I'm concerned that you're going
18 to give us some information upon which we're supposed to make
19 a determination that NDEP didn't have to make their
20 determination. It's that simple. It doesn't seem right. If
21 they didn't have it, they should have it so maybe they will
22 or maybe they wouldn't modify their determination. But it
23 seems like it's a new ball game now.

24 MR. TOMKO: Part of our presentation, Chairman
25 Gans, will be, as Rick was indicating, there was a truncated

1 permit process where if there had been a better dialogue, if
2 there had been the more usual opportunity for Refuse to, if
3 Refuse knew, had a heads up, as they typically would, that

4 CEMS was going to be required, this information would have
5 been provided during the course of the dialogue that
6 typically takes place.

7 Now, we -- there is information within NDEP's own
8 permitting history that indicates CEMS is not appropriate.
9 There's a fundamental question when you think of CEMS
10 continuous emission monitors, is their variability to the
11 extent that you need to continuously monitor those emissions.
12 We believe that there's not. We believe that NDEP did not
13 assess that variability prior to making their determination.
14 And so we would like to offer evidence during the course of
15 this proceeding that shows if they had, if they had made that
16 inquiry, if they had given our client the opportunity to
17 present that information, that information would show
18 ultimately that there's not that kind of variability that
19 would warrant CEMS.

20 And so I mean we are presenting information from
21 NDEP's own permits, as you'll see, to demonstrate that CEMS
22 is not typically required. But I think there is, I think the
23 Commission will want to understand, well, geez, why would you
24 need to monitor these continuously. And I think it would be
25 informative for the Commission to see that evidence during

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1 the course of this proceeding.

2 CHAIRMAN GANS: And I'm not opposed to that. I'm
3 just asking the question that evidently since you did not ask
4 for or apply for a permit modification with this new

5 information, I get the feeling that maybe you figured it
6 wouldn't do any good so you had to come to us to see if it
7 would do any good with us.

8 MR. TOMKO: I think that's a fair statement.

9 CHAIRMAN GANS: Any other comments, questions
10 from the two parties?

11 MEMBER LANDRETH: I just have a question for
12 Mr. Angell. I am curious about the de novo review position
13 that you've taken. And one of the things that I'm really
14 wondering about is do you believe that de novo review applies
15 in every appeal that comes before the SEC or is it unique to
16 this particular case because of the so-called truncated
17 process that I think in your mind cut off the opportunity to
18 provide information? I know that's an issue here and who
19 called for the truncated process and so on. But are you
20 taking a position that the SEC every time an appeal regarding
21 a permit comes up has the authority to open it up, start from
22 essentially, not from scratch but build on the administrative
23 record and take in any additional information that you think
24 is relevant?

25 MR. ANGELL: I'll admit I haven't contemplated

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1 every scenario. But to answer your question, obviously we
2 think it applies in this case. In similar permit appeals, I
3 think the plain lines for the statute says that it would be
4 de novo review. I think the Commission still has an
5 important role as a gate keeper of new information here and

6 that's a standard evidentiary threshold applied by any
7 tribunal making decisions as to what type of information is
8 going to accept upon which to base a decision.

9 And so Chairman Gans' question about is this
10 fair, well, that factors in to that -- that question can be
11 part of the Commission's determination about how to approach
12 this. But I think that -- And so just speaking now about
13 other scenarios, there's been a scenario described where a
14 permit may be issued and another party, an interested third
15 party chooses to challenge that permit or seek different
16 terms and they come in after comment periods have closed and
17 file an appeal and say hey, we think this information is
18 important and we think this changes, this requires the
19 Commission to change the permit. I think the Commission can
20 make its determination and it can determine at two levels.
21 It can determine whether or not to admit the evidence. It
22 can determine how much weight it gives to that evidence, if
23 it's good quality evidence. If it's air quality or water
24 quality or whatever new information is being presented to the
25 Commission that perhaps was not before NDEP at the earlier

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1 stage, if it does not have indicia of dependability and being
2 helpful to in this case the Commission and this adjudicatory
3 proceeding, the Commission can weigh that in to how much
4 weight it assigns or whether it's admissible.

5 But to answer your question, I think yes, it is
6 intended to be a time for gathering and weighing information.

7 MEMBER LANDRETH: Well, I guess I'm concerned and
8 I would like you to respond to this. Chairman Gans' question
9 when he promised this, and that is do you perceive any
10 mischief that may be available in having sort of a de novo
11 approach? Now, I'm not saying this happened in this case. I
12 don't believe it did. But I could imagine how sandbagging
13 could be a real risk that a party calls for a truncated
14 process for whatever reason or the process is truncated and
15 it allows them an opportunity to prepare a better case or a
16 different case. I'm curious. And as I say, I don't think
17 that is what happened here but I am concerned.

18 MR. ANGELL: I think that gets to the point where
19 if the Commission determines that such a sandbagging tactic
20 has been used, that can certainly weigh in to how the
21 Commission approaches the questions of whether to accept the
22 evidence and how much it should be weighed.

23 I think -- And I appreciate your comments about
24 this situation. And these fact-based hearings are always
25 just that, fact-based. It's going to be dictated a bit by

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1 the circumstances and the story leading up to how the parties
2 came before the Commission. I think the Commission has that
3 discretion and should carefully guard and exercise that
4 discretion.

5 And I think if a party were trying to sandbag in
6 such a way and here just for the record, the items that we're
7 discussing at this moment related to issues that RI certainly

8 commented on in the comments to its own permit. These aren't
9 wholly unrelated topics. We aren't dashing in with oh, here
10 is a new argument. We are simply trying to provide further
11 information and foundation to help the Commission feel
12 comfortable with the decision that we think is appropriate.

13 If the sandbagging or mischief scenario were to
14 arise, I think the Commission would be well within its
15 authority to say that's not appropriate, it's not helpful to
16 the Commission. The Commission makes that determination as
17 pointed out in the evidentiary provisions of the APA that if
18 the Commission -- it talks generically and also in the
19 Commission's own rules, the Commission was given that
20 authority and has restated that authority that it can make
21 that determination.

22 So if somebody shows up playing those kind of
23 games, I'm sure once their face felt the door slam on it
24 once, you wouldn't see a habit of it repeatedly. So I don't
25 think we're in a position where we're going to step over the

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1 brink in to chaotic motions before the Commission, chaotic
2 appeals before the Commission and people dashing in with
3 boxes of new information with no relation. I think the
4 Commission has control over that.

5 CHAIRMAN GANS: Counsel, I have one other
6 question, a short one, I hope. The Vegas case that was
7 cited, how much weight does that carry? I mean it's a fairly
8 clear --

9 MS. REYNOLDS: City of Las Vegas versus Clark
10 County. That's a Ninth Circuit decision from 1984. And I
11 don't know how much weight it has. I've got the case here if
12 the Commission wants to look at it. I mean the Division
13 correctly pointed out that it's almost a throw-away
14 reference. And I'm trying to see the exact footnote. It
15 wasn't an issue that was before the Ninth Circuit. And of
16 course I don't know how persuasive a Ninth Circuit is going
17 to be to a Nevada State Supreme Court. But that is the
18 statement that the Ninth Circuit set that there's not a lot
19 of explanation and there's no discussion as far as how they
20 arrived at that conclusion.

21 MEMBER LANDRETH: But it's in a footnote and it
22 was not something that was material to the issues in the
23 case?

24 MS. REYNOLDS: Right. Let me see if I can read
25 it to you.

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1 CHAIRMAN GANS: Well, that's fine. I just wanted
2 to make sure that I understand that. Any other questions of
3 either party by the panel? Any discussion? Any direction?
4 Motion?

5 MEMBER PORTA: You're looking at me. Let's take
6 a break.

7 CHAIRMAN GANS: I've been asked to take a break.
8 The court reporter needs a little break and I think we do
9 too. So we'll break for five minutes. Ten minutes.

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(Recess was taken)

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11 CHAIRMAN GANS: I think it's up to the panel
12 right now. As we left, we were talking about our
13 deliberation on this issue of standard. Is there any
14 discussion or comments by the panel or a motion on how you
15 want to proceed?

16 MEMBER LANDRETH: I would just say that,
17 Mr. Chairman, I have concerns about the fairness and
18 appropriateness of expanding the evidence. And I realize
19 that the appellant takes the position that these issues were
20 touched on in the permitting process. But to greatly expand,
21 the evidence that was not before the Division when it made
22 its permanent decision

23 MEMBER PORTA: And I would just add I find it
24 hard for a company like Refuse, Inc. or any large company to
25 be surprised by the issuance of a final permit. It had the

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1 opportunity to comment. And I just find that, you know,
2 troubling and a little bit difficult to believe. So I think
3 the introduction of new evidence on a de novo process I'm not
4 in favor of. And if they want to bring those things up as we
5 proceed, then we will rule as we go forward.

6 CHAIRMAN GANS: Can we have a motion to that
7 effect?

8 MEMBER PORTA: Sure.

9 MEMBER LANDRETH: I would second it.

10 CHAIRMAN GANS: All those in favor signify by

11 aye.

12 (The vote was unanimously in favor of the motion)

13 CHAIRMAN GANS: Opposed? None. The motion
14 carries.

15 Do you have other preliminary matters?

16 MS. TANNER: Not really. Maybe if I can just ask
17 a clarifying question. This ruling is that this is not a de
18 novo review, it's limited to the record?

19 CHAIRMAN GANS: Yes.

20 MS. TANNER: Is that the ruling I'm hearing?
21 Okay. And then the only other issue, I guess, would be --
22 well, there's two other issues. I think one we can -- The
23 remedy of what happens if NDEP is found to be arbitrary and
24 capricious, I think we can put that one off, if you're
25 comfortable with that, to see if that finding is actually

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1 made.

2 CHAIRMAN GANS: well, now, let me just comment on
3 that. What I heard counsel say, and correct me, is that you
4 aren't arbitrary and capricious as an agency but we will be
5 depending on how we rule. That's what I've heard.

6 MR. ANGELL: That's correct, your Honor.

7 MS. TANNER: Okay. well, I still think that
8 there still needs to be some clarification about what the
9 standard of review, what filter are you going to be looking
10 at in reviewing this evidence. And my position is that
11 filter should be under an arbitrary and capricious standard,

12 which is deferential to the agency. That's an issue, number
13 one.

14 De novo, we've accomplished.

15 And then finally, if you were to have found that
16 there was an error by NDEP, what's their remedy? Do you make
17 that decision here today or is that something that gets
18 remanded? And I think that third issue we can certainly put
19 off to determine whether or not you actually do make that
20 finding.

21 CHAIRMAN GANS: And I think we should. we
22 haven't heard the evidence yet.

23 MS. TANNER: But I -- So my point would be we've
24 addressed the de novo review but we would ask that you impose
25 a standard of review in this matter of arbitrary and

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1 capricious acts by the agency.

2 CHAIRMAN GANS: Comments.

3 MR. ANGELL: Well, first my comment stands as you
4 reiterated it that the standard of review is it would be
5 arbitrary and capricious for this permit to be affirmed.

6 Also just as a characterization, I heard
7 Commissioner Porta describe the consideration of evidence as
8 being based on, as additional items are presented they would
9 be evaluated by the Commission at that time.

10 MEMBER PORTA: Yes. Because you made the
11 argument that, you know, you were, thought you were still in
12 a dialogue of the permitting process when the permit was

13 issued. That's why you didn't introduce this evidence that
14 you're asking for de novo.

15 MR. ANGELL: Yes.

16 MEMBER PORTA: Okay. So I think as we hear those
17 arguments that you're going to make I assume then we will
18 rule on that.

19 MR. ANGELL: Thank you. I wanted to confirm
20 because it sounds different.

21 CHAIRMAN GANS: And that was the motion.

22 MR. ANGELL: Thank you.

23 CHAIRMAN GANS: Counsel. Questions? Concerns?
24 Don't like it, but you'll go along with it?

25 MS. TANNER: Don't like it but we'll go along

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1 with it.

2 CHAIRMAN GANS: Okay. Any other preliminaries?
3 We spent over two hours on preliminaries, but I think they
4 were important.

5 Then from there we get on with the opening
6 statements. We'll begin the appeal hearing with opening
7 statements by counsel for the appellant, followed by the
8 Division of Environmental Protection. Opening statements may
9 be waived by any party.

10 MR. TOMKO: We would like to take the opportunity
11 to present an opening statement. And actually some of the
12 opening statement has already been covered. Because those
13 preliminaries took so much time and because attorneys like to

14 talk, I am going to do my best to be succinct and to the
15 point.

16 I would just say first of all I appreciate the
17 Commission taking this time. I know you have other
18 responsibilities, other things going on in your lives. I
19 appreciate that.

20 I would like to also say that on behalf of
21 myself, my co-counsel, my client, we have the utmost respect
22 for NDEP. I have personally worked with some of these guys
23 for a number of years, know them well, frequently on the same
24 side of the table. We just think in this case they got it
25 wrong.

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1 So with that -- And should we try to figure out
2 just dimming the lights maybe?

3 This is -- I think everybody understands the
4 premise, our position, my client's position, it is
5 unreasonable to require overly burdensome continuous
6 emissions monitoring for a facility that can be sufficiently
7 monitored using much simpler methods.

8 We are here to ask for the Commission to require
9 NDEP to, for the Commission to require NDEP to draft the
10 permit. We are not asking the Commission to redraft the
11 permit. But to request the Commission to require NDEP to
12 redraft the permit to require appropriate alternative
13 monitoring that is sufficient without being excessive, which
14 we think continuous emissions monitoring is.

15 I'll move briefly through this. Our client is
16 Refuse, Inc. The parent company is Waste Management. They
17 operate landfills throughout the country, many of them with
18 landfill gas to energy projects. That's what they're called.
19 The one that we are talking about is in Nevada on the western
20 border. You can see that red dot. That's Lockwood, maybe
21 seven or eight miles due east from here.

22 I think the Commission has an understanding what
23 these landfill gas to energy projects are so I won't go over
24 that.

25 The project is three engines. These are three

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1 engines which will burn and recover landfill gas and energy
2 and regenerate renewable energy. I think it's on the order
3 of five to six megawatts total.

4 Like any of these, any IC engine, in your car
5 engines are internal combustion engines. They're a little
6 bit bigger, burning a different fuel. But they will, when
7 they burn the fuel, they will have products emissions like
8 what comes out of a tailpipe, carbon monoxide, oxide
9 nitrogen, that's the focus of this case.

10 The CEMS are required. There are CEMS required
11 for each of them. And the acronym we'll be hearing a lot of
12 is CEMS, continuous emissions monitors. So that's the
13 question for those emissions of carbon monoxide and oxides of
14 nitrogen, and I'll be calling those CO and NOx, does there
15 need to be continuous emissions monitoring?

16 This is the regulation that both NDEP and we
17 agree is at issue here. The permit must include requirements
18 for monitoring that are sufficient to ensure compliance with
19 the conditions of the operating permit including as necessary
20 requirements concerning the use, maintenance and the
21 installation of equipment or methods for monitoring. And I
22 point out the words that are highlighted, sufficient and
23 necessary.

24 The condition in the permit that's the subject
25 here requires Lockwood Landfill to install, calibrate and

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1 operate continuous emission monitoring systems for the
2 measurement of CO and NOx in the exhaust stacks of the
3 engines. And these are continuous monitors that can take
4 data points very frequently for all practical purposes
5 continuously. And of course, one of the things that we'll be
6 talking about are these, the fact that the NOx submissions,
7 the limitation that's at issue here centers around an annual,
8 it's an annual emission limitation as is the limitation on
9 carbon monoxide emissions. We're talking about a limit on
10 the tons per year of CO and NOx that can be emitted on an
11 annual basis and the question is do you need a continuous
12 emission monitor for purpose of excessive compliance with
13 that.

14 No dispute RI agrees that it's appropriate to
15 require monitoring. It's necessary to provide a reasonable
16 demonstration of compliance. I think NDEP would agree with

17 that. But again, we believe that CEMS constitutes
18 unreasonable excessive monitoring that goes well beyond what
19 is required to provide sufficient insurance of compliance.

20 The evidence that we would like to present will
21 show that CEMS are far beyond the monitoring that is almost
22 always required for a source such as Lockwood.

23 Second point, we believe NDEP's own analysis, the
24 basis for their justification of the CEMS does not support
25 CEMS. And we'll look at that. In particular, we do not

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1 think their assertion that the increment, and I'll explain
2 these terms to make sure we're all on the same page, the
3 increment is not threatened by NDEP's own analysis.

4 We believe the evidence will show that CEMS are
5 inconsistent with NDEP's past permit decisions to require or
6 not require CEMS.

7 We will introduce evidence to show that engine
8 performance and emissions are consistent and predictable such
9 that continuous monitoring is not required.

10 Now, this is some of the evidence that I think
11 we'll end up having a dispute over its admissibility. But I
12 think as we move through the, our witnesses, you'll see why
13 perhaps it is relevant to your decision and is appropriate
14 for that evidence to be introduced.

15 The evidence will also show that the NOx and CO
16 emission limits are established at levels that are readily
17 achieved. The evidence will show that variability of

18 emissions is predictable, easily managed and well within
19 emission limits.

20 Additionally, we will show that there are
21 alternative monitoring options using portable emission
22 analyzers that are more than sufficient to confirm engine
23 performance and are an acceptable monitoring method.

24 We will acknowledge and Refuse during the course
25 of the permitting project provided evidence or information to

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1 NDEP that showed that look, there are exceptions but that's
2 an exceptional case. In the Los Angeles area where there are
3 extraordinary air quality --

4 MS. MEHTA: I don't mean to interrupt counsel's
5 presentation, but I do object and this is part of the
6 evidence. In his opening statement he is referring to the
7 South Coast Air Quality Management District which is
8 inadmissible evidence. So for the record I object to
9 presenting in opening argument any argument or evidence about
10 what air management districts that are not in Nevada are
11 doing.

12 MR. TOMKO: Well, I will move on from that point.
13 Now I would like to discuss a little bit about the basis that
14 NDEP has asserted for requiring CEMS. And to do that, to
15 just provide a little bit of background, there are air
16 quality standards referred to as NAAQS, National Ambient Air
17 Quality Standards. As you can see by the second bullet, the
18 Clean Air Act, those are established by EPA, implemented by

19 NDEP. Those are standards requisite to protect public
20 health.

21 what we will be focusing on is increment, which
22 is a different kind of standard and it represents a
23 non-health based growth allowance that applies in some areas.
24 I will avoid going in to the Visintine Clean Air Act, but
25 suffice it to say, and I think it was described this way in

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1 NDEP's brief, it's a growth allowance. And you get so much
2 growth in an air shed that is subject to it and the question
3 is how much of that increment is going be consumed by the
4 Lockwood Landfill project.

5 This is not a case about protecting public
6 health. The NAAQS standard, this is not about compliance
7 with that. This is from NDEP's technical support document.
8 I know it's not readable. But what this is, and if it would
9 be helpful we had this as an exhibit. But it is NDEP's air
10 quality analysis for NOx and CO among other pollutants and it
11 demonstrates that the Lockwood Landfill emissions would be
12 well within compliance with those health-based standards.

13 This next slide takes those numbers and it simply
14 depicts NDEP's numbers and I guess this highlighter doesn't
15 work. But from NDEP's table and their technical support
16 document, they show that this is the air quality standard and
17 we're talking about carbon monoxide, one-hour average. This
18 is the standard. This is the NAAQS. And what this graph
19 shows, this is the background concentration of all the other

20 sources that are contributing to pollution in that area. And
21 this is the Lockwood Landfill's emissions impacts.

22 There's also an eight-hour CO emission and this
23 is the same picture, just summarizing NDEP's analysis. And I
24 should say NDEP, they have not asserted otherwise that
25 there's an air quality problem with the NAAQS.

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1 NOx, the other pollutant that we'll be talking
2 about, this is its air quality standard, a thousand
3 micrograms per cubic meter. The blue bar is Lockwood
4 Landfill's impact and the other sources.

5 So the real focus is on this idea of increment or
6 the growth allowance. Now, NDEP in their brief they state
7 that the Lockwood Landfill is located in the Tracy Air Basin,
8 which has very limited resources available to remaining
9 sources.

10 Another statement from their brief. Most of the
11 25 micrograms per cubic meter -- Now, that's how the
12 standard, the increment growth allowance is expressed. 25
13 micrograms per cubic meter. Most of the 25 micrograms per
14 cubic meter has already been consumed. There is only a
15 sliver remaining for new sources or existing sources seeking
16 modifications.

17 Now, remember, this is their justification for
18 why CEMS are required for NOx.

19 This is from NDEP's technical support document
20 and this is a little bit fence to look at. I'll just

21 describe it briefly. You can see this is the increment 25
22 micrograms per cubic meter. This is the meteorological year.
23 The way these concentrations are determined, there are air
24 quality dispersion models. They're basically programs that
25 are run on computers, you feed emissions data in to them,

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1 meteorological data, topography and you predict what the air
2 quality impacts are going to be.

3 In this case, NDEP did it for two different years
4 and for both years they identified two receptors and they
5 picked the, one receptor that had the maximum total
6 concentration, 22.4, which is getting pretty close to that 25
7 microgram per cubic meter standard. But then they also show
8 what Refuse Inc.'s contribution was to the total
9 concentration. And you can see it is 0.02240.

10 The other receptor NDEP identified in its
11 analysis was the receptor where Refuse had the maximum
12 concentration outside of its facility. That's this number,
13 1.36056. And then again the total concentration. Same thing
14 for the met year 2001.

15 Now, again, to aid the Commission in being able
16 to digest the numbers, we just presented them in a bar graph.
17 And what this shows are the for the respective years, 2000
18 and 2001, the maximum increment consumption in the vicinity
19 of the Lockwood Landfill. And again this is NDEP's analysis.
20 what they show and the bars again for the maximum
21 contribution it's getting up pretty high. But this red

22 sliver, that's Lockwood Landfill's contribution. This is
23 everyone else's.

24 Now, for those other receptors that I mentioned,
25 the receptors where Refuse, where the Lockwood Landfill is

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1 having its maximum concentration at anywhere around the
2 facility, those are the red bars on top of everybody else.
3 When we talk about increment, you can visualize, you know, if
4 this is the vicinity, if this is a map of the vicinity,
5 you're going to have depending on where the receptors are,
6 where the locations are, you'll have different concentrations
7 being impacted more or less by different sources. The point
8 of these slides is that the impact on increment from Lockwood
9 appears to, it's in the eye of the evaluator. But we would
10 take the position that it's quite minimal.

11 This is NDEP's conclusion on their increment
12 analysis. They say this table, the increment analysis table,
13 shows no receptors for concentration for the increment
14 standards for NOx as a result of activities related to Refuse
15 Inc.'s Class 1 significant revisions.

16 Our view is that NOx increment does not provide a
17 reasonable basis for requiring CEMS.

18 There's a second CEMS requirement for carbon
19 monoxide, for CO. As I was putting this together and as the
20 NDEP's folks know PSD is a very difficult complicated area,
21 so rather than put everybody to sleep, I kind of boiled this
22 down to a fairly high level.

23 There is a permit, permitting program called PSD,
24 prevention of significant deterioration. This project was
25 not subject to that. The applicability, the basis for

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1 determining whether your applicability is if the project is
2 going to have an emission increase of a single pollutant of
3 250 tons per year to ensure that the Lockwood project and the
4 facility was not deemed to be a major source, the company
5 requested that there be a facility-wide cap with appropriate
6 monitoring at 249 tons, which is below that 250-ton
7 threshold.

8 NDEP's position is that CEMS are necessary to
9 demonstrate compliance with the emission cap. And of course
10 we don't agree with that.

11 what we will show is that under similar
12 circumstances NDEP has issued emission caps like they have
13 done for Lockwood but they have not required CEMS, relying
14 instead on a representative annual stack test.

15 we will show that Lockwood's actual emissions
16 will be well below the CO emissions cap. In particular, we
17 hope to show -- And this is why we would like to introduce
18 some additional evidence -- that the engines will operate
19 comfortably below those permits limits.

20 Again, we will show, we will introduce evidence
21 to show that the engine performance is predictable and
22 consistent. Unfortunately, we believe the evidence shows
23 quite clearly that NDEP recognized the importance of assess

24 emissions variability but unfortunately did not do so prior
25 to deciding to require CEMS.

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1 I will skip over the next slide to avoid an
2 objection. But we will introduce it later as evidence to
3 make the point that NDEP did not in fact consider the
4 variability and emissions from those engines.

5 And again, the significance, the very significant
6 point is if the emissions aren't going to bear a significant
7 extent why do you need the continuous emissions monitor.
8 Again, it's like car engines. I'm not sure what the
9 requirements are out here. In Salt Lake we have to every two
10 years now have an emissions test. We don't have to do it
11 continuously. Similar issue.

12 We will also show that Refuse, Inc. provided NDEP
13 with information when it became aware that NDEP was
14 contemplating continuous emissions monitors, which it did not
15 become aware of until relatively late in the game, the
16 company said well, wait a minute. There's another approach
17 here. If you believe that there's additional monitoring to
18 validate the engine performance, here's something else.
19 Let's talk about alternative. These portable analyzers,
20 which we think provide a very effective additional method of
21 gaining information.

22 We will show that portable emission analyzers are
23 typically accepted by air quality agencies to provide an
24 assurance of compliance with NOx and CO emission limits.

25 This isn't something that's being proposed that has never

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1 been done before.

2 And we will show that NDEP failed to respond to
3 Refuse Inc.'s request to consider the alternative monitors.

4 Finally, we'll show that -- And this goes,
5 there's some discussion on gee, why weren't you providing
6 this information that you want to provide to us now, why
7 weren't you providing this sooner to NDEP so they could have
8 a crack at it.

9 well, in fact, we believe the permit process did
10 not take place the way it typically does with the agency.
11 NDEP's formal practice is to provide a proposed draft permit
12 to the permittee before public review in order to receive
13 input and resolve issues.

14 In this case, NDEP did not afford Refuse, Inc. an
15 opportunity to review the draft permit before it was issued
16 for public review. And in fact Refuse became aware of the
17 CEMS requirement, no indication from NDEP. Up until that
18 draft permit came out for public comment, there was no
19 indication that CEMS was something that they were
20 contemplating. In fact, we will show that the information
21 that the company was getting back from NDEP was that it was,
22 you know, comfortable with the emission levels that were
23 being provided.

24 we will show that the following issuance of the
25 draft permit prior to issuance of a final permit Refuse

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1 provided NDEP with information explaining why CEMS was
2 inappropriate and again offered an alternative monitoring
3 option to CEMS.

4 And finally, without providing Refuse, Inc. any
5 notice or opportunity to resolve the CEMS issue, NDEP issued
6 the final permit even though it was fully aware that the
7 company strongly disagreed with the CEMS requirement and
8 believed that there were other much more reasonable and
9 appropriate monitoring methods.

10 Rick, I believe, I don't think we need to do more
11 on standard of review at this point. So with that, that will
12 conclude our opening statement.

13 CHAIRMAN GANS: Thank you.

14 MS. MEHTA: At this point, Commission, I would
15 just ask what your preference is, if we do our opening, which
16 will get us in to the lunch hour.

17 CHAIRMAN GANS: How long is your opening
18 statement?

19 MS. MEHTA: It's pretty long. It could go as
20 long as 30 minutes.

21 CHAIRMAN GANS: And would you prefer to make it
22 before or after lunch?

23 MS. MEHTA: It's up to the Commission's
24 preference.

25 MEMBER PORTA: 30 minutes is not bad.

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1 CHAIRMAN GANS: Okay. we'll hear your opening
2 statement.

3 MS. MEHTA: I apologize, Commission. I'm not a
4 technical information expert, an IT expert. Could I ask for
5 your help for a second?

6 well, maybe I'll ask the Commission again, do you
7 want to take a break now while we figure out our technical
8 difficulties? I apologize.

9 CHAIRMAN GANS: Okay. Everybody want to come
10 back at 1:00 o'clock? Does that leave enough time? Okay.
11 Then we'll adjourn now and reconvene at 1:00 o'clock.

12 (Lunch recess was taken)

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1 THURSDAY, OCTOBER 6, 2011, 1:00 P.M.

2 ----oOo----

3 CHAIRMAN GANS: We will reconvene. It is 1:00
4 o'clock and I think we have NDEP's opening statement in front
5 of us.

6 MS. MEHTA: Thank you, Chairman. I apologize for
7 the technical difficulties that we experienced before, but we
8 have them sorted out, I hope.

9 Refuse contends that this is not a public health
10 issue. But NRS 445B.100 is the mandate that under which this
11 whole program is set forth. And that is, it is the public
12 policy of the State of Nevada and the purpose of NRS 445B.100
13 to 445B.640, which are the Clean Air statutes, to achieve and
14 maintain levels of air quality which will protect human
15 health and safety, prevent injury to plants and animal life,
16 prevent damage to property and preserve visibility and scenic
17 and aesthetic and historic values of the state. That's the
18 whole purpose of the program.

19 NDEP's job is to make sure that we stay in
20 attainment with the NAAQS, the National Ambient Air Quality
21 Standards. Because if we're not in attainment then we're
22 exceeding the public health standards set for air quality.
23 Our goal is to make sure that that doesn't happen and that
24 air quality doesn't degrade to unacceptable levels. That's
25 why compliance is so important.

1 So let me tell you what this case is about from
2 our perspective. If you can put up the first slide. This
3 case is about NDEP requiring the Ford Taurus of monitoring
4 where Refuse, Inc. wanted the Ford Pinto. What I mean by
5 that, if you can go to the next slide, is that NAC 445B.3405
6 requires the permit to retain requirement through monitoring
7 that are sufficient to ensure compliance with the conditions
8 of the operating permit. It doesn't say contain requirements
9 for monitoring that are minimally sufficient. And that's
10 what Refuse, Inc. wants you to do is require lesser
11 monitoring. NDEP doesn't believe that the monitoring that
12 Refuse requested is sufficient. CEMS, continuous emissions
13 monitoring systems are and that's why NDEP imposed CEMS.

14 The difference is the Pinto may run but it
15 doesn't have air bags or other crash safety features like the
16 Taurus. And that's what's at issue here.

17 If we can go to the next slide. I spoke to you
18 about NDEP's duty. The duty and responsibility of the agency
19 is to manage the air basin, to make sure that we don't go in
20 to non-attainment.

21 The Tracy Air Basin is triggered under prevention
22 of significant deterioration, which is a term of art from the
23 Clean Air Act, but it's triggered for nitrogen oxide or NOx.
24 What that means is that there's very little NOx left in the
25 air basin for new and existing sources to what we say

1 consume. Essentially what that means is new and existing
2 facilities that want to expand and need to emit more
3 pollutants, more NOx in to the air basin, they can't do it if
4 that will force or turn the air basin in to non-attainment.
5 That's why that increment, that sliver is so important.
6 Because if that entire sliver is consumed we go in to
7 non-attainment.

8 In fact, future economic development depends on
9 NDEP's management of this resource. If we go in to
10 non-attainment and the NOx increment is not preserved, that
11 will prevent future industries from coming in and being able
12 to emit in this basin.

13 Refuse also sought a cap to avoid PSD permitting.
14 The permit modification to install three internal combustion
15 engines at Lockwood Landfill was to generate electricity by
16 burning landfill gas. Refuse asked for complete operational
17 flexibility, no controls and to be able to shuttle emissions
18 among sources so long as they didn't exceed 249 tons per year
19 of carbon monoxide.

20 The reason for doing this was to avoid PSD
21 permitting. PSD permitting is a more onerous process that
22 would have required Refuse to implement best available
23 control technologies. The whole point of staying below this
24 cap was to avoid having to put pollution controls on those
25 engines. And they asked for it while knowing that landfill

1 gas is inherently dirty and variable which they told the
2 agency. That in turn results in increased pollution
3 emissions.

4 Another aspect of this particular application
5 that makes it so unique is that the Lockwood Landfill is
6 located, as you can see in the pull-out box, it's located in
7 one of the most coveted areas for industry to locate to. The
8 Tahoe-Reno Industrial Center is located in this area and it's
9 still marketing to attract new businesses to come to this air
10 basin.

11 If we can go to the next slide. This is the air
12 basin, the Tracy Air Basin where Lockwood Landfill is
13 located. As you can see by the green area, this is all
14 privately-held land. The red area is public land. It's held
15 by BLM. So what that means is when sources want to move here
16 they don't have to go through the EIS process with BLM in
17 order to set up shop. That's huge.

18 And as I mentioned, the single largest industrial
19 park in northern Nevada is located here and is actively
20 marketing to attract new businesses to move here. It's also,
21 this air basin is 15 minutes from the Reno-Sparks area. It
22 has freeway access, railway access, information technology
23 access and utilities. It's highly desirable for business and
24 industry.

25 As a result, most of the NOx increment in this

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1 basin has already been consumed. So NDEP has a duty to
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2 manage the remainder very carefully to ensure availability
3 not just for Refuse but for all existing facilities that may
4 want to expand and new facilities that want to locate there.

5 It's a tremendous responsibility and NDEP doesn't
6 take it lightly.

7 We're not debating the contribution by Refuse,
8 Inc. to the NOx increment. But NDEP's obligation is to make
9 sure that that increment, that contribution is not exceeded.
10 That's the importance of compliance.

11 It's also important to keep in mind that this is
12 a Title 5 permit, which means not only does it need to go out
13 for public comment, it goes to EPA. And not only can EPA
14 comment on it, if they disagree with the permit terms or with
15 the enforceability of the permit, they could actually veto
16 it. So it's important for NDEP to be able to satisfy EPA
17 that this is an enforceable permit and compliance, that
18 compliance is assured.

19 Despite being a Title 5 permit, however, Refuse,
20 Inc. needed this permit and demanded this permit on a very
21 expedited basis. If we can go to the next slide. It may be
22 difficult for you to read. But this is a timeline of the
23 events for the permitting process. Refuse initially
24 submitted the application on August 16th, 2010. And less
25 than ten days later, NDEP rejected that application because

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1 it didn't include a necessary air dispersion model. They
2 couldn't process the application without that. But Refuse

3 said, "Wait a minute. Please let us submit the application
4 and we'll send you the model shortly thereafter." And NDEP
5 allowed them to do that.

6 So they resubmitted the application on September
7 13th, 2010. But there was no air dispersion model. Days
8 went by and then a few weeks, then two months. And by
9 November 19th there was still no air dispersion model. So
10 NDEP sent a letter saying, "Hey, we can't continue to process
11 this until we get further information. We need the air
12 dispersion model and we need emission unit application
13 forms."

14 In the meantime, however, the application because
15 NDEP didn't reject it, was deemed complete by default on
16 November 13th. That date is important because NDEP had one
17 year from November 13th to make a final determination on the
18 permit. NDEP didn't have to under regulation, they didn't
19 have to make a decision until November 13th 2011. We're not
20 even there yet. The reason why this was issued so rapidly
21 was because Refuse, Inc. demanded it.

22 So they got their dispersion model in around
23 November 19th. And then in December, on December 13th they
24 submitted the last of the information that NDEP needed to
25 process the permit. They escalated the issue, however, to

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1 Mr. Mike Elges and they said, "We need this permit ASAP."
2 NDEP committed. They committed to getting this permit out as
3 quickly as possible. And in fact, it went to public notice

4 on February 14th. That's two months after they got all of
5 the information that they needed to be able to process the
6 permit.

7 Now, Refuse, Inc. says, "Well, you didn't give us
8 a draft courtesy copy before and that's not normal operating
9 procedures." But that is actually normal operating
10 procedures. NDEP has no obligation to provide a courtesy
11 copy before they issue the draft permit. And in fact, they
12 only do so in certain circumstances where the permittee or
13 the applicant requests it. They don't do it as a matter of
14 policy.

15 After the public noticing comment period, Refuse
16 submitted their comments. EPA also submitted comments. And
17 then Refuse sought a meeting with NDEP, which occurred in
18 April of 2011. At that meeting they said that they had to
19 get this permit out by May 16th or they would lose their
20 contract and their ability to proceed with the project. And
21 the final permit, NDEP committed and delivered, came out May
22 12th 2011. So NDEP short-circuited their process by six
23 months for their ability to review and process all of the
24 information in order to accommodate Refuse, Inc.

25 Let's go to the next slide. So I want to talk a

1 little bit about the substance of the application. Refuse
2 didn't want any operational limits on the engines or on the
3 flare. They could have asked to -- They could have asked to
4 essentially limit the hours of operation. Obviously when an

5 engine is not on, it's not emitting. But they didn't do
6 that. They requested that each device, the flare and the
7 engines, be permitted to their maximum capacity and 100
8 percent load. They requested that these engines be allowed
9 to operate full throttle.

10 The agency also granted that request. The agency
11 didn't impose operational limits on the flare or the engines,
12 but it was because the agency requires CEMS to monitor
13 compliance.

14 CEMS directly measures the emissions that are
15 coming from the tail pipe. And so with the CEMS, NDEP knows
16 exactly how much carbon monoxide and how much NOx is coming
17 out of that tail pipe.

18 Refuse also sought a facility-wide cap of 249
19 tons per year for carbon monoxide. Go to the next slide.
20 what this means is that Refuse can shuttle its emissions
21 between one engine or another engine or another engine or the
22 flare or other sources at its facility so long as it doesn't
23 exceed that cap.

24 But if we can go back to the first slide, to the
25 prior slide, the slide that shows what they requested in

1 their permit, it shows, if we can get there, this one. It
2 shows that the engines alone, the three engines alone have a
3 potential to emit of 252 tons per year, just those three
4 engines. That's in excess of the cap. The total wide,
5 facility-wide estimate is 365 tons per year. Again, that's

6 why compliance is so important to the agency.

7 And again, it's important to note the reason that
8 Refuse sought this cap was to avoid PSD, to avoid having to
9 put pollution control technologies on those engines.

10 Refuse now claims that the actual emissions are
11 well below that cap so there's no real reason to worry about
12 compliance. But that's not what they asked for. They asked
13 to operate them at full throttle, maximum capacity, 100
14 percent loads. And they asked for that to avoid putting
15 pollution controls on.

16 Again, NDEP agreed. They allowed them to take
17 the cap. They said okay. They even pushed back on EPA. EPA
18 said, "You know what, we're not comfortable with that. We
19 want a buffer. We want a lower cap to make sure that these
20 guys don't accidentally go in to PSD permitting."

21 And NDEP said, "No. That's not necessary because
22 we have the CEMS. We know or we will know if they trigger
23 that cap, so we don't need to have an extra buffer in between
24 the 249 and something lower."

25 And just as importantly, Refuse will know if it's

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1 starting to head in that direction or if its emissions are
2 going to exceed the cap because of the CEMS. And with the
3 CEMS, NDEP doesn't need to require control technology.

4 So if we can go to the next slide, the one after
5 that actually. After the draft permit went out, Refuse, Inc.
6 commented, submitted its comments on the draft permit. And

7 they said, you know, we need to, we need to be able to
8 replace or overhaul our engines because the gas is dirty and
9 it beats up the engines. We don't want to have to do a
10 permit modification every time we have to overhaul one of
11 these engines and we don't want to have to do stack testing
12 every time, so can you accommodate us on that one as well.

13 And it's important to note that landfill gas is
14 by nature a variable dirty gas. I mean it's produced by bugs
15 essentially chewing up the stuff and producing, producing
16 methane. But along with the methane it produces carbon
17 dioxide, moisture, non-methane organic compounds and
18 sulfides. It's not like natural gas that burns cleanly and
19 predictably.

20 So when Refuse, Inc. met with NDEP in April to
21 discuss their permit, they said -- and this was the first
22 time that they mentioned it, it wasn't in their permit
23 application, they said we need this kind of flexibility
24 because of the dirty nature of the landfill gas.

25 That dirty gas means that the engines lose

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1 efficiency over time, therefore the emissions will increase
2 over time. It's not a question of if, but when. And the
3 dirtier the fuel, the faster that will happen. But the
4 agency and Refuse will know exactly when with CEMS. So even
5 though Refuse hadn't asked for it in its application, NDEP
6 was once again able to accommodate Refuse and allow them to
7 overhaul their engines without doing permit modification and

8 without doing a source test every time an overhaul was done.

9 Also with the CEMS, Refuse can minimally
10 condition the gas. They have to do some minimal level of
11 treatment because the gas contains water, a lot of moisture,
12 which doesn't burn, and it contains carbon dioxide, which
13 doesn't burn. So there has to be some minimal level of
14 treatment. But the treatment levels can vary. You can
15 condition the gas to make it burn very cleanly or you can do
16 the minimal level that gets, that allows you to avoid
17 non-methane organic compound emission limits under federal
18 law. And that's the level of treatment that Refuse is
19 required to do in its permit, very minimal. It's not
20 required to knock out solaxins, for example, which when they
21 burn, solaxins produce silica or sand. And those deposits
22 can gunk up the engines. But they're not required to do that
23 nor have they said that they were going to do that.

24 Again, Refuse didn't want to put control
25 technologies on its engines. That was the whole reason for

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1 PSD permitting and for taking this cap. If they had
2 triggered PSD permitting, they would be required to put best
3 available control technologies on their engines. NDEP said
4 okay, no controls, no problem, because with CEMS we know how
5 much you're emitting.

6 CEMS gives NDEP the assurance that Refuse won't
7 emit more than its self-imposed limit and it won't emit more
8 nitrogen oxide than it says it will.

9 But Refuse now says, no, wait a minute, CEMS are
10 too much. Not because they're too difficult or too expensive
11 to implement, but in the April meeting Refuse told NDEP that
12 we don't want you guys to set a precedent for CEMS going on
13 landfill gas to energy projects.

14 That is not an appropriate basis for NDEP to
15 exercise its discretion. NDEP has to do what's in the best
16 interest of this state and to protect the public health and
17 safety of the citizens of Nevada.

18 Refuse hasn't pointed to any rule or regulation
19 that NDEP has violated. It only says that NDEP acted
20 arbitrarily and capriciously by requiring CEMS. But NAC
21 445B.3405, the statute or the regulation that we looked at,
22 gives NDEP the very discretion to determine what monitoring
23 is sufficient for compliance with the permit terms.

24 The greater the flexibility that NDEP gives in
25 the permit to the applicant to operate their facility any way

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1 they want, the greater the need for monitoring. NDEP must
2 ensure that Refuse's modifications remain minor for PSD
3 applicability and doesn't pollute more NOx than it's allowed.
4 Otherwise, the permit doesn't contain meaningful emission
5 limits.

6 Refuse also argues that NDEP acted arbitrarily
7 and capriciously because it hasn't required CEMS for other
8 facilities. But testimony will show that NDEP has, indeed,
9 required CEMS for other facilities, even facilities that

10 weren't seeking a cap like Refuse was.

11 This is not a situation of abusive discretion.

12 The agency did exactly what it was mandated to do. It worked
13 with Refuse to enable Refuse the operational flexibility that
14 it wanted to have a 249 ton per year cap, to not put
15 pollution control technologies on and to -- and to burn a
16 dirty fuel.

17 If we can go to the next slide. But in order to
18 do that and to justify the permit both to EPA as well as to
19 the public interest in the industry groups, NDEP has to
20 ensure that Refuse doesn't emit more pollution than it says
21 it will. NDEP must also make sure that Refuse will stay
22 within its self-imposed cap. CEMS allows it to do that.

23 Refuse says, well, we think that hand-held
24 analyzer monitoring is sufficient. The first time that they
25 ever proposed hand-held analyzers was not in the permit

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1 application. It wasn't even in the comments on the draft
2 permit. It was at that April meeting, one month before they
3 told NDEP that they had to have the permit.

4 The hand-held analyzers, you know, they also
5 contend that NDEP didn't respond to their hand-held analyzer
6 proposal. There's two reasons for that. One, the
7 information that Refuse provided to show them information
8 about the hand-held analyzers, NDEP looked at and felt that
9 it wasn't sufficient. Two, NDEP had one month to get the
10 permit out by the time frame that Refuse demanded. So they

11 didn't put a formal response letter together, that's true.
12 But they did respond to Refuse's demands. They got the
13 permit out in the time frame that Refuse needed.

14 The other point about hand-held analyzers is that
15 they are not an acceptable method per EPA for compliance.
16 They can't be used for enforcement. They're only -- They can
17 only be used to estimate how efficiently the engines are
18 operating.

19 So what Refuse seeks from you it boils down to
20 this, they want all the operational flexibility in the world.
21 They want no controls. They want to be able to shuttle
22 emissions back and forth between their various sources at the
23 facility and they want a 249 ton per year cap for carbon
24 monoxide to stay below PSD permitting. They want to locate
25 or they are located in an area that is PSD-triggered for NOx

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1 and in an area that is very attractive to existing and future
2 businesses and is still attracting industry to that location.
3 But for compliance, Refuse is saying just trust us, we won't
4 go over our limit. NDEP cannot do that. If it did, it would
5 be subject to lawsuit by any public interest or industry
6 group that says you guys just, you guys just issued a permit
7 that is not enforceable. And it would abdicate its
8 responsibility to manage this air resource by not requiring
9 CEMS.

10 So in conclusion, Refuse hasn't pointed to any
11 regulation or statute that NDEP violated. It only says that

12 NDEP was arbitrary and capricious in requiring CEMS. But
13 NDEP has discretion to determine what's sufficient for
14 compliance with the permit terms. And NDEP determined that
15 CEMS was, indeed, sufficient and necessary to comply with the
16 terms of this permit. NDEP performed its duty. It worked
17 with Refuse within the time frame that Refuse demanded. It
18 evaluated all of the information that Refuse was willing to
19 provide. It gave Refuse the flexibility that it asked for in
20 its permit application but to make sure that it stayed within
21 its self-imposed limit for carbon monoxide and that it
22 wouldn't emit too much NOx, it required CEMS.

23 Now, counsel for Refuse mentioned that there's no
24 annual smog check in Utah because it's not necessary anymore.
25 That's because new vehicles essentially have the equivalent

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1 of a CEMS. So your check engine light goes on when you're
2 emitting too much and you know to take it to the garage and
3 get it tuned. That's what NDEP required here. That's what
4 NDEP required. NDEP required the car with air bags. That
5 wasn't an abusive discretion. It wasn't arbitrary and
6 capricious. It was the only way to permit the facility the
7 way that Refuse, Inc. wanted to operate it and fulfill NDEP's
8 duty to manage the air basin. Thank you.

9 CHAIRMAN GANS: Thank you.

10 Is the appellant ready to present their case?

11 MR. TOMKO: We are.

12 MEMBER PORTA: Can I just ask a couple clarifying
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13 points on the opening statement?

14 MS. REYNOLDS: Sure.

15 MEMBER PORTA: It's on the regs for PSD and NOx
16 increment. Just so I understand to make sure I'm clear, for
17 CO it's not a PSD-triggered basin that we're talking about
18 here, but in any air basin in the state for criteria
19 pollutant potential to emit over 250 tons per year, if the
20 source submits an application with that, a PSD review would
21 be required regardless of where they are in the state, is
22 that correct, for CO in this case?

23 MS. MEHTA: Yes, that is correct.

24 MEMBER PORTA: Okay. Now on the NOx -- Under PM
25 10, NOx and I think sulfur dioxide, it has been triggered as

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1 an instrument basin, which means it hasn't violated the NAAQS
2 yet but you have monitoring to indicate that it's a basin
3 potential of going in to non-attainment for NOx; is that
4 correct?

5 MS. MEHTA: That is correct.

6 MR. TOMKO: May I?

7 CHAIRMAN GANS: Sure.

8 MR. TOMKO: Just a point of clarification. The
9 increment and the fact that the increment is triggered is
10 totally apart from compliance with the NAAQS.

11 MEMBER PORTA: Right. Right. I get that. And
12 if the instrument is triggered, then the requirement of any
13 sort, Refuse, Inc. or whoever, tends to go through a more

14 formal -- I guess they have to go through a BACT review or
15 not. What happens if they trigger the increment? I'm trying
16 to judge the severity of triggering the increment.

17 MR. TOMKO: The increment, once the increment is
18 triggered that means there is an accounting process at that
19 point that has to take place through the permitting process
20 to ensure that the increment, in this case 25 micrograms per
21 cubic meter, there's not a growth that exceeds that amount.
22 So the permit analysis, NDEP went through the permit
23 evaluation in the table that I showed during my opening
24 presentation, shows that they evaluated how much increment
25 consumption is taking place in that basin for all sources

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1 including Refuse, Inc.

2 MEMBER PORTA: Okay.

3 MR. TOMKO: And so it's simply a determination to
4 ensure that that growth allowance is not exceeded, which was
5 made.

6 MEMBER PORTA: Okay. But again, if you -- my
7 question is if you go over that growth, if you would have
8 triggered the increment what is the implication?

9 MS. MEHTA: well, if they go over, if they exceed
10 the increment --

11 MEMBER PORTA: Right.

12 MS. MEHTA: -- they can't go, we can't issue the
13 permit.

14 MEMBER PORTA: Okay. Okay. But you stated that
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15 it would go, the basin would go non-attainment in your
16 opening statement; is that correct? But you couldn't issue a
17 permit to make it go. So I guess I'm kind of confused on
18 that point.

19 MR. TOMKO: Point of clarification if I may.
20 Non-attainment is something that is a term that is used
21 relative to the NAAQS. And so with all due respect, if you
22 exceed the increment, it would not mean you were in
23 non-attainment for that standard.

24 MEMBER PORTA: That's what I wanted clarification
25 on. Thank you.

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1 CHAIRMAN GANS: Is this agreed with the other
2 party? Do we agree on this? His question has been answered
3 by RI and NDEP agrees with that answer?

4 MS. MEHTA: The only clarification that I want to
5 make is that the increment is there to make sure that the
6 basin doesn't go in to non-attainment. It's like a safety
7 check.

8 MEMBER PORTA: Because potentially if it were,
9 the NAAQS could be exceeded, is that a correct statement?

10 MR. ELGES: No. Let me take a crack at this.
11 Essentially the way this works is when the increment is
12 triggered it's a new lower standard that is set in the area
13 to protect or assure that the area doesn't go non-attainment.
14 But we can't authorize permits that would exceed those
15 incremental levels.

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16 MEMBER PORTA: Okay.

17 MR. TOMKO: If I could show something here
18 graphically that would be very helpful.

19 MEMBER PORTA: Again, I'm just trying to get
20 clarification here to make sure I got this straight.

21 MR. TOMKO: So this is zero right here. And
22 this, and right now we're talking NOx because that's the only
23 thing that has an increment. And the NAAQS is 100, but the
24 growth allowance is 25. That doesn't mean that you could
25 only go up to here. There's a baseline issue. You

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1 determine -- It depends what -- I mean this is really an
2 interesting area, but I'll keep it simple. The baseline
3 that's set at some point in time, and you basically establish
4 what the air quality is. So let's say the baseline is at 50,
5 then the allowable increment growth is up to 75. Now, you
6 could have a situation where the baseline is triggered here
7 at 90 and the increment would take you above the NAAQS. Now,
8 this would become the limiting factor at that point.

9 MEMBER PORTA: So there is a buffer between the
10 NOx increment and the NAAQS?

11 MR. ELGES: Yeah. That becomes the new standard.

12 MEMBER PORTA: Right. That becomes the new
13 standard under the Clean Air Act. Okay. I got you.
14 Alright. I'm good.

15 CHAIRMAN GANS: We're fine. I just wanted to
16 make sure we all agree. Okay. You're on.

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17 MR. TOMKO: Well, I don't think we all agree.

18 CHAIRMAN GANS: You don't agree with that? You
19 presented it.

20 MR. TOMKO: I agree with that. We have a planned
21 presentation of evidence and witnesses. And I was going to
22 start with one witness and go all the way through. But in
23 view of some of the discussion we had this morning on why we
24 believe some of the evidence that we will seek to introduce
25 as this proceeding progresses, I would request that I kind of

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1 start in the middle of what I was going to present with one
2 of our witnesses, complete that relatively short testimony
3 and then turn it back over to my colleague here to interview
4 another witness. And then I'd like to come back and pick up
5 with the first witness that I started with.

6 CHAIRMAN GANS: That's okay. I'll remind you
7 that with witnesses they will all be sworn in. There will be
8 cross, redirect and then questions by the panel. So that is
9 the process that we're going to go through with every
10 witness.

11 MR. TOMKO: Patrick Sullivan. I'm assuming this
12 is our seat over here. Should we turn the projector off?

13 MS. MEHTA: Yeah. Or you can just put the cap
14 on.

15 CHAIRMAN GANS: Could we have the lights back on
16 too, please, if we're not going to be using that.

17 (Witness was sworn in)
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18 CHAIRMAN GANS: Have him state his name and all
19 we need to know about you.

20

21 PATRICK SULLIVAN

22 Called as a witness on behalf of the
23 Appellant, having been first duly sworn,
24 was examined and testified as follows:

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1 DIRECT EXAMINATION

2 By Mr. Tomko:

3 Q. Could you state your name and all we need to know
4 about you, including your professional background.

5 A. Sure. My name is Patrick Sullivan. I'm a
6 consultant for Refuse, Inc. I work for SCS Engineers. We're
7 a consulting firm that specializes in the industry. My
8 specialty within SCS is air quality permitting and
9 compliance. I'm our national partner for air quality
10 permitting compliance for solid waste facilities which would
11 include the facilities we're talking about, landfill and
12 landfill gas to energy projects.

13 I've been with SCS and in the consulting business
14 for over 22 years now.

15 Administratively I run our solid waste
16 engineering consulting practice in the western US, which
17 includes all the things we do consulting, but my personal
18 technical expertise is in air quality.

19 Professional affiliations I think that are
20 relevant. I am the chairman of the Rules and Regulations
21 Committee of the Landfill Gas Division of the Solid Waste
22 Association of North America, acronym SWANA. And SWANA is a
23 major national organization for the solid waste stream.

24 I'm also the chairman of the Waste Industry Air
25 Coalition, which is a group under the National Solid Waste

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1 Management Association, who is yet another national
2 organization related to the solid waste industry.

3 I am the vice director of the mother lode chapter
4 of the Air and Waste Management Association, which is a
5 national organization relative to air quality and waste
6 management.

7 I'm also on the executive board of the California
8 Biomass Collaborative, which is an organization funded by the
9 California Energy Commission to develop biomass energy
10 resources including landfill gas.

11 So as part of all of those affiliations, a part
12 of my job is to look at regulations and statutes as they
13 relate to the solid waste industries, specifically to air
14 quality and air quality permitting compliance for those solid
15 wastes. So that's something I do every day of my
16 professional career.

17 Of the types of facilities we're talking about
18 here, I've probably been involved with the permitting of over
19 40 of those by my count across the US, most of those in the

20 western US where I permitted landfill gas to energy
21 facilities of some type. Approximately 20 of those have been
22 for Waste Management and their various subsidiaries around
23 the country.

24 So I do have significant experience permitting
25 those exact types of facilities that are in question here.

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1 Q. Your educational background, did you mention
2 that?

3 A. I have a Bachelor's degree in biology from
4 Harvard University. I graduated in 1989. And I started
5 working with SCS right out of college and I'm still employed
6 there. I'm the senior vice president at SCS as well.

7 Q. Professional accreditations?

8 A. I am a registered environmental assessor in the
9 State of California and I'm a certified permitting
10 professional within the South Coast Air Quality Management
11 District. They certify to do permitting within their
12 jurisdiction.

13 Q. Pat, could you tell me when the first time you
14 became aware that CEMS were required for this project?

15 A. The first time that I became aware that CEMS was
16 proposed to be required is when the draft permit was issued
17 on or about February 14th.

18 Q. And prior to that you had no indication that CEMS
19 were going to be a requirement?

20 A. No.

21 Q. You had not had any discussions with NDEP
22 regarding CEMS?

23 A. Not on the CEMS issue.

24 Q. I'm going to hand you I guess this is going to be
25 Exhibit B but I can't keep track of that. We'll hand some

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1 exhibits out. Could you identify the exhibit that I just
2 handed to you. Would you hand him -- I actually handed him
3 my copy?

4 MR. ANGELL: And that could be the record copy as
5 well. Actually the record is already over there.

6 MS. REYNOLDS: Before you start asking him any
7 questions, I just want to clarify something. Have you guys
8 stipulated to any exhibit admissibility? Do you have joint
9 exhibits?

10 MS. MEHTA: No, we don't.

11 MS. REYNOLDS: Okay. For ease of numbering we're
12 going to call your exhibits of the appellant by number. So
13 this will be Appellant's Exhibit 1 and yours will be
14 designated by letter.

15 MS. MEHTA: Okay.

16 CHAIRMAN GANS: Has the Division looked this
17 over?

18 MS. MEHTA: We're currently looking it over.

19 CHAIRMAN GANS: Hold on just a second then.

20 MS. MEHTA: If we can have just a moment, please.

21 No objection.

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22 CHAIRMAN GANS: So this will be Exhibit 1.

23 MS. REYNOLDS: And it's admitted, yes. You need
24 to state on the record that this exhibit is admitted.

25 CHAIRMAN GANS: Okay. So this exhibit is

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1 admitted in to the record as Exhibit 1.

2 Q. (By Mr. Tomko) Pat, can you describe what this
3 exhibit is?

4 A. Sure. This is e-mail exchange between Larry
5 Kennedy from NDEP and Gabrielle Fourie with SCS Engineers.
6 She is a staff person who works for me and is working on the
7 Lockwood permit.

8 Q. And could you tell me what looking at the first
9 e-mail in this chain from Larry Kennedy to Gabrielle, could
10 you tell me what he is requesting?

11 A. Yes. Mr. Kennedy requested that we provide him
12 with an example of emissions testing from a similar or the
13 same Caterpillar engine that was proposed for this project so
14 that we could show that the manufacturer guarantee or the
15 request NOx emission rate that we put in our application that
16 it could, indeed, be met.

17 Q. And was that information provided to Mr. Kennedy?

18 A. Yes. It was submitted via e-mail, the copies of
19 two stack tests for these same engines, Caterpillar 20
20 engines, demonstrating that they could meet those limits.

21 Q. Could you read the first sentence of Larry
22 Kennedy's final response back to Gabrielle?

23 A. Sure. "Gabrielle, I've had a chance to review
24 the test reports and at first glance the results look good.

25 Q. And what did that indicate to you?

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1 A. Well, to us that indicated that we had
2 sufficiently demonstrated that the engines of the equipment
3 met that emission limit and Mr. Kennedy was satisfied.

4 Q. So you indicated that the first time you became
5 aware that there were CEMS is when the draft permit issued;
6 is that correct?

7 A. Yes.

8 Q. And you understand that this appeal is over the
9 CEMS issue?

10 A. Yes, I understand that.

11 Q. And so it must be an important issue to the
12 company to appeal it?

13 A. That's why we're here.

14 Q. Were you working with NDEP through the permitting
15 process? Was SCS Engineering working with NDEP through the
16 permitting process?

17 A. Yes, we were working with them.

18 Q. And so why didn't you, on this important issue
19 why wouldn't you have had a heads up that CEMS was going to
20 be specified as the monitoring?

21 MS. MEHTA: Objection. Leading.

22 CHAIRMAN GANS: Sustained.

23 MR. TOMKO: You did not have a heads up that CEMS
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24 was going to be required?

25 MS. MEHTA: Same objection.

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1 CHAIRMAN GANS: Sustained.

2 Q. (By Mr. Tomko) Did you have a heads up that CEMS
3 was going to be required?

4 A. No.

5 Q. You did not see a draft permit prior to it going
6 out to public comment?

7 A. No.

8 Q. In your experience is it typical to receive a
9 draft permit?

10 MS. MEHTA: Objection. Lack of foundation. What
11 we're talking about is NDEP's policy here. He hasn't laid
12 any foundation that this individual has any experience with
13 NDEP's policy.

14 CHAIRMAN GANS: Sustained. Go ahead. Let's
15 develop that a little bit, okay.

16 Q. (By Mr. Tomko) Okay. Have you done permitting
17 work with Nevada in the past?

18 A. Yes.

19 Q. In the past have you received draft permits prior
20 to them going to public comment?

21 A. Yes.

22 MS. MEHTA: I just want to have an objection for
23 the record. We were subpoenaed by Refuse, Inc. and we
24 provided 9,600 pages of documents in response to the

25 subpoena. None of the exhibits that Mr. Tomko is intending

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1 to introduce right now have any of the bates numbers that we
2 put on all of those documents when we produced them. And
3 just for clarification because I don't have 9,600 pages --

4 MR. TOMKO: well, these --

5 MS. MEHTA: Just a second, please.

6 MR. TOMKO: These were not produced.

7 CHAIRMAN GANS: Hang on. Let her finish.

8 MS. MEHTA: Because I don't have 9,600 pages in
9 my head, I do object to the introduction of evidence that was
10 not produced by us in response to that subpoena which
11 requested basically the administrative record in the permit
12 and especially to evidence that hasn't been provided to us
13 prior to the hearing.

14 CHAIRMAN GANS: So you're suggesting to us that
15 this is something new? Is that what I'm hearing you say?

16 MS. MEHTA: I can't tell you definitively if it's
17 new or not because obviously if we produced it, it would have
18 a bates number on it. But I believe Mr. Tomko was basically
19 about to say that no, we haven't seen it before.

20 MR. TOMKO: It is correct that these were not
21 produced by NDEP. These are -- This is correspondence,
22 e-mail correspondence on other projects, permitting projects
23 that have taken place between SCS and NDEP and them being
24 admitted for the purposes of establishing a prior permit
25 practice in which the agency has in fact provided draft

1 permits prior to the public comment period.

2 CHAIRMAN GANS: Tom.

3 MEMBER PORTA: You know, I would not feel
4 comfortable with anything that's presented here, you know,
5 that we discussed earlier about previous information being
6 submitted. And I think that falls in to this category. I
7 don't know what your opinion is, but I think we're here to
8 hear the case that NDEP had the information on.

9 CHAIRMAN GANS: Yes, I agree with that. I agree
10 with that.

11 MR. TOMKO: May I indulge the Commission with
12 just a point or two? I mean one of the things we talked
13 about earlier this morning was the admissibility of certain
14 information and why that information was not presented to
15 NDEP as part of the permitting process. And what we are
16 trying to show is that that opportunity was not afforded to
17 the company given the way the process with NDEP unfolded.

18 Our position -- And this permitting, prior
19 permitting record, not part of this permit, but it
20 demonstrates a normal course of pattern, a normal course of
21 business in which NDEP has comported itself in the past. And
22 I would suggest that it is relevant for the Commission to
23 understand how that process is played out in the past to
24 understand why we were not able to submit certain information
25 to NDEP prior to the issuance of a permit.

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1 CHAIRMAN GANS: I have a question too but go
2 ahead.

3 MEMBER PORTA: But we don't know, you know, on
4 the policy if in this case they did not supply the current
5 applicant with a draft permit. I mean it could go either way
6 on several different times. So we don't know a history of
7 this policy or lack of policy. So I don't know how we can
8 make a determination that this was the standard protocol for
9 NDEP to do.

10 CHAIRMAN GANS: I would have to agree with that.
11 And I guess I will go one step further. Are you suggesting
12 also that you had no role in that?

13 MR. TOMKO: I'm sorry. No role in?

14 CHAIRMAN GANS: well, it's been explained to us,
15 and I realize we'll take further testimony on in that you
16 wanted this expedited. When I hear the word "expedite" I
17 always come up with the question in my mind if it's expedited
18 and going faster than it would normally go, what has been
19 compromised. It's just a question I have. I'm not saying
20 anything has.

21 MR. TOMKO: Our position is yes, the company did
22 want the permit in a timely fashion. The committee was not
23 attempting to expedite it to the extent that it was
24 shortcutting a necessary exchange of information. And we,
25 you know, as we develop testimony I think you'll see that.

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1 CHAIRMAN GANS: I still agree with Mr. Porta.

2 MR. TOMKO: So we won't accept it, these
3 exhibits. Pat, in your experience in permitting other
4 projects with NDEP, has SCS, have you received copies of
5 draft permits prior to them going to public notice?

6 THE WITNESS: Yes. We have done three previous
7 permitting processes with NDEP at the Lockwood Landfill for
8 air permits, initial Title 5 permit, renewal of the Title 5
9 permit and the permitting of the candlestick flare. And in
10 each of those three cases we've got draft permits provided to
11 us ahead of the public review draft and allowed to comment on
12 those, in some cases multiple times prior to them being
13 issued for draft for public comment. So I have three
14 previous examples prior to this case and all three of those
15 we got drafts ahead of time and had multiple -- in fact we
16 felt it was a great process. It was very collaborative. We
17 had emission calculations that were submitted to us that we
18 exchange and verify that we're both on the same page. Then
19 we got an initial draft permit that was issued to us and we
20 got to comment on that. And then we even got a final look of
21 a draft just to make sure that everything was tidied up
22 before it was issued for public comment. And that was a
23 great process. We were very happy with the Department.

24 In the case of the candlestick flare, that
25 happened very quickly because it was a case where we needed

1 it because of regulatory requirement. And NDEP was great.
2 They expedited it and got the permit issued quickly so we
3 wouldn't miss our regulatory deadline to have the flare in
4 place and yet we still had the collaboration and exchange of
5 information and exchange of drafts. And I think the permit
6 was better for it. It's in everyone's best interest in my
7 opinion to issue those drafts collaborative informal review
8 because there's always mistakes, despite everyone's best
9 efforts. There is misunderstanding. There is other ways you
10 could maybe handle the same permit condition and you could
11 work those things out.

12 And we prefer to work those out in collaboration
13 with the Department rather than waiting until the formal
14 public comment period because it makes it much more difficult
15 because now the public has seen it. Now EPA has seen it.
16 And if you do need to make changes, those changes can be more
17 difficult and they could even force you back through the
18 whole public and EPA review process again if the changes are
19 significant enough. So that was our experience with the
20 three other situations.

21 MR. TOMKO: And just for the Commission's
22 benefit, given where we are at, I had indicated that I was
23 going to proceed with a portion of Mr. Sullivan's testimony.
24 I would like to kind of continue and kind of back track and
25 pick up at the beginning and go through that completely. So

1 we won't be switching at this point.

2 Pat, in your experience, your permitting
3 experience, just generally for sources that have NOx emission
4 limits, CO emission limits, what kind of monitoring is
5 typically required to demonstrate compliance with those
6 emission limits?

7 MS. MEHTA: Objection on the basis of relevance.
8 we're talking about Nevada. we're not talking -- Again, this
9 goes to their desire to introduce all sorts of regulations
10 around the country. But what is important here is how Nevada
11 ensures compliance with this permit term.

12 MR. TOMKO: That's fine. Let's start with
13 Nevada.

14 CHAIRMAN GANS: Acceptable?

15 MS. MEHTA: No objection.

16 CHAIRMAN GANS: Okay. This is number?

17 MS. REYNOLDS: 3.

18 CHAIRMAN GANS: Number 3.

19 Q. (By Mr. Tomko) Pat, could you identify what I've
20 just handed to you?

21 A. Yes. This is a Class 1 air quality operating
22 permit issued by NDEP to Nevada Cement Company.

23 Q. And what type of source is it for?

24 A. It's for a cement facility, but it's got a series
25 of individual emission units that are listed that effectively

1 are all related to kiln.

2 Q. And could you tell me what the NOx emission limit
3 is that is specified in this permit?

4 A. The NOx limit is 475.84 pounds per hour and
5 2,084.2 tons per year.

6 Q. And how about the CO emission limits?

7 A. CO limit is 36.37 pounds per hour and 159.3 tons
8 per year.

9 Q. And could you look at the monitoring provisions
10 in the permit and tell me if CEMS are required for this
11 permit?

12 A. No, I see no requirement for CEMS.

13 Q. And then the period, could you look at the
14 performance compliance testing section which is on bates
15 number 7209. And could you identify the testing requirement
16 that is required there for CO and NOx?

17 A. The testing requirement for CO and NOx appears to
18 include an initial compliance test conducted within 180 days
19 and then an annual test every 12 months of the permit. So an
20 annual stack test along with an initial stack test is
21 required for compliance.

22 Q. And is the stack test method of determining
23 compliance typical in your experience?

24 A. Yes. These appear to be standard US EPA
25 standards for testing.

1 Q. This is what should be the next exhibit. And
2 let's put this aside.

3 CHAIRMAN GANS: Let's make sure they're accepted
4 before we hand them out.

5 MR. TOMKO: Certainly, oh, okay.

6 MS. MEHTA: I would request -- I mean, these have
7 our bates numbers on them so obviously we produced them. But
8 until a few foundational questions are laid, it's hard to
9 determine if we have an objection as to relevance. So we
10 don't object to the form of the exhibit because obviously we
11 produced it and I'm not objecting now, but I need to know
12 exactly where counsel is going before I can make an objection
13 if that's appropriate.

14 CHAIRMAN GANS: That's reasonable. Okay. Let me
15 see those then. Is that the next one we're doing?

16 MR. ANGELL: Yes. But I think she has a request.

17 MEMBER PORTA: She wants the relevance.

18 CHAIRMAN GANS: I'm sorry. I'm sorry. Yes.

19 MR. TOMKO: Oh, I misunderstood.

20 MS. TANNER: You can hand it to the witness, just
21 not to the Commission.

22 Q. (By Mr. Tomko) Patrick, could you --

23 A. Am I done with that?

24 Q. Can you put that aside when you're finished with
25 these? Just turn them over or whatever. Can you describe to

1 me what I just handed to you?

2 A. Yes. This is another Class 1 air quality
3 operating permit issued by NDEP to Nanowatt Energy, LLC.

4 Q. And for what kind of a source is it issued for?

5 A. It is for technically a power plant that includes
6 six simple cycle combustion turbines and also includes some
7 liquid storage tanks for kerosene or diesel.

8 Q. And the combustion turbines, what are the size of
9 those?

10 A. 60 megawatts a piece.

11 Q. And how does that compare to the Lockwood
12 engines, the size of the Lockwood engines?

13 A. Each of the three engines at Lockwood are 1.6
14 megawatts each, so for a total of 4.8.

15 Q. And for these engines, and this specific permit
16 conditions are on bates number 2855, is that for the engines
17 that you were just discussing?

18 A. Right. This is the turbines.

19 Q. Right. And could you turn to the next page, it
20 specifies emission limits and indicate what the CO emissions
21 are?

22 MS. MEHTA: At this point I do want to object to
23 this permit, to the relevance of this. We're talking about
24 NDEP's permitting action on Refuse Inc.'s permit and to
25 parade a bunch of permits through that Mr. Tomko hasn't

1 established that Mr. Sullivan worked on or has any knowledge
2 about other than reading a permit, I think that it goes

3 beyond the scope of the relevance of this hearing.

4 CHAIRMAN GANS: Can you explain to us where we're
5 going here?

6 MR. TOMKO: Yes, I would like to do that. This
7 is a permit for engines for energy generation project similar
8 to Nanowatt, larger than Nanowatt that has very similar
9 permit requirements in terms of emission caps. It has very
10 different monitoring. It's a decision made by NDEP that we
11 think shows how NDEP typically goes about establishing
12 monitoring.

13 CHAIRMAN GANS: And the witness' relationship to
14 all of this? He worked on this or part of this?

15 MR. TOMKO: The witness did not work on this
16 particular project. This is a permit issued by NDEP. NDEP's
17 position is that they've exercised their discretion
18 appropriately and consistently. We think there are several
19 permits issued by this agency, produced by this agency to us
20 during discovery, which make the case that NDEP's, what
21 they're representing is just not true. This is very
22 important. This is a very important piece of evidence and I
23 think it would be very helpful for the Commission to
24 understand the kind of monitoring that has been established
25 by NDEP on a very similar permitting circumstances.

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1 CHAIRMAN GANS: Okay. But what does he have to
2 do with that? Is he confirming it? What's he doing?

3 MR. TOMKO: Well, he is familiar with the

4 Lockwood plant, which he worked on. And I would like Pat to
5 compare the particulars in this permit to Lockwood and
6 distinguish them.

7 CHAIRMAN GANS: Pleasure of the panel?

8 MEMBER PORTA: I just want to make sure we're
9 comparing apples to apples. Because every different basin
10 has different rules that may be applicable. So if these come
11 in like Nevada Cement is I believe in a separate basin,
12 different triggers, different requirements. So if we're
13 seeing these permits come in and then there's testimony, I
14 want to make sure we're hearing very similar, the same air
15 basin similar requirements and will you do that or?

16 MR. TOMKO: Yes, we can. When you're talking
17 about the basin, that's increment, that's NOx. The principal
18 point we want to show with this is relative to CO emissions
19 which is basin independent because there is not an increment
20 for CO.

21 MEMBER PORTA: Right.

22 MR. TOMKO: So regardless of where a facility
23 would be located, an emission cap and how compliance is
24 demonstrated would be relevant.

25 MEMBER PORTA: Okay. That's would I would like

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1 to see if the information is going to be presented.

2 MS. MEHTA: Mr. Chairman, if I may make -- I
3 think I made this objection but it got a little sidetracked.
4 This witness, as Mr. Tomko has said, isn't the appropriate

5 person to lay the foundation for this particular permit. He
6 can certainly try to get it in on cross-examination of our
7 witnesses.

8 MR. TOMKO: Well, this is a permit issued by NDEP
9 that goes to the very heart of our case.

10 CHAIRMAN GANS: I don't think the issue here is
11 that we don't want this exhibit.

12 MR. TOMKO: Sure.

13 CHAIRMAN GANS: The issue is why it's being
14 brought up with this witness. I would agree with counsel
15 that there's probably more appropriate witnesses to bring
16 this up with.

17 MR. TOMKO: Although for purpose of allowing a
18 comparison with this permit with Lockwood I think the
19 consultant for the Lockwood facilities particularly able to
20 do that.

21 MEMBER PORTA: I guess I would agree with that if
22 this witness was a person involved in that permitting process
23 for that facility. And they weren't. So I would tend to
24 agree with you, Mr. Chairman, that the more appropriate
25 witness would be someone from the Division to compare these

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1 permits and answer these questions.

2 CHAIRMAN GANS: I don't think you should have a
3 problem with that. You still have rebuttal and you can call
4 another witness for that. This is not the time.

5 Q. (By Mr. Tomko) Okay. Pat, could you identify

6 what I've just handed to you?
7 A. Yes. It's a March 15th 2011 letter from SCS
8 Engineers signed by myself and my staff person, Pat Mohn from
9 the NDEP and we are commenting on the draft Class 1 air
10 quality operating permit for Lockwood Landfill including
11 these proposed landfill gas engines.
12 Q. And this was submitted during the public comment
13 period?
14 A. Yes.
15 Q. And could you describe the purpose of the letter?
16 A. Sure. The purpose of the letter was to note
17 issues or items in the draft permit that we had problems with
18 and that we were requesting NDEP to give further
19 consideration to. Some items were simple corrections that we
20 thought something had gotten written incorrectly. Some items
21 are things where we like NDEP to consider alternative
22 language in the permit. And then we also bring up the
23 comment on the CEMS issue.
24 Q. So that was one of the issues -- The CEMS issue
25 was one of the issues that this comment letter was

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1 specifically addressing?
2 A. Yes.
3 Q. And which comment is that?
4 A. That's comment number nine on page five of the
5 letter.
6 Q. Starting at the bottom of page five there's a

7 list of landfills. Do you see that?

8 A. Yes.

9 Q. And it goes over to page six. What was the
10 purpose of providing that list of landfills?

11 A. We provide that list of landfills to give the
12 NDEP staff who we had understood that by this point had never
13 permitted landfill gas engines before, that they might
14 benefit from some of the examples of other agencies that had
15 permitted those engines.

16 And specifically relative to CEMS, we wanted to
17 note that all of these landfill gas to energy projects with
18 landfill gas fired engines in the western US that none of
19 them had required CEMS. And that was part of our response to
20 the request that they reconsider the CEMS requirement.

21 Q. And could you explain what this list, what this
22 list is based on?

23 A. A compilation of projects that my firm has been
24 involved with or Waste Management projects, Waste Management
25 and one of their other subsidiaries has that landfill gas to

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1 energy project on their landfill?

2 Q. So you're familiar with each of these landfill
3 projects?

4 A. Yes.

5 Q. Is this a comprehensive list of all the landfill
6 gas to energy projects in the country?

7 A. No.

8 MS. MEHTA: Objection. I just request that
9 counsel because he is on direct examination not ask leading
10 questions.

11 CHAIRMAN GANS: Okay.

12 Q. (By Mr. Tomko) what is the scope of this list?

13 A. This list were projects again that either SCS or
14 Waste Management were familiar within the western US. We
15 thought those would be the most relevant to Nevada, NDEP,
16 particularly since many of these are in the nine
17 jurisdictions which Nevada falls in, but they would be more
18 likely to want to see decisions that were made by other EPA
19 region nine states or other neighboring states.

20 Q. Are there other landfill gas to energy projects?

21 A. Yes, there's landfill gas to energy projects
22 around the country.

23 Q. This, the list of landfills in this March 15th
24 letter said they don't require CEMS. How do they demonstrate
25 compliance with their CO and NOx emission limits?

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1 MS. MEHTA: Objection. Relevance.

2 MR. TOMKO: I do not think it's irrelevant at all
3 to see how other landfill gas to energy projects that have
4 engines similar to the project at Lockwood, how they have
5 been required to demonstrate compliance with CO and NOx
6 emission limits. And that's the very purpose of why we're
7 here.

8 CHAIRMAN GANS: I'm going to overrule that.

9 Continue.

10 Q. (By Mr. Tomko) And so again, the question is how
11 do these landfills go about demonstrating compliance with the
12 NOx and CO emission limits from the engines that are at those
13 sites?

14 A. Most of them have just some annual stack testing
15 requirements to show compliance with the various emission
16 limits. Some of them also use periodic monitoring with
17 hand-held devices as part of their compliance program.

18 Q. And you said hand-held devices. Can you explain
19 what that is?

20 A. That is a monitoring instrument that directly
21 measures concentrations of NOx and CO or whatever pollutant
22 that you have in the exhaust stream from an emitting device,
23 any type of device. But it's made at a size that's portable
24 and can be moved from site to site and can test a variety of
25 locations.

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1 Q. And are those the alternative -- is that the --
2 the alternative monitoring approach that you propose for
3 Lockwood, does that involve this kind of analyzer?

4 A. Yes. That's the alternative approach we did
5 propose. How that works is during each annual stack test
6 while the official stack test is going on they're also
7 monitoring with the portable analyzer and you're correlating
8 those results and you end up with a correlation factor that
9 relates to official stack test results to the hand-held

10 device. And then the hand-held device can be used on a
11 periodic basis throughout the year to measure those emissions
12 and they can use the correlation factor to relate it back to
13 the stack test. So that's how they're typically used. And
14 how frequent depends on the agency and how frequent they want
15 to see it.

16 Q. Okay. So on page six, the second paragraph
17 following that list of engines, could you read that please?

18 A. As there is -- The whole paragraph?

19 Q. Let's start with the first sentence.

20 A. "As there is no control equipment to malfunction,
21 the CEMS is not warranted and emissions change slowly over
22 time, therefore RI believes that the data gathered by CEMS
23 will not provide any additional compliance information that
24 wouldn't be captured during the annual source test and would
25 be more than sufficient to detect any issues."

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1 Q. Could you explain what the significance is of the
2 reference that there is no control equipment to malfunction?

3 A. We made that reference because when an emitting
4 device relies on a control system to maintain a short
5 compliance with its emission, you now have another piece of
6 equipment that can now malfunction and cause an exceedance of
7 the emission limit. So you have the underlying basic
8 equipment, in this case an engine. That can have problems
9 and potentially exceed its limit. Now you have a control
10 system that you rely on to meet your emission, that's a

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11 secondary device.

12 So it's been my experience that when you have
13 back-end control systems, more monitoring rather than less is
14 typically required because you have a second item there that
15 can malfunction. And in fact we believe that's consistent
16 with US EPA periodic monitoring guidance would suggest the
17 same. If you have control equipment, more, not less
18 monitoring is warranted.

19 So in this particular case we're proposing these
20 engines without control systems for their emissions and
21 therefore we didn't have that added piece of equipment that
22 could malfunction and cause an exceedence of the limit.

23 Q. Also in the sentence that you read, the point is
24 made that emissions changed slowly over time. Could you
25 explain the significance of that and the relevance to that to

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1 CEMS?

2 A. That's in relationship specifically to the CO
3 emissions. As we heard earlier today, carbon monoxide
4 emissions from an engine will increase over time as the
5 impurities in that gas build up on the engines, particularly
6 the cylinder heads of those engines, and result in a
7 reduction in performance, which typically means less
8 efficient combustion. And less efficient combustion means
9 more CO. But that is a process that occurs over time, a
10 matter of months. And we think it's trackable over that
11 time.

12 And because we believe that change occurs
13 gradually over time, that instantaneous monitoring with CEMS
14 was not warranted to capture that trend. We could capture it
15 with other ways of testing, with annual stack test and with
16 our proposal for periodic monitoring where at different
17 points during the year be able to see those changes in time
18 as it approached whatever our emission limit was and then be
19 able to do whatever we needed to do to make sure we didn't
20 exceed those levels and CEMS wasn't necessary for us to
21 achieve that. That was our point.

22 MR. TOMKO: I would ask that the March 15th
23 letter be admitted for evidence.

24 MS. MEHTA: No objection.

25 CHAIRMAN GANS: Thank you. Please. We'll accept

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1 it. This is Number 4?

2 MS. REYNOLDS: Yes.

3 Q. (By Mr. Tomko) Did the March 15th letter resolve
4 the CEMS issues?

5 A. No.

6 Q. Did you have any additional efforts, make any
7 additional efforts to resolve the CEMS issue with NDEP?

8 MS. MEHTA: Objection. Leading.

9 CHAIRMAN GANS: Sustained.

10 Q. (By Mr. Tomko) Was there a follow-up meeting
11 with NDEP?

12 A. We requested a meeting with NDEP to discuss not

13 only the CEMS issues but all of our comments in the March
14 letter.
15 Q. You requested a meeting. Was there a meeting?
16 A. Yes.
17 Q. What was the date of that meeting?
18 A. April 14th. I would have to see a document to
19 see.
20 Q. Okay. April 14th?
21 A. Thereabouts. I'm guessing. It was in April.
22 Q. There was a meeting and what month was it in?
23 A. April.
24 Q. And did you discuss the CEMS issue at that
25 meeting?

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1 MS. MEHTA: Same objection.
2 Q. (By Mr. Tomko) What was discussed at the April
3 meeting?
4 A. Again, we discussed all of our comments from the
5 March letter including the CEMS issue.
6 Q. And how did that meeting come about?
7 A. We requested the meeting with NDEP.
8 Q. And do you recall who was at the meeting for
9 NDEP?
10 A. Yes. The meeting was attended on the NDEP side
11 by Larry Kennedy and Pat Mohn from NDEP.
12 Q. And on behalf of Refuse Inc?
13 A. On behalf of Refuse, Inc. it was myself,

14 Christian Colline from Waste Management, Allen Hunt from
15 Waste Management Renewable Energy and Teresa, and I can't
16 remember her last name. It was a staff person for Waste
17 Management.

18 Q. And you mentioned you discussed the CEMS issue at
19 the meeting. What in particular did you discuss about the
20 CEMS?

21 A. We reiterated our concerns and tried to follow up
22 on some of the comments we made in the March letter. We also
23 presented them with a proposed alternative monitoring
24 program, as I described earlier, using the hand-held
25 monitoring devices. We discussed that with them and

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1 ultimately tried to convince them to reconsider the CEMS and
2 instead consider an alternative approach.

3 Q. What was NDEP's response to the proposal?

4 A. They said they would consider it, further review
5 it, but that two individuals that were there at the meeting
6 that they would not be able to make this determination on
7 their own and that they were likely to seek advice from Mr.
8 Mike Elges.

9 Q. Okay. I'd like to hand you another proposed
10 exhibit. Could you identify, Pat, what this is that I just
11 handed you?

12 A. This is a -- The first item on page one is an
13 e-mail from me to Pat Mohn and Larry Kennedy from NDEP. I'm
14 thanking them for the meeting and providing some follow-up

15 information that they had requested at the meeting. And
16 that's attached to the e-mail starting with an April 21st
17 letter that effectively summarizes what additional pieces of
18 information we are attaching. And then attached to that
19 letter are all of those pieces of information.

20 Q. Okay. Could you read the first paragraph of your
21 e-mail and again state who it's addressed to?

22 A. Again, this is to --

23 MS. MEHTA: I'd just like to launch an objection
24 to -- It's appropriate to lay the foundation and then move
25 for the exhibit. But it's not appropriate to start reading

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1 the exhibit before it's been introduced.

2 If you want to move for the admission of this
3 exhibit, Mr. Tomko, I won't object.

4 MR. TOMKO: Okay.

5 CHAIRMAN GANS: We'll accept it right now. This
6 is 5?

7 MS. REYNOLDS: Yes.

8 Q. (By Mr. Tomko) And with that, Pat, I will ask
9 you again if you could read the first paragraph of that
10 e-mail.

11 A. Yes. Again, the e-mail from Pat Mohn and Larry
12 Kennedy. It states, "Pat and Larry, thank you so much for
13 meeting with us and discussing our permitting concerns. We
14 appreciate your willingness to work out some of the permit
15 issues that are problematic for us. To that end, we promise

16 to provide some follow-up information that was discussed and
17 requested at the meeting. We are hopeful that this
18 information gives you what you need and allows you to move
19 forward with the permit language changes we discussed. We
20 understand two of those will need to go to Mike Elges for
21 approval."

22 Q. Okay. And then with the attached letter would
23 you describe the information generally that's provided in
24 that letter?

25 A. Sure. The letter and the attachment to it covers

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1 several topics that were discussed at the April 14th meeting
2 and then where additional information was requested by NDEP.
3 And the genesis goes back to our original comments on the
4 draft permit.

5 As it relates to the CEMS issue, we provided some
6 additional information that we had mentioned that we could
7 provide to them at the meeting. And those items are bulleted
8 on page one of the April 21st letter and they include, in
9 general, rule language and/or permit examples from other
10 landfill gas to fire engine projects where the periodic
11 monitoring with the handheld is used as a compliance tool.

12 So the intent was to provide NDEP with other
13 examples where jurisdictions allowed the use of the hand-held
14 monitoring either issuing another permit condition or
15 actually having it in a rule upon which a permit condition
16 was then based.

17 In addition, we provided a guidance prepared by
18 the Bay Area Air Quality Management District, which is in the
19 San Francisco bay area, specific to landfill gas to fire
20 engine. The guidance, although it is for BACT requirements
21 in what that jurisdiction deems to be best available control
22 technology for these engines to determine compliance with
23 best available control technology, the guidance states the
24 barrier will use the periodic monitoring as a compliance tool
25 to make sure that the BACT requirements are being met.

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1 So those, that list of information was additional
2 information that we provided specific to those other
3 examples.

4 We also provided some information on some other
5 items that they requested, like kind replacement issue that
6 was referenced earlier, swap out engines and doing an
7 overhaul. And we provided permit examples from, again from
8 other jurisdictions that had allowed that and had some permit
9 language we thought would be helpful to NDEP and their
10 consideration of that issue. There were also a few other
11 items.

12 Q. Could I direct you to page 486 of this exhibit?
13 And that's of course the NDEP bates number. Could you
14 describe what this document is?

15 A. This is a Title 5 operating permit or a portion
16 of it, relevant portions of it issued by the Oregon
17 Department of Environmental Quality. It was issued to the

18 Riverbend Landfill Company, which is a Waste Management
19 subsidiary.

20 Q. Okay. And could you identify for me what the CO
21 emission limit is for this permit?

22 A. As noted on Condition 29 B, which is on bates
23 number 488, CO site-wide emission cap for this facility is
24 249 tons per year.

25 Q. And could you tell me if there's a CEMS

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1 requirement?

2 A. No. The Riverbend Landfill, which has six
3 landfill gas-fired engines, candlestick flare and closed
4 flare all burning landfill gas, all of those combustion
5 devices as well as some other devices that emit CO are all
6 contained under a cap, the 249 ton per year cap.
7 Individually adding up their potential to emit it would be
8 over 250, but the cap is used here in a similar way it was
9 proposed for the Lockwood to maintain minor source status
10 related to PSD and the landfill to gas-fired engines here do
11 not have CEMS requirement.

12 Q. And the in-house requirements determined for that
13 cap?

14 A. Stack, yes.

15 Q. Okay. I would ask you to turn to page 537. And
16 could you describe what is on page 537?

17 A. Starting on page 537 bates stamp is where we
18 provided NDEP again with, as it states, examples of other

19 permits using periodic monitoring for landfill gas engines.
20 And the first one is Northwest Regional Landfill, which is in
21 Maricopa County, Arizona.

22 Q. And the permit condition, could you describe what
23 the permit condition requires for monitoring NOx and CO
24 emissions?

25 A. Yes. It requires quarterly monitoring with some

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1 form of device and reportable analyzers are considered
2 acceptable for that monitoring.

3 Q. And on page 538, could you describe what page 538
4 is?

5 A. Page 538 is a rule example from the State of
6 Texas where they allow periodic testing for NOx and CO on
7 internal combustible engines using again a portable hand-held
8 device as being allowed. Again, it's quarterly and it
9 indicates that the portable analyzers are allowed.

10 Texas Waste Management has six landfills where
11 they have plants in Texas, landfill gas plants in Texas that
12 have this as a permit condition. Texas has permit by rule.
13 That's why I didn't provide an actual permit example because
14 they actually can permit these devices by rule.

15 Q. And are the petitional examples on pages 541 and
16 542, I think I missed one before that, 540, are those in a
17 similar vain?

18 A. Right. Those are in a similar vain. Foothills
19 Landfill, which is in the San Joaquin Valley District, again

20 a rule language that allows portable analyzers for NOx and a
21 permit condition on a landfill gas-fired engine require a
22 monthly monitoring portable device for NOx and CO. And
23 that's on page 540.

24 On 541 is the Simi Valley Landfill. That's
25 Ventura County Air Pollution District. Again, the rule

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1 language is on 541 and the permit condition is on 542. The
2 actual monitoring program and how that monitoring is done is
3 required to be included in to an engine operator inspection
4 plan, which is also provided and starts on page 544. So
5 that's the way that requirement was implemented by requiring
6 this engine inspection plan which includes the periodic
7 monitoring.

8 Q. Thank you. I'd like you to go back to the March
9 15th exhibit. I'm not sure what exhibit number it is. And
10 if you could turn to page 2094 bates number. It's page five
11 of the document. And we had looked at those lists of other
12 landfills earlier. And the first one is -- Let's not look at
13 the first one. Let's look at the last one under California
14 landfills, the Altamont Landfill. And what permitting
15 jurisdiction is that in?

16 A. That's the Bay Area Air Quality Management
17 District.

18 Q. Okay. And is that the permit for that?

19 MS. MEHTA: Objection. This is something that
20 does not appear to have been provided to us. It certainly

21 was not something we produced in response to the subpoena and
22 is not part --

23 CHAIRMAN GANS: This is Exhibit 4 that you're
24 talking about?

25 MS. MEHTA: No. This is what he just handed to

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1 the witness. But I object to any questioning about this.

2 CHAIRMAN GANS: Wait a minute. Hold up. I
3 thought we were looking at Exhibit 4, page 2095. Are you all
4 done with that?

5 MR. TOMKO: Well, I referenced that for the
6 purposes of identifying the fact that this exhibit, which has
7 been accepted, identifies the Altamont Landfill and I'd like
8 to introduce the permit for that landfill.

9 CHAIRMAN GANS: And your objection is?

10 MS. MEHTA: I object on the basis of relevance,
11 lack of foundation and the fact that this was never provided
12 to us during the permitting process.

13 CHAIRMAN GANS: I think we need some better
14 foundation.

15 Q. (By Mr. Tomko) You referenced this landfill in
16 the March 15th letter. And what was the purpose of
17 referencing it?

18 A. The purpose of referencing this landfill was that
19 it was a facility that has a landfill gas-fired engine and
20 those engines are not required to have CEMS to determine
21 compliance with their emission limits.

22 In addition, this landfill also has a CO cap that
23 was imposed to prevent major source status.

24 Q. Was the purpose of listing -- what was the basis,
25 what was the documentation that you relied on for listing

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1 this landfill on here?

2 A. We rely on the permit issued for that facility
3 that shows that they had permit to operate landfill gas-fired
4 engines. Those engines have individual as well as site-wide
5 emission limits and they're not required to have CEMS.

6 CHAIRMAN GANS: Counsel, one thing that concerns
7 me is that I think you've made a point that CEMS is not used
8 in other landfills. I get that. I got it in your brief.

9 MR. TOMKO: Okay.

10 CHAIRMAN GANS: But I want to go back to what
11 Mr. Porta said earlier. If this one that you're talking
12 about now is on Venus and this one is over on Mars, we have
13 to have apples and oranges here. The more important to me
14 is --

15 MR. TOMKO: Okay.

16 CHAIRMAN GANS: -- how they relate. And I'm not
17 getting that.

18 MR. TOMKO: Okay. Fair point. I apologize.

19 Q. (By Mr. Tomko) The CO cap for the Lockwood
20 Landfill, what is the reason for the CO cap?

21 A. To avoid being considered a major source of CO
22 emissions.

23

Q. Okay.

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A. To have and to maintain our minor source status under the PSD program.

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Q. And the CO cap for the Altamont permit, what is the basis for that?

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MS. MEHTA: Again, I object. Once again, this was, as Exhibit 4 demonstrates, they did provide some permit language. They didn't provide the Altamont permit. And now we're on the verge of, you know, ballooning the amount of evidence that was never provided to the agency for your consideration here.

I also object on the lack of foundation because he hasn't established how Mr. Sullivan is familiar with this permit at all.

CHAIRMAN GANS: And I want to go back and remind you again, you know, I'm not sure I really care about the cap. I mean this sounds very bad. But I'm concerned about the environmental situation we're in. Are we on the moon or are we on earth? Are we in Lockwood or are we on some other landfill somewhere else at a different altitude, different environmental conditions, different temperatures? I've got to see the relevance. I'm going back to Mr. Porta's comment about apples and oranges.

MR. TOMKO: The CO cap and the purpose of the CO cap is regardless of location. To avoid PSD it doesn't matter if you're in San Francisco, if you're in Texas. The

24 same laws apply in terms of emission limitations before
25 triggering PSD. So caps are established in many

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1 jurisdictions for that very purpose. And there has to be a
2 mechanism for ensuring compliance with that cap. And the
3 rationale for ensuring compliance with a cap at an Altamont
4 facility, a Lockwood facility, where ever, it's the same to
5 ensure that that cap is not exceeded.

6 CHAIRMAN GANS: So your point is the cap, not
7 where it's at?

8 MR. TOMKO: Exactly. And there's some confusion
9 because we've been talking about increment. And increment is
10 cite specific. That's NOx. Okay. It would be -- I would
11 not try to argue that Altamont had the same considerations as
12 Lockwood does relative to that pollutant. But again, we have
13 two pollutants and each have a sense requirement.

14 CHAIRMAN GANS: I'm going to allow this. But I
15 think it goes back to what we were talking about before,
16 about introducing evidence, introducing information that was
17 never discussed or given to NDEP. I still have a little
18 problem with that based on the motion that we approved.

19 MR. TOMKO: I understand. I believe you
20 indicated that you would consider evidence as presented. And
21 again, the purpose of, you know, going back to the March 15th
22 exhibit, which is a comment letter submitted by the company,
23 they identified this as one of the landfills.

24 CHAIRMAN GANS: Okay. Proceed.

MR. TOMKO: Thank you.

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1 MS. MEHTA: Mr. Tomko, I'm not lodging an
2 objection. I do note that our court reporter probably needs
3 a break. So if Mr. Tomko is at a breaking point here
4 shortly, I would just request that we take a five-minute
5 break so that our court reporter can rest her hands.

6 MR. TOMKO: That sounds fair. Shall I just
7 finish quickly with this?

8 CHAIRMAN GANS: Uh-huh.

9 Q. (By Mr. Tomko) So could you describe what kind
10 of source this is?

11 A. This is a, this is a solid waste landfill. And
12 it has a variety of individual emission units, including two
13 landfill gas flares, two landfill gas fire combustion
14 turbines and two landfill gas-fired IC engines.

15 Q. And I'll direct you to -- well, I'll ask you if
16 there is a CO emission cap for this permit?

17 A. There is. In fact the permitting action that was
18 described in this permit that was issued on November 3rd
19 2009, the purpose of the permitting action was to establish
20 that cap. The sources under that cap already existed and
21 were already permitted prior to this time. And I was
22 involved with the permitting of the engines that we were
23 talking about here and I also did the permitting that's
24 referenced in this permit, establishing the CO cap.

25 Q. And are CEMS required to demonstrate compliance

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1 with this?

2 A. No, CEMS are not required.

3 Q. Okay. And how is compliance determined?

4 A. Compliance is determined for the two landfill gas
5 flares and the two combustion turbines, an admission factor
6 is determined during the annual stack testing and the factor
7 is multiplied by throughput information, effectively heated
8 input that is monitored throughout the year. And that's used
9 to calculate annual emissions. And it's done each month for
10 a 12-month rolling total so that no 12 months can go over the
11 cap.

12 The two landfill gas-fired engines are done a
13 little bit differently. They actually use the -- The
14 calculation is done similarly but that's actually developed
15 from the hand-held monitoring. So they use the hand-held
16 monitoring which is calibrated and correlated during the
17 annual stack test and that develops an emission factor and
18 then that factor is multiplied by the actual throughput to
19 those devices for the two engines. And then that's all
20 tallied up together and they have to confirm on the 12-month
21 rolling total that they never exceed the CO cap that's been
22 established.

23 MR. TOMKO: Okay. I would ask that this be
24 admitted as an exhibit.

25 MS. MEHTA: I have the same objections as to

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1 relevance and lack of foundation.

2 CHAIRMAN GANS: I'm going to allow it. which one
3 is this?

4 MS. REYNOLDS: 6.

5 CHAIRMAN GANS: 6. Okay. Are we ready for a
6 break?

7 MR. TOMKO: Yes.

8 CHAIRMAN GANS: Okay. Let's take a break. Come
9 back at three.

10 (Recess was taken)

11 CHAIRMAN GANS: Because of some time constraints
12 that I mentioned at the beginning of the hearing, I'm going
13 to cut this off at 3:50. We still have to have public
14 comment of course and some other little things. We have some
15 messages I want counsel to share with all of us. So if
16 you'll work towards that end, I would appreciate it.

17 MR. TOMKO: Okay. Are we ready to reconvene on
18 the record?

19 Q. (By Mr. Tomko) Pat, can you describe what I just
20 handed to you?

21 A. You handed me a Title 5 permit to operate for a
22 landfill gas to energy project at Tri Cities Landfill on the
23 Salt River Pima Maricopa Indian Community land, which is near
24 Phoenix, Arizona.

25 MS. MEHTA: Again, I object to any testimony on

1 this exhibit for the reasons that I've stated. It's in
2 another area. It's comparing apples to oranges or we don't
3 even know if we're in an apples to oranges territory. It's
4 not relevant. It wasn't provided to NDEP. And there's no
5 foundation that this witness has any familiarity with this
6 permit.

7 Mr. Tomko appears to want this witness to testify
8 as an expert. He has not been proffered as an expert nor has
9 Mr. Tomko provided an expert report, which he is required to
10 do if he wants to proffer this witness as an expert. So I
11 object to those grounds.

12 MR. TOMKO: If I may, Pat Sullivan did work on
13 this permit. This permit was identified in the March 15th
14 letter. We could pull that back out. This is an EPA permit,
15 the significance of which, as counsel indicated in her
16 opening statement, that if they were not to permit Lockwood
17 in the fashion they did that they would have EPA breathing
18 down their throat. This permit is relevant to show that in
19 fact EPA, in fact the same region that NDEP is in, region
20 nine, issued this permit.

21 CHAIRMAN GANS: Mr. Tomko, I'm going to allow
22 this, but it goes right back to relevancy again. I took for
23 face value what you gave us in your briefs. I didn't think
24 you were lying to us about these various permits and these
25 various areas that you're talking about.

1 MR. TOMKO: Right.

2 CHAIRMAN GANS: But you have not convinced me yet
3 that there's relevancy, that there's apples and oranges here.
4 You can go ahead with this, but I think you're missing the
5 point, for me anyway.

6 MR. TOMKO: May I try to explain one more time
7 with your indulgence?

8 CHAIRMAN GANS: Sure.

9 MR. TOMKO: And I apologize for not being clear.
10 We have a NOx issue and we have a CO issue. The purpose that
11 NDEP put forth for needing CEMS for NOx was based on the
12 increment which we don't think that's an issue. There's a
13 separate justification for CO. The justification for CO is a
14 cap to avoid PSD. The PSD regulations apply broadly and
15 uniformly. So to the extent there is a CO cap to avoid a
16 PSD, that is apples to apples. If I were making cases on
17 increment to comparing NOx increment and the Lockwood air
18 shed with a different air shed, I think that would be an
19 apples and oranges.

20 Additionally, the other thing that I think is
21 very important to relevance is all of these are landfill gas
22 engines and the fundamental question, EPAs under the Clean
23 Air Act permits are to establish emission limits. The
24 emission limits are to be complied with. The law requires
25 that there be monitoring sufficient to ensure compliance.

1 That's what we're talking about here.

2 So regardless of the permit, regardless of
3 whether it's a cement kiln, in fact, or a Lockwood Landfill
4 engine, that is the same premise. We're intending to focus
5 more on landfill energy and landfill energy projects that are
6 utilizing similar technologies, similar engines because it's
7 similar to what we're doing. But it does not matter where
8 those engines are. The Clean Air Act requires that emission
9 limits be established and that there be a method of
10 determining compliance. And the question is what's the
11 sufficient, what's necessary under Nevada's law, what is
12 necessary?

13 And we think it is important that other competent
14 air quality agencies, EPA region nine, which exercises
15 oversight over NDEP, they have made similar decisions to
16 establish emission limits and monitoring methods. And we
17 think that is very relevant.

18 CHAIRMAN GANS: Because this is region nine I
19 said I would allow it. I want to do one other thing, I'll
20 probably speak to Mr. Porta so that you can explain this to
21 me also.

22 MEMBER PORTA: I would tend to agree with
23 Mr. Tomko's explanation. PSD and the 250 tons per year limit
24 for CO, NOx, whatever it is, applies anywhere in the US. If
25 you're a source and you come in to any state and you're going

1 to emit or have the potential to emit over 250 tons, you're
2 going to be subject to PSD. Okay. The NOx increment is
3 different, it's site specific like he has stated.

4 My issue again is with issues of evidence and the
5 appropriateness of the evidence being admitted and it's
6 relevant. I think this is similar to what we're looking at
7 in the Lockwood Landfill case for CO. And if this gentleman,
8 Mr. Sullivan, has, you said he did this permit or had worked
9 on this permit?

10 MR. TOMKO: Yes.

11 MEMBER PORTA: I would think it would be
12 appropriate that we could go ahead and hear this one.

13 MS. MEHTA: I have one more objection because
14 this wasn't produced in advance. I'm looking at it for the
15 first time. I do note that it's not dated and it's not
16 signed. And so for authentication purposes, I have an
17 objection.

18 MEMBER PORTA: That's another issue that we
19 talked about at the very beginning of this hearing that I'm
20 having trouble with. The Division was not provided this
21 during the process of permitting. Is it appropriate for us
22 to now consider it at this juncture, at this appeal?

23 MR. TOMKO: And I believe your rules allow you to
24 accept evidence that is relevant to helping you to decide, to
25 understand a matter. And I believe this for the reasons I've

1 explained is exactly that.

2 CHAIRMAN GANS: Please authenticate it and I said
3 you could proceed.

4 Q. (By Mr. Tomko) Pat, you're familiar with this
5 facility?

6 A. Yes.

7 Q. And could you tell me what your involvement was
8 in this permit?

9 A. My firm and the staff under my direction do all
10 the air quality permitting and compliance for this Tri Cities
11 Landfill. And when this project was proposed, Salt River
12 Project, which is a local utility in the Phoenix area. So we
13 asked them because of their experience with the landfill and
14 these types of projects in getting the permit that you see
15 here there. And this version of the permit I actually
16 downloaded off of US EPA region nine website. This is the
17 way it came off of their website, without the signature and
18 date, which I'm sure we can authenticate for you.

19 CHAIRMAN GANS: Oh, I need that, the
20 authentication, please, if we're going to admit this in to
21 evidence. Otherwise if it's not authentic, if you can't show
22 authenticity I don't want it in the record.

23 MR. TOMKO: You want a signed copy before it's
24 admissible?

25 CHAIRMAN GANS: Yes, I do.

□

1 MR. TOMKO: So we'll come back to this?

2 CHAIRMAN GANS: Uh-huh.
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3 MR. TOMKO: Okay. And with that authentication
4 it will be admissible?

5 CHAIRMAN GANS: I just want to caution both
6 counsel, and probably it applies more to RI than it does to
7 NDEP, that this whole issue of evidence and exhibits, it's
8 going to hold us up, it's going to continue to hold us up and
9 it's going to continue to delay this whole hearing.

10 MR. TOMKO: I appreciate that point. And I think
11 as we're moving forward at least what I would like to explore
12 next is something that was provided to NDEP. So I don't
13 anticipate an objection to that. And I think some of the
14 other permits that we will come back to with the NDEP folks
15 and review with them. So we'll try and keep it moving along.

16 MEMBER PORTA: Just a point of clarification. We
17 did accept Exhibit 6 in to the record but now we want to make
18 sure we have a -- I'm just seeking clarification. We
19 accepted Exhibit 6 in to the record I think with the
20 exception that we get a certified or a verified --

21 CHAIRMAN GANS: With the condition.

22 MEMBER PORTA: Condition that we get a certified
23 or verification of the copy.

24 MS. REYNOLDS: He hasn't given you -- That's
25 potentially Exhibit 7. 6 is fine. It's signed and dated.

□

1 MEMBER PORTA: Okay. So it's 7?

2 CHAIRMAN GANS: It's 7.

3 MR. TOMKO: And you don't want me to explore

4 questions with him at this point on that?

5 Q. (By Mr. Tomko) Okay. So we are going back to
6 the exhibit which is the April 21st correspondence. And
7 again, this was correspondence that was submitted to NDEP
8 with the attachment that I would like to talk about next.
9 And this is on page 558, bates number 558. Pat, could you
10 describe what this document is?

11 A. Yes. This is a white paper issued by the Bay
12 Area Air Quality Management District. And it is a
13 culmination of their revisiting of what is best available
14 control technology for clean burn landfill gas fire IC
15 engines.

16 Q. Okay. And could you refer to, and I'll refer to
17 the page numbers on the document itself, four of 15. Do you
18 see footnote two?

19 A. Yes.

20 Q. There's a relevant or a reference in there to Pat
21 Sullivan of SCS Engineers; is that correct?

22 A. That's correct.

23 Q. Is that you?

24 A. That's me.

25 Q. I'd ask you on that page --

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1 CHAIRMAN GANS: Page again?

2 MR. TOMKO: This is page four of five of the
3 document.

4 THE WITNESS: Four of 15.
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5 MR. TOMKO: I'll give you the bates number, 561.
6 And we were just talking about footnote two which references
7 Pat Sullivan.

8 Q. (By Mr. Tomko) Pat, could you, the last sentence
9 of the penultimate paragraph, could you read that down
10 through the next paragraph, please.

11 A. Penultimate?

12 MS. MEHTA: Mr. Tomko uses big words. I don't
13 know what it means either.

14 THE WITNESS: My Harvard degree is not getting me
15 the penultimate.

16 MR. TOMKO: I'm sorry. I have a partner that
17 always uses that and I didn't know what it was when he first
18 started using it.

19 The next to the last paragraph on page, on that
20 page, the last sentence of that paragraph that begins "in
21 general."

22 THE WITNESS: "In general, adjustments in engine
23 operation to achieve lower NOx do not result in the most
24 efficient combustion. Discussions with engine owner,
25 operators, emission testers support this. Experienced

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1 operators and emission test engineers report that when the
2 engine is adjusted to achieve very low NOx concentration, the
3 engine operating stability is reduced and in the words of
4 some operating engines run very rough barely functioning.

5 When engine combustion stability compromise, CO conversion to
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6 CO 2 is reduced as NOx is reduced. This will continue until
7 a point is reached for further engine adjustments to affect
8 NOx reduction adjustment exponential CO increase. The
9 additional fact that landfill gas is highly variable as well
10 as BTU content and also combustion and compares CO conversion
11 to CO 2.

12 Q. (By Mr. Tomko) Could you explain to us what that
13 paragraph is saying?

14 A. Sure. And to do that, a little bit of history of
15 how this came about, over time, this air district had been
16 rationing down what they consider best available control
17 technology for both NOx and CO. Both numbers had been coming
18 down. It got to a point where we were not able to achieve
19 both at the same time because the two work against each other
20 and that's what's described in this paragraph. As you work
21 to reduce NOx, some of the things that we do to reduce NOx
22 can actually increase the CO.

23 So it got to a point where we could not meet
24 these very stringent limits. So we went to the Bay Area Air
25 Quality Management District, and we being representatives

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1 from the landfill industry, and asked them could you revisit
2 this issue. And we presented them with some information and
3 a request to reconsider BACT, reflective of the facts of this
4 inverse relationship between the NOx and the CO, and in doing
5 so could they promulgate a more reasonable BACT standard that
6 would give us some flexibility to meet the limits on a

7 consistent basis.

8 Q. So this paragraph that you just read, could you
9 explain what that's talking about, what that relationship
10 between NOx and CO is?

11 A. As an engine is tuned to achieve the low NOx
12 levels, the combustion efficiency of that engine can go down.
13 As soon as efficiency and combustion goes down, you get more
14 CO. As described here, what happens actually is less of the
15 CO is converted to CO₂. So instead it's emitted as CO. And
16 over time as we try to tune those engines to achieve the low
17 NOx levels, the CO would increase.

18 Q. Is NOx, the NOx emission limit, is it independent
19 of CO?

20 A. No, it's not independent of CO.

21 Q. Okay. Towards the end of that paragraph there's
22 a reference to landfill gas as highly variable. Could you
23 address that?

24 A. I'm not sure what it meant to the Bay Area Air
25 Quality Management District. But what it means to me is that

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1 particularly since in the other part of that same sentence
2 they reference lower BTU content, landfill gas is essentially
3 50 percent methane versus natural gas which is almost a
4 hundred percent methane. And with the lower BTU content, as
5 noted here, less heat input to a device can also result in
6 less efficient combustion. So that was one of the other
7 trends that they were describing that resulted in the CO

8 increase of these engines.

9 Q. The engines that were the subject of this study,
10 this paper, were they landfill, were they burning landfill
11 gas?

12 A. Yeah.

13 Q. So the emission data that is presented in this
14 study, that was based on engines burning landfill gas?

15 A. Yeah.

16 Q. If you could turn to page 11 of 15, there's a
17 discussion regarding low NOx bias and low CO bias. Can you
18 explain what that is about?

19 A. After the bay area reviewed this situation,
20 information is submitted by industry and information they
21 developed on their own. On page 11 of 15 or the bates number
22 568, they provide their summary and conclusion and
23 recommendations relative to this revisiting of that. So what
24 they ultimately decided in terms of what they would define as
25 BACT or the new BACT standard, they would give two options in

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1 effect. And those two options would either entail a low NOx
2 bias option or a low CO bias option.

3 And the rationale behind their selection is if
4 you are to select the lower NOx option, which is the .5 grams
5 per brake horsepower, if you were to achieve that lowest of
6 NOx levels, you should get more flexibility on the CO and
7 allow the CO to go up to a higher number to allow you that
8 flexibility to achieve the lower NOx.

9 On the lowest CO bias, if you're not willing to
10 achieve the lowest NOx number, we'll give you less
11 flexibility on the CO. So basically those are two options
12 that they have promulgated.

13 And subsequent to this white paper, this became
14 their published BACT standard for landfill gas-fired engines
15 giving us the two options.

16 Q. Where would the Lockwood Landfill engine limits
17 established in the permit, where would they fit relative to
18 these ranges?

19 A. The numbers we permitted for Lockwood were at the
20 high end of the range of the NOx number. In fact of the two
21 NOx numbers here we picked the higher NOx number .6 grams per
22 brake horsepower. Our CO number is actually much higher.
23 But we have proposed a permit is 3.9 grams per brake
24 horsepower. So our permit limits, the modeling analysis we
25 did were all based on the 3.9. And that number is also

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1 included in this document as well required to demonstrate
2 compliance document as well.

3 Q. And so with the limits for Lockwood they're not
4 constrained by the NOx, the low other NOx limit?

5 A. Right, they're not constrained by the lower NOx
6 limit. And in effect we picked the high end of the range for
7 both parameters, we would think we could ever possibly see
8 for these types of devices, so we would have emission limits
9 that were effectively ones that were both pollutants that we

10 would never exceed or have any chance of exceeding.

11 Q. Okay. And there's a Figure 2 in this document,
12 and I'm looking to see what page it's on. It looks like it's
13 on page nine of 15. And I would like to just for the aid of
14 all of us looking at it, pass a reproduction of this if
15 there's no objection.

16 MS. MEHTA: As long as it's a reproduction, I
17 have no objection.

18 MR. TOMKO: Move to admit this as an exhibit.

19 Q. (By Mr. Tomko) Pat, could you describe -- In
20 NDEP's brief, they assert that Figure 2 shows substantial
21 variability of the CO emissions as a basis for requiring
22 CEMS. Could you first of all explain what this Figure 2 is
23 showing?

24 A. Figure 2 is showing a series of data that the Bay
25 Area Air Quality Management District collected on CO

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1 emissions over time. And these are data that were collected
2 actually with a hand-held monitoring device for CO. And the
3 bay area is using them to show the changes in CO emissions
4 over time with these engines.

5 Q. And what causes the, this increase in trend in CO
6 emissions?

7 A. As I've noted, CO is effectively a product
8 incompleting or not as optimal combustion. One of the
9 constituents of landfill gas that was referenced earlier is
10 solaxins, which are a sillicate organic complex. when

11 combustion produces sillicate, sand, and it, though it's a
12 different texture than sand, it has a sticky texture and it
13 actually coats the silicone heads of a reciprocating IC
14 engine. And over time as it builds up, efficiency is
15 reduced. As efficiency is reduced, the CO goes up.

16 And as I've testified to earlier, it's a long
17 process. This occurs over months as the CO drifts up from
18 the initial levels that an engine can achieve when the
19 cylinder heads are clean up to these higher levels over time.
20 And that's what's shown by this exhibit.

21 I'm not sure what the definition of variable
22 being used here. What I see here is actually, it is varying
23 and if your definition is changing. But we believe it's
24 predictable. It's a predictable change. And that is what we
25 think this figure shows. We know it's going to change over

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1 time and it's going to change gradually and we can track
2 that.

3 And in particular this is being tracked using
4 hand-held monitoring devices for the data that's presented
5 here in tracking that increase.

6 Q. The emissions increase and the data shown on this
7 chart, how does that relate to the emission limits
8 established at Refuse, Inc. at those engines?

9 A. Well, the Refuse, Inc. limit is shown in green in
10 the exhibit. It's 3.9 grams per brake horsepower. It's off
11 scale here.

12 MS. MEHTA: All right. Now I have an objection.
13 It was represented that this was just a photographic
14 reproduction of this graph. And now actually we have an
15 interpretation of Refuse Inc.'s limits on this graph. So I
16 do object to the introduction of this.

17 CHAIRMAN GANS: I think you misrepresented this.

18 MR. TOMKO: Can I ask Pat some questions to
19 establish the validity of the representation on this graph?
20 And I apologize for not identifying that on there. That was
21 not my intent.

22 CHAIRMAN GANS: Okay. Well, we'll withhold your
23 objection and let's see where you're going.

24 Q. (By Mr. Tomko) Pat, the CO limit expressed in
25 the Lockwood permit, could you tell me what that is?

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1 A. The CO limit in the Lockwood permit is
2 effectively, it's based on 3.9 grams per brake horsepower
3 hour.

4 Q. And what is the permit limit in the Lockwood --
5 what is the emission limited expressed in the permit issued
6 by NDEP?

7 A. It's 19.2 pounds an hour, which is calculated
8 directly from --

9 Q. You were the engineering consulting firm that
10 calculated that emission limit and proposed it in the permit?

11 A. Yes, yes.

12 Q. And what was the basis for calculating that
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13 emission limit?

14 A. The basis was the 3.9 grams per brake horsepower
15 hour as a maximum emission level and then multiplied by
16 maximum operating hours, 8,760 hours per year at a hundred
17 percent load all of the time.

18 CHAIRMAN GANS: Counsel.

19 MS. MEHTA: The question I have is whether this
20 is being -- whether counsel is seeking that this is
21 introduced as an exhibit or as a demonstrative. Because
22 obviously it's basically combining information as a
23 demonstrative exhibit would. It's not a reproduction from
24 the information that was provided to us.

25 MR. TOMKO: I would propose to, with what we've

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1 just discussed I propose to introduce it as an exhibit.

2 CHAIRMAN GANS: well, it has and it's been
3 accepted as Exhibit Number 7 already. So that's why I'm
4 asking you is there something here that's particularly
5 offensive?

6 MS. MEHTA: I would just ask that it be a
7 demonstrative exhibit only and not -- demonstrative it
8 doesn't become part of the record. It's just to help explain
9 something and that's what they're trying to do.

10 MEMBER PORTA: I would agree with that. It
11 represented that this came from the white paper. This didn't
12 come from the white paper.

13 CHAIRMAN GANS: That's right.

14 MEMBER PORTA: So as a demonstration that's fine,
15 in my opinion.

16 CHAIRMAN GANS: Okay.

17 Q. (By Mr. Tomko) So Pat, just -- the relevance of
18 the increasing trend in CO emissions relative to the NOx or
19 the CO limit at Lockwood is?

20 A. Well, the relevance is despite the trends that
21 are shown here, the highest data point on here somewhere
22 between probably 3.3 and 3.5 grams per brake horsepower hour
23 as the highest numbers that were ever recorded for these
24 engines. And we're proposing a limit that's at 3.9 really
25 with the purpose that it be a limit that would never be

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1 exceeded and could never be exceeded. And we think this
2 exhibit actually shows that despite that trend over time we
3 still are not going to exceed our 3.9 limit.

4 Q. Looking at this exhibit it shows an increase in
5 trend. Did CO emissions just increase indefinitely?

6 A. No.

7 Q. And why is that?

8 MS. MEHTA: Objection to the extent that he's
9 asking something that goes beyond what is represented on this
10 particular graph. He has not laid any foundation that
11 Mr. Sullivan knows.

12 CHAIRMAN GANS: Sustained.

13 Q. (By Mr. Tomko) Pat, could you turn to page 12 of
14 15 of the white paper, and that big paragraph towards I guess
Page 169

15 the bottom third, the sentence that begins "the proposed
16 addition." Could you read that, please?

17 A. "The proposed addition of monthly monitoring and
18 maintenance frequency requirements will ensure that NOx, CO
19 and non-methane organic compounds emissions remain as low as
20 possible throughout the entire year. Overall, these not to
21 exceed, which is the NT acronym, CO standards, monthly
22 monitoring and" --

23 Q. I just wanted you to read that one sentence.
24 When that statement that the maintenance frequency
25 requirements will ensure NOx and CO and non-methane organic

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1 compound emissions from these engines remain as low as
2 possible, what are they talking about when they say
3 maintenance frequency?

4 MS. MEHTA: Same objection.

5 CHAIRMAN GANS: Yes. Sustained.

6 Q. (By Mr. Tomko) Pat, you're familiar with these
7 engines and their operation generally?

8 A. Yes.

9 Q. And you're familiar with permit requirements for
10 these engines?

11 A. Yes.

12 Q. And are you familiar with the way in which the
13 engines are maintained to ensure performance of those
14 engines?

15 A. Yes.

16 Q. And are you familiar with the effect of that
17 maintenance on the emissions?

18 A. Yes.

19 CHAIRMAN GANS: Continue.

20 Q. (By Mr. Tomko) So the sentence that you read,
21 the proposed addition of monthly monitoring and maintenance
22 frequency requirements to ensure NOx, CO emissions from these
23 engines remain as low as possible, that reference to
24 maintenance, could you explain what that is, what kind of
25 maintenance?

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1 A. Well, here the bay area is referencing the
2 requirement that they intend to propose as part of permit
3 conditions reflecting this new BACT program. And in those
4 conditions, as that sentence notes, monthly monitoring is
5 done with hand-held devices. And based on the results of
6 those monitoring events, watching those CO emissions as they
7 creep up over time, once they reach a certain threshold then
8 a specific maintenance requirement is triggered. And that's
9 noted on page 15 of 15, item number five, maintenance
10 requirements.

11 And effectively what that means is permittee is
12 then required to do a top end or major maintenance overhaul
13 of that engine, which as part of that the cylinder heads are
14 all cleaned and refurbished, thereby returning those
15 emissions back down to the lower level. And that's a
16 continual process that is done tracking the emissions to a

17 certain point clearly below the threshold for their standard
18 and then doing the maintenance to bring it back down. And
19 that's an ongoing trend that continues.

20 Now, engine operators do this as a standard
21 operating procedure anyways, annual maintenance events are
22 standard operating procedure and actually required by the
23 manufacturers of these engines to maintain their warranties.
24 So in many cases they would be doing these things anyways.

25 But specifically here, the bay area is

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1 referencing their requirement for maintenance at the intent
2 imposed in these permits.

3 MR. TOMKO: If you'll just excuse me for a
4 minute. My outline got kind of chopped up with the order
5 that I've gone there. I would like to introduce several
6 exhibits. I'd like to introduce the technical review
7 document for this project, the technical support document
8 that formed the basis for NDEP.

9 MS. MEHTA: No objection.

10 CHAIRMAN GANS: Okay. This is admitted as
11 Exhibit 8.

12 MS. MEHTA: Mr. Chairman, if I could just have a
13 clarification since this Exhibit 8. For Exhibit 7 I believe
14 you said that it was only admitted for demonstrative
15 purposes?

16 CHAIRMAN GANS: Correct.

17 MS. MEHTA: Okay. Thank you very much.

18 Q. (By Mr. Tomko) Pat, could you identify this
19 document?

20 A. Yes. It's the technical review and determination
21 of continued compliance for Refuse, Inc. in the Lockwood
22 Landfill gas to energy project.

23 Q. Okay. And I'd ask you to turn to page 13 of the
24 document, 2112 of the bates number. Can you describe what
25 that table is?

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1 A. The table on page 13 of the document is a summary
2 table of the air dispersion modeling that was conducted as
3 far as permitting process for this facility.

4 Q. Okay. And could you describe what I've just
5 handed you?

6 MS. MEHTA: Counsel, may I have a copy of that?

7 MR. TOMKO: I'm sorry.

8 MS. MEHTA: Thank you.

9 THE WITNESS: Within the table in the document it
10 covers modeling done by the applicant, Refuse, Inc.,
11 effectively confirmatory modeling done by NDEP to verify our
12 data, our modeling. It adds in the background concentration
13 that existed at the relative monitoring station. And then
14 the total impact therefore at that location. And that's
15 compared to the natural air quality standard.

16 Q. (By Mr. Tomko) And does that do that for CO?

17 A. Yes, it does that for CO.

18 Q. Does that do that for the one-hour standard?

19 A. Yes, it does.

20 Q. And could you explain what this graph is that I
21 just handed you?

22 A. What you handed me is a bar graph that provides a
23 representation of compliance with the one-hour standard based
24 on the modeling results using NDEP's numbers.

25 Q. So the numbers depicted on that graph look

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1 identical to the numbers that are listed in that table for
2 the background concentration?

3 A. Yes. It includes the background concentration of
4 5,142 micrograms per cubic meter. Includes impact and
5 Refuse, Inc. of 850 micrograms per cubic meter, which is from
6 NDEP's modeling.

7 Q. And its compliance demonstrated with the air
8 quality standard?

9 A. Yes. Compliance demonstrated with the standard.

10 MR. TOMKO: I'd like to submit this as an
11 exhibit.

12 MS. TANNER: Can I actually address this issue?
13 I know that we had some discussion on Exhibit 7.

14 CHAIRMAN GANS: Excuse me. I didn't hear what
15 you said.

16 MS. TANNER: I know we had some discussion on
17 Exhibit 7 previously. But I believe that demonstrative
18 evidence is fine for you to look at it. I don't think it
19 should actually be admitted in to the record. with Exhibit

20 7, the chronology was it was admitted when it was represented
21 that it was merely a reproduction of what was, had been
22 previously provided to NDEP.

23 When it turned out that it was demonstrative
24 evidence, what I believe should happen is that you withdraw
25 Exhibit 7 as admitted. We can look at it. It's

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1 demonstrative. Same with this. We can look at it. It's
2 demonstrative, but should not be admitted in to the record.

3 MR. TOMKO: I would offer this as an exhibit as
4 being just a graphical representation of exactly the data
5 that is in NDEP's technical support document for the purposes
6 of facilitating the Commission's ability to synthesize that
7 information.

8 MS. TANNER: And just to sum up, counsel can make
9 charts and graphs all he wants, but they're not evidence.
10 They're tools for him to use to argue but they are not
11 evidence before the Commission of anything that's happened in
12 the record or outside of the record. They just are not
13 evidence. So I would ask that Exhibit 7 be withdrawn and
14 that this proposed exhibit not be admitted. I'm not saying
15 he can't look at it, he can't show it to you. But it should
16 not be admitted in to the record.

17 CHAIRMAN GANS: I want to ask the panel.

18 MEMBER PORTA: First of all, let's clarify what
19 Exhibit 7 is. We're talking about this sheet; correct? And
20 it was a representation in Exhibit 5; right? So we're going

21 to accept Exhibit 5. Okay. I would tend to agree. We can
22 look at this information, but as a part of the record I don't
23 think it's appropriate for explaining their position on this
24 graph, which is probably from the NAC.

25 CHAIRMAN GANS: Kathryn.

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1 MEMBER LANDRETH: I would agree.

2 MS. REYNOLDS: Just to make it clear, although
3 these are going to be numbered doesn't necessarily mean that
4 they're admitted. We need some way to maintain the record
5 for purposes of judicial review and even if you don't admit
6 an exhibit --

7 MEMBER PORTA: We've looked at --

8 MS. REYNOLDS: -- they would be able to argue on
9 appeal that it should have been admitted and there has to be
10 some way for the district court --

11 MEMBER PORTA: A numbering system.

12 MS. REYNOLDS: Some numbering system for them to
13 be able to track what's going on.

14 MS. TANNER: And if I may, I think you can
15 probably resolve that by saying something to the effect of
16 Exhibit 7 admitted, withdrawn. Exhibit 8 offered, denied.
17 I'm sorry. I'm getting fuzzy. But it still keeps the same
18 number. You're going through but you're just noting exactly
19 what the result was.

20 MS. REYNOLDS: Yes. And that's what we're doing.

21 CHAIRMAN GANS: And that's exactly what we'll do.
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22 MR. TOMKO: So this witness(sic) will be offered
23 as an exhibit and not accepted as an exhibit?

24 CHAIRMAN GANS: That's correct.

25 MR. TOMKO: But accepted for demonstrative --

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1 MS. REYNOLDS: Purposes, correct.

2 CHAIRMAN GANS: Purposes, uh-huh.

3 Counsel, you have five more minutes.

4 MR. TOMKO: Okay. I tried to pick a topic here
5 that I could wrap up relatively quickly. These are all kind
6 of similar.

7 Q. (By Mr. Tomko) Could you identify what I've just
8 handed you, Pat?

9 A. You handed me another graphical representation of
10 the compliance with the National Land and Air Quality
11 standard for the CO. This time it's for the eight-hour
12 standard.

13 Q. And is that similar to the one-hour standard?

14 A. Yes.

15 Q. And is it based on the numbers and NDEP's
16 technical support document table?

17 A. Yes, it is.

18 Q. And does it show the same standard?

19 A. Yes. It shows compliance with the eight-hour CO
20 standard.

21 MR. TOMKO: Okay. Can I just clip through all of
22 these?

23 CHAIRMAN GANS: Uh-huh.
24 Q. (By Mr. Tomko) And the next one, please?
25 A. The next one is in similar graphical

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1 representation is for the annual NOx standard.
2 Q. Can you confirm the numbers that are identical to
3 NDEP's table?
4 A. Yes, I've confirmed the numbers are identical to
5 NDEP's table.
6 Q. Okay. And the next one is a little bit
7 different. You have the technical support document there.
8 If you could turn to page 15, table 5.5-2. Could you tell me
9 what that table is?
10 A. Using the same bar graph concept, a graphical
11 representation of the results of NDEP's NOx increment
12 consumption analysis.
13 Q. Okay. And the numbers presented for the NOx
14 increment analysis are identical to those presented in NDEP's
15 table?
16 A. Yes, with some rounding.
17 Q. You're thorough. I appreciate that. Could you
18 identify the number in the table and then the number on the
19 graph and go through them one by one, please. Let's start
20 with met year 2000. And the first row for total
21 concentration, what is the number in the table?
22 A. The number in the table is 22.42728.
23 Q. And the number on the graph?

24 A. 22.41. It's lawyer rounding. Sorry. I couldn't
25 resist. No. The Department apparently rounds things out to

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1 a lot of significant digits. So you both get criticized by
2 me.

3 Q. 41. So 22.4 is right all the way to 22.4. The
4 Refuse contribution?

5 A. .02.

6 Q. And what is it in the table?

7 A. .02240.

8 Q. Okay. And then the, if you could go to the, I
9 guess, the next maximum one, which is going to be year 2000,
10 the total concentration, could you compare that one?

11 A. Graph 21.25 table is 21.26962.

12 MR. TOMKO: Okay. And then I'd like to just
13 apologize. I think what happened is there was a revised
14 technical support document. I think some of the numbers have
15 changed in some of the documents. There's a little
16 confusion. So that's why I believe there's this discrepancy.

17 I will at this point because it is ten of the
18 hour and I believe the Chair has asked that we conclude at
19 that point, I will not offer these increment pictures. I
20 will come back to those. However, with these numbers where
21 there was no such discrepancy I would offer these.

22 MS. MEHTA: The same objection. As long as
23 they're demonstrative and not made part of the record.

24 MR. TOMKO: Right. Consistent with that.

25 MEMBER PORTA: Could we get a better copy of this

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1 table?

2 MS. MEHTA: Yes. We will make sure that that
3 happens.

4 CHAIRMAN GANS: It's very difficult to read.

5 MEMBER PORTA: I'm old but not that old.

6 CHAIRMAN GANS: I hope so.

7 THE WITNESS: Do you also want a copy of that
8 document and all of those graphs that were not legible? I
9 don't know if that's of interest to you?

10 MEMBER PORTA: I don't.

11 THE WITNESS: It was hard for me to see them.

12 CHAIRMAN GANS: Okay. I've accepted those two as
13 demonstrative only and not part of the record. And I think
14 you want to make some comments; is that right?

15 MS. REYNOLDS: Public comment.

16 CHAIRMAN GANS: Okay. I'm going to again since
17 we are adjourning ask for any public comments. Is there
18 anyone in the audience that wishes to provide any public
19 comment during this meeting? Seeing none, I will close
20 public comment and turn to our counsel.

21 MS. REYNOLDS: We need to schedule a continuation
22 of this hearing. And what we would like for the parties to
23 do is to get together and determine exactly how many -- I
24 said exactly, but some kind of a rough estimate of how many
25 days you think that this hearing is going to take. I don't

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1 know how many more witnesses Refuse has and what you guys
2 have got in terms of your witnesses and then also leaving
3 adequate time for this council to deliberate. Because we
4 don't want to come back and do this piecemeal. We want to
5 try and schedule a block of time to do this.

6 And so what we would like for the parties to do
7 is get together and determine that type within those
8 scheduling parameters and give us a series of dates so that
9 we can coordinate among the panel members and staff.

10 MS. MEHTA: If I may address that for a second.
11 We did confer prior to this hearing. And just because of
12 travel schedules and other things, the first available date
13 that it looks like that we could reconvene is December 5th
14 and 6th. But we didn't talk about how long after that it
15 might go, so we can certainly have that conversation.

16 CHAIRMAN GANS: We would like to complete it next
17 time. Seriously. I don't see any benefit to either party
18 for us to continue to delay and have these intervals. I know
19 from my background -- Tom is probably worse. He's a little
20 older and he forgets. And so we don't want that to happen.
21 Any intervals at all are not good in my opinion. So it works
22 to nobody's benefit. So if we get back again, let's finish
23 it.

24 MS. REYNOLDS: And to that end, perhaps you guys
25 can get together and try and stipulate to your exhibits

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1 because it seems like we were spending quite a bit of time
2 today arguing about exhibits and perhaps that might get this
3 moving faster.

4 MS. TANNER: We couldn't agree more.

5 MEMBER PORTA: I guess we're asking you to try
6 harder before December 5th or 6th.

7 MS. MEHTA: Understood.

8 CHAIRMAN GANS: Is there anything we have to get
9 out of here, anything either party wants to leave us with,
10 not a part of the record now, just anything that we need to
11 know?

12 MEMBER PORTA: Well, the 7th is tentatively
13 scheduled for a full SEC hearing, so I'm hoping two days will
14 be sufficient. The 7th hearing may not go because of lack of
15 agenda items.

16 MR. WALKER: That's a correct statement.

17 CHAIRMAN GANS: Okay.

18 MS. REYNOLDS: So are we scheduling this for the
19 5th and 6th?

20 CHAIRMAN GANS: They're going to get back to us.
21 Keep it open on the calendar. Okay. We're adjourned.

22 (Hearing concluded at 3:55 p.m.)
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