



July 27, 2009

State Environmental Commission
Attn: John B. Walker, Executive Secretary
901 S. Stewart St., Suite 4001
Carson City, NV 89701-5249

MOTION TO LIMIT SCOPE OF REBUTTAL TESTIMONY (NRS 233B)

**Appeals of Revised Class II Air Quality Operating Permit (Bango Oil LLC)
AP 2992-1473**

The undersigned attorneys, on behalf of Bango Oil LLC ("Bango Oil"), hereby move the State Environmental Commission (the "Commission") for an order limiting the scope of rebuttal testimony supporting the appeals filed by Lorraine Griffin, Donald Mello, and David C. Mathewson (collectively, the "Appellants") in this matter. This motion is made pursuant to the Nevada Administrative Procedure Act (NRS 233B) and is supported by the following points and authorities.

POINTS AND AUTHORITIES

Practice before the Commission in contested cases is subject to the provisions of NRS 233B.121 - .150, *inclusive*, and NAC 445B.875 - .899, *inclusive*. Regarding the scope of rebuttal testimony, NRS 233B.123(1) provides that "[I]rrelevant, immaterial or unduly repetitious evidence must be excluded..." (emphasis added). This mandate is reiterated in the Commission's Rules of Practice, which provide that the Commission may "[l]imit the time and scope of the examination of witnesses and disallow repetitive testimony". NAC 445B.895(2)(b). Further, in cases where multiple appellants have substantially similar interests, as is the case here, the Commission is endowed with the continuing authority to limit the number of witnesses who may testify. NAC 445B.8957.

In this appeal, Appellants were permitted a day-long hearing during which each of the Appellants were permitted to call numerous witnesses and subject such witnesses to hours of often unfocused and repetitive testimony. Because Appellants are unrepresented parties, the Commission permitted this testimony over the objections of Bango Oil, and in contravention of state law. Though Bango Oil respects that certain

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procedural leeway may be granted to unrepresented parties, there must be a limit to this procedural flexibility – as discussed above, that limit is provided by state law and the Commission's Rules of Practice. In order to ensure that Bango Oil's procedural rights are not infringed upon, this Commission should mandate compliance by all parties of the applicable procedural rules.

As of the date of this Motion, it is unclear whether, and to what extent, the Commission will allow rebuttal testimony, and perhaps testimony on new information. While Bango Oil contends that no such rebuttal testimony is either necessary or appropriate to resolve the sole issue in this case – whether NDEP properly issued a revised Class II Air Quality Permit to Bango Oil – Bango requests that if such testimony is permitted, that the mandates of NRS 233B and NAC 445B are respected and that rebuttal testimony only be permitted where it would be relevant and non-repetitious.

In this regard, it must be noted that NRS 233B.121(2)(b), as well as general principles of due process, requires that only those issues noticed for a contested hearing may be considered by the Commission. The mandate of NRS 233B is echoed by the Commission's procedural rules at NAC 445B.891(2)(b)–(d). The Commission's hearing notice identifies the issues to be considered as:

- NDEP's decision granting the permit to Bango Oil denies the citizens of Churchill County the right of due process regarding an alleged request by the Churchill County District Attorney to "condition issuance of the Permit" on the granting of an amended special use permit by Churchill County to Bango Oil;
- NDEP's decision granting the permit was taken without regard to complaint(s) filed with Churchill County against Bango Oil concerning possible violations of the company's existing Special Use Permit issued by Churchill County;
- The used oil processed at the Bango facility includes used oil from California designated as a hazardous waste in California;
- Odor is a nuisance that the NDEP has not resolved;
- People at the January 28, 2009 hearing testified to nuisance, perceived health issues, and quality of life issues that have not been addressed by NDEP; and
- The ambient air studies relied on by NDEP "may have been done" when the facility was at its lowest production or not operating at all and are insufficient data for granting the permit.

Pursuant to NRS 233B and NAC 445B, the foregoing six issues are the only issues to which testimony and evidence could potentially be considered relevant. Accordingly, the Commission must limit testimony to that which is relevant to one of the six issues discussed above.

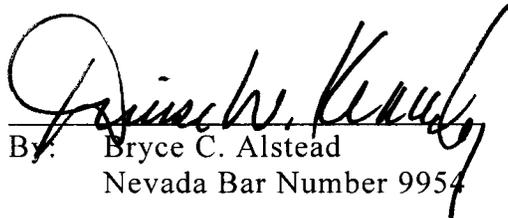
Notably, the first three issues are clearly outside of NDEP's air permitting jurisdiction, are irrelevant to NDEP's decision to issue the final permit and should, therefore, be dismissed.¹ The fifth issue is vague and does not raise an issue that can be ascertained under NDEP's air permitting authority and should, therefore, be dismissed. No evidence was introduced at the hearing in support of the sixth issue, but it was, nevertheless, refuted by evidence at the hearing and should, therefore, also be dismissed.

The remaining issue, raised only in Mr. Mello's appeal, was the one on which the majority of the testimony centered on at the April 29 hearing. Appellants were granted approximately six hours of testimony to develop their respective case on this point; any further testimony would be irrelevant and unduly repetitious. Accordingly, pursuant to NRS 233B.123(1), no further testimony on odor issues should be allowed by this Commission.

Five of the six noticed issues are irrelevant to NDEP's decision to grant Bango Oil a revised Class II Air Quality Permit. The sixth noticed issue has been the subject of hours of already repetitive testimony. As such, pursuant to state law and the Commission's Rules of Practice, no further testimony should be permitted at the July 28th continuance of this hearing. Conversely, should this Commission find a proper reason to permit further testimony and evidence by Appellants, such testimony should be constrained to the bounds of state law.

Respectfully Submitted,

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BCA/DWK

¹ Bango Oil has previously filed a motion to dismiss regarding this issues. The prior motion to dismiss is supplemented by a motion for summary judgment and renewal or motion to dismiss previously filed this date.

² By an April 29, 2009, Order of the Commission, Ms. Kennedy has been admitted Pro Hac Vice for these proceedings.