



1           **A.     The Mellos' Appeal**

2           The appeal by Mr. and Mrs. Mello (hereinafter, the "Mello Appeal") does not state at all  
3 what law or regulation NDEP-BAPC has allegedly violated in issuing the permit. Nor does it  
4 allege that NDEP-BAPC has erred in issuing the permit or any basis for such error. It does  
5 not even allege that NDEP-BAPC abused its discretion in renewing the permit.<sup>2</sup> The appeal  
6 merely states that the nature of the appeal is "to address the continuous odorous emissions  
7 from Bango Oil." Mello Appeal dated July 20, 2011. The Mello Appeal cites to three statutory  
8 provisions, but does not explain in any way whatsoever how those provisions form a basis for  
9 the appeal. The first statute, NRS 459.520, governs regulations for granting, renewing,  
10 modifying, suspending, revoking or denying permits for disposal of hazardous wastes. The  
11 Mellos' prior appeal from the modified permit for Bango alleged that "used oil processed at  
12 Bango is hazardous waste in California." Tr. July 28, 2009, at 452, ll. 16-17. Regulation of  
13 hazardous waste under NRS 459.520 is outside of the purview of the Bureau of Air Pollution  
14 Control's jurisdiction.

15           The next statute cited by the Mello Appeal is NRS 445B.115, which defines "air  
16 pollution." There is no allegation of any violation or abuse of discretion with respect to  
17 issuance of the renewed permit under this statute.

18           Finally, the Mello Appeal cites to NRS 445B.340, which merely indicates that an  
19 aggrieved party may take an appeal from an action of the Department of Conservation and  
20 Natural Resources within ten days of the notice of the action. Again, there are no allegations  
21 that NDEP-BAPC failed to perform a required function, acted arbitrarily or capriciously, or  
22 otherwise erred in issuing the permit renewal.

23           In summary, the Mello Appeal provides no basis whatsoever for the appeal.

24           Next, the Mello Appeal seeks an abeyance of the appeal proceeding pending issuance  
25 of a modification to the permit to use natural gas fuel. Appeal Form 3 at p. 2. This is not

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27           <sup>2</sup> See NRS 233B.135(3), which sets forth the standard for review that a district court must use upon a  
28 petition for judicial review of a contested case. The judiciary's de novo review of the agency's interpretation of  
the law and application of the same substantial evidence standard to findings of fact implies that the  
Commission's standard of review is the same as the court's. See *Helms v. State, Div. of Env't'l Prot.*, 109 Nev.  
310, 313, 849 P.2d 279, 281 (1993).

1 appropriate procedurally. First, there is no statutory or regulatory basis to put an appeal of a  
2 permit on hold pending issuance of a modification to the permit. Only the instant permit  
3 issuance is before the Commission. If NDEP-BAPC has erred or abused its discretion in  
4 issuing this permit because of odor issues, it is improper to wait until a modified permit may be  
5 issued to address them. Likewise, if the natural gas permit modification is issued, the  
6 appellants will have the opportunity to appeal that permit modification. Second, the parties  
7 have the right to proceed to a hearing within 20 days of the appeal.

8 The Mello Appeal also seeks an inappropriate remedy. It seeks – without providing any  
9 statutory or regulatory basis to do so – a hearing to review the natural gas conversion, and  
10 quarterly meetings with the County of Churchill. Pursuant to NRS 445B.360(2), the  
11 Commission must “affirm, modify, or reverse” the action of the Director, which in this case is  
12 issuance of the permit. It may not, however, impose a review hearing or require meetings to  
13 be held with the County, since none of those actions would affirm, modify, or reverse issuance  
14 of a permit.

15 Finally, the abeyance and remedy that the Mello Appeal seeks demonstrate that there  
16 is no allegation that the permit was issued improperly. In fact, the Mello Appeal’s request for  
17 an abeyance pending the modification underscores that there has been no error or abuse of  
18 discretion by NDEP-BAPC regarding its decision to issue this permit. If there were, the  
19 appellants would not be willing to hold the appeal in abeyance pending the modification of the  
20 permit.

21 In summary, the Mello Appeal has provided no grounds whatsoever for the appeal. It  
22 has identified no error or abuse of discretion by NDEP-BAPC in issuing the permit. For that  
23 reason, the appeal should be dismissed.

24 **B. The Wideman Appeal**

25 A second appeal was filed by Mr. Richard Wideman (the “Wideman Appeal”). The  
26 Wideman Appeal alleges that “NDEP has not performed diligently in protecting the residents  
27 from noxious odors,” has ignored complaints, and has not properly monitored the plant.  
28 Wideman Appeal at 1.

1 As with the Mello Appeal, this appeal also fails to set forth the legal and factual grounds  
2 for such allegations. Mr. Wideman has not identified what NDEP-BAPC is required to do, nor  
3 how it has failed to perform such obligations. In fact, his allegations are undermined by the  
4 evidence that was presented at the 2009 appeal. Commissioner Anderson indicated that  
5 NDEP-BAPC had taken "extraordinary efforts" to address residents' concerns. Tr. July 28,  
6 2009, at 482, ll. 5-10. He further indicated that the odor issue was more a land use concern  
7 than an air pollution permitting issue. Tr. July 28, 2009, at 482, ll. 11-16. Greg Remer of  
8 NDEP-BAPC testified that the agency had investigated odor complaints by sending multiple  
9 individuals to the plant and surrounding areas over 30 times at various times of day, but never  
10 found an actionable level of odor. Tr. Apr. 29, 2009, at 133, ll. 19-25; 134, ll. 1-25; 135, ll. 1-8.  
11 Presumably, the same testimony that the Commission heard over two days in 2009 would  
12 merely be repeated at this appeal.

13 More importantly, however, the Commission in its order granting summary judgment  
14 stated that "[a]lthough the Commission heard testimony about odors, the odor issue is an  
15 enforcement issue under NAC 445B.22087 and is not relevant to the permit revision."<sup>3</sup> Order  
16 at 2, ll. 12-13. Mr. Wideman has not specified how the odor issue is relevant to issuance of  
17 the renewed permit, and, therefore, the appeal should be dismissed.

18 **II. Motion to Consolidate Appeals and for Briefing Schedule and More Definite**  
19 **Statement**

20 In the event that the Commission decides to allow the appeals to proceed, NDEP-  
21 BAPC requests a briefing schedule pursuant to NAC 445B.8925. NDEP-BAPC respectfully  
22 requests that the Commission issue an order (1) consolidating the appeals under NAC  
23 445B.8957 because the issues presented will be substantially the same and Appellants will  
24 suffer no prejudice by consolidation; and (2) directing the Appellants to file a consolidated brief  
25 detailing the issues they wish to present to the Commission at the hearing. Specifically, with  
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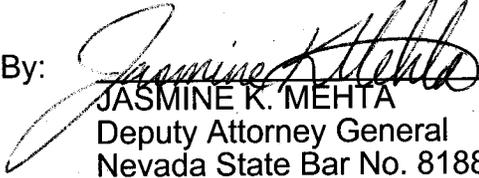
27 <sup>3</sup> NAC 445B.22087(3) sets forth the basis for an odor violation: "The Director shall deem the odor to be  
28 a violation if he or she is able to make two odor measurements within a period of 1 hour. These measurements  
must be separated by at least 15 minutes. An odor measurement consists of a detectable odor after the odorous  
air has been diluted with eight or more volumes of odor-free air."

1 regard to the latter, NDEP-BAPC requests that the Appellants be instructed to file briefs that  
2 contain facts and supporting authorities on the specific statutory act or omission that they  
3 allege NDEP-BAPC violated in issuing the permit. After Appellants file their brief, NDEP-  
4 BAPC requests that it has the opportunity to file a responsive brief and/or motion to  
5 Appellants' brief. NDEP-BAPC proposes the following briefing and hearing schedule:

- 6 • Opening brief by Appellants to be filed by Friday, September 2, 2011;
- 7 • Responsive brief(s)<sup>4</sup> to be filed by Friday, September 23, 2011.

8 DATED this 11th day of August, 2011.

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27 <sup>4</sup> Bango Oil, LLC has filed a motion for leave to intervene. If allowed to intervene, it will likely desire to  
28 file its own responsive brief.

CERTIFICATE OF SERVICE

I, Sandra L. Geyer, certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 11th day of August, 2011, I deposited for mailing a true and correct copy of the foregoing **NEVADA DIVISION OF ENVIRONMENTAL PROTECTION'S MOTION TO DISMISS APPEALS, OR ALTERNATIVELY, FOR BRIEFING SCHEDULE**, via United States Postal Service in Carson City, Nevada, by first class mail, postage prepaid, to the following:

Donald and Saundra Mello  
13999 Cadet Road  
Fallon, Nevada 89406

Richard Wideman  
13993 Cadet Road  
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Sandra L. Geyer, Legal Secretary II