

1 **BEFORE THE STATE OF NEVADA, STATE ENVIRONMENTAL COMMISSION**

2 **In Re:**) **Reply to Sierra Club Motion**
3) **Seeking (1) Issuance of Subpoenas**
4 **Appeal of Water Pollution Control**) **to Compel Production of**
5 **Groundwater Permit NEV91022**) **Documents, (2) Vacatur and**
6 **Reid Gardner Station**) **Continuance in the Proceedings,**
7) **and (3) A Preliminary Injunction**
8) **to Suspend the Effectiveness of**
9) **the Permit and Halt Construction**
10) **of New Wastewater Ponds**
11)

12 Nevada Power Company, a Nevada corporation doing business as NV Energy (“NV
13 Energy” or “Intervenor”) submits this Reply to Appellant’s motion as styled above (the
14 “Motion”). As discussed in more detail in this Reply, NV Energy, as Intervenor in this
15 proceeding, vigorously objects to each of the three requests made to the State Environmental
16 Commission (“SEC” or the “Commission”) in the Appellant’s Motion.

17 **I. RELEVANT BACKGROUND**

18 NV Energy’s application for the renewal of its groundwater discharge permit (the “Permit
19 Renewal”) was submitted to the Nevada Division of Environmental Protection (“NDEP” or the
20 “Division”) on February 20, 2009. On October 21, 2009, the Division issued a “Public Notice of
21 Proposed Action” which proposed issuance of the Permit Renewal, subject to certain effluent
22 limitations and special conditions. *See Exhibit 1.* The Division set a 30-day period for receiving
23 public comment, which ended November 30, 2009. Due to the continued public interest in the
24 Renewal Permit, NDEP also conducted a public hearing on the proposed Permit Renewal on
25 June 3, 2010, in Moapa, Nevada. On June 24, 2010, the Division issued its Notice of Decision
26 granting the Permit Renewal. *See Exhibit 2.* Within the Notice of Decision NDEP responds to
27 public comments raised during and before the June 3rd public hearing, but in doing so also notes
28 the following:

*Much of the comments dealt with issues outside the scope of the permit or
regulations and authority of the [NDEP Bureau of Water Pollution
Control]. Because the comments have been answered and the follow-up*

1 *comments raised no new permit issues, NDEP has made the determination*
2 *to re-issue the permit.*

3 Exhibit 2, page 2. Among the comments received and responded to by NDEP in its June 24th
4 Notice of Decision were detailed comments submitted by the Appellant. Exhibit 2, pages 5-12.
5 In fact, more than 50% of the Notice of Decision is dedicated to responding to Appellant's
6 comments on the draft Permit Renewal.

7 The Permit Renewal was issued by NDEP on June 24, 2010, with an effective date of
8 June 25, 2010. The June 24th Notice of Decision clearly stated that NDEP's final determination
9 could be appealed to the Commission within ten (10) days of the Notice of Decision, in
10 accordance with the administrative rules of the Commission. On July 2, 2010, Appellant filed its
11 appeal request in this proceeding by submitting a completed Commission Form #3 – Form for
12 Requesting an Appeal Hearing Before the Nevada State Environmental Commission.

13 Within its appeal request, Appellant objects to NDEP's perceived "failure to date to
14 provide Sierra Club with adequate notice of its right to appeal the final permit", despite the fact
15 that the right to appeal is clearly stated on the first page of NDEP's June 24th Notice of Decision.
16 *See* Exhibit 2, page 1. Notwithstanding that fact, Appellant uses this alleged "failure" of NDEP
17 to make the following request in its Form #3 appeal request to the Commission:

18 *[T]his request to appeal is filed to protect Sierra Club's right to appeal.*
19 *The appeal itself should be held in abeyance until we have had time to*
20 *fully examine the above-noted documents and their legal basis, and we*
21 *further seek leave until that time to amend the following description of the*
22 *nature and grounds for appeal.*

23 On July 21, 2010, the Commission responded to Appellant's appeal request and agreed to
24 hold the appeal in abeyance "pending actions by [counsel for Sierra Club] to further quantify the
25 nature of the appeal and/or negotiate resolution of outstanding issues with NDEP and/or NV
26 Energy."

27 In the absence of any further pleadings by the Appellant to quantify the nature of its
28 appeal, on September 10, 2010, NDEP requested that the Commission order pre-hearing briefs

1 concerning the issues to be presented. By Order dated September 22, 2010, the Commission set
2 forth a briefing schedule whereby Appellant was ordered to file a brief with the SEC on or before
3 October 7, 2010. The Commission further ordered the appeal hearing to take place November 4
4 and 5, 2010.

5 On October 6, 2010, Appellant filed its present Motion. By email submitted at 11:36 PM
6 on October 7th, the Appellant submitted “a protective filing, only” of Appellant’s opening brief.
7 See Exhibit 3.

8 II. DISCUSSION

9 As discussed in more detail below, the Motion seeks actions by the Commission that are
10 neither justified nor warranted. Appellant’s Motion seems only to underscore the fact that its
11 own actions have caused the problems for which they now seek relief from this Commission.
12 Notwithstanding the fact that their timing woes are the result of their own actions or inaction, the
13 relief they seek is in no way appropriate in this proceeding.

14 A. Request for Issuance of Subpoena to Compel Production of Documents

15 Appellant’s request to subpoena documents is wholly unsupported and without merit.
16 Appellant seeks documentation from NDEP and NV Energy that was not developed as part of
17 this permit application process. Appellant’s recent public record requests to NDEP pertain to
18 documentation that relate to the ongoing groundwater investigation under the oversight of
19 NDEP’s Bureau of Corrective Action (“NDEP/BCA”). NV Energy, under the oversight of
20 NDEP/BCA, has been separately conducting groundwater investigation and characterization
21 activities pursuant to the Administrative Order on Consent dated February 21, 2008 (the
22 “AOC”). NV Energy voluntarily entered into the AOC with NDEP as a means to responsibly
23 address the historic impacts at the Reid Gardner Station, and which have nothing to do with
24 current operations of the facility. NV Energy has been working under the terms of the AOC for
25 over two and a half years and has already spent significant sums on preliminary investigation and
26 characterization work. NV Energy has committed to a long-term effort to fully understand
27 historic impacts, which in accordance with the AOC schedule is expected to continue through the
28 year 2014.

1 From the beginning, Appellant has been intent upon confusing the issues in this permit
2 proceeding. Neither NV Energy nor NDEP have suggested that there are not areas of potential
3 groundwater impact at the Reid Gardner facility. Quite the contrary, as NV Energy voluntarily
4 entered into the AOC with NDEP to conduct a long term groundwater investigation,
5 characterization and remediation program to address groundwater impacts that may have resulted
6 from historic operations at the facility. NV Energy has been in complete compliance with the
7 terms of the AOC, which is being conducted under the oversight of NDEP/BCA.

8 Pursuant to the Commission's Rules of Practice, there must be good cause shown by the
9 Appellant for the Commission to issue a subpoena. NAC 445B.892. Since the Appellant
10 continues to request documentation that has no relevance to this Permit Renewal, Appellant has
11 not provided good cause for the Commission to issue such a subpoena in this matter. Sierra Club
12 is always free to submit requests for public records pursuant to the Nevada open records law,
13 regardless of relevance to this proceeding. *See* Chapter 239, Nevada Revised Statutes.
14 However, Sierra Club's belief that they have not received documentation timely does not give
15 them the right to subpoena documents that have no relevance to this proceeding.

16 **B. Request to Vacate Hearing Dates and Briefing Schedule**

17 Appellant has failed to show any good cause for the Commission to vacate the hearing
18 date and briefing schedule ordered by the Commission in this matter. NAC 445B.894. As
19 discussed in Part I of this Reply, Appellant had ample time to develop its appeal in this matter.
20 Appellant was actively involved during the public comment period before the Permit Renewal
21 was issued. Appellant filed its appeal request over three months ago. In fact, after alleging in its
22 appeal request insufficient notice to prepare proper grounds for appeal before the 10-day appeal
23 deadline, Appellant nonetheless failed to file any subsequent refinement to its initial pleading. It
24 was not until the final minutes of October 7th, the deadline for Appellant's brief in this
25 proceeding, that Appellant filed its opening brief as a "protective filing, only". It defies logic
26 that Appellant, an active participant in this permit application process, could not find sufficient
27 time to prepare an appeal brief three months after filing its request for appeal. As noted above,
28 Appellant's alleged inability to timely receive and review documents from NDEP has no

1 relevance to this proceeding, since such documents only relate to the groundwater investigation
2 and characterization activities being conducted pursuant to the AOC under the oversight of
3 NDEP/BCA.

4 **C. Request for Preliminary Injunction to Suspend the Effectiveness of the Permit**
5 **Pending Appeal and Halt Construction of New Ponds on the Mesa.**

6 Of all Appellant's requests in this Motion, its argument for preliminary injunction is
7 clearly the most strained and inappropriate. Perhaps most stunning, Appellant offers no legal
8 support for its request of this Commission to grant the extreme remedy of a preliminary
9 injunction. If Appellant had taken the time to explain the legal bases for awarding a preliminary
10 injunction, it would quickly become obvious to the Commission that such a request cannot
11 withstand legal scrutiny.

12 Commission appeal hearings are "contested cases," and therefore subject to the contested
13 case provisions of the Nevada Administrative Procedures Act. NRS 233B.121 et. seq. *See*
14 Exhibit 4. To the extent the Commission has any legal authority to award a preliminary
15 injunction, such authority would come from NRS 233B.140, which provides in pertinent part:
16 "A petitioner who applies for a stay of the final decision in a contested case shall file and serve a
17 written motion for the stay on the agency and all parties of record to the proceeding *at the time of*
18 *filing of the petition for judicial review.*" [emphasis added]. Needless to say, the Appellant did
19 not make such a written motion at the time it filed its appeal. In fact, this request for injunction
20 comes over three months after our Permit Renewal was issued. Therefore, Appellant's Motion
21 fails based solely on the clear reading of the pertinent statute.

22 However, even if one looks past that fatal legal flaw in the Motion, Appellant has made
23 no attempt to show the Commission how this request satisfies the high burden for awarding a
24 preliminary injunction. Under well established Nevada law, a preliminary injunction is
25 available when the movant can demonstrate that (i) the non-moving party's conduct, if allowed
26 to continue, will cause irreparable harm for which compensatory relief is inadequate and (ii) that
27 the movant has a reasonable likelihood of success on the merits. *See Boulder Oaks Community*
28 *Ass'n v. B & J Andrews Enterprises, LLC*, 215 P.3d 27, 31; *See also* NRS 33.010.

1 Appellant has offered no argument for its likelihood of success on the merits or that NV
2 Energy's authorized activities pursuant to the groundwater discharge permit are causing
3 irreparable harm. Of course, Appellant cannot reasonably argue that it is likely to succeed on the
4 merits considering that it has still not fully developed its full grounds for appeal, and the
5 allegations Appellant has offered to date have no relevance in this proceeding (as discussed
6 above). To the extent Appellant has offered a fully developed argument in its appeal, it has
7 certainly not shown any likelihood to succeed on the merits.

8 Similarly, it is hard to fathom how Intervenor's continued activity under its approved
9 Permit Renewal would cause "irreparable harm" to Appellant. NV Energy maintained full
10 compliance with its previous groundwater discharge permit issued by the NDEP in October
11 2005, of which this Permit Renewal is replacing. In fact, this Permit Renewal is one component
12 of a larger plan to *improve* from both an environmental and operational perspective the manner
13 in which the Facility utilizes its evaporation ponds. This Permit Renewal expressly contemplates
14 ultimate closure of our existing ponds that are located closer to groundwater in favor of newly
15 constructed, double-lined ponds on the Mesa that have an approximate 150 ft depth to
16 groundwater. NV Energy's continued operations pursuant to its Permit Renewal serve to
17 mitigate potential future impacts to the environment; a far cry from "irreparable harm."

18
19 In summary, for the reasons discussed above, Intervenor opposes Appellant's Motion and
20 requests that the Commission deny it *in toto*.

21 RESPECTFULLY SUBMITTED

22 

23 _____
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1 **CERTIFICATE OF SERVICE**

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3 I certify that on October 15, 2010, I served a copy of the foregoing document to the
4 following by electronic means, as well as by U.S. Mail, postage prepaid:
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