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Executive Secretary

SEC Appeal Hearing
Notice Pursuant to NRS 233B.121 and NAC 445B.891

Date: September 13, 2011

To: Appellant:
Refuse, Inc.
Represented by Andrew M. Kenefick Senior Legal Counsel, Waste
Management Western Group & Richard J. Angell & Michael
Tomko, Attorney at Law, Parsons Behle & Latimer

Respondent:
Nevada Division of Environmental Protection
Represented by William Frey, Esq. & Jasmine Mehta
Office of the Attorney General

From: John B. Walker, Executive Secretary

Subject: Notice of Hearing: Refuse, Inc. Appeal Air Pollution Control
Permit #AP4953-1148.01

A three-member panel of the State Environmental Commission (SEC) has scheduled an appeal hearing on the above referenced permit. The hearing will begin on October 6, 2011 at 9:00 a.m. in Reno, Nevada at the Nevada Department of Wildlife, Conference Room "A", 1100 Valley Road. The hearing will continue on October 7th, if necessary, at the same location. The October 6th hearing date was selected after consultation with the parties, and the parties were informed of the date on July 29, 2011.

The SEC has jurisdiction to hear this appeal pursuant to: NRS 445B.360, NRS 445B.210 and NAC 445B.875 through NAC 445B.899. The statutes and regulations involved in this appeal hearing are: NAC 445B.252; NAC 445B.256; NAC 445B.257; NAC 445B.259; NAC 445B.261; NAC 445B.3405; 40 CFR Part 52, Appendix E; 40 CFR Part 60, Appendix B; and 40 Part 60, Appendix F.

About the Appeal: On May 12, 2001, the Nevada Division of Environmental Protection (NDEP) issued Revised Class I (Title V) Air Operating Permit AP4953-1148.01. The permit authorized the construction and operation of three internal combustion engines at the Lockwood landfill facility located in Storey County, Nevada.

On May 23, 2011, appellant Refuse, Inc. (Refuse) filed its appeal of all provisions requiring the installation and use of the continuous emission monitoring systems (CEMS) for the landfill-gas-to-energy (LFGTE) engines.

Refuse appeals the CEMS-related permit conditions on the grounds that they are beyond the statutory and/or regulatory authority of NDEP, arbitrary and capricious, unduly costly and burdensome, unreasonable, and without legal or technical basis. It asserts the following bases for appeal in its notice of appeal: (1) there is no regulatory authority that specifically requires CEMS for LFGTE projects; (2) there is no technically sound basis for requiring CEMS units on landfill gas IC engines; (3) CEMS units are not well-suited for monitoring landfill gas combustion engines; (4) alternative monitoring equipment, such as annual stack testing and handheld emissions monitoring, will yield reliable data that will be sufficient to ensure compliance; (5) the CEMS requirement is an overly burdensome monitoring, recordkeeping and reporting requirement and extremely cost-prohibitive for a small facility; (6) the CEMS requirement will jeopardize the project; and (7) NDEP did not adequately consider and address the prior comments Refuse submitted.

Procedural History: On May 31, 2011, NDEP filed a motion for a briefing schedule, to which Refuse filed a response on June 16, and to which NDEP filed a reply on June 23. On June 24, Refuse filed a request for a subpoena to be issued for various NDEP documents, which NDEP opposed on June 30, 2011. On July 11, 2011, the SEC issued an Order Regarding Issuance of Subpoena, Briefing Schedule and Hearing Date. Then on July 13, 2011, Refuse filed a request for limited reconsideration of the July 11 Order, to which NDEP filed its opposition on July 20, 2011. The SEC issued its Order Regarding Reconsideration of SEC Order Regarding Issuance of Subpoena on July 21, 2011.

Hearing Procedure: Practice before the SEC is governed by the attached regulations found at NAC 445B.875 et seq. The online version is located at: <http://www.leg.state.nv.us/NAC/NAC-445B.html#NAC445BSec875> NRS 233B.121 to 233B.150 are also applicable. See: <http://www.leg.state.nv.us/NRS/NRS-233B.html#NRS233BSec121>

Related Information: Additional information about this appeal, including the briefs noted above, is available on the SEC website at the following location: http://www.sec.nv.gov/main/refuse_appeal.htm



Practice before the State Environmental Commission

NAC 445B.875 Definitions. (NRS 233B.050)

1. As used in NAC 445B.875 to 445B.899, inclusive, unless the context otherwise requires, the words and terms defined in NAC 445B.877 to 445B.884, inclusive, have the meanings ascribed to them in those sections.

2. The meanings ascribed to words not included in NAC 445B.877 to 445B.884, inclusive, are in accordance with applicable sections of NAC governing air quality, water pollution or solid waste management and of chapters 444, 445A and 445B of NRS.

NAC 445B.877 “Appellant” defined. (NRS 233B.050) “Appellant” means any person:

1. Who requests a hearing before the Commission, pursuant to chapter 278, 444, 444A, 445A, 445B, 459, 486A or 519A of NRS or the Commission’s regulations concerning the control of air or water pollution or the management of solid waste; or

2. Whose appearance before the Commission is required by:

(a) The Director;

(b) An authorized representative of the Director; or

(c) A person who is designated by or pursuant to a county or city ordinance or a regional agreement or regulation to enforce local ordinances or regulations for the control of air pollution.

NAC 445B.879 “Commission” defined. (NRS 233B.050) “Commission” means the State Environmental Commission or a panel of three or more members of the State Environmental Commission in accordance with NRS 445A.610 and 445B.350, where appropriate.

NAC 445B.881 “Department” defined. (NRS 233B.050) “Department” means the State Department of Conservation and Natural Resources.

NAC 445B.882 “Director” defined. (NRS 233B.050) “Director” means the Director of the Department.

NAC 445B.884 “Person” defined. (NRS 233B.050) “Person” has the meaning ascribed to it in NRS 445B.150.

NAC 445B.886 Petitions to adopt, file, amend or repeal regulations. (NRS 233B.050)

1. Any interested person may petition the Commission in writing for the adoption, filing, amendment or repeal of any regulation and shall accompany his petition with relevant data, views and arguments as required by form 1.*

2. Upon submission of a petition, the Commission will within 30 days either deny the petition in writing stating its reasons or initiate regulation-making proceedings in accordance with NRS 444.560, 445A.435 or 445B.215, whichever is applicable.

*(See adopting agency for form.)

NAC 445B.888 Declaratory orders, advisory opinions. (NRS 233B.050)

1. Any member of the public may petition the Commission for a declaratory order or an advisory opinion as to the applicability of any statutory provision, Commission regulation or decision as required by form 2.*

2. Upon submission of a petition, the Commission will within 30 days issue a declaratory order or an advisory opinion in writing stating reasons for its action.

*(See adopting agency for form.)

NAC 445B.890 Request for hearing. (NRS 233B.050) Any person requesting a hearing before the Commission concerning a final decision of the Department may do so by filing a request, within 10 days after notice of the action of the Department, on form 3* with the State Environmental Commission, 901 South Stewart Street, Suite 4001, Carson City, Nevada 89701-5249.

*(See adopting agency for form.)

NAC 445B.891 Notice of hearing. (NRS 233B.050)

1. The Secretary of the Commission will schedule a hearing to be held within 20 days after receipt of the request for a hearing or an order to appear before the Commission.

2. All of the parties must be notified by registered or certified mail of the date thereof which must be no less than 5 days after the date of notification. The notice must include:

(a) A statement of the time, place and nature of hearing;

(b) A statement of the legal authority and jurisdiction under which the hearing is to be held;

(c) A reference to the particular sections of NRS and NAC allegedly violated; and

(d) A brief and concise statement of the matters asserted or the issues involved.

NAC 445B.8915 Intervention in certain proceedings. (NRS 233B.050, 445B.210)

1. A person, other than a party to a proceeding, who believes that he may be directly and substantially affected by the proceeding may request an order to intervene in the proceeding by filing a written petition for leave to intervene with the Commission.

2. Except as otherwise provided in this subsection, a petition for leave to intervene must be filed with the Commission not later than 10 calendar days after the notice of appeal related to the proceeding in which the intervention is sought is filed with the Commission pursuant to the provisions of NRS 445B.340. The petitioner shall serve a notice of a petition for leave to intervene upon each party to the proceeding. A party may file a response to the petition within 5 calendar days after receipt of the petition. If a petitioner files a petition for leave to intervene with the Commission after the period prescribed in this subsection, the petition must set forth the reason for the delay in filing the petition. The petition for leave to intervene must:

- (a) Identify the proceeding in which the petitioner requests leave to intervene;
- (b) Set forth the name and address of the petitioner and, if the petitioner is represented by an attorney or other authorized person, the name, address and telephone number of the attorney or other authorized person;
- (c) Contain a clear and concise statement of the direct and substantial interest of the petitioner in the proceeding;
- (d) Set forth the manner in which the petitioner will be affected by the proceeding; and
- (e) Include a statement indicating whether or not the petitioner intends to present evidence in the proceeding.

3. If a petition for leave to intervene demonstrates a direct and substantial interest in the subject matter of the proceeding or any part of the proceeding and does not unreasonably broaden the issues or prejudice any party to the proceeding, the Commission may grant leave to intervene or otherwise appear and participate in the proceeding with respect to the matters set forth in the petition.

4. If it appears during a proceeding that an intervener has no direct or substantial interest in the proceeding or that the public interest does not require his participation in the proceeding, the Commission may dismiss the intervener from the proceeding.

(Added to NAC by Environmental Comm'n by R227-03, eff. 4-20-2004)

NAC 445B.892 Subpoenas. (NRS 233B.050)

1. Subpoenas to compel attendance of any person at a hearing or to require the production of books, records or other documents may be issued by the Commission.

2. Requests for the issuance of subpoenas must be made to the Commission in writing no less than 5 days prior to the hearing date, setting forth the reason and necessity for the subpoenas. Upon good cause shown, subpoenas may be issued at the request of any party to the hearing at any time. The Commission may issue any subpoenas on its own initiative without request.

3. All costs incident to subpoenas issued at the request of appellant must be borne by the appellant. The Commission may demand payment of those costs prior to the issuance of the subpoenas.

NAC 445B.8925 Briefs. (NRS 233B.050)

1. The Commission may, upon its motion or a motion by a party, order briefs to be filed before or after a hearing and shall prescribe the period during which the briefs must be filed.

2. Each brief must be accompanied by an acknowledgment of service or a certificate of mailing for all parties.

NAC 445B.893 Panels to conduct certain hearings; decision of panel. (NRS 233B.050) Three or more members of the Commission constitute a proper panel, where appropriate, in accordance with NRS 445A.610 and 445B.350, and a majority of those present must concur in any decision. The decision will be in writing and is a public record.

NAC 445B.894 Change in time or place of hearing; informal disposition of matter. (NRS 233B.050)

1. Upon good cause shown, the Commission may vacate and reset the time of hearing.

2. Upon good cause shown, the Commission may transfer the place of hearing to a more appropriate location, taking into consideration the convenience and fairness to the witnesses and the parties.

3. Unless otherwise provided by law, informal disposition may be made by all involved parties at any time of any contested case or matter.

NAC 445B.895 Appearance of parties; procedure at hearing. (NRS 233B.050)

1. The parties may appear in person and may be represented by counsel. All testimony must be given under oath and recorded verbatim pursuant to the provisions of NAC 445B.897.

2. The Commission:

(a) Will determine the order of the presentation of evidence; and

(b) May limit the time and scope of the examination of witnesses and disallow repetitive testimony.

3. Hearings are open to the public until such time as confidential information, within the meaning of chapter 445B of NRS or applicable sections of this chapter or chapter 445A of NAC, is admitted to the record, at which time the hearing will be closed.

NAC 445B.8953 Conduct at hearing; maintenance of order. (NRS 233B.050)

1. A person who appears in a proceeding shall conform to the recognized standards of ethical and courteous conduct as determined by the Commission. All parties to a hearing, their counsel and the spectators shall conduct themselves in a respectful manner.

2. The Commission may take any action which it determines is necessary to maintain order during a hearing, including, without limitation:

(a) Excluding a party or his attorney or authorized representative from the hearing;

(b) Excluding a witness from the hearing; and

(c) Limiting the taking of testimony and presentation of evidence during the hearing.

(Added to NAC by Environmental Comm'n by R227-03, eff. 4-20-2004)

NAC 445B.8957 Consolidation of proceedings. (NRS 233B.050)

1. The Commission may consolidate two or more proceedings if it appears that the issues are substantially the same and the rights of the parties will not be prejudiced by the consolidation.

2. At a consolidated hearing, the Commission will determine the order in which the parties introduce evidence and present testimony.

3. If two or more parties have substantially similar interests and positions, the Commission may, at any time during the hearing, limit the number of witnesses who will be allowed to testify.

NAC 445B.896 Findings of Commission. (NRS 233B.050)

1. At the conclusion of the hearing, the Commission may take the case under submission and will notify the appellant and any other party to the hearing of its findings and recommendations in writing within 30 days after the date of the hearing.

2. Final recommendations will be in writing and will separately state findings of fact and conclusions of law. Findings of fact and recommendations will be based upon substantial evidence. Findings of fact will include a concise statement of the evidentiary facts supporting the findings.

NAC 445B.897 Record of hearing. (NRS 233B.050)

1. Each hearing must be recorded electronically. An electronic recording of the hearing must be made available for inspection or copying. A party who requests a copy of an electronic recording must pay the cost to copy the recording.

2. In addition to the provisions of subsection 1, a party may request that a hearing be recorded by a court reporter who is certified pursuant to chapter 656 of NRS. A party who requests that a hearing be recorded by a court reporter must pay the costs relating to the services of the court reporter, including the cost charged by the court reporter for providing a transcript of the hearing.

[Environmental Comm'n, Practice Rule 7, eff. 1-7-73; A 4-3-74; A and renumbered as Rule 12, 1-9-76]—(Substituted in revision for NAC 445.992)

NAC 445B.899 Petitions for reconsideration or rehearing. (NRS 233B.050)

1. A petition for reconsideration must specifically:

(a) Identify each portion of the challenged decision which the petitioner deems to be unlawful, unreasonable, or based on erroneous conclusions of law or mistaken facts; and

(b) Cite those portions of the record, the law or the rules of the Commission which support the allegations in the petition. The petition may not contain additional evidentiary matter or require the submission or taking of evidence.

2. A petition for rehearing must:

(a) Allege that a decision is in error because of an incomplete or inaccurate record;

(b) Specifically set forth the nature and purpose of any additional evidence to be introduced; and

(c) Show that such evidence is not merely cumulative and could not have been introduced at the hearing.

3. A petition for reconsideration or rehearing of a decision must be served upon all parties of record within 15 days after the effective date of the decision.

4. An answer to a petition for reconsideration or rehearing may be filed with the Commission by any party of record in the proceeding within 5 days after the filing of the petition. The answer must be confined to the issues contained in the petition and served upon all parties of record. Proof of service must be attached to the answer.

5. The Commission will grant or deny a petition for reconsideration or rehearing within 10 days after the date of the filing of the petition. The denial of a petition may be on the record without a separate decision.

6. Unless otherwise ordered by the Commission, the filing of a petition for reconsideration or rehearing or the granting of such a petition does not excuse compliance with, or suspend the effectiveness of, the challenged decision.

7. If the Commission grants a petition for reconsideration, it will reexamine the record and decision with regard to the issues on which reconsideration was granted and issue a modified final decision or affirm its original decision within 20 days after the petition is granted.

8. If the Commission grants a petition for rehearing, it will, within 20 days thereafter, conduct a hearing to allow the parties to present additional evidence and will issue a modified final decision or affirm its original decision.

9. A modified final decision of the Commission issued upon reconsideration or rehearing will incorporate those portions of the original decision which are not changed by the modified final decision.

10. A modified final decision of the Commission or the affirmation of an original decision of the Commission is a final decision for the purposes of judicial review.

(Added to NAC by Environmental Comm'n, eff. 11-9-95)