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BEFORE THE STATE OF NEVADA, STATE ENVIRONMENTAL COMMISSION

In Re:)	Sierra Club Response to the Opposition to Its
)	Motion For
Appeal of Water Pollution Control)	
Groundwater Permit NEV91022)	(1) Subpoenas to Compel Production of
Reid Gardner Station)	Documents and Data,
)	
)	(2) Vacatur and Continuance in the
)	Proceedings, and
)	
)	(3) A Preliminary Injunction to Suspend the
)	Effectiveness of the Permit and Halt
)	Construction of New Wastewater Ponds

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In their respective statements in opposition to Sierra Club’s motion, Appellee Nevada Division of Environmental Protection (NDEP) and Intervenor NV Energy proffer a clever two-step, but the Commission should decline the dance. Sierra Club’s response here distinguishes, as necessary, between their arguments.

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1. Subpoenas of Documents and Data

9 NDEP and NV Energy both assert that all the documents comprising the record of
10 this case are available to Sierra Club, while similarly failing to list the documents they
11 assert exhaustively comprise that record. Regardless, as Sierra Club denoted in its Oct. 7-
12 filing, NDEP was not entitled to issue NEV91022 to NV Energy where the latter was not in
13 substantial compliance with its prior permit, or where the new permit provisions
14 insufficiently protect the environment. As such, Sierra Club is entitled to review—and
15 hopes that NDEP would have done the same—the documents that likely will establish that
16 NV Energy was not in substantial compliance with its prior permit or that will establish
17 that the newly-issued permit is insufficiently protective. To date, these documents have
18 been withheld but are within the possession of NDEP or NV Energy.

1 a. NDEP's Arguments Against Subpoenas of Documents

2 NDEP admits that the documents sought are public records to which Sierra Club has a
3 right of access (NDEP Opp at 1). NDEP also asserts that it has “consolidated *most* of the
4 documents regarding the Reid Gardner permit renewal process in its Carson City office.” *Id.*
5 (emphasis added). Notably, NDEP fails to say where or whether it has consolidated the rest of its
6 documents relevant to the renewal of NEV91022. Nevertheless, NDEP asserts that “[f]or the
7 past few months NDEP and its counsel have informed Sierra Club that the documents are
8 available for review.”

9 This last assertion is patently false, as NDEP’s counsel for its Oct. 14-filed opposition
10 brief surely understands from reading his co-counsel’s Sept. 21 letter to Sierra Club.¹ That letter
11 indicated that Sierra Club’s Sept.13 request for documents relevant to this appeal was being
12 partly fulfilled by NDEP’s Bureau of Corrective Actions. See attached Exhibit 1 to Resp to Opp.
13 to the Motion. In it, Counsel Tanner committed to “get back to [Sierra Club] as soon as possible”
14 as to five specific categories of additional data and document that Sierra Club had sought from
15 NDEP’s BWPC. These categories included (1) quarterly ground water monitoring reports, (2)
16 information about leachate collected by mandated interstitial pond liner collection systems, (3)
17 hydrogeologic site characterization and engineering design reports for the newly proposed
18 wastewater ponds in the Mesa area, (4) existing pond documentation as to installation, hydraulic
19 performance, performance of the leak collection system, and impacts on the Muddy River flood
20 plain, and (5) The updated O&M Manual and Sampling and Analysis Plan required to be

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¹ While the Oct. 14 filing and the Sept. 21 letter were both signed by the Attorney General, the Sept. 21 letter was written and co-signed by Deputy AG Carolyn Tanner, while the Oct. 14 filing was written and co-signed by Deputy AG William Frey.

1 submitted in September 2010. See Exh. 1 to the Motion: Correspondence with Parties Seeking
2 Documents and Data, at 3-4.

3 Counsel Tanner also committed to advise Sierra Club “as soon as possible” as to
4 “whether and where [additional documents sought by Sierra Club] exist within the public
5 record,” *Id.*, including many that were previously described in Sierra Club expert Elliott Lips’s
6 memo of Oct. 4. See Exhibit 2 to the Motion: Oct. 4 Memorandum from Elliot Lips.

7 To date, Counsel Tanner has neither made the requested documents available to Sierra
8 Club nor advised Sierra Club as to their location or availability, except to have left a voicemail
9 on Oct. 7 for Sierra Club counsel stating, in relevant part, that Sierra Club “had the opportunity
10 to look at Water Pollution Control’s documents a long time ago.” See Exhibit 2 to Resp to Opp.
11 to the Motion (verbatim transcript of voice mail from Dep AG Tanner). Sierra Club did, on three
12 separate occasions, examine files of the BWPC, including as “long ago” as the end of June 2010.
13 But while a number of relevant data documents were produced (and then, reproduced at Sierra
14 Club’s expense), many of the documents and data that Sierra Club has sought have (still) not
15 been produced. Sierra Club lists these needed, relevant documents in Exh. 3 in Resp to Opp to
16 Motion, SC Doc Requests Delineated. The requests were directed not only to Counsel Tanner,
17 but also to (or copied to) Jeryl Gardner of the BWPC and to Shannon Harbour of the BCA.

18 In sum, NDEP’s assertion that Sierra Club has had opportunity to review all of the
19 documents comprising the record is inaccurate. NDEP has never produced a complete record,
20 nor has it responded to Sierra Club’s requests for documents that Sierra Club has shown should
21 be part of the record -- either to deny the request as outside of the record, or to produce the
22 documents.

23 b. NV Energy’s Arguments Against Subpoenas of Documents

1 NV Energy argues that the documents Sierra Club seeks were “not developed as part of
2 this permit application process,” but, instead, “pertain to documentation that relate to the ongoing
3 groundwater investigation under the oversight of NDEP’s [BCA].” NV Energy “Reply” to Sierra
4 Club Motion at 3. Sierra Club disputes that all the documents it seeks pertain to that “ongoing
5 investigation.” Even if that assertion were true, it establishes nothing, since the content of a
6 document can be relevant to two proceedings, even if it was “developed” for one. As was
7 explained item by item in attached Exhibit 3, *Id.*, these documents clearly “pertain” to the
8 question whether NDEP’s grant of NEV91022 was lawful. As was indicated in Sierra Club’s
9 protectively-filed Opening Brief, Sierra Club believes that receipt of the full record – including
10 the documents sought by Sierra Club that are being withheld by NDEP and NV Energy – is
11 essential for it to ascertain whether NV Energy was in substantial compliance with key terms of
12 its prior permit, or not in compliance and thus rendering invalid NDEP’s grant of the new permit.

13 14 **2 Vacatur and Continuance in the Proceedings, and**

15 NDEP argues against granting Sierra Club any additional time to review the documents it
16 seeks because “all documents that NDEP relied on in making its decision to issue the permit
17 existed in NDEP’s files prior to the permit’s issuance.” However, NDEP ignores a key question
18 at issue in this appeal, namely whether the documents and data it considered, and its findings
19 made after such consideration, were sufficient to ground its decision under the law.

20 First, the documents and data that Sierra Club has requested are relevant, as indicated
21 above, to the questions (1) whether NV Energy was in substantial compliance with its prior
22 permit terms, and (2) whether the terms of the presently-challenged permit are sufficiently
23 protective of the environment in light of the relevant history and contemporaneous evidence of
24 contamination. If the answer to either question is “no,” then NDEP’s grant of the permit is

1 invalid under the law. Second, if NDEP failed to adequately consider that record and draft permit
2 terms in light of that record, then its decision to grant the permit was arbitrary or capricious, and
3 so also unlawful under the law.²

4 NV Energy commits the same logical error when it advances the argument that because
5 Sierra Club filed its notice of appeal over three months ago, it had “ample time to develop its
6 appeal in this matter.” NV Energy Opposition at 4. This argument assumes that the record to
7 which Sierra Club has had access over that period was sufficient for such development. But, as
8 Sierra Club has shown, exhaustively, in its earlier motion and above, that is simply not the case.
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10 **3. Preliminary Injunction to Suspend the Effectiveness of the Permit and Halt Construction** 11 **of New Wastewater Ponds**

12 Sierra Club seeks a temporary suspension of NEV91022, pending resolution of the
13 Appeal, pursuant to NRS 233B.127, in light of threat to public health posed by construction of
14 new wastewater ponds whose soundness of design has not been evaluated by NDEP nor by the
15 public.

16 In opposition to the motion, NDEP here makes a valid, but ultimately irrelevant, point in
17 asserting that relocation of wastewater ponds further from the Muddy River may be “more
18 protective of the environment than the current location.” *See also* NV Energy Opp. at 6. NDEP
19 strays well beyond the evidence, however, in asserting that “the new construction will *ensure*
20 that these ponds are zero-discharge.”

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² Finally, for purposes of the present argument, NDEP here, as above, fails to indicate which documents it regards as exhaustively comprising the administrative record, to the exclusion of all other data and documents concerning the record and performance of Reid Gardner facilities that may impact or impair waters of the state.

1 NDEP's first assertion may be correct, assuming that the hydrogeological site
2 characteristics and design details of the newly proposed ponds are adequate to the task. But
3 these are the very details that NDEP (and NV Energy) continues to withhold from Sierra Club. It
4 is also possible, given inadequacies as to site and proposed construction, that the proposed ponds
5 will leach contaminants to groundwater, or even result in catastrophic failure (massive pond
6 breaching). The devil is in the details, and Sierra Club's request for these documents, and
7 NDEP's response, reveal that either these details do not exist or that NDEP has not considered
8 them. Moreover, the question is not whether the location of the new ponds will be, on balance,
9 more protective of the environment than the existing ponds, but rather, whether the new permit
10 ensures that the new ponds and other facilities at Reid Gardner will be *sufficiently* protective of
11 the environment, as required by law.

12 As to NDEP's second assertion, Sierra Club flatly rejects that NDEP or NV Energy can
13 *ensure* against any discharge. Again, absent the details regard construction, design, site
14 characteristics, *inter alia*, NDEP is not able to approximate the risk even on a qualitative basis.
15 As noted above, it does not appear that NDEP has reviewed these documents as they have not
16 even been produced as part of the record.

17 As was discussed briefly in Sierra Club's motion, in the course of its work on this appeal,
18 Sierra Club has discovered what appears to be egregious evidence of contemporaneous leaching
19 from existing ponds. The evidence was in the form of visual observations, and supported by
20 photos, from Oct. 4. Sierra Club earlier conveyed this information to NDEP, but has received
21 from NDEP no confirmation that it is investigating NV Energy for the substantial violations of
22 its present permit that the supplied-evidence seems to support. Accordingly, we provide, as Exh.
23 4 in Resp to Opp to Motion (Elliott Lips Memo re Discharge/Leachate) the same memorandum

1 from Sierra Club’s expert in this matter that was earlier provided to NDEP, detailing potential
2 leaching from existing ponds directly into the floodplain of the Muddy River.

3 Moreover, the sparse groundwater monitoring data to which the Sierra Club has been
4 given access indicates that contamination of groundwater near the Muddy River has accelerated
5 in recent years – after the double lining of all existing ponds.

6 In the absence of design and related details as to the proposed new wastewater ponds on
7 the Mesa, Sierra Club and NDEP can only presume that the new ponds will be similarly designed
8 – and will similarly leach contaminants to the environment, and eventually to downgradient
9 reaches of the Muddy River. Because the only relevant time to prevent such contamination is
10 prior to the disposal of wastewater in the ponds, it is incumbent on NDEP to act to halt
11 construction of the new ponds before they are completed and filled. In light of NDEP’s apparent
12 failure to act, we have urged the Commission to do so – at least during the pending of the present
13 Appeal.

14 Continued construction of the ponds, when such construction may ultimately be enjoined,
15 allows NV Energy to invest additional resources into a project that may be unlawful. As such, at
16 the very least, we request that the Commission not entertain any arguments by NV Energy that
17 its expenditure of resources thus far is a reason to continue with the project. NV Energy has
18 been on notice that the permit is being appealed since early July and its decision to move forward
19 with construction nevertheless evidences a disregard for the possibility that the Commission may
20 order NV Energy to substantially alter or halt its construction.

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4. In Sum

For the above reasons, Sierra Club urges the Commission to reject the arguments advanced by NDEP and NV Energy in opposition to Sierra Club’s motion, as not persuasive, and further urges the Commission to grant the Sierra Club’s motion in its entirety.

RESPECTFULLY SUBMITTED



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1 **CERTIFICATE OF SERVICE**
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3 The undersigned, Daniel Galpern, does hereby certify that on the 19th day of October, 2010, a
4 true and correct copy of the foregoing MOTION TO ISSUE SUBPOENAS, VACATE
5 HEARING AND SCHEDULING ORDER, AND SUSPEND PERMIT AND ISSUE
6 INJUNCTION, was emailed, and mailed, postage prepaid, to the following:
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8

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