



September 6, 2007

Mr. John Walker
Executive Secretary
Nevada State Environmental Commission
901 South Stewart Street, Suite 4001
Carson City, NV 898701

Re: Comments of Newmont Mining Corporation and Newmont Nevada Energy Investment, LLC on Petition by Western Resource Advocates Requesting a Permitting Moratorium for Certain Electric Generating Facilities

Dear Mr. Walker:

On behalf of Newmont Mining Corporation and Newmont Nevada Energy Investment, LLC (collectively referred to as "Newmont") Holland & Hart LLP respectfully submits the following comments on the petition by Western Resource Advocates and others (collectively "WRA") to suspend permitting for certain electrical generating facilities, pending adoption in Nevada of an emission standard for greenhouse gas (GHG) emissions. Newmont, uniquely, is both a generator of electricity in Nevada at its TS Power Plant, and a consumer of electrical power at its Nevada gold mining operations, and brings both perspectives to these comments.

Newmont is familiar with the comments submitted by LS Power, Sierra Pacific Resources, Toquop Energy LLC, and the Center for Energy and Economic Development, and generally supports these comments. We submit that the petition to suspend permitting for electrical generating facilities is flawed on public policy, energy, economic and legal grounds.

I. To Grant the Petition Would Contradict the Direction Provided by the State Legislature

In its 2007 session, the Nevada legislature considered and rejected adoption of a program limiting GHG emissions, concluding it was premature for

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the state to adopt such a program. Instead, the legislature provided for development of a statewide GHG registry, which can provide invaluable data for the future development and implementation of a national program to reduce GHG emissions. For the Commission to grant the petition would be directly counter to the direction provided by the legislature. Neither Newmont nor other generators or consumers of electrical power seek to ignore concerns regarding climate change. However, as reflected in the decision of the legislature, climate change issues are global in scope, and measures limiting GHG emissions and the appropriate schedule for such limitations are best made at a national and international level.

II. Measures to Promote Renewable Sources of Electricity, with Associated GHG Reductions, are Already Being Taken in Nevada

The State of Nevada already has adopted a Renewable Portfolio Standard pursuant to which 20% of the State's retail load must come from renewable generation by 2015. This requirement will help reduce GHG emissions. Sierra Pacific Resources notes that the Intertie which is a part of its Ely Energy Center project will provide transmission for potential new sources of wind, solar and geothermal energy, thereby facilitating development of more renewable energy. Sierra Pacific also refers to its plans to participate in investments of up to \$2 billion to increase the renewable share of its energy portfolio by more than 50%. LS Power notes that the 500 kV transmission line being developed by Great Basin Transmission, an LS Power-Dynegy joint venture, likewise will promote development of renewable sources--but that this transmission line is made possible by the new coal-fired White Pine Energy Station as the economic anchor for the line. LS Power also refers to its efforts to develop 250 MW of wind energy near the transmission line. According to Sierra Pacific Resources, by the end of this year Nevada will use more solar and geothermal energy per capita than any other State.

Development of new coal-fired generation does not displace renewable generation, but works in tandem with renewable sources to help enable development of a balanced portfolio. Because both wind and solar power are intermittent resources; they cannot provide baseload power to ensure that electricity will be available when needed to meet the growing demand for power in Nevada. These renewable sources cannot stand alone, but need to be balanced by adequate baseload power.



III. New Coal-fired Generation is Needed to Balance Current Reliance on Natural Gas-fired Generation and Make Adequate Supplies of Affordable Electricity Available to Nevada Businesses and Citizens

Toquop Energy's comments note that more than 51% of the generating capacity in Southern Nevada, Arizona and New Mexico is natural gas-fired capacity, and cites comments by the Chair of the PUCN that Southern Nevada uses natural gas to generate all but 18% of its power. The steep increases in the price of natural gas in recent years make natural gas-fired electricity increasingly expensive. A principal motivation for Newmont's development of its TS Power Plant was the high cost of electricity needed for its Nevada gold mining operations.

Toquop also notes that natural gas production in the U.S. has flattened out, which poses questions about the reliability and adequacy of natural gas supplies to fuel new electrical generation. Coal supplies, on the other hand, are abundant and affordable. Development of new coal-fired generation is essential to hedge against natural gas availability and price volatility.

Nevada has been the fastest-growing state in the U.S. in recent years, and continued rapid growth is anticipated. Continued growth requires the development of several thousand megawatts, or more, of reliable new electrical generation to meet increasing demand. New coal-fired generation is an essential part of the power generation mix if this demand is to be met. If permitting were to be suspended for coal-fired and certain other new sources of electrical generation, it would create a significant risk that supplies of electricity might not be adequate to meet the needs of Nevada's businesses and citizens.

IV. New Coal-fired Plants Use State-of-the-Art Emission Control Technology and are More Efficient than Older Plants

New coal-fired plants must meet increasingly stringent requirements to reduce and control emissions of "criteria" pollutants such as nitrogen oxides, sulfur dioxide, particulate matter, carbon monoxide and volatile organic compounds. To be permitted, each plant must meet rigorous requirements to install Best Available Control Technology (BACT), comply with PSD increments (which limit increases in pollutant concentrations in ambient air) and meet visibility requirements in designated national parks and wilderness areas. Newmont's TS Plant, currently under construction, will be one of the cleanest, lowest-emitting coal-fired plants anywhere. Opponents of the TS Plant filed an aggressive appeal with EPA's Environmental Appeals Board (EAB) which asserted numerous flaws in the air quality permit issued by the NDEP, including



contentions that emission limits failed to meet requirements to install BACT. However, the EAB rejected every ground raised in the appeal and upheld the permit as issued. The NDEP surely will require other new power plants to meet strict requirements for BACT.

Also, new coal-fired plants are more efficient than old plants, and therefore burn less fuel to generate a given amount of electricity. Permitting and construction of new plants will enable older, less efficient plants to be retired, thereby reducing GHG emissions. Sierra Pacific Resources has committed to shut down three inefficient plants, subject to PUCN approval and completion of its Ely Energy Center. Perversely, suspension of permitting of new plants could delay retirement of less efficient and more polluting existing plants and thereby frustrate the petitioner's professed objective to reduce GHG emissions.

V. The SEC is Not Required to Regulate GHG Emissions Nor Authorized to Suspend Permitting

WRA argues that permitting of new coal-fired power plants should be suspended unless: (1) the State of Nevada adopts regulations limiting power plant CO₂ emissions to no more than 1100 lbs/MW-hr, and (2) PSD permits analyze and limit CO₂ and other GHG emissions based on BACT requirements. However, the Commission is neither required nor authorized to adopt such CO₂ regulations, mandate CO₂ limits in PSD permits, or suspend permitting.

A. The U.S. Supreme Court Has *Not* Ruled that EPA Must Regulate GHG Emissions

To support its argument, WRA cites *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007), in which the U.S. Supreme Court held that CO₂ emitted from motor vehicles is an "air pollutant" and that EPA has authority to regulate such emissions. WRA attempts to stretch this narrow holding into a conclusion that Nevada is *required* to regulate GHGs, but the attempt grossly distorts the holding in the case. Although the Supreme Court held EPA has authority to regulate CO₂ emissions from motor vehicles, it did not hold that EPA *must regulate* such emissions. EPA must regulate motor vehicle CO₂ emissions *only* if it determines that such emissions endanger public health; in the alternative, if it fails to exercise its discretion to make such a determination, it must provide a reasonable explanation for not doing so. These issues are before EPA on remand. If EPA decides to regulate CO₂ emissions based on these factors, the nature and scope of such regulations would be for EPA to decide, not individual states. WRA claims that the NDEP has authority to regulate GHG emissions "as a surrogate to



the EPA”, but cites no authority that would authorize the NDEP to substitute its judgment for EPA’s on this issue.

WRA further argues that, although the holding in the *Massachusetts* case concerned only vehicle emissions, that case should be construed to mean EPA also has statutory authority and an obligation under Section 111 of the Clean Air Act (CAA) to regulate stationary sources of GHG emissions as well. WRA concedes, however, that the question whether EPA has authority to regulate power plant GHG emissions is currently pending before the U.S. Court of Appeals for the District of Columbia in *State of New York, et al v. EPA*. EPA’s authority over power plant GHG emissions not having been decided, it is premature to assume that the State of Nevada and this Commission would have such authority. Even if the D.C. Circuit were to hold that EPA has authority to regulate GHG emissions from power plants under Section 111, that statute grants regulatory authority only to the Administrator (of EPA), not to individual states.

B. GHG Emissions are Not Subject to PSD BACT Analyses

While the decision in *Massachusetts v. EPA* established that CO₂ is a pollutant under the CAA, the relevant question for purposes of the BACT analysis is whether it is a regulated pollutant for PSD purposes. The CAA provides that no major emitting facility may be constructed unless

the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility.

42 U.S.C. § 7475(a)(4) (emphasis added).

Best available control technology (BACT) is defined as

an emissions limitation (including a visible emissions standard) based on the maximum degree of reduction for each a [sic] regulated NSR pollutant which would be emitted from any proposed major stationary source or major modification. . . .

40 C.F.R. § 51.166(b)(12).

Thus, BACT analyses are not required for every “air pollutant”, but only for a defined class of “regulated NSR pollutants.”



Regulated NSR pollutants include:

- (i) Any pollutant for which a national ambient air quality standard has been promulgated . . . ;
- (ii) Any pollutant that is subject to any standard promulgated under section 111 of the Act [New Source Performance Standards];
- (iii) Any Class I or II substance subject to a standard [regulating Stratospheric Ozone]...; or
- (iv) Any pollutant that otherwise is subject to regulation under the Act; except that any or all hazardous air pollutants either listed in section 112 of the Act . . . are not regulated NSR pollutants . . .

40 C.F.R. § 51.166(b)(49).

In other words, a BACT analysis must consider emissions of pollutants regulated under National Ambient Air Quality Standards (NAAQS), new source performance standards (NSPS), substances that damage stratospheric ozone, and pollutants “otherwise subject to regulation” under the CAA, with the exception of hazardous air pollutants (HAPS) regulated under section 112.

A substance is not “subject to regulation” for PSD and BACT purposes merely because it is a pollutant under the CAA. Such a reading of subsection (iv) would render subsections (i) – (iii) superfluous. To the contrary, subsection (iv) only includes pollutants currently regulated under the CAA in some manner not mentioned in subsections (i) through (iii).

EPA’s draft New Source Review Workshop Manual, USEPA, October, 1990 (NSR Manual), affirms that regulated NSR pollutants include only pollutants regulated under final rules promulgated by EPA. Specifically, the NSR Manual includes a table summarizing significant emission rates for regulated pollutants, and the accompanying text states that “[r]egulations covering several pollutants . . . have recently been proposed. Applicants should, therefore, verify what pollutants have been regulated under the Act at the time of application.” *Id.* at A.21, Table A-4, note (d) (emphasis added). Thus, pollutants are not considered “regulated” for purposes of the PSD program until they are covered by a final adopted regulation.



The NSR Manual is consistent with the EPA's ruling in *In the Matter of: North County Resource Recovery Associates*, 2 E.A.D. 229 (EAB 1986). There, the Administrator determined that unregulated hazardous air pollutants (HAPs) nonetheless could be taken into account in evaluating environmental impacts, even though they were *not directly subject to BACT*. Although the HAPs in question were pollutants, and although EPA had the authority at that time to regulate them, HAPs for which regulations had not been adopted were deemed unregulated for purposes of PSD, and BACT analysis was not required for them. See also, *In re Genesee Power Station Limited Partnership*, 4 E.A.D. 832 (EAB 1993). BACT is required only for pollutants actually regulated under the CAA.

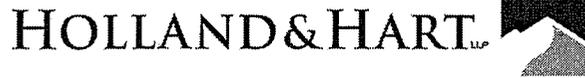
The *North County* conclusion was recently reaffirmed by EPA in the preamble to the agency's December 31, 2002 PSD/NSR rule revisions, 67 Fed. Reg. 80186, 80239-40, in which EPA adopted a definition for "regulated NSR pollutant." In the preamble, the agency listed only 14 pollutants which are "currently regulated under the [Clean Air] Act" that "are subject to Federal PSD review and permitting requirements." It went on to say "[t]he PSD program applies automatically to newly regulated NSR pollutants, which would include final promulgation of an NSPS applicable to a previously unregulated pollutant." *Id.* (emphasis added). Therefore, not all pollutants are subject to PSD. They become subject to PSD only when they actually become regulated under the CAA. CO₂ is not currently regulated.¹

Finally, apart from the flaw in WRA's argument that all "pollutants" are subject to BACT, decisions on BACT are required to be made on a case-by-case basis during the permitting process—not in the context of WRA's petition.

C. The Commission Has No Authority to Suspend Permitting

WRA devotes many pages to arguing that the Commission has authority to and is required to regulate GHG emissions. However, it fails to cite any authority that would empower the Commission to suspend permitting for coal-

¹ WRA asserts that, because CO₂ monitoring is required pursuant to 40 C.F.R. Part 75, CO₂ is regulated under the CAA. The claim is misleading. Part 75 sets forth requirements that govern monitoring of SO₂ and NO_x emission under the Acid Rain program. Included in Part 75 are requirements for monitoring of CO₂ or oxygen, as "diluent gases". Measurement of these gases is part of the protocol pursuant to which emissions of SO₂ and NO_x are monitored and calculated. There are no limits or standards for CO₂ or oxygen, and neither is regulated under the CAA.



fired power plants. Even if it had authority to regulate power plant GHG emissions, it would be error for the Commission to suspend permitting until GHG regulations were adopted. WRA's failure to cite any authority on this point is a compelling reason to reject the petition.

VI. Summary

WRA's petition is flawed on public policy, energy, economic and legal grounds, and should be summarily rejected.

Newmont appreciates the opportunity to comment on the petition.

Respectfully submitted,

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