

Summary Minutes of the  
STATE ENVIRONMENTAL COMMISSION (SEC)

Meeting of November 12, 2008

Nevada Department of Wildlife's Conference Room A  
1100 Valley Road, Reno, Nevada

**Members Present:**

Lewis Dodgion, Chairman  
Alan Coyner, Vice Chairman  
Tony Lesperance  
Pete Anderson  
Kenneth Mayer  
Ira Rackley  
(Eugene) Jim Gans  
Tracy Taylor

**Members Absent:**

Stephanne Zimmerman  
Frances Barron  
Harry Shull

**SEC Staff Present:**

Rose Marie Reynolds, SEC/DAG.  
John Walker, Executive Secretary  
Kathy Rebert, Recording Secretary

**BEGIN SUMMARY MINUTES**

The meeting was called to order at 10:00 am by Chairman Dodgion who stated the meeting had been properly noticed and that a quorum was present. He introduced Commissioner Tony Lesperance, Director of the Department of Agriculture, attending his first Commission meeting since appointment to the Commission. Chairman Dodgion invited Commissioner Lesperance to give a little of his background.

Commissioner Lesperance said he taught at the University (of Nevada) for a number of years, had a successful business in Elko for almost 20 years, and now owns and operates a ranch in Paradise Valley.

Moving toward the agenda, Chairman Dodgion asked Mr. John Walker if there were any changes or additions. Mr. Walker responded that there were no changes at this time but there would be some addendums to the regulations presented.

Chairman Dodgion moved to Agenda Item 1:

**1) Approval of minutes from the September 24, 2008 SEC hearing**

Commissioner Gans pointed out on page 6 of the September 24, 2008 minutes the Commission was discussing (the item regarding the Vanderbilt Settlement Agreement) and the Deputy Attorney General gave an opinion that he would like to see included in the minutes.

Deputy AG Rose Marie Reynolds proposed the following verbiage be added to that section: "Ms. Reynolds expressed concern about compliance with the open meeting law and the notice that had been provided to Vanderbilt Minerals".

**Motion:** With the above noted change to be added to the September 24, 2008 minutes, Commissioner Coyner moved the minutes be accepted, Commissioner Rackley seconded, and the minutes were approved unanimously.

The Chairman now moved down to Agenda Item 2:

2) Approval of Settlement Agreements - Air Quality Violations

- Sierra Nevada Construction Inc
- Vanderbilt Minerals Corporation

(The Settlement Agreements table is contained in ATTACHMENT 1)

(Begin prepared remarks of Mr. Larry Kennedy)

Mr. Chairman and members of the Commission, good morning. For the record, my name is Larry Kennedy. I Supervise the Compliance & Enforcement Branch in the NDEP's Bureau of Air Pollution Control.

The Commission is authorized under the Nevada Revised Statutes to levy administrative penalties for Major violations of state rules and regulations that protect air quality. Based on a long-standing agreement, the Bureau of Air Pollution Control assesses penalties for these violations on the behalf of the Commission. The companies listed on today's agenda are aware that the Bureau acts as the Commission's agent in negotiating Settlements, and that the Commission may see fit to adjust a penalty that we have assessed.

There are two Settlement Agreements on today's agenda. In September the Commission voted to continue consideration of a proposed Settlement involving Vanderbilt Minerals Corporation. A request was made for Vanderbilt to attend and I have been assured by Darren True of Vanderbilt that he will be at today's hearing. Today I will be providing the Commission with more information regarding Vanderbilt, the nature of the violation, and how the Bureau assessed the penalty.

The two settlements today provide us with the opportunity to compare the penalty assessed for an emissions violation in which pollutants are released to the environment and the penalty assessed for a non-emission violation. One of these penalties arises from a short-lived but serious emissions violation, the other penalty implies Vanderbilt's repeat offense for operating without a permit. Though serious, it can be referred to as a "paperwork" violation but resulted in no impact to the environment. Mr. Chairman, I would also like to clarify a procedural matter. Individuals or companies involved in settlement agreements are not routinely required to attend the Commission hearing. In the past, the Commission has occasionally requested that a chronic offender appear before it during consideration of a settlement agreement. In keeping with this sentiment,

the Bureau only asks the Commission to request a company's presence when that company commits the same offense three times in less than five years. That is the practice that we have generally followed.

Mr. Chairman, what I propose to do today is to describe in some detail each of the alleged violations and how the Bureau arrived at each penalty assessment. Would you prefer that I answer questions regarding each Settlement separately, or that we hold questions and discussion until after I have described both Settlements?

**(break in Mr. Kennedy's prepared remarks)**

Chairman Dodgion asked the Commission which they prefer and suggested they hear and settle number 1 and then move on to Vanderbilt, to which the other Commissioners agreed.

**(resume Mr. Kennedy's prepared remarks)**

The first Settlement: Sierra Nevada Construction operates a number of road construction projects in Nevada, including an aggregate processing and hot mix asphalt plant near Rye Patch Reservoir in Pershing County. In August, an inspector observed large quantities of dust coming from Sierra Nevada's Rye Patch facility. The inspector discovered that the emissions were coming from some conveyors feeding aggregate to the asphalt plant.

Further investigation confirmed that the company had failed to install the wet dust suppression required by its air quality permit on four conveyor transfers and was operating without those controls. As a result, each unit was emitting large, opaque clouds of dust. Based on the facility's operating records, the plant had started up two days previously and had only operated for part of several days. Sierra Nevada had installed the required emission controls on the plant's other emission units.

This constitutes two separate violations. One is for failing to install the emission controls required by the permit; it is not in itself an emissions violation. Please refer to the Administrative Penalty Table (**ATTACHMENT 2**) included with today's package. The Table was developed by the Bureau to provide more consistent penalty assessments for non-emission and "paperwork" violations. Two important considerations are (i) the relative severity of the same violation among different sources and (ii) the ability to pay, which depend mainly on the size of the company. The Table relies mainly on the Permit Class, on the left side of the table, to represent these factors. Permitted facilities range from major industries that emit hundreds to thousands of tons a year of regulated pollutants, represented by Class 1 sources, to small plants that emit less than 5 tons a year, represented by Class 3 sources.

I will refer specifically to the case of Sierra Nevada Construction who was issued a Class 2 (General) permit. In this case the penalty for failing to install emission controls is \$1000/unit. This equates to a total penalty of \$4,000 for this violation.

The second violation is for the pollutant release. The Bureau uses the Penalty "Matrix," which considers factors such as the magnitude of the pollutant release and its duration, as well as the recurrence of violations, to help assess penalties for emission violations. In this case an opacity exceeding 50% corresponds to an "extremely high" volume of emissions, and carries a penalty of \$3,200 per unit per day. Opacity refers to the ability of a cloud of dust or particulate matter to block light. Based on four emission units and a full day of operation, the penalty for excess emissions is \$12,800.

The penalties for both violations total \$16,800. I'll be happy to answer any questions you may have.

**(break in Mr. Kennedy's prepared remarks)**

The Commission had no questions; Commissioner Dodgion asked if there was a representative from Sierra Nevada Construction in the audience and if he cared to say anything; the representative responded that he did not.

Chairman Dodgion asked if there was discussion from the Commission and then asked for a motion on the Sierra Nevada Construction Inc. Settlement Agreement.

**Motion:** Commissioner Anderson moved to approve the Settlement Agreement as presented; Commissioner Rackley seconded. Motion was carried unanimously.

Chairman Dodgion then moved to the Settlement Agreement with Vanderbilt Minerals and established there was a representative from the company present at the hearing.

**(resume Mr. Kennedy's prepared remarks)**

Settlement number 2 refers to Vanderbilt Minerals Corporation. This proposed settlement was discussed at length in the September 2008 hearing. Vanderbilt operates a small claim mining and processing facility in Nye County.

In 2002, a Bureau inspector discovered that Vanderbilt was operating its facility without an air quality permit. Vanderbilt paid a penalty of \$5,100 to settle this violation. In 2006, an inspector discovered that the ductwork to one of the plant's baghouses was leaking - a weld had broken in the ductwork. Based on the small amount of the emissions release, but taking into account the previous violation, the Bureau assessed a penalty of \$880 for this failure to maintain equipment resulting in excess emissions.

In October 2006, the NDEP sent Vanderbilt a "courtesy letter" alerting the company that its air quality operating permit would expire in 6 months - in April 2007 - and that its renewal application was due. It's not the NDEP's responsibility to send such reminders, but the NDEP extends this courtesy for all active air quality permits. Vanderbilt's air permit expired in April 2007.

In May 2008, an inspector discovered that Vanderbilt was still in operation, and had continued to operate the facility since April 2007 - for 13 months. The NDEP required

that Vanderbilt suspend its operations until an application for a new air quality operating permit could be processed. The facility was shut down for 40 days while this was done. Vanderbilt's failure to renew its permit also resulted in higher processing fees: a new permit for a Class 2 facility costs \$1,000 more than a simple permit renewal.

Vanderbilt is a small Class 2 facility - it employs 7 people and produces only 34,000 tons/yr of clay minerals. For such a facility, the Administrative Penalty Table calls for a penalty of \$3,000 per processing system for operating without a permit. In accordance with the plant's two processing systems, the base penalty was assessed at \$6,000. Accounting for the recurring violations, however, increased the base penalty by 40 percent for a total penalty of \$8,400.

I would like to emphasize that in contrast to an emissions violation, this is a paperwork violation. The inspector discovered no emissions violations. Vanderbilt had continued to comply with all the requirements of its expired air quality permit, and enjoyed no cost benefit in failing to renew its air quality permit. We believe, however, that the 13-month duration of the violation provided little opportunity for mitigating the assessed penalty.

**(End prepared remarks of Mr. Kennedy)**

Chairman Dodgion asked the representative from Vanderbilt to come forward. The Chairman explained that at the meeting in September, the Commission was quite concerned about the recurring violations of operating without a permit and is perhaps interested in increasing the amount of the fine. He asked to hear why Vanderbilt didn't renew their permit and what the company's intentions are in the future.

The General Manager from Vanderbilt Minerals Corporation (Mr. Darren True) addressed the Commission. Mr. True stated he was not the responsible official the date of the first violation, he was just the foreman at the time. When the permit came due, he gave the proper paperwork to the environmental person who handles that for the company and she "dropped the ball" and didn't follow-thru on it. Mr. True said that it was ultimately his responsibility to make sure the permit was acted on. He explained they are a small mining outfit, about 3,400 tons and there are 2 employees that work at the mill where they process clay.

Chairman Dodgion clarified with Mr. True that Vanderbilt was aware the permit was expiring, received the notice and it just got dropped. Chairman Dodgion then asked if there were other questions for Mr. True.

Commissioner Lesperance asked where the mine is and from where the work force comes. Mr. True answered that they are located 1 mile south of Beatty, Nevada on Vanderbilt Road on approximately 160 acres and their workforce comes from Beatty and Pahrump.

Commissioner Gans stated there seems to be a series of violations, more than one, and asked why. "Why do you figure your particular company would be involved in more than one violation?" Mr. True replied that the first one he is not familiar with because he

wasn't in that position at that time. He said that all of their safety records are in good standing and they didn't even know they had to have the permit. The previous general manager is retired now. The other violation was due to a weld that broke and it was on a small mill. Basically they just had to repair it and everything was back in compliance.

Commissioner Gans then asked Mr. Kennedy if there were no significant environmental impact at the facility and if the facility has continued to comply with its air permit. Mr. Kennedy noted the new permit is unchanged from the previous permit in terms of the conditions or processing.

Chairman Dodgion entertained a motion.

**Motion:** Commissioner Coyner moved that the penalty for NOAV 2137 remain at \$8,400. Motion was seconded by Commissioner Anderson. Chairman Dodgion added to the motion that penalties for future violations, particularly operating without a permit will be higher. Motion passed unanimously.

Chairman Dodgion moved to Agenda Item 3.

### 3. Arsenic Rule Extensions

Ms. Jennifer Carr, Chief of the Bureau of Safe Drinking Water, made the presentation regarding the Arsenic Rule and the proposed system extensions, after which she invited questions from the Commission.

**(Begin prepared remarks of Ms. Jennifer Carr)**

Good Morning, Mr. Chairman, Members of the Commission. I am Jennifer Carr, Chief of the Bureau of Safe Drinking Water. I'm here this morning to present and discuss a set of systems that need more time to comply with the Arsenic Rule. These systems are seeking extensions to exemptions that were issued by the Commission in 2006 and 2007. You were provided an updated summary list of systems this morning and I'll reference it several times during my discussion.

Since it may have been a while since you've thought about arsenic in drinking water, I'll provide a little background, discuss guiding statutes, regulations, US EPA Guidance, and how the Bureau came to the recommendations we are asking you to consider today.

First of all, an exemption is an administrative tool that can be used to grant water systems additional time to acquire financial and technical assistance to meet drinking water standards, if they meet certain requirements.

The revised arsenic standard of 10 parts per billion (ppb) was enacted on January 22, 2001 and became enforceable (five years later) on January 23, 2006. You may recall that the old standard was 50 ppb. In 2006 and 2007 the SEC granted exemptions to 64 qualifying water systems; which provided them, until January 23, 2009, to comply (or, three more years).

When the original exemptions were issued, they included a list of milestones that put each system on a path to compliance. The Bureau has been working with and tracking the progress of each water system during this time. During 2008, the Bureau reached out to these systems with numerous reminder letters, notice letters, invitations to be present today; requests for progress information, follow-up phone calls and some meetings or on-site visits. All this effort by staff has contributed to systems' progress and successes that I'll note this morning.

The systems that have been operating under an exemption are on the final updated summary list that was handed out this morning. As I go through my discussion, I will reference this list. The first thing I'd like to do, before we get farther into the discussion, though, is draw your attention specifically to the portion you will be asked to act on. These systems are listed on the back under the heading "Systems Eligible and Recommended for Extension" and the one system at the bottom, which is the Nevada Department of Prison's Silver Springs Conservation Camp.

I will reference this list a few times and I will discuss the Bureau's thinking behind each category of systems. If you flip the list back over, you will see on page 1 that, out of the original 64 water systems, 13 have since become compliant. Therefore, 51 water systems continue to work toward compliance. According to NAC 445A, water systems that have exemptions, but have not achieved compliance yet, may receive an extension of time if certain criteria are met. Some of the criteria I am about to review are based in statute or regulation, some are based in federal guidance. To help you understand why certain systems are eligible, let's walk through why other systems have been eliminated from the Bureau's recommendations today.

On your summary list, the second category includes 8 systems (from Carson City Water Division to Spring Creek Utilities). The Bureau cannot recommend an extension for these systems because of the size of the population they serve. NAC 445A states that a water system may qualify for up to three additional two-year extensions if it serves a population of less than 3,300 customers. These systems all serve more than that number and therefore do not qualify for an extension.

I anticipate that at least 3, and possibly 5, of these systems serving >3,300 people, will achieve compliance prior to the deadline of January 23, 2009. Systems that are not in compliance by January 23rd, will officially be in violation of the Arsenic Maximum Contaminant Level (or MCL), and the Bureau will issue a Finding of Violation. Along with the Finding, systems will either receive an Administrative Order to comply or we will have pre-negotiated an Administrative Order on Consent. Every attempt will be made to write consent orders with the water systems. In either case, the Orders will contain a new set of deadlines to bring them into compliance as soon as possible.

Now, I'll move down to the next 10 water systems, in the third category (from Old River Water Company to Five Star Mobile Home Park). They are smaller than 3,300 customers, but they have higher concentrations of arsenic in their supply. Specifically, they have an arsenic concentration greater than 30 ppb.

The concentration-based extension criterion originates from public health protection. While the overall intent of granting exemptions is to address the needs of economically challenged systems (by providing additional time to achieve compliance) NAC 445A.489 requires a determination that an exemption “will not result in an unreasonable risk to health”. To aid in this determination relative to extensions, the NDEP utilized the U.S. EPA Implementation Guidance for the Arsenic Rule.

That Guidance documents an approach that helps to determine what likely does not constitute an unreasonable risk to health, rather than what does. The approach bases the total length of an exemption (with extensions) on the exposure concentration of arsenic delivered to the consumer.

In your binders, you have a background document. On Page 2 of that document, there is a table that will help with this discussion titled Table 1. Table 1 was adapted from the U.S. EPA guidance and depicts various arsenic concentration ranges with recommendations for the total number of years that systems should have to comply. Again, these timeframes are intended to aid us in determining that an exemption (and its extensions) will not result in an unreasonable risk to human health.

The systems we are asking you to act on today fall into the category indicated by bold italics and will have a total of 10 years to comply with the new standard.

**Table 1: Exemption & Extension Eligibility Recommendations <sup>(1)</sup>**

System Population Served	Total Time to Comply After Rule Revision- Jan 22, 2001	Exemption Periods Available	Recommended arsenic concentration criteria for granting an exemption or an extension			
			>30 ppb ≤50 ppb <sup>(2)</sup>	>25 ppb ≤30 ppb	>20 ppb ≤25 ppb	>10 ppb ≤20 ppb
>3,300 persons	8 years	3 year Exemption (to Jan 23, 2009)	Granted	Granted	Granted	Granted
<3,300 persons	8 years	3 year Exemption (to Jan 23, 2009)	Granted	Granted	Granted	Granted
	<b><i>10 years</i></b>	<b><i>1<sup>st</sup> Extension (to Jan 23, 2011)</i></b>	<b><i>Not Elig.</i></b>	<b><i>Eligible</i></b>	<b><i>Eligible</i></b>	<b><i>Eligible</i></b>
	12 years	2 <sup>nd</sup> Extension (to Jan 23, 2013)	Not Elig.	Not Elig.	Eligible	Eligible
	14 years	3 <sup>rd</sup> Extension (to Jan 23, 2015)	Not Elig.	Not Elig.	Not Elig.	Eligible

(1) Adapted from U.S. EPA Implementation Guidance for the Arsenic Rule, Appendix G-15, August 2002

(2) U.S. EPA’s recommendation was 35 ppb, Nevada chose the old standard of 50 ppb.

The timeframes and recommendations in Table 1 reveal an intent to address the systems with the highest exposure concentrations (and highest increased risk to health) first. Likewise, the NDEP has followed EPA Guidance in this case and has selected the concentration threshold of 30 ppb as the next qualifying tier for extensions. The Bureau recommends that the SEC consider this stair-stepped approach as a factor in deciding to grant exemption extensions.

We've come full circle in our discussion, now, and we are back to the category of systems on page 2 of your summary list that we are recommending for extension.

NAC 445A.490.5 states "...an exemption ... may be renewed ... if the public water system establishes that it is taking all practicable steps to meet the requirements...". The NDEP has worked with each exempted public water system to gauge their progress in taking "all practicable steps" and has used this information in its recommendations. The 32 systems we are recommending this morning have been making varying degrees of progress, but Bureau staff agree that additional time should be granted to these systems.

There is one system at the very bottom of the list under the heading "Systems Eligible for Extension, But No Proof of Public Notice (as of 11/7/08)". This system is the NDOP Silver Springs Conservation Camp. When your binders were published in late October, this section had 15 systems, but staff worked diligently to receive proof that the water systems provided notice of this hearing to the customers of their systems.

Unfortunately, the State had to close the Silver Springs Conservation Camp in July due to the budget cuts you are all certainly familiar with. The system meets the criteria for an extension, but it could not provide notice to its users because there was no one to provide notice TO. In speaking with the Division of Forestry, the Camp remains held in State control and can only be used for that purpose. They intend, at this time, to re-open it and therefore the NDEP recommends that this final system also be granted an extension in the event that they succeed in doing so. Notice to the people served by that system will be required upon re-opening of that facility.

In your binders, you have a copy of the proposed extension agreement. This agreement is quite similar to the original exemption documents that were issued previously. Extensions will extend to January 23, 2011 and include an updated list of milestones. As was done previously, the last paragraph includes a note to systems that may be eligible for additional extensions after 2011.

That concludes my testimony and I would be happy to answer any questions you may have. Thank you

NOTE: The modified list of water systems referenced above is presented as **ATTACHMENT 3 - ARSENIC EXEMPTION EXTENSION LIST**.

After Ms Carr's prepared remarks, Commissioner Coyner asked if there would be any financial penalties in the future for water systems that remain Not Eligible/Not Recommended and an Administrative Order issued.

Ms. Carr explained that this program has not had a history of imposing penalties or fines; "it is preferable to see money going into the water system itself, especially with the small water systems." She went on to say this approach will continue to be taken as long as the systems continue to make progress toward compliance. She said that if a situation were to come up where milestones are not able to be negotiated, where there is an issue of real recalcitrance then the Division's position would change. She said the intent of the program is to work with these systems to have the water systems come into compliance as soon as possible.

Commissioner Coyner said the if you were thinking to assess penalties you would need to establish what sort of history you have for that or establish what those penalties might be.

Ms. Carr noted that the Bureau of Safe Drinking Water doesn't have a history of anything like that to rely on so that is something which would have to be addressed in the future.

Commissioner Anderson asked Ms. Carr if smaller water systems with greater than 30 ppb (parts per billion of arsenic) could get help from local government, either the county or cities. She said they have worked with a number of systems generally to accomplish just that. In fact, it was noted that Crystal Clear Water Company will be bring water in from the City of Yerington. It was further stated that Nye County is doing some sampling and exploration on behalf of some small systems.

Commissioner Anderson asked if some water systems would get an Administrative Order on Consent after January 2009. Ms. Carr noted that was correct.

Ms. Carr then provided some specific information about several water systems that would soon be in compliance with the arsenic rule, e.g., Carson City Water Division, the Virgin Valley Water District, and the East Valley Water System and possibly the Moapa Valley Water District and the Gardnerville Ranchos GID.

Ms. Carr further stated that the Indian Hills GID has been working with an engineering company to define a compliance solution and they may be in compliance as soon as May 2010. As well, the Spring Creek Mobile Home Park and Spring Creek Utilities are also actively working with the Division on determining their path to compliance.

Commissioner Gans asked if the third group on the list had plans in place to meet the requirements of the arsenic rule. Ms. Carr said that most of them have a plan noting that the Equestrian Estates Co-op Water Association is likely going to be in compliance soon; "they're working on Point of Use devices for their residences and we're finalizing our Point of Use policy so as soon as we can do that then we'll be able to reach an agreement with them." She did say that the Frontier Village Mobile Home Park may be one of the

systems where the Division may take a unilateral approach as opposed to an Administrative Order on Consent.

Chairman Dodgion then asked about "Point of Use" and if that would be an acceptable method of compliance or is it defined as acceptable? Ms. Carr said that it's defined as a US EPA best available technology for small systems but there are a lot of problems inherent in using that as a final system and it is an option of last resort. Chairman Dodgion asked if the Division was developing a policy or regulations that would govern Point of Use. Ms. Carr said they are working on a policy document that would address sampling requirements, tracking mechanisms etc.

Commissioner Lesperance expressed concern about how to handle a system that does not reach compliance. He asked if you just say to the residents some day, you can't drink the water. Ms. Carr explained this "exemption process" is in place, so that water systems are giving the maximum time to protect the residents and to ferret out solutions for compliance. She also said the Division's Board for Financing Water Projects does have money (i.e., grants and loans) to assist water systems get into compliance with the arsenic rule.

Commissioner Gans expressed a fear that we are just delaying the inevitable and asked Ms. Carr what she thought. Ms. Carr responded that she thinks the majority of systems will have solutions by the end of this process; she noted however that the mobile home parks with small systems were problematic. Commissioner Mayer asked if most of those on the List were trying in earnest to reach this goal and Ms. Carr replied that most were.

Commissioner Coyner asked how confident Ms. Carr is about the arsenic level for each system on the List. Ms. Carr responded that she is confident with the numbers.

Chairman Dodgion then invited public comments on the agenda item.

Louis Lani, representing Lander County's water system in Austin addressed the Commission and expressed his difficulty with the cost of many EPA issues recently: EPA compliance of an existing sewage system, arsenic levels and radon levels. There is a community of 300 people, half of which are on social security. His problem is funding; the water system is trying to make progress but how do they contend with the costs for fixing these? He is interested in getting some information regarding Point of Use and wondered when that option might be available.

Ms. Carr replied they had hoped to have the Point of Use guidelines finished very soon.

Chairman Dodgion asked if there would be public workshops on Point of Use. Ms. Carr said that wasn't their original intent but that is something they could consider or ask the water systems for some input.

The next speaker was Dianne Humble from Indian Hills GID. Ms. Humble gave the Commission a brief history on the GID and some of the problems. They have a new general manager who will be addressing arsenic removal.

The public comment portion of the hearing was then closed by Chairman Dodgion and he asked if there was any further discussion by the Commissioners. There being none, he moved to the motion.

**Motion:** Commissioner Gans moved for approval of the List of Systems Eligible and Recommended for Extension, recommendation dated 11/7/2008. Commissioner Rackley seconded.

Clarification was made regarding the motion that it is a two-year extension and does include Silver Springs Conservation Camp. Motion was passed unanimously.

Chairman Dodgion moved to the next agenda item.

#### **Air Quality Planning/Air Pollution Control**

#### **4. Regulation 191-08: Reporting Requirements for Excess Air Emissions & Clarification of Procedures for Renewal of Permits**

Mr. Greg Remer, Chief of the Bureau of Air Pollution Control presented the regulation.

**(Begin prepared remarks of Mr. Greg Remer)**

Mr. Chairman, members of the Commission, for the record, my name is Greg Remer and I'm the Chief of the Bureau of Air Pollution Control. LCB File Number R191-08 consists of amendments to four existing regulation sections that we are requesting to amend in order to bring additional clarity to these provisions. These regulations, if approved, will be permanent.

Beginning with Section 1, the changes proposed relate to the timing a source's request to conduct testing, scheduled maintenance or scheduled repairs that may result in excess emissions. The existing language did not adequately instruct sources to request approval in advance of conducting these actions. There is also a distinction being made for the timing requirements between scheduled maintenance and scheduled repairs. The existing language presented a conflict with the definitions of those terms. There is also a provision being added which allows the Agency to specify the format for receipt of this information. Historically, the language precluded any form other than written.

Moving on, amendments to Sections 2 through 4 relate to the application renewal timing for Class I, Class II and Class III permits, respectively. The Sections are being amended to clarify that applications received after the time line specified in each applicable section, may be required to cease operation when the permit expires and must apply for the issuance of a new permit with the appropriate new permit fee. This is being done because of an audit of the Division conducted by LCB several years ago. The audit

revealed/recommended that, for permit renewals, the Division was not consistent in the processing of renewal applications that were not submitted timely. LCB recommended that the Division correct its process to clarify what procedures and fees are applicable if a renewal application is not submitted timely.

As always, the Division conducted a work shop for the amendments. The workshop for this proposal was conducted in Carson City on October 21st and no adverse comments were received. However, two similar comments were received by e-mail prior to the workshop. The Division satisfactorily responded to the commenters and no changes were made to the proposed rule. With that, the Division recommends that Petition R191-08 be adopted as proposed. I'd be happy to answer any questions you may have.

**(End prepared remarks of Mr. Remer)**

Commissioner Coyner asked Mr. Remer if anyone had a problem with the 30 day notification proposed in Section 2. Mr. Remer explained the distinction in that particular section with the definition "scheduled maintenance" is a planned event being done with at least 30 days notice and "scheduled repair" is something that is being done on a much tighter timeframe due to breakdowns or unanticipated repairs.

Chairman Dodgion invited public comment. There being none, he moved on to the motion.

**Motion:** Commissioner Rackley moved for approval of Resolution 191-08 as presented; motion seconded by Commissioner Anderson. Motion passed unanimously.

Chairman Dodgion moved to Agenda Item 5.

### **Air Quality Planning/Air Pollution Control continued**

#### **5. Regulation R190-08: [BART] Best Available Retrofit Technology & Emission Limitations for Major Electric Generating Units**

Mr. Greg Remer, Chief of the Bureau of Air Pollution Control, presented this regulation.

**(Begin prepared remarks of Mr. Greg Remer)**

Mr. Chairman, members of the Commission, again for the record, my name is Greg Remer and I'm the Chief of the Bureau of Air Pollution Control. I'm here to present LCB File Number R190-08, which consists of amendments to the abbreviations and adoption by reference sections of the NAC as well as a new regulation related to the federal regional haze rule for Best Available Retrofit Technology (or BART). These regulations, if approved, will be permanent.

Before we begin, a brief explanation of the Regional Haze Rule may be helpful. The RHR was adopted by EPA in 1999, with significant amendments following in 2005. The RHR

requires states to prepare and submit plans to address visibility impacts on mandatory Class I areas (such as Jarbidge or Grand Canyon Park). Part of the RHR is the requirement for certain existing sources to evaluate and install the best available retrofit emission control technologies for emissions of SO<sub>2</sub>, NO<sub>x</sub> and PM. This initial plan will commence a 60 year planning and evaluation process for each state to return all mandatory Class I areas to natural background conditions.

At this time, I would like to pass out Exhibit A for your consideration. Exhibit A completely replaces the version of R190-08 in your packet. Exhibit A is identical to the regulation in the Commission's package except for an amendment to Section 4, subsection 1(c) for Reid Gardner station's SO<sub>2</sub> BART limit. Turning now to the proposed regulation in Exhibit A, Sections 2 and 3 contain a definition for BART and the criteria used for the review of controls for a source. Section 4 contains the proposed BART regulation and specific emission limits for Units 1 and 2 at NV Energy's Fort Churchill station, Units 1 through 3 at NV Energy's Tracy station, Units 1 through 3 at NV Energy's Reid Gardner station, and Units 1 and 2 at Southern California Edison's Mohave station. There are several changes the Division is making to the LCB draft. The changes primarily relate to the NO<sub>x</sub> emission limitations for all units.

Generally, the averaging period for NO<sub>x</sub> is being broadened to a 12-month rolling average for all units. However, the emission limits for Fort Churchill, Tracy and Reid Gardner stations are being tightened. The BART control requirement is also being modified for the units at Fort Churchill and Tracy stations. For Reid Gardner station, the SO<sub>2</sub> emission limit is also being tightened to 0.25 lb/MMBtu for units 1 through 3. For the Mohave station, the NO<sub>x</sub> emission limit is proposed to be increased to 0.15 lb/MMBtu, but a short term mass emission limit of 788 lb/hr is also being added.

The bulk of these changes are the result of the completion of the Division's independent review of the Companies' BART reports. It should be noted that there is some uncertainty in the ability of the proposed controls to achieve the emission levels required and future fuel quality may degrade. If one or more of the units are unable to achieve the control levels specified and the companies have made all reasonable attempts to comply, the Division may, upon review, propose to the Commission at a future date recommended emission limits that are achievable.

In subsection 2, the Division is proposing to modify the language to allow for the companies to install a different control process than that required as long as the emission limits in the regulation are achieved. The changes also reflect the recent combined name change from Nevada Power & Sierra Pacific Power to NV Energy.

Moving on to Section 5, the language just makes it clear where the new Sections being added are to be placed within the body of Chapter 445B.

In Section 6 the Division is proposing to remove the abbreviation for BACT (which is no longer used within the air regulations) and add the abbreviation for BART.

Finally, in Section 7 the Division is updating its references for some recent EPA amendments to Appendix S of 40 CFR Part 51 and to the PSD regulations in 40 CFR Part 52.21. The amendments are necessary to maintain the Division's PSD delegation. In addition, we are proposing to adopt by reference 40 CFR Part 51.301. These are necessary CFR definitions for the RHR and SIP.

As always, the Division conducted a work shop for the amendments. The workshop for this proposal was conducted in Carson City on October 21st and no adverse comments were received with comment in support received from Southern California Edison for this petition. With that, the Division recommends that Petition R190-08 identified as Exhibit A be adopted as proposed. I'd be happy to answer any questions you may have.

**(End prepared remarks of Mr. Remer)**

Mike Elges, Chief of the Bureau of Air Quality Planning, added to Mr. Remer's presentation about information and challenges faced in the development of these regulations. In particular Mr. Elges said that Long-term coal contracts for utility companies are incredibly difficult to get and projections about the fuel some power plants use may no longer be available and that higher sulfur fuels could have impacts on future compliance issues. He noted that some power plants like Reid-Gardner don't have a buffer in their existing SO<sub>2</sub> controls. The possibility of Reid-Gardner changing the source of coal and possible higher emissions was briefly discussed.

Chairman Dodgion talked about compliance date and asked if EPA will ever approve an implementation date. Mr. Elges said that with this particular program the Division has been actively working with EPA. There is a higher sense of urgency with EPA to get these SIPS (State Implementation Plans) approved and he is pretty confident the Division will get them approved.

Commissioner Gans asked why Reid-Gardner doesn't have a buffer that one would normally expect. Mr. Elges gave an explanation and history of reviewing Reid-Garner's scrubber and the reasons which may have put Reid-Gardner in a position that isn't necessarily consistent with other facilities throughout the nation.

Chairman Dodgion mentioned the letter from NV Energy that had been received which commented on R190-08 and commended the Bureau of Air Pollution Control for their work on it. A copy was given to the Commission and can be found in **ATTACHMENT 4**.

Chairman Dodgion then asked for Public Comments, where upon Mr. Nader Mansour, representing So. California Edison (SCE - majority owner of the Mojave Generating Station) addressed the Commission. Mr. Mansour said that the Mojave Generating Station is permitted to operate either with 100% coal, 100% natural gas or any combination of the two fuels. Recently, SCE has spoken to potential buyers who have indicated their intent to operate the plant on 100% gas. As a consequence SCE is in the process of submitting a permit modification application to change the permit condition, remove the coal allowance and allow for natural gas. Also, they have had to revise their BART [regulatory] analysis based on natural gas. Mr. Mansour said in SCE's judgment, the NDEP's staff has

done an excellent job in balancing those factors in arriving at the BART limits for the Mohave Generating Station. Mr. Mansour is here to express SCE support for the regulation.

Chairman Dodgion asked if there were any other public comments. There being none, the public hearing was closed and the chairman asked for the motion.

**Motion:** Commissioner Gans moved for approval of petition number R190-08, the copy handed out today marked Exhibit A. Commissioner Rackley seconded; motion passed unanimously.

Chairman Dodgion moved to Agenda Item 6.

### **Air Quality Planning/Air Pollution Control continued**

#### **6. Regulation T008-08: Nevada's Electrical Generation Unit Greenhouse Gas Emissions Mandatory Reporting Requirements (Temporary Regulation)**

The regulation was presented to the Commission by Colleen Cripps, Deputy Administrator for the Division of Environmental Protection. She stated that T008-08 is a temporary regulation that addresses the establishment of a greenhouse gas registry.

Ms. Cripps provided background to the development of the regulation. She said the Nevada Legislature passed SB422, which required the Division to establish a statewide greenhouse gas inventory, which the Division is in the process of finalizing and will be presented to the Commission at the February 2009 hearing. The regulation requires all greenhouse gas emissions from electric generating units to be reported to the registry.

The regulation governs facilities or units that generate 5 megawatts or greater those are non-renewable energy generation units. The bill required independent verification methods and specific reporting requirements. She noted there are 12 facilities and 91 units that meet this definition.

Ms. Cripps went on to explain that mandatory reporting requirements are being initiated across the country; 12 states, including Nevada, are part of those. As part of the last federal appropriations bill, US EPA was directed to develop a mandatory reporting rule. To add more to the complexity, Congress has also been working on a number of bills related to greenhouse gases.

Ms. Cripps said that the work the Division has been doing is an attempt to balance national activities and ensure a flexible approach in establishing a Nevada reporting program that will be cost effective and the easiest to implement.

Ms. Cripps announced that after evaluating a number of options to accomplish greenhouse gas reporting, NDEP agreed the best option would be to work with an organization called The Climate Registry to develop a Nevada specific reporting program.

Ms. Cripps explained in detail about The Climate Registry, obtaining data and reporting of the data. In brief, she said the Climate Registry is relatively new. It was established by states, tribes, and provinces in North America to encourage voluntary early action to increase energy efficiency, to decrease greenhouse gas emissions and to provide a consistent method to measure greenhouse gases. Nevada was a founding member and the Division is also a founding reporter to this registry.

She said that NDEP also wanted to make sure the data submitted was going to be nationally consistent. The Climate Registry is working very closely with EPA and their mandatory reporting rules to ensure that the protocols and the data are going to be generated consistently so the information is comparable across states and across countries.

Ms. Cripps said NDEP also evaluated the cost of that program versus doing an internal system and this is the most cost effective approach.

She said the timing worked out well as NDEP was identified as the pilot for The Climate Registry for mandatory reporting protocols. She noted the regulations before the Commission have been provided to The Climate Registry.

Ms. Cripps explained the sections in the proposed regulation.

At Sec. 12: Commissioner Mayer asked about enforcement action taken by the Director after 2008. Ms. Cripps responded that there will be enforcement should the companies not comply. Commissioner Mayer asked what kind of enforcement there would be. Ms. Cripps explained that it is basically the same as used now.

Commissioner Mayer asked if it needed to be stated in the regulation. Chairman Dodgion explained that this becomes part of the overall Air Pollution Control regulations and the penalties and the enforcement provisions are included in those regulations. Ms. Cripps agreed.

Ms. Cripps completed the explanation of the regulation. She closed by saying this is a temporary regulation and NDEP will be back in a years time to adopt them as permanent; She said at that time fees will be addressed.

Ms. Cripps said there were two publically noticed workshops held, one in Las Vegas and one in Reno and there was general support for these regulations. There is also a letter of support from NV Energy (a copy of which is in ATTACHMENT 5).

Commissioner Gans asked Ms. Cripps to give an overview on the inventory they have conducted. Ms. Cripps said it is a statewide inventory that was developed a couple years ago by the Center for Climate Strategies. NDEP went through that inventory and looked closely at the electric generating information. The major sectors are electric generating and transportation. Commissioner Gans asked what the magnitude difference is between the two. Ms. Cripps didn't have that figure; she said they are both about 30% of the emissions. The inventory will be in a presentation on the February 2009 agenda.

Commissioner Coyner asked if using such words as “evaluation, verification, and enforcement” implies new people (will be needed). Was she contemplating new staff? Ms. Cripps answered that during the last Legislative session, the large settlement with Nevada Power and the Reid-Gardner station was agreed upon to fund the greenhouse gas programs and the implementation of SB422 for the first two years and then NDEP would evaluate costs and propose fees to fund implementation of the regulation. Things have changed pretty substantially since then; there is one person who has been hired in the Bureau of Air Quality Planning to deal with greenhouse gases. There are a number of people in the Bureau who are working on greenhouse gases and climate change issues in addition to their existing work.

Commissioner Coyner, citing the strikeout of the fees in the proposed regulation, asked if in the future NV Energy would be in support of fees to offset the cost of more staff. Ms. Cripps answered that they would. There were a number of meetings where fees were discussed; the regulated community made the decision about how they wanted the fees applied and how they wanted them calculated. They were all in agreement with the fee package we had originally developed.

Chairman Dodgion asked if there were any other questions for Ms. Cripps and there were not. The Chairman then extended an invitation to Mr. Joe Johnson, who wanted to make a public comment.

Mr. Johnson expressed support for the regulation and The Climate Registry. He said he is at the hearing today representing the Sierra Club who participated in workshops and public meetings. They are concerned about striking the fees and would prefer they remain in the regulation.

Chairman Dodgion asked if there were any other public comments; there were none so he closed the public comments and asked if there were any other comments from the Commission.

Commissioner Gans raised the point that the fees (which are now stricken from the proposed regulation) were going to support an extra person and said he therefore assumed that would be put off for a year. Ms. Cripps informed him that the position was going to continue to be funded with existing fees from the settlement agreement with Reid-Gardner or make adjustments from other sources of fees.

Chairman Dodgion asked if there were other comments. There were none so he asked for a motion.

**Motion:** Commissioner Gans moved for approval of LCB file no. T008-08 as written in the revision marked Exhibit A. Commissioner Rackley seconded; motion passed unanimously.

Chairman Dodgion moved to the next Agenda Item.

## Water Quality Planning

### 7. Regulation R186-08: Revision of Molybdenum Aquatic Life Water Quality Standard

Paul Comba from NDEP'S Bureau of Water Quality Standards presented the regulation to the Commission. Mr. Comba commenced with a Power Point presentation to explain some of the issues and questions associated with the current Molybdenum standards along with issues and questions leading to concerns on whether that standard is applicable to Nevada's waters. He then, provided a broad overview of the concentrations of "moly" that were derived as protective of aquatic life values. Mr. Comba's Power Point presentation is presented as **ATTACHMENT 6**.

During Mr. Comba's presentation he said NDEP met and got feedback from EPA Region 9. He said the proposed criterion values have been reviewed and approved by EPA Region 9 and they gave NDEP positive feedback. He also said that the US Fish and Wildlife Service was involved throughout the process. He noted that three workshops were conducted: one in Carson City, one in Elko, and one in Las Vegas, and BWQP received no formal written comments from the public about the proposed regulation changes.

Commissioner Lesperance asked if the Bureau has long-term values concerning Nevada water, like the Truckee River, Carson River, Steamboat Ridge irrigation ditches. Mr. Comba explained that irrigation ditches were not assessed, and referred to a graph showing the ambient moly levels they see in Nevada's existing surface waters.

Commissioner Lesperance asked why there is a concern today with aquatic life when this situation with Molybdenum has been around a long time. Mr. Comba explained one of the reasons for this proposal today is in response to comments received at various workshops that the 0.019 mg/l is not really an appropriate number for Nevada surface waters. Consequently, and for the past 5 years NDEP looked more closely at the standards to see if they were realistic.

Commissioner Rackley asked if the dischargers had looked at the regulation and if they have a problem with the numbers. Mr. Comba said yes, they have looked at it and the dischargers are in support of it. The Bureau received an email from the City of Las Vegas supporting the effort.

Commissioners commented that the regulation was increasing the values. Mr. Comba replied that the current standard (the baseline) really wasn't developed appropriately and the EPA protocol was followed in setting the standard.

Commissioner Rackley pointed out that none of the streams shown in the presentation would be listed as impaired water because of the proposed change.

Commissioner Lesperance expressed his concern with the increased standards because he says due to the drain-off from the Sierra Nevadas, all of western Nevada has a lot of Molybdenum. A short discussion took place regarding level standards for livestock.

Commissioner Anderson asked what the consequences for the future would be if left at the existing level. Mr. Comba responded that he did not see any (consequences); it's just a matter of having a standard that is appropriate.

Ms. Kathy Sertic, Chief of the Bureau of Water Quality Planning, addressed the Commission to explain that with current standards, there are 11 waters on our 303(b) list of impaired waters. With the revised standards, those waters would come off the list.

Commissioner Gans asked what the reason was for looking at the Molybdenum and deciding something had to be changed. Ms. Sertic told the Commission that in June 2008 she gave an overview of the long-range plans and one of the main elements of that plan was to evaluate NDEP water quality standards and ensure that those standards are appropriate. She said that the Molybdenum standard had been questioned a number of times. She also said this was the appropriate standard and it was developed according to the EPA protocols.

There being no other comments or questions from the Commission, Chairman Dodgion called Doug Barto, who asked to address the Commission. Mr. Barto is Vice-Chairman of the Environmental Committee for the Nevada Mining Association. Mr. Barto read a letter from the Nevada Mining Association expressing support in the use of sound science to develop the criteria for the revision. A copy of that letter is found in **ATTACHMENT 7**.

Chairman Dodgion closed the public hearing, asked if there were any more comments from the Commission, and then asked for a motion.

**Motion:** Commissioner Anderson moved to approve R186-08 as written, seconded by Commissioner Lesperance, and passed unanimously.

Chairman Dodgion moved to the next Agenda Item.

## **Water Pollution Control**

### **8. Regulation R152-08: Transfer of Regulatory Authorities for Subdivision Review**

Mr. Cliff Lawson from NDEP presented the regulation.

**(Begin prepared remarks of Mr. Lawson)**

Mr. Chairman, members of the Commission, my name is Cliff Lawson, Supervisor of the Technical Services Branch, Bureau of Water Pollution Control. Our agency is respectfully requesting that Proposed Regulations Changes for the Subdivision Regulations be adopted.

The proposed regulation will complete the transfer of authorities covered by Senate Bill (SB) 395. SB395, passed in the 2005 Legislative session, transferred statutory and regulatory authorities for Subdivision Review Programs Nevada Revised Statute (NRS) and Nevada Administrative Code (NAC) 278 from the Nevada Division of Health to the Nevada Division of Environmental Protection (NDEP).

Essentially, the proposed regulations revise the text references of "Health Division" to "Division of Environmental Protection." The above referenced regulations were originally adopted by the State Board of Health in 1982 in order to implement the statutory responsibilities of NRS 278 for the Subdivision of Lands. These responsibilities were transferred to NDEP by SB 395. These responsibilities include the review of tentative maps and approval of final subdivision maps. Final map approval, as amended by SB 395, is found in NRS 278.377.

No written comments to the LCB draft concerning the proposed changes were submitted or were received during public workshops. Workshops were held in Elko, Carson City and Clark County.

At this time, I would be happy to answer any questions you may have regarding the proposed regulations.

**(End prepared remarks of Mr. Lawson)**

Commissioner Gans asked for clarification of the transfer in regard to work and staff. Mr. Lawson explained this it was just a change in the wording to reflect that NDEP is in fact the agency performing the duties under the regulation. Chairman Dodgion asked if NDEP had received resources to implement the change in statutory authority, Mr. Lawson answered in the affirmative.

There being no other comments or questions, the Chairman asked for the motion.

**Motion:** Commissioner Gans moved to approve LCB file no. R152-08 as presented by staff; seconded by Commissioner Rackley. The motion passed unanimously.

The Chairman moved to the next Agenda Item.

## **9. Administrator's Briefing to the Commission**

Mr. Leo Drozdoff, Administrator of the Nevada Division of Environmental Protection addressed the commission concerning the following issues.

**Queenstake Mine:** Mr. Drozdoff noted that there was a mass exodus at the Queenstake Mine last summer. He said the entire workforce of 400 was laid off and that created quite a sense of urgency for NDEP and the United States Forest Service. He said NDEP has subsequently embarked on a two-way strategy for dealing with the site. The strategies were to maintain a field presence at the site and develop internal knowledge as well as to work with the Yukon Nevada Gold Company which has retained a small workforce on the

site. Mr. Drozdoff stated that NDEP has had two person crews at the site from August to the present. He said NDEP's stated goal has always been to make facility viable, however, he said there were real issues that needed to be dealt with, both short and long term. He said NDEP has formed a group of internal staff along with staff from EPA and the Forest Service. He told the Commission that NDEP had sent correspondence to the Mining Company in September that outlined what needed to be done to comply with regulatory programs and permits issued by NDEP's Air, Mining and Waste Management Bureaus.

He stated that actions taken by Yukon Nevada are today incomplete and that while progress has been made some serious issues remain. He said environmental controls for seepage from the tailings impoundment were left undone, misters used to enhance evaporation broke down, and holes in liners were repaired but subsequently reappeared.

He told the Commission that NDEP has reached a point where the agency had no choice but to refer the matter to the Attorney General's Office for judicial action. He said that a judge could call the reclamation bond or work with the company and NDEP to find some sort of alternate arrangement to address environmental compliance issues at the site.

He did say that NDEP has done as much as could be done at this point and while the company has tried hard, it was just not possible to go from a workforce of 400 to that of around 20 and really expect to maintain compliance and become an active gold mine facility again.

Chairman Dodgion asked if there had to be a court action to exercise the reclamation bond. Mr. Drozdoff said he didn't know because the Division has never experienced a situation like this before. He said in the past NDEP used reclamation bonds to address bankruptcy when a facility just walked away from a mine site. In the current case, the company hasn't gotten the job done and they are just out of compliance. He said that NDEP needs a judge to rule the company is out of compliance before the bond funds can be accessed.

Commissioner Mayer asked about the AG's time frame. Mr. Drozdoff answered that we've asked to make the case a top priority.

**EPA Actions:** Mr. Drozdoff noted that with the recent elections, there will be changes in leadership at EPA in Washington and San Francisco. He told the Commission that NDEP has been very dissatisfied with many of the directions, policies, and proposed regulations EPA has developed especially over the last four years. He said NDEP continues to lose on many legal fronts on very significant environmental issues that have caused NDEP and others to expend a lot of resources unnecessarily. He told the Commission that NDEP has spent thousands of man-hours over the last four years on what amounts to failed EPA policies and regulations while EPA has ratcheted up work requirements for the Division.

He advised the Commission that Deputy Administrator Tom Porta recently sent an email to one of San Francisco EPA senior managers and basically described the situation as broken. He said the Division is just waiting for new administration at EPA to begin. He also said

that on a staff level the Division has good relationship in selected programs, but from a management standpoint he concurs with Mr. Porta's assessment, the situation is just broken.

He further advised the Commission that NDEP has its own transition team with a list of items and timely issues for consideration by the incoming US EPA Regional Administrator and program people in D.C. He noted that Mr. Porta is the president of a group of state water chiefs and Ms. Cripps of NDEP is the president of a similar group in air. He stated that NDEP is really addressing problem areas on many different fronts.

He said the Division even has conflicts with US EPA regarding the Queenstake mine issue. He noted Division staff has been at the site for two months and US EPA, without any sort of consultation, recently filed a complaint with the Department of Justice about problems at the Queenstakes mine.

Commissioner Gans asked if there is supposed to be a partnership between the State and US EPA and Mr. Drozdoff stated there is absolutely supposed to be a partnership. He (Mr. Drozdoff) said that is the exact issue that Ms. Cripps and the National Association of Clean Air Agencies have taken to US EPA and Mr. Porta and the Association of State and Interstate Water Pollution Control Agencies (ASIWPCA) have taken. Mr. Drozdoff said there is widespread disagreement with the direction the US EPA has taken over the last few years. He noted that Mr. Porta was very instrumental in drafting a policy document called "A Call for Change" that came out from the ASIWPCA Board that most if not all of the states supported.

Mr. Drozdoff said he is cautiously optimistic about a change when the new administration starts but he also said that things didn't get to this point overnight and change is not going to happen overnight.

Commissioner Gans asked if this is something we would talk to Senator Harry Reid about. Mr. Drozdoff said they have spoken to staff of Senator Reid and all of our elected officials.

**LS Power:** Mr. Drozdoff referenced two relatively recent letters, copies of which were given to the Commission at this hearing. (Copies may be found in **ATTACHMENT 8**).

One of the letters was issued by US EPA Headquarters to the US Fish and Wildlife Service and the National Marine Fisheries Service. The letter basically made the point that US EPA has found relevant to obligations under the Endangered Species Act (ESA) there is no impact to polar bears or coral off the coast of Florida by permitting of new "coal fueled" electric generating power plants throughout the country. He said the US EPA Region 9 wrote a similar letter to Colleen Cripps of NDEP which basically said the Division could move forward with the LS Power permitting process now that ESA issues have been resolved. Mr. Drozdoff told the Commission the letters were significant. He also said the no matter what NDEP decides to do on the LS permit application, someone will likely sue the Division. He said that if the permit is issued, environmental groups will appeal; if the

permit is not issued, the permittee will sue. He did tell the Commission that NDEP could likely make a decision regarding the LS permit before the next Commission meeting.

Mr. Drozdoff concluded his remarks by stating that NDEP staff continues to be really outstanding. The work staff performs is complete, thorough, and dynamic.

The Administrator's Briefing finished, Chairman Dodgion moved to the final Agenda Item.

#### **10. Public Comment**

There were no additional public comments.

Chairman Dodgion adjourned the meeting at 2:19 pm.

Next Commission Hearing will be February 11, 2009 in Carson City or Reno.

## ATTACHMENT INDEX

- ATTACHMENT 1 NDEP-BAPC Settlement Agreements - November 12, 2008
- ATTACHMENT 2 Administrative Penalty Table - Air Violations
- ATTACHMENT 3 Arsenic Exemption Extension List
- ATTACHMENT 4 Letters from NV Energy Addressing R190-08
- ATTACHMENT 5 Letter from NV Energy addressing T008-08
- ATTACHMENT 6 Power Point presentation on Regulation R186-08
- ATTACHMENT 7 Letter from Doug Barto, Nevada Mining Association
- ATTACHMENT 8 Letter regarding LS Power/White Pine Energy Association

## NDEP-BAPC SETTLEMENT AGREEMENTS – November 12, 2008

TAB NO.	COMPANY NAME	VIOLATION	NOAV NUMBER(S)	PROPOSED SETTLEMENT AMOUNT
1	Sierra Nevada Construction, Pershing County	<p>NAC445B.275 “Violations: Acts Constituting; notice.” For failing to install emission controls (wet dust suppression) on four emission units and for operating without those controls, resulting in excess emissions (excess opacity) from those units.</p> <p>The \$4,000 penalty for failing to install emission controls is based on the Administrative Penalty Table. The \$12,800 penalty for excess emissions is based on application of the Penalty Matrix: an opacity reading equal to or exceeding 50% corresponds to an “extremely high” volume of emissions, and carries a penalty of \$3,200 per unit per day. The penalties total \$16,800.</p>	2133 & 2134	\$16,800
2	Vanderbilt Minerals Corporation, Nye County	<p><b>Continued from the September 24, 2008 SEC hearing.</b></p> <p>NAC445B.275 “Violations: Acts Constituting; notice.” For operating a clay mining and processing facility for 13 months without the required air quality operating permit. The facility’s operating permit expired in April 2007 but Vanderbilt continued to operate without it until discovery by the NDEP-BAPC in May 2008.</p> <p>The base penalty of \$6,000 is based on the Administrative Penalty Table, which calls for \$3,000 per major processing system for Class 2 sources. The Penalty Matrix was used to account for non-compliance history. Application of the Matrix resulted in a total adjustment of 40%, including 25% for the recurring violation (operating without a permit), to yield a total penalty of \$8,400.</p> <p><b>Previous violations:</b> In 2002, the SEC ordered Vanderbilt to pay a penalty of \$5,100 to settle a violation issued for operating without a permit. In 2006, the SEC ordered Vanderbilt to pay a penalty of \$880 to settle a violation issued for excess emissions (fugitive emissions) caused by failure to maintain the ductwork for one of the baghouses.</p>	2137	\$8,400

**Administrative Penalty Table - Non-Emissions Air Quality Violations**  
 (Note that the Penalty *Matrix* is used to augment or adjust some penalties)

Permit Class	Constructing or Operating without a Permit (per major processing system)	Failure to Install required Air Pollution Control Equipment (per emission unit)	Failure to Maintain Process or Air Pollution Control Equipment that results in Uncontrolled Emissions (minimum; penalty matrix used to assess severity)	Failure to Comply with a Permitted Operating Parameter (per event)	Failure to conduct required Monitoring, Recordkeeping, or Reporting - includes incomplete or inadequate source test reports (per reporting period or per unit-day)	Failure to Comply with a Stop Order or any provision in a Schedule of Compliance	Violations related to Source Tests			
							Failure to provide adequate (30-day) Notification	Failed test - exceedance of permitted emissions limit (minimum; penalty matrix used to assess gravity component)	Late Test, or Failure to Test	Failure to Conduct IOCDs
1	\$10,000	\$5,000	\$600	\$600	Annual Compliance Cert: \$2,000 Semi-Annual Monitor. Rept: \$1,000 Other: \$600	\$10,000	\$1,000	\$2,500 per "major" pollutant*, \$1,500 per other pollutant(s)	\$1000 per system per month, up to a maximum of \$8,000 per system	\$200 per system per month, up to a maximum of \$2,000 per system
2	\$3,000	\$1,000	\$600	\$600	\$600 [for major violations, as identified by NAC 445B.281.4]	\$5,000	\$1,000	\$1,500 per pollutant	\$500 per system per month, up to a maximum of \$6,000 per system	\$200 per system per month, up to a maximum of \$2,000 per system
2 - General	\$1,000	\$1,000	\$600	\$600	\$600 [for major violations, as identified by NAC 445B.281.4]	\$5,000	\$500	\$1,500 per pollutant	\$500 per system per month, up to a maximum of \$6,000 per system	\$100 per system per month, up to a maximum of \$2,000 per system
3	800 (per facility)	\$600	\$600	\$600	\$600 [for major violations, as identified by NAC 445B.281.4]	\$2,500	\$500	\$500 per pollutant	\$500 per system per month, up to a maximum of \$2,500 per system	\$100 per system per month, up to a maximum of \$1,000 per system
SAD	\$600 plus \$50 per acre of planned disturbance	n/a	\$600	\$600	\$600 [for major violations, as identified by NAC 445B.281.4]	\$2,500	n/a	n/a	n/a	n/a

\* A pollutant for which a source is a major source.

**NDEP Bureau of Safe Drinking Water - List of Water Systems with Arsenic Exemptions and Their Status for Extension  
Recommendations to the State Environmental Commission**

	COUNTY	PWS ID#	PUBLIC WATER SYSTEM NAME	ARSENIC (ppb)	POP	DATE OF ORIGINAL EXEMPTION
<b>Systems In Compliance</b>						
1	CH	NV0000046	COUNTRY CLUB ESTATES	31	130	September 6th, 2006
2	CH	NV0000906	JETWAY CHEVROLET	41	40	December 4th, 2007
3	CH	NV0000060	WEST STAR MHP	42	35	December 4th, 2007
4	CH	NV0002541	NAS CENTROID EW RANGE	28	80	September 6th, 2006
5	CH	NV0000849	PINE GROVE UTILITY TRUST	49	25	September 6th, 2006
6	CL	NV0000327	GAYE HAVEN CARE HOME	9	50	May 24th, 2007
7	CL	NV0000146	HITCHIN POST MOTEL AND RV PARK	1	350	May 24th, 2007
8	CL	NV0000219	SEARCHLIGHT WATER COMPANY	10	760	September 6th, 2006
9	EU	NV0002092	NEWMONT GOLD MILL 1	0	100	September 6th, 2006
10	LY	NV0000813	CHURCHILL RANCHOS ESTATES	27	172	September 6th, 2006
11	ST	NV0000879	ALCOA MICROMILL	10	25	September 6th, 2006
12	WA	NV0001085	DESERT SPRINGS UTILITY COMPANY	12	9,710	September 6th, 2006
13	WA	NV0000206	PIONEER HILLS MHP	32	427	September 7th, 2007
<b>Systems Not Eligible/Not Recommended - Population &gt;3,300</b>						
14	CC	NV0000015	CARSON CITY WATER DIVISION	20	56,500	September 6th, 2006
15	CL	NV0000160	MOAPA VALLEY WATER DISTRICT	19	8,000	September 6th, 2006
16	CL	NV0000167	VIRGIN VALLEY WATER DISTRICT	60	17,000	September 6th, 2006
17	DO	NV0002216	EAST VALLEY WATER SYSTEM	36	3,845	September 6th, 2006
18	DO	NV0000066	GARDNERVILLE RANCHOS GID	19	11,500	September 6th, 2006
19	DO	NV0000355	INDIAN HILLS GID	17	5,800	September 6th, 2006
20	EL	NV0005027	SPRING CREEK MHP	44	4,146	September 6th, 2006
21	EL	NV0000036	SPRING CREEK UTILITIES	11	6,792	September 6th, 2006
<b>Systems Not Eligible/Not Recommended - Concentration &gt;30 ppb</b>						
22	CH	NV0000303	OLD RIVER WATER COMPANY	32	300	May 24th, 2007
23	CH	NV0000055	SOUTH MAINE MHP	48	100	September 6th, 2006
24	CL	NV0000109	EQUESTRIAN ESTATES CO OP WATER ASSOC	36	108	September 6th, 2006
25	CL	NV0000147	FRONTIER VILLAGE MHP	42	60	May 24th, 2007
26	DO	NV0000070	TOPAZ LODGE WATER CO INC	38	40	September 6th, 2006
27	EL	NV0000349	HOLLISTER HECLA WATER SYSTEM	31	30	May 24th, 2007
28	ES	NV0000072	GOLDFIELD TOWN WATER	47	350	September 6th, 2006
29	LI	NV0000005	ALAMO SEWER AND WATER GID	36	900	May 24th, 2007
30	LY	NV0000361	CRYSTAL CLEAR WATER COMPANY	47	400	September 6th, 2006
31	LY	NV0002516	FIVE STAR MHP	37	90	May 24th, 2007

<b>Systems Eligible and Recommended for Extension</b>						
33	CH	NV0003068	CARSON RIVER ESTATES	28	90	December 4th, 2007
34	CH	NV0000047	DELUXE MHP	24	37	December 4th, 2007
35	CH	NV0000061	TOLAS PARK MHP	20	54	May 24th, 2007
36	CH	NV0000058	WILDES MANOR	20	70	December 4th, 2007
37	CH	NV0000903	CMC STEEL FABRICATORS DBA CMC JOIST	16	400	September 7th, 2007
38	CH	NV0000052	OK MOBILE HOME PARK	15	90	September 6th, 2006
39	CL	NV0002501	NPS COTTONWOOD COVE	15	1,354	September 6th, 2006
40	DO	NV0000887	SUNRISE ESTATES	17	91	September 6th, 2006
50	EU	NV0000043	CRESCENT VALLEY WATER SYSTEM	12	350	May 24th, 2007
51	EU	NV0002573	DEVILS GATE WATER SYSTEM GID 2	12	70	May 24th, 2007
52	HU	NV0005069	HUMBOLDT CONSERVATION CAMP NDOP	15	140	September 6th, 2006
41	HU	NV0000907	LONE TREE MINE	15	150	May 24th, 2007
42	HU	NV0000162	MC DERMITT WATER SYSTEM	19	200	December 4th, 2007
53	HU	NV0002528	TURQUOISE RIDGE JOINT VENTURE	20	250	September 6th, 2006
54	LA	NV0000008	LA CO SEWER AND WATER DIST 1 BM	24	3,026	May 24th, 2007
43	LA	NV0000006	LA CO SEWER AND WATER DIST 2 AUSTIN	14	350	May 24th, 2007
56	LI	NV0000013	CALIENTE PUBLIC UTILITIES	17	1,500	September 6th, 2006
55	LI	NV0000185	PANACA FARMSTEAD WATER ASSOCIATION	20	800	May 24th, 2007
57	LY	NV0000223	SILVER SPRINGS MUTUAL WATER COMPANY	25	3,000	September 6th, 2006
44	LY	NV0000242	WEED HEIGHTS DEVELOPMENT	18	500	May 24th, 2007
58	LY	NV0000255	YERINGTON CITY OF	19	2,900	September 6th, 2006
45	MI	NV0000357	HAWTHORNE ARMY AMMO DEPOT	30	300	May 24th, 2007
46	MI	NV0000897	SCHURZ ELEMENTARY SCHOOL	14	320	December 4th, 2007
47	NY	NV0000009	BEATTY WATER AND SANITATION DISTRICT	27	1,100	September 6th, 2006
60	NY	NV0005028	SHOSHONE ESTATES WATER COMPANY	30	240	December 4th, 2007
61	NY	NV0000237	TONOPAH PUBLIC UTILITIES	13	2,600	September 6th, 2006
62	ST	NV0000878	MASTERFOODS USA	15	140	December 4th, 2007
64	WA	NV0000896	BRISTLECONE FAMILY RESOURCES	12	25	September 6th, 2006
32	WA	NV0000193	CRYSTAL TP	27	80	September 6th, 2006
63	WA	NV0004021	SILVER KNOLLS MUTUAL WATER COMPANY	13	120	May 24th, 2007
48	WA	NV0001086	SKY RANCH WATER SERVICE CORPORATION	14	2,030	September 6th, 2006
49	WA	NV0003000	VERDI SCHOOL	13	250	September 6th, 2006

<b>Systems Eligible for Extension, But No Proof of Public Notice (as of 11/7/08)</b>						
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59	LY	NV0002595	Silver Springs Conservation Camp NDOP	19	144	September 6th, 2006
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November 12, 2008

State Environmental Commission  
c/o Mr. John B Walker  
Executive Secretary  
901 South Stewart Street, Suite 4001  
Carson City, Nevada 89701-5249

**Re: Regulation R190-08: [BART] Best Available Retrofit Technology & Emission Limitations for Major Electric Generating Units**

Dear Commissioners

My schedule has precluded me from attending today's hearing and therefore I would like to submit the following comments relating to proposed Regulation R190-08 (BART) on behalf of NVEnergy.

NVEnergy owns and operates the electric generating units listed for emission control retrofits under the referenced BART regulation as follows: Tracy 1, 2 & 3; Ft. Churchill 1&2; and Reid Gardner 1, 2 & 3. NVEnergy has been working closely with the Bureau of Air Pollution Control (BAPC) for well over the last year to evaluate suitable retrofit control technologies and emission limits with the aim to address regional haze concerns.

The final emission controls and proposed permit limits proposed in Regulation R190-08 do represent substantial reductions that will require fuel switching and/or capital deployment at the affected units. The fact that these older units must be retrofitted to meet the proposed regulation adds a factor of uncertainty as to what emission levels may actually be achievable; based on condition of the units and available technology. Further, in the case of Reid Gardner, the uncertainty associated with future fuel supply characteristics could impact the ability of the proposed technology to achieve the required emission limits. That said, NVEnergy wishes to commend BAPC for the inclusive process utilized throughout the development of this regulation and we want you to know that NVEnergy is committed to continue working closely with BAPC to implement these controls in a way that is protective of the environment and the citizens of the State of Nevada.

Thank you for the opportunity to submit these comments.

Sincerely,

A handwritten signature in black ink that reads "Starla Lacy". The signature is written in a cursive, flowing style.

Starla Lacy  
Executive, Environmental, Health and Safety



November 12, 2008

State Environmental Commission  
c/o Mr. John B Walker  
Executive Secretary  
901 South Stewart Street, Suite 4001  
Carson City, Nevada 89701-5249

**Re: Regulation T008-08: Nevada's Electrical Generation Unit Greenhouse Gas Emissions Mandatory Reporting Requirements**

Dear Commissioners:

My schedule has precluded me from attending today's hearing and therefore I would like to submit the following comments relating to proposed Regulation T008-08 (Nevada's Electrical Generation Unit Greenhouse Gas Emissions Mandatory Reporting Requirements) on behalf of NVEnergy.

NVEnergy owns and operates the majority of the electric generating units impacted by this rule. In 2006, NVEnergy joined the California Climate Action Registry and began the voluntary reporting of our greenhouse gas emissions into that organization. Earlier this year, NVEnergy became a founding member of The Climate Registry, along with the State of Nevada, where we will continue to report our greenhouse gas emissions in the future. NVEnergy wishes you to know that our company is committed to working closely with the Nevada Division of Environmental Protection to inventory and track greenhouse gases produced within the State and we support regulation T008-08 to facilitate that process.

Thank you for the opportunity to submit these comments.

Sincerely,

A handwritten signature in black ink that reads "Starla Lacy". The signature is written in a cursive, flowing style.

Starla Lacy  
Executive, Environmental, Health and Safety



# Revision of Molybdenum Aquatic Life Water Quality Standard

Water Quality Planning Regulation  
R186-08

# Regulatory Background

- Current Nevada standard is 19  $\mu\text{g}/\text{L}$  (NAC 445A.144)
  - Derived in California RWQCB report for the San Joaquin River
  - Based on toxicity data for three species and national background Mo concentration
  - Not calculated using EPA methods – Not based primarily on toxicity data as required
- No EPA national aquatic life criteria
  - Many states have no aquatic life WQC for Mo

# Derivation of Current Mo Standard

Species	Effect Level (µg/L)	Citation
rainbow trout	120	Birge et al., 1980
narrow-mouthed toad	960	Birge, 1978
<i>Daphnia magna</i>	1150	Kimball manuscript
<b>Geometric Mean Effect Level:</b>	<b>510</b>	

Geometric mean of effects level (510 µg/L) and national ambient background concentration (0.68 µg/L) = **19 µg/L**

# Evaluation of Molybdenum Aquatic Life Standard

- Review all relevant Mo toxicity studies
- Evaluate aquatic life toxicity data
  - Substantiate current standard
  - or
  - Develop revised water quality standard

# Acute Test Data

Rank	Species	Common Name	Acute Effect Level (mg Mo/L)
15	<i>Ictalurus punctatus</i>	channel catfish	10,000.0000
14	<i>Chironomus tentans</i>	midge	7,533.3000
13	<i>Lepomis macrochirus</i>	bluegill	6,790.0000
12	<i>Gammarus fasciatus</i>	scud	3,940.0000
11	<i>Crangonyx pseudogracilis</i>	isopod	2,650.0000
10	<i>Oncorhynchus mykiss</i>	rainbow trout	2,269.4034
9	<i>Daphnia magna</i>	cladoceran	2,218.0871
8	<i>Oncorhynchus nerka</i>	kokanee salmon	2,000.0000
8	<i>Catostomus commersoni</i>	white sucker	2,000.0000
7	<i>Catostomus latipinnis</i>	flannelmouth sucker	1,940.0000
6	<i>Girardia dorocephala</i>	flatworm	1,225.6000
5	<i>Ceriodaphnia dubia</i>	cladoceran	1,015.0000
4	<i>Oncorhynchus kisutch</i>	coho salmon	1,000.0000
4	<i>Oncorhynchus tshawytscha</i>	chinook salmon	1,000.0000
3	<i>Pimephales promelas</i>	fathead minnow	253.8110
2	<i>Euglena gracilis</i>	protistan	72.3000
1	<i>Tubifex tubifex</i>	tubificid worm	28.9100

# Chronic Test Data

Rank	Species	Common Name	Chronic Effect Level (mg Mo/L)
5	<i>Oncorhynchus mykiss</i>	rainbow trout	866.0254
4	<i>Pimephales promelas</i>	fathead minnow	163.5427
3	<i>Daphnia magna</i>	cladoceran	97.0183
2	<i>Ceriodaphnia dubia</i>	cladoceran	60.4380
1	<i>Catostomus commersoni</i>	white sucker	1.7000

# Review Aquatic Life Toxicity Data

- Laboratory toxicity test results indicated higher thresholds to molybdenum
- Current molybdenum standard based on limited toxicity data
- Sufficient toxicity data available to use EPA standard method for revised criteria development

*Guidelines for Deriving Numerical National  
Water Quality Criteria for the Protection of  
Aquatic Organisms and their Uses*  
(EPA 1985)

- Screening criteria for toxicity test data
- Minimum data requirements for developing criteria
- Procedures for calculating criteria

# Acute Test Data

Rank	Species	Common Name	Acute Effect Level (mg Mo/L)
15	<i>Ictalurus punctatus</i>	channel catfish	10,000.0000
14	<i>Chironomus tentans</i>	midge	7,533.3000
13	<i>Lepomis macrochirus</i>	bluegill	6,790.0000
12	<i>Gammarus fasciatus</i>	scud	3,940.0000
11	<i>Crangonyx pseudogracilis</i>	isopod	2,650.0000
10	<i>Oncorhynchus mykiss</i>	rainbow trout	2,269.4034
9	<i>Daphnia magna</i>	cladoceran	2,218.0871
8	<i>Oncorhynchus nerka</i>	kokanee salmon	2,000.0000
8	<i>Catostomus commersoni</i>	white sucker	2,000.0000
7	<i>Catostomus latipinnis</i>	flannelmouth sucker	1,940.0000
6	<i>Girardia dorotocephala</i>	flatworm	1,225.6000
5	<i>Ceriodaphnia dubia</i>	cladoceran	1,015.0000
4	<i>Oncorhynchus kisutch</i>	coho salmon	1,000.0000
4	<i>Oncorhynchus tshawytscha</i>	chinook salmon	1,000.0000
3	<i>Pimephales promelas</i>	fathead minnow	253.8110
2	<i>Euglena gracilis</i>	protistan	72.3000
1	<i>Tubifex tubifex</i>	tubificid worm	28.9100

# Acute Criterion Derivation

Rank	Genus	GMAV (mg/L)	LN GMAV	(LN GMAV) <sup>2</sup>	P = R/(N+1)	p <sup>0.5</sup>
4	<i>Ceriodaphnia</i>	1,015.0000	6.9226	47.9230	0.2857	0.5345
3	<i>Pimephales</i>	253.8110	5.5366	30.6538	0.2143	0.4629
2	<i>Euglena</i>	72.3000	4.2808	18.3255	0.1429	0.3780
1	<i>Tubifex</i>	28.9100	3.3642	11.3178	0.0714	0.2673
		Sum	20.1042	108.2200	0.7143	1.6427

Sample Size (N) = 13

$$S^2 = \frac{\sum((LN\ GMAV)^2) - \left(\frac{(\sum(LN\ GMAV))^2}{4}\right)}{\sum(P) - \left(\frac{(\sum(\sqrt{P}))^2}{4}\right)} = 180.7081$$

$$S = \sqrt{S^2} = 13.4428$$

$$L = \left(\sum(LN\ GMAV)\right) - \frac{(S(\sum(\sqrt{P})))}{4} = -0.4944$$

$$A = S(\sqrt{0.05}) + L = 2.5114$$

$$FAV = e^A = 12.3232$$

$$\frac{FAV}{2} = \frac{12.3232}{2} = 6.1616$$

**Criteria Maximum Concentration (CMC) =  
Acute Criterion = 6.16 mg Mo/L**

# Chronic Criterion

- Too few chronic toxicity data to develop criterion via methodology used to derive acute criterion
- Derive criterion by determining an acute-chronic ratio (ACR)

# ACR Derivation

<i>Species</i>	Acute Value (mg/L)	Chronic Value (mg/L)	ACR	Species Mean ACR
<i>Ceriodaphnia dubia</i>	1015.0	76.9	13.2	13.2
<i>Pimephales promelas</i>	644.2	163.5	3.9	3.9
<i>Daphnia magna</i>	1727.8	153.8	11.2	22.9
<i>Daphnia magna</i>	2847.5	61.2	46.5	
<i>Oncorhynchus mykiss</i>	2269.4	866	2.6	2.6
<b>Final ACR</b>				<b>7.5</b>

# Chronic Criterion Calculation

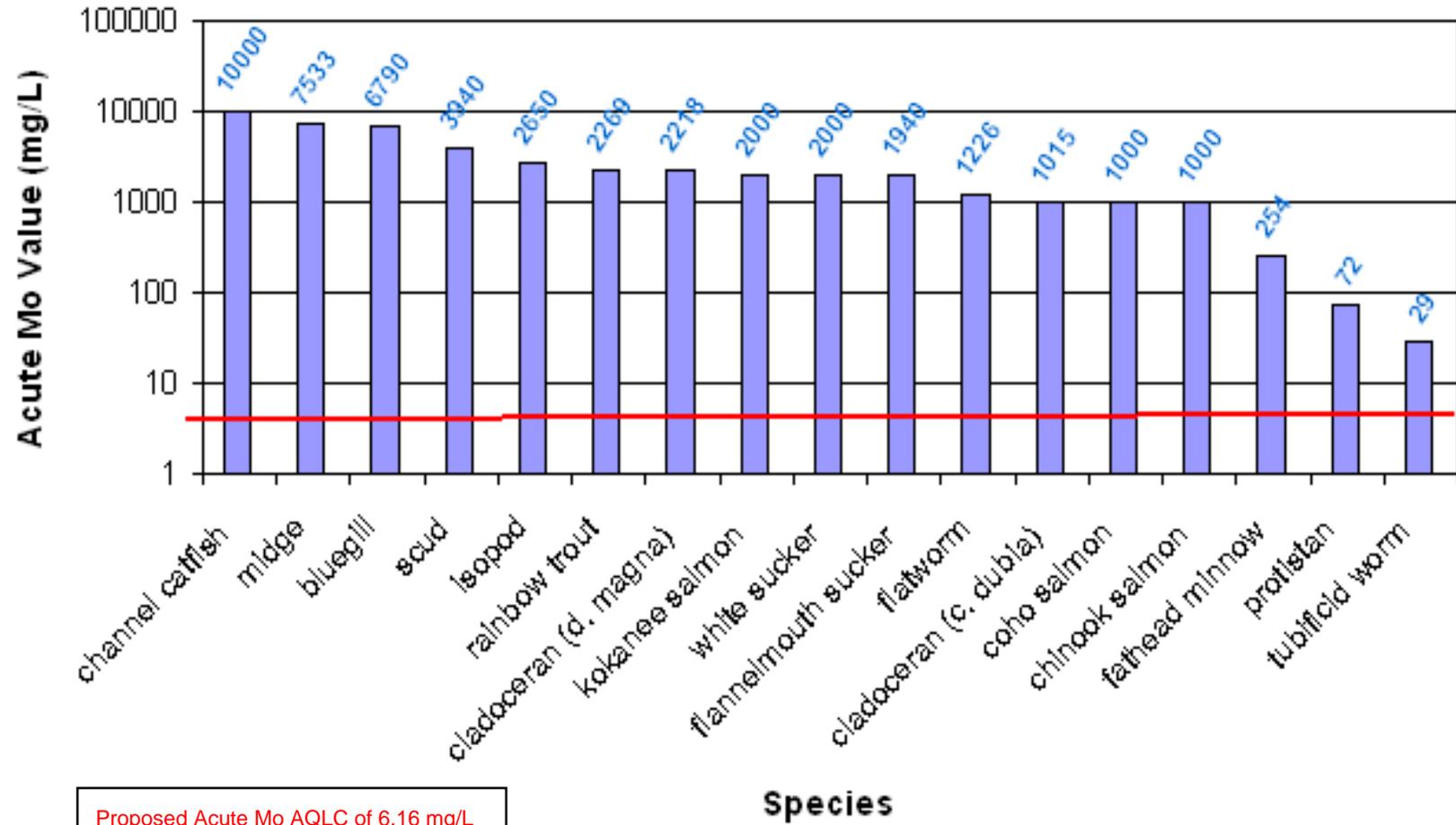
Final Acute Value (FAV)  $\div$  ACR = Final Chronic Value (FCV)

FAV (12.32 mg Mo/L)  $\div$  ACR (7.5) = FCV (1.65 mg Mo/L)

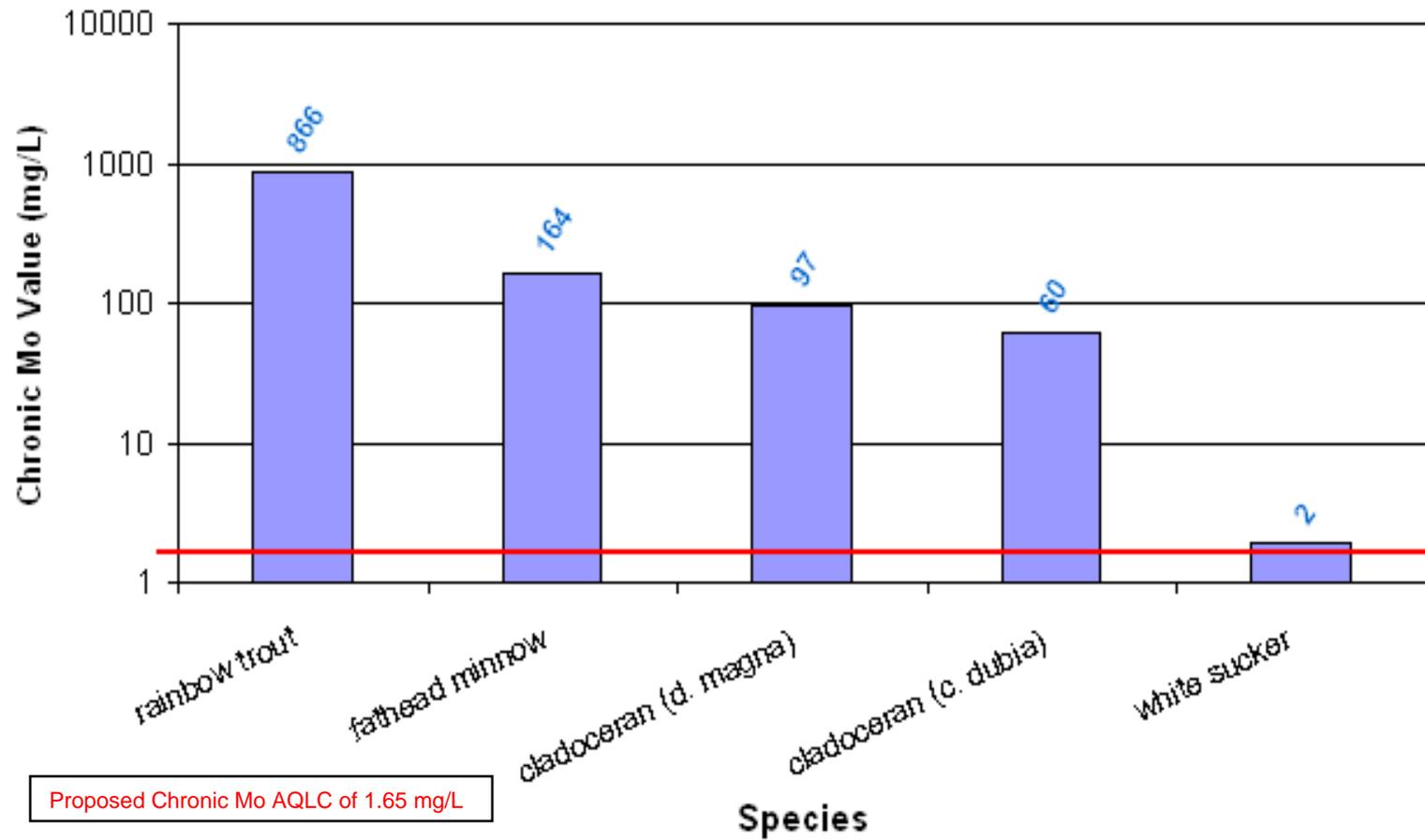
FCV = Criteria Continuous Concentration (CCC) = Chronic Criterion

Chronic Criterion for Molybdenum = 1.65 mg/L

## Acute Toxicity Values



### Chronic Toxicity Values



# Summary

- Molybdenum aquatic life criteria developed based on current toxicity data and EPA methods
- Proposed criteria are well below values observed to have no effect in lab studies
- Proposed criteria appropriate as state-wide molybdenum water quality standards

1-hour average            6,160 µg/l

96-hour average        1,650 µg/l

# Proposed Regulation Revisions (NAC 445A.144)

- Replace existing molybdenum aquatic life standard with 1-hr average of 6,160  $\mu\text{g/l}$  and 96-hr average of 1,650  $\mu\text{g/l}$
- Revise Section 1 language to allow for site-specific water body standards
- Reference origin revised molybdenum standard, and editorial change regarding location of iron irrigation standard



# NEVADA

## Mining Association

**PRESIDENT**

Mark E. Amodio

November 12, 2008

**OFFICERS**

**CHAIRMAN**

Greg Lang

Lew Dodgion, Chairman

State of Nevada

**CHAIRMAN ELECT**

Bill Goodhard

State Environmental Commission

**VICE CHAIRMAN**

Brant Hinze

901 South Stewart Street, Suite 4001

Carson City, Nevada 89701

**PAST CHAIRMAN**

Nigel Bain

RE: Comments to Proposed Administrative Change to Nevada Administrative Code 445A.144, Regulation No. R186-08.

**DIRECTORS**

Michael Brown

Tim Janke

Brant Hinze

Cindy Jones

Tony Jensen

Mary Kaye Cashman

Tony Sanchez

Don Deines

Gerald Van Campen

James O'Neil

Bruce Hanson

Robert Taylor

Jim Taranik

Stephanie Alberts-Weber

Dear Chairman Dodgion:

The Nevada Mining Association appreciates the opportunity to provide comment on the proposed adoption of a revision to the Aquatic Life standard for Molybdenum.

The Association membership supports the adoption of new Molybdenum criteria with a one hour average standard of 6,160 micrograms per liter and a 96 hour average criteria of 1650 micrograms per liter.

The Association membership supports the use of sound science to develop water quality criteria and appreciates the State's efforts to protect water resources while allowing responsible use of water resources.

Sincerely,



Doug Barto

NvMA Environmental Committee Vice-Chairman

Environmental Compliance Manager Newmont Mining Corporation

9210 Prototype Drive  
Suite 200

Reno, NV 89521

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

OCT 03 2008

OFFICE OF  
AIR AND RADIATION

Mr. H. Dale Hall  
Director  
U.S. Fish and Wildlife Service  
1849 C Street, NW  
Washington, DC 20240

Mr. James Lecky  
Director, Office of Protected Resources  
National Marine Fisheries Service  
1315 East-West Highway, 13<sup>th</sup> Floor  
Silver Spring, MD 20910

Dear Messrs. Hall and Lecky:

Re: Endangered Species Act and GHG Emitting Activities

The U.S. Environmental Protection Agency is currently evaluating several permits under the Clean Air Act for activities that emit various air pollutants, including carbon dioxide (CO<sub>2</sub>) and other greenhouse gases (GHG).<sup>1</sup> Public comments on draft permits and the environmental impact statements for related approvals have alleged that authorization of GHG-emitting activities requires that EPA and various lead federal agencies address certain species in consultations with the relevant wildlife Services under section 7(a)(2) of the Endangered Species Act (ESA) due to possible impacts of the GHG emissions from these activities. This letter seeks to confirm your agreement with EPA's determination, based on the following analyses, that issuance of permits under the Clean Air Act for activities that emit GHGs in amounts equal to or less than those analyzed below does not require consultation with NOAA Fisheries or the U.S. Fish and Wildlife Service (FWS) under section 7(a)(2) of the ESA to address the remote potential risks that public commenters suggest GHG emissions from an individual source could present for certain listed species.

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<sup>1</sup> These permits are in various stages of the review process within the Agency, including administrative appeals before the Agency's Environmental Appeals Board that delay the effective date of and final agency action on the permit (and thus preclude the construction authorized by the permit) until the EAB completes its review. 40 U.S.C. § 124.15(b)(2), 124.19(f). In addition, EPA has included conditions in some permits that prohibit construction of the facility until EPA notifies the permittee that EPA has fulfilled any ESA obligations. The conditions also explicitly retain authority for EPA to ensure that the permit applications or terms are amended as appropriate to address any issues regarding the protection of listed species that may be identified.

## **Background regarding ESA Section 7(a)(2) and GHGs**

Section 7(a)(2) of the ESA requires federal agencies, in consultation with NOAA Fisheries and/or the FWS (the Services), to ensure that actions they authorize, fund or carry out are not likely to jeopardize the continued existence of federally-listed threatened or endangered species, or result in the destruction or adverse modification of designated critical habitat of such species. 16 U.S.C. § 1536(a)(2). Under relevant implementing regulations, consultation is required only for actions that “may affect” listed species or critical habitat that are present in the action area of the proposed action. 50 C.F.R. § 402.14. Consultation is not required where the action has “no effect” on such listed species or critical habitat. The effects of the action are defined by regulation to include both the direct and indirect effects on species or critical habitat. 50 C.F.R. § 402.02. Indirect effects are those that are caused by the action and are later in time, but still are reasonably certain to occur. *Id.*; see also 51 Fed. Reg. 19926, 19932-33 (June 3, 1986) (discussing “reasonably certain to occur” in the context of cumulative effects analysis and noting that only matters that are likely to occur – and not speculative matters – are included within the standard).

Neither the ESA, nor the implementing regulations at 50 C.F.R. Part 402, require a federal agency to obtain the Services’ agreement on a determination that the agency’s action does not trigger the consultation requirements of section 7(a)(2). By seeking the Services’ agreement with our determination on this matter, we do not intend to create any new process for EPA’s compliance with section 7(a)(2) or to otherwise establish new interagency coordination procedures where consultation is not required. However, given the relative novelty of issues relating to GHG emissions from facilities permitted under EPA’s Clean Air Act authorities and certain listed species, we are seeking to confirm that our agencies’ respective understandings of relevant ESA obligations are consistent.

EPA is aware, for instance, that NOAA Fisheries has jurisdiction over two species of coral (elkhorn and staghorn) present in the Caribbean that are listed as threatened under the ESA. 71 Fed. Reg. 26852 (May 9, 2006). EPA understands that NOAA Fisheries has identified elevated sea surface temperature and increased CO<sub>2</sub> concentrations as stresses on the listed coral species. *Id.* at 26854-59. We note, however, that these species are not located in or near the area of the activities covered by permits under review at EPA.

EPA is also aware that the FWS has jurisdiction over polar bears present in Arctic regions that are listed as threatened under the ESA. 73 Fed. Reg. 28212 (May 15, 2008). EPA is currently considering one permitting action for activities in the Arctic, but the polar bear is not located in or near the area of the majority of the activities covered by permits under review at EPA. Nevertheless, EPA understands that FWS has identified loss of sea ice habitat due to rising global temperatures as a stress on the listed polar bear species. *Id.* at 28225-26.

FWS and NOAA Fisheries share responsibility for implementing the ESA. Accordingly, these agencies have primary expertise regarding, and familiarity with, the requirements of the ESA.

## **Polar Bear Listing**

FWS recently considered the issue of GHG emissions from a single source and the triggering of ESA Section 7(a)(2) requirements.

In the context of the final listing of the polar bear as a threatened species under the ESA, FWS determined, with supporting analysis provided by the U.S. Geological Survey, that the best currently available scientific data do not support drawing a causal connection between GHG emissions from a particular facility and effects on listed species or their habitats, for ESA purposes. In addition, FWS explained that it does not believe there is sufficient data to establish that such impacts are reasonably certain to occur, for ESA purposes. Based on these determinations, FWS concluded that action agencies need not consult with respect to any such impacts.<sup>2</sup>

As FWS explained in the final polar bear listing:

Formal consultation is required for proposed Federal actions that “may affect” a listed species, which requires an examination of whether the direct and indirect effects of a particular action meet this regulatory threshold. GHGs that are projected to be emitted from a facility would not, in and of themselves, trigger formal section 7 consultation for a particular licensure action unless it is established that such emissions constitute an “indirect effect” of the proposed action. To constitute an “indirect effect,” the impact to the species must be later in time, must be caused by the proposed action, and must be “reasonably certain to occur” .... [T]he best scientific data available today are not sufficient to draw a causal connection between GHG emissions from a facility in the conterminous 48 States to effects posted to polar bears or their habitat in the Arctic, nor are there sufficient data to establish that such impacts are “reasonably certain to occur” to polar bears. Without sufficient data to establish the required causal connection – to the level of “reasonable certainty” – between a new facility’s GHG emissions and impacts to polar bears, section 7 consultation would not be required to address impacts to polar bears.

73 Fed. Reg. at 28300.

Additionally, the U.S. Department of the Interior today is issuing a Solicitor’s Opinion in which it details why proposed actions that involve the emission of GHGs would not meet the “may affect” threshold set forth in the ESA regulations and therefore would not trigger the consultation requirements under section 7(a)(2) of the ESA. The Opinion explains that, for purposes of the ESA “may affect” test, neither direct effects nor indirect effects result from the GHG emissions from a single source. Citing to the U.S. Geological Survey’s analysis and its continuing validity, the Opinion concludes that where the effect at issue is climate change in the

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<sup>2</sup> See Memorandum from H. Dale Hall, Director, U.S. Fish and Wildlife Service re: “Expectations for Consultation on Actions that Would Emit Greenhouse Gases” (May 14, 2008); Memorandum from Mark D. Myers, Director, U.S. Geological Survey re: “The Challenges of Linking Carbon Emissions, Atmospheric Greenhouse Gas Concentrations, Global Warming, and Consequential Impacts” (May 14, 2008).

form of increased temperatures, proposed actions that involve the emission of GHGs cannot pass the “may affect” test and therefore are not subject to ESA consultation.

Accordingly, given the statements by FWS in the polar bear listing and by the DOI Solicitor, EPA believes the FWS would conclude that consultations with FWS under ESA section 7(a)(2) are not required to address the possible impacts of the GHG emissions from the permit activities pending before the EPA.

### **Modeling Analysis**

As an additional basis for considering its ESA section 7(a)(2) obligations, EPA has analyzed whether the GHG emissions from a single source could be modeled to determine whether the risk of harm to any listed species – including the listed corals or polar bears, or to the habitat of such species – from the anticipated emissions of that single source would trigger ESA section 7(a)(2) consultation. As explained below, this additional analysis supports the same conclusion reached by FWS: consultation under ESA section 7(a)(2) would not be required based on GHG emissions from a single source authorized by EPA.

To date, research on how emissions of CO<sub>2</sub> and other GHGs influence global climate change and associated effects has focused on the overall impact of emissions from aggregate regional or global sources. This is primarily because GHG emissions from single sources are small relative to aggregate emissions, and GHGs, once emitted from a given source, become well mixed in the global atmosphere and have a long atmospheric lifetime. The climate change research community has not yet developed tools specifically intended for evaluating or quantifying end-point impacts attributable to the emissions of GHGs from a single source, and we are not aware of any scientific literature to draw from regarding the climate effects of individual, facility-level GHG emissions.

The current tools for simulating climate change generally focus on global and regional-scale modeling. Global and regional-scale models lack the capability to represent explicitly many important small-scale processes. As a result, confidence in regional- and sub-regional-scale projections is lower than at the global scale. There is thus limited scientific capability in assessing, detecting, or measuring the relationship between emissions of GHGs such as CO<sub>2</sub> from a specific single source and any localized impact on a listed species, its habitat, or its members for purposes of ESA considerations. This is consistent with the U.S. Geological Survey’s analysis, which observed:

It is currently beyond the scope of existing science to identify a specific source of CO<sub>2</sub> emissions and designate it as the cause of specific climate impacts at an exact location.<sup>3</sup>

EPA has developed considerable expertise in current global climate change research and has substantial experience in utilizing the available models to analyze GHG emissions. Notwithstanding the uncertainties associated with modeling single-source emissions and localized regional or sub-regional end-point impacts, EPA has conducted the following analysis

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<sup>3</sup> See note 2 *supra*.

and considered the anticipated GHG emissions from an individual source with the emissions estimates described above, in relation to the two listed coral species and the polar bears.

The proposed facilities for which Clean Air Act permits are pending vary in size and associated magnitude of GHG emissions. To assess the potential impact of the GHG emissions from EPA-permitted sources – and to help ensure that our analysis covers all such proposed sources that are foreseeable – EPA has conducted an assessment for a model facility using emissions estimates that are substantially greater than the emissions estimates from any actual project currently pending before EPA.<sup>4</sup> In the analysis that follows, EPA used emissions estimates of 14,132,586 metric tons per year of CO<sub>2</sub>, 273.6 metric tons per year of nitrous oxide (N<sub>2</sub>O) and 136.8 metric tons per year of methane (CH<sub>4</sub>), which are also GHGs.<sup>5</sup> The following criteria pollutant emissions were used:<sup>6</sup>

- Ozone (O<sub>3</sub>) (180.7 metric tons per year of volatile organic compounds)
- Carbon monoxide (CO) (6019 metric tons per year)
- Sulfur dioxide (SO<sub>2</sub>) (3609 metric tons per year)
- Nitrogen oxides (NO<sub>x</sub>) (3018.5 metric tons for first five years, then 2326.2 annual metric tons for the remaining 45 years)

Furthermore, based on the information we have on several pending facilities, EPA assumed that the model facility would have a useful life of approximately 50 years.

Using the well-established Model for the Assessment of Greenhouse-gas Induced Climate Change (MAGICC),<sup>7</sup> changes in global CO<sub>2</sub> concentrations, global-mean surface air temperature and sea-level were projected resulting from the model facility's annual emissions of CO<sub>2</sub>, N<sub>2</sub>O and CH<sub>4</sub>, as well as the relevant criteria pollutants (listed above), between 2013 and 2063,<sup>8</sup> over

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<sup>4</sup> For the model facility, EPA used criteria pollutant and GHG emissions rates that are 20 percent greater than the emissions estimates from one of the largest of the proposed facilities – the Desert Rock Energy Facility. This source is a 1500 MW coal-fired steam electric generating unit to be located on lands of the Navajo Nation near Shiprock, New Mexico.

<sup>5</sup> The Draft Environmental Impact Statement (EIS) for Desert Rock prepared by the U.S. Bureau of Indian Affairs estimates this facility will emit 12.7 million tons per year of CO<sub>2</sub>. EPA calculated the methane and nitrous oxide rates by using AP-42 emissions factors and certain parameters reflected in the calculation of CO<sub>2</sub> emissions in the EIS for Desert Rock. We then converted these estimates to metric units and increased each number by 20 percent.

<sup>6</sup> Criteria pollutant emissions are based on the Desert Rock permit application and final permit. The model facility emissions are 20 percent greater than these figures and converted to metric units.

<sup>7</sup> Wigley, T.M.L. 2008. MAGICC/SCENGEN 5.3 (Model for the Assessment of Greenhouse-gas Induced Climate Change/SCENario GENerator): User's Manual. Boulder, Colo.: National Center for Atmospheric Research. <http://www.cgd.ucar.edu/cas/wigley/magicc/>

<sup>8</sup> We presumed that a large facility receiving a PSD permit in 2008 would not begin operations, and hence emissions, until approximately 2013 due to construction and other activities. If the climate modeling exercises described in this letter were to start a few years before 2013, it is expected that the timing of results would vary only slightly but that the magnitude of results would be essentially the same. If the modeling analysis were to be conducted over a time frame longer than 50 years (i.e., assuming a power plant lifetime of 75 years for example), but with the same amount of annual emissions, the climate effects described in this letter would still be the same over the initial 50-year period, but would then be slightly greater after 50 years, showing greater and longer-lasting climate effects.

which time these annual emissions (with the exception of NOx) are assumed to remain constant.<sup>9</sup> The results are relative to one global GHG emissions scenario (A1B) used by the IPCC, but with a range of different climate sensitivities.<sup>10</sup> Going out to 2100, the model estimates that the maximum global atmospheric CO<sub>2</sub> concentration increase resulting from the model facility's emissions occurs approximately 50 years after the facility begins emitting and is approximately 0.06 parts per million, corresponding to approximately 0.01 percent of total global atmospheric CO<sub>2</sub> concentrations projected over this time period. The maximum global mean temperature increase resulting from the emissions occurs approximately 50 years after the facility begins emitting and ranges approximately between 0.00022 to 0.00035 degrees Celsius (°C) (0.00037 to 0.00063°F), corresponding to approximately 0.01 percent of the total global mean temperature increase resulting from the projected global GHG emissions over this time period.

Regarding climate change over the Caribbean and Arctic (habitat for the listed coral and polar bear species, respectively), regional models can project temperature changes resulting from global-scale GHG emissions. A widely-accepted and used regional model is the SCENario GENerator (SCENGEN) model.<sup>11</sup> SCENGEN operates in conjunction with MAGICC and projects a warming of 1.4-2.5 °C (2.5-4.5°F) for global emissions (based on scenario A1B) for an area (5 degree by 5 degree grid box) centered over the U.S. Virgin Islands (20 degrees north by 65 degrees west) in 2070 (approximately 50 years after the facility begins emitting, coinciding with the maximum warming in the global mean temperatures analysis).<sup>12</sup> In addition, SCENGEN projects a warming of 3.6-6.3 °C (6.5-11.3°F) for global emissions (based on scenario A1B) for an area (5 degree by 5 degree grid box) centered over the southern Beaufort Sea in the Arctic (off the northern coast of Alaska, 75 degrees north by 145 degrees west) in approximately 50 years after the facility begins emitting, coinciding with the maximum warming in the global mean temperatures analysis.

SCENGEN, however, cannot process the changes due to a single source's emissions. Nonetheless, we note that applying the proportion of the global mean warming potentially due to the model facility as indicated above through use of MAGICC (approximately 0.01 percent) to the Caribbean results gives a maximum projected regional warming of 0.00014-0.00025°C

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<sup>9</sup> As described above, the CO<sub>2</sub> emissions rate for the model facility reflects a rate of CO<sub>2</sub> emissions substantially greater than the rate estimated for any of the proposed facilities currently under review within EPA. With regard to NOx emissions, the permit for the Desert Rock facility (which formed the basis for the model facility emissions) decreases the NOx emission limits (and thus associated emissions) over time.

<sup>10</sup> Range accounts for model runs with climate sensitivities varying between 2 and 4.5°C. Climate sensitivity refers to the equilibrium change in global mean surface temperature following a doubling of the atmospheric CO<sub>2</sub> concentration. This value is estimated by the IPCC Fourth Assessment Report as likely to be in the range 2 to 4.5°C with a best estimate of about 3°C.

<sup>11</sup> Wigley, T.M.L. 2008. MAGICC/SCENGEN 5.3 (Model for the Assessment of Greenhouse-gas Induced Climate Change/SCENario GENerator): User's Manual. Boulder, Colo.: National Center for Atmospheric Research. <http://www.egd.ucar.edu/cas/wigley/magicc/>

<sup>12</sup> SCENGEN was only run using the global emissions scenario (A1B). SCENGEN was not run using the emissions estimates described above alone. Instead, the global emissions results were scaled to the single source level according to the proportion of the global mean warming due to the single source computed in MAGICC.

(0.00025-0.00045°F) potentially due to the model facility's GHG emissions.<sup>13</sup> Applying a similar scaling to the Arctic results (for global-scale emissions) gives a maximum projected regional warming of 0.00036-0.00063°C (0.00065-0.00113°F) potentially due to the GHG emissions analyzed here. Although confidence in regional temperature projections is generally lower than confidence in global average projections, these results are consistent with the well-established notion that warming over the tropical oceans will be less than the global average and that warming over the high latitudes will be significantly more than the global average.

As noted earlier, once CO<sub>2</sub> is emitted it becomes well mixed in the global atmosphere due to its long atmospheric lifetime. Some of the CO<sub>2</sub> emitted, however, is absorbed by land vegetation and the oceans. Since the 1980s, about half of the anthropogenic CO<sub>2</sub> emissions have been taken up by the terrestrial biosphere and the oceans. Uptake of CO<sub>2</sub> can increase the acidic levels of the oceans. The IPCC has noted that ocean acidification due to the direct effects of elevated CO<sub>2</sub> concentrations will impair a wide range of planktonic and other marine organisms that use aragonite to make their shells or skeletons. To project the change in tropical ocean pH that would occur as a result of a change in atmospheric CO<sub>2</sub> from the model facility analyzed above (0.06 ppm), EPA used the Program Developed for CO<sub>2</sub> System Calculations.<sup>14</sup> The program computed a pH reduction of approximately 0.0001 units in 2070 (approximately 50 years after the facility begins emitting, coinciding with the maximum 0.06 ppm CO<sub>2</sub> concentration increase).

Our review of the relevant scientific literature provides no information that would indicate that corals would be sensitive to temperature or pH changes of this magnitude. Furthermore, such changes cannot be physically measured or detected. There are limited tools available for assessing the effects of projected climate changes on listed species. EPA is aware of the COMBO model,<sup>15</sup> used to project the effects of climate changes on corals at regional scales. The COMBO model for coral assessment has only recently been accepted for publication, and its methods have not been widely vetted by the research community, nor its application widely tested by users. The COMBO model may be used to calculate the impacts to Caribbean coral reefs from changes in average sea-surface temperature and CO<sub>2</sub> concentrations due to projected global emissions, such as scenario A1B from IPCC. However, this model cannot process the single-source incremental changes in CO<sub>2</sub> concentrations and temperature discussed above. Moreover, any attempt to scale COMBO results based on the incremental CO<sub>2</sub> concentrations that would be due solely to a single source's emissions would represent a novel and untested application of model results. At this time, EPA does not believe that such a novel application would be consistent with the best available data standard for ESA purposes to assess potential impacts of single-source emissions on the corals at a regional scale. We note, however, that any such scaling would necessarily substantially reduce any projected potential impacts.

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<sup>13</sup> Over the tropical oceans, on average, the surface air temperature is about the same as the sea surface temperature.

<sup>14</sup> Lewis, E., and D. W. R. Wallace. 1998. Program Developed for CO<sub>2</sub> System Calculations. ORNL/CDIAC-105. Carbon Dioxide Information Analysis Center, Oak Ridge National Laboratory, U.S. Department of Energy, Oak Ridge, Tennessee.

<sup>15</sup> Buddemeier, R., P. Jokiel, K. Zimmerman, D. Lane, J. Carey, G. Bohling, and J. Martinich, 2008. A modeling tool to evaluate regional coral reef responses to changes in climate and ocean chemistry. *Limnology and Oceanography Methods*: In Press.

Likewise, our review of the relevant scientific literature provides no indication that any specific degree of polar bear sensitivity can be attributed to global or regional temperature changes of the magnitudes described above. EPA is also aware of the extensive analysis performed by the U.S. Department of the Interior (DOI) to support listing the polar bear as a threatened species, using sea ice projections from general circulation models (GCMs), carrying capacity (considering population and habitat) models and a Bayesian<sup>16</sup> network model. EPA is not aware of modeling tools that could be used to analyze the implications of single source emissions on polar bear populations. Any attempt to scale the results of DOI's analysis based on the incremental CO<sub>2</sub> concentrations that would be due solely to a single source's emissions would represent a novel and untested application of model results, and thus would not be consistent with the best available data standard for ESA purposes.

The best available climate change modeling tools predict that a source with GHG emissions in amounts equal to or less than those of the model facility analyzed above will have at most an extremely small impact on average global temperature and global atmospheric CO<sub>2</sub> concentrations over and beyond the anticipated functional lifetime of the proposed source. Regional modeling and any associated downscaling calculations to predict effects at a specific species location introduce untested approaches and additional uncertainties. It is clear that any such temperature and ocean acidification outputs, or any specific impact on the corals or polar bears, would be too small to physically measure or detect in the habitat of these species. Known tools for assessing the impacts of these small climate changes on the two listed coral species and polar bears are presently insufficient for quantifying potential effects. While the foregoing conclusions apply to the listed coral species and polar bears, the MAGICC modeling is not specific to any particular species or its members or any specific location, and the same outputs would constitute the first step in an assessment of impacts on other species. Given the very small global mean climate change magnitudes projected based on the emissions of this type of single source, we believe the outputs of such a single-source impact analysis for other species in other locations would also be of an extremely small magnitude that is too small to physically measure or detect.

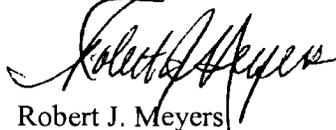
In these circumstances, and also in light of the uncertainties in attempting to use the models' outputs to predict impacts at a local level, EPA has determined that the risk of harm to any listed species, including the listed corals or polar bears, or to the habitat of such species based on the anticipated emissions of the model facility as described above, or any facility with lower emissions, is too uncertain and remote to trigger ESA section 7(a)(2) obligations. Section 7(a)(2)'s purpose of ensuring no likely jeopardy to listed species and no destruction or adverse modification of designated critical habitat is not implicated by such remote potential risks. See, e.g., *Ground Zero Center for Non-Violent Action v. U.S. Department of the Navy*, 383 F.3d 1082 (9<sup>th</sup> Cir. 2004) (where the likelihood of jeopardy to a species is extremely remote, consultation is not required). This reasoning is consistent with the conclusion reached by FWS and DOI that consultation under ESA section 7(a)(2) is not required for GHG emissions from a single source.

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<sup>16</sup> Bayesian Network models represent a set of interacting variables that are linked by probabilities. They provide an efficient way to represent and summarize understanding of a system, and can combine empirical data and expert knowledge into the same modeling structure. They are also particularly useful in synthesizing large amounts of quantitative and qualitative information to answer "what if" kinds of questions.

While FWS has already determined that ESA consultation in general would not be required on proposed permits or licenses for individual facilities that emit GHGs, we nonetheless would appreciate a response from each of you regarding our determination at your earliest convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Meyers". The signature is written in a cursive style with a large initial "R".

Robert J. Meyers  
Principal Deputy Assistant Administrator  
Office of Air and Radiation



## United States Department of the Interior

### FISH AND WILDLIFE SERVICE

Nevada Fish and Wildlife Office  
1340 Financial Blvd., Suite 234  
Reno, Nevada 89502  
Ph: (775) 861-6300 ~ Fax: (775) 861-6301



Bureau of Land Management  
SEP 04 2007  
RECEIVED

Ely, NV  
August 29, 2007  
File No. BLM 7-14

#### Memorandum

To: Field Manager, Ely Field Office, Bureau of Land Management, Ely, Nevada  
(Attn: Jeffrey Weeks)

From: Field Supervisor, Nevada Fish and Wildlife Office, Reno, Nevada

Subject: Request to Conclude Informal Consultation on White Pine Energy Station

The Fish and Wildlife Service (Service) received a Biological Assessment (BA) and request to conclude informal consultation on the White Pine Energy Station project pursuant to Section 7 of the Endangered Species Act, as amended, (Act) on June 20, 2007. The bald eagle was the only species included in the BA. In an e-mail to Paul Podborny of your staff on July 9, 2007, we noted that a final rule to delist the bald eagle was imminent; it had, in fact, been published in the Federal Register that same day. We advised that we postpone our response to your request until after the 30-day comment period had closed (i.e., August 8, 2007) so that we could be consistent with the regulatory framework in place at the time the Final Environmental Impact Statement (FEIS) and Record of Decision for the White Pine Energy Station are released.

Since the bald eagle is no longer protected under the Act, no consultation is required. The Service will continue, however, to protect the bald eagle under the authority of the Bald and Golden Eagle Protection Act (BGEPA) and the Migratory Bird Treaty Act (MBTA). Both of these laws prohibit killing, selling, or otherwise harming eagles, their nests, or their eggs. The Service has published National Bald Eagle Management Guidelines which we provided to your staff in an e-mail dated July 19, 2007; these guidelines and other information on the bald eagle, including a draft post-delisting monitoring plan, are available at <http://www.fws.gov/migratorybirds/baldeagle.htm>. Although the emphasis of the national management guidelines is on protection of nests, there are also recommendations on protecting communal roosts and foraging areas. Since there are no nests or communal roosts in the vicinity of the project, the only relevant guideline is the one to minimize disturbances in the vicinity of

TAKE PRIDE  
IN AMERICA 

Field Manager

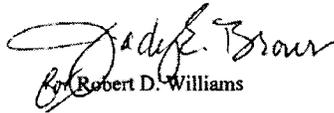
File No. BLM 7-14

foraging areas. We recommend that the FEIS include a commitment to abide by our national management guidelines under the BGEPA.

The Service is in the process of establishing a permit program under the BGEPA that would authorize limited take of bald and golden eagles consistent with the purpose and goal of the BGEPA. Coverage provided by any take that has been authorized under any existing Biological Opinions will remain in effect until new regulations have been promulgated under the BGEPA.

Although the bald eagle is no longer listed by the federal government, it is important to note that it remains protected under State of Nevada statutes. Therefore, we recommend that you contact the Nevada Department of Wildlife to ensure that you are in compliance with Nevada laws and regulations regarding the bald eagle.

If you have any questions regarding the information provided in this memo, please contact me or Steve Caicco of my staff at 775-631-6300. Specific requests for information about the bald eagle should be directed to Steve Abele on our staff.

  
For Robert D. Williams

cc:

Program Lead: Fish, Wildlife, and T&E, Nevada State Office, Bureau of Land Management,  
Reno, Nevada

Assistant Field Supervisor, Southern Nevada Fish and Wildlife Office, U.S. Fish and Wildlife,  
Las Vegas, Nevada



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**REGION IX**

**75 Hawthorne Street  
San Francisco, CA 94105-3901**

October 14, 2008

Colleen Cripps  
Nevada Division of Environmental Protection  
901 South Stewart Street  
Suite 4001  
Carson City, NV 89701-5249

Re: White Pine Energy Station

*Colleen*  
Dear Ms. Cripps:

On November 16, 2007, we received a letter from Michael Elges of the Nevada Division of Environmental Protection's (NDEP) Bureau of Air Quality Planning, asking us to make a determination whether we have satisfied the United States Environmental Protection Agency's (EPA's) obligations under the Endangered Species Act (ESA) for the proposed White Pine Energy Station (WPES). Our letter today responds to Mr. Elges' request for such a determination and documents EPA's compliance with relevant requirements of the ESA for WPES. NDEP may, therefore, proceed with its action on the application of White Pine Energy Associates, LLC for a Class I Operating Permit to Construct (Permit).

EPA's ESA obligations were triggered because NDEP is issuing the Permit in accordance with Part C (Prevention of Significant Deterioration, or "PSD") of the Clean Air Act (CAA), 42 U.S.C. 7401, et seq., pursuant to a delegation agreement with EPA which became effective October 14, 2004. Section IV.H.3 of the delegation agreement provides that NDEP will not issue a final PSD permit until EPA advises you that we have met our obligations under Section 7 of the Endangered Species Act (ESA). Section 7(a)(2) of the ESA requires federal agencies, in consultation with U.S. Fish and Wildlife Service (FWS) and/or the National Oceanic and Atmospheric Administration Fisheries Service ("NOAA Fisheries," and, with FWS, the "Services"), to ensure that actions they authorize, fund or carry out are not likely to jeopardize the continued existence of federally-listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat of such species. 16 U.S.C. § 1536(a)(2). Under relevant implementing regulations, consultation is required only for actions that "may affect" listed species or critical habitat. 50 CFR § 402.14. Consultation is not required where the action has "no effect" on listed species or critical habitat.

EPA's permitting action, along with a related action of the U.S. Bureau of Land Management ("BLM"), was the subject of consultation with FWS under section 7(a)(2) of the ESA. BLM was the lead federal agency for Section 7(a)(2) compliance for this

action, and EPA is relying in part on BLM's consultation activity to comply with section 7(a)(2) of the ESA for the PSD permitting action by EPA.

For this action, the action agencies' ESA compliance included two considerations. The first part of the compliance resulted in the memorandum dated August 29, 2007, from FWS notifying the BLM that the only species of concern, the bald eagle, had been removed from the list of endangered species. The FWS memorandum, which is referenced in NDEP's November 16, 2007, letter to EPA Region 9, further stated that since the bald eagle is no longer protected under the ESA, no consultation is required. A copy of the memorandum is enclosed with this letter.

The second consideration arose when the Sierra Club submitted comments on the proposed Permit stating that the permitting authority should evaluate the effects on species from the proposed Permit's authorization of emissions of carbon dioxide and other greenhouse gases (GHG). The Sierra Club comments alleged that authorization of the pollution emitting activities requires Federal action agencies to address certain species in consultations with the relevant Services under section 7(a)(2) of the ESA due to possible impacts of the GHG emissions from an authorized activity.

We note that in the context of the final listing of the polar bear as a threatened species under the ESA, FWS determined, with supporting analysis provided by the U.S. Geological Survey, that the best currently available scientific data do not support drawing a causal connection between GHG emissions from a particular facility and effects on listed species or their habitats, for ESA purposes. Further, EPA notes that on October 3, 2008, the U.S. Department of the Interior (DOI) issued a Solicitor's Opinion in which it detailed DOI's conclusion that proposed actions that involve the emission of GHGs would not meet the "may affect" threshold set forth in the ESA regulations and therefore would not trigger the consultation requirements under section 7(a)(2) of the ESA.

As an additional analysis, and considering EPA's expertise in current global climate change research and substantial experience in utilizing available models to analyze GHG emissions, EPA conducted a general assessment of the anticipated GHG emissions from a large coal-combusting source in relation to two listed coral species under NOAA Fisheries' jurisdiction and listed polar bears under the jurisdiction of FWS. Notwithstanding the uncertainties associated with modeling single-source emissions and localized regional or sub-regional end-point impacts, EPA assessed a model facility, using emissions estimates that are greater than the emissions estimates from any actual project currently pending before EPA, including WPES. That assessment is described in the enclosed letter, which EPA sent to the Services on October 3, 2008.

As reflected in the enclosed letter, EPA's conclusion based on its additional assessment is that the risk of harm to any listed species, including the listed corals or polar bears, or to the habitat of such species from the anticipated GHG emissions of the model facility – which are higher than those from the proposed WPES – is too uncertain and remote to trigger ESA section 7(a)(2) consultation. *See* enclosed letter, page 8. Since the emissions from the WPES coal-fired power plant are expected to be much less

than the model facility emissions modeled in the analysis described in the enclosed letter, any risk of harm to listed species, including the listed corals or polar bears, or to the habitat of such species from the anticipated GHG emissions generated by WPES is similarly too uncertain and remote to trigger ESA section 7(a)(2) consultation.<sup>1</sup> The National Oceanic and Atmospheric Administration responded by letter dated October 10, 2008, indicating its agreement with our analysis.

Although EPA has conducted the additional analysis set forth in the attached letter to contribute its expertise to the consideration of listed species issues, BLM remained the lead federal agency for section 7(a)(2) compliance, and nothing in this letter is intended to supersede or be contrary to BLM's lead agency role.

Therefore, based on the enclosed memorandum and letter and the analysis described above, I am advising you that EPA has completed its obligations as described in the delegation agreement. We recommend that your agency place this letter and the documents referenced above in the administrative record for your action on the WPES PSD permit. Thank you for your cooperation in this matter.

Sincerely,



Deborah Jordan  
Director, Air Division

Enclosures

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<sup>1</sup> The modeling analysis discussed herein included estimated carbon dioxide emissions of 14,132,586 metric tons per year from the model facility. Although the Draft Environmental Impact Statement (EIS) for the WPES (prepared by the US Bureau of Land Management) estimated the carbon dioxide emissions for that facility at approximately 18,262,864 metric tons per year, we have been notified through a subsequent draft EIS for the Ely Energy Center (also prepared by the Bureau of Land Management) that the revised estimate of carbon dioxide emissions from the WEPS is 11.68 million metric tons per year. This later estimate is supported by the emissions estimated from similar facilities reporting actual emissions in EPA's Acid Rain Database.