HOLLAND&HART LLP

Bryce C. Alstead
Phone (775) 327-3067
Fax (775) 786-6179
balstead@hollandhart.com

Denise W. Kennedy, P.C.
Phone (303) 295-8066
dkennedy@hollandhart.com

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State Environmental Commission
Attn: John B. Walker, Executive Secretary
901 S. Stewart St., Suite 4001
Carson City, NV 89701-5249

PRE-HEARING BRIEF AND MOTION FOR SUMMARY JUDGMENT

Appeals of Revised Class II Air Quality Operating Permit (Bango Oil LLC)
AP 2992-1473

The undersigned attorneys, on behalf of Bango Oil LLC ("Bango Oil"), hereby move the State Environmental Commission (the "Commission"), pursuant to the pre-hearing briefing authorization of Nevada Administrative Code ("NAC") 445B.8925, for an order granting Bango Oil summary judgment on the appeals filed by Lorraine Griffin, David C. Mathewson, and Donald Mello (collectively, the "Appellants") in this matter. This motion is supported by the following points and authorities, and the evidence presented at the April 29, 2009 Commission hearing (the "Hearing").

This motion renews and updates the previously filed Motion to Dismiss, which the Commission decided to hold in abeyance at the April 29 hearing. As set forth in that motion, this case is about an appeal of a minor modification to a minor source. The NAC sets forth the standards and requirements to be followed in issuing such an air permit modification. NAC 445B.308(2) specifies the grounds on which a permit may be denied:

> If the source will (1) prevent the attainment or maintenance of a state or national ambient air quality standard; (2) will violate the state implementation plan; or (3) will violate any applicable requirement, the permit may be denied.

Additionally, NAC445B.318.3 provides that:

> "[a]n operating permit ***must be granted*** if the Director finds from a stack emission test or other appropriate test and other relevant information that use of the stationary source will

not result in any violation of the air quality regulations" or the provisions of the federal Clean Air Act.

The record establishes that NDEP followed all of these requirements and concluded, consistent with NAC 445B.308(2) and 445B.318.3, that the permit modification should be issued. Nor did Petitioners introduce any evidence at the April 29 hearing that contravened this determination by NDEP.

POINTS AND AUTHORITIES

I. Introduction.

The appeals in this matter center on factually unsupported assertions regarding odors allegedly relating to the Bango Oil facility (the "Facility"). Appellants also make vague assertions about Churchill County's non-existent authority over this appeal, perceived health issues, and the general non-responsiveness of NDEP. Even if these allegations were relevant to an appeal of a Class II Air Quality Permit, which they are not, Appellants' allegations are not factually supported. Importantly, Appellants were granted an exceedingly broad opportunity to prove their respective cases at the Hearing – a day-long affair during which Appellants were permitted to provide hours of unfocused testimony and groundless allegations – and failed to prove any facts sufficient to support their appeals. Thus, there are no genuine issues as to any material fact that is relevant to the appeal and summary judgment is, therefore, an appropriate dispensation of this matter.

Indeed, even if Appellants' allegations had factual support, none of the appeals present a legal basis for reversal or modifying the Facility's Class II Air Quality Permit (the "Permit"). None of the Appellants have proven – indeed, none of the Appellants have even alleged – a failure to comply with the Class II Operating Permits Rules or applicable standards of NAC 445B (Air Quality). Accordingly, the appeals should be denied as a matter of law.

Much of the discussion at the Hearing focused on the perceived odor impacts of the Facility. Odor standards are set forth by state law – namely, NAC 445B.22087 – and the evidence in the record proves that the Facility meets this standard. *Notice of Response to Comments,* NDEP (February 19, 2009) NDEP Exhibit "E" ("NDEP Response") (providing that the odors associated with the Facility do not constitute a nuisance pursuant to NAC 445B.22087.). The remaining allegations simply do not allege facts which, if proven, would support the reversal or modification of the Permit. Given the undisputed facts set forth below, this Commission should enter summary judgment in favor of Bango Oil.

II. Statement of Undisputed Facts.

Bango Oil applied for the Permit on July 30, 2008[1]; the Permit was granted by NDEP on February 13, 2009, after extensive opportunity for public comment and a lengthy public hearing at which all concerns were heard, and after NDEP's issuance of a thorough response to public comment document that responded to the concerns raised both in written comments and at the hearing. *NDEP Response*. The Permit authorized a minor modification to a minor source pursuant to NAC 445B. Cf., NAC 445B.094 (defining "major source") The revised Permit does not change the Facility's status as a Class II (minor) source of emissions. *NDEP Response*. NDEP found that the Facility's operations under the revised Permit would not exceed any applicable ambient air quality standards. *Application Review*. While NDEP's air regulations indicate a minor modification to a Class II permit typically takes 75 days to issue, NDEP took over 6 months to issue this minor modification to ensure that public concerns were thoroughly considered.

NAC 445B.318(3) mandates that an operating permit must be granted if NDEP finds that a facility's operations will not result in a violation of NAC 445B or the federal air quality regulations adopted by reference in NAC 445B.221. The Facility is in compliance with all applicable provisions of the Permit as well as NAC 445B. *Application Review*. Further, as conclusively proven by 14 NDEP site inspections (as well as numerous tests by Churchill County) the Facility is in compliance with all state law odor standards. *NDEP Response*. Additionally, the NDEP Response clearly shows that the Facility processes no materials regulated as hazardous waste under Nevada law (referencing March 16, 2006 written determination by the NDEP Bureau of Waste Management ("Written Determination")).

NDEP provided Appellants with its Notice of Response to Comments on February 19, 2009.[2] Appellants filed their appeals on February 20 and 27 respectively. Appellant Mello's appeal alleges that "[o]dor continues to be a nuisance and that NDEP has not resolved the problem" and that "[o]dor *could result in* significant loss of property value, marketability of property or obtaining financing for neighboring landowners" (emphasis added).[3] Appellant Griffin's appeal alleges that NDEP's decision to grant the Permit "[d]enies the citizens of Churchill County the right of due process" and that "[o]riginal variances that were granted under NAC 444.8456 were not revisited".[4] Appellant Mathewson's appeal alleges that he sent a letter to NDEP and had

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[1] See, NDEP Application Review (February 2009), NDEP Exhibit "C" ("Application Review").

[2] This document has previously been defined in this motion as the "NDEP Response".

[3] See, Appeal of Donald Mello, filed February 27, 2009.

[4] See, Appeal of Lorraine Griffin, filed February 27, 2009.

received no reply and that "[i]nadequate environmental studies have been conducted with regard to Bango facility."[5]

None of the Appeals allege facts sufficient to reverse or modify a Class II Air Quality Permit. None of the Appeals allege that any specified grounds exist to deny the Permit. *See, e.g.,* Appeals at Section 6. None of the appeals provide facts indicating that the Facility violates any applicable Nevada air quality regulations. Id. Instead, the appeals indicate a general dissatisfaction with the Facility and NDEP's responsiveness. These allegations, even if proven true, do not provide a legal basis for reversing or modifying the Permit. Bango filed a Motion to Dismiss prior to the April 29 hearing because the appeals, on their face, did not raise any issues that were relevant to NDEP's determination to issue the minor permit modification. The Commission decided to hold this motion in abeyance. Now that appellants have had their opportunity to present their case in chief on the appeal, it is abundantly clear that no facts or evidence were introduced that contravened the findings and determinations NDEP made in accordance with NAC 445B to issue the minor permit modification.

Notwithstanding that none of the appeals provides a sufficient legal basis to support a reversal or modification of the Permit, each of the Appellants was given ample opportunity to prove facts sufficient to support their respective allegations at the eight-plus hour long Hearing. *See, generally,* Transcript of SEC Appeal Hearing (April 29, 2009) ("Transcript" or "Tr."). At the Hearing, Appellants could not properly raise new arguments that were not set forth in their appeals; however, even if they could, no genuine issues of material fact were raised at the Hearing. The undisputed facts of this matter are not in question, and Bango Oil is entitled to summary judgment dismissing the appeals as a matter of law.

III. Legal Argument.

A. Standard of Review

Nevada courts have found that trials may be cancelled when they would "[s]erve no useful purpose." *Short v. Hotel Riviera, Inc.,* 79 Nev. 94, 96, 378 P.2d 979, 980 (1963) (citations omitted). The rationale behind this rule – to ensure the efficient administration of the legal system – is equally applicable to quasi-judicial administrative hearings. Indeed, without the tool of summary judgment, parties and hearing officials could easily be bogged down in lengthy and expensive hearings that can legally serve no practical function. When, as is the case here, further hearings cannot change the outcome of a case, summary judgment is plainly appropriate. *See, Van Cleave v. Kietzke-Mill Mini Mart*, 97 Nev. 414, 415, 633 P.2d 1220, 1221 (1981).

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[5] See, Appeal of David C. Mathewson, filed February 20, 2009 (at times, the three appeals are collectively referenced as the "Appeals").

If the pleadings, testimony, and other evidence in the record show that there are no genuine issues as to any material fact, and the party moving for summary judgment is entitled to judgment as a matter of law, summary judgment should be granted. *See, id.; see, also, Borgeson v. Scanlon,* 117 Nev. 216, 19 P.3d 236 (2001). Once the movant has demonstrated that no genuine issues as to any material facts exist, unless the opposing party can provide evidence showing such an issue, summary judgment is proper. *See, Bakerink v. Orthopedic Assoc., Ltd.,* 94 Nev. 428, 581 P.2d 9 (1978); *see, also, Hickman v. Meadow Wood Reno*, 96 Nev. 782, 784, 617 P.2d 871, 872-873 (1980).

The burden on the non-moving party is substantive in nature. To preclude summary judgment, the party opposing a motion for summary judgment must present specific facts, not mere allegations or conclusions. *See, Bird v. Casa Royale West,* 97 Nev. 67, 71, 624 P.2d 17, 19 (1981); *Bond v. Stardust, Inc.,* 82 Nev. 47, 50, 410 P.2d 472, 473 (1966). "[T]he opposing party is not entitled to have the motion for summary judgment denied on the mere hope that at trial he will be able to discredit movant's evidence; he must ... be able to point out to the court something indicating the existence of a triable issue of fact." *Hickman,* 96 Nev. at 784. Though a party opposing a summary judgment motion is entitled to favorable inferences from the evidence presented, it is not entitled to survive a motion on "[t]he gossamer threads of whimsy, speculation and conjecture." *Collins v. Union Fed. Sav. & Loan Ass'n.*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983) (quoting *Hahn v. Sargent*, 523 F.2d 461, 467 (C.D. Mass 1975)).

As discussed more fully below, there are no genuine issues of material fact with respect to any of the appeals. The appeals are either based on irrelevant allegations (e.g., that NDEP failed to promptly respond to a letter) or are completely unsupported by the evidentiary record (odor complaints). Accordingly, this Commission should grant summary judgment and dismiss each of the appeals.

B. Summary Judgment is Appropriate for Ms. Griffin's Appeal.

Ms. Griffin asserts three issues in her appeal:

- that the Facility processes "hazardous waste";
- that Churchill County's special use permit procedures have not been appropriately respected by NDEP; and
- that the Facility's NAC 444 variances should be revisited.

Even granting all favorable inferences to Ms. Griffin, and even if true, none of these allegations provide a basis for challenging a Class II Air Quality Permit. Nor did Ms. Griffin introduce any evidence at the hearing to support a claim that these issues are relevant to NDEP's decision to issue the air permit modification. Indeed Ms. Griffin

acknowledges this and stated "I am not charging any violation of applicable regulations at this time." Tr. at 244. Summary judgment is, therefore, appropriate as a matter of law.

1. Hazardous Waste Allegations are not Relevant to the Issuance of an Air Permit Modification.

Hazardous waste allegations are simply not germane to the review of an air quality permit. *See, NDEP Response.*[6] Moreover, even if Ms. Griffin's allegations had some relevance to an appeal of a Class II Air Quality Permit, it has been conclusively shown that the Facility does not process hazardous waste as defined by Nevada law. Materials defined as "hazardous waste" in their state of origin do not trigger Nevada's regulatory scheme when the material is not stored before processing. *See, NDEP Response* (citing Written Determination). Even assuming that the Facility processes hazardous waste material, this material is not – and cannot be – regulated under Nevada law because Bango Oil immediately processes all such material. *See,* Testimony of Mr. Larry Kennedy, NDEP, Transcript at 294 (hereafter "Tr."). Accordingly, even if Ms. Griffin's hazardous waste contention were relevant to an appeal of a Class II Air Quality Permit, which it is not, Ms. Griffin has presented no evidence showing any violation of Nevada's hazardous waste regulations.

2. Compliance with the County Special Use Permit is not Relevant to Issuance of the Air Permit Modification

Ms. Griffin's contentions regarding Churchill County regulations are not relevant to an appeal of a state air quality permit. Any alleged violations of Bango Oil's County permits must be pursued through County channels, rather than this Commission. Indeed, just as Churchill County has no regulatory powers concerning the Permit, this Commission has no authority over Churchill County's land use scheme. *See, e.g.,* NRS 278.250 & 278.315; Tr. at 111, 312.

3. The NAC 444 Variance is Not Relevant to Issuance of the Air Permit Modification

Similarly, Ms. Griffin's third contention, that the Facility's variances pursuant to NAC 444 should be reconsidered, has no relation to the Permit. NAC 444.8458 (pertaining only to hazardous waste management).

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[6] "NRS 459.520 is a statute which governs the permitting of facilities which treat, store, or dispose of hazardous waste. These are waste management requirements that are not applicable to the air quality requirements implemented by the NDEP-BAPC". NDEP Response.

In sum, none of Ms. Griffin's contentions provide a legal basis to reverse or modify the Permit. As such, in the interest of efficiency, preserving state and other resources, and fairness to all participants, this Commission should grant Bango Oil's motion for summary judgment as to Ms. Griffin's appeal.

C. Summary Judgment is Appropriate for Mr. Mathewson's Appeal.

Mr. Mathewson does not allege any facts, and presented no facts at the hearing, in support of reversing or modifying the Permit. Mr. Mathewson's appeal states only that NDEP was non-responsive to his requests for information and that inadequate environmental studies had been conducted. Even assuming that Mr. Mathewson's claim of non-responsiveness could be construed as a basis for challenging the Permit, which it cannot be, it must be noted that NDEP in fact responded to Mr. Mathewson's request for information.[7] Because NDEP's evaluation of the permit as evidenced in the technical review document satisfy all applicable regulations for the grant of a Class II Air Quality Permit, and because Mr. Mathewson provided no evidence in support of his claim that inadequate environmental studies had been conducted, summary judgment is appropriate to dispose of this appeal. *Bakernick,* 94 Nev. 428.

D. Summary Judgment is Appropriate for Mr. Mello's Appeal.

Mr. Mello's appeal asserts four issues:

- that the Facility processes "hazardous waste";
- that the Facility's odor is a nuisance;
- that testimony during a January 2009 public hearing indicated "perceived health issues" as well as vague quality of life issues arising from the Facility's operations; and
- that NDEP's air quality studies "may have been done" when the Facility was operating below-capacity and therefore those studies do not comprise sufficient data upon which to grant the Permit.

Many of these allegations are simply irrelevant to the granting of a Class II Air Quality Permit; moreover, even if such allegations were deemed relevant, none of them were supported by any evidence at the April 29 hearing. Summary judgment is, therefore, appropriate as a matter of law. *See Hickman,* 96 Nev. at 784.

1. Hazardous Waste Allegations Are Not Relevant to Issuance of an Air Permit Modification

[7] See, February 25, 2009 letter from NDEP to Mathewson, NDEP Exhibit "F".

As discussed above in Ms. Griffin's claims, hazardous waste issues are outside the scope of a Class II Air Quality permit appeal. Moreover, as similarly detailed above, Mr. Mello's contention is incorrect and is not supported by facts in the record. [8] Summary judgment, therefore, should be granted on this claim.

2. Because the Facility is in Full Compliance with State Odor Regulations, the Continuing Complaints about Odor from the Facility are not Relevant to the Issuance of an Air Permit Modification.

Mr. Mello next complains that odors from the Facility constitute a nuisance. This contention was the focal point of the Hearing, and appears to be Appellants' primary concern.[9] However, the facts in the record conclusively demonstrate that the Facility is not a nuisance under state law. *See, NDEP Response* (citing odor standard of NAC 445B.22087); Tr. at 65-68. Because no countervailing studies or other material *facts* have been produced by Appellants, the issue is ripe for determination through summary judgment. *See, Bakernick,* 94 Nev. 428.

Odor nuisances are governed by state law. NAC 445B.22087 provides that an odor violation exists if two odor measurements taken within one hour result in a detectable odor after the air is diluted to a 8:1 standard with clean air. In fact, the County conducted extensive odor sampling during which odors could not be detected at all during most of the sampling; on a few occasions odors were only detected at a dilution level of 2:1, *4 times lower than* the applicable state standard for nuisance odors. Transcript at 66-67. Moreover, since May 2007, NDEP has spent hundreds of hours investigating odor complaints at the Facility and has conducted 14 inspections of the Facility, allocating extraordinary resources to the residents' odor concerns. *NDEP Response;* Tr. at 264-66, 282-85, 292, 300. NDEP has never found a violation of NAC 445B.22087. NDEP, nevertheless, continued to work with the facility to reduce all potential odor causing activities and many improvements at significant expense to the facility have been made. Tr. at 67-69. NDEP's ultimate conclusion was that the complained-of odors "[d]o not meet the definition of persistent, strong odors that constitute a nuisance" pursuant to NAC 445B.22087. Id. Further, Mr. Mello alleges no facts indicating that Bango Oil has violated this standard. Accordingly, summary judgment is plainly appropriate. *See, Bird,* 97 Nev. at 71.

3. Vague Assertions Regarding "Perceived" Health and Quality of Life Issues are Factually Unsupported and are Not a Legal Basis to Reverse or Modify the Permit.

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[8] In the interest of efficiency, Bango Oil will not restate the reasons why a hazardous waste complaint is irrelevant to the Permit. Instead, please refer to Section II.B of this motion for a fuller discussion.

[9] See, e.g., Tr. at 34-37 (opening statement of Don Mello); 39-40 (opening statement of David Mathewson); 47-49 (opening statement of Lorraine Griffin).

Mr. Mello next contends that vague assertions made at NDEP's January 29, 2009 public hearing on the Permit provide a basis for its reversal. Many of these same vague assertions regarding "perceived health issues" and quality of life were reiterated at the Hearing. No facts supporting a correlation between the Facility and any of these complaints were presented at the hearing. Indeed, Mr. Mello's contention is solely based on the subjective views of various individuals. It is well settled that speculative or conclusory statements do not constitute facts sufficient to defeat a motion for summary judgment under Nevada law, *see, Bird*, 97 Nev. at 71, nor could such vague assertions serve as any legal basis for challenging the air permit modification.

4. Mr. Mello's Contention That NDEP Improperly Assessed the Emissions Impact of the Facility is False.

Mr. Mello's suggestion that NDEP "may have" tested the Facility when it was not operating or was at its lowest production levels is false. Mr. Mello introduced no evidence on this point. NDEP's conclusion that the Facility meets all applicable air quality standards was based on conservative, worst case assumption modeling of the maximum emission limits authorized by the Permit. *Application Review;* Tr. at 69-70, 77.

The undisputed facts of this case demonstrate that NDEP's modeling was proper for evaluating the air impacts of the facility and that, contrary to Mr. Mello's unsupported assertion, maximum permitted emissions were used in the model and that the facility is in compliance with these permitted emission levels. Therefore, summary judgment should be granted on this claim.

E. Appellants Provided No Relevant Facts at the Hearing That Would Preclude an Order Granting Summary Judgment.

As discussed more fully above, Appellants were granted an eight-hour hearing through which they were given a full opportunity to expand on their respective appeals. Appellants' claims must be limited to those raised in their respective appeals. NRS 233B.121(2). This fact cannot be ignored, as it would be procedurally improper to allow Appellants to expand the scope of their appeals with no prior notice to NDEP and Bango Oil. Notwithstanding this, even if Appellants could properly rely on new allegations and evidence first put forth at the Hearing, no genuine issues of material fact were raised at the hearing that would preclude a finding of summary judgment.

The majority of Appellants' testimony at the hearing was focused on odor issues. NDEP provided substantial evidence supporting its conclusion that the Facility does not violate the state order regulation, NAC 445B.22087. Accordingly, to avoid summary judgment, Appellants had the burden of producing evidence contravening NDEP's

review. Appellants did not meet their burden. The evidence relied on by Appellants consisted primarily of conclusory statements. Under Nevada law, such evidence is plainly insufficient to withstand a motion for summary judgment. *Bird,* 91 Nev. at 71.

IV. Conclusion.

None of the appeals of the Permit allege facts sufficient to support the reversal or modification of the Permit. Additionally, although this Commission's analysis must be limited to the claims alleged in the appeals, Appellants did not prove any facts during the Hearing that would support a reversal or modification of the Permit. Even granting all appropriate inferences to Appellants, Appellants have raised no genuine issues of material fact sufficient to preclude a grant of summary judgment, and Bango Oil is entitled to judgment as a matter of law. Accordingly, Bango Oil respectfully requests that this Commission grant this motion and enter an order granting Bango Oil summary judgment dismissing the respective appeals of the Permit.

Respectfully Submitted,

HOLLAND & HART LLP

By: Bryce C. Alstead
Nevada Bar Number 9954

Denise W. Kennedy, P.C.
Colorado Bar Number 15092[10]

BCA/DWK

[10] By an April 29, 2009, Order of the Commission, Ms. Kennedy has been admitted Pro Hac Vice for these proceedings.