

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

**BEFORE THE STATE ENVIRONMENTAL COMMISSION**

Appeal regarding Air Quality Violation No.  
3139, Class II Air Quality Operating Permit  
AP 1611-0835.03 (FIN A0480)

**REPLY BRIEF**

Reck Bros, LLC (“Reck Bros”), by and through its attorney Lucas Foletta of McDonald Carano LLP, submits this Reply Brief (“Brief”) pursuant to that certain Stipulation to Extend Briefing Schedule executed June 25, 2024 (“Stipulation”).

**I. Reck Bros. has not waived any arguments**

The Nevada Division of Environmental Protection (“NDEP”) contends that Reck Bros. waives any arguments not specifically made in its opening brief. (NDEP Response Br. at Section IV(c).) Its principal citation in support of this argument is to Nevada Rule of *Appellate* Procedure 28(a)(10). This citation is inapposite. The instant proceeding is not an appellate proceeding and thus the rule does not apply.

The record in this case has not been established; that is the purpose of the hearing. NAC 445B.890 (articulating the write of an aggrieved party to request a hearing). To require Reck Bros.—or any party requesting a hearing—to make every argument against the government’s action before the hearing undermines the purpose of the hearing itself. To this point, the Nevada Supreme Court has explained:

In quasi-judicial proceedings before an administrative hearing officer, waiver rules serve the same purpose as in traditional judicial proceedings: allowing a party to make arguments to which the opposing party has a chance to respond and the trier of fact has an opportunity to consider in an informed manner. *See Oliver v. Barrick Goldstrike Mines*, 111 Nev. 1338, 1344-45, 905 P.2d 168, 172 (1995) (stating that the purpose of the waiver rule “is to prevent appellants from raising new issues on appeal concerning which the prevailing party had no opportunity to respond and the district court had no chance to intelligently consider during the proceedings below”); *see also Valley Health Sys., LLC v. Eighth Judicial Dist. Court*, 127 Nev. 167, 173, 252 P.3d 676, 680 (2011); accord *Landmark Hotel & Casino, Inc. v. Moore*, 104 Nev. 297, 299, 757 P.2d 361, 362 (1988)

1 (“The purpose of the requirement that a party object to the action of the trial court at the  
2 time it is taken is to allow the trial court to rule intelligently and to give the opposing party  
the opportunity to respond to the objection.”).

3 *Highroller Transp., LLC v. Nevada Transp. Auth.*, 139 Nev. Adv. Op. 51, 541 P.3d 793, 801  
(Nev. App. 2023).

4 NDEP’s argument would turn the waiver rule on its head. NDEP will have every opportunity to  
5 rebut claims made by Reck Bros. at hearing. There is simply not a requirement that Reck Bros.  
6 put forward the particularized basis of every argument before-hand.

7 NDEP’s position also reads requirements into the SEC’s regulatory provisions that don’t  
8 exist. For example, the requirement that aggrieved parties submit a request for hearing. NAC  
9 445B.890(1). Nothing in that section conditions hearing rights—whether they be to scope or any  
10 other issues—on the basis of a more particularized brief. Indeed, nothing in NAC 445.8925  
11 authorizing briefs contains any specific requirements regarding the contents of briefs. Instead it  
12 is limited to administrative requirements (*e.g.*, page length). It bears noting too that briefs are  
13 required only on a permissive basis—where the SEC orders it. NAC 445.8295(1). They are not  
14 required as a matter of law in every case. *Id.* Nothing in the Stipulation and Order regarding  
15 briefing establishes such a requirement. (Stipulation and Order.)

16 Other procedural rules would be rendered meaningless as well. For example, the  
17 requirement to submit exhibits and notice of witnesses no later than five (5) days before hearing.  
18 NAC 445B.8914(1). A five-day rule for evidence is inconsistent with the claim that all evidence  
19 must be presented in the opening brief, as claimed by NDEP.

20 NDEP’s claim also improperly shifts the burden to Reck Bros. to identify the entirety of  
21 the basis of its defense, when in fact the state bears the burden to support its regulatory action.  
22 To this point, the NSC has held as follows:

23 The United States and Nevada Constitutions proscribe deprivation “of life, liberty, or  
24 property, without due process of law.” U.S. Const. amend. XIV, § 1; Nev. Const. art. 1, §  
8(2). Although “[t]he hearing officer shall liberally construe the pleadings and disregard

1 any defects which do not affect the substantial rights of any party,” NAC 679B.245(2), and  
2 “proceedings before administrative agencies may be subject to more relaxed procedural  
3 and evidentiary rules, due process guarantees of fundamental fairness still apply,”  
4 *Dutchess*, 124 Nev. at 711, 191 P.3d at 1166 (footnote omitted). “Administrative bodies  
5 must... give notice to the defending party of ‘the issues on which decision will turn and ...  
6 the factual material on which the agency relies for decision so that [the defendant] may  
7 rebut it.’ ” *Id.* (footnote omitted) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight  
8 Sys., Inc.*, 419 U.S. 281, 288-89 n.4, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974)). “***[I]n the  
9 context of administrative pleadings, ‘due process requirements of notice are satisfied  
10 where the parties are sufficiently apprised of the nature of the proceedings so that there  
11 is no unfair surprise.’*** ” *Id.* at 712, 191 P.3d at 1167 (quoting *Nev. State Apprenticeship  
12 Council v. Joint Apprenticeship & Training Comm. for the Elec. Indus.*, 94 Nev. 763, 765,  
13 587 P.2d 1315, 1317 (1978)).  
14 *Home Warranty Adm'r of Nevada, Inc. v. Dep't of Bus. & Indus.*, 137 Nev. 43, 48, 481 P.3d  
15 1242, 1248 (2021).

16 In this case, Reck Bros. properly filed the notices of appeal, citing the appropriate and  
17 necessary grounds for hearing. If the SEC desires to further refine the issues for appeal, it may  
18 do so by calling a pre-hearing conference pursuant to NAC 445B.8913. That said, nothing in the  
19 law requires Reck Bros. to definitively state each and every issue it will raise at hearing in the  
20 briefs in this matter. And nothing about reserving the ability to put forward additional evidence  
21 at hearing—so long as the SEC’s procedural rules are satisfied—creates an “ambush.”

## 22 **II. Reck Bros. appeal was timely filed**

23 As NDEP points out, Reck Bros. initiated the instant appeal with a timely filed notice of  
24 appeal. (NDEP Opening Br. at 4.) NDEP complains that a second appeal was filed outside the  
ten-day window, but that is not the case. The initial notice of appeal clearly indicates the basis of  
the appeal: that the notice of violation was (1) clearly erroneous, and (2) arbitrary, capricious and  
the result of abuse of discretion. (NDEP Opening Br. at Ex. G.) As set forth in Reck Bros.  
opening brief, those remain the basis of appeal. And although the separate identified factual  
bases for the appeal referenced errors with the penalty, there is no requirement that the notice  
include a detailed explanation of the appeal. Instead, the regulations merely require “[a] brief  
and concise statement of the facts which provide the basis for the appeal.” NAC 445B.890(3)(c).

1 The factual statement need not be exhaustive. *See id.* At NAC 445B.890(3).

2 Here, the facts clearly reveal a dispute about the NDEP’s notice of violation, which itself  
3 references the failed test. (Exhibit A.) Reck Bros. subsequent amendment to its notice of appeal  
4 simply provided additional detail as those details became known to Reck Bros. This is  
5 specifically consistent with the first notice of appeal, in which Reck Bros. stated: “Appellant will  
6 likely update this statement as further detail becomes available.” (NDEP Opening Br. at Ex. F.)  
7 It is also consistent with the treatment of analogous action in civil cases where claims are added  
8 by amendment. Those claims are considered to “relate back” to the complaint where they arise  
9 out of the same set of facts. NRCP 15(c). Ironically, while NDEP raises concerns about being  
10 “ambushed”, their argument instead creates an unsupported burden on Reck Bros. to identify  
11 with particularly the factual basis of its appeal within ten days of the complained about violation.  
12 Nothing in the statues or regulations supports this reading.

13 **DATED this 9th day of September, 2024.**

14 **McDonald Carano LLP**

15  
16 **By:**   
17 **Lucas Foletta, Esq.**  
*Attorney for Reck Bros, LLC*

18  
19  
20  
21  
22  
23  
24

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

PROOF OF SERVICE

I hereby certify that I electronically delivered the foregoing REPLY BRIEF on behalf of RECK BROTHERS LLC to the following persons and entities electronically to the following parties as indicated below:

**Sheryl Fontaine**  
**Frederick Perdomo**  
**Nevada State Environmental Commission**  
[Pucnsfontaine@dnep.nv.gov](mailto:Pucnsfontaine@dnep.nv.gov)  
[fperdomo@ndep.nv.gov](mailto:fperdomo@ndep.nv.gov)

**Office of the Attorney General**  
**Aaron D. Van Sickle**  
**Greg Cloward**  
**Angela Lee**  
[advansickle@ag.nv.gov](mailto:advansickle@ag.nv.gov)  
[JCloward@ag.nv.gov](mailto:JCloward@ag.nv.gov)  
[amlee@ag.nv.gov](mailto:amlee@ag.nv.gov)  
*Attorneys for the Nevada Division of Environmental Protection*

DATED: September 9, 2024.

/s/Carole Davis  
An Employee of McDonald Carano LLP