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7 **BEFORE THE STATE ENVIRONMENTAL COMMISSION**
8 **STATE OF NEVADA**

9 RECK BROTHERS, LLC,
10 Appellant,

11 vs.

12 NEVADA DIVISION OF
ENVIRONMENTAL PROTECTION,
13 Respondent.

**Re: Appeal of Notice of Alleged Air
Quality Violation No. 3139
Class II Air Quality Operating
Permit AP1611-0835.03**

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15 **NDEP'S RESPONSE BRIEF**

16 Respondent the Nevada Division of Environmental Protection, Bureau of Air Quality
17 Planning ("NDEP"), by and through counsel, Nevada Attorney General Aaron D. Ford and
18 Deputy Attorney General J. Gregory Cloward, hereby files its Response to the "Opening
19 Brief" filed by appellant Reck Brothers, LLC ("Reck"). This Response is based on the
20 attached Memorandum of Points and Authorities and all pleadings on file, the exhibits
21 attached hereto, as well as the oral argument the State Environmental Commission
22 ("SEC") will hear on this matter.

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 **I. INTRODUCTION**

25 Reck challenges a notice of alleged violation issued by NDEP. The violation relates
26 to Reck exceeding the emissions limits of its operating permit by 438%. Reck does not
27 challenge the fact that that exceedance occurred. For the reasons articulated herein, this
28 Commission should affirm the notice of alleged violation.

1 **II. RELEVANT FACTS**

2 Reck operates an asphalt plant in Ely. At the time of the violation underlying this
3 appeal, Reck was allowed to operate pursuant to Class II Air Quality Operating Permit
4 AP1611-0835.03 (“the permit”) issued by NDEP. See Exhibit A, Class II Air Quality
5 Operating Permit AP1611-0835.03. For the emission unit at issue in this appeal, Reck’s
6 drum mixer, the permit sets forth specific emissions limits for various compounds. *Id.* at
7 NDEP 13. As relevant here, Reck must not discharge PM₁₀¹ into the atmosphere at a rate
8 in excess of 2.06 pounds per hour. *Id.* The permit also sets forth requirements for
9 monitoring, testing, and recordkeeping, related to the drum mixer. *Id.* at NDEP 14.

10 In 2021, NDEP staff conducted an inspection at Reck’s plant. Exhibit B, Notice of
11 Findings and Stop Order No. 2023C-06, at NDEP 37. The inspection revealed that Reck
12 had failed to complete compliance testing of the drum mixer as required by the permit. *Id.*
13 On April 1, 2022, NDEP issued three minor violations for Reck’s failure to comply with the
14 recordkeeping requirements of the permit. *Id.* at NDEP 38. On July 3, 2023, NDEP issued
15 a stop order requiring Reck to cease operation of the drum mixer until Reck scheduled
16 compliance testing for the unit. *Id.* at NDEP 39. The stop order required Reck to complete
17 compliance testing withing 90 days of startup of the drum mixer. *Id.*

18 In conjunction with the stop order, Reck coordinated with a third party, Broadbent
19 & Associates, Inc. (“Broadbent”), to conduct compliance testing in November 2023. See
20 Exhibit C, Source Test Report. The testing found that the drum mixer was emitting PM₁₀
21 at a rate of 9.015 pounds per hour²—an exceedance of 438% of the 2.06 pounds per hour
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25 ¹ PM₁₀ is particulate matter 10 micrometers in diameter or less. Particulate matter is not a single
26 pollutant, but rather a complex mixture of solid particles and liquid droplets. Particulate matter that is 10
27 micrometers or less are inhalable into the lungs and can cause adverse health effects. PM₁₀ is one of the
28 criteria air pollutants for which the Clean Air Act requires the US Environmental Protection Agency to set
National Ambient Air Quality Standards. See United States Environmental Protection Agency, Particulate
Matter Basics, <https://www.epa.gov/pm-pollution/particulate-matter-pm-basics>.

² Reck completed three runs during its November 4, 2023, testing. Broadbent invalidated the second
run because the final leak rate exceeded the initial leak rate, indicating that not all emissions were measured
during testing. 9.015 pounds per hour represents the average of the first (10.11 pounds per hour) and third
(7.92 pounds per hour) runs. See Exhibit D at NDEP 188.

1 allowed by the Permit. *See* Exhibit D, NDEP Source Test Review, at NDEP 188; *see also*
2 Exhibit C at NDEP 126. Reck does not challenge that result.

3 On February 15, 2024, NDEP issued the subject Notice of Alleged Air Quality
4 Violation No. 3139 (hereafter, “NOAV No. 3139” or “the NOAV”). Exhibit E, Notice of
5 Alleged Air Quality Violation No. 3139. The NOAV found a violation for Reck’s failure to
6 comply with the emissions limits set forth in the permit. *Id.* at NDEP 200. The NOAV also
7 noted that, at a previous enforcement conference, Reck had failed to provide any evidence
8 that the exceedance had not occurred. *Id.* The NOAV stated NDEP’s intent to seek a
9 penalty of \$21,024. *Id.* at NDEP 197.

10 On February 23, 2024, Reck filed a notice of appeal purporting to challenge the
11 amount of NDEP’s recommended penalty. Exhibit F, First Request for Appeal Hearing.
12 Reck subsequently filed a second notice of appeal challenging NOAV No. 3139 itself.
13 Exhibit G, Second Request for Appeal Hearing.

14 **III. STANDARD OF REVIEW**

15 This appeal is governed by NAC 445B.890. Reck asserts one issue on appeal—that
16 NDEP’s decision to issue NOAV No. 3139 was arbitrary and capricious. Appellant’s
17 Opening Brief (“AOB”) at 1–2;³ *see also* NAC 445B.890(2)(f). When reviewing a question of
18 fact, this Commission accords deference to NDEP’s determination that Reck exceeded the
19 emissions limitations of its permit. *See State Indus. Ins. Sys. v. Bokelman*, 113 Nev. 1116,
20 1119, 946 P.2d 179, 181 (1997) (“On questions of fact, an administrative agency’s decision
21 is given deference . . .”). This Commission’s inquiry is limited to reviewing whether
22 NDEP’s determination is supported by substantial evidence. *Id.* (internal citation omitted).
23 “Substantial evidence is that which a reasonable mind might accept as adequate to support
24 a conclusion.” *Nevada Emp’t Sec. Dep’t v. Cline*, 109 Nev. 74, 77–78, 847 P.2d 736, 738
25 (1993) (internal quotation marks and citation omitted).

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³ In violation of NAC 445B.8925(5)(e), Reck’s Opening Brief does not include page numbers.
Therefore, the page numbers cited herein assume the first page of the Opening Brief is page “1.”

1 **IV. ARGUMENT**

2 This Commission should affirm NOAV No. 3139. First, Reck’s appeal warrants
3 dismissal as untimely filed because Reck did not file a notice of appeal challenging the
4 NOAV itself within NRS 445B.340’s 10-day window. Second, Reck’s appeal fails on the
5 merits because the source test revealed an emissions exceedance of 438%, Exhibit D at
6 NDEP 188, constituting a violation of a condition of Reck’s operating permit, Exhibit A at
7 NDEP 13. Reck concedes that this “limited exceedance” occurred. AOB at 1. And Reck’s
8 argument that the exceedance does not constitute a violation is non-cogent, and
9 unsupported by any legal authority or the record. *Id.* Finally, although Reck purports to
10 “reserve its right” to raise additional arguments challenging the NOAV in the future, *id.* at
11 2, any arguments not raised in the Opening Brief have been waived.

12 **A. Reck’s Appeal Warrants Dismissal as Untimely Filed**

13 NRS 445B.340 requires an aggrieved party to file its notice of appeal no later than
14 10 days after the date of NDEP’s notice of action. The statute does not provide for an
15 amended notice of appeal, nor does any other. Here, Reck filed its first notice of appeal
16 within NRS 445B.340’s 10-day window. *See* Exhibit F. However, that notice of appeal
17 challenged only NDEP’s proposed penalty related to the NOAV, not the NOAV itself. *See*
18 *id.* Because NDEP has yet to recommend a penalty to this Commission, that issue is not
19 ripe for a decision.⁴ Reck subsequently filed a second notice of appeal, in which it
20 challenged the NOAV. Exhibit G. But that notice was filed on March 6, 2024—more than
21 10 days after Reck received the NOAV.⁵ *See id.* Accordingly, Reck’s notice of appeal is
22 untimely and this Commission should dismiss it as such.

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25 ⁴ To be certain, NDEP intends to recommend a penalty to this Commission if and when a final decision
is made upholding the NOAV at issue in this appeal.

26 ⁵ NDEP emailed Reck a copy of the NOAV on February 15, 2024, and Reck acknowledged receipt of
27 the NOAV the next day. *See* Exhibit H, NDEP Email to Reck Brothers re: Enforcement Conference Summary
and Outcomes. Reck thereafter received a copy of the NOAV via certified mail on February 22, 2024. *See*
28 Exhibit I, United States Postal Service Electronic Certified Mail Return Receipt. Even if this Commission
were to calculate NRS 445B.340’s 10-day window from February 22, Reck’s second notice of appeal was still
filed untimely.

1 **B. Reck’s Failure to Comply with the Emissions Limitation Set Forth in**
2 **its Operating Permit Constitutes a Violation**

3 Should this Commission wish to hear Reck’s appeal, the appeal fails on the merits.
4 Failure of an operator to comply with “any condition of an operating permit constitutes a
5 violation.” NAC 445B.275(1). The operating permit involved in this appeal was issued on
6 February 20, 2019. *See* Exhibit A at NDEP 1. The permit sets forth various limitations on
7 each of Reck’s 16 emission units. *See generally* Exhibit A. As relevant to this appeal, the
8 permit states that “[t]he discharge of PM₁₀ to the atmosphere [from the drum mixer] will
9 not exceed 2.06 pounds per hour, **nor** more than 2.10 tons per year.” *Id.* at NDEP 13
10 (emphasis added).

11 Broadbent’s source test revealed that Reck’s drum mixer was emitting PM₁₀ at an
12 average rate of 9.015 pounds per hour—an exceedance of 438% of the 2.06 pounds per hour
13 allowed by the Permit. Exhibit D at NDEP 188. Reck concedes that this “limited
14 exceedance” occurred. AOB at 1–2. Nevertheless, Reck summarily argues that the
15 exceedance does not constitute a violation because the exceedance “does not reflect material
16 environmental harm.” *Id.* at 1. Reck further argues that because its plant did not operate
17 at full capacity in 2023, the failed test is not indicative of “actual environmental harm.” *Id.*

18 As an initial matter, this Commission need not consider Reck’s argument because it
19 is non-cogent, unsupported by any legal authority, and lacks factual support from the
20 administrative record. *See Edwards v. Emperor’s Garden Rest.*, 122 Nev. 317, 330 n.38,
21 130 P.3d 1280, 1288 n.38 (2006) (explaining that courts need not consider arguments that
22 are not cogently argued or lack the support of relevant authority).

23 Regardless, Reck’s argument demonstrates a misapprehension of the violation on
24 appeal. Although it sounds like legalese, there is no requirement that an operator cause
25 material, or actual, environmental harm before NDEP can issue an NOAV. Nor must
26 NDEP allow, as Reck appears to argue, a plant to exceed its emissions limits by 438% while
27 operating at full capacity for an entire year before issuing an NOAV. NDEP’s role is to

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1 prevent any environmental harm, if possible. NDEP is not limited only to prosecuting
2 operators who cause material harm to the environment.

3 Reck's argument also downplays the significance of this violation. Under the Clean
4 Air Act, the U.S. Environmental Protection Agency ("EPA") sets National Ambient Air
5 Quality Standards ("NAAQS"). See 42 U.S.C. § 7409. NAAQS include primary and
6 secondary pollutant standards. United States Environmental Protection Agency, NAAQS
7 Table, <https://www.epa.gov/criteria-air-pollutants/naaqs-table>. Primary standards provide
8 public health protection, which include protection of sensitive populations such as
9 asthmatics, children, and the elderly. *Id.* Secondary standards provide public welfare
10 protection, including protection against "decreased visibility, and damage to animals,
11 crops, vegetation, and buildings." *Id.* PM₁₀ has both a primary and secondary standard.
12 *Id.* Nevada is charged with developing and implementing a state implementation plan
13 ("SIP") that provides a statutory and regulatory framework for the State to attain and
14 maintain the NAAQS. 42 U.S.C. § 7410. Primary components of Nevada's SIP include
15 permitting stationary emission sources (like Reck's asphalt plant), verifying that the
16 proposed emissions from such sources are with the NAAQS, and confirming that each
17 permitted source's actual emissions are within authorized permit limits.⁶

18 When a permittee, like Reck, exceeds its permitted emissions limits, even
19 minimally,⁷ there are consequences. As an initial matter, permit emission limits are set
20 based on a facility's requested operating conditions and NDEP verification that the
21 operating conditions do not exceed the NAAQS. If a facility is allowed to operate in excess
22 of its permit limits, the permits lose significance, and the ultimate result is that NDEP
23 lacks certainty that it is attaining and maintaining ambient air quality with the NAAQS.

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25 ⁶ Nevada's SIP is not a single document. Rather, Nevada's SIP requirements are "a collection of
26 regulatory, non-regulatory and quasi-regulatory elements." Nevada Division of Environmental Protection,
27 Regulations and SIP Development, [https://ndep.nv.gov/air/planning-and-modeling/regulations-and-sip-
development](https://ndep.nv.gov/air/planning-and-modeling/regulations-and-sip-development).

28 ⁷ Reck's exceedance in this case was not minimal, but NDEP offers a minimal exceedance as an
example to demonstrate that there is no value to the "harmless error" argument posited by Reck as it relates
to a violation of a permit limit.

1 Additionally, facilities are required to install and maintain equipment that controls
2 emissions within permitted limits. Allowing facilities to disregard permit limits
3 encourages facilities to deprioritize these costs. This in turn creates a market advantage
4 for the facility associated with noncompliance and generates a general culture of
5 noncompliance within the State. Finally, if Nevada’s implementation of its SIP is deficient,
6 either for individual facilities or program-wide, the State and individual facilities are
7 subject to federal sanctions and/or enforcement. *See* 42 U.S.C. §§ 7410(m), 7509(a)(4),
8 7413. Reck’s harmless error argument is misguided and meritless.

9 Here, Broadbent’s particulate matter test demonstrated that Reck’s drum mixer was
10 discharging PM₁₀ at an average rate of 9.015 pounds per hour. Exhibit D at NDEP 188.
11 This is an exceedance of 438% of the operating permit’s allowance of 2.06 pounds per hour.
12 Exhibit A at NDEP 13. By causing this exceedance, Reck failed to comply with the
13 emissions limitation of the permit. And that failure constitutes a violation under
14 NAC 445B.275(1). Accordingly, this Commission should affirm NOAV No. 3139.

15 **C. Reck Has Waived Any Other Arguments**

16 Reck claims to “reserve the right to put forward evidence in support of” six additional
17 grounds upon which Reck has made no attempt to expound in its Opening Brief. AOB 2.
18 Reck cannot do so.⁸ “Issues not raised in an appellant’s opening brief are deemed waived.”
19 *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011).
20 Moreover, offering new arguments in a reply brief is improper because it deprives the
21 opposing party of an opportunity to respond. *Oracle USA, Inc. v. Rimini St., Inc.*, No. 2:10-
22 CV-0106-LRH-VCF, 2016 WL 6208254, at *2 (D. Nev. Oct. 24, 2016) (citing *Tovar v. U.S.*
23 *Postal Serv.*, 3 F.3d 1271, 1273 n.3 (9th Cir. 1993)).

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25 ⁸ New evidence is generally not considered by the Commission in a proceeding such as this. *See*
26 NAC 445B.8914(5) (providing, as relevant here, that “[t]he Commission will not, at a hearing to affirm, modify
27 or reverse an action of the Director pursuant to . . . [NRS] 445B.360, consider evidence which was not
28 submitted to the Department before the issuance of the decision or order which is the subject of the appeal
unless . . . [t]he Commission determines that reasonable cause exists for the failure of a party to submit the
evidence.”). To that end, this Commission’s hearing schedule, to which Reck did not object, provides for only
arguments based on the record—not the introduction of new evidence. *See* Exhibit J, SEC Email Setting
Hearing Schedule.

1 This Commission should not entertain Reck’s attempt to win this appeal by ambush.
2 This Response Brief is NDEP’s only chance to respond to Reck’s arguments before oral
3 argument. Reck should have articulated with particularity any argument it wished to raise
4 in its Opening Brief. *Cf.* NRAP 28(a)(10) (providing that an appellant’s opening brief “must
5 contain appellant’s contentions and the reasons for them, with citations to the authorities
6 and parts of the record on which the appellant relies . . .”). Reck chose not to do so thereby
7 depriving NDEP of a chance to respond to the other grounds Reck summarily lists in its
8 Opening Brief. Accordingly, any additional arguments Reck makes in the future have been
9 waived.

10 **V. CONCLUSION**

11 For the foregoing reasons NDEP respectfully requests that this Commission affirm
12 NOAV No. 3139.

13 DATED this 26th day of August, 2024.

14 AARON D. FORD
15 Attorney General

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1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of the Office of the Attorney General, State of Nevada,
3 and that on this 26th day of August, 2024, I served a copy of the foregoing NDEP'S
4 RESPONSE BRIEF, via electronic mail, to:

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INDEX OF EXHIBITS

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