BEFORE THE STATE ENVIRONMENTAL COMMISSION

STATE OF NEVADA

In Re: Appeal of Air Operating Permit: Class I Operating Permit No. AP4953-1148.01 by Refuse, Inc.	**NEVADA DIVISION OF ENVIRONMENTAL PROTECTION'S RESPONSE BRIEF TO REFUSE, INC.'S OPENING BRIEF**

The Nevada Division of Environmental Protection, Bureau of Air Pollution Control ("NDEP-BAPC" or "NDEP"), by and through counsel, Catherine Cortez Masto, Attorney General for the State of Nevada, and Jasmine K. Mehta, Deputy Attorney General, hereby responds to Refuse, Inc.'s ("RI") Opening Brief.

INTRODUCTION

The appellant, Refuse, Inc., sought – and obtained – a permit to use landfill gas emitted at the Lockwood Landfill in northern Nevada for use as a fuel to generate electricity. RI's application sought to avoid Prevention of Significant Deterioration ("PSD") permitting requirements – which would impose much more stringent technologies to prevent and minimize emissions – by self-imposing a carbon monoxide ("CO") cap of 249 tons per year ("tpy"), just under the 250 tpy limit that would trigger PSD permitting. RI also sought maximum operating flexibility, including the ability to burn variable, dirty gas without first conditioning it; the ability to overhaul and swap out engines without conducting a source test to verify emissions; no hourly limitations on operations; and the ability to shuttle its emissions between various units at the facility.

The Lockwood Landfill is located in a PSD-triggered basin, meaning that the air resource in that basin is extremely limited. Most of the resource has been consumed, and NDEP is tasked with trying to make as much of the resource available to new and existing sources.

NDEP accommodated all of RI's requests, in spite of concerns from the U.S. Environmental Protection Agency ("EPA"). However, in order to ensure compliance with the

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CO cap as well as to ensure that RI did not exceed the remaining limited amount of nitrogen oxides ("NOx") resource in the basin, NDEP imposed a continuous emissions monitoring system ("CEMS") for both CO and NOx as a compliance measure.

RI now contends that NDEP abused its discretion by doing so. But RI has not pointed to any law, regulation or rule that NDEP violated in requiring CEMS. In fact, RI's real concern is not with the cost or burden of operating CEMS (as stated in the Form 3). RI's real concern – as it admitted to NDEP – is that imposing CEMS will create a precedent to which other states might look in future permitting actions since RI (or its parent company) operates nationwide.

That is not a basis to impose – or fail to impose – CEMS. NDEP must manage the air resource in this State in the manner that benefits the most users and maintains its in-attainment status. NDEP is required, pursuant to NAC 445B.3405(c)(1), to impose permit conditions "sufficient to ensure compliance." That is exactly what NDEP has done in this case, and, therefore, RI's appeal should be denied.

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FACTUAL BACKGROUND

Refuse, Inc., by and through its agent, SCS Engineers, a firm based in Long Beach, California, first submitted an application for a Title V operating permit to burn landfill gas ("LFG") in internal combustion engines ("IC engines") to generate electricity at the Lockwood Landfill in northern Nevada on August 10, 2010. Aug. 10, 2010, SCS Cover Letter (NDEP1679), attached hereto as **Exhibit A.** NDEP rejected that application on August 24, 2010, as incomplete because RI failed to include the required Air Dispersion Modeling Analysis and Environmental Evaluation. 08/24/10 Letter (NDEP1585-1586), attached hereto as **Exhibit B**; 8/27/10 Email from L. Kennedy (NDEP1035-1036), attached hereto as **Exhibit C.**

RI intended to seek an artificial cap for carbon monoxide ("CO") to avoid triggering Prevention of Significant Deterioration ("PSD") requirements, which would require a different type of application. Toward that end, RI spoke with the permit engineer, Mr. Patrick Mohn, P.E., on September 3, 2010. SCS representative Gabrielle Fourie discussed with Mr. Mohn

what RI would need to provide for the requested emissions cap for carbon monoxide. Mr. Mohn followed that phone call with an email, which indicated that the proposed emissions cap needed to include "testing, monitoring, recordkeeping, and reporting provisions," such as "[p]rovisions for an adequate frequency of source testing to enable meaningful 12-month rolling emissions calculations" and "[p]rovisions for monitoring of operational parameters (examples are fuel flow rates, fuel heating value, etc.)." 9/3/10 Email from P. Mohn to G. Fourie (NDEP56-57) attached hereto as **Exhibit D.** Mr. Mohn also let SCS know that mere reliance on the manufacturer's guarantee regarding emissions would not be sufficient for purposes of demonstrating compliance. *Id.*

SCS resubmitted the application on September 13, 2010 (Application (NDEP1680-1812, attached hereto as **Exhibit E**) but once again, failed to include the required Air Dispersion Modeling Analysis and Environmental Evaluation. Nor did it adequately address the extensive monitoring and control requirements that Mr. Mohn had advised were necessary. However, based on SCS' verbal commitment to provide that evaluation in the near future, NDEP-BAPC agreed to accept the application and continue its technical review. As of November 19, 2010, the applicant still had not tendered the modeling analysis. Even though the application requested a facility-wide emissions cap of 249 tons per year of CO , it did not include any of the other existing air pollution sources located at the facility that were associated with the proposed cap, nor did it provide adequate detail for how RI would show compliance with the requested cap. Therefore, NDEP-BAPC issued a letter on November 19, 2010, requesting further information and informing RI that it would not continue to process the application until the requested items were addressed and submitted to the agency. 11/19/10 Letter (NDEP 1578-1579), attached hereto as **Exhibit F.** The applicant submitted the last of the required information on December 13, 2010, some three months later. 12/16/10 Email re timeline, attached hereto as **Exhibit G.**

RI's application to revise Title V Operating Permit AP4953-1148 involved permitting of a landfill gas-to-energy ("LFGTE") facility including three new 17.82 MMBtu/hr, 2233 horsepower internal combustion engines, manufactured by Caterpillar, fired by landfill gas,

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while also retaining the existing 64 MMBtu/hr candlestick flare used to combust landfill gas. **Exhibit E**; Technical Review of Application (NDEP2100-2116) at 2101, attached hereto as **Exhibit H.** RI requested that the IC engines and flare be permitted to operate under no operational constraints or limitations. Operating at maximum capacity, the three IC engines alone – not including the flare or other combustion units already in use at the facility - have a potential to emit approximately 252.3 tons per year ("tpy") of CO. In its application, RI noted that permitting of the IC engines and existing flare at full capacity would "trigger federal PSD requirements, which would delay and likely jeopardize this renewable energy project. As such, a facility-wide cap is proposed to create a synthetic minor facility under PSD." **Exhibit E** at 1685; **Exhibit H** at 2106.

There are two regulated pollutants at issue in this appeal: carbon monoxide and nitrogen oxides ("NOx"). Permitting of the IC engines would represent an increase of 38.8 tpy of NOx, increasing the facility-wide potential to emit to a total of 82.3 tpy of NOx, much closer to the major source level. RI proposed to monitor and record the flow of landfill gas into the three engines using a single flow device, calculating the flow "if necessary, to each engine using a ratio based on total flow and the power output to each engine." **Exhibit E** at 1697. In terms of compliance monitoring devices or activities, RI proposed to "maintain and operate the engines in a manner consistent with good air pollution control practices and perform an initial performance test to demonstrate compliance." ***Id.*** (emphasis added).

Because the facility is located in a PSD triggered basin where the air resource is limited, NDEP-BAPC was required to fully evaluate the additional consumption of the PM10, NOx, and SO2 resource left in the basin. In late January, NDEP-BAPC's analyses concluded that the proposed modification would not fully consume the remaining PM10, NOx, and SO2 increments allowing for the revised permit to be issued. It is worth noting that, if the analyses had concluded that any of the remaining increments would have been exceeded, NDEP-BAPC would have been required to deny issuance of the revised permit. NAC 445B.318.

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NAC 445B.3395(4) requires the agency to make a preliminary determination to issue or deny a significant revision of a Class I operating permit within 180 days after the official date of application submittal. Inspite of SCS' delay in providing the necessary information and because of significant pressure from SCS to issue the permit sooner, the agency issued draft revised Permit AP4953-1148 on February 11, 2011, more than 3 months before the regulatory deadline. The draft permit required that the LFGTE's IC engines employ continuous emissions monitoring systems ("CEMS") to monitor and record emissions of CO and NOx.

The draft permit was noticed for public comment and comment by the U.S. EPA Region IX. Public Notice (NDEP261), attached hereto as **Exhibit I.** By letter dated March 15, 2011, SCS Engineers provided nine comments on the draft permit. SCS Comments (NDEP2090-2096), attached hereto as **Exhibit J.** Following the receipt of comments by U.S. E.P.A. Region IX (NDEP2097-2099, attached hereto as **Exhibit K**), SCS, RI and NDEP-BAPC met on April 14, 2011, to discuss SCS' comments. Handwritten notes from L. Kennedy dated 4/14/11 (NDEP1380-1384), attached hereto as **Exhibit L**; Notes from P. Mohn (NDEP975-976), attached hereto as **Exhibit M**; *see also* 4/21/11 Email from P. Sullivan to P. Mohn and L. Kennedy regarding meeting (NDEP474), attached hereto as **Exhibit N.** Although the parties were able to resolve issues related to comments two through eight either at the meeting or through information subsequently provided by SCS, two issues proved more difficult. In comment no. 1, SCS requested, for the first time, "the flexibility to perform a "like" engine replacement if necessary" of the IC engines in the LFGTE facility. During the April 14 meeting, SCS/RI first described the operational problems involved in burning a "dirty fuel" such as landfill gas: the engines require careful maintenance to help maintain engine performance over time, as well as regular top-end overhauls and periodic major overhauls, at which time the entire engine block is replaced. **Exhibits L** and **M.** As related by SCS/RI, for simplicity, the entire engine is generally replaced every two to three years and rebuilt offsite. However, SCS/RI insisted that source testing of the replacement engines was unnecessary. None of the information regarding the intended operation of the LFGTE facility, the regular

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overhauls of the engines, nor the request to perform like-kind replacements of the IC engines, was described in the permit application.

NDEP-BAPC noted that the types of overhauls and like-kind replacements described by SCS/RI are rarely provided for in an operating permit because of complexities in determining compliance with various federal standards that become effective at the time units are reconstructed and/or fully replaced. Instead, NDEP-BAPC's regulations contain provisions for sources to request permission to undertake various equipment changes so that an evaluation of any new requirements can take place before an engine is overhauled or replaced. SCS/RI noted that LFGTE facilities typically operate at 98% utilization and wanted to maximize running time by not having to go through additional review. SCS/RI insisted that the permit contain the flexibility to accommodate the engine overhauls and replacements.

In comment no. 9, SCS stated its objections to the IC engines' CEMS requirement. SCS gave 14 examples of other jurisdictions that had permitted a LFGTE facility without requiring CEMS. SCS claimed that:

- "emissions change slowly over time;"
- the CEMS are "overly burdensome" and "extremely cost-prohibitive for a small-scale, renewable energy facility such as ... at Lockwood;"
- there is "no jurisdiction or regulatory precedent that requires CEMS except for those that have rules requiring CEMS, which NDEP does not;" and
- there are "known operational issues" involving the use of CEMS that arise from the presence of "acid vapors, SO2, and siloxanes" in the exhaust gas.

Exhibit J at 2094-95.

SCS also stated that "the vast majority of all LFGTE installations require annual stack testing to determine emission compliance and continuous monitoring/recording," and said that it could "provide monitoring, recordkeeping, and reporting requirements that are commonly used for LFGTE facilities." *Id.* None of these were provided in the permit application.

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1. Meeting with SCS and RI to Address Their Comments

The parties discussed the two outstanding issues at length on April 14. SCS/RI said that they were concerned that the CEMS requirement would or could set a national precedent for permitting LFGTE facilities. **Exhibit L.** As a possible alternative to CEMS, NDEP-BAPC questioned whether SCS/RI would be willing to lower the proposed CO emission cap and the NOx emissions level for the engines, as they had since claimed that the actual emissions levels would be well the proposed permitted limit. *Id.* SCS/RI was adamant that such alternative was not an option. *Id.*

NDEP-BAPC raised the possibility of lowering the cost of installing and operating the CEMS, such as by combining the three stacks to reduce the number of CEMS analyzers, but SCS/RI insisted that the CEMS were unwarranted. *Id.* NDEP-BAPC suggested conditioning the gas, especially the siloxanes, so that the fuel source was more consistent (and therefore the emissions profile would be more consistent). SCS/RI said that siloxane conditioning would "kill the project." *Id.*

Noting the difficulties encountered by others trying to run IC engines in Nevada that are designed for use at lower elevations, and possible problems with generating sufficient LFG fuel because of the dry climate (while discussing SCS' comment no. 7), NDEP-BAPC asked if RI had experience operating LFG engines in other high-desert locations. SCS/RI responded that Lockwood had "plenty of gas" and that they operated engines in other desert locations.

According to SCS/RI, the IC engines have a "flat" or "constant operational profile," the engines "relied on instrumentation and process controls" to maintain consistent operation, and process upsets were not an issue. **Exhibit L.** NDEP-BAPC expressed concerns that the deteriorating performance of the engines over time raised questions regarding their emission profile. When the NDEP-BAPC asked what approaches were being taken by other jurisdictions to assess this question, SCS/RI said that quarterly monitoring using hand-held gas analyzers was being done to monitor emissions. SCS/RI said that some local agencies had written the use of hand-held monitors into their rules. Again, SCS provided no reference to or information regarding portable analyzers in RI's permit application. Nor did it mention

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them in its March 15, 2011, letter commenting on the draft permit. *See* **Exhibit E** and **Exhibit J.**

SCS agreed to provide the NDEP-BAPC with examples of "swap-out" or "like-kind" replacement found in air quality operating permits written by other agencies, and examples of other permits referencing the use of hand-held or portable gas analyzers for periodic monitoring. SCS/RI stated that they needed the final permit issued by May 15, 2011.

2. EPA's Comments

In its comment letter dated March 29, 2011, EPA expressed concern that: (i) the 249.0 tpy emission cap for CO was close to the 250 tpy CO threshold that defines major stationary sources under the PSD program; (ii) the permit contained no provision for monitoring condensable PM2.5 emissions; and (iii) the possibility that construction of the source might trigger permitting requirements under the GHG Tailoring Rule. **Exhibit K.** In discussing the CO emission cap, EPA stated that it "encourages a 5-10% buffer between the permitted emission limits and the federal threshold." EPA went on to state, "the permit should also state that if this [CO cap] limit is relaxed at any time, the facility will be subject to the requirements of 40 Code of Federal Regulations (CFR) 52.21 (r)(4). In addition, if the 249.0 tpy limit is exceeded, the facility may trigger PSD requirements." [1] *Id.* at 2098.

3. Additional information from SCS/RI

On April 21, 2011, SCS provided supplemental information to NDEP-BAPC. NDEP-BAPC found that the arguments made by SCS/RI were not compelling, and in fact were contradicted by the information the agency had gathered, as well as by some of the supplemental information SCS/RI presented. The agency did, however, grant RI the ability to swap out its engines for maintenance without requiring source tests each time the engines were replaced. 5/13/11 Email from L. Kennedy (NDEP1053), attached hereto as **Exhibit O.**

[1] 40 CFR 52.21 (r)(4) prevents a source from circumventing the PSD requirements by requesting a limitation and later exceeding that limit. It provides: "(4) At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then the requirements or paragraphs (j) through (s) of this section shall apply to the source or modification as though construction had not yet commenced on the source or modification."

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As requested by RI, NDEP did not require any operational limits, allowing RI to operate 24 hours a day, seven days a week. Final Permit (NDEP839-936), attached hereto as **Exhibit P.** Nor did NDEP lower the proposed CO emission cap in the permit as suggested by EPA.[2] The NDEP-BAPC accommodated all of the proposed operational flexibility demanded by RI. However, NDEP-BAPC required NOx and CO CEMS to ensure that compliance with the proposed CO cap, the NOX increment, and the short-term emissions limits for NOx and CO are maintained while accommodating RI's requests for maximum operational flexibility, including operation of the LFG flare and maintenance and replacement of the LFG fired engines. On May 12, 2011, NDEP-BAPC issued the final revised Permit, based on its findings that:

- CEMS are in fact in use on LFG engines in at least one other jurisdiction (in the Southern California Air Quality Management District ("SCAQMD");
- RI plans to operate the facility at 98% utilization, insisting on maximum operational flexibility, including the ability to conduct LFG engine replacements as needed;
- RI was unwilling to consider a lower emission cap for CO or lower emission limits for NOx;
- The hand-held monitoring proposed by RI is insufficient to demonstrate compliance;
- More frequent monitoring of this source configuration is required to demonstrate compliance with the 249 tpy CO cap, which is only 0.4% below the 250 tpy applicability threshold;
- Monitoring using the CEMS addressed RI's need for maximum operational flexibility and frequent engine overhauls and replacements, and meant that the frequency of stack testing can be diminished. *Id.*

This appeal followed.

[2] As RI states, "[i]t is not unusual for permit limits to be established with a reasonable buffer between the permit limit and the expected actual emissions in order to provide a high degree of confidence that the emission limit will be met." Opening Br. at 12, fn. 11. RI did not request or propose such a permit limit, and in fact flatly dismissed the concept as unacceptable during its April 14, 2011, meeting with NDEP. **Exhibit L** at 1382.

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STANDARD OF REVIEW

Refuse, Inc. contends that the Commission may conduct a *de novo* hearing to determine whether its requested revisions to the permit should be issued. That is not – and has never been – the standard of review that the Commission has employed. The Commission has not received new evidence and substituted its judgment for that of its expert agency. Instead, it has limited its review to the evidence that was before the agency at the time that it was making its permitting decision. It has also reviewed the agency's decision in light of an alleged violation of a law or regulation in issuing the permit. In the absence of such alleged violation, the Commission has dismissed an appeal. *See* Order Granting Motion to Dismiss in re Appeal of Class I Air Quality Operating Permit to Construct to Jungo Land & Investments, Inc. (June 9, 2010) (dismissing appeal "based on appellants' failure to identify a legal or factual basis for denying [the] permit"). Refuse, Inc. seeks a *de novo* hearing so that it may provide evidence to the Commission that Refuse, Inc. failed to provide to NDEP when NDEP was engaged in its permitting decision-making process. Refuse, Inc. also seeks a *de novo* hearing because it requests that the Commission merely change the language of the permit to eliminate the requirement for CEMS, but then require NDEP to defend that new permit to the U.S. Environmental Protection Agency and to the public during the public comment period.

If the Commission suddenly decides to depart from its standard of practice over the last forty years and to conduct a *de novo* hearing on the issuance of the permit, the Commission will effectively have supplanted NDEP as the permitting agency, and, in doing so, will violate federal and state law.

A. If the SEC Were to Undertake a *De Novo* Hearing, It Will Usurp the NDEP's Statutorily Mandated Role and May Put the State's Air Pollution Control Program Out of Compliance with the Federal Clean Air Act.

Each state is required to comply with the federal Clean Air Act, 42 U.S.C. §§ 7401 through 7671q. The state is required to submit a state implementation plan to demonstrate how it will comply with the Clean Air Act provisions. 42 U.S.C. § 7410(a). The State

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Implementation Plan must include emission limitations, control measures, monitoring, and a permitting program for stationary sources to ensure compliance with the National Ambient Air Quality Standards. *Id.*

Nevada has submitted its Implementation Plan. In addition, the Nevada Legislature has designated the Department of Conservation and Natural Resources as the Air Pollution Control Agency of the State for the purposes of the Federal Act. NRS 445B.205. NRS 445B.135 defines the "Federal Act" as "the Clean Air Act (42 U.S.C. §§ 7401 et seq.), which includes the Clean Air Act of 1963 (P.L. 88-206) and amendments made by the Motor Vehicle Air Pollution Control Act (P.L. 89-272, October 20, 1965), the Clean Air Act Amendments of 1966 (P.L. 89-675, October 15, 1966), the Air Quality Act of 1967 (P.L. 90-148, November 21, 1967), the Clean Air Amendments of 1970 (December 31, 1970) and any amendments thereto made after July 1, 1971." Thus, the Department of Conservation and Natural Resources is the agency that must implement the Clean Air Act and possesses the authority to "take all action necessary or appropriate to secure to this state the benefits of the Federal Act." NRS 445B.205(2).

Interestingly, the designation of the Department as the State Air Pollution Control Agency for the purposes of the Clean Air Act is located in the section establishing the SEC. The Legislature wanted to make it clear that the SEC was not the Air Pollution Control Agency.

The SEC does, however, have a role with respect to the State's compliance with the Clean Air Act. The SEC must promulgate implementing regulations. In doing so, it must rely on the Department for technical advice, support and assistance. NRS 445B.200(7).

The Department is the only entity that may issue permits. It may "[m]ake such determinations and issue such orders as may be necessary to implement the purposes of NRS 445B.100 to 445B.640, inclusive." NRS 445B.230(1). It may also "[r]equire the submission of such preliminary plans and specifications and other information as it deems

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necessary to process permits."[3] NRS 445B.230(6). In contrast, the SEC is the regulation-making arm of the executive branch. It may adopt regulations, establish air quality standards, require record access, establish emission control requirements, designate hazardous air pollutants, hold hearings, establish fuel standards, and require elimination of devices or conduct that create an undue amount of pollution. NRS 445B.210.

As the permitting authority, the Department has the responsibility to implement the federal Title V Program under the Clean Air Act. 40 C.F.R. Part 70 "provide[s] for the establishment of comprehensive State air quality permitting systems consistent with the requirements of title V of the Clean Air Act (Act) (42 U.S.C. 7401, et seq.)." 40 C.F.R. § 70.1(a). The Title V Program is one that requires NDEP to obtain approval directly from EPA as part of the requirements under 40 C.F.R. Part 70. *See* 40 C.F.R. § 70.4(b)(3)(ix) (prohibiting the state authority from issuing a permit "if the Administrator timely objects to its issuance pursuant to §70.8(c) of this part or, if the permit has not already been issued, to §70.8(d) of this part."); 40 C.F.R. § 70.8 (requiring the permitting authority to transmit a copy of the permit application, proposed permit, and final permit to the EPA). If the EPA objects to issuance of the permit, the permitting authority, *i.e.* NDEP, may not issue the permit. 42 U.S.C. § 7661d(b)(3); 40 C.F.R. § 70.8(c). NDEP would have 90 days to resolve the EPA's concerns. If it fails to do so, the EPA "shall issue or deny the permit . . . ." 42 U.S.C. § 7661d(c). Additionally, if the EPA determines that cause exists to "terminate, modify, or revoke and reissue a permit," and if NDEP fails to address the EPA's concerns within 90 days, the EPA may do so. 42 U.S.C. § 7661d(e).

Hence, even if the SEC were to require that the CEMS requirement be struck from the permit, EPA may object to the issuance of such revised permit (which would result in delay of the permit until EPA's concerns are resolved), or it may terminate, modify, or revoke the permit itself.

[3] The Department delegated this role to the Division of Environmental Protection on May 30, 2007. *See* Letter from Allen Biaggi to Wayne Nastri, attached hereto as **Exhibit Q**. This evidence is the type for which the SEC may take judicial notice under NRS 233B.123(5) and NRS 47.160, and NDEP requests that the SEC do so.

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Additionally, and more importantly, if EPA were to determine that the SEC has usurped NDEP as the permitting authority, it could determine that Nevada was not adequately administering and enforcing its permitting program. 42 U.S.C. § 7661a(i)(1). Such determination would allow the State to correct the deficiency within 18 months, but if it failed to do so, the EPA "shall, 2 years after the date of such finding, promulgate, administer, and enforce a program under this subchapter for that State." 42 U.S.C. § 7661a(i)(4). Thus, in the worst-case scenario, if the SEC were to usurp NDEP's role as the permitting authority, the SEC would be required to submit a Title V permitting plan and obtain the EPA's approval under the Part 70 provisions in order to issue permits like Refuse, Inc.'s. If it failed to do so, the EPA could take over air permitting for Nevada, which would result in significant delay to industry.

Thus, if the SEC determines that it may conduct a *de novo* hearing and reopen the permit to insert language requested by the permittee (or other aggrieved party), the SEC will have usurped the Department's role as the Air Pollution Control Agency, in violation of NRS 445B.205. Such action may also cause the State to be in violation not only of its State Implementation Plan, but also of its permitting program under 42 U.S.C. § 7661a-7661f, and 40 C.F.R. Part 70.

B. State Law Does Not Allow for a *De Novo* Hearing.

In addition, the Nevada Administrative Procedure Act ("APA"), NRS 233B.010 through 233B.150, does not support *de novo* hearing authority by the SEC. The Nevada APA states that in contested cases, such as an appeal to SEC:

> Notice may be taken of judicially cognizable facts and of generally recognized technical or scientific facts within the specialized knowledge of the agency. Parties must be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they must be afforded an opportunity to contest the material so noticed. The experience, technical competence and specialized knowledge of the agency may be utilized in the evaluation of the evidence.

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NRS 233B.123(5). The "opportunity to contest" judicially noticed evidence, under general Nevada evidence law, is restricted to "an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter to be noticed" and does not extend to contesting the actual substance of the judicially noticed evidence. NRS 47.160. This limitation makes sense because judicially noticed facts are from "sources whose accuracy cannot reasonably be questioned, so the fact is not subject to reasonable dispute." *Id.* This indicates that the Nevada legislature intended NDEP's factual determinations within its specialized knowledge to be beyond dispute. The last sentence in NRS 223B.123(5) also indicates that agency determinations should be given weight in the evaluation of the evidence, not just the fact finding.

C. A *De Novo* Hearing and Issuance of a Modified Permit Would Effectively Make the SEC the New Permitting Authority.

If the SEC acquiesces to RI's request that it conduct a *de novo* hearing and reissue the permit with RI's suggested language omitting a CEMS requirement, the SEC will effectively become the new permitting authority, notwithstanding the Legislature's designation of DCNR as such. There will be nothing to prevent any aggrieved party, which the SEC has traditionally broadly defined, from contesting a permit that it doesn't like, introducing new evidence, and requiring the Commissioners to substitute their judgment for that of NDEP, the expert agency. The Commissioners will then be forced to become experts in air pollution control: they will have to evaluate technology, delve into modeling reports, engage in discussions with the EPA about pending permit applications to make sure that EPA is satisfied with the controls and monitoring in the permit, and engage in discussions with the public about the permit. Unlike NDEP's employees who review the applications and conduct technical reviews, most of the Commissioners are not engineers. Nor do they have any specialized expertise with respect to air pollution controls and technologies. If, however, the SEC buys in to RI's argument, that is exactly what they will have to obtain in order to be able to act as the permitting authority. Moreover, if the SEC effectively usurps NDEP's permitting authority, it will be incumbent upon the SEC to defend its permitting decisions when those

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decisions are challenged on judicial review. NDEP cannot defend a decision that it did not make.

Furthermore, such decision will create an environment of uncertainty for regulators and permit applicants alike. From the regulators' perspective, nothing would prevent an applicant from withholding information (such as in this case), from NDEP, seeing what it could get from that agency in its permit, and then, if not satisfied (such as in this case), seeking to introduce the information that it withheld on appeal to the SEC in the hopes of getting a better result from this agency. From industry's perspective, nothing would prevent members of the public from appealing to the SEC a permit issued by NDEP and introducing new evidence that they failed to bring to NDEP's attention during the public comment period. Such procedure would allow the appellant to engage in lengthy discovery in a fishing expedition to find new evidence for its appeal. The permittee would face uncertainty regarding its permit conditions and may be reluctant to expend money to comply with its permit terms in the face of such uncertainty.

In addition, if the SEC were to comply with RI's request that it insert Refuse, Inc.'s language in the permit, nothing would prevent members of the public from appealing the permit after re-issuance and bringing new evidence a second time around, since the re-issued permit would essentially be a modification of the existing permit. Depending on the outcome of that hearing (i.e., if the permit is again modified), the SEC could then be in the position of being arbiter in a seemingly endless loop of appeals.

Finally, as a matter of fairness, it would be inequitable for the SEC to make a permitting decision based upon information that the applicant or appellant failed to bring to NDEP's attention before it made its permitting decision. NDEP, as the expert agency, deserves deference to its permitting decisions and to the evidence that was before it when it was engaged in the decision-making process.

The SEC should not entertain new evidence that RI failed to provide to NDEP. RI has not provided any reason, much less good cause, for its failure to do so. If the SEC determines that NDEP should consider such evidence, then the appropriate avenue for the SEC is to direct RI to submit an application to modify the monitoring requirements in its

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permit, at which time it may provide the new information for the agency to consider in its permit review process.[4]

ARGUMENT

A. Overview of RI's Arguments about NDEP's Permitting Decision.

RI argues that NDEP abused its discretion by requiring CEMS to monitor RI's NOx and CO emissions. Yet, it was RI that wanted maximum operating flexibility, including engine overhauls and replacements without source tests, the ability to go back and forth between using the flare and using the IC engines, no operational limits such as limits on hours of operation, and the ability to use dirty gas without conditioning it first.

In addition, the 249 tpy CO cap was a self-imposed limit that RI sought in order to avoid the federal PSD permitting requirements. Moreover, the facility is located in an area where the resource is limited.

Thus, there can be no real dispute that this source and the circumstances in which it desires to operate are unique. NDEP was tasked with ensuring compliance with RI's self-imposed cap pursuant to NAC 445B.3405 while trying to accommodate the level of operating flexibility that RI sought.

RI next argues that NDEP abused its discretion because it has inconsistently required CEMS for RI's facility but not for other similar sources. Opening Br. at 13. There are no similar sources. NDEP must consider each permit application on a case-by-case basis, and in this case, RI sought maximum flexibility with minimal source testing, as well as a self-imposed cap to avoid PSD permitting. The Lockwood Landfill is located in the Tracy Air Basin, which has very limited resource available to remaining sources.

RI argues that NDEP required CEMS for compliance with its annual limits. RI has confused annual emission limits with the CO cap. NDEP did not require annual emission limits, which are limits that each unit at the facility may not exceed. Instead, per RI's request,

[4] RI says that it will provide its proposed permit language "that will address the alternative monitoring option based on hand-held analyzers" at the hearing. Opening Br. at 25, ll. 10-12. RI obviously has prepared such language. It should have provided such language in its opening brief so that the SEC has time to consider it, rather than springing it upon the Commissioners and NDEP at the hearing. NDEP requests that the Commission refuse to consider such language unless RI provides it no later than in its reply brief.

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NDEP issued an emission cap facility-wide for CO. This allows RI to shuttle its emissions between multiple units, so long as it does not exceed the cap.

RI next argues that NDEP typically requires source tests to establish annual emission limits. This is true, but irrelevant. Again, RI is confusing annual emission limits with the cap, but those are very different things. NDEP did not establish annual emission limits for RI's individual units, instead allowing it the maximum flexibility to use the units as it best sees fit so long as it does not exceed the cap. Because RI sought maximum flexibility for its operations, the circumstances of this permit are unique, and the normal tools that NDEP would use for compliance were not available.

RI argues that NDEP abused its discretion by requiring CEMS for its NOx emissions even though it would not exceed the remaining increment. RI ignores that the air resource in the Tracy Air Basin is highly limited. First, the available resource has been decreased from the maximum ambient air quality level of 100 $\mu g/m^3$ to 25 $\mu g/m^3$, the PSD increment level, Most of that 25 $\mu g/m^3$ has already been consumed. There is only a sliver remaining for new sources or existing sources seeking modifications. NDEP must manage that resource to maximize the opportunity for new and existing sources to use the remainder.

RI next contends that there is no realistic prospect that it will violate the CO cap, and therefore CEMS is not needed. Opening Br. at 11. Yet, RI is the one who requested the cap. Again, the cap was a self-imposed limit to avoid PSD permitting requirements. RI's own application shows that the three IC engines alone have a potential to emit more than the cap. Thus, it is very important for NDEP to ensure that RI complies with its self-imposed limitation.

RI contends that its emissions will be consistent over time, and that NDEP failed to consider emissions variability before issuing the permit. Opening Br. at 14-17. NDEP utilized its own experience and familiarity with how IC engines operate in Nevada before issuing the permit. The supplemental data provided by RI confirmed that emissions from LFGTE facilities are variable and tend to creep upward.

Finally, RI contends that NDEP acted arbitrarily and capriciously by failing to consider alternative monitoring options. It now seeks monitoring by handheld analyzers. Opening Br.

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at 23-24. RI did not propose such monitoring in its permit application, or even in its comments on the draft permit. RI raised the issue of handheld analyzers only after the comment period had expired at an April 14, 2011 meeting with the agency. Now, in this appeal, it seeks monitoring that differs from what it proposed even at that meeting. Handheld analyzers, however, cannot be used for compliance. They may be used as indicators of engine performance, but are not designed to be used for compliance and enforcement. Only source tests and CEMS may be used for compliance.

Thus, NDEP did not abuse its discretion in requiring CEMS to ensure compliance with the limit on RI's consumption of the NOx increment as well as with the CO cap. Such requirement was a necessary and prudent measure as required by NAC 445B.3405 to protect the remaining increment in the basin and to ensure that RI does not exceed its self-imposed limit.

B. NDEP Properly Exercised Its Discretion in Requiring a Continuous Emissions Monitoring System to Ensure that RI Complies with its NOX Emissions Limits.

1. The Tracy Basin is a Prevention of Significant Deterioration ("PSD") triggered basin and NDEP must monitor and manage consumption of the remaining air resource.

Under the Clean Air Act, certain areas are designated as either in attainment with National Ambient Air Quality Standards ("NAAQS"), in non-attainment, or unclassifiable. 42 U.S.C. § 7407(d). There are no areas within NDEP-BAPC's jurisdiction that are in non-attainment. However, in certain areas where major emitting sources are located, much of the air resource has already been utilized and more stringent federal standards for use of the remaining resource apply to ensure that these areas do not go into non-attainment. Those areas are known as PSD triggered basins. As explained by the EPA:

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> PSD increment is the amount of pollution an area is allowed to increase. PSD increments prevent the air quality in clean areas from deteriorating to the level set by the NAAQS. The NAAQS is a maximum allowable concentration "ceiling." A PSD increment, on the other hand, is the maximum allowable increase in concentration that is allowed to occur above a baseline concentration for a pollutant. The baseline concentration is defined for each pollutant and, in general, is the ambient concentration existing at the time that the first complete PSD permit application affecting the area is submitted. Significant deterioration is said to occur when the amount of new pollution would exceed the applicable PSD increment. It is important to note, however, that the air quality cannot deteriorate beyond the concentration allowed by the applicable NAAQS, even if not all of the PSD increment is consumed.

Prevention of Significant Deterioration (PSD) Basic Information, http://www.epa.gov/NSR/psd.html, (last viewed on Sept. 6, 2011).

For those areas, NDEP must determine how much of the remaining allowable resource (if any) an applicant's proposed modification would consume. If NDEP's analysis determines that the consumption of the remaining increment would exceed the balance available, NDEP would be required to deny issuance of a permit. NAC 445B.318. Thus, NDEP's evaluation must show that the increment consumption will not be greater than the remaining amount (if any) before NDEP may issue a permit.[5]

The Tracy basin was initially triggered for PSD by the Tracy Generating Station in 1994. The basin contains other important industries and is home to the partly-developed Tahoe Reno Industrial Center, which is being marketed as the world' largest industrial park. It contains the largest block of private land still available for industrial development in western Nevada with access to transportation (I-80, railroad) and utilities (electrical power, natural gas pipelines, and high-speed electronic conductivity). These qualities and its proximity to Reno and California make it highly desirable for industrial development. The basin has an aerial extent of only 280 square miles. The NDEP-BAPC is charged with managing the now limited air resources in this basin, while ensuring that economic growth and development can

[5] RI makes much ado about the fact that NDEP's air quality analysis showed that RI's project would have an insignificant impact on the increment. Opening Br. at 8, ll. 7-9. RI fails to mention that if NDEP's analysis had showed that the project would have a significant impact, it could not have issued the permit. *See* NAC 445B.318.

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continue to occur. Each proposed project requiring an air quality permit in the Tracy basin is carefully scrutinized before final action is taken to issue or deny the permit. This same scrutiny was given to the LFG project proposed by RI.

For nitrogen oxides – NOx for short – the National Ambient Air Quality Standard is and annual standard of 100 μg/m³,. However, the PSD increment established by EPA is an annual standard of 25 μg/m³, which is the more stringent standard that applies for permitting in the Tracy Basin. Much of the remaining increment has already been consumed throughout different portions of the basin. The NDEP-BAPC's evaluation of the resource is based on two separate one-year periods to provide a more accurate assessment of overall increment consumption. This provides two separate data sets, made up of thousands of individual data points that represent the entire basin, which the NDEP-BAPC relies upon for determining the remaining amount of air resource. In the case of RI's NOx analyses, one data set shows that 22.43 μg/m³ were consumed and the other showed that 21.27 μg/m³ were consumed. While these values are below the maximum 25 μg/m³ level, very little increment remains at these specific data points within the basin. As RI noted in its brief, where the NOx value of 22.43 μg/m³ occurs, RI's proposed LFG project will contribute only 0.02 μg/m³, with the balance being consumed by other existing sources. However, at a different location within the basin at Receptor 1282, RI's proposed LFG project is responsible for 1.36 μg/m³ of the 3.24 μg/m³ consumed. In other words, RI's proposed LFG project will nearly double the amount of NOx increment consumed at this location. RI contends that "NDEP's own increment analysis for the Lockwood LFGTE project . . . demonstrates that the NOx increment is not even remotely threatened by RI's facility." Opening Br. at 8, ll. 1-2. The fact that the small area is constrained to the incremental amount of the remaining NOx resource makes it clear that the resource is already threatened.

Appropriate authorization, management and enforcement of such consumption is important. Because the NOx resource is effectively capped at 25 μg/m³, it creates a microcosm cap-and-trade economy. If the PSD increment has been consumed and a new source wants to locate to the area, it will seek (and pay for) existing sources to reduce their

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emissions so that a portion of increment becomes available for it to use. Likewise, an existing source that wants to modify its operation may look to nearby sources for emissions reductions in order to free up the resource in the amount necessary to accommodate the modification. .

As a result, when NDEP grants the right to use a portion of the increment, it must be satisfied that the permittee will stay within the established emissions limitations to ensure that it does not consume more of the increment than it is allowed. Such determination is soundly within NDEP's discretion. In promulgating NAC Chapter 445B, the SEC has afforded NDEP with discretion to determine what measures are necessary to ensure compliance with permit conditions and all applicable requirements. RI requested a self-imposed limitation to avoid a federal applicable requirement. In fact, the NAC requires the NDEP to include in the permit monitoring that is "sufficient to ensure compliance" with any condition of the permit. See NAC 445B.3405(1)(c).

RI claims that since there is no specific regulatory requirement for CEMS with respect to internal combustion engines, NDEP has no discretion to require CEMS. In fact, NAC 445B.3405 sets forth the required contents for a Title V operating permit, and affords NDEP with that very discretion. NAC 445B.3405(1)(c) requires that the Class I operating permit "[c]ontain requirements for monitoring that are sufficient to ensure compliance with the conditions of the operating permit . . . ." (Emphasis added.)

RI contends that CEMS is overkill and that it could provide sufficient monitoring with portable handheld analyzers. However, such analyzers are not sufficient to demonstrate compliance. They are not deemed to be accurate enough for a compliance enforcement action. In fact, if NDEP had granted RI's request to only monitor with handheld analyzers, the permit would be susceptible to challenge by public interest watchdog groups as unenforceable. More importantly, if NDEP sought to bring an enforcement action based on a handheld analyzer reading, RI itself would very likely challenge the ability to enforce the emissions limit based on the analyzer. Portable analyzers, and especially the electrochemical ones proposed by RI, simply are not appropriate tools for compliance. They can be used as indicators of engine performance, but not for enforcement of a limit. There are only two

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federally recognized, State-approved tests for compliance: source tests and CEMS.

Moreover, the General Provisions under the Air Pollution Control Act regulations contemplate continuous emissions monitoring. NAC 445B.256 requires it for certain stationary sources. NAC 445B.257-265 sets forth requirements for CEMS. And NAC 445B.267 affords discretion to NDEP to allow for alternative monitoring procedures when requested by the applicant. NAC 445B.267 provides, in relevant part:

> 1. Upon written application by an owner or operator, the Director may approve alternatives to any monitoring procedures or requirements of NAC 445B.256 to 445B.267, inclusive, including, but not limited to, the following:
>
> (a) Alternative monitoring requirements when installation of a continuous monitoring system or monitoring device specified by those sections would not provide accurate measurements due to liquid water or other interferences caused by substances with the effluent gases.
>
> (b) Alternative monitoring requirements when the affected facility is infrequently operated.
>
> (c) Alternative monitoring requirements to accommodate continuous monitoring systems that require additional measurements to correct for stack moisture conditions.
>
> (d) Alternative locations for installing continuous monitoring systems or monitoring devices when the owner or operator can demonstrate that installation at alternate locations will enable accurate and representative measurements.

If a regulation was required before NDEP could impose CEMS, the agency would rarely be able to require it. Yet it has required CEMS in about 20 operating permits. In fact, although RI conveniently failed to mention so in its discussion of the Naniwa facility, that operating permit requires CEMS for NOx. As discussed in more detail below, unlike RI, which sought the flexibility to operate every minute of the year, the Naniwa facility operates peaker units that are only in use during times of need. Thus, the likelihood of exceeding its NOx limitation is far more remote than the likelihood of RI doing so.

C. A CEMS is Required to Ensure Compliance with RI's Self-Imposed CO Cap to Avoid the Federal PSD Permitting Requirements.

RI proposed a CO cap of 249 tpy to avoid the federal PSD permitting requirements. PSD permitting would otherwise be required because the PTE of the IC Engines alone

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exceeds the 250 TPY permitting threshold. Otherwise, as RI stated in its application, "if all control devices were operating concurrently at full capacity, emissions will trigger federal PSD requirements, which would delay and likely jeopardize this renewable energy project." **Exhibit E** at 1685. If RI triggered PSD requirements, it would be required to install Best Available Control Technology ("BACT"), which is the maximum degree of emissions control that it could achieve.

As RI stated in its application, the estimated emissions from the IC engines by themselves exceeded the 250 tpy threshold. They were estimated to emit 252.28 tpy of CO, which was an increase from the sitewide emissions of 112.95 tpy. The flares and IC engines would emit a total of 365.23 tpy of CO.[6] Thus, RI sought an artificial facility-wide cap of 249 tpy facility-wide to be a synthetic minor source. *Id.*

However, RI did not want to put CO controls on the IC engines. Nor did it want to do source testing every time that it swapped an engine out for maintenance. It did not want to condition the gas. It also wanted maximum operating flexibility. **Exhibit L.** In short, despite the fact that the facility has a potential to emit 365.23 tpy of CO, and RI sought a facility-wide cap of 249 tpy, it basically wanted NDEP to take its word that it would not exceed that artificial cap.

Instead, RI initially sought to demonstrate compliance with the CO cap by calculating emissions based on the flow meter measurements of the gas fed to the engines along with a stack test. **Exhibit E** at 1767. Following issuance of the draft permit, at the April 14 meeting, it introduced the idea of using portable analyzers. **Exhibit L.** However, as discussed above, portable analyzers are not accurate enough to be used for compliance.

In its comments on the draft permit, EPA sought a buffer between the permit limits and the expected actual emissions in addition to the proposed CEMS requirement. However, RI did not propose such a buffer and instead sought a 249 tpy limit. NDEP granted RI's request and responded to EPA that a buffer was not necessary because of the CEMS requirement.

[6] RI claims that the unrestricted potential emissions are 257.75 tpy. Opening Br. at 12, ll. 7-8. It apparently arrives at this figure by omitting the flare. Such calculation contradicts the 365.23 tpy of CO that it stated in its permit application. **Exhibit E** at 1685.

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Response to EPA Comments (NDEP962-964) at 963, attached hereto as **Exhibit R.** EPA ultimately was satisfied with the CEMS monitoring. Without the CEMS monitoring, as discussed above, EPA could object to the permit (in which case it may not be issued), or it could take over the permitting process and impose its own conditions.

Although RI contends that the flare and engines cannot operate simultaneously, and that their respective emissions are therefore not additive, RI did not request such operational limitation in its permit. Opening Br. at 12, ll. 4-5. Thus, the Potential to Emit ("PTE") remains at 365.23 tpy. More importantly, the three IC engines alone have a potential to emit of 252 tpy, which by themselves would exceed the 249 tpy CO cap. RI's compliance obligations and NDEP's permit issuance is based on the potential to emit, not on what RI is likely to emit depending on how it operates the facility. NAC 445B.094 (defining major source as directly emitting or having the potential to emit 100 tpy or more of a regulated air pollutant); NAC 445B.138 (defining potential to emit).[7] NDEP cannot issue a permit with no operational conditions that limit the potential to emit and then base the emissions limits on how the owner or operator is likely to operate the facility.

D. NDEP Considered and Was Concerned about Emissions Variability Prior to Permit Issuance.

RI claims that NDEP "admits" that it did not assess engine emission variability until after the permit had issued and is using that as a post hoc excuse for requiring CEMS. Opening Br. at 14. RI relies solely on an email from Mr. Mohn to the Southern California Air Quality Management District ("SCAQMD") for its assertion. *Id.* at 14-15. RI also claims that the emissions are highly consistent over time. *Id.* at 16-17.

First, RI ignores the fact that the permitting engineers are entitled to rely on their experience as to engine emission variability. The permit writer, Mr. Mohn, is a registered Professional Engineer and has nearly a decade of experience in evaluating technologies and

[7] NAC 445B.138 "Potential to emit" defined. (NRS 445B.210) "Potential to emit" means the maximum capacity of a stationary source to emit a regulated air pollutant under its physical and operational design. Any physical or operational limitation on the capacity of a stationary source to emit a regulated air pollutant, including equipment for the control of air pollution and any restrictions on the hours of operation of the stationary source or on the type or amount of material combusted, stored or processed, may be treated as part of its design for the purposes of determining its potential to emit if the limitation is enforceable by the Director.

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writing permits. He has worked on numerous Class I major source permitting projects ranging from the mining industry to utilities. The Chief of the Bureau of Air Pollution Control, Mr. Larry Kennedy, has over seven years of experience as a permit writer, compliance inspector and supervisor of the Compliance and Enforcement Branch of BAPC. He has reviewed over sixty source test reports and numerous CEMS certifications.

Both gentlemen worked on this permit, and both are very familiar with how IC engines run in northern Nevada. Northern Nevada is distinct from the other sites that Waste Management (RI's parent company) operates. All of the sites listed in its charts on pages 16 and 17 of the Opening Brief are located at low elevations (the highest – High Acres NY – is at 1,267 feet) and in areas of high humidity. The conditions are nothing like northern Nevada's high altitude, dry climate.

Second, the very documentation that RI supplied to NDEP to address concerns expressed by NDEP at the April 14 meeting indicates substantial variability in CO emissions. The Bay Area Air Quality Management District White Paper demonstrates that CO emissions trend upward over a very short amount of time. Figure 2 of that report shows that CO emissions increased over 75 ppm over 180 days, and over 100 ppm over 75 days. BAAQMD White Paper (NDEP558-580) at NDEP566, attached hereto as **Exhibit S.** Both the range of increased emissions is variable, and the time frame for emissions to creep up is variable. It can be very short – a scant two and a half months. The BAAQMD concluded that "it is normal for CO emissions to increase as the engines are operated." *Id.* at 567.

The chart on page 16 of the Opening Brief shows that the emissions also tend to creep up for NOx emissions. Contrary to RI's assertion that its source testing data are "robust" (Opening Br. at 14, ll. 12-14), the source test data are hardly robust and lack depth of years. Only one site – Skyline, TX – has been tested over a six year period, and it was only tested every other year. Yet that site shows that NOx emissions are variable and have tended to creep upward. Several sites (Skyline, DFW, and Mesquite Creek) are all uncomfortably close to the emission limit for Lockwood. It must be kept in mind that a facility generally prepares for source testing by tuning its engines so that it will "pass the source test, if possible, by as

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wide a margin as possible." **Exhibit S** at 564. Source tests, which are generally conducted on an annual basis and must be scheduled well in advance, tend to have better results than would be found upon monitoring the emissions from the engines' "day-in- day-out operation." *Id.* Thus, RI's data shows that the NOx emissions from its own engines are uncomfortably close to the Lockwood emissions limit even when those engines are running at their optimal performance.

Finally, the fact that Mr. Mohn made a post-permit issuance inquiry to the SCAQMD is a red herring. NDEP received no data regarding emissions variability from the SCAQMD, and NDEP obviously did not use such information – since it did not receive any – to justify its permitting decision. Instead, NDEP relied on its own experience and judgment, as well as on comments from RI and EPA, in making its permitting decision.

E. RI Improperly Seeks to Introduce New Data that Was Not Before NDEP During the Permitting Process.

RI improperly seeks to introduce Exhibit 5 – the source tests of engines at its other facilities – to the SEC, even though it failed to provide this data to NDEP during the permitting process. Because RI failed to provide this data to the agency when it was making its permitting decision, the data should be excluded, stricken from the record, and not considered.

As a matter of equity, RI should not be permitted to introduce new evidence when it has shown no good cause for failing to provide that evidence to NDEP. As a practical matter, NDEP would need to undertake its review process to analyze the depth of the data, to assure itself that the source tests are valid, and to evaluate whether the source test data reflects only when the engines are operating at their best. If the engines were tuned to run optimally before the source tests, RI's day-to-day operations and emissions may be higher than the source test data. As it is, the data show that RI's emissions for NOx are uncomfortably close to the Lockwood emission limit.

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F. RI's Reliance on the Naniwa Energy, LLC permit is misplaced.

RI claims that NDEP has allowed Naniwa Energy, LLC to operate with a CO cap of 249 tpy without requiring CEMS. Opening Br. at 13. This is true. It is because the Naniwa facility is radically different from RI's facility.

First, the permitted technology at the Naniwa facility is turbine engines, which run very differently from IC engines. Second, the Naniwa facility turbines run on pipeline quality natural gas, which is a clean, consistent fuel source. Landfill gas, on the other hand, is – as RI admits – a dirty fuel source, creating more variability in how it is burned and the resulting emissions.[8] Third, the Naniwa facility has a CO control – a catalyst – to limit the amount of CO emissions. Refuse, Inc. has no controls on its IC engines. Fourth, when NDEP initially issued the permit to Naniwa Energy, there was much more resource left in the air basin. Significantly less of the increment had been consumed. Finally, and most importantly, the Naniwa facility runs "peaker" units, which are used only in times of peak energy needs. In fact, the facility has rarely run its turbines more than 1,000 hours per year over the last decade. *See* Naniwa Permit (NDEP2834-2871), attached hereto as **Exhibit T.**

One other important item to note about the Naniwa permit – which RI conveniently failed to mention – is that CEMS for NOx is required. *Id.* at 2852.

Thus, because the Naniwa facility is vastly different from RI's proposed LFGTE facility, Naniwa's permit conditions cannot be compared to RI's. In fact, the Naniwa permit is a prime example of how NDEP uses its discretion to require sufficient monitoring for permit compliance. Such discretion can only be exercised on a case-by-case basis.

G. NDEP'S Determination to Require CEMS is Supported by the Principles of Periodic Monitoring.

RI next claims that "common-sense" factors underlying periodic monitoring guidance weigh against imposing CEMS. Opening Br. at 17-18. RI correctly notes that the EPA guidance document on which it relies has been overruled by the court in *Appalachian Power*

[8] The Naniwa facility is also allowed to use oil or kerosene as a fuel source, but it must do a source test to determine the emission factors before doing so.

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Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000), and EPA's website specifically states that the guidance is "for historical purposes only and not to be relied upon for guidance." *See* http://www.epa.gov/region7/air/title5/t5memos/pmguide.pdf (last viewed Sept. 7, 2011). Nonetheless, RI proceeds to use that guidance improperly as governing criteria.

Even if we were to utilize the factors set forth in that invalidated guidance document, however, those factors – contrary to RI's assertion – weigh in favor of utilizing CEMS.

1. The likelihood of violating the applicable requirement (i.e., margin of compliance with the applicable requirement)

RI requested an artificial cap for CO of 249 tpy to avoid being a major source subject to PSD requirements, i.e. BACT requirements. The trigger is 250 tpy. RI purposefully requested that the margin of compliance be minimized as much as possible. In fact, when NDEP suggested adjusting the CO cap downward to create a larger buffer, RI flatly stated that such proposal was not an option. **Exhibit L** at 1382. EPA's comments sought such a buffer in addition to the CEMS (**Exhibit K** at 2098), but NDEP argued in favor of no buffer because compliance would adequately be monitored by the CEMS. **Exhibit R** at 963.

2. Whether add-on controls are necessary for the unit to meet the emission limit.

RI did not request add-on controls, and, accordingly, NDEP did not require add-on controls. Lack of such controls, however, underscores the need for continuous monitoring of emissions to ensure compliance with emission limit.

3. The variability of emissions from the unit over time.

As addressed above, the evidence shows that CO emissions creep upward significantly over a short period of time. **Exhibit S** at 566. Although handheld analyzers are accepted by some regulatory agencies for use as indicators of performance, they are not accepted by regulatory agencies for use in demonstrating compliance with emissions limitations. A CEMS will adequately monitor the emissions to ensure compliance not only with the annual emissions cap, but also with the short-term limits. More importantly, CEMS are accurate and may be used as the basis for a compliance action.

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4. The type of monitoring, process, maintenance, or control equipment data already available for the emission unit.

While annual source tests are required by the permit, those tests cannot be used to enforce the short-term limits in the permit. RI requested maximum operating flexibility (i.e., no operating limits, such as limits on hours of operation), no limit on the amount of landfill gas that it may combust, no conditioning of the fuel source to make it more uniform so that emissions are more uniform (RI specifically rejected conditioning the gas to minimize siloxanes), and no control technologies. The engines' potential to emit CO by themselves exceeds the 250 tpy limit, yet RI sought a facility-wide cap, which includes other engines and the flare, of 249 tpy of CO. Thus, CEMS is necessary to ensure compliance with both the annual cap and the short-term limits in the permit.

5. The technical and economic considerations associated with the range of possible monitoring methods.

There is no question that CEMS is technically feasible. Although nothing in the Nevada Revised Statutes or Administrative Code allow NDEP to consider the cost to the applicant of permit compliance, RI could have minimized the cost of the CEMS by ducting its three engines together so that there is only one emission source. RI would then need only two CEMS – one for CO and one for NOx – rather than six CEMS (CO and NOx CEMS units for each of the three engines).

6. The kind of monitoring found on similar units.

NDEP determines whether CEMS monitoring should be required on a case-by-case basis.

RI's project is the first LFGTE project that NDEP has permitted. It faces unique obstacles. The fuel being burned is – as RI acknowledges – "dirty," which hinders the ability to predict emission levels. It is high in siloxanes, which would likely nullify the engine manufacturer warranty upon which RI would like to rely for its emissions limits. RI specifically rejected any proposals to condition the gas to minimize siloxanes. **Exhibit L** at 1383. In addition, RI sought – and NDEP granted – maximum operational flexibility and the ability to swap out "like-kind" engines without having to conduct source tests each time an engine block

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is swapped out. Such source testing would normally be required to determine the baseline and to calculate the emission factors.

Nonetheless, the requirement for NOx and CO CEMS is not unprecedented, as RI claims. As discussed above, the Naniwa facility is required to have CEMS for NOx. It is not required to have CEMS for CO because its turbines are peaker units that are seldom used and because the units have CO control technologies. NDEP also has required CEMS for several other facilities, including Fulcrum Sierra Biofuels (CO and NOx), Barrick Goldstrike (CO and NOx), Newmont (CO and NOx), and Cyanco Company (NOx).

H. RI'S Other Arguments Are Red Herrings.

RI argues that CEMS are not required in this instance to comply with enhanced monitoring requirements and Compliance Assurance Monitoring ("CAM") is, therefore, not necessary. Opening Br. at 19-20. NDEP did not impose the CEMS requirement per CAM. The final Technical Review performed by NDEP states "CAM requirements do not apply to the new LFG engines, because they will not have any post-process pollutant control devices." NDEP937-957 at 948.

RI requested a self-imposed limitation on CO to avoid federal applicable requirement for PSD permitting. Without the self-imposed limit, the LFG project is required to go through the PSD permitting process because the potential to emit of the IC engines alone exceeds the 250 TPY PSD permitting threshold. The NDEP-BAPC established a 249 TPY CO emissions cap as a condition of the operating permit. The NAC requires monitoring that is "sufficient to ensure compliance" with the conditions of the operating permit, NAC 445B.3405(1)(c). NDEP required a CO CEMS to "ensure compliance" with the 249 TPY CO emissions cap condition.

Now, after the fact, RI argues that it is reasonable to replace the CEMS with portable hand-held analyzers "to provide more frequent (for example, monthly) emissions measurements to confirm engine emissions performance." Opening Br. at 24, II, 1-2. RI acknowledges that these portable analyzers would not be used to measure and record the

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emissions from the IC engines, but rather to "verify the consistency of emissions over time." This in no way would "ensure compliance" with the emissions cap as required by the NAC.

RI's argument essentially boils down to this: CEMS should only be imposed when the facility is using control technologies to achieve compliance because failure of the control technology can result in significant emission variations. Opening Br. at 20. In RI's view, a facility operating without any control technologies whatsoever, with the potential to emit above the PSD trigger, without any operational controls, and burning a highly variable dirty fuel, should only be required to use inaccurate handheld analyzers "to confirm engine emissions performance", even though NDEP could not take an enforcement action upon such analyzers.

If NDEP were to agree to such a permit, it would be susceptible to legal challenge as unenforceable. *See* Payback Time for Continuous Monitoring Systems (NDEP2131-2142), attached hereto as **Exhibit U.** More importantly, EPA would not likely agree to such a permit, and NDEP could not issue a Title V permit without EPA's approval. The real reason that RI objects to CEMS – as it admitted in the April 14, 2011, meeting with NDEP – is because it does not want a national precedent to be set requiring its other LFGTE facilities to have CEMS. NDEP, however, must administer its Title V permitting program based on State concerns and its duty to manage an ever-decreasing resource in a manner that will allow the most use of the resource. It cannot issue a toothless permit merely because the applicant doesn't want to set a "precedent" to which other permitting authorities might look. Similarly, NDEP cannot rely on what other states have required, or in this case, not required, when making its permitting decisions. It must issue a permit that can be enforced and will ensure that the permittee stays within its requested emissions limits.

CONCLUSION

In sum, NDEP properly evaluated all of the information provided by the applicant, and utilized its own experience in issuing the permit. NDEP acquiesced to all of the applicant's demands, allowing it maximum operational flexibility, allowing it swap out its engines without conducting a baseline source test each time, and allowing it to burn the fuel without first conditioning the gas. As a result, in order to ensure that RI stayed within the cap that RI

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proposed, and in order to manage the NOx incremental consumption, NDEP required CEMS for compliance with both the annual and short-term limits imposed by the permit. NDEP did so after taking into account RI's comments as well as EPA's comments. And NDEP did so in a very short time frame, in response to RI's demands to expedite permit issuance. NDEP did not abuse its discretion by ensuring that it managed the resource responsibly. Thus, RI's appeal should be denied in its entirety.

MOTION TO DISMISS, OR ALTERNATIVELY, FOR SUMMARY JUDGMENT

NDEP moves to dismiss RI's appeal for failure to state a claim upon which relief can be granted. Dismissal under NRCP 12(b)(5) is proper where it appears beyond a doubt that the plaintiff, or appellant in this instance, could prove no set of facts which, if accepted by the trier of fact, would entitle him to relief. *Simpson v. Mars, Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997). RI's allegations do not entitle it to relief. First, it has not pointed to any law, regulation or rule that NDEP violated in issuing the permit. Second, the relief that it seeks, for the SEC to insert its proposed language into the permit and require NDEP to defend the revised permit through the public's and EPA's comment period, is improper. Such relief essentially usurps NDEP's authority as the permitting entity under the Clean Air Act. *See Standard of Review discussion above.*

Alternatively, NDEP moves for summary judgment. "Summary judgment is appropriate 'when the pleadings and other evidence on file demonstrate that no "genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law."'" *Costello v. Casler*, 127 Nev. ___, ___, 254 P.3d 631, 634, 127 Nev. Adv. Op. 36 (July 7, 2011) (quoting *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (quoting NRCP 56(c))). When the trier of fact reviews materials other than the pleadings in making its decision, the motion is treated as one for summary judgment. NRCP 12(b).

Summary judgment avoids trial, and its associated cost both in terms of time and money, when trial would "[s]erve no useful purpose." *Short v. Hotel Riviera, Inc.*, 79 Nev. 94, 96, 378 P.2d 979, 980 (1963). The purpose behind the rule, which is to avoid unnecessary legal proceedings and encourage judicial economy, is equally applicable to quasi-judicial

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proceedings such as administrative appeals. Where, as here, further proceedings will not change the outcome of the case, summary judgment should be granted. *See Van Cleave v. Kietzke-Mill Mini Mart*, 97 Nev. 414, 415, 633 P.2d 1220, 1221 (1981).

To preclude summary judgment, the party opposing the motion must present specific facts, not mere allegations or conclusions, that raise a genuine issue of material fact. *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). Though the party opposing the motion is entitled to reasonable 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).

There is no genuine dispute as to any material fact in this case. It is undisputed that RI seeks to operate its LFGTE facility in an air basin that is PSD-triggered for NOx. It is also undisputed that RI seeks an artificial facility-wide cap of 249 tpy of CO, even though its three IC engines alone have the potential to emit over 252 tpy. There is no dispute that RI's application sought no operational limits to reduce the likelihood of exceeding NOx or CO emission limits; that its fuel source is dirty and variable, resulting in variable emissions; and that it sought to limit source testing to merely "an initial performance test" to demonstrate compliance."

It is also undisputed that NDEP does not rely upon handheld analyzers to demonstrate compliance because of the inaccuracy of such technology.

There is no real dispute that even the information provided by RI to NDEP shows that CO emissions from LFGTE facilities creep upward rapidly. BAAQMD White Paper.

Nor is there any dispute that for NDEP's Title V permitting program to remain in good standing with the EPA, it must be enforceable.

The facts demonstrate that NDEP considered all of RI's concerns and acquiesced to almost all of RI's requests. It allowed RI to operate 24 hours a day, 7 days a week, to have an artificial cap for CO that butts up against the major source trigger of 250 tpy, to swap out like kind engines without having to conduct a source test each time, and to operate without

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conditioning the gas. The timeline clearly shows that NDEP did so under pressure from RI to expedite the permit process, and, in fact, NDEP issued the permit four months before it was required to do so by regulation. The record also shows that NDEP resisted EPA's suggestion that it impose a buffer between the permitted emissions and the cap. NDEP did so – and EPA allowed the permit to issue – because CEMS were required for both CO and NOx.

NDEP has discretion under NAC 445B.3405 for which industry lobbied when the permitting program was being established. For the reasons set forth in NDEP's response brief, NDEP properly exercised its discretion in requiring CEMS to ensure that the permit is enforceable and that RI complies with its emission limitations.

For the foregoing reasons, NDEP respectfully requests that the SEC grant its motion to dismiss, or alternatively, for summary judgment.

DATED this 8th day of September, 2011.

CATHERINE CORTEZ MASTO
Attorney General

By: Jasmine K Mehta
WILLIAM FREY
Senior Deputy Attorney General
Nevada State Bar No. 4266
Tele: (775) 684-1229
JASMINE K. MEHTA
Deputy Attorney General
Nevada State Bar No. 8188
Tele: (775) 684-1217
100 North Carson Street
Carson City, Nevada 89701
FAX: (775) 684-1103
Attorneys for Nevada Division of Environmental Protection

Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

CERTIFICATE OF SERVICE

I, Sandra M. Geyer, certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 8th day of September, 2011, I sent a true and correct copy of the foregoing **NEVADA DIVISION OF ENVIRONMENTAL PROTECTION'S RESPONSE BRIEF TO REFUSE, INC.'S OPENING BRIEF,** via electronic mail to the following:

Andrew M. Kenefick
Senior Legal Counsel
Waste Management
Western Group Legal Department
801 2nd Avenue, Suite 614
Seattle, Washington 98104
akenefick@wm.com

William Carr, District Manager
Refuse, Inc.
2401 Canyon Way
Sparks, Nevada 89434
WCarr@wm.com

Michael Tomko
Richard Angell
Parsons Behle & Latimer
201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
mtomko@parsonsbehle.com
rangell@parsonsbehle.com

Sandra M. Geyer, Legal Secretary II
an employee of the Office of the
Nevada Attorney General

Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717