

1 BEFORE THE STATE OF NEVADA, STATE ENVIRONMENTAL COMMISSION

In Re:) **Motion to the SEC, Seeking**
)
Appeal of Water Pollution Control) **(1) Issuance of Subpoenas to Compel**
Groundwater Permit NEV91022) **Production of Documents, and**
Reid Gardner Station)
) **(2) Vacatur and Continuance in the**
) **Proceedings, and**
)
) **(3) A Preliminary Injunction to Suspend the**
) **Effectiveness of the Permit and Halt**
) **Construction of New Wastewater Ponds**
)

2
3 The Sierra Club, by and through its undersigned counsel, Daniel Galpern, hereby moves
4 the SEC for the following actions:

5 (1) Subpoenas to Appellee Nevada Division of Environmental Protection (NDEP) and
6 Intervenor NV Energy in the above matter commanding their production of documents and data
7 necessary to Sierra Club's appeal of NEV91022, pursuant to NAC 445B.892;

8 (2) Vacatur, pursuant to the SEC's authority under NAC 445B.894, of the time set for
9 hearing on this matter and suspension of the SEC's prior briefing schedule until three weeks
10 subsequent to the time that the documents referred to in (1) are received by Sierra Club;

11 (3) Suspension of Permit NEV91022 and an immediate injunction against construction
12 activities of new wastewater ponds on the Mesa, until this present appeal is resolved by final
13 order of the SEC.

14 Sierra Club requests the opportunity to be heard on this Motion, and suggests for that
15 purpose the morning of Tuesday Oct. 12. Sierra Club also requests an immediate suspension of
16 the current briefing schedule in this matter until such time as the SEC rules on this Motion.

17 Based on discussions and correspondence with Counsel for NDEP and NV Energy, Sierra
18 Club believes that this Motion will be opposed. Therefore, although Sierra Club does not believe

1 that opposing parties will be prejudiced in any way by the actions sought in this motion, Sierra
2 Club nevertheless urges that NDEP and NV Energy also be given the opportunity to be heard on
3 the Motion.

4 **1. Subpoenas of Documents and Data**

5 Sierra Club has on numerous occasions, in writing and orally, sought to secure additional
6 documents and data from NDEP and NV Energy, documents and data that are necessary to its
7 appeal of Permit NEV91022. The failure of NDEP, and refusal of NV Energy, to provide these
8 materials substantially impairs Sierra Club's ability to prepare for the currently scheduled
9 hearing in this matter and renders impossible its ability to prepare an effective opening brief.

10 The data and information needed have been sought from the Nevada Department of
11 Conservation and Natural Resources Division of Environmental Protection and, within NDEP,
12 the Bureau of Water Pollution Control (BWPC) and the Bureau of Corrective Action (BCA).
13 Subsequent to the appearance in these proceedings of the Nevada Deputy Attorney General
14 Carolyn Tanner as counsel for NDEP, Sierra Club's requests for document production from
15 NDEP have been through Ms. Tanner. In addition, Sierra Club has sought to meet with NDEP
16 staff in order to discuss the gaping holes in the limited data and documents that have been
17 provided, and the correlative holes in Sierra Club's understanding of the performance of the
18 existing wastewater pond system. To date Ms. Tanner has declined to arrange/allow such a
19 meeting. Also, to date, only a subset of the requested documents have been received, although
20 Ms. Tanner did represent that NDEP was continuing to search for some of the additional
21 documents and data. *See Exhibit 1, Correspondence with Parties Seeking Documents and Data*
22 relevant to the Appeal.

1 That subset of documents were sent only on Sept. 21 to Legal Copycats in Las Vegas (a
2 reproduction and scanning service), and Copycats was able (apparently due to prior, unrelated,
3 workload issues and the time needed to scan oversized maps), to make those documents
4 available to Sierra Club by file transfer protocol only on Sept. 30. In the time between Sept. 30
5 and Oct. 5 (only three business days), Sierra Club has not been able to analyze fully the received
6 subset of documents, given the need for Sierra Club's Counsel and Expert in this matter to
7 prepare for (and travel to and back from) the Oct 4. hearing in Moapa, NV on a parallel matter,
8 namely the Southern Nevada Health District's consideration of NV Energy's application to
9 vastly expand its coal ash landfill (in which materials from the ponds at issue in the present
10 matter become interred). Sierra Club has, however, reviewed the subset sufficiently to know that
11 much of the critical information it seeks remains with the documents and data that have yet to be
12 received.

13 Sierra Club stresses that it is not alleging that NDEP and NV Energy have coordinated to
14 deprive it of necessary documents and data. But, if briefing and the hearing must proceed in
15 their absence, the SEC will be deprived of a full exposition of the relevant issues, and Sierra
16 Club's principal objective to protect the environment more likely will be compromised.

17 As delineated and explained in Exhibit 2 (Oct. 4 memorandum from hydrogeologist
18 Elliot Lips to Sierra Club counsel regarding inability to prepare expert opinions in absence of
19 critical information withheld by NDEP and NV Energy) there are six categories of documents
20 and data that Sierra Club has requested and that Sierra Club needs for its appeal that have not
21 been provided to Sierra Club: (1) numerous quarterly monitoring reports, stemming back to
22 2002, of groundwater quality analysis based on sampling in wells the area of the wastewater
23 ponds, (2) reports and data detailing the quantity and characteristics of liquids accumulated by

1 the interstitial leak detection systems in the existing wastewater ponds, (3) documentation
2 (including groundwater site assessment reports and engineering design reports) that NV Energy,
3 in our view, should have submitted to NDEP prior to NDEP's approval of the Permit, or may
4 have submitted subsequent to such approval; (4) notes of quarterly meetings on implementation
5 of the Administrative Order on Consent between NDEP and NV Energy; (5) documents
6 supporting prior permit applications listed in Appendix A of the Lips Oct. 4 memo; (6) Other
7 documents relating to data on the ground water in the vicinity of the proposed Mesa ponds.

8 Pursuant to Ms. Tanner's recommendation, Sierra Club additionally sought a portion of
9 documents referred to in categories (5) and (6) from Intervenor NV Energy. Sierra Club also
10 accepted a meeting with NV Energy officials proposed by Counsel Woodworth to discuss the
11 relevant issues and go over relevant documents and maps. On Sept. 22, NV Energy counsel Tom
12 Woodworth informed Sierra Club that NV Energy would not provide those documents and
13 would need to withdraw its invitation to meet. Exhibit 1, attached to this motion, provides copies
14 of the relevant email correspondence in which Sierra Club has sought the necessary documents
15 and data.

16 In sum, absent these documents and data, it is not possible for Sierra Club to present, in
17 briefing or at hearing, a full and fair analysis of the central questions at issue in this appeal,
18 including whether operations under the challenged permit reasonably will protect the
19 environment from contaminants that presently infuse and will infuse, respectively, the
20 wastewater in Reid Gardner's existing and proposed holding ponds. Accordingly, Sierra Club
21 seeks SEC subpoenas to compel the production of all documents and data delineated in Exhibit 2
22 (the Lips Oct. 4 memo) by October 26. The subpoena to NDEP should be for the production of
23 materials described in Lips' Oct. 4 memo, on pp. 2-4, numbered paragraphs 1, 2, 3, 4, and 6, and

1 whatever in paragraph 5 is still either with NDEP, including BWPC or BCA. The subpoena to
2 NV Energy should compel the production of materials in numbered paragraphs 5 and 6, and any
3 material relevant to paragraphs 1, 2, and 3 that NDEP does not produce. Sierra Club encourages
4 NDEP and NV Energy to coordinate to more readily fulfill their obligations under the proposed
5 subpoenas to the extent that doing so hastens the conveyance of the complete set of these
6 documents and data without undue duplication. Sierra Club has made arrangements with the
7 following in Las Vegas to receive these materials from either party:

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Legal Copy Cats & Printing, Attn: Larry Wolak
300 S. Fourth Street, Suite 6
Las Vegas, NV 89101
P: 702-598-4455; C 702 321-8608

Sierra Club has made arrangements with the following in Carson to receive these
materials from either party:

NV Blue, Attn: Dave Cordell
280 E. Winnie Lane
Carson City, NV 89706
P: 775.883.6011

2. Vacatur of Hearing and Briefing Schedule

Pursuant to the SEC's authority under NAC 445B.894, Sierra Club requests the SEC to
vacate the hearing dates and briefing schedule, and to re-establish these with due regard for the
deadline it imposes for the production of currently missing documents and data, reasonable time
for Sierra Club and the parties to analyze those materials to be produced, and with due regard for
the convenience of the parties.

Sierra Club hereby incorporates the reasoning it provided in section (1) of this Motion as
reasons for the Vacatur and resetting of the hearing dates and briefing schedule. In brief, it is

1 necessary for Sierra Club to be able to review the relevant materials that speak to the past and
2 current performance of existing wastewater ponds at Reid Gardner, including past and current
3 compliance, *vel non*, with NDEP orders to remediate groundwater contamination stemming,
4 arguable, from the existing ponds. Moreover, understanding the details of that context will
5 provide insight into any predicted performance of newly-authorized ponds, so as to discern the
6 degree to which the present permit was issued in violation, *vel non*, of the law. It is, moreover, a
7 waste of scarce state resources to conduct the present hearing in the absence of the provision of
8 available documents and data that would enable the parties to be well-informed of the full record
9 on which the grant of the permit was in fact based or should have been based. Inversely, the
10 SEC's decision-making will be improved to the extent to which this documentary and data
11 record is complete.

12 **3. Suspension of Effectiveness of Permit Pending Appeal and Injunction Against**
13 **Construction of New Ponds on the Mesa**

14 Sierra Club requests that the SEC suspend the Permit pending the completion of this
15 appeal, and further enjoin any construction of the new wastewater ponds on the Mesa.

16 On the latter point, we attach as Exhibit 3 a memorandum from today, also from Elliot
17 Lips, verifying that NV Energy has begun construction activities – namely, site preparation – of
18 the area on the Mesa where it has been authorized, under the BLM right of way, to construct new
19 wastewater ponds. Sierra Club is prepared, as well, to offer photographs of the area to further
20 document this activity. Any further construction risks not only wasting ratepayer funds, but also
21 Sierra Club's interests in this appeal. Sierra Club does not allege that the company is attempting
22 to establish on the ground what Sierra Club is asking SEC to stop as a matter of law, but to
23 preclude any such temptation Sierra Club seeks the SEC's order to suspend the effectiveness of

1 the Permit during the appeal and an order to cease any further pond-related construction or site-
2 preparation-related activities on the Mesa.

3 In addition, Sierra Club has already submitted information to the Attorney General's
4 office that constitutes grounds for a determination that construction of new ponds on the Mesa of
5 a design similar to that of existing ponds presents a clear risk to public health or welfare, as
6 required under NRS 233B.127 to justify such suspension, upon due notice and procedure. If
7 requested, Sierra Club will provide such additional evidence as the Commission desires,
8 including evidence of prior and existing contamination from the facility's existing ponds.

9
10 In sum, Sierra Club moves for three actions. One, SEC subpoenas commanding
11 production of documents as detailed within and on the attached exhibits. Two, a vacatur of the
12 present hearing dates and briefing scheduling order. Three, suspension of the present Permit and
13 an injunction against further site preparation for or construction of the new mesa wastewater
14 ponds.

15 In the alternative, in the event that the SEC denies requested action (1), Sierra Club
16 requests a one-week delay in the present briefing schedule.

17 RESPECTFULLY SUBMITTED



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20 Western Environmental Law Center
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1 **CERTIFICATE OF SERVICE**

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3 The undersigned, Daniel Galpern, does hereby certify that on the 6th day of October, 2010, a true
4 and correct copy of the foregoing ORDER GRANTING PETITION TO INTERVENE was
5 emailed, and mailed, postage prepaid, to the following:
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7
8 John B Walker, State of Nevada
9 State Environmental Commission
10 901 South Stewart Street, Suite 4001
11 Carson City, Nevada 89701-5249
12

13
14 Carolyn E. Tanner, Deputy Attorney General
15 Office of Attorney General
16 100 North Carson Street
17 Carson City, NV 89701
18 Attorney for Respondent NDEP

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20 Thomas C. Woodworth, Assistant General Counsel
21 NV Energy, Inc.
22 6226 West Sahara Ave, MS 03A
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