Summary Minutes of the
STATE ENVIRONMENTAL COMMISSION (SEC)

Meeting of June 17, 2009, 9:30 AM

Nevada Department of Wildlife
1100 Valley Road
Reno NV

Members Present:
Lewis Dodgion, Chairman
Alan Coyner, Vice Chairman
Pete Anderson
(Eugene) Jim Gans
Tony Lesperance
Kenneth Mayer
Ira Rackley
Tracy Taylor
Stephanne Zimmerman

Members Absent:
Frances Barron
Harry Shull

SEC Staff Present:
Rose Marie Reynolds, SEC/DAG
John Walker, Executive Secretary
Kathy Rebert, Recording Secretary

BEGIN SUMMARY MINUTES

The meeting was called to order at 9:30 am by Chairman Dodgion who declared the meeting had been properly noticed and a quorum was present. Chairman Dodgion asked John Walker if there were any changes to the agenda. Mr. Walker replied that Agenda Item 6: Mining Industry Mercury Petition had been pulled at the request of Tim Crowley. The Chairman moved to the agenda.

1) Approval of minutes from the February 11, 2009 SEC hearing

Chairman Dodgion noted Ira Rackley was not listed in the minutes; that correction will be made. Other than that, there were no further corrections.

Motion: Mr. Gans moved for approval of the minutes with the one correction with a second from Mr. Mayer. Motion passed.

2) Settlement Agreements, Air Quality Violations Corrective Action Regulation
(The Settlement Agreements table is contained in ATTACHMENT 1)

(Begin prepared remarks of Mr. Larry Kennedy)

Mr. Chairman, members of the Commission, good morning. For the record, my name is Larry Kennedy. I Supervise the Compliance & Enforcement Branch in the NDEP's Bureau of Air Pollution Control.

Mr. Chairman, before we begin I would like to recommend that the proposed Settlement Agreement for Bango Oil be removed from today's agenda. I understand that last week a resident of Churchill County wrote to the Commission to express concerns regarding this Settlement. Many of you are aware that the facility has generated some controversy.

The Commission is actively considering the appeal of an air quality permit modification issued in February to Bango Oil. Because it will be difficult to have a meaningful discussion of the proposed Settlement without getting into issues that are also being discussed as part of the appeal process, I recommend that the Bango Oil Settlement be considered at a later date.

(Pause in prepared remarks of Mr. Kennedy)

The Commission did not object to postponing the proposed settlement for Bango Oil.

(Resume Mr. Kennedy's remarks)

The Commission is authorized under the Nevada Revised Statutes to levy administrative penalties for Major violations of state rules and regulations that protect air quality. Based on a long-standing agreement, the Compliance & Enforcement Branch assesses penalties for these violations on the behalf of the Commission. The companies listed on today's agenda are aware that the Branch acts as the Commission's agent in negotiating Settlements, and that the Commission may see fit to adjust a penalty that we have assessed.

Thank you, Mr. Chairman. The other two Settlements involve violations of pollutant emission limits as evidenced by source tests. The penalties for these violations were assessed in the usual manner using the Administrative Penalty Table and Penalty Matrix.

Mr. Chairman, what I propose to do is describe both of the proposed Settlements before asking if there are any questions. Would that be acceptable?

(Being acceptable to the Commission, Mr. Kennedy continued his remarks.)

The first Settlement: A & K Earth Movers operates aggregate processing and hot mix asphalt plants in support of road construction projects in northern Nevada. In October 2008, A&K source tested an asphalt plant located at the Hazen pit in northwestern Churchill County. Test results showed that the plant exceeded the New Source Performance Standard for particulate matter. The asphalt plant also exceeded its permitted mass emission limit for particulate matter during the source test. Subsequent discovery of loose collection bags in the plant's baghouse indicates that it had not been properly maintained.

New Source Performance Standards represent conservative standards of performance for a variety of emission units. The Administrative Penalty Table includes penalties for violations related to emission exceedances during source tests. The Table calls for a $2,500 penalty for Class 2 facilities – that is, minor sources - that exceed these standards.

Settlement No. 2 refers to Premier Chemicals LLC, who operates a magnesite mining and processing operation in Gabbs in northern Nye County. Premier Chemicals mines and

crushes ores to feed kilns that "calcine" ore to produce magnesium oxide for use in a variety of products. In September 2007, testing of one of the Calcining Circuits exceeded its permitted emission limit for particulate matter. Investigation indicated that a bag was missing from the baghouse.

Premier Chemicals is a Class 2 facility. The Administrative Penalty Table calls for a base penalty of $1,500 for the exceedance of a permitted emission limit during a source test by such a facility. Because the emission exceeded the permitted limit by greater than 20 percent, the Penalty Matrix also applies. Taking into account that the emissions were 55 percent higher than the permitted emission limit, the base penalty is increased by 55 percent ($825) to a total penalty of $2,325.

(End prepared remarks of Mr. Kennedy)

Chairman Dodgion asked the Commissioners if they had any questions. Mr. Gans asked the rationale for the follow-up emissions test on facility 1 (A&K Earthmovers) and not on facility 2 (Premier Chemicals). Mr. Kennedy explained this was due to A & K being portable plants and Premier was stationary.

There was no public comment on either item. Chairman Dodgion asked for a motion.

Motion: Ms. Zimmerman moved the two settlements, NOAV 2166 and NOAV 2158 be approved as presented noting the exclusion of NOAV 2146 for Bango Oil. Motion was seconded by Mr. Rackley; motion passed.

Corrective Actions

3) Regulation R189-08: Leaking Underground Storage Tank and Corrective Action Regulations

Mr. Scott Smale, Bureau of Corrective Actions, Supervisor of Dept. of Defense Cleanup Program proposed consideration for adoption Regulation R189-08. Mr. Smale explained the proposed regulation makes revisions to clean up sections of Chapter 445A and Chapter 459 of the NAC. Public comment and workshops were held on these proposed regulations. Three written comments were received on these; two of those comment letters being the most representative and inclusive of comments by the public were included in the Commission packet (see ATTACHMENT 2). Based on public workshops and comments received by the public, an Errata sheet was prepared that includes recommended clarifications to the Regulation. These were considered non-substantial, not requiring redrafting by the Legislative Council Bureau. That Errata is included in the Commission packet (see ATTACHMENT 3) and will be included for adoption with the Regulation.

Mr. Smale presented, in detail, background and information pertinent to the proposed regulation and also provided print out of a power point presentation (see ATTACHMENT 4).

After Mr. Smale's presentation, the Commission had a few questions. Mr. Gans asked if the Regulation is approved, what happens to the cases currently underway. Mr. Smale answered it is believed there will not be an impact on the cases underway because they

are not changing the pathways towards closure. The existing pathways towards closure are staying the same. The action levels being removed hadn't been relied on too significantly to drive clean up considerations. So sites currently underway will have the same end point. The sites this Regulation will affect are sites that have been in a holding pattern that will now have a clear path forward toward closure.

Ms. Zimmerman asked a couple questions, most significantly clarification on management of soil or groundwater removal.

Mr. Anderson asked if a small business impact had been completed. Mr. Smale answered that they had not performed one because it is not believed that this has an economic impact. This Regulation is not adding new authorities but is clarifying existing authorities and creates a more efficient application of authorities. Ms. Zimmerman said it actually allows for more flexibility.

There being no other Commission comments, Chairman Dodgion opened public comment on this agenda item.

Mr. Peter Kruger, representing Nevada Petroleum Marketers Convenience Store Association, spoke in support of the Regulation expressing their feeling that the change in the regulation provides more flexibility and urged adoption. Mr. Kruger said that there is a huge level of trust between the regulated community and the partners at NDEP and he expressed how impressed he was with the presentation provided and the amount of work and detail that went into it.

Ms. Jackie Picciani expressed her concern about using the environmental covenant and asked if there is a mechanism in place to review applicability over time to take into consideration changes in the community and land uses. Mr. Jim Najima, Chief of the Bureau of Corrective Action, replied that when the environmental covenant was passed, it was specifically addressed that it would be recorded in the County of the property location. So during the recordation, it becomes a part of the recording and rezoning ordinances. Commission members had a couple other clarification issues regarding this, on which Mr. Najima provided answers.

Being no further public comment and no further discussion by the Commission, Chairman Dodgion asked for the motion.

Motion: Mr. Gans moved to approve Regulation R189-08 including the eight recommendations on the Errata sheet. Motion was seconded by Ms. Zimmerman and passed.

-- More --

Air Pollution Control / Air Quality Planning Regulation

4) Temporary Regulation T036-09

(Begin prepared remarks of Mr. Matthew Deburle)

Mr. Chairman, members of the Commission, for the record my name is Matthew DeBurle. I'm the Permitting Supervisor of the Bureau of Air Pollution Control. I'm here today to provide you with a brief overview of the proposed amendments contained in Petition T036-09. This is a temporary regulation.

The NDEP is updating its adopt by reference regulation to align some state definitions with federal definitions; update the date of the federal Code of Federal Regulations to the most recent publication date; and adopt sections of the federal New Source Performance Standards that have not been previously adopted by NDEP.

Specifically, Appendix M of 40 CFR Part 51, Appendix A of 40 CFR Part 60 and Appendix B of 40 CFR Part 61 contain specific test methods and procedures for collecting samples. These test methods are cited in the air quality permits and in test protocols submitted by permittees.

Recently published changes to existing New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants are proposed to be adopted in this petition in order for NDEP to avoid losing delegation and continue to implement these requirements. Additionally, newly adopted federal standards are being incorporated in order for NDEP to implement these programs.

Lastly, you will notice that large sections of previously adopted subparts are being deleted. At the time of adoption, these regulations had not been incorporated into the printed CFR. By adopting the CFR as they existed on July 1, 2008, these specific FR notice adoptions are now contained in the printed version of the CFR.

As with all of our proposed regulation changes, a workshop was held to review the proposed amendments. We held a workshop in Carson City on May 28th, 2009. No verbal or written comments were received.

With that, I recommend that the Commission adopt Petition T036-09. I'd be happy to answer any questions you may have.

(End of prepared remarks by Mr. Matthew Deburle)

Chairman Dodgion asked if this temporary regulation is to be presented in October as a permanent regulation why it was necessary to approve a temporary today. Mr. DeBurle answered that there have been inquiries from companies for federal definition changes and the change removes a couple constituents from that definition as well as general clean up to the printed CFR. Mr. Gans asked if by (passing the temporary regulation) the impacted companies can deal with the State and not have to deal with EPA to which Mr. DeBurle replied that was correct.

There was no public comment.

Motion: Mr. Anderson moved Regulation T036-09 be approved as presented, seconded by Ms. Zimmerman; motion passed.

Other SEC Business

5) Update by the Division of Environmental Protection on Nevada Wood Preserving Plant concerning odors

Mr. Larry Kennedy, Bureau of Air Pollution Control (BAPC), in response to the Commission's request at the February 11, 2009 hearing, presented information and chronology relating to Nevada Wood Preserving Plant (in Silver Springs) and complaints of odors in that vicinity. Mr. Kennedy provided a handout and spoke extensively about the wood treatment process, the regulatory authority and compliance activities of the various NDEP bureaus, odor complaints and concerns regarding toxic substances at Nevada Wood Preserving, and investigations and actions NDEP has taken regarding the plant. A copy of Mr. Kennedy's handout can be found in Attachment 5.

Mr. Kennedy's emphasized the following:

Looking in terms of health standards, there have been 14 different inspections by 3 different NDEP bureaus since 2004. All of those indicate that the wood preserving facility is in compliance of its permit requirements and that the emissions from the plant did not represent a threat to public health or the environment.

There have also been the OSHA inspections that confirm in terms of employee safety there weren't any issues.

Odor sampling by the BAPC indicates the odors associated with the process don't constitute a violation under the odor regulation.

NDEP has not been able to definitively identify the source of the odor complaints in Silver Springs.

NDEP recognizes that Dr. Glenn Miller's study indicates that a very small amount of the "Penta" (Pentachlorophenol) formulation used at Nevada Wood may be detectable offsite.

Nevada Wood has voluntarily taken successive measures to control emissions from its wood treatment processes.

NDEP is sensitive to concerns from the residents. NDEP can reassure residents that the plant and emissions from the plant do not present a threat to public health and the environment. NDEP will continue to monitor complaints and evaluate the need for other mitigation measures.

In closing, Mr. Kennedy said NDEP, BAPC spent quite a lot of time and resources in investigating odors. Over half of the bureaus activities in 2007 were directed at regulation 445B.22087 Odors. Odors are subjective, are short lived and difficult to identify. They are classified as nuisances and demand substantial resources and a local presence. Most states rely on local governments or air districts to enforce odor and other nuisance regulations and many states have no specific odor regulations.

Mr. Kennedy's presentation ended, Chairman Dodgion asked if the Commission had questions. Commissioners asked questions which Mr. Kennedy answered related to storage of treated products on the site, drainage of the product from the pad, whether complaints came from residents of the community. Mr. Coyner asked if there was only one monitoring well and mentioned the possibility of a plume. He asked someone to find out and notify him as to whether there is in fact only one monitoring well.

Mr. Gans referred to a letter included in the Commissioner's packets from Professor Glenn Miller which referred to regulations as "cumbersome and useless" and needing to be upgraded. Mr. Gans asked if Nevada's regulations are typical of standard regulations around the United States and Mr. Kennedy answered that they were. Mr. Kennedy said that the difficulty in investigating the complaints is the distance away and the transient nature of the odors. There are tools available to local governments in areas of zoning and variances that are more effective in nuisance complaints rather than having it be part of a program that is more directed at health standards.

Chairman Dodgion began the public comments by calling on Virginia Johnson. Ms. Johnson expressed that more than the complaints about the odor, the residents' complaints are about what chemicals may accompany the odors. When the odors are present, residents have coughing and their eyes "smart." She spoke about the inversion layer within a 5 mile radius that carries odors from the plant. Ms. Johnson said the plant is up for evaluation for another 5 year permit. She would like stronger regulations and better evaluation of the impact of the plant on the community.

Ms. Jackie Picciani spoke next. She said a big drawback in "modeling" is that onsite meteorological data is not gathered. For instance, she said inversion layers do not show up. Another shortcoming in the initial "modeling" is that fate and transport are not included in the analysis. Ms. Picciani said there isn't a quantitative method to say what is actually going into the air; NDEP can't say the residents aren't breathing something harmful if it is unknown what is actually in the emissions. Ms. Picciani expressed that she feels NDEP needs better tools to do the job and it needs to be more comprehensive. She asked the Commission to think about this and what can be done.

Dr. Glenn Miller was next to speak. Dr. Miller said butyl butyrate is the issue here because it has a very objectionable smell. He did a study that looked at butyl butyrate in Silver Springs and there is an association with the proximity to Nevada Wood Preserving site and prevailing winds. It is an immediate proximity problem and the odor probably does go away within a day or two. Dr. Miller compared this information to the complaint order that Mr. Kennedy had indicated and there is a correlation of concentrations. Dr. Miller expanded on the comments he made in his letter regarding the ineffective odor regulations and he also spoke about the effect odors have on the quality of life.

There was minimal discussion of a solution which was tried at a St. Croix, Minnesota company. This involves use of crystalline pentachlorophenol dissolved in biodiesel. It is unknown if this process meets wood preservation standards.

Chairman Dodgion asked Mr. Kennedy to follow up on the biodiesel and the industry standard for approval.

6) Mining Industry Mercury Petition

Petition was withdrawn at the request of the Mining Industry.

Agenda Item 7 was moved as the last agenda item to allow presentation after 1:00 pm because some participants hadn't arrived yet as they were told it was to be discussed after lunch. The Chairman proceeded to Agenda Item 8.

8) Proposed Policy to Improve Adjudication of Appeals Filed with the State Environmental Commission (SEC)

The Deputy Attorney General assigned to the State Environmental Commission -– Ms. Rose Marie Reynolds -- presented a recommendation for a policy change to require a "Position Statement" to augment information on SEC form 3; form 3 is currently used to request appeals of final decisions rendered by NDEP. The SEC handles the appeal process for the division.

Ms. Reynolds explained that under SEC regulation 445B.8925, the Commission may order briefs to be filed before or after an appeal hearing along with prescribing the period of time in which briefs are to be filed. She noted the proposed change would require filing of a Position Statement instead of briefs. She reminded the Commission that in many instances, appellants are not represented by counsel and would be difficult in many cases for such appellants to file a brief. She suggested that a Position Statement would help narrow issues and would assist with the appeal process by providing a statement of the issues, a list of witnesses and summary of proposed testimony, specific legal authority, and all documents to be introduced as evidence in an appeal.

A series of questions would be asked on the form to assist appellants in identifying issues and statute or regulations that haven't been followed or ways NDEP "allegedly" erred in rending a given decision. Filing timeframes would also be included in the Position Statement. She further noted that incorporation of the Position Statement concept would be addressed in the next revision to SEC's Rules of Practice (NAC 445B.875).

Ms. Reynolds said this had been discussed with Senior Deputy Attorney General Bill Frey (DAG/NDEP), and he supports the requirement.

Discussion followed. Mr. Rackley asked that some instruction and guidance for appellants regarding the appeal hearing process be included.

Chairman Dodgion recommended that use of the Position Statement be left to the panel chairpersons' discretion. Mr. Coyner said in situations where there is non-representation by counsel in all cases it would be necessary to have a Position Statement.

The Chairman invited public comment. Dr. Miller commented that clear written instructions regarding appeals are important as well as availability of a resource person to speak to about any questions.

Motion: Mr. Coyner moved that the Commission make a policy change to require the "Position Statement" as presented in Item 8 on the Agenda and direct staff and counsel to incorporate the "Position Statement" into the next revision to SEC's Rules of Practice. Mr. Rackley seconded the motion and it was approved.

9) Administrator's Briefing to the Commission

Mr. Leo Drozdoff, Administrator of the Nevada Division of Environmental Protection, began his briefing by informing the Commission that NDEP is in support of the "Position Statement" requirement, is in agreement with many of the comments the Commission and audience members made regarding this, and the direction in which the Commission is going with the process. He feels it serves everybody the more the process is understood.

Along those lines, Mr. Drozdoff said training is available from the Judicial College in Reno on Administrative Law and wondered if the Commission is interested. He said this could include training for attorneys and some NDEP senior staff who get involved with appeals. This type training could be beneficial and would allow someone with more background to answer questions NDEP staff or the Commission may have regarding appeal process legalities and proceedings.

Chairman Dodgion said he personally thinks it would be a good idea and other Commissioners seemed to agree. Mr. Drozdoff will work with Bill Frey and Rose Marie Reynolds to see about making arrangements.

Mr. Drozdoff relayed information from the recently concluded Legislative Session. From a NDEP perspective, the Session went pretty well. Generally speaking, the level of financial impact on this agency doesn't compare to the significant impact on other State agencies. The bureaus of Water Quality Planning and Safe Drinking Water receive a small amount of general funds for programs, primarily for matching purposes. Funding was cut in these programs and the cuts will have an effect on the bureau work performed and the speed in which it can be done. From a budget standpoint NDEP fared well; there was adequate budget for travel and equipment purchase as well as a new position in Mining that was needed.

Mr. Drozdoff apprised the Commission on some of the agency directed bills (SB 37 and SB 105) and other bills NDEP was involved with in varying degrees and manner (AB426, SB60, SB332, SCR2).

Commenting on the Mining Industry petition which was pulled from the agenda, Mr. Drozdoff said he and his staff had reviewed it. The industry and NDEP have a significant degree of angst with developments at the federal level. The only stated reason the federal government has ever given anyone in NDEP as to why they are pursuing a federal Maximum Achievable Control Technology (MACT) after eight years of saying they wouldn't was that they made a deal with the Sierra Club to get an extra year on an unrelated rule.

He understands the mining industry's concern with this however nothing from the federal level has been seen and it is unknown what EPA is going to do. It seemed a bit premature to move forward with a regulatory petition at this time.

Responding to a question from Mr. Gans regarding the odors issue, Mr. Drozdoff said it is a frustrating situation for everyone involved. The regulations are probably cumbersome and NDEP looked at these and at how other states handle odor issues. Only 3 other states that have definitive air standards were identified. The main reason given by other states that had odor standards and got rid of them, was the standards were impossible to enforce.

Half of bureau staff time this past year was on odor complaints; NDEP's level of effort at the two involved facilities is unprecedented. We would like to find the source and the answer but it is not easy. We will continue to look and try. There is a need for better communication with local county governments and with defined roles and expectations for them and for NDEP.

10) Public Comment

Ms. Johnson, Silver Springs, wondered if there might be a grant available for equipment purchase for 24 hour monitoring for odors.

There being no other public comments, Chairman Dodgion closed the public comment portion of the meeting and moved to the postponed agenda item 7.

7) Petition: Declaratory Order regarding definition of sewage in NAC 445A.107

Chairman Dodgion introduced this agenda item, explaining this issue was one of a four part petition from Amargosa Citizens for the Environment (ACE) considered at the February 11, 2009 SEC hearing and deferred to this hearing for the purpose of obtaining input from NDEP staff. The Chairman announced that since there is also a pending appeal related to this issue, testimony will be limited to this specific issue only and no testimony will be allowed relating to matters which will be part of the appeal hearing.

The issue being considered is a request by petition from Amargosa Citizens for the Environment (ACE), SEC Form #2 dated January 8, 2009, issue "C" for a declaratory order that "Sewage as defined in NAC 445A.107 includes dairy feedlots". The Chairman read the "sewage" definition from NAC 445A.107.

Mr. Tom Porta, Deputy Administrator, spoke on behalf of NDEP. Mr. Porta directed attention to the memo in the hearing packets from Senior Deputy Attorney General Bill Frey to NDEP Administrator Leo Drozdoff dated June 4, 2009 (see ATTACHMENT 6). As the Division's testimony, Mr. Porta summarized the contents of the memo: There were 4 reasons outlined as to why this issue, number C on ACE's petition, should be denied. First, the definition is clearly written. Sewage as contained in 445A.107 includes all water carried animal waste from all feedlots. Second, adding the word "dairy" is not necessary and does not change the definition. Third, the Environmental Commission's interpretive powers are limited pursuant to NRS 233B.120. This statute allows the Commission to determine applicability of statutes and regulations or decisions by the Division. ACE has

asked for a declaratory order to interpret a regulation and therefore is not asking for an opinion as to the applicability of a regulatory provision. Fourth, and most importantly, the definition does not determine or drive the regulatory approach that the Division will take for any industry. For those reasons, the Division recommends the Commission dismiss the ACE petition for declaratory order, issue C.

Chairman Dodgion asked Mr. Porta if his understanding of Mr. Frey's analysis was that the language is clear, straightforward, and therefore needs no further interpretation. Mr. Porta responded affirmatively.

There being no other questions from the Commission, the Chairman invited other interested parties to speak.

Dr. Anette Rink, Supervisor of the Animal Disease Lab, Nevada Department of Agriculture, spoke at the request of Commissioner Lesperance. Mr. Lesperance felt the information Dr. Rink would provide was pertinent to determining the definition of sewage. Dr. Rink provided information regarding the microbiological composition and the potential hazard associated with pathogens in manure.

Mr. Preston Wright, representing Nevada Cattlemen's Association, addressed the Commission saying they support the position of NDEP that no change is needed.

Mr. Jay Lazarus, Glorietta Geoscience, Inc., representing Ponderosa Dairy, spoke next to the Commission. He said he has worked in the CAFO industry since 1997 and gave his credentials. Mr. Lazarus said dairies don't have waste; they have greenwater (liquid manure) and solid manure. Those are not waste, they have a monetary value to them and are not disposed of; they have significant financial value. Mr. Lazarus discussed the definition of sewage and the CAFO rule defining manure as well as his view of how dairies are not feedlots. In summary, he supports NDEP's position.

Mr. John Marshall, counsel for ACE, explained the petition asks for an advisory opinion as to whether or not the waterborne waste coming off of a dairy should be classified under the definition of sewage as defined by NAC 445A.107. While Mr. Marshall concurred with Mr. Frey's point that the definition is straightforward, ACE is asking an advisory opinion that NDEP regulate dairy waste as sewage under this definition.

Mr. Marshall and Chairman Dodgion discussed the intent and exact wording in the petition. Mr. Marshall explained that the backup information provided to the petition expands on the advisory opinion being asked.

Next to speak was Mr. John Zimmerman, attorney with Parsons, Behle & Latimer representing Rockview Farms who owns and operates Ponderosa Dairy. Mr. Zimmerman said they filed an opposition to ACE's petition, were in support of NDEP's position, and felt the petition should be denied. Mr. Zimmerman said ACE's petition at point "C" states clearly that they want "dairy feedlots" included within the definition of sewage. Going beyond that, the Commission would be interpreting the applicability of the statute.

Mr. Coyner asked if there is a definition of feedlots and said he was hesitant to begin defining feedlots. DAG Rose Marie Reynolds said that there is no definition of a feedlot.

Chairman Dodgion stated that the petition says "sewage includes dairy feedlots" however the backup information ACE provided goes into water carried waste. Mr. Dodgion asked Ms. Reynolds if the Commission is constrained to take action as stated in the petition or could they go into the backup material and what ACE really meant. Ms. Reynolds advised that the Commission was confined to the issue as stated in the petition. After further discussion, a motion was made.

Motion: Mr. Lesperance moved that issue "C" of ACE's petition is a mute point and should be dismissed. Mr. Coyner seconded; motion passed.

There being no further business, Chairman Dodgion dismissed the hearing at 12:45 pm.

ATTACHMENTS

ATTACHMENT 1: SETTLEMENT AGREEMENTS TABLE - June 17, 2009

ATTACHMENT 2: SUMMARY OF PUBLIC OUTREACH – R189-08

ATTACHMENT 3: ERRATA SHEET – R189-08

ATTACHMENT 4: SEC SLIDE PRESENTATION R189-08

ATTACHMENT 5: HANDOUT NEVADA WOODPRESERVING PRESENTATION

ATTACHMENT 6: MEMO ON NEVADA ADMINISTRATIVE CODE 445A.107, NV AG'S OFFICE TO NDEP

ATTACHMENT 1

-- Settlement Agreements Table
(2 pages)

NDEP-BAPC SETTLEMENT AGREEMENTS – June 17, 2009

TAB NO.	COMPANY NAME	VIOLATION	NOAV NUMBER	PROPOSED SETTLEMENT AMOUNT
1	A & K Earth Movers, Churchill County	NAC445B.275 "Violations: Acts Constituting; notice." For exceeding the permitted grain loading and emission limit for particulate matter (PM/PM_{10}) during an emission compliance (source) test. Follow-up investigation indicated that the clamps holding some of the bags in the baghouse were loose, resulting in incomplete capture (leaks) of particulate matter. The Administrative Penalty Table includes penalties for violations related to source tests. The Table calls for a $2,500 penalty for Class 2 facilities (minor sources) that exceed a permitted emission limit and grain loading during a source test.	2166	$2,500
2	Premier Chemicals, LLC Nye County	NAC445B.275 "Violations: Acts Constituting; notice." For exceeding the permitted emission limit for particulate matter (PM/PM_{10}) during a source test. Follow-up investigation indicated that a bag missing from one of the baghouse compartments caused it to malfunction (leak). The Administrative Penalty Table calls for a base penalty of $1,500 for a Class II facility exceeding a permitted emission limit during a source test. Because the emission exceeded the permitted limit by greater than 20 percent, the Penalty Matrix also applies. Taking into account that the emissions were 55 percent higher than the permitted emission limit, the base penalty is increased by 55 percent ($825) to a total penalty of $2,325.	2158	$2,325

NDEP-BAPC SETTLEMENT AGREEMENTS – June 17, 2009
(continued)

TAB NO.	COMPANY NAME	VIOLATION	NOAV NUMBER	PROPOSED SETTLEMENT AMOUNT
3	Bango Oil, LLC Churchill County	NAC445B.275 "Violations: Acts Constituting; notice." For constructing unpermitted processing systems without first applying for and receiving a modification of an air quality operating permit. On July 30, 2008 the company submitted an application to revise its air quality permit. The NDEP subsequently discovered that much of two of the systems being permitted, a filtration system ("hydrotreater") and cooling tower, were already under construction. The revised permit was issued in February 2009. Based on the presence of two unpermitted systems and duration of 18 weeks, the Administrative Penalty Table and Penalty Matrix call for a penalty of $108,000. The proposed settlement includes payment of a $10,000 cash penalty and completion of a Supplemental Environmental Project (SEP) requiring installation and operation of a system to treat water generated by the re-refining process. This secondary water treatment system must achieve the quality required for reuse of treated waste water in the plant or for surface application, and must cost at least $122,500 [125% of the remaining $98,000 penalty]. The SEP will benefit air quality by eliminating a potential source of odors and diminishing pollutant emissions, and benefit water resources by decreasing demands on the local groundwater resource and providing water for plant reuse, dust suppression or other surface applications. The proposed Settlement requires that the secondary water treatment system shall commence operation on or before July 15, 2009. Bango Oil has complied with all the milestones identified in the proposed Settlement regarding permitting and installation of the equipment.	2146	$10,000 plus a SEP (water treatment plant) costing at least $122,500

ATTACHMENT 2

-- Public Outreach Comments for R189-08
(14 pages)

Supporting Information for R189-08
Summary of Public Outreach
Select Public Comment and Division Response

The Nevada Division of Environmental Protection held public workshops on the proposed regulations on May 13th in Las Vegas and May 14th in Carson City. Approximately 50 people combined attended the workshops, largely representing the regulated community and the environmental consulting industry.

In addition to the public workshops, targeted outreach was made to agencies responsible for resource management, local governments, and large facility owners who may be impacted by the propose regulations.

Outreach made to:

American Council of Engineering Companies

Resource management agencies:

Truckee Meadows Water Authority
Southern Nevada Water Authority
Las Vegas Valley Watershed Advisory Council

Facilities provided with outreach:

Department of Defense (Hawthorne Army Depot, Nellis AFB, NAS Fallon)
Kinder Morgan
Boeing

Official comments were solicited through public announcement, targeted outreach, and public workshops. The Nevada Division of Environmental Protection fielded numerous clarifying questions and informal comments that help to involve language changes being suggested by the Division in the errata sheet for R189-08. Official comment letters were received from the American Council of Engineering Companies, Kinder Morgan, and a certified environmental manager. Response to comments were prepared for all formal comments received. Response to comments for Kinder Morgan and Ms. Tamara Pelham have been attached for consideration by the State Environmental Commission. These response to comments were selected because they encapsulate the major issues discussed in public workshops and outreach efforts.

Additional comments are being accepted up to the date of the SEC hearing, and the SEC members will be informed of the receipt of any comments requiring attention at the time of the hearing. The NDEP will provide official response to any comments received and will include them in the administrative record for proposed regulation R189-08

ndep
NEVADA DIVISION OF ENVIRONMENTAL PROTECTION
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STATE OF NEVADA
Department of Conservation & Natural Resources
DIVISION OF ENVIRONMENTAL PROTECTION

Jim Gibbons, Governor
Allen Biaggi, Director
Leo M. Drozdoff, P.E., Administrator

May 19, 2009

Jacquelin Buratovich, P.E.
Contract Project Manager
Kinder Morgan Energy Partners, L.P.
370 Van Gordon Street
Lakewood, CO 80228-8304

RE: **Response to comments on Revised Proposed Regulation of the State Environmental Commission LCB File No. R189-08**

Dear Ms. Buratovich:

The Nevada Division of Environmental Protection, Bureau of Corrective Actions received comments on the referenced proposed regulations from your office in correspondence dated May 7, 2009. The referenced proposed regulation includes revisions to the State of Nevada site cleanup and leaking underground storage tank programs. Comments have been accepted as part of the public involvement process prior to a hearing for adoption in front of the State Environmental Commission. The comments and responses will be incorporated into the public record accompanying the proposed regulation at the SEC hearing.

Comment: *Section 4.Why is this a 'stand-alone' section instead of being integrated into 445A 227, 2272, and 22725?*
Response: This was written as a stand-alone section in order to prevent redundancy of language across several sections of the Chapter. While this was largely a stylistic choice, we do believe that dealing with environmental covenants in a single section serves some minor functional purposes as well. First, it does not give undue importance to the use of environmental covenants as one tool among many to protect human health and the environment. If language relevant to environmental covenants was integrated across all sections where decisions are made about the protection of human health and the environment, it might be indicative that environmental covenants were given preference over other remedial options. Secondly, the language of this section was drafted to emphasize the voluntary nature of environmental covenants; integration across several sections might confuse the voluntary nature through drafting errors or simply by undue repetition.

Comment: *Section 8(3). In this section as in other sections with multiple conditions, it would be helpful to clarify whether the provisions are alternative, or whether all conditions apply. This can be determined by the convention requiring the reader to look for the final conjunction in the list ("and" or "or");however, it is not clear that this drafting convention is always deliberate or intended or applied. Apparently, the provisions of Section 8(3) are*

intended to be alternatives, but the ambiguities could be avoided with additional text – "follow up reporting is sufficient to demonstrate one or more of the following:"
Response: The convention for the construction of series using an "and" or an "or" conjunction is deliberate and strictly adhered to by Legislative Counsel Bureau drafters of statutory and regulatory language in the NRS and NAC. An "and" construction requires that all elements in the series be true. An "or" construction requires that only one element in the series be true. The provisions of Section 8(3) are intended to be alternatives and are governed by the "or" construction. However, because this section contains multiple subsections that complicate comprehension and since other reviewers have indicated confusion, the Division will look at their options for adding clarifying language similar to that recommended in the comment.

Comment: *Section 8(3)(a). This provision is ambiguous. It apparently intends to say that an assessment may not be necessary if abatement actions taken by the owner or operator reduce contamination below the action level, but it could be read to mean that the excessive levels of contamination were not caused by the owner or operator.*
Response: The intention of the regulatory language is interpreted correctly by the commenter. The Division recognizes the ambiguity as being logically valid; however, we do not envision that the language will result in ambiguity in practice. The identified ambiguity is present in the existing regulation and has never been identified as a source of confusion by the regulated community. Also, the abatement actions taken by a facility owner/operator pursuant to NAC 445A.22695 must, by the very nature of abatement, result in the reduction of contamination, not an increase, so the comparison against action levels referred to in this subsection must necessarily be in terms of a reduction of contamination not a contribution. However, the Division will look at their options for changing the proposed language from "The level of contamination of the soil **does not exceed**" to "The level of contamination of the soil **no longer exceeds**" for clarification.

Comment: *Section 8(3)(c). It would be helpful to define "environmental media."*
Response: Drafting guides for regulatory and statutory language indicate that a word or phrase that is used in only one section of a Chapter is not given a meaning in the preface sections of a Chapter. Definitions are also not required where the meaning of a phrase is not subject to different interpretations. As presented in this subsection, environmental media are limited to those explicitly dealt with in the corrective action portions of NAC 445A, which includes soil, groundwater, and surface water.

Comment: *Section 9(2)(a). "actual or imminent effect on groundwater..." Since a substance could be released into groundwater and cause an 'effect' that poses no risk (no receptors, de minimus quantities), would it not be appropriate to qualify this requirement with some measure of risk?*
Response: The equivalent language in the existing regulation is "actual or imminent *impact* on groundwater." The proposed regulation replaces "impact" with "effect" since drafting guidelines gives preference to the term "effect" over "impact." The Division has no control over the drafting guidelines and must defer to the Legislative Council Bureau on this substitution.

While it may be the case that the original phrasing, with the term "impact," was more open to risk considerations, the Division does not fundamentally disagree with the use of the word "effect." The Division must uphold statutory mandates to prevent degradation of waters of

the State, and this mandate is not tied to acceptable risk or receptor use. When interpreting the regulations, the Division will maintain the priority to prevent ***any*** discharge to waters of the State that are not regulated under permit. This does not affect the Division's ability to establish appropriate action levels and make consideration of risk when determining acceptable cleanup actions for waters that have already been impacted; this section merely gives authority to the Division to consider taking action on a release to prevent groundwater contamination before the contamination occurs.

Comment: *Section 13. What is the relationship between 1(a) and (b)? Is this intended to allow either method (background or risk)? Section 13(2) says that if more than one action level can be established through Section 13(1), then the most restrictive applies, but not more restrictive than background. Read literally, this means that once background levels are established, background will always be the action level, because a less restrictive level established through a risk assessment can't be selected, based upon 13(2). The intention was probably to allow a less restrictive action level to be determined by risk assessment, and if more than one level is suggested by the risk analysis, the level chosen must be the most restrictive of the 13(1)(b) levels, correct? Section 13(1)(b) only has utility if this interpretation is correct.*

We respectfully offer the observation that the current regulation suffers from this same ambiguity, as does 445A.22735 (action level for groundwater).

Response: The current regulation contains the same ambiguity and has not led to any difficulty in its implementation. However, it appears that the additional language and other changes made in this section may have exacerbated the ambiguity. We will examine options for the alteration of the section to eliminate the ambiguity or to control it through other means. The simplest fix for this ambiguity is to clarify that the most restrictive action level established using the criteria set forth in ***subsection 1(b)*** must be used.

We would argue that due to the current construction and language in 445A.22735 (action level for groundwater) the same ambiguity does not exist or is constrained to such a point as to be effectively non-existent.

Comment: *Section 14(2). Again, it would be helpful to clarify whether (a)(b)(c) must all be satisfied, or are they alternatives. The regulation says all subsections of (a) must be satisfied. Note that since these provisions are intended to be available to allow an owner or operator to avoid initiating a corrective action, it may not be appropriate or possible to have three years of monitoring data to submit with the request.*

Response: Subsections (a), (b), and (c) of Section 14(2) are governed by an "and" construction meaning that all elements in this series must be satisfied. Since there are many subsections and levels of language involved, the NDEP will examine options for the addition of clarifying language.

Comment: *Section 14(2)(c)(1). Could the economic or technological impracticability of treating groundwater result from the contamination at issue?*

Response: No, the Division will not allow that to be a consideration in its determination

Comment: *Section 14(2)(c)(2). How were these three conditions selected? There could possibly be other applicable legal restrictions on the use of the groundwater.*

Response: These three conditions were not meant to be exclusive and were included as the most prominent legal restrictions applicable for the use of groundwater. The Division will examine its options for adding clarifying language. In the absence of clarifying language, the Division would still allow additional legal restriction or institutional control to be presented and considered as part of an evaluation for exemptions from groundwater corrective action.

Comment: *Section 21(1). The requirement to submit a report "regardless of the amount of the release for which the report is submitted" is confusing. Presumably the report is still only required for the "reportable quantities" set forth in NAC 445A.347 and the referenced CFRs. Requiring reporting any and all spills/releases puts an extraordinary burden on industry, and even filling station operators if taken literally.*

Response: The requirement to report a release event "regardless of the amount of the release" is tied only to one specific category of operating releases involving underground storage tanks. The category of releases covered by Section 21(1) is specifically limited to a confirmed release from an underground storage tank for which reporting is required in accordance with 40 C.F.R. 280.61 and can most generally be thought of as a leak in the underground portions of a regulated underground storage tank. This type of leak event requires notification to the implementing agency at the time of confirmation, not at a point where the facility owner/operator can conclude how much substance is being released to the environment as a result of the underground leak. This obligation arises from the requirement of an underground storage tank owner/operator to work with UST compliance officers to resolve the underground leak and assess the extent of impacts that may have resulted.

This requirement does not cover all operating spills or releases at underground storage tank sites. A distinction is made in the new language of the regulations between a confirmed release from an underground storage tank (Section 21(1)) and a spill/overfill (Section 21(2)). The more rigorous reporting requirement are placed on confirmed releases from the UST because these events represent an on-going release in the underground portions of a storage tank which are only discoverable through indirect observation either by leak detection, tightness tests, or excavation around the UST. All other releases at a UST facility are still subject to reportable quantities as discussed in the response to comment below.

The proposed regulation does not present an extraordinary burden on industry because this notification requirement is explicitly present in federal regulations and has been a component of the regulatory program for underground storage tanks since the adoption of those federal regulations over a decade ago. The proposed regulation attempts to add clarity to the distinction between "confirmed releases" and spill/overfills. The proposed regulations also creates a structure whereby corrective action requirements for leaking USTs are not immediately invoked as a result of the required notification but are still tied to the 3 cubic yard trigger, similar to all other release events.

Comment: *Section 21(5). Spill and overfill are defined as "any release..." Again, please confirm that reporting of such releases is still limited by the "reportable quantities" set forth elsewhere in the regulations.*

Response: The "spill or overfill" definition is tied to the release event requiring reporting under Section 21(2). These events are subject to the reportable quantities of 25 gallons, 3 cubic yards of soil, or the discovery in groundwater. This reporting requirement is in compliance with federal regulations governing operation of underground storage tanks. "Spill or overfill" events

generally correspond to one-time incidents, occurring at the surface of a facility or from equipment not considered part of the underground storage tank. The definition is intended to assist a facility owner/operator to distinguish between a "confirmed release" and all other types of releases, which are covered under the definition of a "spill or overfill." Because of the complications involved in the operation of underground storage tanks, particularly the potential for underground releases, there may be difficulty in maintaining a clear distinction between what compromises a "confirmed release" and a "spill/overfill," particularly when soil contamination must be investigated to determine whether it is the result of a leak in the UST, a previous spill/overfill, or historic contamination tied to other removed tanks or past site operations; however, this distinction is necessary, and the proposed regulations adds needed clarity. UST compliance programs may choose to put out further clarifying guidelines and information to UST owners and operators that builds on the regulatory language.

If you have any questions regarding the responses, I would be happy to discuss any issue in further detail with you by e-mail (ssmale@ndep.nv.gov) or by phone (775-687-9384). We also welcome any participation you may wish to have at the State Environmental Commission hearing on June 17, 2009 in Reno, NV.

Sincerely,

Scott Smale
Bureau of Corrective Actions

ndep
NEVADA DIVISION OF ENVIRONMENTAL PROTECTION
protecting the future for generations

STATE OF NEVADA
Department of Conservation & Natural Resources
DIVISION OF ENVIRONMENTAL PROTECTION

Jim Gibbons, Governor
Allen Biaggi, Director
Leo M. Drozdoff, P.E., Administrator

June 8, 2009

Ms. Tamara Pellham
639 Isbell Road, Suite 390
Reno, NV 89509-4967

re: Response to comments on proposed regulation R189-08

Dear Ms. Pellham:

The Nevada Division of Environmental Protection, Bureau of Corrective Actions has received and reviewed comments provided by you in correspondence dated June 3, 2009. Responses to the provided comments have been drafted that indicate where changes to the proposed regulation are recommended based on a comment, that provide clarification where requested, and that provides the position of the Division if a comment has not been incorporated into the proposed regulation.

Comment 1. It was explained during the workshop that proposed regulations are intended to provide a regulatory vehicle allowing the Bureau of Corrective Actions ("BCA") to issue "guidelines" regarding technical methods, sampling procedures, waste management processes, site characterization strategy, etc. Proposed regulations potentially used for purposes of issuing reference "guidelines" include, at a minimum, those added or amended under: Section 3, Section 8, and Section 14. Pending "guidelines" are effectively an extension of the proposed regulations, which will, by virtue of publication and distribution by BCA, become *de facto* requirements. Deviation from published "guidelines," that functionally equate to policy, will require technical defense to both a regulated entity (potentially responsible party) as well as the BCA, whether the technical deviation is widely accepted or uniquely innovative.

An effort to defend, as opposed to an effort to propose, any number of technical approaches within the universe of options affording a solution to an environmental challenge or concern will be more rigorous and time consuming, and therefore, costly. This situation conceivably creates an economic deterrent to the pursuit of alternative or innovative technical approaches that are not specifically endorsed by BCA-published "guidelines". Without a better understanding of how these "guidelines" will be framed and a reasonable opportunity to provide comment and input, it cannot be assumed that the guidelines, as extensions of the proposed body of regulations, will not have an economic impact on the regulated community. It is, therefore, premature to conclude that proposed regulations will have, "No economic impacts to the public...," as stated in response to element number 5 on the *Form #1 – R189-08*. If the preconceived "guidelines" are critical to the execution of the proposed regulations, then the "guidelines" should be *included* in proposed regulations and the public should be given a reasonable opportunity to comment.

Response: In drafting the proposed regulations, care was taken to ensure that the fundamental elements and hallmarks of the Division's established cleanup program were not changed or eliminated. The fundamental elements and hallmarks of the Division's cleanup program include: a single set of easy-to-understand regulations that can accommodate all sites, from the response

after a simple release to a facility-wide cleanup of a site with a long operating history; the flexibility to expand and collapse the level of detail and effort necessary to make determinations about the protectiveness of cleanups based on a number of considerations; the ability of a facility owner or operator to drive cleanup and make determinations about the best approach; and the avoidance of regulating innovation out of existence through the use of exclusionary language. The approach that has developed over time and is reflected in both the current and proposed regulation is a framework that is driven by obligations on a facility owner and operator to undertake cleanup with defined decision points that allow for concurrence by the Division. The regulations avoid language that would give the Division authority to dictate any particular cleanup or method of assessment.

The Division realizes that while the cleanup program as it has been developed has a number of benefits for the regulated community, there are also a number of disadvantages. Most important is the lack of specificity in the regulatory language that would assist the regulated community determine what will satisfy the Division at those points which require regulatory concurrence. Having specific language and requirements written into regulation allows a facility owner to know what hurdles he must pass and how they need to be satisfied; however, this use of specific language can also serve to limit options that may result in a more cost-effective or timely solution.

The Division believes that the best approach is to maintain maximum flexibility in regulatory language, where the inclusion of specific language would have the greatest effect in limiting options available to the regulated community. The Division is comfortable that the flexibility in regulations will not result in cleanups that are not protective of human health and the environment, because the Division, and not the facility owner or operator, still retains the ultimate authority to make this determination. However, the Division feels it is appropriate to put out supporting information that would assist the regulated community efficiently achieve concurrence. This can best be done through the publishing of guidelines, guidance, or opinions that do not rise to the level of regulatory requirements and can be revised, refined, and drafted through an on-going, collaborative process with the regulated community. This may actually result in lower cost as opposed to increased cost, as the necessity of expended costs will be dictated more by site-specific conditions rather than guidelines.

The Division can provide supporting information without limiting a facility owner or operator's ability to pursue alternative methods or apply innovative processes. Supporting information, whatever it is called, is drafted to assist the regulated community in knowing what methods have been successful in achieving concurrence and can be employed with less effort required for justification. This does not mean that any method published in guidelines or guidance must be adhered to at a site. Therefore, guidelines do not become de facto requirements as the program is implemented in Nevada. If a facility owner or operator wishes to pursue an alternative approach, which is still allowable under regulations, the Division must consider it, but depending on the decision being made, the Division will need to evaluate it before it is employed, and this may require additional justification to be provided by a facility owner, just as for any new approach. Any investigation approach or procedures proposed by an owner/operator, regardless of whether it is specifically anticipated and described in Division guidelines, will need to justified as technical defensible in light of site-specific conditions.

Comment 2. New regulation proposed under Section 5 reasonably falls under the jurisdiction of the Bureau of Waste Management and is redundant to both state and federal regulation. Proper and appropriate waste management is already required by law, whether it is generated as a function of

a corrective action or any other process. Waste management per the nondescript "manner approved by the Division" is vague and ambiguous, and it is unclear what additional waste management requirements might be relevant beyond those already required by law. Furthermore, the proposed regulation suggests that current waste management laws or regulations are insufficient to address waste generated by corrective actions, yet the proposed regulation does not add particular clarification that might otherwise improve the regulation and proper handling of hazardous or regulated waste. Until this proposed regulation is further clarified, i.e. defining what "manner approved by the Division" actually means, the implications of the proposed regulation are equivocal and cannot be clearly interpreted for purposes of public comment.

Response: Material handling requirements in Section 5 are intended to support the consolidated cleanup authorities of the Division, which are primarily handled through the Bureau of Corrective Actions. The language was drafted to avoid redundancy and duplication of existing requirements while not superseding or eliminating requirements to obtain permits or comply with transport and disposal laws overseen by other programs within the Division. The language in Section 5 has been taken from existing cleanup regulations in NAC 459.9974 where it provided necessary clarification that management considerations must still be made for soil removed from the ground even if that soil has concentrations below action levels. As a critical clarification, this language is considered appropriate for consolidation in the proposed regulation to apply to all cleanup cases and not just leaking underground storage tanks. The language has been generalized to apply to hazardous substances, hazardous wastes, and regulated substances, whereas the original language applied only to petroleum contamination.

The proposed regulation states that materials removed as a result of corrective action or an assessment under the oversight of the Division must be managed in a manner approved by the Division. It has not been drafted as a waste disposal requirement and does not duplicate the extensive federal and state laws governing disposal. Remediation of a release, whether it be through federal RCRA Corrective Actions, Clean Water Act authorities, or any equivalent State response program, involves a number of decisions about the handling of contaminated material, and many of these decisions occur prior to waste designation and waste disposal. All federal and state cleanup programs create some flexibility in waste laws, such as the Area of Contamination policy and "contained-in" policies under RCRA, which allow materials to be removed, managed, and handled on-site without a waste designation that would require disposal in strict accordance with disposal regulations. This allows cleanup authorities to consider on-site management and treatment options for materials undergoing remediation. Section 5 gives authority to the Division to make determinations about the proper management of materials that have not received a waste designation or are being treated or handled through on-site remediation.

As a component of remediation, off-site waste disposal must still be evaluated as a remedial alternative, and it is appropriate that the Division requires a facility owner or operator to document that off-site disposal will be employed and that adequate information has been collected to support the disposal option. Section 5 grants the authority to the Division to require that these determinations are made in a corrective action plan or assessment work plan that is reviewed by the Division. This does not duplicate those authorities that require proper waste transport or disposal once it has been determined that off-site disposal is a remedial option that will be employed at a site. It also does not absolve a facility owner or operator from complying with those requirements and obtaining all necessary permits.

Section 5 has been added into the cleanup regulations (and was originally adopted into the Underground Storage Tank regulations at NAC 459.9974) to clarify that decisions about the handling of contaminated media are undertaken as a part of remediation authority. Because there are many other programs and authorities within the Division that could potentially have

oversight of contaminated media, it is important to maintain a unifying corrective action authority to expedite site cleanups and eliminate multiple regulatory oversight. When site cleanup results in waste disposal or the use of a treatment process that is regulated by another authority, a facility owner or operator must comply with those requirements, but the authority of the Division to ensure that the cleanup is protective and that the cleanup has not resulted in the transfer of issues to other sites through improper management is central.

The language of Section 5 is particularly important to ensure that the Division's authority to ensure that a cleanup is protective is not limited through the improper application of action levels. The language has been drafted such that any material contaminated with a hazardous substance, hazardous waste, or regulated substance that is removed must still be subject to management approval, not just those materials that are above an action level. An action level is a site-specific determinant that a contaminant presents a threat at a site given many factors that include, but is not limited to, its quantity, concentration, location, mobility, and proximity to receptors. An action level does not determine whether soil or groundwater is considered a waste, and soil or groundwater that is contaminated below action levels at a site does not mean that the material can be handled as though it were not subject to remediation.

Comment 3. Proposed language for Nevada Administrative Code ("NAC") 445A.22695(2) discusses, "immediate action after a release of a hazardous substance, hazardous waste or a regulated substance occurs or upon a discovery of *any contaminated media specified by the Director...*" Please clarify what is meant by *any contaminated media specified by the Director*? Please provide examples of what media might be included or intended to be captured in this particular language.

Response: Subsection 2 of Section 9 of the proposed regulation details the authority of the Division to require an owner or operator to take immediate action after a release of a hazardous substance to abate or mitigate imminent threats to waters of the State and public health. This language has been retained from the current regulations; however, the retained language includes a clarification of the Division's authority. The new language is intended to make clear that the Division has the authority to require immediate action to abate imminent and substantial threats even if the order does not come immediately after a release. The added language covers situations where a release may have occurred sometime in the past and was either not detected, apparent, or reported, but the discovery of the contamination at a later time still warrants immediate action. The "media specified by the Director" should be taken to include all those situations when notification of contamination discovered in media must be made to the Division under NAC 445A.345 to 445A.348, which includes surface water, groundwater, soil, and other surfaces of land.

Comment 4. Proposed modifications to NAC 445A.2272 are relatively substantial, yet the term "*appropriate level of concentration*" was not altered. An argument can easily be made that there is no "appropriate" level of concentration of a hazardous substance, hazardous waste, or regulated substance in the soil that is protective of waters of the State. While the regulation is open for modification, it is suggested to change the word "appropriate" to "tolerable", "agreeable", "manageable", or "ineffectual":, etc., or simply remove the adjective so that the regulation does not suggest that subsurface contamination is "appropriate" in any particular circumstance.

NAC 445A.2272 also inserts new language indicating that action levels will be derived based on "(2) A study approved by the Division," yet the methods available, agreeable, or approved by the Division to derive fundamental remedial action levels has not been discussed or publicized. Without more information clarifying what method of '*study*' will be acceptable, there is an undefined and unrestricted potential for this proposed regulation to have significant economic impact on existing and future remedial projects. It is easily conceivable that the basic derivation of remedial

action levels could become an academic study for a wide range of remedial scenarios. This regulation is considered too vague and has the potential to be applied inconsistently and potentially unfairly.

Response: The language referenced in the first portion of the comment has been retained from the current regulation, which states that action levels for soil must be set at an appropriate level based on protection of waters of the State, human health, and the environment. The existing phrasing and structure means nothing more than action levels must be set appropriately. The Division does not feel that the language requires clarification.

The new language at Section 13(1)(a)(2), which adds the phrase "A study approved by the Division," is only tied to the establishment of a background concentration or volume of a hazardous substance, hazardous waste, or regulated substance. The existing language in regulation required clarification because it stated that a background concentration could only be set forth in a permit issued by the Division; however, a relevant permit that sets forth background concentrations for soil would be present in very few, if any, situations. The clarifying language allows a owner or operator to submit a study for approval that establishes a background concentration for use as an action level in the absence of a permit. While there is existing guidance provided by EPA and DoD, the Division welcomes input on appropriate, scalable, and technically defensible methodologies for conducting background concentration studies from the regulated community.

Comment 5. Proposed modifications to NAC 445A.22725 strike the 10,000 milligram per liter ("mg/L") threshold concentration for total dissolved solids ("TDS"), above which groundwater is not reasonably expected to be a source of drinking water and corrective action to reach a drinking water standard is not required, yet the revised regulation does not include language clarifying what criteria will be used to assess groundwater quality as a source or potential source of drinking water. What, if any, criteria will be used to determine when corrective action for releases to groundwater is not required? This comment is a request for the regulation to be further amended to reference the particular criteria used to determine when groundwater is or is not reasonably expected to be a source of drinking water.

Response: The 10,000 milligrams per liter threshold was struck from the regulations as being redundant, since it constituted only one specific consideration for determining whether it was economically or technologically impractical to render the water fit for human consumption but did not subsequently limit any other potential considerations. The proposed regulation retains the general language currently contained in regulation as being more flexible while still serving to support arguments that are based on the effect that total dissolved solids may have for use considerations. As discussed previously, the Division does not want to unnecessarily limit considerations through the use of regulatory language that could exclude any reasonable supporting information on a site-by-site basis. At this point, the Division prefers to let the regulated community present any and all arguments that they feel have scientific merit to satisfy this individual element of the groundwater corrective action exemption. As the process for issuing groundwater exemptions outlined in the proposed regulation develops and matures, the Division will be in a better position to put out supporting information on those criteria that are determined to be consistently compelling and demonstrable.

Comment 6. The requirement to provide data for 3 years of quarterly groundwater monitoring to substantiate site closure (NAC 445A.22725), versus the minimum of 1 year that is currently required in regulation will (NAC 445A.22745), by default, has an economic impact on the regulated community.

Response: Language in the existing regulation at NAC 445A.22745 does not create a requirement for a minimum of 1 year of groundwater monitoring prior to closure of a site, so the inclusion in the proposed regulation of 3 years of monitoring to support closure is not equivalent and does not represent an increased burden or economic impact to the regulated community. The 1-year monitoring period in existing regulations is related to the termination of a treatment system and is not equivalent to the Division's authority to require additional corrective action or grant site closure.

The 1-year monitoring requirement in NAC 445A.22745(1) is in place to ensure that a year of groundwater monitoring is conducted after termination of a remediation system to assess any potential for rebound in the concentrations of contaminants. This language was taken directly from NAC 459.9979, which places the required monitoring period **after** termination of remediation, but due to language changes during the later adoption of the same cleanup regulations in NAC 445A, the monitoring period was mistakenly placed **concurrent** with remediation by Legislative Counsel Bureau drafters. The Division approached the adoption of cleanup language in NAC 445A to exactly mimic the program that had existed in NAC 459. The intention to create the same authorities and same structure in NAC 445A as was in NAC 459 was presented to the State Environmental Commission and was a condition of adoption; therefore, these two sets of regulations have always been interpreted equivalently. The 1-year monitoring period in NAC 445A.22745(1) is used by the Division to require a year of monitoring after termination of remediation to assess rebound and post-remedial conditions, as the language in NAC 459.9979 clearly intended in the original.

The proposed regulation ensures that the proper language from NAC 459.9979 is used as the basis for post-remediation monitoring requirements and eliminates the incorrect language the exists in NAC 445A(1). The difference in post-remediation monitoring language in the original was one of the driving forces for the proposal of revisions to these regulations

The next comment and response-to-comment addresses the difference between the Division's decision to allow termination of a remedial system and to grant site closure. The two concepts are not equivalent, and the monitoring periods attached to them remain distinct requirements though they may still overlap in certain situations.

Comment 7. The post-remedial groundwater monitoring requirements specified in proposed language for NAC 445A.22745(2) is confusing given the proposed language and groundwater monitoring requirements specified for projects "after the termination of remediation pursuant to NAC 445A.22745" in NAC 445A.22725(2)(a)(3). Please clarify and reconcile the intent of this post-remediation groundwater monitoring requirements. Clarification in the body of proposed regulations is recommended.

Response: Existing groundwater cleanup regulations contain sections for the Division's authority to require corrective action (NAC 44A.22725 and NAC 459.9977) and separate sections for determining when remediation may be terminated (NAC 445A.22745 and NAC 459.9978). The proposed regulation retains this structure and uses much of the existing language. However, the proposed regulation also adds some clarifying language that is intended to clarify how these two decisions are related.

The term "corrective actions" is a broader term that includes all components of a remedy that are taken to achieve protectiveness. This includes removal and treatment of contaminants (which taken together constitute the general term "remediation") but also includes engineering controls, institutional controls, segregation, encapsulation, receptor control, and any number of additional actions that don't involve the treatment of groundwater to remove or destroy contaminants. A case is properly considered "closed" once it is determined that all corrective

actions have been taken which will result in a permanent remedy that is protective of human health and the environment. Although site closure commonly corresponds with the completion of groundwater remediation (particularly if groundwater remediation is the exclusive component of corrective action being taken at the site), there are many instances where termination of groundwater remediation does not mean that the Division has determined that no further corrective actions are necessary.

The existing regulations allow for a treatment system to be terminated once it has reached the limits of its effectiveness in removing contaminants from the groundwater. The limit of effectiveness is demonstrated through matching the asymptotic portions of a concentration curve. However, the concentrations reached at this point may still be above action levels and may still present a threat to human health and the environment—at which point, the Division has the authority to determine whether additional corrective actions (not involving re-initiating the treatment system) are necessary. It should also be noted that the proposed regulation includes an additional condition for termination of a remediation system at concentrations that would be above action levels (Section 15(1)(b)).

The proposed regulation adds language that makes it more explicit that the termination of remediation above action levels must be coupled with a consideration of whether residual concentrations are protective of human health and the environment or whether additional corrective actions must be considered. Under the proposed regulation, a site can only be closed if treatment of groundwater meets action levels or an exemption from groundwater corrective action (or further corrective action after treatment) is granted based on the protectiveness to human health and the environment.

By way of example, consider a facility with a large solvent plume that is migrating towards a domestic supply well. A pump-and-treat system is installed in the body of the plume and operated for a number of years. During its operation, the pump-and-treat system manages to remove a significant mass of contaminants from the groundwater but is eventually shut off due to diminishing returns as demonstrated by reaching the zero slope portion of the concentration vs. time curve. This determination to terminate the pump-and-treat system is not equivalent to closing the site, because residual contamination may still present a threat. Under the current regulations, it wouldn't be appropriate to equate the termination of a remediation system as an automatic granting of site closure, and the proposed regulations makes that even more clear. In our example, if the pump-and-treat system is shut-off and it is shown that the remaining contamination will still reach the domestic supply well at concentrations above drinking water standards, then the facility owner still has an obligation to undertake additional corrective action, such as the installation of pre-treatment on the supply well or some other action to protect receptors.

Decisions about site closure and termination of remediation are distinct, and the monitoring periods attached to the one or the other are not equivalent, though they may overlap on a case-by-case basis. Section 14(2)(a)(3) states that the Division needs 3 years of monitoring data (or another period specified by the Division, it should be noted) as a basis for making a determination that a site can be closed with contamination above action levels. This is to ensure that the Division is making decisions with sufficient information to control against any reasonable changes in future conditions. Section 15(2) states that the Division needs 1 year of monitoring after termination of remediation to understand post-remedial conditions and assess rebound. If termination of remediation occurs at concentrations above action levels, the facility owner will still need to apply for an exemption from further corrective action; in this scenario, the groundwater data collected during design, operation, and post-remedial monitoring of the

treatment system may be used on a case-by-case basis to satisfy the monitoring period required for an exemption from further corrective action above action levels. The different monitoring periods will not need to be satisfied consecutively in all cases.

Comment 8. Proposed modifications to NAC 445A.22745(1)(b) are unclear. At a minimum, it would be helpful to reverse the order of NAC 445A.22745(1)(b) and 445A.22745(1)(c) since 445A.22745(1)(b) references the content of 445A.22745(1)(c). The proposed regulation could be further clarified if separated into more than one sentence or bulleted. *(example provided)*

Response: The Division agrees with the comment. The Division's order of preference for termination of a remediation system is: 1) concentrations consistently meet action levels, 2) data match the asymptotic portions of a concentration curve, and 3) another condition set forth in an approved plan of corrective action. Since the termination condition currently listed in Section 15(1)(b) is only available if it is determined that the asymptotic test in Section 15(1)(c) is not appropriate, a natural order is created that doesn't need to be prefaced. The Division recommends eliminating the phase "***in the following order of preference.***" from Section 15(1).

Your comment letter concludes with the following general comment:

> Generally, the proposed regulations afford the Division more discretion over the establishment of action levels and the conditions warranting corrective action and site closure without including clear criteria regarding how these parameters will be derived, executed, or applied. Consequently, there is concern that proposed regulations may be inconsistently interpreted, used, or applied by different regulators within the same Bureau or by regulators within Bureaus outside of Corrective Actions. While it is acknowledged that over-regulation is not helpful or warranted, the regulated community is best served when regulations are prescriptive and the method of application is clearly understood. In several instances, proposed regulations fail to achieve these characteristics.

Hopefully the concerns in the comment letter have been addressed through the responses to specific comments. We continue to make an effort to chart an appropriate course on corrective action between flexibility in allowable procedures and protectiveness of corrective actions. The proposed regulations do not alter fundamental authorities inherent in current corrective action regulations but are intended to reflect a more efficient application of those authorities. We welcome further engagement with the regulated community, the consulting industry, and the general public through the framework created by the cleanup regulations, and we do not anticipate that that engagement would end with the hearing at the State Environmental Commission. The proposed regulation is scheduled for a hearing in front of the SEC on June 17th and 9:30am at the Nevada Department of Wildlife's conference room A, 1100 Valley Road, Reno, NV.

Sincerely,

Scott Smale
Bureau of Corrective Actions

cc: Leo Drozdoff, Administrator, NDEP
Jim Najima, Chief, BCA
John Walker, SEC Secretary

ATTACHMENT 3

-- Errata for R189-08 (4 pages)

Errata Sheet
NDEP Recommended Changes to Proposed Regulation R189-08

Based on public comment and review by the regulated community, the NDEP has identified minor language changes that would improve the clarity and understanding of the proposed cleanup regulations. The NDEP asks that these changes be considered as errata by the State Environmental Commission during review of the proposed regulation.

- Recommendation #1

Section 8(2)(b)

Original language: "Rely upon methods of field sampling and analytical methods used in laboratories, if any, that are specified by the Division; and"
Recommended language: "Rely upon methods of field sampling and analytical methods used in laboratories, if any, that are [~~specified by~~] ***acceptable to*** the Division; and"

Reason for recommendation: The proposed regulation avoids language that would create a *de facto* requirement to involve the Division in planning efforts for initial assessments, which would slow down the process and limit a facility owner's ability to quickly respond to releases. For this reason, we have avoided the use of terms such as "approved by" in this context, which could be interpreted as a requirement to seek written or verbal approval prior to the use of any field sampling or analytical method and therefore prior to conducting any initial assessment.

The original language of the proposed regulation uses the term "specified by the Division" to convey the intention of the Division to communicate, either through formal correspondence to the facility owner or by posting or endorsing publicly available data quality assurance guidelines, what methods are acceptable to the Division. These endorsed methods could then be relied upon by a facility owner conducting an initial assessment without seeking prior written or verbal approval. However, concerns were raised during public comment that in the absence of "specified" methods, a facility owner would still need to seek prior approval of the Division.

The recommended language preserves the Division's ability to set forth acceptable methods in correspondence and guidelines, but also allows a facility owner to proceed with an assessment in the absence of specified methods with the understanding that the Division will still make consideration of the data collection methods during evaluation of the submitted assessment. The Division has always had the authority to base their review of assessments and cleanups on the latest scientific understanding of field and analytical methods, so the addition of this provision in the regulations does not create a new authority; it is an attempt to create the most efficient application of an existing authority. We believe the recommended change would accomplish this.

- Recommendation #2

Section 8.3

Original language: "The Division shall not require an owner or operator to conduct an assessment pursuant to subsection 1 if documentation is submitted to and approved by the Division or if any follow-up reporting is sufficient to demonstrate that:"
Recommended language: "The Division shall not require an owner or operator to conduct an assessment pursuant to subsection 1 if documentation is submitted to and approved by the Division or if any follow-up reporting is sufficient to demonstrate [~~that~~] ***one or more of the following***:"

Reason for recommendation: During public comment, several commentators expressed confusion about whether a facility owner was required to demonstrate all of the conditions listed in the subsequent subsections or whether it was sufficient to demonstrate just one of the conditions. While the construction of the section and subsections follows the drafting conventions for the creation of "and" versus "or" lists and accurately reflects the Division's intention, we agree that additional language helps clarify requirements in the presence of multiple levels of subsections.

- Recommendation #3

Section 8(3)(a)

Original language: "The level of contamination of the soil does not exceed the action level established for that soil pursuant to NAC 445A.2272 because of any actions taken by the owner or operator of the facility pursuant to NAC 445A.22695;"
Recommended language: "The level of contamination of the soil [~~does not~~] ***no longer*** exceed***s*** the action level established for that soil pursuant to NAC 445A.2272 because of any actions taken by the owner or operator of the facility pursuant to NAC 445A.22695;"

Reason for recommendation: The language change is intended to eliminate an ambiguity in the proposed regulation that seemingly allows a facility owner to avoid assessment and corrective action if it is shown that the contamination in question was not the result of abatement actions (NAC 445A.22695).

- Recommendation #4

Section 9(1)(b)

Original language: "Conducting a visual inspection of any aboveground release or exposed underground release of the hazardous substance, hazardous waste or regulated substance and the prevention of any additional migration of the hazardous substance, hazardous waste or regulated substance into any surrounding soil or groundwater;"

Recommended language: "Conducting a visual inspection of any aboveground release or exposed underground release of the hazardous substance, hazardous waste or regulated substance and the prevention of any additional migration of the hazardous substance, hazardous waste or regulated substance into any surrounding soil, [~~or~~] groundwater ***or surface water***;"

Reason for recommendation: The original language of the proposed regulation appears to eliminate threats to surface water from consideration when taking abatement actions. While the Division may rely on other authorities in other sections of Nevada Revised Statutes and Nevada Administrative Code to ensure that surface water is protected from a release, we believe that it is most efficient to explicitly require and allow consideration of surface water in the abatement sections of these corrective action regulations.

- Recommendation #5

Section 9(2)(a)

Original language: "Has an actual or imminent effect on groundwater; or"
Recommended language: "Has an actual or imminent effect on groundwater ***or surface water***; or"

Reason for recommendation: Same as for Recommendation #4 above.

- Recommendation #6

Section 13(2)

Original language: "Except as otherwise provided in this subsection, if more than one action level for soil may be established using the criteria set forth in subsection 1, the most restrictive action level must be used. In no case may the action level be more restrictive than the background concentration of the hazardous substance, hazardous waste or regulated substance."
Recommended language: "Except as otherwise provided in this subsection, if more than one action level for soil may be established using the criteria set forth in subsection 1***(b)***, the most restrictive action level must be used. In no case may the action level be more restrictive than the background concentration of the hazardous substance, hazardous waste or regulated substance."

Reason for recommendation: Eliminates an apparent ambiguity that would not allow an action level to be set that is less restrictive than the background concentration of a hazardous substance, hazardous waste or regulated substance.

- Recommendation #7

Section 14(2)(c)(2)

Original language: "A legal restriction or institutional control is in effect concerning the use of the groundwater based upon the depth of the groundwater, the presence

of a municipal system or the use of an environmental covenant accepted by the Division."
Recommended language: "A legal restriction or institutional control is in effect concerning the use of the groundwater based upon the depth of the groundwater, the presence of a municipal system, [~~or~~] the use of an environmental covenant ***or other controls*** accepted by the Division."

Reason for recommendation: The Division did not intend to limit consideration only to the three legal restriction or institutional controls expressly listed in this subsection. The listed restrictions and controls are just the most commonly identified restrictions that may be relied upon to satisfy the requirement in this subsection to demonstrate that a durable, effective control of groundwater use is in place.

- Recommendation #8

Section 15(1)

Original language: "After any corrective action required by NAC 445A.22725 involving the treatment of groundwater is begun, the owner or operator may terminate remediation of the release after submitting written documentation and receiving written concurrence from the Division if, in the following order of preference:"
Recommended language: "After any corrective action required by NAC 445A.22725 involving the treatment of groundwater is begun, the owner or operator may terminate remediation of the release after submitting written documentation and receiving written concurrence from the Division if[~~, in the following order of preference~~]:"

Reason for recommendation: The Division's order of preference for the termination of a remediation system is 1) concentrations consistently meets action levels, 2) data matches the asymptotic portions of a concentration curve, and 3) another condition set forth in an approved plan of corrective action. The order of Subsections 15(1)(b) and 15(1)(c) were switched during drafting; however, the Division does not have concerns about the order of the conditions as listed, since the language of the subsections creates a natural hierarchy. To clarify that the order of the list does not dictate preference, we recommend striking that phrase.

ATTACHMENT 4

-- Staff Presentation for R189-08
(3 pages)

SEC Presentation for R189-08

Revisions to regulations related to cleanup of contaminated sites and leaking underground storage tanks.

Brief Overview of NDEP Cleanup Program

- Corrective action is initiated as a response to a release or discovery of contamination.
- All corrective actions, from small releases to complex sites, are handled under the same sets of regulations.
- Regulations create an expandable or collapsible framework where the NDEP exerts authority at specific decision points.
- Corrective actions are driven by the facility owner with the flexibility to pursue different paths to completion.

Purpose of Regulation R189-08

- Consolidates cleanup actions for all source types, including USTs
- Provides more structure in the transition from release reporting to cleanup requirements
- Supports pathway evaluation for soil
- Places more detailed requirements on requests for exemption from groundwater corrective actions

Structure of Regulation R189-08

- Sections being added: 2-5 and 18.
- Important Sections being revised: 8-10, 13-15 and 21-22
- Sections being revised just to update references: 6, 7, 11, 12, 16, 17, 19, 20, and 23-28
- Sections being repealed: listed in Section 29
- Corrective Action regulations not being revised or repealed: NAC 445A.2273, 445A.22735, 445A.2274, 445A.2275, and 445A.22755

Section 2: "Environmental Covenant"

- Simply a definition of "environmental covenant" to support its integration into the corrective action regulations.
- The referenced definition is from NRS 445D:
  - "Environmental covenant" means a servitude arising under an environmental response project that imposes activity and use limitations.

Section 3: Additional Characterization

- Authority of Division to require a plan and schedule for additional characterization
- Not required at all sites, where the initial assessment of site conditions may be satisfactory
- Limitations on authority

Section 4: Environmental Covenants

- This section lays out how the Division intends to use Environmental Covenants (enacted through NRS 445D) as another tool to ensure cleanups are protective
- Covenants retain their entirely voluntary nature—the Division cannot unilaterally place an activity or use restriction on land.

Section 5: Waste Handling

- Requirement for a management plan for investigation derived wastes and wastes generated during corrective action
- Required because a soil action level or groundwater action level is not the only determinant of management requirements
- Language pulled from existing requirement in NAC 459 but simplified to cover all hazardous substances
- Does not include surface water because of the nature of surface water sampling and the other sources of requirements for surface water cleanups

Section 8: Assessment

- Subsection 1—no change. The release report is still the trigger that starts a facility owner/operator down the requirements of corrective action
- Subsection 2—language is added to give support to Division authorities to require a facility owner/operator to examine all pathways and allow for quality control
- Subsection 3—attempts to align release reporting with initiation of a corrective action case
- Subsection 4—gives the Division very limited authority to assist in transition from release reporting to case generation

Section 9: Abatement Actions

- Consolidates both the requirement for a facility owner/operator to take abatement actions and the ability of the Division to require abatement actions to be taken
- A list of abatement actions is given, derived from 40 CFR 280 actions for underground storage tanks, as guidelines for the types of abatement actions allowable without a workplan

Section 10: Soil corrective actions

- Subsection 1—no change except that “may” has been changed to “shall” to reinforce the requirement to do corrective action
- Subsection 2—strengthens the intent of the (a) thru (k) evaluation as a framework for a defensible evaluation and not simply a list of questions to be answered

Section 13: Soil Action Levels

- Expressly allows for a study of background concentrations
- Eliminates the TPH action level and the use of TCLP to establish a hazardous substance action level
- Replaces the eliminated action levels with a consolidated general approach for action levels based on pathway evaluation and IRIS toxicity numbers or an equivalent method
- NDEP anticipates development of Tier II look-up tables and other guidance for use by facilities

Section 14: Groundwater Exemptions

- An exemption is required to close out a site with groundwater contamination above action levels even if remediation is undertaken and completed in accordance with regulations
- Exemption relies on three elements (a) understanding of plume conditions, (b) protection of current receptors, and (c) protection of future receptors
- Framework allows for more specific guidance

Section 15: Termination of Treatment

- Regulation maintains the hierarchy of preference for termination—meets action levels, asymptotic conditions, other condition
- The "other condition" is not intended to allow termination of remediation based on achievement of risk based concentrations.
- The "other condition" is applicable for treatment technologies or site conditions that are not conducive to the asymptotic test only

Section 18: LUST Corrective Action

- This section replaces all the repealed corrective action requirements for underground storage tanks in NAC 459 with a requirement to undertake corrective action in accordance with NAC 445A
- Includes some miscellaneous subsections that are held over from language in NAC 459 that is not fully captured in NAC 445A

Section 21: Operating Releases

- Subsection 1—Confirmed releases are from a site check or system test that indicates a **leak** in the subsurface portions of the tank. The confirmation itself (not based on amount) is a reportable event
- Subsection 2—Spills and overfills (along with the discovery of previous spills or overfills) are still subject to the 25 gallons/3 cubic yards reporting trigger
- Subsection 5—An attempt is made to differentiate spill/overfills from confirmed releases in order to reduce reporting of contamination that doesn't really indicate a leak in a tank.

Section 22: Tank Closures

- The reportable trigger during a tank closure is 25 gallons/3 cubic yards
- The TPH analytical method 8015 has been retained, because even though it does not serve as an action level, a reportable concentration of 100 mg/kg TPH has been kept

ATTACHMENT 5

-- Nevada Wood Preserving (20 pages)

June 17, 2009 SEC Update

NDEP Investigations & Actions regarding Odor complaints in Silver Springs

- Wood treatment process
- NDEP regulatory authority & compliance activities
- Odor complaints & concerns regarding toxic substances directed at Nevada Wood Preserving
- NDEP odor investigation
- Addressing potential sources of odor
- Conclusions & final thoughts – regulation of odors by other states

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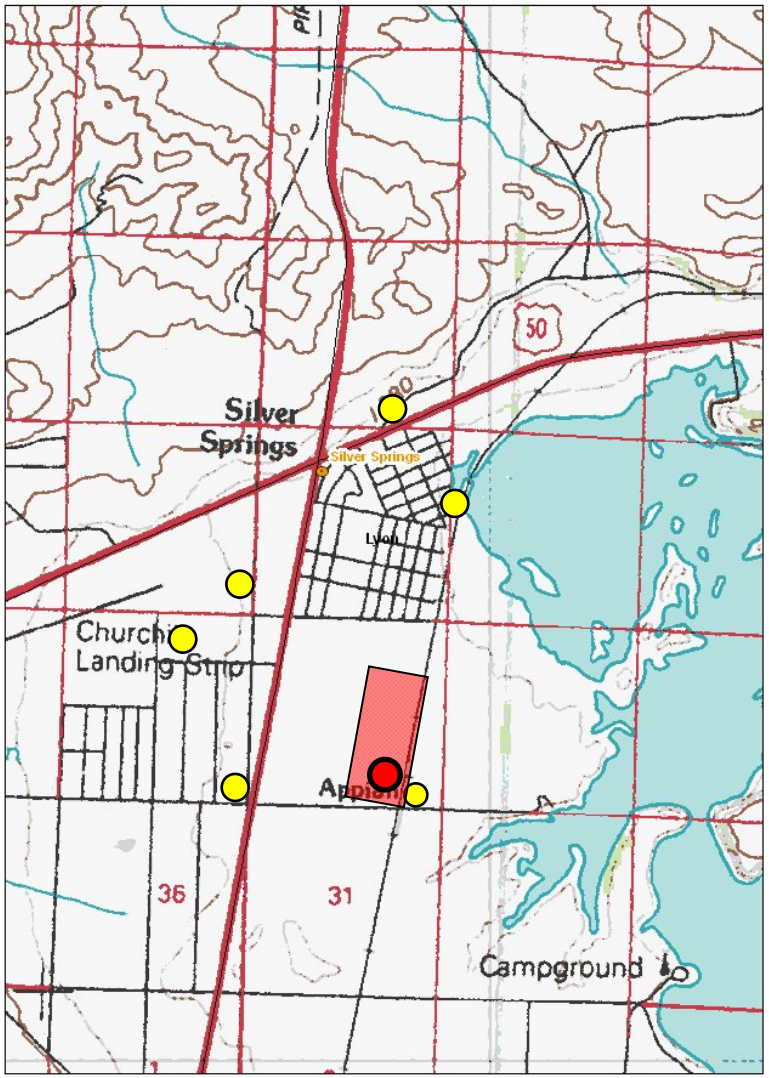
Industries in Silver Springs



- Nevada Wood Preserving
- other industries

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Wood Treatment Processes at Nevada Wood Preserving (NWP)

- "Boultonizing" process: water in wood is replaced by preservatives
- Done under vacuum in sealed cylinders
- Three different treatment formulas:
  - Chromated copper arsenate (CCA)
  - "Pac-Bore", a borate compound
  - Pentachlorophenol ("Penta"), dissolved in diesel oil
- CCA and Penta are hazardous
- Following treatment, wooden poles or posts are stacked on concrete pads to dry

NWP treatment process

1. Time “zero”

2.

3.

4.

5. 15 minutes

NDEP Regulatory Programs applicable to NWP

- Bureau of Waste Management
  - Hazardous waste (RCRA)
- Bureau of Air Pollution Control
  - Hazardous and other air pollutants
  - Fugitive dust, odors
- Bureau of Water Pollution Control
  - Groundwater monitoring
- Bureau of Corrective Actions
  - Spill investigation

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NDEP Compliance & Enforcement

Bureau of Waste Management

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RCRA Compliance Evaluation Inspections

January 2002, January 2004, March 2006, March 2007 & June 2008

Focused Compliance Inspections

January 2002 - in response to a fire at facility
June 2002 - complaint investigation
August 2002 - complaint investigation
December 2004 - Wastewater Treatment Unit Inspection

Enforcement Actions

January 2002 - Informal (Contingency Plan Info)
August 2002 – Formal (leaking tank)
January 2004 - Formal (record keeping)
March 2006 - Informal (container labeling, record keeping)
March 2007 – Informal (container management)
June 2008 - Informal (record keeping, waste determination)

NDEP Compliance & Enforcement

Bureau of Water Pollution Control

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Inspections

January 2002 - in response to a fire at facility

October 2004

September 2005: BWPC permit replaced with Administrative Order on Consent

- Addresses overlap of water (BWPC) & waste (BWM-RCRA) permit requirements

- Requires continued groundwater monitoring with associated concentration limitations

December 2008: monitoring well detects Penta in excess of allowed concentration

- Sample taken in February 2009 shows “no” Penta

- Investigation indicates that December results were related to contamination of a replacement pump, and were not representative of groundwater quality

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Full Compliance Inspections

March 2001, December 2005, August 2006,
February 2007, May 2009

Other Compliance Inspections

January 2006, November 2006* (2), April 2008
*Joint inspection with NDEP Bureau of Corrective Actions

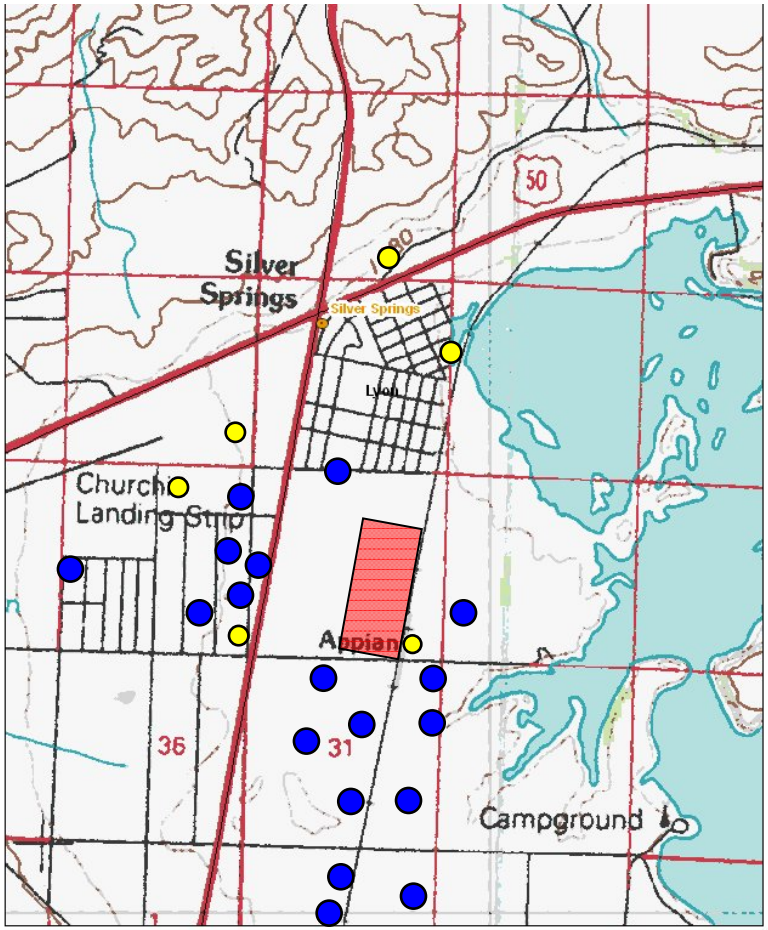
Field investigations and Odor sampling

December 2006 (2), January 2007 – investigations
June 2007, October 2007 – odor sampling

Enforcement Actions

October 2004 - fugitive dust violation

Complaints in Silver Springs



2006 - 2009

Nevada Wood Preserving

other facilities

complainant locations

one mile

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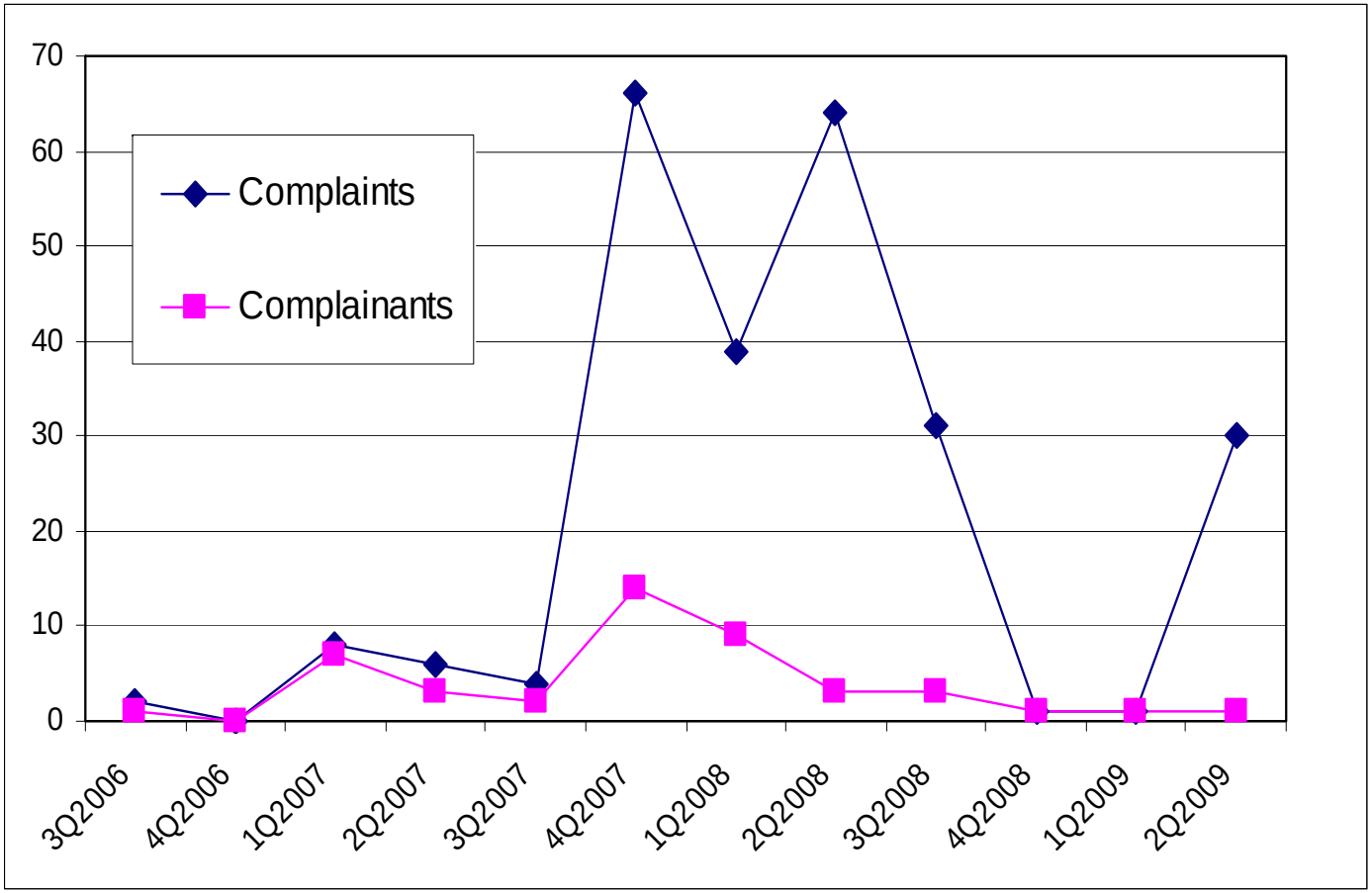
Odor Complaints in Silver Springs



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NAC 445B.22087 Odors

- Requires the NDEP to investigate an odor when at least 30% of the people exposed to it, in usual places of occupancy, find it objectionable
- Defines how violations are determined:
  - Odor is detectable after dilution by a factor of eight
  - Two odor measurements occurring within a one-hour period
- Odor violations constitute minor air quality violations

NDEP-BAPC Odor Investigation In Practice

- Investigate all complaints as they are received
- Identify potential sources
- Compile information
- Ensure that permitted sources are in compliance with their operating permits
- Seek and secure the cooperation of facilities to address possible sources of odors
- If warranted, conduct odor sampling using special sampling equipment

Odor Investigations in Silver Springs

Bureau of Air Pollution Control

- Since August 2006, the NDEP-BAPC has undertaken the following activities:
  - Conducted 6 inspections of Nevada Wood Preserving
  - Responded to dozens of complaints through field investigations and data compilation
  - Provided information to complainants
  - Cooperated with and through Lyon County
  - In 2006, requested that Nevada Wood install “scrubbers” on process tanks and vacuum exhaust systems
  - In 2007, requested compliance confirmation from OSHA
  - In 2007, conducted odor sampling:

    odors detected at the NWP fence line did not constitute violations under NAC 445B.22087
  - In 2008, re-examined NWP’s efforts at capturing fumes

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Odor Investigations in Silver Springs

Bureau of Corrective Actions

- Since October 2007, the NDEP-BCA has done the following:
  - provided information to 5 complainants and responded to their complaints
  - Conducted two unannounced field inspections
  - Met twice with Lyon County officials
  - In April 2008, discussed the situation with Dr. Glenn Miller [University of Nevada, Reno]
  - In July 2008, discussed the results of Dr. Miller's air sampling study with Assemblyman Tom Grady, Lyon County and representatives of NWP

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Information Presented to Lyon County

- November 2007: NDEP-BAPC reported "negative" results of the odor sampling it conducted in October
- March 2008 Meeting, Lyon County Commission
  - Citizens group ("Silver Springs Clean Air Task Force") expresses concerns regarding Nevada Wood Preserving
  - Over 180 other residents of Silver Springs express support for the facility
  - Dr. Miller proposes to conduct an air sampling study to try to identify the possible source of the odors
- July 22, 2008 Meeting and follow-up
  - Dr. Miller summarized the results of his study:
    - Collected samples of ambient air at various locations
    - At 9 locations, detected one of the chemical compounds (butyl butyrate) that also occurs in the Penta formulation
    - Suggested use of an alternative Penta formulation
  - NWP reports that the suggested alternative has not yet been approved under industry certification

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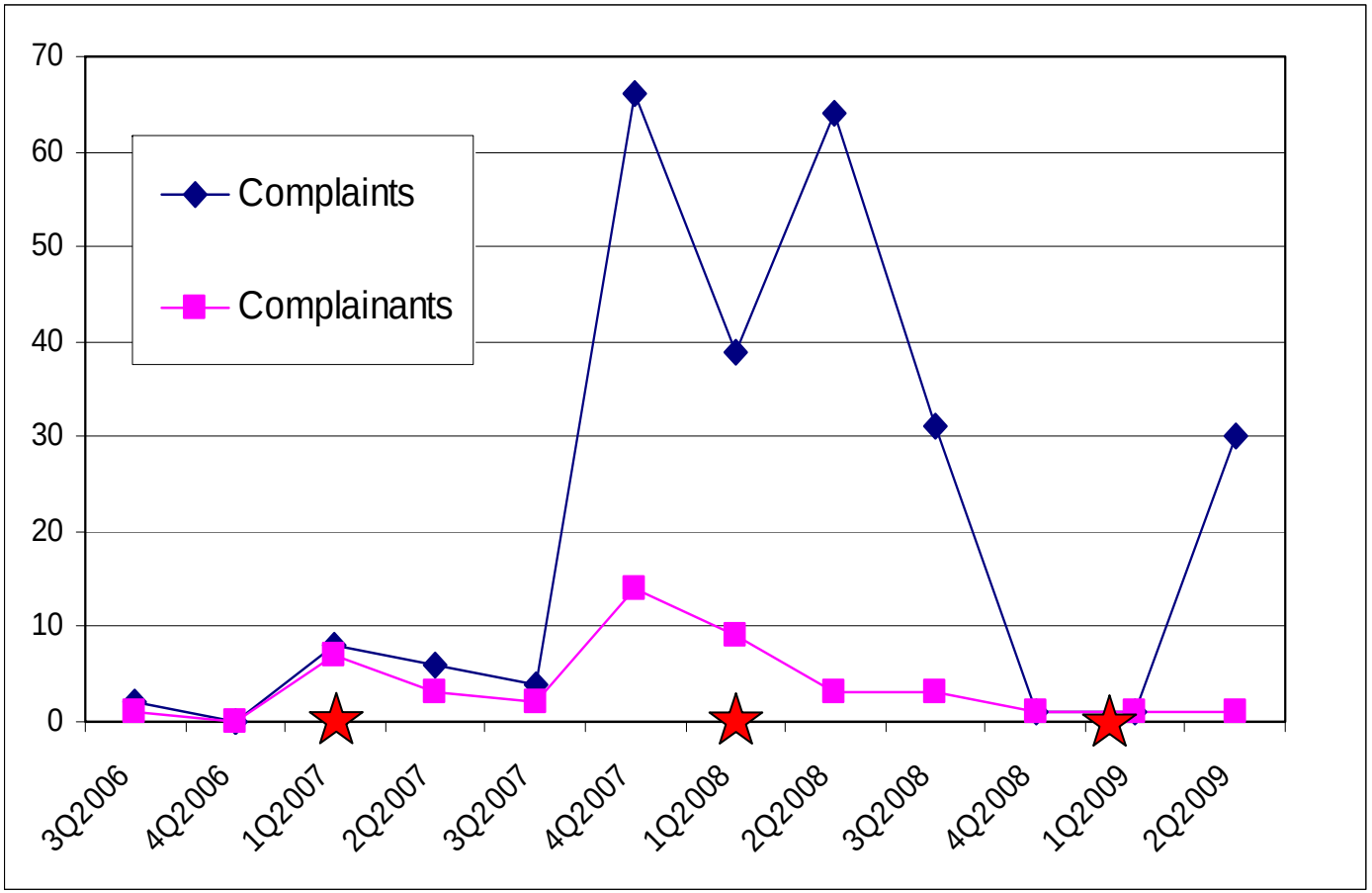
Actions taken by Nevada Wood

- November 2005 – began use of odor neutralizer
- August 2006 – special "P9" oil used in formulas no longer available, NWP began using low-sulfur diesel
- November 2006 – started "cracking" cylinder doors and pulling vacuum for 30 minutes prior to extracting products
- January 2007 – installed "scrubbers" on process tanks and vacuum exhaust systems
- August 2007 – installed a meteorological station for monitoring wind & weather conditions
- February 2008 – started exclusive use of "Penta" concentrate that uses low-odor solvent
- January 2009 – redirected fumes from the vacuum system into the hot oil tank

Odor Complaints in Silver Springs



★ - Action taken by Nevada Wood Preserving

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Conclusions

- 14 NDEP inspections conducted since 2004 indicate that NWP is in compliance with its permit requirements –
  Emissions from NWP do not represent a threat to public health or the environment
- Odor sampling by the NDEP indicates that odors associated with processes at NWP do not constitute a violation under NAC 445B.22087
- The NDEP has been unable to definitively identify the source of the odor complaints in Silver Springs
- Dr. Miller's study suggests that a very small amount of the "Penta" formulation used at NWP may be detectable offsite
- NWP has voluntarily taken successive measures to control emissions from its wood treatment processes
- The NDEP is sensitive to the concerns raised by residents, and will continue to monitor complaints and evaluate the need for other mitigation measures

Conclusions

- Odors are difficult to assess
  - subjectively experienced
  - tend to be short-lived
  - sources are difficult to identify
  - are generally classified as nuisances
- Investigations of odor complaints demand substantial resources & local presence
- How do other states regulate odors?
  - Two other western states (Colorado, New Mexico) have regulations similar to Nevada's
  - Most states rely on local governments or air districts to enforce odor & other nuisance regulations
  - Many states have no specific odor regulations; Montana & Minnesota *removed* odor regs in 2001

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NAC 445B.22087 Odors

NAC 445B.22087 Odors. (NRS 445B.210)

1. No person may discharge or cause to be discharged, from any stationary source, any material or regulated air pollutant which is or tends to be offensive to the senses, injurious or detrimental to health and safety, or which in any way interferes with or prevents the comfortable enjoyment of life or property.
2. The Director shall investigate an odor when 30 percent or more of a sample of the people exposed to it believe it to be objectionable in usual places of occupancy. The sample must be at least 20 people or 75 percent of those exposed if fewer than 20 people are exposed.
3. The Director shall deem the odor to be a violation if he is able to make two odor measurements within a period of 1 hour. These measurements must be separated by at least 15 minutes. An odor measurement consists of a detectable odor after the odorous air has been diluted with eight or more volumes of odor-free air.

[Environmental Comm'n, Air Quality Reg. §§ 10.1.1-10.1.3, eff. 11-7-75]—(NAC A 10-30-95)—(Substituted in revision for NAC 445B.393)

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ATTACHMENT 6

– DAG/NDEP Memo concerning Declaratory Order regarding definition of sewage in NAC 445A.107 (5 pages)

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
100 North Carson Street
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO
Attorney General

KEITH G. MUNRO
Assistant Attorney General

JIM SPENCER
Chief of Staff

MEMORANDUM

DATE: June 4, 2009

TO: Leo Drozdoff, Administrator, Nevada Division of Environmental Protection

FROM: Bill Frey, Senior Deputy Attorney General

SUBJECT: Nevada Administrative Code 445A.107 interpretation

==========

You have requested that I research the interpretation of Nevada Administrative Code (NAC) 445A.107. Your request was made in the context of reviewing the petition from the Amargosa Citizens for the Environment (ACE), which requests, in part, that the State Environmental Commission (SEC) issue a declaratory order that "sewage as defined in NAC 445A.107 includes dairy feedlots." (ACE petition pp. 1-2). As part of my review, I considered if a regulation, plain on its face, requires further interpretation by the agency. In conducting this review I believe case law applicable to courts is also applicable to the SEC and case interpreting statutes are similar to case interpreting regulations.

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SUMMARY

Ace's petition should be denied because it will have no legal impact on NAC 445A.107 or the NDEP's program regulating animal feed operations. ACE's use of the word "dairy" appears to modify the type of feedlot. But, no such limitation or description of feedlot is necessary or required by the regulations. Alternatively, if ACE is using "dairy" to modify the type of animal waste no further interpretation is required. The regulation includes all water carried animal waste from all feedlots. That is as clear as a regulation can be written.

As an initial and critical matter 445A.107 is a regulation of general applicability. To the extent that ACE's petition refers to Ponderosa Dairy, those comments should be summarily disregarded. The regulation applies to everyone not just to the ongoing dispute between ACE and Ponderosa Dairy. Second, even if you ignore the Ponderosa Dairy comments, it is apparent from the petition that ACE is a making a collateral attack on the Ponderosa Dairy permit by arguing in its petition the need for additional monitoring wells at Ponderosa Dairy. The SEC should ignore and disregard all reference to this as it is the subject of a pending contested case between ACE, Ponderosa Dairy and NDEP.

ANALYSIS

ACE has filed a petition seeking a declaratory order the definition of sewage in NAC 445A.107 to include "dairy" feedlots. ACE suggests that dairy wastewater constitutes "sewage" as defined by NAC 445A.107. ACE suggested at the February 2009 SEC meeting that "dairy" waste should be treated to secondary or tertiary standards. ACE's petition should be denied because, 1) the regulation specifically

includes water-carried animal waste from feedlots, according to a plain language interpretation; and 2) the interpretation that ACE seeks does not change the current regulation of animal waste or require it to be treated to secondary or tertiary standards.

ACE determined that the definition of sewage under NAC 445A.107 does not include dairy feedlot waste and needs to be added. However, according to a plain language interpretation of the regulation any feedlot waste is already included in NAC 445A.107. Therefore, a further interpretation of the regulation is not needed and a declaratory order on issue C of ACE's petition should be denied.

The intent of NAC 445A.107 can be determined according to its plain language. "When the language of a statute is plain, its intention must be deduced from such language, and the court has no right to go beyond it." *Cirac v. Lander County*, 602 P.2d 1012, 1015 (Nev. 1979) citing *Hess v. Washoe County*, 6 Nev. 104, 107 (1870), *see also McKay v. Board of Supervisors of Carson City*, 730 P.2d 438,441 (Nev. 1986) (It is well settled in Nevada that words in a statute should be given their plain meaning unless this violates the spirit of the act.). Additionally, if the words of a statute are clear, we should not add to or alter them to accomplish a purpose not on the face of the statute or apparent from permissible extrinsic aids such as legislative history or committee reports. *Id* .at 1016 citing *Lauritzen v. Casady*, 261 P.2d 145, 146 (Nev. 1953), *see also Thompson v. District Court*, 683 P.2d 17, 19 (Nev. 1984) (Where a statute is clear on its face, a court may not go beyond the language of the statute in determining the Legislature's intent); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (As in any case of statutory construction our analysis begins with the language of the statute. . . and where the statutory language provides a clear

answer, it ends there as well.) Therefore, if the language of NAC 445A.107 is plain then no further interpretation is required.

NAC 445A.107 "Sewage" defined.

> 1. "Sewage" means the water-carried human or animal waste from residences, buildings, industrial establishments, feedlots or other places, together with such groundwater infiltration and surface water as may be present.
> 2. The term includes the mixture of sewage with wastes or industrial wastes.

Under a plain reading of this regulation, the definition of sewage contains three main parts with an ordinary meaning: water-carried, human, or animal waste, and from any place. According to this interpretation, if manure or wastewater from a feedlot is considered water-carried and an animal waste, it is already included in the definition of sewage. Therefore, under a strict interpretation of this regulation all feedlots are included and no additional interpretation is required. ACE's use of the word "dairy" appears to modify the type of feedlot. But, no such limitation or description of feedlot is necessary or required by the regulations. Alternatively, if ACE is using "dairy" to modify the type of animal waste again, no further interpretation is required. The regulation includes all water carried animal waste from all feedlots.

The SEC does have some interpretive powers under NRS 233B.120 but those interpretive powers relate only to the applicability of statutes, regulations or decisions of the NDEP. ACE's petition seeks an interpretation of a regulation but this practice is not allowed under the guidelines for interpretation found in NRS 233B.120.

NRS 233B.120:

> Each agency shall provide by regulation for the filing and prompt disposition of petitions for declaratory orders and advisory opinions as to the applicability of any statutory provision, agency regulation, or decision of the agency. Declaratory orders disposing of petitions in such cases shall have the same status as agency decisions. A copy of the declaratory order or advisory opinion shall be mailed to the petitioner.

The SEC has some interpretative power but it is limited by this statute to the applicability of regulatory provisions as they currently exist and not as they could be amended. ACE is asking for a declaratory order to interpret a regulation and therefore, they are not asking for an opinion as to the applicability of any regulatory provision or agency regulation. Therefore, ACE's interpretation request is not within the acceptable bounds of NRS 233B.120.

ACE's petition implies that it's interpretation of the definition of sewage, under NAC 445A.107, if issued, would require a different regulatory approach for "dairy" feedlots. But no such change in approach would result.

CONCLUSION

ACE's petition to include "dairy" feedlots in the definition of sewage under NAC 445A.107 is not necessary. The plain language of NAC 445A.107 includes wastewater from feedlots and therefore, no further interpretation is needed. ACE implies that if "dairy" feedlots are included in the definition of sewage then there will be a different regulatory approach. However, there is no necessary change to the regulations or to NDEP regulatory process as a result of this interpretation. Issue C of ACE's petition is a moot point and should be dismissed.