

CLARK COUNTY NEVADA DEPARTMENT OF
AIR QUALITY MANAGEMENT
and the
UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

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In the Matter of:

NEVADA ENVIRONMENTAL COALITION, INC.
and ROBERT W. HALL Comments re:
Proposed issuance of a renewal Title V (40 CFR Part 70)
Operating Permit for Nevada Power Company Harry Allen Station
by the Clark County Department of Air Quality Management,
June 15, 2003, Certificate of Service.

SID A00533

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**NEVADA ENVIRONMENTAL COALITION, INC.
AND ROBERT W. HALL COMMENTS**

INTRODUCTION

Petitioner Robert W. Hall ("Hall") as an individual, and in his capacity as president of the Nevada Environmental Coalition, Inc. ("NEC") (hereinafter "Petitioners"), hereby submits the following comments. This comment document is timely submitted in response to the public notice dated June 15, 2003 in the Las Vegas Review Journal regarding the proposed issuance of a Title V (40 CFR Part 70) Operating Permit (renewal) to Nevada Power Company Harry Allen Station (HAS) by the Department of Air Quality Management (DAQM).¹ These comments are intended to provide the basis for an Environmental Protection Agency (EPA) timely objection to the issuance of the renewal permit pursuant to the requirements of 40 C.F.R. 70.4(3)(ix). In the alternative, since the existing Part 70 permit for the source is expired, Petitioners request that the Administrator terminate or revoke the operating permit(s) and issue a cease and desist order for Nevada Power Company Harry Allen Station pursuant to the requirements of 40 C.F.R. § 70.4(3)(vi). In the event that the Administrator or Region IX does not take action on this petition as requested, Petitioners' intent is to file a direct appeal in the Ninth Circuit Court of Appeals. Petitioners request confirmation regarding the date the EPA commences its review process.

Petitioners request that this electronic/paper comment document be made a part of the administrative record for the approval or disapproval of a Title V Operating Permit renewal for Harry Allen Station. This petition is submitted to the EPA, the DAQM, and others shown on the service list as comments in opposition to the renewal of a Part 70 Permit for Harry Allen Station. Petitioners request that this document be made a part of any subsequent local, state or federal

¹ By DAQM Petitioners mean the Clark County Department of Air Quality Management and any preceding Clark County department or agency.

administrative proceeding involving proposed Clean Air Act-related actions regarding Harry Allen Station.

This comment document is also a request for the Administrator to implement a Clark County Federal Implementation Plan (FIP) pursuant to the non-discretionary requirements of 40 CFR §70.10 (a)(2). This comment document is submitted without prejudice to any right the Petitioners may have pursuant to any applicable law.

I. OBJECTIONS

The following is taken from the Federal Register notice regarding approval of the Clark County Part 70 Program. The excerpt generally answers the question, “What is the Operating Permit Program?”

According to the EPA,

The CAA Amendments of 1990 required all state and local permitting authorities to develop operating permit programs that met certain federal criteria. In implementing the operating permit programs, the permitting authorities require certain sources of air pollution to obtain permits that contain all applicable requirements under the CAA. The focus of the operating permit program is to improve enforcement by issuing each source a permit that consolidates all of the applicable CAA requirements into a federally enforceable document. By consolidating all of the applicable requirements for a facility, the source, the public, and the permitting authorities can more easily determine what CAA requirements apply and how compliance with those requirements is determined.

The instant Notice of Proposed Action notices the intent of the Clark County Department of Air Quality Management (“DAQM”) to renew the Part 70 Operating Permit to Nevada Power’s Harry Allen Station. By this notice, DAQM has memorialized a scheme to knowingly and willfully issue a permit to Harry Allen Station that is a legally insufficient and legally impermissible Part 70 Operating Permit.

The information provided by the DAQM includes the following statement. “Part 70 Operating Permit (Renewal) Based On: Nevada Power Company Renewal Part 70 Operating Permit Application, received January 31, 2002, Initial Part 70 Operating Permit and its supporting NSR activity issued June 29, 1998 and current ATC/OP (A-00533; Modification 5) for facility issued on June 6, 2003.” Additionally from page 3 of the Technical Support Document (TSD), “This document was prepared in accordance with the latest interpretation of DAQM guidelines, policies, supervisory and managerial instructions, verbal and/or written, issued on or before June 3, 2003.” At the time DAQM made these representations, DAQM knew and should have known that there is no record of a public notice and review process regarding the above-named documents, “interpretation of DAQM guidelines, policies,... instructions.” None of the comments or documents includes a complete Clean Air Act citation compliance review. The public has been left out of the oversight process by the DAQM’s evasion of public notification requirements for policies and guidelines that are used to create permit terms. Bothersome

regulatory requirements are casually “overlooked” or have been simply labeled as an “oversight.” The Petitioners have concluded that DAQM is not only misleading the public, it is making false statements to the federal government for the purpose of making false claims to the federal government. It is logistically impossible for Nevada Power Co. to submit a “complete application” for renewal in January 2002 that contains the requirements that were just agreed upon in an ATC/OP issued June 6, 2003, well after the 2002 application submittal.

Without prejudice, according to DAQM Regulation 0, an “applicable requirement” means, among other things:

- a) Any standard or requirement included in an applicable State Implementation Plan (SIP) approved by the EPA...
- b) Any term or condition of any preconstruction permit.

DAQM is attempting to deny the public any due process regarding public notice, hearing or public involvement with the instant proposal to renew this already expired Part 70 permit. DAQM is attempting to relax existing conditions, add previously unauthorized emissions, and skip the New Source Review (NSR) program under the cover of minor issue, Title V process. The Section 12 and 16 “ATC/OP” mentioned above was issued secretly, without public notice, and without compliance with all applicable requirements. We cannot find evidence of compliance with the issue of BACT for carbon monoxide (CO) concentrations in the turbine exhaust. While other turbines in the County have concentration emission limits that purportedly comply with BACT, this site has successfully evaded that requirement with the assistance of a very helpful management team at the DAQM (and its predecessor agencies). The permit attempts to hide that issue by requiring continuous emission monitors (CEMS) for CO. However, there is no concentration limit listed in the permit and thus no purpose for the CO CEMS.

The instant proposed approval evades the county’s 1979/81 EPA approved SIP by covering up the fact that Nevada Power has operated for years without public involvement, without conformity to the SIP and without full disclosure in the Part 70 administrative process. The County has failed and refused to subject Nevada Power’s Harry Allen Station’s recent “ATC/OP” to the public notice process that is required by the 1979/81 EPA approved SIP. The magnitude of emissions from this source of air pollution required public involvement at the outset of the permitting process. Regardless, the TSD page 5 indicates the initial Part 70 Operating Permit was issued June 29, 1998. According to the renewal permit’s condition Part I, A-2, “This operating permit has a fixed term not to exceed five (5) years.” Thus, the permit expired June 29, 2003. No enforcement measures are discussed in the TSD or the permit. Obviously, there is no need to have a Part 70 permit in Clark County as a source can continue to operate with, or without a permit, in clear violation of CAA §502(a). CAA §502(a) states “VIOLATIONS—After the effective date of any permit program approved or promulgated under this title, it shall be unlawful for any person to violate any requirement of a permit issued under this title, or to operate an affected source... except in compliance with a permit issued by a permitting authority under this title.” The source’s existing part 70 permit expired and the source is operating in violation of Section 501(a) of the CAA.

DAQM secretly issued the latest ATC/OP without public notice, hearing or public involvement in a knowing and willful scheme to defraud the public as well as other local, state and federal agencies. The June 6, 2003 ATC/OP does not comply with the SIP requirement for Best Available Control Technology (BACT) for CO. The SIP requires the application of BACT on CO sources in a PSD area per §15.13. Petitioners object to the statement regarding “interpretation of DAQM guidelines, policies, supervisory and managerial instructions, verbal and/or written, issued on or before June 3, 2003.” That statement misleads in order to supersede and evade the agency’s own SIP and the CAA requirements for PSD area pollutants in an attainment area. The statement is also an admission that there was no public involvement in the process of issuing “supervisory and managerial instructions, verbal and/or written, issued before June 3, 2003.”

Clark County is required to provide the EPA with the opportunity to review new ATCs and modifications that involve major sources in Clark County. To the extent that the EPA was provided with that opportunity, then the EPA would have known about the issuance of the misleading June 6, 2003 permit. In the alternative, if the EPA was not notified, then DAQM has misled the EPA as well as the public. Petitioner requests that the EPA investigate the issue, determine the truth and then take appropriate action.

Petitioners object to amendments and revisions that include terms, limits, and conditions not previously contained in an Authority to Construct (ATC) that was legally issued pursuant to the 1979/81 EPA-approved SIP. The EPA either knew or should have known from their own administrative audits of DAQM or from the many comment and requests for administrative action Petitioners have filed since 1997² that DAQM is not a credible source of information regarding Part 70, SIP conformity or anything else of relevance.

II. RECENT EVENTS

Hall v. EPA, 273 F.3d 1146 (9th Cir. 2001), a relevant decision of the Ninth Circuit Court of Appeals

On August 29, 2001, the Ninth Circuit Court of Appeals vacated the EPA’s proposal to approve DAQM’s revisions to the state implementation plan (“SIP”) rules submitted in 1999. The appeals court vacated Section 0, definitions; Section 12, pre-construction review for new or modified sources; and Section 58, the emission offset credit sections. The court made it clear that the Environmental Protection Agency (“EPA”) had failed to justify its prior, proposed approval of the revisions to the SIP. The Clean Air Act (CAA §116) requires that amendments to SIP approved rules must be at least as stringent as the SIP sections the amendments replaced where cleaner air progress has not been demonstrated. In this instance, the most stringent regulations are the rule sections approved by EPA in 1979, and amended in 1981. This also meant that permits issued pursuant to less stringent local, shadow regulations are legally insufficient. There is no evidence of a legitimate permit for HAS issued pursuant to the 1979/81 EPA approved SIP

² More than thirty-three pounds of comment and request for administrative action documents, exhibits and supporting documents that are now attached as exhibits to the 2002 Clark County, State of Nevada PM-10 and CO SIP submittals.

rules.

In 1979, the EPA preliminarily approved State Implementation Plan (SIP) regulations included a set of AQD rules that were alleged to be as stringent as the 1979 SIP rules. The purpose at all times relevant was that of reaching cleaner air attainment. One of the approved rule sections, section 15, is a very stringent rule. Rule 15 involves pre-construction review of new or modified sources. DAQM's air pollution problem at that time the rule was adopted was serious enough to require a rule section 15 that was more stringent than minimum federal standards. Rule section 15 has been modified numerous times at the local level, but none of the Rule 15 amendments were ever successfully approved as an EPA approved SIP rule. DAQM references the most recent set of Section 15 Regulations as though they are approved SIP regulations when the agency knows that the only version of Section 15 is the 1979/81 version. At the time DAQM publicly noticed the instant proposed permit and the sham June 6, 2003 ATC/OP, DAQM knew that it was using a set of "shadow" regulations that are not a part of the 1979/81 EPA approved SIP. DAQM has no lawful authority to change or substitute SIP regulations while approving Part 70 applications or at any other time. In this instance, any inclusion or reference to regulations other than the 1979/81 EPA approved SIP regulations is misleading and a serious misrepresentation. Most of the proposed permit conditions do not cite or reference the 1979/81 EPA approved SIP rules as lawful authority. The current sham ATC/OP (the basis for the permit according to DAQM) was issued on the basis of bogus pre-construction regulations that were interposed for the purpose of misleading the public. The "shadow" regulations are interposed for the purpose of issuing permits that are less stringent and are legally insufficient. See CAA § 116. Any permit that relies on the "shadow" regulations is a misleading permit.

In 1987, DAQM adopted a locally approved and much less stringent Section 12. DAQM has used the unapproved, local rule section 12 in order to grant and issue pre-construction permits since 1987. DAQM continues to ignore the EPA approved version of rule section 15. In the process, DAQM has knowingly and willfully evaded the Clean Air Act in a manner that would result in the application of criminal penalties if a commercial source were to take similar actions. Local, state and federal employees and not exempt from responsibility since there is no local, state or federal job description that includes misleading the public much less local, state and federal agencies.

On April 23, 1998, the Clark County District Board of Health predecessor agency repealed the EPA approved SIP Section 15 as a local rule in the process of approving the subsequently vacated sections 0, 12 and 58. The problem that DAQM has is that SIP Rule section 15 is the only EPA approved SIP rule regarding new source review. Instead of Rule 15, DAQM has relied upon the less stringent, "shadow" rule Section 12 in order to issue preconstruction permits assuming legally sufficient permits were issued at all. With the reliance on Section 12 for permitting, DAQM has no regulatory means to issue, implement or enforce its 1979/81 EPA approved SIP. Part 70 requires the application of EPA approved SIP regulations.

From 1987, DAQM and its predecessor agencies, the Clark County Health District's Air Quality Division (AQD) and Air Pollution Control Division (APCD) have ignored the federally approved rule section 15 SIP rule without having EPA approved SIP rules to replace rule section 15. Since 1987, APCD, AQD and DAQM have been living a lie with the EPA and the citizens of Clark

County. DAQM has had a very strict, approved rule section 15 on paper that it has not enforced and has no intention of enforcing. At the same time that DAQM refused to enforce its EPA approved 1979/81 SIP regulations, DAQM had no problem accepting approximately three-quarters of a million dollars a year in federal largess for the purpose of enforcing EPA approved regulations as the EPA's proxy in Clark County while each and every representation the County has made regarding compliance or conformity to the 1979/81 EPA approved SIP misleads.

APCD's, AQD's and DAQM's very accommodating management personnel have used the locally approved rule section 12 in a scheme to evade enforcement of its EPA approved state implementation plan (SIP) and the Clean Air Act. Clark County Nevada became the fastest growing area of the United States. In the process, management personnel have allowed air pollution sources to pollute beyond the limits mandated by law. DAQM have represented to the public and the EPA that its rule section 12 was more stringent than its federally approved SIP rule section 15 while knowing that was not true.

The EPA failed or refused to approve rule section 12 as an approved SIP rule until 1999. That approval process was so egregious the Ninth Circuit court of appeals vacated and remanded the submitted rule amendments to the EPA in 2001. "To the extent that Petitioners disapprove the EPA's action, it is because Petitioners question whether the EPA properly assessed the adequacy of the revised new source review program to the task of meeting current attainment requirements." All the while, DAQM ignored its approved SIP and used the much less stringent local rules in a highly successful effort to evade the federal laws they were paid by the EPA to enforce.

When AQD sought approval for Air Pollution Control District Regulation ("APCDR") rule sections 0, 12 and 58 in 1999, the spin that AQD management used was that the proposed amendments were more stringent and met federal standards. AQD failed to disclose how much less stringent the proposed amendments were than the replaced and more stringent Section 15. If AQD had enforced Section 15, the county would now be closer to attainment of the NAAQS. The EPA wanted to believe, so they ignored the unambiguous requirements of section 116 of the CAA and approved rule sections 0, 12 and 58 while rescinding the 1979/81/82 rule section 15.

When the EPA granted preliminary approval of the 1999 submitted SIP amendments, the EPA made press releases and published the preliminary approval in the Federal Register. When the Ninth Circuit Court of Appeals vacated and remanded the submitted SIP to the EPA, the EPA kept quiet since the EPA had unlawfully encouraged Clark County to go ahead and use the SIP submittals as the basis for permitting and enforcement despite the fact they were less stringent than the 1979/81 EPA approved SIP. The EPA has not said or done anything publicly regarding the sanctions that were pending in 1999 or the fact that Clark County and Nevada are in a SIP lapse without the availability of lawful extensions of time.

The date of EPA's proposed Part 70 approval was October 10, 2001, well after the date of the Ninth Circuit Court of Appeals August 29, 2001 decision to vacate the EPA approval of Sections 0, 12, & 58. The EPA failed to note this adverse appeals court event in its FR notice. The EPA erred in proposing approval of a program that does not rely upon a valid, approved, and enforceable SIP to issue permits. On the one hand, the EPA has proposed \$100,000,000 penalty

findings and notices of violation ("NOVs"). On the other hand, the EPA let AQD and now DAQM get away with knowing and willful evasions of all of the applicable laws. Each time that happens, the EPA is aiding and abetting what Petitioners have every reason to believe are criminal acts.

Additional Objections To The Proposed Permit

The following are Petitioners' additional objections to the proposed Part 70 permit. Our objections generally follow the numerical order of 40 CFR §70.

III. 40 CFR §70.1 PROGRAM OVERVIEW

Section 70.1 prescribes the "Program Overview" of a Title V (Part 70) program, while Section 70.2 provides definitions. According to Section 70.1 (b), "All sources subject to these regulations shall have a permit to operate that assures compliance by the source with all applicable requirements."

According to 40 CFR §70.1 (c), "No permit, however, can be less stringent than necessary to meet all applicable requirements."

"Applicable Requirement" is defined within 40 CFR §70.2 and includes several specific requirements. One such requirement is "Any standard or other requirement provided for in the applicable **implementation plan approved or promulgated by EPA** through rulemaking under Title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in part 52 of this chapter."

An additional requirement within the definition of Applicable Requirement is "Any term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D, of the Act."

On information and belief, the source has never received a permit that complied with the EPA approved SIP or that was issued pursuant to an EPA approved SIP. Clearly, the current ATC/OP is not a "preconstruction permit," did not undergo public notice, and would have been based upon the less stringent, shadow regulations of Section 12 in use by the DAQM at the time of issuance. Petitioners object to every condition in the proposed permit that cites the source's June 6, 2003 ATC/OP as the legal authority for the condition. These objections cover virtually every condition in "Part III Special Conditions" of the instant part 70 permit.

The permit is poorly written and extremely inaccurate. Page 19 of the renewal permit indicates the "entire facility" is subject to §12.2.2 and §12.2.7 serious non-attainment area pollutants. The permit however is based exclusively on Prevention of Significant Deterioration (PSD) rules. DAQM has claimed all along that the APEX Valley was a PSD area. Perhaps DAQM is finally admitting the area is a serious non-attainment area. Regardless, the issue of BACT for CO emission concentrations is totally absent in the renewal permit. This same page 18 of the renewal permit indicates the entire facility is subject to the SIP's "all subsections except §15.14."

As noted above, DAQM's predecessor agency AQD rescinded its own EPA approved SIP rule section 15. The appeals court vacated the 1999 proposed SIP regulation additions/amendments. Clark County has long been in a SIP lapse. Because Clark County rescinded Section 15 in 1998 it has no business now trying to enforce those requirements. DAQM does not have the lawful authority to issue "preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I." DAQM's local rules contain many regulations that are less stringent than its previous approved SIP and federal requirements. DAQM has failed to submit the side-by-side comparison that provides evidence to the contrary. The burden is on DAQM to provide evidence that their proposed rules are at least as stringent as the 1979/81 EPA approved SIP rules and that a permit should be issued.

The definition for Applicable requirement also includes "Any standard or other requirement under section 111 or the Act, including section 111 (d)"; and "Any standard or other requirement under section 112 of the Act, including any requirement concerning accident prevention under Section 112 (r)(7) of the Act".

DAQM cannot issue permits that comply with any approved SIP that includes section 111 requirements because DAQM does not have the required SIP regulation and has long ignored the 1979/81 EPA approved SIP rules in any event. DAQM does not have any authority whatsoever to administer or enforce the section 112(r) requirements of the Act, since the responsible agency for section 112(r) is the Nevada Department of Environmental Protection (NDEP).

Clark County has knowingly and willfully misled the public and the EPA regarding the Carbon Monoxide (CO) limits as well. According to the current CO SIP submittal that is being reviewed by EPA's Region IX, TIMET is the only source of CO greater than 100 tpy in the Las Vegas Valley. DAQM admits in this instant action that the Harry Allen Station has a CO PTE of over 150 tpy. Given that Nevada Power was trying to buy reasonably priced electricity during the difficult 2001 period, Petitioners believe that the company would have operated their own units first and that would have resulted in CO emissions from their units far in excess of 100 tpy. Nevertheless, the proposed CO SIP indicates there are no other (except TIMET) sources of CO that are authorized to emit over 100 tpy. Petitioners object to emissions of CO that have the PTE above 100 tpy from this source.

Summary Of Section 70.1 Objections

DAQM does not have rules that have been approved by the EPA sufficient to meet the Title I requirements of the 1990 Clean Air Act Amendments. We have noted that the District Board of Health has previously repealed the previous EPA-approved Section 15. Clark County can not and will not enforce regulations that it has already rescinded. Proposed SIP rules must be noticed to the public as proposed SIP rules. They cannot be lawfully slipped into the SIP without public notice, without compliance with the Administrative Procedures Act ("APA") and NRS 233B. It is legally insufficient to attempt a back door approval of local rules as cover for the fact that there is an approved Nevada SIP with an EPA approved section 15 among a set of rules that starts with definitions.

IV. ADDITIONAL OBJECTIONS TO PERMIT CONDITIONS

According to proposed permit condition A-11, “Any request for a part 70 permit modification must comply with the requirements of AQR Section 12, AQR Section 15 and AQR Subsection 19.5.5”. This is yet another example of DAQM’s evasion of the intent of the Part 70 Program. As Petitioners have pointed out, the CCHD rescinded Section 15 in 1998. DAQM has no business to now suggest it can enforce regulations that have been repealed. Petitioners object to Condition A-11.

Petitioners protest the “Compliance Certification” condition found at A-9. Within the condition, is a “...certification with terms and conditions contained in the operating permit...” The certification is meaningless. Petitioners request that the certification be based upon compliance with “all applicable requirements” and not just a watered-down Part 70 permit that may have had a few requirements intentionally “overlooked” by DAQM management. Petitioners have expressed concern regarding DAQM management actions in the past. The instant proposed permit stands as proof that nothing has changed. If anything, the issues highlighted herein suggest institutional malfeasance. As Petitioners have stated, the source is not in compliance with BACT for CO concentration limits. A certification of compliance based on the terms and conditions of a deficient permit allows the source to certify compliance while ignoring additional applicable requirements found at SIP §15.13.

Petitioners object to the proposed permit Condition A-20 that states in part “... believe that an emission in excess of that allowed by the Air Quality Regulations is occurring.” Since current DAQM regulations are less stringent than the 1979/81 EPA approved SIP, the more stringent standard should apply.

Petitioners object to proposed permit Condition A-16 that gives the local Control Officer any authority whatsoever to determine whether information is eligible for confidential treatment. That would be inconsistent with 40 CFR §2.301.

Petitioners object to every proposed permit condition that uses “NSR ATC/OP A00533 Modification 5” as a basis for authority for the condition. That permit is not a “preconstruction permit.” It is an after the fact attempt by DAQM to justify past malfeasance. NSR ATC/OP A00533 Modification 5 is a sham permit, it is incomplete, and it was not issued pursuant to public notice. DAQM’s effort to streamline the process is simply an excuse to evade the part of the CAA that makes the Act work. That part is the public involvement requirements of the CAA. By avoiding public notice, the public is left out of the role that it plays in identifying the missing SIP requirements noted above.

Petitioners object to Part II of the proposed permit. The listed authority, AQR §§19.2.1 and 19.3.3.3 are not the appropriate legal authority for authorizing emission units in stationary sources. Only those emission units that pre-date the CAA or are listed within a legally valid ATC can be transferred to a Part 70 permit. Otherwise, the stationary source must add emission units consistent with the NSR requirements of the SIP.

Petitioner’s object to the lack of a Compliance Plan. A compliance plan is an applicable requirement, in the proposed permit. No mention was made of all the applicable requirements

that the source is not in compliance with. For example, the TSD discusses the parts of the Section 15 SIP that are favorable to the applicant.

Petitioners object to the lack of an explicit, side-by-side compliance demonstration with all requirements of EPA approved SIP Section 15, 40 CFR Part 60 including applicable subparts A and other applicable New Source Performance Standards. A streamlining demonstration and “permit shield” are missing from the literature and proposed permit as supplied by DAQM.

All the requirements listed above are “applicable requirements”. “No permit, however, can be less stringent than necessary to meet all applicable requirements” (40 CFR §70(c)).

DAQM cannot lawfully issue a Pre-construction Permit or a valid Part 70 permit that “meets all applicable requirements” for the simple reason that Clark County does not have an EPA approved permit program that complies with the 1990 CAA Amendments. For these reasons, and more that follow, the proposed permit must be denied. There is no legally sufficient basis to approve the permit since it was based upon local rules that are less stringent than SIP requirements. None of the pre-construction monitoring requirements of the SIP are mentioned or described or complied with in the instant permit.

V. 40 CFR §70.5 PERMIT APPLICATIONS

The NEC believes that most, if not all stationary sources are honorable, law-abiding companies that are misled by DAQM regarding CAA responsibilities. The focus of this comment is on regulator malfeasance, and less so, the stationary source’s efforts to comply with complicated regulations. DAQM remains a dysfunctional, air pollution enforcement agency.

Regarding the requirement for compliance certification found at 40 CFR §70.5(c) (9) (i), “A certification of compliance with all applicable requirements by a responsible official consistent with paragraph (d) of this section and section 114 (a) (3) of the Act” is required.” Paragraph (d) of the section states the requirement that “This certification and any other certification required under this part shall state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete”.

Neither DAQM nor the Source has lawfully fulfilled the certification requirements. Neither the source nor the DAQM can comply with the certification requirement and that is probably the reason the certification is missing. DAQM does not have any idea what SIP or SIP regulations they are attempting to comply with. That responsibility lies with DAQM, the State of Nevada and the EPA. Without compliance with “all applicable requirements,” and without approved SIP rules, statements of compliance mislead. The fact that the CO concentration limits are missing from the permit indicates the source was never in compliance with BACT in the PSD area. Add to that the source’s existing part 70 permit has expired without enforcement action and it is clear that the Clark County permitting program is nothing but smoke and mirrors.

Summary Of Section 70.5 Objections

Petitioners object to the notion that any source in DAQM can certify compliance with all

applicable requirements short of a thorough compliance plan. The DAQM and its predecessor agencies have put businesses regulated by DAQM in a precarious legal (civil and criminal) situation that is now out of control. There is no lawful basis for the operation of this facility. The only solution, short of civil lawsuits, is a federal operating permit plan initiated sooner, rather than later.

VI. 40 CFR §70.6 PERMIT CONTENT

According to 40 CFR §70.6 (a) (1), each permit issued shall include “Emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance.” Subparagraph i and ii go on to point out that duplicate requirements and overlapping requirements must be reconciled. Without prejudice, the DAQM permit evades many requirements and does not clearly include the “streamlining” demonstration prescribed in EPA white papers. EPA white papers are not statutes or regulations and for that reason, are legally insufficient for any lawful purpose. “Streamlining” is not authorized by law and DAQM has failed to cite any legally sufficient basis for “streamlining.”

DAQM and its predecessor agencies have issued permits pursuant to APCR Section 12 since 1987. Section 12 contains regulations that are not federally enforceable, are not SIP approved, and are less stringent than approved SIP requirements. Consequently, all Part 70 permits that were issued by DAQM that are based on the Section 12 since 1987, are misleading to the public, unlawful, and do not comply with the requirement to “assure compliance with all applicable requirements at the time of permit issuance.”

Compliance requirements are missing from the permit. The proposed permit allows non-quantifiable means of measurement (emission factors) in place of performance tests that would quantify emissions.

Summary Of Section 70.6 Objections

DAQM does not have an approved SIP or authority to issue New Source Review (NSR) or PSD permits. NSR and PSD requirements are applicable requirements under the Act. New Source Performance Standards are additional applicable requirements. DAQM does not provide a clear demonstration, requirement by requirement, that all applicable requirements are addressed. Every attempt that DAQM/AQD has made to issue part 70 permits does not comply with the requirement to “assure compliance with all applicable requirements.” This instant action does not correct the deficiencies at DAQM.

VII. 40 CFR §70.7 PERMIT ISSUANCE, RENEWAL, REOPENING, AND REVISION

According to 40 CFR §70.7 (a)(1)(iv), “The conditions of the permit must provide for compliance with all applicable requirements of this part.”

Under the definition of “applicable requirement” in 40 CFR §70.2, requirements of an approved SIP are an applicable requirement. DAQM does not have an approved SIP that meets the 1990

amendments to the Clean Act (“CAA”). DAQM no longer has a local Rule 15 after the Clark County Board of Health repealed the only approved rule Section 15 on April 23, 1998. Completely absent from the permit are citations to the CAA and to 40 CFR part 60.

Summary Of Section 70.7 Objections

DAQM has not included references or citations to EPA approved SIP (section 15), or to the CAA, or to 40 CFR part 60 requirements.

VIII. 40 CFR §70.8 PERMIT REVIEW BY EPA AND AFFECTED STATES

According to 40 CFR §70.8 (c) (1), “The Administrator will object to the issuance of any proposed permit determined by the Administrator not to comply with applicable requirements or requirements under this part.”

According to 40 CFR §70.8(c) (3) (ii), “Failure of the permitting authority to do any of the following also shall constitute grounds for an objection: (ii) Submit any information necessary to review adequately the proposed permit....”

Petitioners’ object to the fact that EPA has not denied any of the part 70 permits that were issued by Clark County. All such permits were issued without compliance or legal reference to the EPA approved SIP. Petitioners object to the fact that the EPA has not taken any sanction against Clark County despite a huge amount of information that sanctions were applicable a long, long time ago. There has not been any penalty for a failure to conform and comply. That failure is a loud and clear “business as usual signal” to Clark County.

Summary Of Section 70.8 Objections

Petitioners allege that the EPA is failing in its non-discretionary responsibility to object or deny permits that do not comply with “all applicable requirements”. The instant permit does not comply with “all applicable requirements.” The NEC requests that the EPA object to the issuance of the proposed part 70 permit.

IX. 40 CFR §70.9 FEE DETERMINATION AND CERTIFICATION

According to 40 CFR §70.9(a), “The State program shall require that the owners or operators of part 70 sources pay annual fees, or the equivalent over some other period, that are sufficient to cover the permit program costs and shall ensure that any fee required by this section will be used solely for permit program costs.” According to 40 CFR 70.9(b) (1) “The State program shall establish a fee schedule that results in the collection and retention of revenues sufficient to cover the permit program costs.” The required fee schedule is directed at sources of air pollution, not the public.

The AQD and DAQM program have squandered over \$2.1 million by not timely issuing Part 70 permits within the required 3-year period. The fees are inadequate as demonstrated by the agency’s issuance of only a few permits. In the alternative, the fees are adequate, but the agency

has squandered the money on unrelated items such as attorney fees to defend the agency from its own malfeasance. Regardless, not all permits have been issued within the 3-year period as required.

DAQM operates a failed program as demonstrated by the failure to issue legally sufficient permits in a timely manner. With more than a 100% turnover of part 70 permit writers since 1997, DAQM's part 70 program is legally and administratively deficient and insufficient.

Summary Of Section 70.9 Objections

DAQM would have collected more than enough money to issue all the part 70 permits, if the pre-construction permits were valid. Unfortunately DAQM does not have valid permits issued according to approved SIPs. DAQM's management has squandered an opportunity to collect approximately \$2.1 million. The program is recognized locally as a dismal, deliberate failure. Despite the known failure, former agency executives walked off with substantial golden parachutes for their reward for a job "well done".

X. 40 CFR §70.10 FEDERAL OVERSIGHT AND SANCTIONS

DAQM and AQD have had almost 8 years to prepare an approvable part 70 permit. Petitioners were provided with only 30 days to review the proposed permit. Despite that handicap, Petitioners have found deficiencies that render the permit fatally deficient. As a result of the deficiencies noted herein, petitioners respectfully request that all of the requirements of 40 CFR §70.10 be implemented without delay.

40 CFR §70.10(c) provides the criteria for the Administrator to withdraw approval of State programs. One of those criteria is found at Section 70.10 c (1) (i) which states that the Administrator may withdraw approval "Where the permitting authority's legal authority no longer meets the requirements of this part...." The DAQM program no longer meets the requirements of a program that justifies the Administrator's continued support. If this program does not justify Administrator action, then there is no program that will ever justify Administrator action. Administrator inaction provides evidence of EPA's inability to do the job given to it by Congress.

Summary Of Section 70.10 Objections

Petitioners object to the lack of EPA intervention based upon the requirements of Section 70.10. The NEC requests EPA action, including sanctions as prescribed by CAA Section 179(b) (2) without further delay.

XI. SUPPLEMENTAL ISSUES

On January 23, 1997, the Clark County District Board of Health published Air Pollution Control Regulations. The regulations were preceded by a revision list. The revision lists includes revisions for Section 15 on June 28, 1979, September 3, 1981 and May 27, 1993. The actual Section 15 - Source Registration included with the published sections was not revised for SIP

purposes after 1982. The January 23, 1997 version contains sub-sections that are not in previous versions of Rule 15. They include sub-sections 15.14.4.3.2, 15.14.4.3.3 and 15.14.4.3.4. Other EPA unapproved sections, with identical numbers, have been replaced by DAQM/AQD and have been used deceptively by DAQM to whitewash the true EPA approved SIP requirements.

On August 3, 1994, David P. Howekamp, Director, Air & Toxics Division, EPA sent a "copy of Clark's applicable State Implementation Proposed regulation amendments (SIP)" along with a cover letter to Michael Naylor, Director, DAQM Air Pollution Control District. The copy does not include sub-sections 15.14.4.3.2, 15.14.4.3.3 and 15.14.4.3.4. The copy included a Clark County Applicable State Implementation Plan proposed regulation amendments Action Log that shows section 15 - Source Registration approved on 04/14/81, 46 FR 21766. It also shows sub-section 15.14 as having been approved 04/14/81, 46 FR 21766 and again on 06/21/82, 47 FR 26621.

In response to a request by the Nevada Environmental Coalition, Inc. (NEC), Andrew Steckel, Chief, Rulemaking Office, sent a copy of a DAQM Applicable State Implementation Proposed regulation amendments Action Log, Last Updated 01/27/99. The information for Section 15 includes the following approval dates and Federal Register (FR) citations.

15.1-15.6	06/21/82	47 FR 26621
15.6.1.4-15.6.1.5	08/27/81	46 FR 43142
15.6.1.6-15.6.2.5	06/21/82	47 FR 26621
15.6.2.6	08/27/81	46 FR 43142
15.6.3-15.6.3.5	06/21/82	47 FR 26621
15.6.4-15.6.5	08/27/81	46 FR 43142
15.6.6-15.12	06/21/82	47 FR 26621
15.3	Prevention of Significant Deterioration	
15.13.1-15.13.5	06/21/82	47 FR 26621
14.13.6	(Not assigned)	
15.13.7-15.13.15	06/21/82	47 FR 26621
15.14	08/27/81	46 FR 43142
15.14.1	06/21/82	47 FR 26621
15.14.1.1	08/27/81	46 FR 43142
15.14.1.2	06/21/82	47 FR 26621
15.14.2-15.14.3	08/27/81	46 FR 43142
15.14.3.1-15.14.4.1	06/21/82	47 FR 26621
15.14.4.2	08/27/81	46 FR 43142
15.14.4.3	06/21/82	47 FR 26621
15.14.4.3.1-15.14.4.3.5	08/27/81	46 FR 43142

The 01/27/99 updated list shows only two approval dates and two FR publications for the entire rule fifteen. The 1994 Howekamp document lists the 06/21/82 47 FR 26621 approval and a 04/14/81 46 FR 21766 approval but not the 08/27/81 46 FR 43142 approval listed in the Steckel 01/27/99 update. The June 28, 1979, September 3, 1981 and May 27, 1993 dates published by the APCD or AQD appear to be local attempts to rewrite a federally approved SIP regulation without the benefit of EPA approval. APCD and AQD did not use EPA approved SIP Section 15.

They used a locally modified Section 15 until they had a better idea with the unapproved rule section 12. The mixing of EPA approved SIP rule sections with unapproved SIP rule sections was not wise, particularly while Sections 0, 12 & 58 plus the rescission of Section 15 were on appeal

DAQM's attempt to amend vacated rules is legally insufficient. The applicant cannot lawfully do that as long as important, approved SIP rules are vacated and other rule sections were modified without EPA approval.

XII. THE SIGNIFICANCE OF THE KERR-McGEE FINDING AND NOTICE OF VIOLATION (NOV)

On September 27, 2001, the U.S. Environmental Protection Agency (EPA) issued a Finding and Notice of Violation (NOV) against Kerr-McGee Chemical L.L.C. ("KMC"), for violations at its inorganic chemical manufacturing facility in Henderson, Nevada. The NOV found violations of the Clean Air Act's New Source Review (NSR) program going back to May 1994. The penalties levied of \$25,000.00 to \$27,500 per day go back to 1994 for each violation and are subject to administrative mitigation. The EPA alleged that Kerr-McGee violated EPA approved Clean Air Act State Implementation Plan (SIP) rule sections from the 1979 SIP (amended in 1981/82). The NOV cited two instances where the Clark County Health District's Air Quality Division (the predecessor to DAQM) issued permits to Kerr-McGee in contradiction to the approved SIP regulations. The NOV acknowledges that local rules approved as part of the approved SIP on May 11, 1999 were vacated and remanded in *Hall v. EPA*, No. 99-70853, 263 F.3d 926 superseded by 273 F.3d 1146 (9th Cir. 2001).

This NOV directly contradicts the Department of Air Quality Management's contention that it may issue NSR permits based on local or unapproved SIP rules. There is a strong message in the NOV that sources of air pollution that rely upon permits issued by authority of unapproved SIP regulations are at substantial risk. The NOV notes that the Clean Air Act provides for criminal penalties, imprisonment, or both for persons who knowingly violate any federal regulation or permit requirement more than 30 days after the date of issuance of a Notice of Violation. A copy of the Kerr-McGee NOV may be found on the NEC Web site at www.necnev.org.

The following is a partial list of Las Vegas Valley sources that received findings and notices of violation from the EPA. The fact that the EPA had to levy NOV's after APCD or AQD granted permits to these sources does not add to DAQM's enforcement credibility.

- Nevada Cogeneration, #1 and #2, NOx
- Titanium Metals (TIMET), SO2
- Lasco Bathware, VOC
- Wells Cargo, PM10
- Las Vegas Paving, PM10
- Nevada Ready Mix, PM10
- Southern Nevada Paving, PM10
- Capital Cabinets, VOC
- J.R. Simplot Silica, SO2

CalnevPipeline, VOC
Chemical Lime Co. (Apex), PM10, SO2, NOx
Kerr-McGeeChemical, CO
Environmental Technologies of Nevada, Inc., PM10

Regulator negligence and malfeasance has left Clark County citizens without the protections ordinarily afforded by approved SIPs. The only way citizens have to ensure that actions within polluted areas will not degrade those areas is by legally sufficient SIPs that are not misleading. The lack of approved SIPs undercuts the National Environmental Policy Act (“NEPA”) and the CAA’s cumulative environmental impact or conformity provisions. There are no EPA approved proposed regulation amendments sufficient to achieve the NAAQS. No federal agency operating in Clark County has ever completed a legally sufficient transportation or general conformity determination. Even if conformity determinations were completed, they could not conform to CAA 1990 amendment SIPs that do not exist. Each DAQM certification of compliance with any SIP that DAQM has ever made is misleading to the EPA, other federal agencies and the citizens who live in or visit Clark County. The most important misrepresentation is that there is compliance anywhere when there is no cumulative environmental impact or Clean Air Act conformity determinations. Petitioners ask conformity to what? The EPA has allowed never-ending misrepresentations to continue beyond all statutory boundaries.

In full recognition of this regulatory void, valley promoters of air pollution sources have cynically championed projects that violate the NAAQS. Legally sufficient SIPs in Clark County’s numerous nonattainment areas would have prevented violations of the NAAQS. No legally sufficient SIP would permit the current levels of air pollution emitted by county sources of air pollution. As but one more example, the APEX Valley has had numerous exceedances of ozone and PM₁₀. A legitimate regulatory effort would have declared the area non-attainment years ago. Clark County, with the added help of EPA, has allowed thousands of additional tons of air pollution to be added to a bogus emissions inventory, above and beyond the levels of pollution that resulted in violations of the NAAQS.

XIII. RELIEF SOUGHT

Petitioner requests that the instant application be denied. Petitioner requests that the EPA reverse the proposed full approval and replace the local program with a Federal Operating Permit program, as required by law.

Petitioner claims all of his rights including but not limited to those found in NEPA, the federal Administrative Procedures Act (“APA”) and the Clean Air Act (“CAA”).

Petitioner further requests full EPA compliance with the language, spirit and intent of the Clean Air Act §113, 42 U.S.C. § 7413, Federal Enforcement, and §116 Retention of State Authority. Over the last several years, Petitioner has provided both the EPA Administrator and the Region IX Administrator with credible information that DAQM’s violations of the Clean Air Act “are so widespread that such violations appear to result from a failure of the State in which the proposed regulation amendments or permit program applies to enforce the proposed regulation amendments or permit program effectively.” Approving a relaxed SIP contrary to CAA §116

would serve no purpose other than to aid and abet continuing civil and criminal violations of our nation's environmental laws.

DAQM remains dysfunctional primarily because of its failure to attract and retain experienced personnel who have the ability to operate the division according to the language, spirit and intent of the Clean Air Act. Neither the EPA nor the Petitioners can do the task for them. Approving applications that clearly should not be approved is a reasonable option to the DAQM.

Petitioner requests that the EPA implement a Federal Implementation Plan regulation amendments (FIP) pursuant to §110(c) (1), and apply Sanctions §110(m) pursuant to §179(a), supra, without further delay. That means now. That does not mean months or years from now. DAQM has met all of the requirements for a FIP many times over. The public health and safety is held hostage while bureaucrats procrastinate.

In making this request in our own interest, Petitioners honor those who have lost their lives or whose quality of life has declined as a proximate result of the acts of a few. Petitioners especially honor the memories of Cynthia Mikes and of Elizabeth Gilmartin. May they rest in peace.

Dated: July 15, 2003 at Las Vegas, Nevada

Respectfully submitted,

/s/ Robert W. Hall

Robert W. Hall, as an Individual and as President
Nevada Environmental Coalition, Inc.
10720 Button Willow Drive
Las Vegas, Nevada 89134
(702) 360-3118