

STATE OF NEVADA

Department of Conservation & Natural Resources

DIVISION OF ENVIRONMENTAL PROTECTION

Jim Gibbons, Governor

Allen Biaggi, Director

Leo M. Drozdoff, P.E., Administrator

November 20, 2007

Charles Benjamin
Nevada Director
Western Resource Advocates
769 Basque Way, Suite 300
Carson City, NV 89706

Dear Mr. Benjamin,

Thank you for submitting comments on behalf of Nevadans for Clean Affordable Reliable Energy (NCARE) pertaining to the Memorandums of Understanding (MOUs) negotiated between the Nevada Division of Environmental Protection (NDEP) and the owners of three coal-fired electric generating plants proposed for construction in Nevada. NDEP has made a few minor changes to the MOUs based on the comments submitted. When it comes to the overall meaning and intent of the MOUs, however, it appears we may have to simply agree to disagree.

It is clear from NCARE's previous actions in this state and elsewhere that it is the organization's goal to simply stop the construction of these and other coal-fired power plants. Unfortunately, we believe that NCARE's strong opposition to the plants affected NCARE's review of these MOUs. NDEP believes that NCARE has misconstrued the overriding purpose and intent of the MOUs and misread many of its components. Moreover, we believe in several instances NCARE has presented opinions as fact and chose to ignore the recent history of power generation planning and the ongoing need for baseload electric generation in Nevada.

As noted when I provided NCARE with an opportunity to comment, the MOU process has been used dozens of times by NDEP to assist in memorializing environmental agreements with parties in cases where no federal or state regulations apply. It is traditionally a one-on-one negotiation between NDEP and the parties involved – not a public process. Although NCARE claims that the MOU process evades the lawful regulatory process under the Clean Air Act (CAA), this is simply not true. The MOUs are the product of informal good-faith negotiation among the parties. They are not, and were never intended to be, a form of regulation of greenhouse gas emissions from power plants. Rather, they are a recognition by all parties that CO2 emissions from these plants is of concern and the MOUs create a process for evaluating and implementing carbon capture and sequestration in the absence of state or federal regulations. NDEP believes the MOUs are a constructive step forward because they demonstrate a commitment by the companies to install carbon capture and sequestration technology as soon as it is technically and commercially available, to conduct research into those technologies and to design their plants so that they can be retrofitted for carbon capture and sequestration. As correctly noted in NCARE's comment letter, these MOUs are over and above any federal or State of Nevada requirement. In our view, Nevada should be commended for its action. In fact, a November 7, 2007 article for the AFP wire service in Paris cites an International Energy Agency (IEA) report entitled "World



Energy Outlook 2007,” which urges governments worldwide to “focus on developing clean coal technologies, in particular carbon capture and sequestration.” This is exactly the approach NDEP was taking in negotiating the MOUs.

Although we have stated our position with regard to the regulation of greenhouse gases to you several times in informal meetings and at the September 7, 2007 Nevada State Environmental Commission (SEC) hearing, there continues to be an apparent disconnect in communication. Therefore, we will restate our position here. NDEP believes it has the authority to develop regulations for SEC adoption to regulate CO₂. As of today, there are no existing state or federal regulations applicable to CO₂ emissions. There are, however, many actions and initiatives being undertaken in Nevada, regionally, nationally and internationally on the issue of global climate change that will significantly affect how the NDEP addresses greenhouse gas emissions in the future. Nevada is participating in this effort in a number of ways. They include:

- The creation of the Climate Change Advisory Committee (CCAC) by Governor Gibbons -- This group of prominent, knowledgeable Nevadans has been tasked with evaluating the impact of climate change on Nevada and coming up with a set of recommendations that address those impacts and reduce greenhouse gas emissions.
- Participation in the Western Climate Initiative (WCI) -- Nevada has joined the WCI as an observer. This initiative is a regional effort to examine possible actions to curb greenhouse gas emissions and set goals for doing so, as an observer.
- Passage and implementation of SB 422 -- During the 2007 session of the Nevada Legislature, NDEP worked with State Senator Dina Titus on the development and passage of SB422, which requires electric generation companies to participate in a greenhouse gas registry and requires the creation and regular updates to a statewide inventory of greenhouse gases. This bill was signed into law by Governor Gibbons making Nevada one of the first states to require the registration of greenhouse gas emissions by electric utilities. At Governor Gibbon’s request, Nevada became one of the early members of the California Registry, and the regulations necessary to implement SB422 are on the agenda for the December State Environmental Commission hearing.

NDEP believes that any regulatory proposals developed to deal with greenhouse gases and climate change must include, and be consistent with, the recommendations of the CCAC and the lessons learned through other regional and national efforts. We recognize that action on these proposed power plants will take place in advance of the completion of these activities and, simply put, that is why we moved forward with the development of the MOUs.

Throughout NCARE’s comment letter, concern is expressed about the language in Section C.5. that allows the MOUs to be terminated or modified as a result of new federal or state regulations. NDEP recognizes that the discussion on climate change is quite dynamic and, through that language, we attempted to recognize the real possibility that future regulatory change could provide other unanticipated measures that may better address these emissions. However, NDEP and the companies also recognized that minor regulatory changes should not be used to undermine these agreements and so included the following: “...laws regulating CO₂ emissions shall not be deemed to include laws that create GHG monitoring or reporting requirements or laws that impose other, non-substantive or administrative requirements.” For whatever reason,

NCARE did not recognize this section. Therefore, we bring it to your attention now. Additionally, in light of your comments, the MOUs were modified to include a review process to evaluate the impact of any new state or federal requirements and determine whether or not to terminate or modify the MOUs.

Throughout NCARE's response is the notion that the Massachusetts case determined that CO2 is now a regulated pollutant under the New Source Review (NSR) provisions. At this point in time, that perspective is actually more opinion than fact. NCARE fails to recognize that, even after the Supreme Court decision, there continues to be a broad range of opinion on this issue. In fact, there are cases pending before the EPA's Environmental Appeals Board that will likely shed some light on this extremely important point. Given the critical nature of these decisions, we anticipate they will also be appealed through the courts, so any definitive answer may be years into the future. In the meantime, there are numerous power plant permits in process throughout the country, including the three in Nevada. The majority of these plants are being designed and permitted without CO2 provisions and without an MOU process on carbon capture and sequestration. We are required to continue to move forward through the existing permitting process. Along with all of the actions Nevada has undertaken on climate change listed earlier, NDEP is monitoring these cases. The federal decision to include or not include CO2 as a regulated pollutant under NSR will play a significant role in Nevada's developing strategy on this issue.

Some of NCARE's comments, somewhat naively and incorrectly, imply that these plants are being foisted upon Nevada. This observation is not correct. In fact, the proposed plants are actually the result of very deliberate and careful action over the past seven years. During the California energy crisis of 2000, power outages occurred across the Golden State due to shortage of power generation and lack of available power for purchase. The crisis raised serious concerns throughout the West, including here in Nevada. In order to avoid a similar crisis in Nevada, then-Governor Guinn, ordered the formation of the Nevada Electric Energy Policy Committee, made up of business leaders, utility executives and legislators, and tasked them with examining the status of electric utility deregulation in the state and make recommendations regarding Nevada's long-term energy policy. In January 2001, the committee submitted, among others, the following observations and recommendations relating to permitting and construction of new electric generation:

- "Extreme price volatility and uncertainty of adequacy of supply are unacceptable to Nevada. It should be the policy of Nevada to put in place a plan so that there is an adequate supply of electricity at a predictable price and with acceptable environmental impacts for the residents of the state."
- "In order to achieve the results above, the state should have a policy of encouraging construction of generation and transmission, as well as energy efficiency and demand reduction which can be demonstrated to contribute to reasonable prices and adequate supply."
- "In order to promote the effectiveness of the permitting process, the state of Nevada should establish a single agency, the PUCN (Public Utilities Commission of Nevada),

to manage the process of siting transmission and generation facilities, except in those counties which are exempted from certain requirements.”

Nevada had a serious deficiency in electric generation, and, according to the PUCN, that deficiency continues today. State agencies, including NDEP, were instructed to make permitting new power generation projects a high priority. Over the last several years NDEP has permitted several geothermal plants and began working with these proposed coal-fired plants as early as 2004 to help implement the recommendations of that Committee.

In its 2006 resource planning document entitled “Nevada’s Electricity Future: A Portfolio-Focused Approach”, the PUCN outlines the challenges still confronting the state five years removed from the California crisis. “Both Nevada Power and Sierra Pacific need additional generation resources,” the report observes. “Nevada Power’s need for approximately 2,000 megawatts of additional capacity exists today. Without the addition of new capacity, the capacity shortfall will escalate to 4,000 megawatts by 2020. Additionally, a substantial percentage of Nevada Power’s existing generation assets are older and could reach the end of their useful lives as early as 2012.”

The report also notes that Nevada law requires the PUCN to address the challenge by assessing and adjusting the utilities’ Integrated Resource Plans (IRPs) using a number of criteria, including “reliability, diversity of fuel, economic impact, and environmental impact”. As part of its 2006 IRP, Nevada Power’s proposed Ely Energy Center, a 1,500 MW baseload coal-fired generating plant in eastern Nevada, was approved by the PUCN. The report also notes that “carbon emissions capture technology for new plants is not commercially available at this time,” a statement that remains true today.

During the 2006 public hearings on the Resource Plan for the Ely Energy Center (hearings in which NCARE was a participant), the PUCN rejected a request by NCARE to delay in the development of this “time sensitive, needed generation resource.” The PUCN also rejected NCARE’s assumption that renewable resources can fill the capacity shortfall and displace the proposed new coal-fired capacity. This PUCN determination is very important because NCARE, contrary to the actual PUCN findings, continues to assert that renewable energy can take the place of these plants. Independent of any work by the PUCN, it is also noteworthy that the IEA report did not identify an alternative to coal-fired energy that can provide the power needed world wide through 2030.

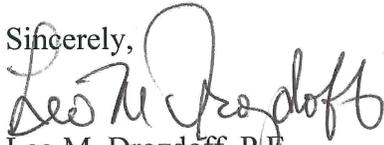
Following NCARE’s unsuccessful efforts before the PUCN, Western Resource Advocates, a member of NCARE, petitioned the SEC to halt the permitting process for the three power proposed plants. In September 2007, the SEC rejected that petition. Instead, the SEC asked NDEP to continue negotiating with the companies in an effort to memorialize some environmental agreements that would begin to address the greenhouse gas emissions issue until such time as federal or state regulations are enacted.

Today, November 20, 2007, NDEP and the companies have signed the MOUs. NDEP is proceeding with the permitting process for the three proposed power plants, setting forth all applicable environmental requirements for the plants. Direction from the Attorney General’s

Office during NCARE's SEC petition hearings made it clear that neither the SEC nor the NDEP has the regulatory authority to stop the permitting process. Moreover, if the applicants meet all existing state and federal requirements, NDEP must issue the final permits.

Going forward, NDEP awaits the recommendation of the Governor's task force on climate change. These recommendations will, no doubt, be the catalyst for future actions, including the development of greenhouse gas regulations. Any regulations or permits issued under these regulations will go through a full public process as required by law. We look forward to working with you and other stakeholders through those processes.

Sincerely,

A handwritten signature in cursive script that reads "Leo M. Drozdoff". The signature is written in black ink and is positioned above the printed name.

Leo M. Drozdoff, P.E.
Administrator

cc: L.H. Dodgion, Chairman, SEC
Allen Biaggi, Director, DCNR
Colleen Cripps, Deputy Administrator, NDEP
Mike Elges, Chief, BAQP