



Minutes of the Clark County

Air Pollution Control Hearing Board Meeting

June 12, 2014

I. CALL TO ORDER

Chair Daniel Sanders called the meeting of the Air Pollution Control Hearing Board to order at 1:30 p.m. A quorum was present and Affidavits of Posting of the agenda were provided as required by the Nevada Open Meeting Law. The Affidavits will be incorporated into the official record.

PRESENT: Daniel Sanders, Chair
Karen Purves, Vice-Chair
Tom Foster, P.E.
Herbert Inhaber
Mark Ireland
Craig Schweisinger
Evan S. Wishengrad, Esq.

LEGAL COUNSEL: Ofelia Monje, Esq., Counsel for DAQ

DAQ STAFF: Gary Miller, Compliance and Enforcement Manager
Lewis Wallenmeyer, Director
Araceli Pruett, Administrative Secretary

OTHERS

PRESENT: Nick Ceabuca, Creative Builders; Heather Mackinnon, DAQ; Shibi Paul, DAQ;
Lea Kain, DAQ; Chuck Richter, DAQ; Tony Pathyil, DAQ; Kandice Allen, DAQ

II. PUBLIC COMMENT

There were no public comments.

APPROVED APC HEARING BOARD

DATE: 2/5/15

BY: Araceli Pruett

Board Secretary

III. APPROVE MINUTES OF MARCH 13, 2014

Chair Sanders called for comments, changes, or corrections to the March 13, 2014 minutes. Board Member Foster suggested the alternate location of that meeting (Wetlands Park Nature Center) be noted in the minutes. Said change was noted on the record. Being no other changes, Board Member Wishengrad made a motion to approve the minutes with the noted change, which was seconded by Board Member Inhaber, and carried by the rest of the board members. The motion passed unanimously.

IV. MATTERS REQUIRING BOARD DISCUSSION/POSSIBLE ACTION

[Chair Sanders requested the board proceed to Item V, Report by DAQ Staff, since the appellant had not arrived. It was later reported by DAQ staff that the appellant had experienced transportation issues on the way to the meeting and would be tardy].

A. APPEALS

1. **CREATIVE BUILDERS – NOV #8482** – Creative Builders is appealing the Air Pollution Control Hearing Officer's Order. On March 26, 2014, the Hearing Officer found Creative Builders in violation of Air Quality Regulations Subsections 94.4.1 and 94.7.6.1 for conducting construction activities prior to obtaining a valid Dust Control Permit; and for allowing superintendents and foremen to work on site without having completed the required Air Quality Dust Control Class on September 23 and October 18, 2013 at the Chase Bank DU ATM construction site, located at 1435 West Craig Road in Clark County, Nevada. A \$1,250 penalty was assessed.

Nick Ceabuca appeared on behalf of Creative Builders, Inc. and was sworn in. It was agreed DAQ would provide a summary of the facts, and then appellant would be provided the opportunity to follow-up with questions and testimony.

DAQ Compliance and Enforcement Manager Gary Miller provided background on the case based on the information stated in NOV #8482. On September 12, 2013, a permit application was submitted for the subject project, but was not issued due to a number of deficiencies. DAQ staff repeatedly notified Creative Builders of said deficiencies and that the permit would not be issued until they were resolved. The required information was never received and the permit was never issued. On October 18, 2013, DAQ Air Quality Specialist Heather Mackinnon inspected the subject project and observed evidence of trenching activity over 100 feet in length, which would have required a dust control permit and that the project was nearly complete. Mr. Miller referred board members to the photographs and aerial map contained in the board books that Ms. Mackinnon used to document the trenching activity. Creative Builders was therefore cited for working without a permit and for not having on-site personnel complete a DAQ dust class, which was one of the deficiencies noted in the permit application that was preventing its issuance.

Board Member Purves questioned whether any direct contact was made with Mr. Ceabuca after the application was submitted. Counsel Monje pointed out staff had emailed Mr. Ceabuca, but never received response from him and eventually received a response from Chris Denzel.

Mr. Miller explained the calculation of the \$1,250 recommended penalty. The standard penalty for failure to obtain a dust control permit is \$500 and a \$500 adjustment was added for continuing to work without a permit, for a total of \$1,000. The standard penalty for not attending a dust class is \$250. AQR allow for a maximum penalty of \$10,000 per day per violation, which could have significantly increased the penalty.

Mr. Ceabuca maintained he was not aware he needed a permit, stating he took over the job from another contractor and started the job in August. Mr. Ceabuca acknowledged completing and signing the permit application contained in the board books. There were repeated inquiries on how Mr. Ceabuca learned he needed a permit. Mr. Ceabuca stated an inspector from DAQ came by and told him he needed a permit. He referred to the email exchange on bates number 0000019 between DAQ staff and Chris Denzel concerning the deficiencies in the application, stating Mr. Denzel was the electrician on the job who helped him with the permit paperwork. Board Member Purves referred to Section 4 of the permit application (bates number 000006) that listed Nick Ceabuca as the Point of Contact for dust control matters and inquired if that was his current contact information. Mr. Ceabuca agreed it was.

Board Member Wishengrad inquired whether Mr. Ceabuca thought he was done with the permit process once he submitted the application. Mr. Ceabuca concurred. Board Member Wishengrad referred to Section 5 of the permit application (bates number 000006) that addresses the DAQ Dust Class requirement for on-site supervisory personnel, noting the checked box indicated personnel had not attended dust class. Mr. Ceabuca acknowledged checking the box and understanding the 30-day dust class attendance requirement, stating he took the class in November or December. Board Member Purves asked if Mr. Ceabuca recalled any communication with DAQ about the application being incomplete. Mr. Ceabuca did not recall communication about the application incompleteness, but recalled communication about attending a dust class.

Mr. Ceabuca felt the \$1,250 penalty was excessive for a first time offense. There was testimony about the affiliation between Mr. Denzel and Mr. Ceabuca. Mr. Ceabuca reiterated that Mr. Denzel was his electrician who helped him with his paperwork. Board Member Wishengrad referred to the email dated October 31 (bates stamp 000019) from Mr. Denzel to Brenda Whitfield of DAQ that stated Mr. Ceabuca was informed he needed to take the dust class to continue his involvement as general contractor. Mr. Ceabuca explained he missed the first class, but took it in November or December. Counsel Monje asked Mr. Ceabuca to confirm the email address provided on the application (bates stamp 000005); he confirmed its validity. Referring to Ms. Whitfield's email to Creative Builders dated September 23 (bates stamp 000021) listing the deficiencies in the application, she asked Mr. Ceabuca if he responded to that email. He could not recall, stating he gave the information to Mr. Denzel to contact DAQ on his behalf.

Mr. Ceabuca acknowledged the project was completed with Creative Builders as the general contractor. There was discussion about the application and permitting process with other entities that Mr. Ceabuca works with. Mr. Ceabuca explained when he obtains a building permit, he applies for it and they notify him when it is approved and he does not pay a fee until it is approved. He did not think the dust class requirement was related to the permit issuance. He reiterated that he did not think he needed a permit, but applied for it after he learned he needed it.

Board Member Foster inquired whether the permit was ever issued. Mr. Miller responded the permit was not issued because page 2 of BMP 20 was missing. There are best management practices (BMP) for different construction activities and permittees only complete BMPs that are applicable to their project activities. BMPs are not listed in the regulations, but are adopted by reference in AQR Section 94. Mr. Miller referred to bates number 000013, which is the first page of BMP 20, Trackout Prevention, explaining it continues on to another page but Mr. Ceabuca never completed that second page. Board Member Foster questioned whether page 2 of BMP 20 was relevant to this project. Mr. Miller stated it was.

Board Member Foster referred to Ms. Whitfield's September 23 email (bates stamp 000021) that states Mr. Ceabuca needed to sign up and attend the dust class within 30 days of the permit being issued. He reasoned that because the permit was never issued, it was not a violation. Mr. Miller retorted that if Mr. Ceabuca had signed up for dust class and submitted page 2 of BMP-20, the permit would have been issued. Counsel Monje added Mr. Ceabuca did not complete the forms necessary to get the permit issued. Board Member Wishengrad understood Mr. Foster's reasoning, but pointed out that according to earlier testimony, Mr. Ceabuca felt he had a permit after submitting the application. Board Member Purves concurred.

Board Member Inhaber moved to assess the \$1,250 penalty, stating he felt the applicant was informed of the requirements at every stage of the process. Being no second, the motion did not carry.

Chair Sanders opened the matter to board discussion.

Board Members inquired about the initial site visit mentioned during Mr. Ceabuca's testimony when he learned he needed a permit. DAQ Air Quality Specialist II Heather Mackinnon was sworn in and testified she was not aware of an inspection prior to her October 18 visit, stating it was possible another officer inspected the site prior to her. She inspected the site to check the status of the project after the permit application was submitted and put on hold until further information was received. The project was 90-95% complete, with obvious signs of trenching. Her inspection was documented in the photographs included in the board books. Mr. Ceabuca acknowledged said photographs were an accurate representation of the site on October 18, 2013, and that he performed the trenching activity.

Board Member Foster questioned whether page 2 of BMP 20 could have been misplaced after the application was submitted. Mr. Miller stated it was unlikely since applications are scanned as soon as they are submitted before being turned over to the permit reviewer.

There was discussion about how permits are issued and tracked, and whether a permit might have been issued to the previous contractor. Mr. Miller explained permits are issued to the applicant who then becomes the permittee and that existing permits are typically transferred through a permit modification when there is a change in contractors. He did not believe a prior permit was issued for this job. Board Member Wishengrad referred to Mr. Ceabuca's request for appeal (bates number 000029) that states, "owner's representative gave verbal assurance to Creative Builders that all permits were in place before construction," pointing out there had been no representation that the property owner said that was untrue. Board Member Ireland recalled Mr. Ceabuca stating an inspector stopped by and said he needed a permit, adding if it was already permitted he would have just needed a transfer.

There was ongoing discussion about whether or not the property owner should be contacted and/or included in violations. Board Member Wishengrad felt AQR Section 8 could be interpreted in a way that makes property owners liable. Mr. Miller disagreed, stating AQR Section 8 applied to stationary sources and that construction activities are regulated under AQR Section 94 and the permittee assumes project responsibility under that rule. Board Member Wishengrad inquired about the use of an owner's designee as referenced in AQR Subsections 94.4.1 and 94.5.8. Mr. Miller stated an owner's designee was not submitted, adding the applicant certified he had authority to do the work and agreed to be responsible for all project activities under the certification statements on the application signature page (bates number 000006). Mr. Miller explained the owner's designee was in the initial rule, but presented several problems for contractors who had a difficulty getting the form completed in a timely manner due to multiple owners or out-of-state owners. After district attorney evaluation, the certification statements were added to the application signature page, where the applicant certifies having the owner's authority to use the property, meeting the owner's designee requirements. Board Member Ireland recalled this being an issue in the past.

Board Member Wishengrad questioned a property owner's financial liability under AQR Subsection 94.7.4.4.1, which references reimbursements by the owner and/or operator for costs incurred in remedial actions and allows for liens to be placed on the subject property. He referred to the definition for "'Owner' and/or 'Operator'" under AQR Section 0, stating it was unclear who is responsible. Although he felt the company creating the condition should be held responsible, Board Member Wishengrad felt there was ambiguity in the regulations about a property owner's responsibility. Mr. Miller reiterated that through the permit application, a permittee certifies having the property owner's authority to work on the subject property and agrees to bear responsibility for the project, including compliance with the regulations. Any penalties levied would be pursued against the permittee not the property owner. Counsel Monje explained the inclusion of "and/or Operator" in the definition for "Owner" was so that collection could be pursued against the permittee (as the operator); however, if the property owner is the permittee, a lien could be placed on the property.

Board Member Foster also felt the regulations put the onus on the owner and/or operator, stating there was no mention of the contractor. Mr. Miller responded the department views the permittee as the operator. The permittee gets the permit to do the work with the authority of the property owner and agrees to be responsible for the project, becoming a representative of the owner. Board Member Foster suggested the AQR definition of "owner and/or operator" be modified to include the permittee so that it is clear the permittee is responsible.

Chair Sanders commented on his contracting experience and that it is well-known that permittees are responsible for the project and dust control matters, stating property owners do not want the responsibility. He agreed the regulation language could be modified and made clearer. His concern was why Mr. Ceabuca failed to respond and fall through with what was needed to get the permit issued after he was notified.

Mr. Miller reported Mr. Ceabuca attended dust class in January 24, 2014.

Board Member Purves referred to Ms. Whitfield's October 21 email (bates stamp 000020) that provided the location of the necessary BMP form on the department website, asking Mr. Ceabuca if he completed or Mr. Denzel completed that page. Mr. Ceabuca stated he believed Mr.

Denzel submitted the form. She asked if DAQ had any evidence that page was ever submitted. Counsel Monje stated the department had checked its records and the form was never submitted.

Board Member Wishengrad commented that as a general contractor, Mr. Ceabuca is presumed to know his responsibilities and ignored staff's direction during the permitting process. He pointed out the project started in August, application was submitted in September, and dust class was not attended until January 2014. He concluded it was appellant's obligation to meet these requirements in a timely manner and felt the fine was lenient and could have been much higher.

Upon inquiry, Mr. Ceabuca stated the job was finished in September. Board Member Foster remarked it was not possible to take the class prior to finishing the job if the permit was applied for on September 12 and the job was completed that same month. Board Member Wishengrad responded that he did not have a permit and should have ceased work until a permit was issued. Mr. Ceabuca stated he did not have the funds to pay for the class at the time and reiterated the \$1,250 penalty was too much for a first time offense. Counsel Monje referred to Ms. Mackinnon's testimony that when she inspected the project on October 18, it was 95 percent complete not fully complete.

Board Member Foster asked that the board consider the violations separately during the motioning phase. Chair Sanders agreed.

[Board Member Inhaber left the meeting at approximately 3 p.m., before the final deciding motions were made, therefore, he did not participate in those votes.]

Chair Sanders opened the matter to board discussion. Being no further questions or comments, Chair Sanders asked for a motion. Board Member Wishengrad moved to deny the appeal on the failure to take the dust class in a timely manner, and to impose the \$250 penalty. Chair Sanders reiterated the motion was to deny the appeal on that portion of the violation and assess the \$250 penalty. Board Member Purves seconded the motion. The Chair called for a vote on the motion, which was affirmed by Board Members Purves, Wishengrad, and Chair Sanders and was opposed by Board Members Ireland and Foster. The motion carried on a majority vote.

Chair Sanders asked for a motion on the second portion of the violation concerning the failure to get a permit. Board Member Purves moved to deny the appellant's request and to assess the \$500 penalty as well as the \$500 adjustment for continued non-compliance of AQR Subsection 94.4.1. Chair Sanders reiterated the motion was to deny the appeal on the failure to get a permit and assess the \$1,000 penalty. Board Member Foster seconded the motion. The Chair called for a vote on the motion, which was affirmed by Board Members Ireland, Foster, Purves, Wishengrad, and Chair Sanders. Being no oppositions—the motion passed unanimously.

[After the board ruled on Creative Builders' appeal of the Hearing Officer's Order on NOV #8482, there was discussion about regulation improvements. Board Member Wishengrad commented earlier that the board's role is to ensure the department and appellants are in conformance with the regulations and if they are ambiguous they need to be cleaned up and consistent. Mr. Miller reported the department has been going through a process to improve and update existing regulations as many were inherited from the health district, but had not been in the position to make all the necessary changes. Section 12 was recently revised and the department hopes to get approval on those soon. It is working on revising the Section 90 series,

including Section 94, but that cannot be done until the EPA acts on the department's PM¹⁰ Maintenance Plan. Once that plan is approved and the County is back in attainment, the revision process will resume and will include workshops. Counsel Monje pointed out any affected regulations will require the applicable definitions to be reviewed and revised if needed.]

Counsel Monje reported the department was offering a payment plan to the appellant and requested that offering be included in the record. Chair Sanders instructed the department to make whatever arrangements necessary.

V. REPORT BY DAQ STAFF

[This item was moved ahead of Item IV.A, Appeals, due to appellant's late arrival].

Update on Pollutants

DAQ Director Lewis Wallenmeyer provided an update on the status of some of the criteria pollutants affecting Clark County.

- *Ozone Standards.* It is ozone season and smoke from nearby wildfires increases ozone levels, normally causing an exceedance of the ozone standard. The current standard is 75 parts per billion (ppb); however, the EPA is expected to promulgate a new standard by the end of the year, lowering it to 65-70 ppb. The matter is under independent review by the Clean Air Scientific Advisory Committee, who will provide recommendations to the EPA. It is unknown what that standard will be, but Mr. Wallenmeyer predicts it could be 68 ppb. The County currently averages 75ppb and, if were not for the Exceptional Events Rule that provides for the exclusion of data due to exceptional events (transport, wildfires, etc.), it would undoubtedly be in nonattainment. He added the County has its own exceedance challenges from cumulative effects of combustion sources and VOC emissions without the added contribution from neighboring areas.

DAQ is doubtful it will be able to meet the new standard and has joined EPA's Ozone Advance program, which is a collaborative effort between the agencies to help participants stay in attainment. This program will allow DAQ to make commitments to control some of the precursors that form ozone through transit improvements, increasing public transportation, retrofitting busses with cleaner burning technologies, increasing solar development, and public outreach efforts. DAQ will be sending a draft of its program plan to EPA by the end of the month. EPA wants to see a proactive effort to deal with these challenges by those going into nonattainment status, which will also help avert lawsuits for inaction. Mr. Wallenmeyer feels the commitments the department is making are reasonable and achievable. The department is also exploring the utilization of subsidies to help gas stations improve vapor-control technologies and replacing combustion-related energy sources with solar energy, which should help.

Mr. Wallenmeyer reported on some of the upcoming solar projects in the valley. The Reid-Gardner facility is expected to convert to natural gas and solar power in the next five years. There was discussion over concerns about the thermal solar towers south of Primm and its effects on the environment and wildlife. Most of the projects planned in the County will use a photovoltaic system, not a thermal system. Solar photovoltaic facilities are being constructed

north of Primm and on the Moapa Paiute Indian reservation. DAQ has no jurisdiction over tribal lands or coal-fired power plants. However, the department works with the tribal government and assists them with training and monitoring data. There was mention of the strict regulations on the tribal site. Under statute, coal-fired plants are overseen by the State.

- *Particular Matter*¹⁰ (*PM*¹⁰). The department is awaiting EPA's approval of its Maintenance Plan. If this plan is approved as expected, the County will be redesignated from nonattainment to attainment. To facilitate EPA's approval, the dust regulations were adjusted to include areas in attainment status since past regulations only dealt with areas in nonattainment status.
- *Sulfur Dioxide* (*SO*₂). Clark County is in attainment and unclassifiable status for SO₂ and is expected to continue in this status since there are no significant sources of SO₂. It will continue to be monitored.

Upcoming Recruitments

Mr. Miller reported that the department is currently recruiting a new Air Pollution Control (APC) Hearing Officer and anticipates having this individual appointed at the July 1 Board of County Commissioners meeting. Additionally, the department will begin recruiting three citizen members for the APC Hearing Board to fill upcoming vacancies due to term expirations. The respective members are encouraged to reapply for their positions. Staff will remind these members of their term expirations and solicit letters requesting reappointment during the recruitment process. This recruitment will also be open to the public and published in the Las Vegas Review Journal to give other constituents an opportunity to apply. There was discussion about the cost of publication.

Natural Occurring Asbestos

Mr. Miller updated the board on the Natural Occurring Asbestos (NOA) issue in Southern Nevada. The Regional Transportation Commission (RTC) has drafted a report discussing the samples taken along the alignment from Railroad Pass to the bridge near the Hoover Dam. With the exception of samples taken in the mountainous area east of Boulder City, the results have shown a less than 1 percent concentration of asbestos. Asbestos regulations focus on greater than 1 percent, before it becomes a regulated material. They are seeing levels at 0.2-0.4 level, but the bulk of the samples collected are well below the 1.0 % level. Samples taken in the mountainous area (by drilling into the rock) had results in the 6-7 percent range. Mr. Miller explained one would expect to see a higher concentration in those areas if the sample was taken from a rock vein formed millions of years ago, than the alluvial area along the alignment where rock has deteriorated through time. Two sample methods were used-- polarized light microscopy (PLM) and transmission electronic microscope (TEM); both are known to be precise so he is confident in those results.

An internal task force has been created with representatives from RTC, NDOT, EPA and other health professionals. Additional air monitoring on the alignment will take place over the next few months to check the concentration in the air. They anticipate getting a bid in the next few months and having a contract in place near the end of the year so they can begin the project in the spring of 2015. DAQ feels it has the dust control regulations and systems in place to deal

with the project, and that its dust control rules are more stringent than California's dust regulations for controlling NOA from construction projects and they have made it work. Mr. Miller explained California has a similar process and they are building roads in NOA areas where they sample and then implement the appropriate control measures. He acknowledged minimizing dust during project blasting could present a challenge. A conference call with RTC is scheduled for later this month.

Other matters

- *New District Attorney.* Ofelia Monje introduced herself as the new Clark County Deputy District Attorney for DAQ.
- *Cost Containments.* Mr. Wallenmeyer briefed the board on some of the cost containment measures implemented by the department over the last several years, including migrating from a paper-based to electronic system in many operational areas and using its website to provide public access to forms, announcements, and other documents. Travel and training restrictions imposed by County Management during the economic downturn have been lifted and the department is able to resume training for staff.
- *Facility changes.* The department's office will undergo renovations that will include functional amenities, including an onsite weigh-in facility for monitoring division activities.

VI. IDENTIFY EMERGING ISSUES TO BE DISCUSSED BY BOARD AT FUTURE MEETINGS

Board Member Wishengrad inquired about collaboration between the various permitting agencies. He understands when you apply for a permit in sanitation or civil works they specify whether there are other special requirements or permits needed and will not issue said permit until those are complete or an exception is made and suggested a similar approach.

The department collaborates with some of the other county agencies, most of which is informational. The building department's application materials include notification to contact DAQ for a permit for activities relating to construction and asbestos removal. DAQ explored a greater collaboration in the past when reviewing building permits for asbestos-related projects and discovered the department issues over 20,000 permits per year. This would require an additional 5-6 staff members to review those permits and DAQ does not have the systems or resources to do this. Mr. Miller pointed out the responsibility falls on the operator/permittee to determine what permits are needed. The fire department will not issue a Certificate of Occupancy for a building unless they have verification that any stationary sources are permitted by DAQ. DAQ also works with business license, reviewing business license applications for potential applicability for stationary source permit requirements.

Mr. Wallenmeyer commented on the complexity of a collaborative multi-agency approach because the dilemma becomes which department signs off first and the process becomes cumbersome and almost impossible with so many involved.

Board Member Wishengrad inquired about the process when a permit is required and had not been obtained and whether a notice to comply would be issued before any further action was taken

against a permittee. Mr. Miller responded it was usually not an issue if they came in and got a permit within a day or two, but in the subject appeal (concerning Creative Builders) the department was totally ignored.

VII. PUBLIC COMMENT


Mr. Ceabuca returned, reiterating he did not know he needed a permit and that it was a miscommunication, but he would pay the fine because he does not have a choice.

There were no further public comments.

VIII. ADJOURNMENT

Being no further business, Chair Sanders adjourned the meeting at 3:52 p.m.

Submitted for approval,



Gary D. Miller, Compliance and Enforcement Manager
Department of Air Quality



Date