

RECORD ON APPEAL

RE: NV ENERGY – REID GARDNER STATION  
WATER POLLUTION CONTROL GROUNDWATER PERMIT NO. NEV91022

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# VOLUME 1

# NEVADA DIVISION OF ENVIRONMENTAL PROTECTION

## AUTHORIZATION TO DISCHARGE

In compliance with the provisions Chapter 445A of the Nevada Revised Statutes (NRS), the Permittee,

**NV Energy**  
**6226 West Sahara Avenue, M/S #30**  
**Las Vegas, Nevada 89146**

is authorized to discharge process and other wastewater from a facility, located at:

**Reid Gardner Station**  
**I-15 North, Exit 88 –Wally Kay Road**  
**Moapa, Clark County, Nevada 89025**

**Latitude: 36° 39' 30" N; Longitude: 114° 38' 20"W**  
**SW ¼ SW ¼ Section 5 & SE ¼ Section 6, T 15S, R 66E MDB&M**

**with discharge to: 8 existing on-site double-lined evaporation ponds (Ponds F, B-1, B-2, B-3, C-1, C-2, E-1 and E-2), and eventually to 9 yet-to-be constructed double-lined evaporation ponds in the Mesa area (Ponds M-1 through M-9); meeting Nevada standards of performance for zero-discharge facilities**

in accordance with effluent limitations, monitoring requirements, and other conditions set forth in Parts I, II and III hereof.

This permit shall become effective on June 25, 2010.

This permit shall expire at midnight June 24, 2015.

Signed this 24<sup>th</sup> day of June, 2010.

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Jeryl R. Gardner, P.E.  
Bureau of Water Pollution Control



**PART I**

**I.A. EFFLUENT LIMITATIONS, MONITORING, AND CONDITIONS**

**Introduction:** NV Energy operates the Reid Gardner Station, located in the Moapa Valley at I-15 North, Exit 88 (Wally Kay Road), 60 miles northeast of Las Vegas, in Clark County, Nevada. US Highway I-15 East is about 2 miles east of the plant site, and State Route 168 is about 2 miles northeast of the facility. The site is accessed from I-15 by Wally Kay Road.

**Facility Location:** Latitude: 36° 39' 30"N; Longitude: 114° 38' 20"W  
Section 5, T 15S, R 66E MDB&M

**Discharge Locations:** Existing Ponds: F, B-1, B-2, B-3, C-1, C-2, E-1 and E-2  
And Future Ponds: M-1 through M-9  
Sections 5, 6 & 8, T 15S, R 66E MDB&M

Wastewater is generated primarily from the wet scrubbers, cooling tower blowdown and fly ash residue. Cooling tower blow down supplies the scrubbers and bottom ash transport system. As a result of the recent installation of baghouses on Units 1-3, 99% of the fly ash is removed, reducing the total amount of fly ash delivered to the ponds. 88,000 gallons per day (gpd) is removed from the bottom ash system to use for dust control on facility haul roads, and at the nearby landfill. An additional 15,000 gpd from the diesel plume recovery system oil-water separator is used for dust control on coal piles. Monthly sampling and quarterly reporting of water quality results of water used for dust control applications is required.

The scrubbers and boiler bleed off discharge to settling Pond F, with overflow directed to the current evaporation ponds; when the new ponds are constructed and in use, the discharge will be collected by the Effluent Forwarding Pump System (EFPS) and the EFPS will direct the discharge to the Mesa Ponds. Incident stormwater and runoff from the facility is also drained to the evaporation ponds. Current operational maximum daily flows are 0.379 MGD (263 gpm). Incident stormwater and runoff from the facility is drained to the evaporation ponds. Maximum daily flow to the evaporation ponds is permitted at 0.576 MGD (400 gpm), and average daily flow to the evaporation ponds is permitted at 0.490 MGD (340 gpm).

Beginning in 1997 the Division has required the originally unlined or clay lined ponds to be dried, cleaned and either reconstructed with double liners and leak detection and collection systems, or removed from service. Since then, all ponds have either had double HDPE liners with leak detection and collection systems installed, or have been removed from service. No unlined ponds used for storage and evaporation under previous permits are permitted for discharge under this permit. Ponds solids removal and remediation of the formerly used unlined ponds, including the most recently closed ponds, D & G, are being addressed by the Division's Bureau of Corrective Actions (BCA). As current ponds are removed from active service the closure requirements and oversight will pass to the BCA, and become part of the BCA 2008 Administrative Order on Consent. All past and existing groundwater

and/or soil contamination issues are being addressed by the BCA, with approval, oversight and inspection being conducted by the BCA. Ponds D and G, and all other previously used unlined ponds are considered closed by the Bureau of Water Pollution Control. The eight current evaporation ponds (Ponds F, B-1, B-2, B-3, C-1, C-2, E-1 and E-2) were cleaned and double-lined; during this permit lifetime a potential of 9 additional evaporation ponds (M-1 through M-9) will be constructed in stages, or are planned for construction in the upland Mesa area, on a 555-acre grant of BLM-leased land.

The Mesa area has much greater depths to groundwater (approximately 150 ft) than the current and former evaporation and settling ponds located in the floodplain. The active discharge ponds collectively have approximately 95 acres of surface area; the Mesa ponds collectively have a surface area of approximately 120 acres. All of the currently active ponds are individually lined with two geomembrane liners, a 60-mil HDPE primary liner and 40-mil HDPE secondary liner with an interstitial leak detection and collection system. All of the proposed Mesa ponds will be individually lined with two geomembrane liners, an 80-mil HDPE primary liner and a 60-mil HDPE secondary liner with an interstitial leak detection and collection system. Leakage rates greater than 500 gpd/acre will be reported to the Division within 24 hours. Leakage from the primary liner will not result in a discharge to the environment; this leakage is intercepted by pumps in the interstitial space between the primary and secondary linings, and is collected and pumped back to the evaporation ponds.

- I.A.1. **Effluent Limitations:** There shall be no discharge from the facility to the ground surface or waters of the State of Nevada except as authorized by this permit. There shall be no discharge of substances that would cause a violation of water quality standards of the State of Nevada. Water quality management shall be such that the water quality in the waterbodies shall not be degraded below natural conditions, and the downstream water quality shall meet the water quality standards for beneficial use required in NAC 445A.210. No single value standard shall be exceeded.

During the period beginning on the effective date of this permit, and lasting until the permit expires, the Permittee is authorized to operate a fluid and solids containment system in accordance with the permit limitations and monitoring requirements listed in Table 1 below, and to discharge wastewater to double-lined evaporation ponds with leak detection and collection systems. The initial discharge is to Pond F Sump (Outfall 001) which discharges to Ponds B-1, B-2, B-3, C-1, C-2, E-1, E-2 and Mesa Ponds M-1 through M-9, as constructed.

Samples taken in compliance with the monitoring requirements specified below shall be taken at the following locations. Flow and all parameters shall be monitored at the discharge from the Pond F Sump at Outfall 001, prior to routing to the current appropriate evaporation pond, or at the EFPS discharge system (Outfall 002) prior to routing to the appropriate Mesa evaporation ponds.



- b. By September 25, 2010, the Permittee shall submit an updated O&M Manual to the Division for approval.
  - c. By September 25, 2010, the Permittee shall submit an updated Sampling and Analysis Plan (SAP) for the permitted active ponds to the Division for approval.
  - d. The Permittee shall submit an annual report, per I.B.2.b., that contains among other information, a status update on the ponds under BCA oversight as part of BCA site closure requirements. The annual report is due January 28<sup>th</sup> of each year, beginning January 28, 2011.
- I.A.3. **Annual Fee:** The Permittee shall remit an annual review and services fee in accordance with NAC 445A.232, starting July 1, 2011 and every year thereafter until the permit is terminated.
- I.A.4. **Odors:** There shall be no objectionable odors from the collection system, treatment facility or disposal areas.
- I.A.5. **Water Quality Standards:** There shall be no discharge of substances that would cause a violation of water quality standards of the State of Nevada.
- I.A.6. **Authorized Discharges:** There shall be no discharge from the facility operations, maintenance, dust control, treatment and disposal facilities except as authorized by this permit.
- I.A.7. **Security:** The treatment and disposal facility shall be fenced and posted.
- I.A.8. **Process Operations and Maintenance:** The facility shall be operated in accordance with a Division –approved Operations and Maintenance (O&M) Manual. The O&M Manual shall be updated whenever there is a change in the operation of the facility.
- I.A.9. **Visibility Parameters:** There shall be no discharge of floating solids or visible foam in other than trace amounts.
- I.A.10. **Solid Waste Management:** All solid, toxic or hazardous waste shall be properly handled and disposed of pursuant to applicable laws and regulations. Any sludge generated during operation shall be characterized and disposed of in accordance with local, State and Federal regulations. The Permittee shall submit to the Division by July 28<sup>th</sup> of each year a report of the quantities and qualities of all waste material removed from the evaporation ponds for the twelve months preceding July 1 of the same time frame. The report shall verify the disposal site.
- I.A.11. **Operations and Maintenance of Permitted Activities:** The Permittee shall operate the permitted facility in compliance with permit provisions and requirements, and in accordance with the approved O&M Manual.
- I.A.12. **Best Management Practices:** The Permittee shall develop and implement Best Management Practices (BMPs) at the facility to include, at a minimum, “good housekeeping” measures. Best Management Practices shall be incorporated into a

specific section of the O&M Manual.

I.A.13. **Presumption of Possession and Compliance:** Copies of this permit, along with any subsequent modifications, and the approved O&M Manual shall be maintained at the permitted facility at all times.

I.A.14. **Pond Management:**

- a. A minimum of two feet of freeboard shall be maintained in the ponds at all times.
- b. Inspections and maintenance, including the periodic removal of materials to restore capacity, shall be conducted in accordance with the O&M Manual. Summaries of these activities shall be reported with the Quarterly Reports.
- c. Any liquids accumulated in leak detection systems shall be sampled and analyzed in accordance with the requirements of Table I.A.1. above. Leakage rates shall be reported in units of average gpd per month, per pond. All leakage rates to be reported with the Quarterly Report.
- d. Damaged ponds or ponds with leakage rates in excess of 500 gpd per acre shall be repaired. Initial notification of excess leakage rates is required to the Division within 24 hours of discovery. Additionally, the Division shall be notified in writing within one week of leak confirmation, and a repair plan shall be submitted within one month.

I.A.15. **Closure:**

- a. Once each of the existing ponds become full, the pond will be removed from service and shall not be returned to service in the future. Once each pond is removed from service, that pond will be incorporated into the BCA AOC for final remediation planning and closure.
- b. Sixty days prior to closing any pond permitted for discharge by this permit, the Permittee shall submit closure plans to the Division.

I.A.16. **Facility Construction:** All facility industrial process and wastewater collection and disposal systems shall be constructed in conformance with plans approved by the Division. All plans must be approved by the Division prior to the start of construction, and must be stamped by a Professional Engineer licensed in the State of Nevada (NV P.E.). All changes to any plans approved by the Division must be stamped by a NV P.E. and re-approved prior to implementation.

**I.B MONITORING AND REPORTING**

I.B.1. Samples and measurements taken as required herein shall be representative of the volume and nature of the monitored discharge. Analysis shall be performed by a State of Nevada certified laboratory. Results from this lab must accompany the Discharge Monitoring Report.

I.B.2. **Reporting**

- a. **Quarterly Reporting:**  
Monitoring results obtained during the previous three (3) months shall be summarized for each month and reported on a Discharge Monitoring Report (DMR) Form received in this office no later than the 28<sup>th</sup> day of the month following the completed reporting period. The first report is due on July 28, 2010. An original signed copy of these, and all other reports required herein, shall be submitted to the Division at the following address:

**Nevada Division of Environmental Protection  
Bureau of Water Pollution Control  
Attn: Compliance Coordinator  
901 S. Stewart Street, Suite 4001  
Carson City, Nevada 89701**

- b. **Annual Report:**  
The fourth quarter report shall include a plot of date (x-axis) versus concentration (y-axis) for each analyzed constituent. The plot shall include data from the preceding five years, if available. Any data point from the current year that is greater than the limits in Part I.A.1 must be explained by a narrative.

I.B.3. **Definitions**

- a. **30-Day Average Discharge:** The total discharge during a month divided by the number of samples in the period that the facility was discharging. Where less than daily sampling is required by this permit, the 30-day average discharge shall be determined by the summation of all the measured discharges divided by the number of samples during the period when the measurements were made.
- b. **Daily Maximum:** the highest measurement during the monitoring period.
- c. **30-Day Average Concentration (Other than Fecal Coliform Bacteria):** The arithmetic mean of measurements made during the month.
- d. **30-Day Average Concentration (Fecal Coliform Bacteria):** The geometric mean of measurements made during the month. The geometric mean is the "nth" root of the product of "n" numbers. Geometric mean calculations where there are non-detect results for fecal coliform shall use the detection limit as the value for the non-detect results.
- e. **Discrete Sample:** Any individual sample collected in less than 15 minutes.
- f. **Composite Sample (Flow-Rate Measurements):** the arithmetic mean of no fewer than six individual measurements taken at equal time intervals for 24 hours, or for the duration of discharge, whichever is shorter.

- g. **Composite Sample (Other than Flow-Rate Measurements):** A combination of no fewer than six individual flow weighted samples taken at equal time intervals for 24 hours, or for the duration of discharge, whichever is shorter. Flow-weighted sample means that the volume of each individual sample shall be proportional to the discharge flow rate at the time of sampling.
- 1.B.4. **Test Procedures:** Analyses shall be conducted by a "certified laboratory" using an "approved method of testing", as defined at NAC 445A.0564 and NAC 445A.0562, respectively.
- 1.B.5. **Recording the Results:** For each measurement or sample taken pursuant to the requirements of this permit, the Permittee shall record the following information:
  - a. The exact place, date, and time of sampling;
  - b. The dates the analyses were performed;
  - c. The person(s) who performed the analyses;
  - d. The analytical techniques or methods used; and
  - e. The results of all required analyses, including detection limits.
- 1.B.6. **Additional Monitoring by Permittee:** If the Permittee monitors any pollutant at the location(s) designated herein more frequently than required by this permit, using approved analytical methods as specified above, the results of such monitoring shall be included in the calculation and reporting of the values required in the DMR Form. Such increased frequency shall also be indicated.
- 1.B.7. **Records Retention:** All records and information resulting from the monitoring activities required by this permit, including all records of analyses performed and calibration and maintenance of instrumentation and recordings from continuous monitoring instrumentation, shall be retained for a minimum of three (3) years, or longer if required by the Administrator.
- 1.B.8. **Reporting Limits:** Unless otherwise allowed by the Division, the approved method of testing selected for analyses shall have a reporting limit which is:
  - a. Half or less of the discharge limit; or, if there is no discharge limit,
  - b. Half of less of the applicable water quality criteria; or, if there is no applicable limit or criteria,
  - c. The lowest reasonably obtainable limit using an approved test method.
- 1.B.9. **Modification of Monitoring Frequency and Sample Type:** After considering monitoring data, stream flow, discharge flow and receiving water conditions, the Division may, for just cause, modify the monitoring frequency and/or sample type by issuing an order to the Permittee.
- 1.B.10. **All laboratory analyses conducted in accordance with this discharge permit must have detection limits at or below the permit limits.**

## PART II

### II.A. MANAGEMENT REQUIREMENTS

- II.A.1. **Change in Discharge:** All discharges authorized herein shall be consistent with the terms and conditions of this permit. The discharge of any pollutant identified in this permit more frequently than or at a level in excess of that authorized shall constitute a violation of the permit. Any anticipated facility expansions, or treatment modifications which will result in new, different or increased discharges of pollutants must be reported by submission of a new application or, if such changes will not violate the effluent limitations specified in this permit, by notice to the permit issuing authority of such changes. Any changes to the permitted treatment facility must comply with NAC 445A.283 to 445A.285. Pursuant to NAC 445A.263, the permit may be modified to specify and limit any pollutants not previously limited.
- II.A.2. **Facilities Operation:** The Permittee shall at all times maintain in good working order and operate as efficiently as possible all treatment or control facilities, collection systems, or pump stations installed or used by the Permittee to achieve compliance with the terms and conditions of this permit.
- II.A.3. **Adverse Impact:** The Permittee shall take all reasonable steps to minimize any adverse impact to receiving waters resulting from noncompliance with any effluent limitations specified in this permit, including such accelerated or additional monitoring as necessary to determine the nature and impact of the non-complying discharge.
- II.A.4. **Noncompliance, Unauthorized Discharge, Bypassing and Upset**
- a. Any diversion, bypass, spill, overflow or discharge of treated or untreated wastewater from wastewater treatment or conveyance facilities under the control of the Permittee is prohibited except as authorized by this permit. In the event the Permittee has knowledge that a diversion, bypass, spill, overflow or discharge not authorized by this permit is probable, the Permittee shall notify the Division immediately.
  - b. The Permittee shall notify the Division by calling the NDEP Spill Line at 1-888-331-6337 within 24 hours of any diversion, bypass, spill, upset, overflow or release of treated or untreated discharge other than that which is authorized by the permit. A written report shall be submitted to the Administrator within 5 days of diversion, bypass, spill, overflow, upset or discharge, detailing the entire incident, including:
    - i. time and date of discharge;
    - ii. exact location and estimated amount of discharge;
    - iii. flow path and any bodies of water which the discharge reached; and,
    - iv. the specific cause of the discharge; and the preventive and/or corrective actions taken.

- c. The following shall be included as information which must be reported within 24 hours: any unanticipated bypass which exceeds any effluent limitation in the permit; any upset which exceeds any effluent limitation in the permit; and violation of a limitation for any toxic pollutant or any pollutant identified as the method to control a toxic pollutant.
- d. The Permittee shall report all instances of noncompliance not reported under Part II.A.4.b at the time monitoring reports are submitted. The reports shall contain the information listed I Part II.A.4.b.
- e. An "upset" means an incident in which there is unintentional and temporary noncompliance with the permit effluent limitations because of factors beyond the reasonable control of the Permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.
- f. In selecting the appropriate enforcement option, the Division shall consider whether or not the noncompliance was the result of an upset.
- g. The burden of proof is on the Permittee to establish that an upset occurred. In order to establish that an upset occurred, the Permittee must provide, in addition to the information required under Part II.A.4.b above, properly signed contemporaneous logs of other documentary evidence that:
  - i. The facility was at the time being properly operates as required in Part II.A.2 above; and
  - ii. All reasonable steps were taken to minimize adverse impacts as required by Part II.A.3 above.

II.A.5. **Removed Substances:** Solids, sludge, filter backwash, or other pollutants removed in the course of treatment or control of wastewaters shall be disposed of in a manner such as to prevent any pollution from such materials from entering any navigable waters.

II.A.6. **Safeguards to Electric Power Failure:** In order to maintain compliance with the effluent limitations and prohibitions of this permit, the Permittee shall either:

- a. Provide at the time of discharge an alternative power source sufficient to operate the wastewater control facilities; or
- b. Halt or reduce all discharges upon the reduction, loss or failure of the primary source of power to the wastewater control facilities.

## II.B. RESPONSIBILITIES

II.B.1. **Right of Entry and Inspection:** The Permittee shall allow the Administrator and/or his authorized representatives, upon the presentation of credentials, to:

- a. Enter at reasonable times upon the Permittee's premises where an effluent source is located or in which any records are required to be kept under the terms and conditions of this permit;
- b. Have access to and copy any records required to be kept under the terms and conditions of this permit;
- c. Inspect, at reasonable times, any facilities, equipment (including monitoring and control equipment), practices, or operations required in this permit; and
- d. Perform any necessary sampling or monitoring to determine compliance with this permit at any location for any parameter.

II.B.2. **Transfer of Ownership or Control:** In the event of any change in control or ownership of facilities from which the authorized discharge emanates, the Permittee shall notify the succeeding owner or controller of the existence of this permit by letter, a copy of which shall be forwarded to the Administrator. All transfers of permits require Division approval.

II.B.3. **Availability of Reports:** Except for data determined to be confidential under Nevada Revised Statutes (NRS) 445A.665, all reports prepared in accordance with the terms of this permit shall be available for public inspection at the Division office. As required by the Act, effluent data shall not be considered confidential. Knowingly making any false statement on any such report may result in the imposition of criminal penalties as provided for in NRS 445A.710.

II.B.4. **Furnishing False Information and Tampering with Monitoring Devices:** Any person who knowingly makes any false statement, representation, or certification in any application record, report, plan or other document filed or required to be maintained by the provisions of NRS 445A.300 to 445A.730, inclusive, or by any permit, rule, regulation or order issued pursuant thereto, or who falsifies, tampers with or knowingly renders inaccurate any monitoring device or method required to be maintained under the provisions of NRS 445A.300 to 445A.730, inclusive, or by any permit, rule, regulation or order issued pursuant thereto, is guilty of a gross misdemeanor and shall be punished by a fine of not more than \$10,000 or by imprisonment. This penalty is in addition to any other penalties, civil or criminal, provided pursuant to NRS 445A.300 to 445A.730, inclusive.

II.B.5. **Penalty for Violation of Permit Conditions:** NRS 445A.675 provides that any person who violates a permit condition is subject to administrative and judicial sanctions as outlined in NRS 445A.690 through 445A.705.

II.B.6. **Permit Modification, Suspension or Revocation:** After notice and opportunity for a hearing, this permit may be modified, suspended or revoked, in whole or in part, during its term for cause including, but not limited to, the following:

- a. Violation of any terms or conditions of this permit;
- b. Obtaining this permit by misrepresentation or failure to disclose fully all relevant facts; or

- c. A change in any condition that requires either a temporary or permanent reduction or elimination of the authorized discharge.
  
- II.B.7. **Toxic Pollutants:** Notwithstanding Part II.B.6 above, if a toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is established under Section 307(a) of the Act for a toxic pollutant which is present in the discharge and such standard or prohibition is more stringent than any limitation for such pollutant in this permit, this permit shall be revised or modified in accordance with the toxic effluent standard or prohibition and the Permittee so notified.
  
- II.B.8. **Liability:** Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the Permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable Federal, State, or local laws, regulations or ordinances.
  
- II.B.9. **Property Rights:** The issuance of this permit does not convey any property rights, in either real or personal property, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of personal rights, nor any infringement of Federal, State or local laws or regulations.
  
- II.B.10. **Severability:** The provisions of this permit are severable, and if any provision of this permit, or the application of any provisions of this permit to any circumstance, is held invalid, the application of such provision to other circumstances and the remainder of this permit shall not be affected thereby.

### PART III

#### III.A. OTHER REQUIREMENTS

- III.A.1. **Reapplication:** If the Permittee desires to continue to discharge, he shall reapply not later than 180 days before this permit expires on the application forms then in use. The application shall be accompanied by the renewal application fee required by NAC 445A.232.
  
- III.A.2. **Signatures Required on Application and Reporting Forms**
  - a. Application and reporting forms submitted to the department must be signed by one of the following:
    - i. A principal executive officer of the corporation (of at least the level of vice president) or his authorized representative who is responsible for the overall operation of the facility from which the discharge described in the application or reporting form originates; or
    - ii. A general partner of the partnership; or
    - iii. The proprietor of the sole proprietorship; or

- iv. A principal executive officer, ranking elected official of or other authorized employee of the municipal, state, or other public facility.
- b. Each application must contain a certification by the person signing the application that he is familiar with the information provided that, to the best of his knowledge and belief, the information is complete and accurate, and that he has the authority to sign and execute the application.
- c. **Changes to Authorization:** If an authorization under paragraph b of this section is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of paragraph b of this section must be submitted to the Division prior to or together with any reports, information, or applications to be signed by an authorized representative.

III.A.3. **Holding Pond Conditions:** If any wastewater from the Permittee's facility is placed in ponds, such ponds shall be located and constructed so as to:

- a. Contain with no discharge the once-in-25 year 24-hour storm at said location;
- b. Withstand with no discharge the once-in-one-hundred year flood of said location; and
- c. Prevent escape of wastewater by leakage other than as authorized by this permit.

III.A.4. **Flow Rate Notification:** The Permittee shall notify the Administrator, by letter, not later than 90 days after the 30-day average daily influent flow rate first equals or exceeds 85% of the design treatment capacity of the Permittee's facility given in Part I.A above. The letter shall include:

- a. The 30-day average daily influent flow rate;
- b. The maximum 24-hour flow rate during the 30-day period reported above, and the date the maximum flow occurred;
- c. The Permittee's estimate of when the 30-day average influent flow rate will equal or exceed the design treatment capacity of the Permittee's facility;
- d. A status report on the treatment works which will outline but not be limited to past performance, remaining capacity of the limiting treatment and disposal units or sites, past operational problems and improvements instituted, modifications to the treatment works which are needed to attain the permitted flow rate due to changing site specific conditions or design criteria; and
- e. The Permittee's schedule of compliance to provide additional treatment capacity before the 30-day average daily influent flow rate equals the present design treatment capacity of the Permittee's facility.

Via email  
6/25/10

FORM # 3  
FORM FOR REQUESTING AN APPEAL HEARING  
BEFORE THE NEVADA STATE ENVIRONMENTAL COMMISSION

Sent to email to John Walker, SEC Secretary,

1. Name, address, telephone number, and signature of applicant:

**Dan Galpern, Staff Attorney, Western Environmental Law Center  
1216 Lincoln Street, Eugene OR 97401  
(541) 485 2471 x114  
galpern@westernlaw.org**



**Megan Anderson, Staff Attorney, Western Environmental Law Center  
208 Paseo del Pueblo Sur, Unit 602  
Taos, NM 87571  
Tel. 575.613.4195  
anderson@westernlaw.org**

**Representing the Sierra Club**

2. Specify type of applicant: Individual, Partnership, Corporation, or Other: **Non profit corporation**

3. Other person or persons authorized to receive service of notice:

**Jeryl R. Gardner, P.E., Bureau of Water Pollution Control, NDEP**

4. Complete description of the business or activity and the location of the activity involved in the request:

**Renewal, with modifications, of Nevada Discharge Permit NEV91022, authorizing discharge of process and non-process water to evaporation ponds located at the Reid Gardner Station (RGS) in Moapa, Clark County, Nevada, operated by NV Energy, with discharge to: 8 existing on-site double-lined evaporation ponds (Ponds F, B-1, B-2, B-3, C-1, C-2, E-1 and E-2), and eventually to 9 yet-to-be constructed double-lined evaporation ponds in the Mesa area (Ponds M-1 through M-9)**

5. Nature of the appeal and grounds thereof:

**(a) As an initial matter, we object to NDEP's failure to date to provide Sierra Club with adequate notice of its right to appeal the final permit, even though that document, the corresponding notice of decision, and the corresponding final fact sheet were finalized on June 24, and even though Sierra Club, through Counsel Galpern and Anderson, submitted extensive**

comments on same by email (to which NDEP responds in its Notice of Decision document). The Counsel discovered the documents only yesterday (Thursday, July 1st) on NDEP's website, and so was only then informed that a request for appeal needed to be filed on or before tomorrow, Saturday, July 3. Accordingly, this request to appeal is filed to protect Sierra Club's right to appeal. The appeal itself should be held in abeyance until we have had time to fully examine the above-denoted documents and their legal basis, and we further seek leave until that time to amend the following description of the nature and grounds for appeal.

(b) The provisions of the permit are insufficient to ensure against pollutant discharges despite the fact that no discharges are ostensibly allowed under this "no-discharge" permit. If NV Energy designs its Reid Gardner evaporation pond facility pursuant to the minimum standards mandated in the permit, significant contamination of groundwater and/or surface water will ensue. This assertion is supported by two factors: Industry standards for HDPE dual-lined ponds allow for a certain amount of leakage as part of their design (thus requiring an interstitial leakage detection and collection system), yet there is no process or system required by the permit to prevent, detect, or remediate such leakage beyond the second liner.

(c) Although the permit purports to shift responsibility for soil and groundwater contamination to the Bureau of Corrective Action, the Bureau of Water Pollution Control cannot evade its responsibility under NRS 445A.465 to prevent discharge from any point source of any pollutant into any waters of the State (including groundwater) or to allow a pollutant discharged from a point source to remain in a place where the pollutant could be carried into the waters of the State (including groundwater) by any means.

(d) BWPC argues, without citation, that it lacks "regulatory authority regarding climate change," even though state agencies retain inherent authority and responsibility, as guardians of the public trust in natural resources, including the atmosphere and state waters, and even though the Nevada Water Pollution Control Law expressly declares state policy and agency purpose to be to maintain the quality of state waters. See NRS 445A.305. As Sierra Club noted in earlier comments, such water quality cannot be maintained in the event of accelerated climate change.

(e) Based on the above, and given the facility's ongoing violations of previous permits and failure to remediate previous contamination, the permit renewal must be denied, or in the alternative, modified to require rigorous groundwater monitoring under and around the existing and proposed evaporation ponds, as well as to require a sufficient plan to remediate the inevitable contamination that will result from their operation.

6. Section or sections of the State Air Quality Regulations, Water Pollution Control Regulations, Hazardous Waste Regulations, Solid Waste Management Regulations, or NRS section involved in the appeal:

*Revised 10/24/05*

**For the reasons stated in Item 5(a) above, the following listing of statutes and regulations is partial and we reserve the right to add or amend:**

**NRS 445A.605(1) [appeal process]; NAC 445A.263(7) [appeal process]; NRS 445A.465 [prevention of pollutant discharge]; NAC 445A.250 [discharge monitoring]**

7. **Approximate time in hours and minutes necessary for delivery of oral testimony and reading of prepared statements as admissible evidence to be entered in the record: 30 minutes for opening, 10 minutes to rebut argument of NDEP, and 10 minutes to rebut the argument of each intervenor.**

**Date of Request: July 2, 2010**

**Send Form To: John B. Walker, State Environmental Commission, 901 South Stewart Street, Suite 4001  
Carson City, NV 89701-5249**



July 12, 2010

***Via Email and Hard Copy***

John B. Walker, Executive Secretary  
State of Nevada  
State Environmental Commission  
901 South Stewart Street, Suite 4001  
Carson City, Nevada 89701

Re: Petition for Leave to Intervene in Sierra Club Appeal of NDEP Renewal of Nevada Power Company Nevada Discharge Permit NEV91022

Dear Mr. Walker:

Pursuant to Nevada Administrative Code (NAC) Section 445B.8915, Nevada Power Company d/b/a NV Energy ("NV Energy") hereby petitions the State Environmental Commission (the "Commission" or "SEC") for leave to intervene in the appeal request filed with the Commission by the Sierra Club on July 2, 2010, regarding the Nevada Division of Environmental Protection's ("NDEP") renewal of Nevada Discharge Permit NEV91022 for the Reid Gardner Station. In support of this petition, NV Energy submits the following information in accordance with NAC 445B.8915.2:

***(a) The proceeding in which the Petitioner requests leave to intervene***

NV Energy requests leave to intervene in Sierra Club's appeal of the NDEP decision on June 24, 2010 to approve the request of NV Energy to renew its process and wastewater discharge permit for the Reid Gardner Station (Permit No. NEV91022).

***(b) The name and address of the Petitioner and the name, address and telephone number of any attorney or other authorized person representing the Petitioner***

The Petitioner and its mailing address are:

Nevada Power Company d/b/a NV Energy  
6226 West Sahara Ave  
Las Vegas, NV 89146

In this proceeding, NV Energy will be represented by the following:

Tony Garcia  
Environmental Services Manager  
NV Energy, Inc.  
6226 West Sahara Ave, MS 30  
Las Vegas, NV 89146  
(702) 402-5767  
[tgarcia@nvenergy.com](mailto:tgarcia@nvenergy.com)

Thomas Woodworth  
Assistant General Counsel  
NV Energy, Inc.  
6226 West Sahara Ave, MS 03A  
Las Vegas, NV 89146  
(702) 402-5694  
[twoodworth@nvenergy.com](mailto:twoodworth@nvenergy.com)

***(c) Petitioner's interest in this proceeding***

NV Energy is the permittee of the discharge permit that is the subject of this proceeding, and therefore its interests are directly and substantially affected by the outcome of this proceeding.

***(d) The manner in which Petitioner will be affected by this proceeding***

This renewed discharge permit, on the terms approved by NDEP, is vitally important to the continued operation of the Reid Gardner Station. Any modification or reversal of this permit could have substantial adverse effects on the ability of NV Energy to continue to operate the facility.

***(e) Whether the Petitioner intends to present evidence in this proceeding***

At this time, NV Energy intends to present evidence in the proceeding.

If there are any questions, please contact me at (702) 402-5694 or via email at [twoodworth@nvenergy.com](mailto:twoodworth@nvenergy.com).

Respectfully submitted,



Thomas C. Woodworth  
Assistant General Counsel  
NV Energy, Inc.  
6226 West Sahara Ave, MS 03A  
Las Vegas, NV 89146  
Tel: (702) 402-5694  
[twoodworth@nvenergy.com](mailto:twoodworth@nvenergy.com)

**CERTIFICATE OF SERVICE**

I certify that on July 12, 2010, I served a copy of the foregoing document to the following by electronic means, as well as by U.S. Mail, postage prepaid:

Dan Galpern  
Staff Attorney  
Western Environmental Law Center  
1216 Lincoln Street  
Eugene, OR 97401  
(541) 485-2471 x114  
[galpern@westernlaw.org](mailto:galpern@westernlaw.org)  
*\*\*Representing the Sierra Club*

Megan Anderson  
Staff Attorney  
Western Environmental Law Center  
208 Paseo del Pueblo Sur, Unit 602  
Taos, NM 87571  
(575) 613-4195  
[Anderson@westernlaw.org](mailto:Anderson@westernlaw.org)  
*\*\*Representing the Sierra Club*

Jeryl R. Gardner, P.E.  
Department of Water Pollution Control



RECEIVED

SEP 13 2010

NEVADA STATE  
ENVIRONMENTAL COMMISSION

STATE OF NEVADA  
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street  
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO  
*Attorney General*

KEITH G. MUNRO  
*Assistant Attorney General*

JIM SPENCER  
*Chief of Staff*

September 10, 2010

John B. Walker  
Executive Secretary  
State Environmental Commission  
901 South Stewart Street, Suite 4001  
Carson City, Nevada 89701

Re: *Reid Gardner Power Station Permit Appeal*

Dear John:

I understand that you have tentatively scheduled a hearing on the appeal in this matter for November 4 – 5, 2010. Please consider this letter as a formal request by the Division of Environmental Protection for appeal briefs, and for an Order requiring a schedule setting forth deadlines for the parties to file with the State Environmental Commission, appeal briefs, any applicable response briefs and/or other motions. If you have any questions, please do not hesitate to contact me.

Sincerely,

CATHERINE CORTEZ MASTO  
Attorney General

By:

  
CAROLYN E. TANNER  
Deputy Attorney General  
Bureau of Government Affairs  
(775) 684-1270

CET/lzd

Cc: Dan Galpern, Esq.  
Thomas C. Woodworth, Esq.  
Jon Palm, Chief, BWPC, NDEP  
Alan Tinney, BWPC, NDEP  
Jeryl Gardner, BWPC, NDEP  
Jim Najima, Chief, BCA, NDEP  
Shannon Harbour, BCA, NDEP

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Before The State Of Nevada, State Environmental Commission

In Re: )  
 )  
Appeal of Water Pollution Control )  
Groundwater Permit NEV91022 )  
Reid Gardner Station )  
\_\_\_\_\_ )

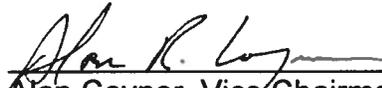
**ORDER GRANTING PETITION TO INTERVENE**

On July 2, 2010, the Western Environmental Law Center on behalf of the Sierra Club filed an appeal of Permit No. NEV91022 issued on June 24, 2010, by the Nevada Division of Environmental Protection (NDEP) to NV Energy, Inc..

On July 12, 2010, NV Energy, Inc. filed a Petition for Leave to Intervene with the State Environmental Commission (SEC). As indicated in the Petition for Leave to Intervene, NV Energy, Inc. has a direct and substantial interest in the appeal because it is the named permittee of Water Pollution Control Groundwater Permit NEV91022 being appealed by the party above. NV Energy, Inc. will therefore be directly affected by a decision of the SEC.

Based upon the foregoing, it is hereby ordered that the Petition for Leave to Intervene filed by NV Energy, Inc. is GRANTED pursuant to NAC 445B.8915.

Dated this 21 day of September, 2010.

  
\_\_\_\_\_  
Alan Coyner, Vice Chairman  
State of Nevada, State Environmental Commission

**CERTIFICATE OF SERVICE**

1  
2 The undersigned, an employee of the State of Nevada, State Environmental  
3 Commission, does hereby certify that on the 22 day of September, 2010, a true and  
4 correct copy of the foregoing ORDER GRANTING PETITION TO INTERVENE was duly  
5 mailed, postage prepaid, to the following:

6  
7 Thomas C. Woodworth Esq  
8 Assistant General Counsel  
9 NV Energy, Inc. 6226 West Sahara Ave, MS 03A  
Las Vegas, NV 89146  
CERTIFIED MAIL 7007 0220 0003 5226 0309

10 Attorneys for Intervener NV Energy

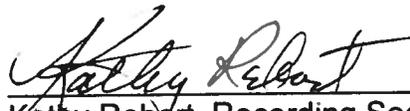
11 Dan Galpern, Staff Attorney  
12 Western Environmental Law Center  
13 1216 Lincoln Street  
Eugene, OR 97401  
14 CERTIFIED MAIL 7007 0220 0003 5226 0316

15 Attorney for Petitioner Sierra Club

16 Megan Anderson, Staff Attorney  
17 Western Environmental Law Center  
208 Paseo del Pueblo Sur, Unit 602  
Taos, NM 87571  
18 CERTIFIED MAIL 7007 0220 0003 5226 0323  
19 Attorney for Petitioner Sierra Club

20 Carolyn E. Tanner  
21 Deputy Attorney General  
22 Office of Attorney General  
100 North Carson Street  
Carson City, NV 89701

23 Attorney for Respondent NDEP

24  
25   
26 \_\_\_\_\_  
27 Kathy Rebert, Recording Secretary  
28

1 BEFORE THE STATE OF NEVADA, STATE ENVIRONMENTAL COMMISSION

2 In Re: )

3 )  
4 Appeal of Water Pollution Control )  
5 Groundwater Permit No. NEV91022 )  
6 Reid Gardner Station )

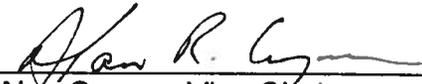
ORDER REGARDING BRIEFING  
SCHEDULE

7 On July 2, 2010, appellant Sierra Club filed an appeal of a renewal with modifications of  
8 Permit No. NEV91022 issued on June 24, 2010 by the Nevada Division of Environmental  
9 Protection ("NDEP") to NV Energy, Inc. ("NV Energy") to discharge process and other  
10 wastewater to evaporation ponds located at Reid Gardner station.

11 On July 12, 2010, NV Energy filed a Petition for Leave to Intervene with the State  
12 Environmental Commission ("SEC"), which was granted on September 21, 2010. On  
13 September 10, 2010, NDEP requested that the SEC order pre-hearing briefs concerning the  
14 issues to be presented. Neither NV Energy nor Sierra Club has objected.

15 Based on the foregoing and pursuant to NAC 445B.8925, it is hereby ORDERED that  
16 Sierra Club file a brief with the SEC on or before October 7, 2010 and serve a copy of the brief  
17 on all parties to the appeal as listed in the attached certificate of service. The brief should  
18 contain a detailed statement of the issue(s) to be raised during the hearing, including legal  
19 authorities that Sierra Club alleges NDEP violated in renewing Permit No. NEV91022 and  
20 supporting facts. A list of proposed witnesses should also be included. It is also ORDERED  
21 that NDEP and NV Energy shall each file responsive briefs on or before October 21, 2010.  
22 Sierra Club's reply brief in response to NDEP's and NV Energy's briefs, which is optional, is  
23 due on or before November 1, 2010. It is further ORDERED that the appeal hearing in this  
24 matter is scheduled for November 4 and 5, 2010.

25 Dated this 22 day of September, 2010.

26   
27 \_\_\_\_\_  
28 Alan Coyner, Vice Chairman  
State Environmental Commission

CERTIFICATE OF SERVICE

The undersigned, an employee of the State of Nevada, State Environmental Commission, does hereby certify that on the date shown below, a true and correct copy of the foregoing ORDER REGARDING BRIEFING SCHEDULE was duly mailed, postage prepaid, to the following:

Thomas C. Woodworth Esq.  
Assistant General Counsel  
NV Energy, Inc. 16226 West Sahara Ave, MS 03A  
Las Vegas, NV 89146  
CERTIFIED MAIL 7007 0220 0003 5226 0330

Attorneys for Intervener NV Energy

Dan Galpern, Staff Attorney  
Western Environmental Law Center  
1216 Lincoln Street  
Eugene, OR 97401  
CERTIFIED MAIL 7007 0220 0003 5226 0347

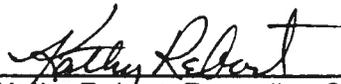
Attorneys for Appellant Sierra Club

Megan Anderson, Staff Attorney  
Western Environmental Law Center  
208 Paseo del Pueblo Sur, Unit 602  
Taos, NM 87571  
CERTIFIED MAIL 7007 0220 0003 5226 0354

Attorneys for Appellant Sierra Club

Carolyn E. Tanner  
Deputy Attorney General  
Office of Attorney General  
100 North Carson Street  
Carson City, NV 89701

Attorneys for Respondent NDEP

  
\_\_\_\_\_  
Kathy Rebert, Recording Secretary

DATED: September 22, 2010

1 BEFORE THE STATE OF NEVADA, STATE ENVIRONMENTAL COMMISSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8  
9 Sierra Club has made arrangements with the following in Carson to receive these  
10 materials from either party:

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

11  
12 **2. Vacatur of Hearing and Briefing Schedule**

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

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

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

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

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

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

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

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

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

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

17 RESPECTFULLY SUBMITTED



18  
19  
20 Daniel Galpern, Staff Attorney  
21 Oregon Bar No. 06195  
22 Western Environmental Law Center  
23 1216 Lincoln Ave.  
24 Eugene, OR 97403  
25 (541) 359-3243  
26

27

1 **CERTIFICATE OF SERVICE**

2  
3 The undersigned, Daniel Galpern, does hereby certify that on the 6th day of October, 2010, a true  
4 and correct copy of the foregoing ORDER GRANTING PETITION TO INTERVENE was  
5 emailed, and mailed, postage prepaid, to the following:  
6

7  
8 John B Walker, State of Nevada  
9 State Environmental Commission  
10 901 South Stewart Street, Suite 4001  
11 Carson City, Nevada 89701-5249  
12

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

19  
20 Thomas C. Woodworth, Assistant General Counsel  
21 NV Energy, Inc.  
22 6226 West Sahara Ave, MS 03A  
23 Las Vegas, NV 89146  
24 Attorney for Intervenor  
25

26  
27  


28  
29  
30 Daniel Galpern, Staff Attorney  
31 Oregon Bar No. 06195  
32 Western Environmental Law Center  
33 1216 Lincoln Ave.  
34 Eugene, OR 97403  
35 (541) 359-3243  
36

1 BEFORE THE STATE OF NEVADA, STATE ENVIRONMENTAL COMMISSION

In Re: ) Declaration of Daniel Galpern  
Appeal of Water Pollution Control )  
Groundwater Permit NEV91022 )  
Reid Gardner Station )

2  
3 1. My name is Daniel Galpern. I am over the age of eighteen years. I am one of the  
4 counsel for Appellant Sierra Club in this case. I make this declaration in support of Sierra Club's  
5 motion for subpoenas, vacatur of hearing and briefing, and suspension of permit and injunction  
6 against construction and related site preparation activities.

7 2. Exhibit 1 provides excerpts of emails that I sent to parties in this matter regarding  
8 document and data requests. I omitted any substantive material so as not, by this exhibit, to  
9 prove more than that Sierra Club made numerous and strenuous efforts to secure such material,  
10 as well as to meet with parties so as to discuss such material and the issues they raise.

11 3. Exhibit 2 constitutes a faithful reproduction of a memo Elliot Lips sent to me as  
12 an attachment to an email of Oct 4.

13 4. Exhibit 3 constitutes a faithful reproduction of a memo Elliot Lips sent to me as  
14 an attachment to an email of Oct 6.

15 5. I declare under the penalty of perjury that the foregoing is true and correct to the  
16 best of my knowledge.



Daniel Galpern, Staff Attorney  
Oregon Bar No. 06195  
Western Environmental Law Center  
1216 Lincoln Ave.  
Eugene, OR 97403  
(541) 359-3243

Email: Dan Galpern to Lina (Carolyn) Tanner of 9-28-10

Lina,

I want to be sure to request for the following document among those that NDEP is searching for:

Converse, 2007, Geotechnical Data Report, 320-acre Mesa Fly Ash Storage, Feb 20, 2007.

This document was listed in the Encyclopedia as document No. 332. Even if it is with NPC, we believe it should have been submitted to NDEP.

Thank you.

Dan

--

...

---

Email to Lina (Carolyn) Tanner of 9-27-10

Lina,

Thank you for your response.

I have made arrangements with Legal Copy Cats to receive the documents you had sent there.

Regarding the other documents that you will advise us about — namely those within possession of the BWPC, please consider this a public records request of the BWPC or any other part of NDEP that may have those documents. We appreciate your action to secure these for us as soon as possible.

For your information, I took your suggestion to contact Tom Woodworth to seek his assistance in (1) securing those documents that were referred to in the Reid Gardner Station AOC Encyclopedia of Supporting Documentation but have not yet been located at or provided to us by NDEP, and (2) securing a site visit of the Reid Gardner facility. Tom's clients have directed him to decline both requests.

**From:** Daniel Galpern [<mailto:galpern@westernlaw.org>]

**Sent:** Wednesday, September 22, 2010 12:35 PM

**To:** Woodworth, Thomas

**Subject:** FW: Sierra Club Records Request

Thomas Woodworth  
Assistant General Counsel

NV Energy, Inc.  
6226 West Sahara Ave, MS 03A  
Las Vegas, NV 89146  
(702) 402-5694  
[twoodworth@nvenergy.com](mailto:twoodworth@nvenergy.com)

Hi Tom,

I look forward to hearing back from you today, if possible, about meeting with yourself and NV Energy personnel in charge of operations with respect to the RG waste ponds and landfill(s). We would appreciate if these meetings could be set for Oct 4, from 830-1030am, at your offices in Las Vegas, or else at another location in Las Vegas, or else at 930am in Moapa NV.

In addition, we would greatly appreciate it if NV Energy would kindly supply us with the documents, on the attached, that NDEP maintains it does not have in its possession. Please see the attached "NDEP Redline re Location..." Receiving these in electronic, searchable form would be most convenient.

Thank you very much.

Dan

---

Email to Lina (Carolyn) Tanner of 9-15-10

Dear Lina,

Thank you for your note. ....

...as for our requests for documents and meetings, we eagerly await your response. While, as you note, our request for an appeal was filed July 2, our requests before and since that time to complete the record, ... still have not been fulfilled, and it is for that reason that establishing a briefing and hearing schedule at this time is manifestly premature.

...

---

Excerpts of email to Lina (Carolyn) Tanner of 9-13-10

Hi Lina,

Please see the attached two pdf documents, in response to your email and, as well, in request of several other necessary documents, in request of a meeting, and in request to conduct a site visit.

Please let me know. Thank you.

Yours,

Dan

....

---

Excerpts of letter to Lina (Carolyn) Tanner attached to 9-13-10 Email

...

Hi Lina:

This is to respond to your email of last week (9/8/10), and to make several additional requests of NDEP.

As to existing documents that we have sought that are clearly in the possession of NDEP in Las Vegas, I have contacted Legal Copycats as you suggested, although we would appreciate if these documents could be provided to us directly and quickly from NDEP.

We found two of the documents we were seeking on the BCA website, but that reduces only a bit the 55 or so documents that we need that were listed on the Reid Gardner Station AOC Groundwater Investigation Encyclopedia of Supporting Documentation. Please see the attached, revised file.

Regarding the other documents not denoted on the Encyclopedia of Supporting Documentation as at NDEP, we would be very surprised to learn that these are not in fact in the position of NDEP. These documents, after all, are support documents providing detail that BCA will have needed to verify and retain to be able to review commitments made and compliance achieved (or not) over time with various relevant administrative orders and requirements.

It is difficult to believe, for example, that permit applications to NDEP, or NV Energy correspondence in response to NDEP comments, or other NPC/NDEP correspondence, or notices of violations regarding pond discharges, or even geotechnical evaluations of the ponds, or corrective action plan responses to NDEP – that these have not been retained by NDEP.

... I should just speak with Shannon Harbour directly about this, and I am fine to do so unless that is not acceptable to you (and, if so, please let me know).

If, after that is done, the documents really do appear to be missing or not otherwise available to NDEP, I ask that NDEP request them immediately from NV Energy or its contractor.

There is some additional information that we need, as well.

1. The record supplied to us had only a small share of quarterly ground water monitoring reports. The additional ones we need are:

2002 1Q-4Q  
2003 1Q-4Q  
2004 1Q-4Q  
2005 1Q-4Q  
2006 1Q-3Q  
2008 1Q-4Q  
2009 1Q-3Q

2010 2Q

2. The quarterly groundwater monitoring reports that we do have fail to contain information on water recovered from the interstitial leak detection / leak collection layer between the primary and secondary HDPE liners for the newly double-lined ponds. Please provide all such information, at least from 2002 to current, including the one due on 7/28/2010.

3. During our August review of NDEP documents housed in Carson City, Jeryl noted that NV Energy had not yet submitted any hydrogeologic site assessment reports and engineering design reports for the 3 proposed evaporation ponds in the Mesa area (M-1, M-2, and M-3) described in the 2010 groundwater discharge permit (NV91022). I would like to call Jeryl to seek updated information about this, again unless you deem that unacceptable and let me know (as above).

4. We request the following materials relating to the existing ponds that are not in the record that has to date been provided to us:

- a) documentation from NVE and/or NDEP that the liner systems were properly installed and documentation on the hydraulic performance of the drainage net.
- b) documentation from NVE and/or NDEP on the performance and operation of the leak collection system for all existing ponds (pump rates, volumes, etc.).
- c) documentation from NVE and/or NDEP on analysis of flood potential of the Muddy River, potential effect on existing ponds in the flood plain, and mitigation.

5. We request the following additional documents:

The updated O&M Manual and the updated Sampling and Analysis Plan that NV Energy is required to submit to you this month.

6. We reprise our prior request to meet with or, at minimum, to have a phone call, with Shannon Harbour and her staff and Jeryl Gardner and his staff, so that we can gain further understanding of the record, potentially reduce the amount of time needed for the contested hearing, reduce costs being incurred by my client, reduce costs for your client, and also potentially, depending on the answers to our questions, allow formation of terms of a settlement.

The questions we wish to put to Ms Harbour and Mr. Gardner and their staff include the following, and as I noted previously, we would be willing to submit a fuller list of topics to discuss prior to such discussion.

...

[Questions omitted here so as not to get into the substance of Sierra Club's concerns about the adequacy of current permit protections.]

7. Finally, for now, would you please arrange, or direct me to the proper person to arrange, for three colleagues and myself to conduct a site visit of the Reid Gardner evaporation ponds and related facilities. At this time, we would like to do this at 9am on 10/4/2010.

...

---

Experts of second document attached to 9-13-10 email to Lina (Carolyn) Tanner

## Documents Required by Sierra Club

...

### **From Reid Gardner Station AOC Groundwater Investigation Encyclopedia of Supporting Documentation**

[Request of approximately 75 documents (4 pages) not listed here.]

---

Excerpt of email from Dan Galpern to Jeryl Gardner and Lina (Carolyn) Tanner on 9/8/2010

Greetings Jeryl:

I hope you are well.

It appears that a number of documents referred to in the "Reid Gardner Station AOC Groundwater Investigation Encyclopedia of Supporting Documentation" (by Stanley Consultants, Inc. February 2010 (Draft)), were not among those provided to us by disk and were not available in the files that Emily Rhodenbaugh reviewed with the assistance of our expert.

Some or all of these documents may be essential to our understanding of what has occurred at the NDEP-regulated waste evaporation ponds.

Please see the list below. The document number listed in parentheses at the end of each reference is the document number in the Encyclopedia.

In addition, although NDEP supplied us with a number of documents related to the AOC for the ponds, we would appreciate receiving the more recent AOC-related materials, namely since April 1, 2010.

We would prefer these documents provided in a searchable pdf format by CD, and sent to myself and to Eliot Lips, addresses below.

....

....

Elliott W. Lips  
Principal Engineering Geologist  
Great Basin Earth Science, Inc.  
2241 E. Bendemere Circle  
Salt Lake City, Utah 84109  
(801) 599-2189  
[clips@gbearthscience.com](mailto:clips@gbearthscience.com)

**Materials required by WELC, as denoted in "Reid Gardner Station AOC Groundwater**

**Investigation Encyclopedia of Supporting Documentation”**

....

.....

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Except of email to Lina (Carolyn) Tanner on 9/1/10

Dear Lina,

It was very nice to speak with you today. To follow up both (1) with respect to a couple of our questions, and (2) setting up a meeting:

(1) We would appreciate your putting the following questions to the relevant persons at NDEP.

....

What data and analysis do NDEP and/or NVE have ... [re TDS] between 2002 and 2010?

A secondary question is this: NDEP has crafted an ostensibly “zero-discharge permit.” What set of rules did NDEP follow for the definition and standard of design for such permit? We have presumed it is 445A.385 for the definition and 445A.424 for the operation and design requirements, but we didn’t see these cites in the permit.

(2) In addition, we would like to meet with the follow persons to discuss the permit and the evaporation ponds situation at Reid Gardner:

NDEP’s John Palm, Al Tinney, Jim Najima and Shannon Harbour and, if warranted, with NV Energy. [Please correct me on spelling.] Two good dates for us for such a meeting include Sept 10 (any time during work hours) or Oct 8 in the afternoon.

....

We look forward to working with you on this matter.

Thank you.

Dan

....

---

## Great Basin Earth Science, Inc.



2241 East Bendemere Circle  
Salt Lake City, Utah 84109  
Phone (801) 599-2189  
Fax (801) 487-8473  
elips@gbearthscience.com

October 4, 2010

Dan Galpern  
Western Environmental Law Center  
1216 Lincoln Street  
Eugene, Oregon 97401

RE: Hydrogeology and Permitting Review  
NV Energy – Reid Gardner Station  
Nevada Department of Environmental Protection (NDEP) Discharge Permit NEV91022

Dear Dan:

Western Environmental Law Center (WELC) has requested that I conduct a review and prepare a report expressing my professional opinion of hydrogeologic and permitting issues related of the NDEP Discharge Permit (permit) for the evaporation ponds at NV Energy's (NVE) Reid Gardner Station (RGS).

In the course of conducting my evaluation, it has become apparent that there is a long history of prior permitting activities for the evaporation ponds at RGS. In order to conduct a reasonable and thorough evaluation of the recent permit decision, it is necessary to have a complete understanding of past permit activities such as conditions of previous permits, documentation of noncompliance with previous permits, and regulatory action taken by NDEP for noncompliance. In addition, it is absolutely necessary that I have a complete understanding of current and past ground water conditions, especially with regard to pollutants that have been released from the evaporation ponds. Integral to evaluating the permitting activities and ground water conditions, it is necessary to have a complete history of past construction and operation of the evaporation ponds, particularly the liner systems. Quite simply, I can not evaluate the hydrogeologic and permitting issues, and I can not provide you with my professional opinion without having a complete picture of past regulatory activities, an understanding of past impacts to waters of the state, and an understanding of the evaporation ponds liner performances.

To date, I have reviewed several documents that were supplied to me by WELC and NDEP. However, documents that have been made available are not sufficient for me to conduct my analysis or formulate my professional opinion. As you know, I have provided WELC with lists of documents that are necessary for me to review. But, only a small portion of the documents that contain the necessary information on past permitting activities, ground water contamination, and operations of the evaporation ponds have been made available.



Presented below is a list of documents that I must have in order to conduct a reasonable and thorough evaluation of site hydrogeologic and permitting issues.

1. **Quarterly Ground Water Monitoring Reports.** These reports contain the results of monitoring conducted by NVE and submitted to NDEP of the approximately 75 monitoring wells at the RGS facility, and are the very basis of analyses of ground-water conditions, and an evaluation of the performance of the liner systems of the existing evaporation ponds. We do not have the following (these were included in your request for documents to Carolyn "Lina" Tanner on September 13, 2010):

2002 1Q-4Q  
2003 1Q-4Q  
2004 1Q-4Q  
2005 1Q-4Q  
2006 1Q-3Q  
2008 1Q-4Q  
2009 1Q-3Q  
2010 2Q

2. **Interstitial Layer Monitoring.** The quarterly ground water reports do not contain data or reporting of water detected and recovered from the interstitial leak detection / leak collection layer between the primary and secondary HDPE liners for the double-lined ponds. Monitoring and reporting of leakage rates, and analysis of any liquids accumulated in the leak detection systems is a condition of the 2005 discharge permit. These data furthermore serve as means of identifying failures in the liner. In order for me to evaluate the performance of the liner system for the existing ponds and evaluate the efficacy of this system for future ponds, it is imperative that these data be made available for review. This information (going back to 2002) was included in your request for documents to Lina Tanner on September 13, 2010.
3. **Proposed Mesa Ponds Documentation.** The information and documents made available to us by NDEP in August, 2010 did not include any hydrogeologic site assessment reports or engineering design reports for the proposed evaporation ponds in the Mesa area. Jeryl Gardner (NDEP-BWPC) stated that NV Energy had not yet submitted these reports to NDEP. It seems quite remarkable that NDEP would have approved the discharge permit on June 24, 2010 without this supporting documentation. Obviously I can not even begin to evaluate the hydrogeology issues that may be related to these ponds without a site assessment report. In addition, I can not evaluate the expected performance of the ponds (particularly the liner system) without having engineering design reports. These reports were included in your request for documents to Lina Tanner on September 13, 2010.



4. **Administrative Order on Consent (AOC) - Implementation Meeting Notes and Status Reports.** NDEP and NVE conduct Quarterly Meetings on the AOC Implementation, and NVE also submits to NDEP Monthly AOC Status Update Reports. Based on my review of other AOC documents, I have reason to believe that specific work items or tasks of the AOC are related to requirements of prior enforcement actions taken by NDEP, or address requirements specified in prior permits issued by NDEP. On September 29, 2010, I spoke with Shannon Harbour, NDEP-BCA and she informed me that she has copies of notes of these quarterly meetings and copies of the monthly status reports, both electronically. I requested copies of these going back to February, 2008, along with an updated AOC schedule. Ms. Harbour stated that she would send them to me via email; however, as of today, I have not received these documents from NDEP.
  
5. **Permit Supporting Documents.** NVE has submitted numerous documents to NDEP in support of their prior permits. These documents contain information on *inter alia*, site hydrogeologic conditions, data collection and analysis of water quality, engineering design reports, construction "as-built" reports, construction quality assurance and quality control reports, liner design details, and all other information necessary to demonstrate to NDEP that the evaporation ponds are both designed and have functioned in compliance with applicable standards. As I discussed earlier, in order for me to evaluate the decision by NDEP to have issued the 2010 discharge permit, it is necessary for me to be able to review and evaluate these supporting documents submitted by NVE to NDEP. In particular, it is necessary to evaluate the design and performance of the liner systems for the existing ponds, in as much as NDEP is apparently relying on the assumption that these liners are meeting the "zero-discharge" performance standard, and as such will suffice for the proposed new evaporation ponds. (As noted above, in order for NDEP to actually be in a position to verify that there is no discharge from the ponds, it is necessary to evaluate the data on leakage rates from the interstitial leak detection / leak collection layer. To date, NDEP has not provided us with those data).
  

In your request for documents to Lina Tanner on September 13, 2010, you included a list of permit supporting documents that I had identified as those that would contain the information described above. On September 30, 2010, we received a portion (approximately half) of the requested documents from NDEP BCA. As of today, I have only been able to review in detail a small portion of the documents we received on September 30. However; I have conducted a cursory review of all the documents and find that critical information on the design, construction, and performance of the existing ponds is not contained in the documents we have received. Appendix A lists the documents that you requested on September 13, 2010, but that we have not received, and that are necessary for me to conduct a thorough and meaningful evaluation of the permit.

  
6. **Miscellaneous Documents.** The Environmental Assessment (EA) prepared by the BLM for the Reid Gardner Facility Pond and Landfill Expansion Project (March, 2008) references a report prepared by a consultant to NVE that may contain information on

Hydrogeology and Permitting Review  
NV Energy Reid Gardner Station  
NDEP Discharge Permit  
October 4, 2010  
Page 4 of 6



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ground water in the vicinity of the proposed Mesa ponds. On September 28, 2010, you requested the following document from Lina Tanner; however, I have not yet received it:

Converse, 2007, Geotechnical Data Report, 320-acre Mesa Fly Ash Storage, Feb 20, 2007 (Document No. 332 of the AOC Encyclopedia)

In closing, my attempt to review the information supporting NDEP's decision to issue a new discharge permit for the evaporation ponds at RGS has been hindered by a lack of critical information. All of this information should have been given to NDEP by NVE in support of their permit applications (both the 2010 and prior permits). Until I receive the documentation discussed in this letter, I can not fully evaluate the hydrogeologic and permitting issues.

If you have any questions or require additional information, please do not hesitate to contact me.

Sincerely,  
**Great Basin Earth Science, Inc.**

A handwritten signature in black ink, appearing to read "Elliott W. Lips". The signature is fluid and cursive, with a large, stylized "L" at the end.

---

Elliott W. Lips, P.G.  
Principal Engineering Geologist

Attachment: Appendix A

## APPENDIX A

### **List of Permit Supporting Documents Requested from NDEP on September 13, 2010, but not received from BCA on September 30, 2010**

- Converse, 2003, Final Grading and Quality Control Quality Assurance Report – Reconstruction of Ponds D & E, 12/23/2003 (Document No. 20).
- Kleinfelder, 2001, Addendum 1 – Reid Gardner Station – Hydrogeologic Characterization 2000 to NPC, 4/10/2001 (Document No. 29).
- Intellus, Corporation, 1986, Hydrogeologic Study, 9/15/1986 (Document No. 52).
- Converse, 1993, Report of Professional Engineering Services, 5/14/1993 (Document No. 60).
- NDEP, 1999, Hydrogeologic Assessment; Principal Components and Data Needs, 9/15/1999 (Document No. 87).
- NPC/NDEP, 2001-2007, NPC/NDEP Correspondence, 9/2001 – 5/2007 (Document No. 97).
- NPC, 2004, Renewal of Authorization to Discharge Permit #NEV01022, NPC 2/19/2004 (Document No. 138).
- NPC, 2002, 4C-1 Pond Liner Installation Quality Control/Quality Assurance, 2/27/2002 (Document No. 146).
- NDEP, 2002, Unit 3 Evaporation Pond relining Pond E Close D, 8/6/2002 (Document No. 149).
- Converse, 1990, Geotechnical Investigation Seepage Condition Evaporation Pond E, 7/16/1990 (Document No.152).
- NPC, 2001, Soil and Water Sampling, 5/31/2001 (Document No. 279).
- Stanley Consultants, 2005, NPC Reid Gardner Pond F and G Permit Application to NDEP, 10/1/2005 (Document No. 286).
- Converse, 2002, Geotechnical Investigation Retrofit Ponds D and E, 5/17/2002 (Document No. 291).
- Converse, 2008, Pond D Restoration Evaluation, 9/28/2008 (Document No. 309).
- Kennedy Jenks, 2002, Pond D and E Record Drawings, 4/30/2002 (Document No. 311).

Converse Consultants, 2009, Geotechnical Evaluation Pond D, 1/27/2009 (Document No. 318).

Converse Consultants, 2008, Geotechnical Evaluation Pond D, 10/10/2008 (Document No. 319).

Bio-West, Inc, 2008, Final 2007 Muddy River Report, 5/1/2008 (Document No. 325).

Mifflin and Associates, 1995, 1994 Hydrologic Impacts from Groundwater Withdrawals in the Upper Muddy River Valley, Nevada, 4/1/1995 (Document No. 338).

Water Resource Center, Desert Research Institute, Analysis of 1994 Groundwater Level Trends in the Upper Muddy River Valley, Nevada, 6/1/1995 (Document No. 339).

Converse, 2008, Geotechnical Evaluation of Pond 4A, 10/20/2008 (Document No. 358).

NPC, 2004, Table 1 Pond Size Data, 2/18/2004 (Document No. DP-04).

NPC, 2003, Reid Gardner Hydrogeologic Report Summary History, 7/29/2003 (Document No. DP-05).

Converse, 2005, Hydrogeologic Investigation Summary, 4/14/2005 (Document No. DP-12).

Leak Location Services, Inc., 2005, Geomembrane Leak Location Survey for Pond E-1 and C-2, 7/6/2005 (Document No. DP-16).

NPC, 2007, Monitoring Well Data, 10/19/2007 (Document No. DP-38).

In addition, the following documents listed in a transmittal letter from Shannon Harbour to Legal Copy Cats September 21, 2010, but **WERE NOT** made available from Legal Copy Cats on September 30, 2010.

NPC, Revised Hydrogeologic Characterization Report Response to NDEP comments letter dated August 11, 2003, 5/21/2004 (Document No. 116).

NPC, 2004, Corrective Action Plan for Ponds F & G, 9/10/2004 (Document No. 211).

NPC, 2003, Corrective Action Plan for Ponds D & E, Response to NDEP Comments Letter Dated December 16<sup>th</sup>, 2002 and As-Built Drawings, 9/3/2003 (Document No. 217).

NPC, 2005, E2 Evaporation Pond Repair Plan Permit No. NEV91022, 9/9/2005 (Document No. DP-22).

NDEP, 2004, Corrective Action Plan for Ponds F and G, 9/21/2004 (Document No. NDEP-120).

## Great Basin Earth Science, Inc.



2241 East Bendemere Circle  
Salt Lake City, Utah 84109  
Phone (801) 599-2189  
Fax (801) 487-8473  
elips@gbearthscience.com

### MEMORANDUM

TO: Dan Galpern, Western Environmental Law Center  
FROM: Elliott W. Lips, P.G., Principal Engineering Geologist  
DATE: October 6, 2010  
RE: Observations of Construction Activities – Mesa Evaporation Ponds at NV Energy's Reid Gardner Station

---

On October 4, 2010 I was present on the mesa south of the Reid Gardner Station, on BLM administered land. The time of my visit was between approximately 7:30 and 7:45 am. At this time I observed and photographed<sup>1</sup> the following:

1. Significant construction activities were taking place on the mesa in an area identified by the BLM (2008 EA) as the location of NVE's mesa evaporation ponds. My observations were made from the southern limit of the construction area.
2. At the time of my observations, there was no equipment operating, however the fresh tracks in the soils appear to be from dozers and scrapers.
3. Based on examination of tracks in the soils from the earth-moving equipment, I believe that these activities are recent (within the past few weeks).
4. The area of disturbed land as a result of the recent construction activities is approximately between 30 and 50 acres. This estimate is based on comparing my field observations and photographs to scaled drawings of the mesa area, which are on a photographic base map, and from measurements made on Google Earth.
5. The construction activities consisted of stripping and removal of topsoil and excavation and removal of underlying soils to a depth of about 10 feet. In addition, it is possible that material was being placed as fill on the lower (northern) portions of the construction site.
6. Because no equipment was operating at the time of my observations, I can not say where the excavated material was placed. I can not confirm that topsoil was being salvaged and stockpiled for use in later reclamation. I can not confirm that any material placed as fill in the lower portions of the construction area was being compacted.
7. It is my opinion that the recent construction activities are the first phases (site preparation and grading) in the construction of NVE's mesa evaporation ponds.

---

<sup>1</sup> I can provide you with electronic copies of the photographs upon your request.

1 BEFORE THE STATE OF NEVADA, STATE ENVIRONMENTAL COMMISSION

In Re: ) Declaration of Daniel Galpern  
Appeal of Water Pollution Control )  
Groundwater Permit NEV91022 )  
Reid Gardner Station )

2  
3 1. My name is Daniel Galpern. I am over the age of eighteen years. I am one of the  
4 counsel for Appellant Sierra Club in this case. I make this declaration in support of Sierra Club's  
5 motion for subpoenas, vacatur of hearing and briefing, and suspension of permit and injunction  
6 against construction and related site preparation activities.

7 2. Exhibit 1 provides excerpts of emails that I sent to parties in this matter regarding  
8 document and data requests. I omitted any substantive material so as not, by this exhibit, to  
9 prove more than that Sierra Club made numerous and strenuous efforts to secure such material,  
10 as well as to meet with parties so as to discuss such material and the issues they raise.

11 3. Exhibit 2 constitutes a faithful reproduction of a memo Elliot Lips sent to me as  
12 an attachment to an email of Oct 4.

13 4. Exhibit 3 constitutes a faithful reproduction of a memo Elliot Lips sent to me as  
14 an attachment to an email of Oct 6.

15 5. I declare under the penalty of perjury that the foregoing is true and correct to the  
16 best of my knowledge.



Daniel Galpern, Staff Attorney  
Oregon Bar No. 06195  
Western Environmental Law Center  
1216 Lincoln Ave.  
Eugene, OR 97403  
(541) 359-3243



STATE OF NEVADA  
STATE ENVIRONMENTAL COMMISSION

901 South Stewart Street, Suite 4001  
Carson City, Nevada 89701-5249  
Telephone (775) 687-9308  
Fax (775) 687-5856  
[www.sec.nv.gov](http://www.sec.nv.gov)



CHAIRMAN:  
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Las Vegas, NV

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Las Vegas, NV

Stephanne Zimmerman  
Las Vegas, NV

COUNSEL  
Rose Marie Reynolds

STAFF  
John B. Walker  
Executive Secretary

Kathy Rebert  
Recording Secretary

**SEC Preliminary Hearing**  
**Notice Pursuant to NRS 233B.121 and NAC 445B.891**

**Date:** October 8, 2010

**To:** Appellants:  
Sierra Club  
Represented by Dan Galpern, Western Environmental Law Center

Respondent:  
Nevada Division of Environmental Protection, Bureau of Water  
Pollution Control  
Represented by Carolyn Tanner, Office of the Attorney General

Intervener:  
NV Energy  
Represented by Thomas C. Woodworth, Esq.

 **From:** John B. Walker, Executive Secretary

**Subject:** Preliminary Hearing: Reid Gardner #NEV91022

A three-member panel of the State Environmental Commission (SEC) has scheduled a preliminary hearing on the above referenced appeal filed by appellant Sierra Club. This preliminary hearing will be held as a teleconference beginning at 1:30 p.m. on October 21, 2010. SEC staff will contact the parties with the appropriate call in number at a later date.

The SEC has jurisdiction to hear this appeal pursuant to NRS 445A.605, NRS 445A.610, and NAC 445B.875 through NAC 445B.899. The statutes and regulations involved in the preliminary hearing are NRS 445A.605, NRS 445A.610, NAC 445B.892 and NAC 445B.894(1).

**Hearing Procedure:** Practice before the SEC is governed by the attached regulations found at NAC 445B.875 et seq. The online version is located at: <http://www.leg.state.nv.us/NAC/NAC-445B.html#NAC445BSec875>. NRS 233B.121 to 233B.150 are also applicable.

**Matters for Consideration:** On July 2, 2010, appellant Sierra Club filed an appeal of a renewal with modifications of Permit No. NEV 91022 issued on June 24, 2010 by the Nevada Division of Environmental Protection ("NDEP") to NV Energy, Inc. ("NV Energy") to discharge process and other wastewater to evaporation ponds located at Reid Gardner station. On

September 22, 2010, the SEC issued an order establishing a briefing schedule and scheduling the hearing for November 4 and 5, 2010.

On October 7, 2010, Sierra Club filed a motion seeking: (1) issuance of subpoenas to compel production of documents; (2) vacatur and continuance of the November hearing; and (3) a preliminary injunction to suspend the effectiveness of the permit and halt construction of new wastewater ponds. A copy of Sierra Club's motion is attached.

This Preliminary Hearing will be confined to the following issues: (1) whether to issue the requested subpoenas pursuant to NAC 445B.892; (2) whether the November hearing should be continued pursuant to NAC 445B.894(1); and (3) whether to issue a preliminary injunction as requested.

Please note that written oppositions, if any, to Sierra Club's motion must be filed by 5 p.m. on October 15, 2010. Any written response to an opposition(s) must be filed by 5 p.m. on October 19, 2010.

**Related Information:** Additional information about this appeal, including all of the documents listed herein, is available on the SEC website at the following location: <http://sec.nv.gov>.

**Attachments:** October 7, 2010 Motion filed by Sierra Club  
SEC Rules of Practice

CERTIFICATE OF SERVICE

The undersigned, an employee of the State of Nevada, State Environmental Commission, does hereby certify that on the date shown below, a true and correct copy of the SEC Preliminary Hearing Letter dated October 8, 2010 for the Reid Gardner Appeal was duly mailed, postage prepaid, to the following:

Thomas C. Woodworth Esq.  
Assistant General Counsel  
NV Energy, Inc. \6226 West Sahara Ave, MS 03A  
Las Vegas, NV 89146  
CERTIFIED MAIL 7007 0220 0003 5226 0378

Attorneys for Intervener NV Energy

Dan Galpern, Staff Attorney  
Western Environmental Law Center  
1216 Lincoln Street  
Eugene, OR 97401  
CERTIFIED MAIL 7007 0220 0003 5226 0385

Attorneys for Appellant Sierra Club

Megan Anderson, Staff Attorney  
Western Environmental Law Center  
208 Paseo del Pueblo Sur, Unit 602  
Taos, NM 87571  
CERTIFIED MAIL 7007 0220 0003 5226 0392

Attorneys for Appellant Sierra Club

Carolyn E. Tanner  
Deputy Attorney General  
Office of Attorney General  
100 North Carson Street  
Carson City, NV 89701

Attorneys for Respondent NDEP



Kathy Rebert, Recording Secretary

DATED: October 8, 2010

BEFORE THE STATE ENVIRONMENTAL COMMISSION  
STATE OF NEVADA

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In Re: )  
Appeal of Water Pollution Control Permit: )  
**Groundwater Permit NEV91022,** )  
**Reid Gardner Station** )

**NDEP'S OPPOSITION TO SIERRA CLUB'S MOTION TO THE SEC, SEEKING**  
**(1) ISSUANCE OF SUBPOENAS TO COMPEL PRODUCTION OF DOCUMENTS,**  
**(2) VACATUR AND CONTINUANCE IN THE PROCEEDINGS, AND**  
**(3) A PRELIMINARY INJUNCTION TO SUSPEND THE EFFECTIVENESS OF THE PERMIT AND HALT CONSTRUCTION OF NEW WASTEWATER PONDS**

Attorney General's Office  
100 N. Carson Street  
Carson City, Nevada 89701-4717

NDEP's Opposition to Sierra Club's Motion to the SEC, Seeking (1) Issuance of Subpoenas to Compel Production of Documents, (2) Vacatur and Continuance in the Proceedings, and (3) A Preliminary Injunction to Suspend the Effectiveness of the Permit and Halt Construction of New Wastewater Ponds.

NDEP hereby opposes the Motion filed by Sierra Club for the following reasons:

**1. Issuance of Subpoenas to Compel Production of Documents**

Unless declared by law to be confidential, NDEP's documents are public records. NRS 239.010. All public records in NDEP's possession are available for review and copying. To that end, NDEP has consolidated most of the documents regarding the Reid Gardner permit renewal process in its Carson City office. Sierra Club can at any time come, review the documents, and arrange for and get copies.

Sierra Club's motion essentially implies that NDEP should be required to provide all documents that Sierra Club needs for its appeal. This request is unreasonable. NDEP should not be put in a position where, no matter what it does, it will always be subject to criticism and attack for not providing the documents Sierra Club believes it needs. Moreover, this request essentially asks that NDEP prepare Sierra Club's appeal for it by compiling the documents that NDEP believes Sierra Club needs for the appeal. Sierra Club should be

1 required to prepare its appeal by reviewing the documents and determining the relevance of  
2 the documents and whether the documents should be presented to the SEC at the hearing.

3 NDEP notes, however, that Sierra Club's motion potentially includes numerous  
4 documents that have no relevance to this appeal. NDEP reserves its right to object to the  
5 admission of those documents at the hearing. It is noteworthy that all documents relevant to  
6 this appeal (i.e., the administrative record) have been available for months, yet Sierra Club  
7 files its motion requesting relief less than a month before the hearing. The permit renewal  
8 was issued on June 28, 2010, and now, four months later, Sierra Club complains it needs  
9 additional documents and time to review them. For the past few months, NDEP and its  
10 counsel have informed Sierra Club that the documents are available for review. Sierra Club  
11 has had ample time to review the documents and the SEC should deny its request to continue  
12 the hearing.

13 **2. Vacatur and Continuance in the Proceedings**

14 Sierra Club advances the argument that the appeal hearing set for November 4 and 5  
15 must be continued because it needs time to review the additional documents sought in  
16 request (1). This will inevitably require the appeal hearing to be delayed. Sierra Club ignores  
17 the fact that all documents that NDEP relied on in making its decision to issue the permit  
18 existed in NDEP's files prior to the permit's issuance date.

19 Given that all documents relied on by NDEP in reviewing the permit were available  
20 prior to issuance of the permit, Sierra Club's request for continuance should be denied.

21 **3. A Preliminary Injunction to Suspend the Effectiveness of the Permit and**  
22 **Halt Construction of New Wastewater Ponds**

23 As a matter of law, there is a presumption that the renewed permits are valid. The  
24 existing ponds, are located in the flood plain of the Muddy River, are the subject of a  
25 corrective action that cannot begin until the construction of the new ponds are completed.  
26 Sierra Club is not harmed in anyway by the construction of the new ponds. The new ponds  
27 each have two synthetic liners with leak detection systems. Furthermore, the new ponds will  
28 be located farther from the Muddy River, up on the mesa nearby and not in the floodplain.

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This relocation is more protective of the environment than the current location and the new construction will ensure that these ponds are zero-discharge. Delaying the construction of the new ponds increases the risk of pollution of the Muddy River, and of the groundwater.

DATED this 14th day of October, 2010.

CATHERINE CORTEZ MASTO  
Attorney General

By: /s/ William Frey  
WILLIAM FREY  
Senior Deputy Attorney General  
Nevada Bar No. 4266  
100 North Carson Street  
Carson City, Nevada 89701-4717  
*Attorneys for the Division of  
Environmental Protection*

Attorney General's Office  
100 N. Carson Street  
Carson City, Nevada 89701-4717

**CERTIFICATE OF SERVICE**

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I, Rosiland M. Hooper, hereby certify that I am an employee of the Office of the Nevada Attorney General, and on this 14th day of October, 2010, I filed the foregoing **NDEP'S OPPOSITION TO SIERRA CLUB'S MOTION TO THE SEC, SEEKING (1) ISSUANCE OF SUBPOENAS TO COMPEL PRODUCTION OF DOCUMENTS, (2) VACATUR AND CONTINUANCE IN THE PROCEEDINGS, AND (3) A PRELIMINARY INJUNCTION TO SUSPEND THE EFFECTIVENESS OF THE PERMIT AND HALT CONSTRUCTION OF NEW WASTEWATER PONDS**, to the following individuals via email:

John Walker, Secretary  
State Environmental Commission  
jwalker@ndep.nv.gov

Dan Galpern  
Western Environmental Law Center  
galpern@westernlaw.org

Thomas C. Woodworth  
Assistant General Counsel  
NV Energy  
TWoodworth@nvenergy.com

/s/ Rosiland M. Hooper  
Rosiland M. Hooper, Legal Secretary II  
an employee of the Nevada Attorney General

Attorney General's Office  
100 N. Carson Street  
Carson City, Nevada 89701-4717

1 **BEFORE THE STATE OF NEVADA, STATE ENVIRONMENTAL COMMISSION**

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

11 Nevada Power Company, a Nevada corporation doing business as NV Energy ("NV  
12 Energy" or "Intervenor") submits this Reply to Appellant's motion as styled above (the  
13 "Motion"). As discussed in more detail in this Reply, NV Energy, as Intervenor in this  
14 proceeding, vigorously objects to each of the three requests made to the State Environmental  
15 Commission ("SEC" or the "Commission") in the Appellant's Motion.

16 **I. RELEVANT BACKGROUND**

17 NV Energy's application for the renewal of its groundwater discharge permit (the "Permit  
18 Renewal") was submitted to the Nevada Division of Environmental Protection ("NDEP" or the  
19 "Division") on February 20, 2009. On October 21, 2009, the Division issued a "Public Notice of  
20 Proposed Action" which proposed issuance of the Permit Renewal, subject to certain effluent  
21 limitations and special conditions. See Exhibit 1. The Division set a 30-day period for receiving  
22 public comment, which ended November 30, 2009. Due to the continued public interest in the  
23 Renewal Permit, NDEP also conducted a public hearing on the proposed Permit Renewal on  
24 June 3, 2010, in Moapa, Nevada. On June 24, 2010, the Division issued its Notice of Decision  
25 granting the Permit Renewal. See Exhibit 2. Within the Notice of Decision NDEP responds to  
26 public comments raised during and before the June 3<sup>rd</sup> public hearing, but in doing so also notes  
27 the following:

28 *Much of the comments dealt with issues outside the scope of the permit or  
regulations and authority of the [NDEP Bureau of Water Pollution  
Control]. Because the comments have been answered and the follow-up*

1                    *comments raised no new permit issues, NDEP has made the determination*  
2                    *to re-issue the permit.*

3 Exhibit 2, page 2. Among the comments received and responded to by NDEP in its June 24<sup>th</sup>  
4 Notice of Decision were detailed comments submitted by the Appellant. Exhibit 2, pages 5-12.  
5 In fact, more than 50% of the Notice of Decision is dedicated to responding to Appellant's  
6 comments on the draft Permit Renewal.

7                    The Permit Renewal was issued by NDEP on June 24, 2010, with an effective date of  
8 June 25, 2010. The June 24<sup>th</sup> Notice of Decision clearly stated that NDEP's final determination  
9 could be appealed to the Commission within ten (10) days of the Notice of Decision, in  
10 accordance with the administrative rules of the Commission. On July 2, 2010, Appellant filed its  
11 appeal request in this proceeding by submitting a completed Commission Form #3 – Form for  
12 Requesting an Appeal Hearing Before the Nevada State Environmental Commission.

13                    Within its appeal request, Appellant objects to NDEP's perceived "failure to date to  
14 provide Sierra Club with adequate notice of its right to appeal the final permit", despite the fact  
15 that the right to appeal is clearly stated on the first page of NDEP's June 24<sup>th</sup> Notice of Decision.  
16 See Exhibit 2, page 1. Notwithstanding that fact, Appellant uses this alleged "failure" of NDEP  
17 to make the following request in its Form #3 appeal request to the Commission:

18                    *[T]his request to appeal is filed to protect Sierra Club's right to appeal.*  
19                    *The appeal itself should be held in abeyance until we have had time to*  
20                    *fully examine the above-noted documents and their legal basis, and we*  
21                    *further seek leave until that time to amend the following description of the*  
22                    *nature and grounds for appeal.*

23                    On July 21, 2010, the Commission responded to Appellant's appeal request and agreed to  
24 hold the appeal in abeyance "pending actions by [counsel for Sierra Club] to further quantify the  
25 nature of the appeal and/or negotiate resolution of outstanding issues with NDEP and/or NV  
26 Energy."

27                    In the absence of any further pleadings by the Appellant to quantify the nature of its  
28 appeal, on September 10, 2010, NDEP requested that the Commission order pre-hearing briefs

1 concerning the issues to be presented. By Order dated September 22, 2010, the Commission set  
2 forth a briefing schedule whereby Appellant was ordered to file a brief with the SEC on or before  
3 October 7, 2010. The Commission further ordered the appeal hearing to take place November 4  
4 and 5, 2010.

5 On October 6, 2010, Appellant filed its present Motion. By email submitted at 11:36 PM  
6 on October 7<sup>th</sup>, the Appellant submitted "a protective filing, only" of Appellant's opening brief.  
7 See Exhibit 3.

## 8 II. DISCUSSION

9 As discussed in more detail below, the Motion seeks actions by the Commission that are  
10 neither justified nor warranted. Appellant's Motion seems only to underscore the fact that its  
11 own actions have caused the problems for which they now seek relief from this Commission.  
12 Notwithstanding the fact that their timing woes are the result of their own actions or inaction, the  
13 relief they seek is in no way appropriate in this proceeding.

### 14 A. Request for Issuance of Subpoena to Compel Production of Documents

15 Appellant's request to subpoena documents is wholly unsupported and without merit.  
16 Appellant seeks documentation from NDEP and NV Energy that was not developed as part of  
17 this permit application process. Appellant's recent public record requests to NDEP pertain to  
18 documentation that relate to the ongoing groundwater investigation under the oversight of  
19 NDEP's Bureau of Corrective Action ("NDEP/BCA"). NV Energy, under the oversight of  
20 NDEP/BCA, has been separately conducting groundwater investigation and characterization  
21 activities pursuant to the Administrative Order on Consent dated February 21, 2008 (the  
22 "AOC"). NV Energy voluntarily entered into the AOC with NDEP as a means to responsibly  
23 address the historic impacts at the Reid Gardner Station, and which have nothing to do with  
24 current operations of the facility. NV Energy has been working under the terms of the AOC for  
25 over two and a half years and has already spent significant sums on preliminary investigation and  
26 characterization work. NV Energy has committed to a long-term effort to fully understand  
27 historic impacts, which in accordance with the AOC schedule is expected to continue through the  
28 year 2014.

1 From the beginning, Appellant has been intent upon confusing the issues in this permit  
2 proceeding. Neither NV Energy nor NDEP have suggested that there are not areas of potential  
3 groundwater impact at the Reid Gardner facility. Quite the contrary, as NV Energy voluntarily  
4 entered into the AOC with NDEP to conduct a long term groundwater investigation,  
5 characterization and remediation program to address groundwater impacts that may have resulted  
6 from historic operations at the facility. NV Energy has been in complete compliance with the  
7 terms of the AOC, which is being conducted under the oversight of NDEP/BCA.

8 Pursuant to the Commission's Rules of Practice, there must be good cause shown by the  
9 Appellant for the Commission to issue a subpoena. NAC 445B.892. Since the Appellant  
10 continues to request documentation that has no relevance to this Permit Renewal, Appellant has  
11 not provided good cause for the Commission to issue such a subpoena in this matter. Sierra Club  
12 is always free to submit requests for public records pursuant to the Nevada open records law,  
13 regardless of relevance to this proceeding. *See* Chapter 239, Nevada Revised Statutes.  
14 However, Sierra Club's belief that they have not received documentation timely does not give  
15 them the right to subpoena documents that have no relevance to this proceeding.

16 **B. Request to Vacate Hearing Dates and Briefing Schedule**

17 Appellant has failed to show any good cause for the Commission to vacate the hearing  
18 date and briefing schedule ordered by the Commission in this matter. NAC 445B.894. As  
19 discussed in Part I of this Reply, Appellant had ample time to develop its appeal in this matter.  
20 Appellant was actively involved during the public comment period before the Permit Renewal  
21 was issued. Appellant filed its appeal request over three months ago. In fact, after alleging in its  
22 appeal request insufficient notice to prepare proper grounds for appeal before the 10-day appeal  
23 deadline, Appellant nonetheless failed to file any subsequent refinement to its initial pleading. It  
24 was not until the final minutes of October 7<sup>th</sup>, the deadline for Appellant's brief in this  
25 proceeding, that Appellant filed its opening brief as a "protective filing, only". It defies logic  
26 that Appellant, an active participant in this permit application process, could not find sufficient  
27 time to prepare an appeal brief three months after filing its request for appeal. As noted above,  
28 Appellant's alleged inability to timely receive and review documents from NDEP has no

1 relevance to this proceeding, since such documents only relate to the groundwater investigation  
2 and characterization activities being conducted pursuant to the AOC under the oversight of  
3 NDEP/BCA.

4 **C. Request for Preliminary Injunction to Suspend the Effectiveness of the Permit**  
5 **Pending Appeal and Halt Construction of New Ponds on the Mesa.**

6 Of all Appellant's requests in this Motion, its argument for preliminary injunction is  
7 clearly the most strained and inappropriate. Perhaps most stunning, Appellant offers no legal  
8 support for its request of this Commission to grant the extreme remedy of a preliminary  
9 injunction. If Appellant had taken the time to explain the legal bases for awarding a preliminary  
10 injunction, it would quickly become obvious to the Commission that such a request cannot  
11 withstand legal scrutiny.

12 Commission appeal hearings are "contested cases," and therefore subject to the contested  
13 case provisions of the Nevada Administrative Procedures Act. NRS 233B.121 et. seq. *See*  
14 Exhibit 4. To the extent the Commission has any legal authority to award a preliminary  
15 injunction, such authority would come from NRS 233B.140, which provides in pertinent part:  
16 "A petitioner who applies for a stay of the final decision in a contested case shall file and serve a  
17 written motion for the stay on the agency and all parties of record to the proceeding at the time of  
18 filing of the petition for judicial review." [emphasis added]. Needless to say, the Appellant did  
19 not make such a written motion at the time it filed its appeal. In fact, this request for injunction  
20 comes over three months after our Permit Renewal was issued. Therefore, Appellant's Motion  
21 fails based solely on the clear reading of the pertinent statute.

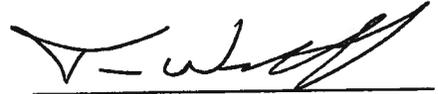
22 However, even if one looks past that fatal legal flaw in the Motion, Appellant has made  
23 no attempt to show the Commission how this request satisfies the high burden for awarding a  
24 preliminary injunction. Under well established Nevada law, a preliminary injunction is  
25 available when the movant can demonstrate that (i) the non-moving party's conduct, if allowed  
26 to continue, will cause irreparable harm for which compensatory relief is inadequate and (ii) that  
27 the movant has a reasonable likelihood of success on the merits. *See Boulder Oaks Community*  
28 *Ass'n v. B & J Andrews Enterprises, LLC*, 215 P.3d 27, 31; *See also* NRS 33.010.

1 Appellant has offered no argument for its likelihood of success on the merits or that NV  
2 Energy's authorized activities pursuant to the groundwater discharge permit are causing  
3 irreparable harm. Of course, Appellant cannot reasonably argue that it is likely to succeed on the  
4 merits considering that it has still not fully developed its full grounds for appeal, and the  
5 allegations Appellant has offered to date have no relevance in this proceeding (as discussed  
6 above). To the extent Appellant has offered a fully developed argument in its appeal, it has  
7 certainly not shown any likelihood to succeed on the merits.

8 Similarly, it is hard to fathom how Intervenor's continued activity under its approved  
9 Permit Renewal would cause "irreparable harm" to Appellant. NV Energy maintained full  
10 compliance with its previous groundwater discharge permit issued by the NDEP in October  
11 2005, of which this Permit Renewal is replacing. In fact, this Permit Renewal is one component  
12 of a larger plan to improve from both an environmental and operational perspective the manner  
13 in which the Facility utilizes its evaporation ponds. This Permit Renewal expressly contemplates  
14 ultimate closure of our existing ponds that are located closer to groundwater in favor of newly  
15 constructed, double-lined ponds on the Mesa that have an approximate 150 ft depth to  
16 groundwater. NV Energy's continued operations pursuant to its Permit Renewal serve to  
17 mitigate potential future impacts to the environment; a far cry from "irreparable harm."

18  
19 In summary, for the reasons discussed above, Intervenor opposes Appellant's Motion and  
20 requests that the Commission deny it *in toto*.

21 RESPECTFULLY SUBMITTED

22 

23 Thomas C. Woodworth  
24 Assistant General Counsel  
25 NV Energy  
26 6226 West Sahara Ave, MS 03A  
27 Las Vegas, NV 89146  
28 (702) 402-5694

CERTIFICATE OF SERVICE

I certify that on October 15, 2010, I served a copy of the foregoing document to the following by electronic means, as well as by U.S. Mail, postage prepaid:

Dan Galpern  
Staff Attorney  
Western Environmental Law Center  
1216 Lincoln Street  
Eugene, OR 97401  
(541) 485-2471 x114  
[galpern@westernlaw.org](mailto:galpern@westernlaw.org)  
*\*\*Attorney for Sierra Club*

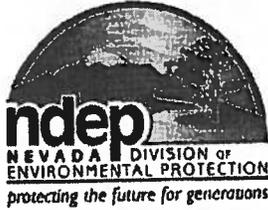
Megan Anderson  
Staff Attorney  
Western Environmental Law Center  
208 Paseo del Pueblo Sur, Unit 602  
Taos, NM 87571  
(575) 613-4195  
[Anderson@westernlaw.org](mailto:Anderson@westernlaw.org)  
*\*\*Attorney for Sierra Club*

Carolyn E. Tanner, Deputy Attorney General  
State of Nevada  
Office of Attorney General  
5420 Kietzke Lane, Suite 202  
Reno, NV 89511  
*\*\*Attorney for Nevada Division of Environmental Protection*



Thomas Woodworth  
Assistant General Counsel  
NV Energy  
6226 West Sahara Ave, MS 03A  
Las Vegas, NV 89146

# **EXHIBIT 1**



# STATE OF NEVADA

Department of Conservation & Natural Resources

*Jim Gibbons, Governor*

*Allen Biaggi, Director*

DIVISION OF ENVIRONMENTAL PROTECTION

*Leo M. Drozdoff, P.E., Administrator*

## PUBLIC NOTICE OF PROPOSED ACTION

Web posting 10/21/09

The Administrator, Division of Environmental Protection, Carson City, Nevada is issuing the following notice of proposed action under the Nevada Revised Statutes.

The Administrator has received a complete application for renewal of water pollution control discharge permit #NEV91022 from the following applicant:

NV Energy  
6226 W. Sahara Ave.  
Las Vegas, Nevada 89146

NV Energy operates the Reid Gardner Station, at a site located approximately 60 miles northeast of Las Vegas, in the Moapa Valley, in Sections 5&6, T15S, R66E MDB&M, Latitude: 36°39'30"N; Longitude: 114°38'20"W. Access to the facility is via Interstate 15, exit 88 (Wally Kay Road). The plant is a 4-unit 650 Megawatt coal fired, power generating facility. The permit is for the discharge of power plant generated waste streams to double-lined evaporation ponds. The proposed discharge permit is for a period of five years.

On the basis of preliminary review of the requirements of the Nevada Revised Statutes (NRS) and implementing regulations, the Administrator proposes to issue a groundwater discharge permit, subject to certain effluent limitations and special conditions.

Persons wishing to comment upon or object to the proposed determinations by the Administrator regarding permit issuance or request a hearing pursuant to the Nevada Administrative Code, Water Pollution Control should submit their comments or request, in writing or by Fax, within thirty (30) days of the date of newspaper publication, by 11/30/2009, either in person or by mail to:

Nevada Division of Environmental Protection  
Bureau of Water Pollution Control  
901 S. Stewart St., Ste. 4001  
Carson City, NV 89701

Page 2  
Public Notice of Proposed Action  
NV Energy -Reid Gardner Station

The request must be filed within the comment period and must indicate the interest of the person filing the request and the reasons why a hearing is warranted. All comments or objections received within thirty days will be considered in the formulation of final determinations regarding the application. If written comments indicate a significant degree of public interest in the proposed permit, the Administrator shall hold a public hearing. A public notice of such hearing will be issued not less than thirty days prior to the hearing date.

If no hearing is held and the determinations of the Administrator are substantially changed from the tentative determinations, the Administrator will give public notice of the revised determinations. Additional comments and objections will be considered at that time.

The application, proposed permit, comments received, and other information are on file and may be copied, or copies may be obtained by writing to the above address or by calling Jeryl R. Gardner of the Bureau of Water Pollution Control at (775) 687-9423, or FAX (775) 687-4684. Copies of the Fact Sheet and Public Notice may be viewed or printed from the NDEP website at <http://ndep.nv.gov/admin/public.htm>.

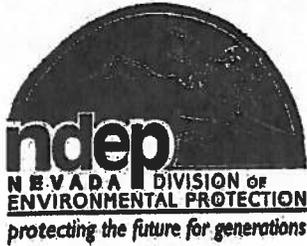
Please bring the foregoing notice to the attention of all persons whom you know would be interested in this matter.

This Document is for Electronic Distribution

901 S. Stewart Street, Suite 4001 • Carson City, Nevada 89701-5249 • p: 775.687.4670 • f: 775.687.5856 • [ndep.nv.gov](http://ndep.nv.gov)

- - 0004

# **EXHIBIT 2**



# STATE OF NEVADA

Department of Conservation & Natural Resources

*Jim Gibbons, Governor*

*Allen Blaggi, Director*

**DIVISION OF ENVIRONMENTAL PROTECTION**

*Leo M. Drozdoff, P.E., Administrator*

June 24, 2010

## **NOTICE OF DECISION**

**PERMIT NUMBER NEV91022**

**NV ENERGY, INC.**

**REID GARDNER STATION**

The Nevada Division of Environmental Protection (NDEP), Bureau of Water Pollution Control (BWPC) has decided to issue the State of Nevada Groundwater Permit NEV91022. This permit authorizes discharge of process and non-process water to evaporation ponds located at the Reid Gardner Station (RGS) in Moapa, Clark County, Nevada, operated by NV Energy. Sufficient information has been provided, in accordance with Nevada Administrative Code (NAC) 445A.228 through NAC 445A.263, to assure the BWPC that the waters of the State will not be degraded from this operation and that public safety and health will be protected.

This permit will become effective June 25, 2010. The final determination may be appealed to the State Environmental Commission pursuant to Nevada Revised Statutes (NRS) 445A.605. The appeal must be requested within ten (10) days of the date of this notice of decision and in accordance with the administrative rules of the Commission.

During the comment period, comments were received from members of the Moapa Band of Paiutes. The majority of the comment letters requested a public hearing to learn more about the permit and waste streams discharged from RGS. One letter focused on the pond odors and chemicals being discharged to the ponds, and requested a long-term exposure risk study, outside of the scope of BWPC regulations and permitting authority. One additional letter primarily addressed air emissions, and recommended: conducting a health feasibility study to look at health consequences of living near RGS, to be paid for by

NV Energy; a tribal lifestyle study be conducted to identify exposure and risk, to be paid for by NV Energy; and increased public outreach and education on plant operation. On June 3, 2010 NDEP held a public hearing and meeting to provide information on the BWPC permit and to receive comments and questions. Much of the comments dealt with issues outside the scope of the permit or regulations and authority of BWPC. Because the comments have been answered and the follow-up comments raised no new permit issues, NDEP has made the determination to re-issue the permit.

Should the public seek information on the NV Energy –Reid Gardner Station that is outside the scope of BWPC regulations and authority, and BWPC permit requirements, they may contact the following:

Landfill and Health Questions: Southern Nevada Health District (Dennis Campbell 702-759-0555)  
Pond Closure Questions: NDEP –Bureau of Corrective Actions (Shannon Harbour, P.E. 775-687-9332)

## RESPONSE TO PUBLIC COMMENTS FROM CORRESPONDENCE RECEIVED

Letter received November 2, 2009 from Vernon Lee, Moapa Band of Paiutes Tribe member

1.1

**Comment:** *For years, we in my neighborhood, have suffered from the effect of these ponds, I have seen children with bloody noses for no apparent reason, elders who have endured the long term exposure to the foul smell that often blow from those ponds, and nobody has explained, exactly what chemicals are being disposed of, how much volume has been put into these ponds, and what are the dangers of the long term exposure. It is my belief that we as a "Native People" have been exposed to a, serious hazard, by the continuous expansion of these ponds, and without a complete in-depth study of the full effects of a long term exposure to these toxic atmospheres, we will continue to be damaged.*

**Response:** The Reid Gardner Station (RGS) water pollution control permit, NEV91022, is a zero-discharge permit. The evaporation ponds do not discharge to groundwater like infiltration basins. Chemicals discharged into the ponds include a corrosion inhibitor and biocide used to prevent scale in the cooling towers, caustic soda neutralized with a weak acid to form salt and water, and oxygen sources used during warmer weather. Maximum permitted total discharge to the ponds is 0.576 million gallons per day. No discharge is allowed to surface water, specifically the Muddy River. The double-lined leak detection and collection system meets the NDEP regulations for zero-discharge impoundments. All of the currently active ponds are individually lined with two geomembrane liners, a 60-mil HDPE primary liner and 40-mil HDPE secondary liner with an interstitial leak detection and collection system. All of the proposed Mesa ponds will be individually lined with two geomembrane liners, an 80-mil HDPE primary liner and a 60-mil HDPE secondary liner with an interstitial leak detection and collection system. Leakage rates greater than 500 gpd/acre will be reported to the Division within 24 hours. Leakage from the primary liner will not result in a discharge to the environment; this leakage is intercepted by pumps in the interstitial space between the primary and secondary linings, and is collected and pumped back to the evaporation ponds. To ensure that water quality is not degraded RGS is required to monitor both groundwater and the Muddy River for a suite of parameters. Long term exposure risks and other health studies are not authorized under BWPC regulations. The permit is protective of the environment and public health.

1.2

**Comment:** *NV Energy's (Nevada Power) Reid Gardner Station is 1 mile from our reservation, it began as a single 125 megawatt unit, it has grown to 4 units with 650 megawatts, this growth has encroached to less than one-half of a mile from our community. Native people have a connection to the earth, the ground we walk on, and air we breath, we can no longer function culturally. The time has come for the Nevada Division of Environmental Protection to realize that this*

*Tribe is in danger. The simple renewing of a permit should not and cannot be allowed.*

Response: The Division notes the concerns of the Tribe. The renewal permit is protective of the environment and public health (see Response to Comment 1.1).

The NDEP received 56 Letters between November 23, 2009 and November 30, 2009, from 55 members of the Moapa Band of Paiutes: Delores Simmons, Brenda Tom, Arrion Henry, Sandra Bushhead, Ian Zabarte, Delia Grassrope, Jorge Hernandez, Howard Swain, Kenneth Haitty, Vernon Lee, Sharlene Frank, Cynthia Dotson, Shane Tom, Veronica Zubia, Darleen Etter, Simone Levi, Amber Simmons, Gary Lee, Karen Brown, Calvin Meyers, Karen Benn, Julie Simmons, Arnold Segmiller, Ural Begay, Erika Lee, Finley John, Cynthia John, Linda Donahue, Kami Miller, La Dawn Levi, Diana Croci, Gwendolyn Tom, Mary Jane Levi, Raphela Spute, Jacquie Lee, Elliott Bushhead, Shirley Anderson, Anthony Frank, Iris Daboda, Juanita Kinlichinic (2 letters), Russell Samson, Preston Tom, Miracle Domingo, Eunice Ohte, Lalovi Miller, Deanna Domingo, Stephanie Osborne, Ashly Osborne, Roger Levi, Darryl Ohte, Eulalia Hartt, Nadine John, Marcia Bushhead, Adrian Tom, and William Anderson.

2.1

Comment: *I am requesting a hearing to learn more about the permit and the waste streams discharged from Reid Gardner Station.*

Response: NDEP conducted a hearing in Moapa, Nevada on June 3, 2010 and provided information on the Water Pollution Control permit.

**Letter received 12/02/09 from Moapa Band of Paiutes Council Chairman, Darren Daboda**

3.1

Comment: *A health feasibility study should be conducted to look at the primary health consequences, vulnerable segments of the population and recommended risk mitigation measures from toxins emitted from Reid Gardner Station should be paid for by the polluter. A study of the tribal lifestyle and culture should be conducted to identify increased risk of exposure to toxins emitted from the Reid Gardner Station through unique exposure pathways and provide culturally appropriate recommendation to mitigation to protect the tribal community should be paid for by the polluter.*

Response: NDEP-BWPC regulations do not authorize us to conduct health feasibility or tribal lifestyle or risk/exposure studies (see Response to Comment 1.2).

3.2

Comment: *Increased public outreach and education on plant operation should be provided to the tribal community to repair tribal community perception of tribal community wellbeing and paid for by the polluter.*

Response: See Response to Comment 2.1.

**Letter received June 3, 2010 from Daniel Galpern/ Western Environmental Law Center**

4.1

Comment: *We submit these comments on behalf of the Sierra Club. Members of Sierra Club live, work, and engage in recreation in areas that will be impacted by Reid Gardner pollution and are deeply concerned about the Draft Permit. In particular the groups are concerned about (1) the Draft Permit's inadequate protection of groundwater, surface waters, and human health, and (2) your apparent wholesale failure to take climate change into account when deciding whether to issue this renewal permit.*

Response: The BWPC zero-discharge permit requires Reid Gardner to abide by applicable State regulations. The permit is protective of the environment and human health (see Response to Comment 1.1). BWPC permits do not have regulatory authority regarding climate change.

4.2

Comment: *Coal fired power plant pollution threatens the rivers, streams, and air in Nevada and nationwide. The U.S. Environmental Protection Agency ("EPA") has made clear that "coal combustion wastewater [has] the potential to impact human health and the environment." As existing and proposed coal-fired plants are submitted to mandatory permitting processes, state regulatory agencies, including the Nevada Division of Environmental Protection ("NDEP"), gain the opportunity to protect public health and environment. We urge you to not waste that opportunity. This is critical with respect to NV Energy's Reid Gardner Station ("Reid Gardner") since this facility has, at best, a dismal history of non-compliance with state and federal laws that aim to protect the environment and public health.*

Response: The facility is in compliance with all NDEP-BWPC regulations and the current BWPC permit requirements.

4.3

Comment: *Reid Gardner recently installed baghouses that are purported to "catch" 99% of particulate matter emitted from the plant. This reduction in air pollution, while welcome in itself, threatens ground and surface waters with undue contamination. In this regard, it falls to NDEP to protect the citizens of Nevada from this air-to-water pollution re-shuffling.*

*The problem is acute with regard to the wastewater discharge permit for Reid Gardner. On the one hand, NDEP asserts in the Draft Permit that it allows for no discharge to the ground, surface or waters of the state (Section I.A.1). On the other hand, the Draft Permit in fact allows substantial discharge to the environment without penalty.*

*In particular, the Draft Permit allows 576,000 gallons of wastewater each day to flow to the evaporation ponds. The Draft Permit also allows for Reid Gardner to leak up to 500 gpd/acre from each of the 95 total acres of those ponds. Thus, under its proposed permit terms, Reid Gardner would be allowed to discharge more than 47,400 gallons of untreated wastewater contaminated by dangerous by-products of the coal combustion process into the environment.*

*Eventually, much of this pollution will find its way to groundwater or to the Muddy River. The total threat exceeds 17 million gallons of such pollution annually. Ground water quality and the quality of the Muddy River will be degraded. Thus, although NDEP describes this Draft Permit as a "no discharge permit," the enormous amount of pollution it in fact allows raises questions beyond lexicology.*

*We urge NDEP to reconsider its decision to issue a water pollution control permit to Reid Gardner, period. In the alternative, the Draft Permit must be redrawn as ensure that it delivers what is promised, namely elimination of all discharges and protection of the Muddy River's water quality, area groundwater, and human health.*

**Response:** The zero-discharge permit does not allow discharge to surface waters, specifically the Muddy River, and the evaporation ponds do not discharge to groundwater. The allowable leakage is not to the environment, but is captured and returned to the ponds. The action leakage rate (ALR) measures transmittance through the primary liner from minor defects including pinhole leaks not visible until the pond is in service and leakage collected. The Division's ALR of 500 gallons per day (gpd) per acre for surface impoundments is found in the Engineering Guidance Document, "Ten States Standards". The zero-discharge permit prohibits degradation of water quality. (See Response to Comment 1.1)

**4.4**  
**Comment:** *Well samples reported to NDEP in quarterly discharge monitoring reports for the Reid Gardner Station show ongoing and increasing exceedences for allowable levels of chloride, sulfate, nitrate, arsenic, boron, chromium, magnesium, manganese, molybdenum, and vanadium as well as continuing exceedences for TDS, selenium, sodium, and titanium.*

**Response:** The BWPC permit requires monitoring of these parameters but there are no documented exceedences. For information on the NDEP -Bureau of Corrective Actions (BCA) monitoring requirements and site-specific action limits contact BCA representative, Shannon Harbour, P.E.

**4.5**  
**Comment:** *Administrative actions aimed at halting migration of Reid Gardner's contaminants have been undertaken by NDEP from at least 1997, when NDEP*

*issued an Administrative Order on Consent (AOC). The latest AOC dates from 2008.*

**Response:** NDEP-BWPC issued an AOC in 1997 requiring that all ponds be closed or cleaned and lined with HDPE double liners with leak detection and collection systems. The facility has complied with all the requirements of the 1997 AOC. NDEP-BWPC has issued no further AOCs to RGS. The BCA issued an AOC in 2008 to RGS. For further information on the BCA AOC contact the BCA representative, Shannon Harbour, P.E.

4.6

**Comment:** *First Quarter 2007 DMR reports of monitoring wells showed exceedances of NV action levels for at least one of the above-denoted parameters in 55 of the 62 wells sampled. In response to this contamination, a NDEP enforcement action ordered NV Energy to implement corrective measures. Yet, by 2010, based on the most recent publicly available monitoring well sampling report, the groundwater contamination situation has not improved despite the AOC; indeed, with respect to most parameters, it has worsened.*

*Thus, in 2010, at least one measured contaminant was found in 56 of 60 wells sampled. 2010 arsenic levels remain at 4.6 times the state action level (the same as in 2007). Selenium levels for 2010 have climbed to 5.6 times the state action level (from 3 times that level in 2007). TDS levels climbed to 62.3 times the state action level in 2010 (from 54.5 times that level in 2007). Boron levels, which were 371 times the state action level in 2007, climbed to 536 times the state action level in 2010. Other contaminants also remain at egregiously high levels.*

*Because groundwater testing shows continued contamination --as evinced by increased concentrations of site related chemicals found in monitoring wells down-gradient of existing evaporation ponds -- NDEP must withhold the renewal permit.*

*NRS 445A.495(1) provides that "[T]he Department may issue a new permit upon expiration of an existing permit if ... the holder of the permit is in full or substantial compliance with all the requirements and schedules of compliance of the expired permit" among two other mandatory requirements.*

*Section I.A.4 in the existing Permit attempts to ensure the quality of groundwater. Since groundwater contamination stemming from the facility has increased over the most recent three year period, it is clear that Reid Gardner is not "in full or substantial compliance with the requirements" of its existing permit and is, moreover, unlikely in the extreme to be able to eliminate all discharges/leakages in compliance with the qualitative effluent limitation described in I.A.1 of the Draft Permit. Further, at today's hearing in Moapa, an NDEP official admitted that existing evaporation ponds utilize substandard technology that fail to adequately protect the groundwater. The facility's existing use of substandard*

*and insufficient technology, even in the face of recurrent state efforts to mandate improvements, provides no confidence in Reid Gardner's ability and willingness to do better under the Draft Permit. Moreover, because the facility is far from "full or substantial compliance," the NDEP is barred by statute from issuing Reid Gardner a renewal permit. We request that the Draft Permit at issue here be withheld in light of the Facility's failure to meet the requirements of NRS 445A.495(1).*

**Response:** The former clay ponds that were required to be closed or lined, have been closed or cleaned, dried and lined by RGS. The facility is in compliance with the BWPC zero-discharge permit (see Response to Comment 4.2).

4.7

**Comment:** *The State of Nevada incorporates the Clean Water Act in Nevada Revised Statutes ("NRS") 445A.300 through 445A.730 in the Nevada Water Pollution Control Law ("NWPCCL"). The purpose of the NWPCCL is "to maintain the quality of the waters of the State consistent with the public health and enjoyment, the propagation and protection of terrestrial and aquatic life, the operation of existing industries, the pursuit of agriculture, and the economic development of the State." NRS 445A.305(2)(a).*

*The objective of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." § 101(a), 33 U.S.C. § 1251(a). The CWA established a national goal to eliminate "the discharge of pollutants into navigable waters by 1985." § 101(a)(1), 33 U.S.C. § 1251(a)(1). The CWA strives to achieve this objective by a combination of technology based and technology forcing standards. Effluent limitations are technology based and determined for categories and classes of point sources. § 301, § 33 U.S.C. § 1311; § 304, 33*

*U.S.C. § 1314. State water quality standards (WQS) are technology forcing and do not take cost into account in determining water quality. § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A). Additionally, the CWA sets out to prevent waters from becoming degraded by the cumulative impacts of many polluters by requiring states to adopt "antidegradation" policies. See CWA § 303(d)(4)(B), 33 U.S.C. § 1313(d)(4)(B); 40 C.F.R. § 131.12. NDEP must ensure that the evaporation ponds' NPDES permit is consistent with and implements CWA's antidegradation policy.*

**Response:** The Clean Water Act pertains to jurisdictional waters only, not groundwater. The permit is a State-issued, zero-discharge permit, not a Clean Water Act permit.

4.8

**Comment:** *Discharges from the Ponds to the Muddy River pose significant human health and environmental threats. By-products and waste from the coal combustion process at Reid Gardner will be disposed of in the ponds, which contain fly ash,*

*scrubber sludge, bottom ash, slag, and waste water treatment. Leachate from the ponds of up to 500 gallons per day per acre will be allowed without immediate reporting or repair requirements. Coal combustion waste is enormously dangerous and the evaporation pond's discharges pose significant environmental risks.*

*Furthermore, the dangers of coal ash waste have been highlighted in Sierra Club's recent comments to the Missouri Department of Natural Resource regarding the draft Sibley Generating Station Utility Waste Landfill NPDES permit, #MO-0136131. These comments have been attached in Appendix A and we specifically incorporate by reference the substantive and scientific points in those comments, including the sources it relied upon.*

Response: No discharge to surface waters, specifically the Muddy River, or groundwater is allowed under the permit, and the zero-discharge permit prohibits water quality degradation.

4.9

Comment:

*The dangerous contaminants found in coal combustion waste have the potential to impact human health and the natural environment. According to the EPA, pond leachate and storm water runoff will contain high concentrations of these contaminants through their contact with coal combustion waste.*

*Studies have shown that the pollutants present in discharges from coal-fired power plants can affect aquatic organisms and wildlife, resulting in lasting environmental impacts on local habitats and ecosystems. Peer-reviewed literature has documented the impacts resulting from intentional and accidental surface water discharges of wastewater from coal-fired power plants, as well as environmental impacts from leachate from waste management units (i.e., surface impoundments and landfills) entering the ground water system.*

*EPA's review of wastewater discharges from power plants, and the treatment technologies available to reduce pollutant discharges, has indicated the need to update the current national effluent guidelines regulations. The current regulations, which were last updated in 1982, do not adequately address the pollutants being discharged and have not kept pace with changes that have occurred over the last three decades.*

*The Reid Gardner Station's wastewater discharge and contact storm water will be collected in evaporation ponds, which have the potential to leak millions of gallons directly into the Muddy River and surrounding groundwater without any treatment, posing grave risks to human health and the environment. The Draft Permit fails to include restrictions needed to protect against these risks. Sierra Club has two main concerns with the Draft Permit:*

*(A) It is inadequate and not stringent enough to protect groundwater, surface waters, and human health. (B) Issuance of the permit fails to address the climate change crisis.*

*A. The Draft Permit is inadequate to protect ground water, surface water, and human health. Given Reid Gardner's less than perfect compliance history & if the permit is to be renewed it should be substantially strengthened, not weakened. The fact that the Draft Permit has weaker terms in a number of respects discussed below illustrates that NDEP has failed to exercise its best professional judgment to protect public health and the environment. This is especially the case in light of the fact that the provisions at issue are unaccompanied by any reasoned justification for their weakening.*

*1. The Draft Permit increases allowable leakage rates and reporting thresholds. The 2010 Draft Permit only requires leaks over "500 gpd/acre" to be reported within 24 hours and to be repaired; smaller leaks can go unrepaired and need only be reported quarterly. The 2005 permit required that all leakages over "100 gpd/acre" be repaired, and reported within one week. This is a 400% increase in allowable discharges that do not have to be repaired nor reported immediately. We urge NDEP to establish a true "no discharge permit."*

*2. Failure to require reporting of all leakages, or at least those greater than 100 gpd/acre, within a 24-hour time period.*

*The 2010 Draft Permit only requires leakages over 500 gpd/acre to be reported within 24 hours. To be consistent with the 2005 permit, the threshold should be reduced to 100 gpd/acre. To allow leakages to not be reported except in quarterly reports is inadequate and harmful. Under this standard with the active 95 acres of evaporation ponds up to 47,405 gpd could leak without triggering a repair and immediate reporting requirement.*

*3. The language of Draft Permit it is ambiguous as to where sampling for pollutants under "Profile I" will occur. The 2005 Permit indicates sampling at ponds, while the 2010 Draft Permit suggests that the pond effluent sampling will occur at "pond leachate collection systems." The 2010 Draft Permit provides that all "active and proposed ponds are individually lined with two HDPE geomembrane liners . . . with an interstitial leak detection system." While it can be reasoned that this requires measuring Profile I pollutants in the ponds, it is not clear which ponds will have to be sampled and how often. The Draft Permit should amended to include sampling of all ponds each month.*

*4. The Permit does not measure "Flow Rate" through proposed ponds and leaves open that M-1, M-2, & M-3 will not be sampled for "Profile I" pollutants. The 2010 Draft Permit suggests that the pond "Flow Rate" will only be measured at one location, "Pond F Sump totalizing flowmeter." However, the 2010 Draft Permit indicates that three "additional evaporation ponds" (M-1, M-2, M-3) will be built during the duration of the Draft Permit. Later the Draft Permit states*

*that "Pond F Sump . . . discharges to Ponds B-1, B-2, B-3, C-1, C-2, E-1, E-2." This fails to make it clear what the flow measurement requirement for ponds M-1, M-2, M-3 will be. By not listing M-1, M-2, M-3, it appears that the NDEP expects the proposed ponds to be distant from the specified monitoring site for "Flow Rate." This interpretation seems consistent with the proposed ponds being located on a separate track of 555 acres of BLM land. The Draft Permit should be amended to expressly require the monitoring of "Flow Rate" at ponds M-1, M-2, M-3.*

*The Draft Permit does not effectively impose requirements to measure for "Profile I" pollutants at the proposed ponds. Given that the ponds are not yet built the 2010 Draft Permit should be amended to specifically require "Profile I" testing in each of the proposed ponds.*

*5. Several pollutants, including cyanide, are not covered not in the 2010 Draft Permit.*

*The 2005 Permit contains a list of pollutants to be monitored and reported, several of which have been removed from the 2010 Draft Permit. These include: chloride, ammonia as N, aluminum, potassium, sodium, and titanium. While the 2010 Draft Permit has added some pollutants, no reason is provided. Given Reid Gardner's compliance history, no pollutant that was once regulated should be removed from the permit without reasonable justification.*

*Nevada Administrative Code 445A.121 (NAC) contains standards that are applicable to all surface waters regardless of the permit. Subsection 7 provides that "wastes from municipal, industrial, or other controllable sources containing . . . cyanide . . . must not be discharged untreated or uncontrolled into the waters of Nevada." The pollutant cyanide is not listed in the Draft Permit, while all other pollutants under subsection 7 are listed in the Draft Permit. We request that the pollutant cyanide be reinstated, absent evidence that cyanide will not be used nor created in the coal combustion process.*

*B. The Draft Permit Must Take Climate Change Into Account.*

*The most recent report of the Intergovernmental Panel on Climate Change reinforces the need to rapidly transition our economy away from fossil fuel energy generation to renewable sources that do not emit greenhouse gas pollution into the atmosphere. If no action is taken in the near future, dangerous climate change could become truly irreversible. The United States Supreme Court held in 2007 that the EPA has authority to regulate carbon dioxide, a greenhouse gas, under the Clean Air Act, and this year the EPA responded with a finding carbon dioxide and other GHG pollution endangers human health and human welfare. With the federal government taking action to address greenhouse gases, it would be counterproductive for NDEP to issue permits that impair the nation's efforts to reduce atmospheric greenhouse gas concentrations. Thus, the*

*Division should only issue a permit to Reid Gardner if it reasonably finds that doing so will not impair the nation's goal to arrest climate change.*

*The effects of climate change will not be isolated to air temperatures. Changes in air temperature change moisture content and thus affect the hydrologic cycle. As the planet continues to warm ecosystems and people are rendered more vulnerable to environmental pollution. NDEP should take these issues into account when considering renewal of the permit.*

*Given that climate change will affect the hydrologic cycle, NDEP must look at how a reduction in stream flow will affect state water quality standards. Thus, NDEP must consider how climate change affects the likelihood that discharges, including leakages from the evaporation ponds, will violate water quality standards. In particular, NDEP must consider whether the Draft Permit includes leakage rates that will impair water quality in the Muddy River and the region's groundwater.*

*The environmental harms and human health risks associated with coal ash are a growing concern and affect communities across the nation. Despite the lack of updated federal standards, the Division has an opportunity to use its authority to protect Nevadans' water quality and health from the toxic contaminants that will be discharged from the Reid Gardner power plant. We request that the Draft Permit be made more stringent than the previous permit to protect groundwater, surface waters, and human health. Furthermore, we request that the Division modify the Permit to address its impact on climate change and the cumulative impact of climate change Reid Gardner pollution on local ecosystems and public health on the project.*

**Response:** The 2010 zero-discharge permit has been amended to clarify pond monitoring at the outfall of the Effluent Forwarding Pumping System (system that will pump fluid to the proposed Mesa ponds. (The permit has also been revised to reflect the correct numbering of the Mesa ponds to be utilized first.) All pollutants required to be monitored by the 2005 permit are required to be monitored by the 2010 permit and are summarized in the Table separately or grouped under Profile I. Cyanide is not required to be monitored by the 2005 permit or the 2010 permit. (See Responses to Comments 1.1, 4.1, 4.2, 4.3, 4.4, 4.5, 4.6, and 4.8).

**NDEP held a public hearing and meeting on June 3, 2010.**

During the hearing and meeting the NDEP provided information on the BWPC permit and responded to all comments and questions. Because no additional comments were made during the hearing and meeting and prior to issuing this Notice of Decision, and no objections to permit issuance were made, the NDEP has made the decision to re-issue the zero-discharge permit to NV Energy for the Reid Gardner Station, effective June 25, 2010.

# **EXHIBIT 3**

**Woodworth, Thomas**

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**From:** Daniel Galpern [galpern@westernlaw.org]  
**Sent:** Thursday, October 07, 2010 11:36 PM  
**To:** John Walker; Lina (Carolyn) Tanner; Woodworth, Thomas  
**Subject:** Appeal of Permit NEV91022: Protective Filing of Opening Brief  
**Attachments:** 20101007 Protective Opening Brief.pdf

Oct. 7, 2010

Mr Walker and Counsel,

Attached is a protective filing, only, of Appellants Opening Brief. We expressly reserve the right to file a revised and expanded version subsequent to the SEC's disposition of our Oct 6-filed motion.

Thank you.

--

Dan Galpern, Attorney  
Western Environmental Law Center  
1216 Lincoln Street  
Eugene, OR 97401  
(541) 359-3243  
[galpern@westernlaw.org](mailto:galpern@westernlaw.org)  
[www.westernlaw.org](http://www.westernlaw.org)

The Western Environmental Law Center is a non-profit public interest law firm that works to protect and restore western wildlands and advocates for a healthy environment on behalf of communities throughout the West.

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# **EXHIBIT 4**

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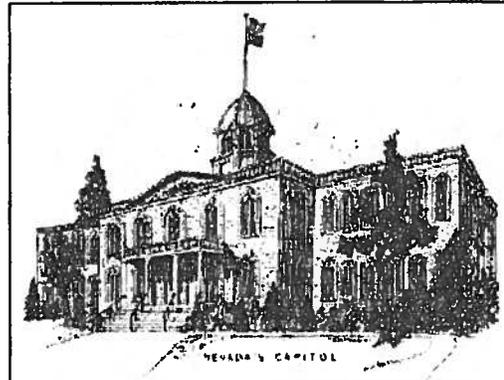
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## The SEC Appeal Process

The State Environmental Commission hears appeals of final decisions rendered by the Nevada Division of Environmental Protection (NDEP). Appeals may be filed on final agency decisions such as compliance orders, fines, issuance of permits etc. Appeals to the Commission must be submitted on SEC Form 3 and received timely, within 10 days after the date of a final decision (as per NRS 445B.340, NRS 445A.605, NAC 459.9995, NAC 445B.890, and NAC 519A.415). Please note that appeals not received timely will not be considered by the Commission.



There is however an exception to the 10 day filing requirement and that exception is contained in NRS 445A.690. Under this law (which is specific to Water Controls), "Any compliance order is final and is not subject to review unless the person against whom the order is issued, within 30 days after the date on which the order is served, requests by written petition a hearing before the Commission."

**Appeal Panel:** A three person panel of the SEC typically hears an appeal. An attempt will be made to hold appeal hearings within 20 days of receipt of the petition for appeal barring any extenuating circumstances. Appeal hearings are "noticed" to the parties of the appeal only. While SEC appeals are open public meetings, because they are "contested cases" they are not subject to Nevada's Open Meeting Law and thus "a public comment period" is not required at the hearing. The public, however, can attend an appeal hearing.

In a contested case, all parties must be afforded an opportunity for hearing after reasonable notice. The notice typically includes the time, place and nature of the hearing; a statement of the legal authority and jurisdiction under which the appeal will be held; a reference to the particular sections of the statutes and regulations involved; and a short and plain statement of the matters being contested.

While parties to the appeal are entitled to be represented by counsel, legal representation is optional. "Appellants" who bring appeals before the Commission can, and often do, represent themselves. The Division of Environmental Protection is represented by the Nevada Attorney General's office in all appeals before the Commission.

Under the SEC's Rules of Practice, a party other than the appellant (i.e., the individual making the appeal), can be admitted to a hearing as an intervener. An intervener has the same status, rights and privileges in the appeal process afforded to other parties. Typically an intervener can be an individual, organization, or business with a vested interest in the decision being appealed. Specific rules allowing interveners into the appeal process are defined in the SEC's Rules of Practice.

Since appeal hearings are contested cases, hearings are conducted much like a court case. The proceedings are officially recorded and parties present a case in chief, which might include opening statements, testimony (given under oath), cross examination, introduction of evidence (in the form of exhibits), etc. Of note, in order to focus the issues being contested and prior to an appeal hearing, the



Commission may by motion, or by motion of another party, order briefs. Briefs are typically ordered with an accompanying briefing schedule that specifies the timing of response briefs by other parties as may be required.

When the parties have finished their respective cases and the appeal hearing is concluded, the members of the appeal panel openly discuss the case and then rule by motion to either uphold, modify or dismiss the action being contested. The Commission may also take the case under submission and subsequently notify the parties 30 days after the hearing of its findings and recommendations. The final recommendation of the Commission is issued in writing and based on substantial evidence with a statement of findings of fact and matters of law. The final decision is issued as an order of the Commission.

Once again, appeals are contested cases, governed by Nevada Revised Statute 233B; example of recent appeals are referenced on the SEC home page under "Recent Appeal hearings."

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*Last updated 08/19/2010 12:54.03*



Webmaster



1 a. NDEP's Arguments Against Subpoenas of Documents

2 NDEP admits that the documents sought are public records to which Sierra Club has a  
3 right of access (NDEP Opp at 1). NDEP also asserts that it has "consolidated *most* of the  
4 documents regarding the Reid Gardner permit renewal process in its Carson City office." *Id.*  
5 (emphasis added). Notably, NDEP fails to say where or whether it has consolidated the rest of its  
6 documents relevant to the renewal of NEV91022. Nevertheless, NDEP asserts that "[f]or the  
7 past few months NDEP and its counsel have informed Sierra Club that the documents are  
8 available for review."

9 This last assertion is patently false, as NDEP's counsel for its Oct. 14-filed opposition  
10 brief surely understands from reading his co-counsel's Sept. 21 letter to Sierra Club.<sup>1</sup> That letter  
11 indicated that Sierra Club's Sept. 13 request for documents relevant to this appeal was being  
12 partly fulfilled by NDEP's Bureau of Corrective Actions. See attached Exhibit 1 to Resp to Opp.  
13 to the Motion. In it, Counsel Tanner committed to "get back to [Sierra Club] as soon as possible"  
14 as to five specific categories of additional data and document that Sierra Club had sought from  
15 NDEP's BWPC. These categories included (1) quarterly ground water monitoring reports, (2)  
16 information about leachate collected by mandated interstitial pond liner collection systems, (3)  
17 hydrogeologic site characterization and engineering design reports for the newly proposed  
18 wastewater ponds in the Mesa area, (4) existing pond documentation as to installation, hydraulic  
19 performance, performance of the leak collection system, and impacts on the Muddy River flood  
20 plain, and (5) The updated O&M Manual and Sampling and Analysis Plan required to be

20

<sup>1</sup> While the Oct. 14 filing and the Sept. 21 letter were both signed by the Attorney General, the Sept. 21 letter was written and co-signed by Deputy AG Carolyn Tanner, while the Oct. 14 filing was written and co-signed by Deputy AG William Frey.

1 submitted in September 2010. See Exh. 1 to the Motion: Correspondence with Parties Seeking  
2 Documents and Data, at 3-4.

3 Counsel Tanner also committed to advise Sierra Club "as soon as possible" as to  
4 "whether and where [additional documents sought by Sierra Club] exist within the public  
5 record," *Id.*, including many that were previously described in Sierra Club expert Elliott Lips's  
6 memo of Oct. 4. See Exhibit 2 to the Motion: Oct. 4 Memorandum from Elliot Lips.

7 To date, Counsel Tanner has neither made the requested documents available to Sierra  
8 Club nor advised Sierra Club as to their location or availability, except to have left an voicemail  
9 on Oct. 7 for Sierra Club counsel stating, in relevant part, that Sierra Club "had the opportunity  
10 to look at Water Pollution Control's documents a long time ago." See Exhibit 2 to Resp to Opp.  
11 to the Motion (verbatim transcript of voice mail from Dep AG Tanner). Sierra Club did, on three  
12 separate occasions, examine files of the BWPC, including as "long ago" as the end of June 2010.  
13 But while a number of relevant data documents were produced (and then, reproduced at Sierra  
14 Club's expense), many of the documents and data that Sierra Club has sought have (still) not  
15 been produced. Sierra Club lists these needed, relevant documents in Exh. 3 in Resp to Opp to  
16 Motion, SC Doc Requests Delineated. The requests were directed not only to Counsel Tanner,  
17 but also to (or copied to) Jeryl Gardner of the BWPC and to Shannon Harbour of the BCA.

18 In sum, NDEP's assertion that Sierra Club has had opportunity to review all of the  
19 documents comprising the record is inaccurate. NDEP has never produced a complete record,  
20 nor has it responded to Sierra Club's requests for documents that Sierra Club has shown should  
21 be part of the record -- either to deny the request as outside of the record, or to produce the  
22 documents.

23 b. NV Energy's Arguments Against Subpoenas of Documents

1 NV Energy argues that the documents Sierra Club seeks were “not developed as part of  
2 this permit application process,” but, instead, “pertain to documentation that relate to the ongoing  
3 groundwater investigation under the oversight of NDEP’s [BCA].” NV Energy “Reply” to Sierra  
4 Club Motion at 3. Sierra Club disputes that all the documents it seeks pertain to that “ongoing  
5 investigation.” Even if that assertion were true, it establishes nothing, since the content of a  
6 document can be relevant to two proceedings, even if it was “developed” for one. As was  
7 explained item by item in attached Exhibit 3, *Id.*, these documents clearly “pertain” to the  
8 question whether NDEP’s grant of NEV91022 was lawful. As was indicated in Sierra Club’s  
9 protectively-filed Opening Brief, Sierra Club believes that receipt of the full record – including  
10 the documents sought by Sierra Club that are being withheld by NDEP and NV Energy – is  
11 essential for it to ascertain whether NV Energy was in substantial compliance with key terms of  
12 its prior permit, or not in compliance and thus rendering invalid NDEP’s grant of the new permit.

## 13 14 **2 Vacatur and Continuance in the Proceedings, and**

15 NDEP argues against granting Sierra Club any additional time to review the documents it  
16 seeks because “all documents that NDEP relied on in making its decision to issue the permit  
17 existed in NDEP’s files prior to the permit’s issuance.” However, NDEP ignores a key question  
18 at issue in this appeal, namely whether the documents and data it considered, and its findings  
19 made after such consideration, were sufficient to ground its decision under the law.

20 First, the documents and data that Sierra Club has requested are relevant, as indicated  
21 above, to the questions (1) whether NV Energy was in substantial compliance with its prior  
22 permit terms, and (2) whether the terms of the presently-challenged permit are sufficiently  
23 protective of the environment in light of the relevant history and contemporaneous evidence of  
24 contamination. If the answer to either question is “no,” then NDEP’s grant of the permit is

1 | invalid under the law. Second, if NDEP failed to adequately consider that record and draft permit  
2 | terms in light of that record, then its decision to grant the permit was arbitrary or capricious, and  
3 | so also unlawful under the law.<sup>2</sup>

4 |       NV Energy commits the same logical error when it advances the argument that because  
5 | Sierra Club filed its notice of appeal over three months ago, it had "ample time to develop its  
6 | appeal in this matter." NV Energy Opposition at 4. This argument assumes that the record to  
7 | which Sierra Club has had access over that period was sufficient for such development. But, as  
8 | Sierra Club has shown, exhaustively, in its earlier motion and above, that is simply not the case.

9 |  
10 | **3. Preliminary Injunction to Suspend the Effectiveness of the Permit and Halt Construction**  
11 | **of New Wastewater Ponds**

12 |       Sierra Club seeks a temporary suspension of NEV91022, pending resolution of the  
13 | Appeal, pursuant to NRS 233B.127, in light of threat to public health posed by construction of  
14 | new wastewater ponds whose soundness of design has not been evaluated by NDEP nor by the  
15 | public.

16 |       In opposition to the motion, NDEP here makes a valid, but ultimately irrelevant, point in  
17 | asserting that relocation of wastewater ponds further from the Muddy River may be "more  
18 | protective of the environment than the current location." *See also* NV Energy Opp. at 6. NDEP  
19 | strays well beyond the evidence, however, in asserting that "the new construction will *ensure*  
20 | that these ponds are zero-discharge."

20

<sup>2</sup> Finally, for purposes of the present argument, NDEP here, as above, fails to indicate which documents it regards as exhaustively comprising the administrative record, to the exclusion of all other data and documents concerning the record and performance of Reid Gardner facilities that may impact or impair waters of the state.

1 NDEP's first assertion may be correct, assuming that the hydrogeological site  
2 characteristics and design details of the newly proposed ponds are adequate to the task. But  
3 these are the very details that NDEP (and NV Energy) continues to withhold from Sierra Club. It  
4 is also possible, given inadequacies as to site and proposed construction, that the proposed ponds  
5 will leach contaminants to groundwater, or even result in catastrophic failure (massive pond  
6 breaching). The devil is in the details, and Sierra Club's request for these documents, and  
7 NDEP's response, reveal that either these details do not exist or that NDEP has not considered  
8 them. Moreover, the question is not whether the location of the new ponds will be, on balance,  
9 more protective of the environment than the existing ponds, but rather, whether the new permit  
10 ensures that the new ponds and other facilities at Reid Gardner will be *sufficiently* protective of  
11 the environment, as required by law.

12 As to NDEP's second assertion, Sierra Club flatly rejects that NDEP or NV Energy can  
13 *ensure* against any discharge. Again, absent the details regard construction, design, site  
14 characteristics, *inter alia*, NDEP is not able to approximate the risk even on a qualitative basis.  
15 As noted above, it does not appear that NDEP has reviewed these documents as they have not  
16 even been produced as part of the record.

17 As was discussed briefly in Sierra Club's motion, in the course of its work on this appeal,  
18 Sierra Club has discovered what appears to be egregious evidence of contemporaneous leaching  
19 from existing ponds. The evidence was in the form of visual observations, and supported by  
20 photos, from Oct. 4. Sierra Club earlier conveyed this information to NDEP, but has received  
21 from NDEP no confirmation that it is investigating NV Energy for the substantial violations of  
22 its present permit that the supplied-evidence seems to support. Accordingly, we provide, as Exh.  
23 4 in Resp to Opp to Motion (Elliott Lips Memo re Discharge/Leachate) the same memorandum

1 from Sierra Club's expert in this matter that was earlier provided to NDEP, detailing potential  
2 leaching from existing ponds directly into the floodplain of the Muddy River.

3 Moreover, the sparse groundwater monitoring data to which the Sierra Club has been  
4 given access indicates that contamination of groundwater near the Muddy River has accelerated  
5 in recent years – after the double lining of all existing ponds.

6 In the absence of design and related details as to the proposed new wastewater ponds on  
7 the Mesa, Sierra Club and NDEP can only presume that the new ponds will be similarly designed  
8 – and will similarly leach contaminants to the environment, and eventually to downgradient  
9 reaches of the Muddy River. Because the only relevant time to prevent such contamination is  
10 prior to the disposal of wastewater in the ponds, it is incumbent on NDEP to act to halt  
11 construction of the new ponds before they are completed and filled. In light of NDEP's apparent  
12 failure to act, we have urged the Commission to do so – at least during the pending of the present  
13 Appeal.

14 Continued construction of the ponds, when such construction may ultimately be enjoined,  
15 allows NV Energy to invest additional resources into a project that may be unlawful. As such, at  
16 the very least, we request that the Commission not entertain any arguments by NV Energy that  
17 its expenditure of resources thus far is a reason to continue with the project. NV Energy has  
18 been on notice that the permit is being appealed since early July and its decision to move forward  
19 with construction nevertheless evidences a disregard for the possibility that the Commission may  
20 order NV Energy to substantially alter or halt its construction.

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**4. In Sum**

For the above reasons, Sierra Club urges the Commission to reject the arguments advanced by NDEP and NV Energy in opposition to Sierra Club's motion, as not persuasive, and further urges the Commission to grant the Sierra Club's motion in its entirety.

RESPECTFULLY SUBMITTED



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Daniel Galpern, Staff Attorney  
Oregon Bar No. 06195  
Western Environmental Law Center  
1216 Lincoln Ave.  
Eugene, OR 97403  
(541) 359-3243  
galpern@westernlaw.org

1 **CERTIFICATE OF SERVICE**

2  
3 The undersigned, Daniel Galpern, does hereby certify that on the 19th day of October, 2010, a  
4 true and correct copy of the foregoing MOTION TO ISSUE SUBPOENAS, VACATE  
5 HEARING AND SCHEDULING ORDER, AND SUSPEND PERMIT AND ISSUE  
6 INJUNCTION, was emailed, and mailed, postage prepaid, to the following:  
7

8  
9 John B Walker, State of Nevada  
10 State Environmental Commission  
11 901 South Stewart Street, Suite 4001  
12 Carson City, Nevada 89701-5249  
13 jbwalker@ndep.nv.gov  
14

15  
16 Carolyn E. Tanner, Deputy Attorney General  
17 Office of Attorney General  
18 100 North Carson Street  
19 Carson City, NV 89701  
20 ctanner@ag.nv.gov  
21 Attorney for Respondent NDEP  
22

23  
24 Thomas C. Woodworth, Assistant General Counsel  
25 NV Energy, Inc.  
26 6226 West Sahara Ave, MS 03A  
27 Las Vegas, NV 89146  
28 TWoodworth@nvenergy.com  
29 Attorney for Intervenor NV Energy  
30

31  


32  
33 Daniel Galpern, Staff Attorney  
34 Oregon Bar No. 06195  
35 Western Environmental Law Center  
36 1216 Lincoln Ave.  
37 Eugene, OR 97403  
38 (541) 359-3243  
39 galpern@westernlaw.org  
40  
41

1 BEFORE THE STATE OF NEVADA, STATE ENVIRONMENTAL COMMISSION

In Re: ) Declaration of Daniel Galpern  
Appeal of Water Pollution Control )  
Groundwater Permit NEV91022 )  
Reid Gardner Station )

2  
3 1. My name is Daniel Galpern. I am over the age of eighteen years. I am one of the  
4 counsel for Appellant Sierra Club in this case. I make this declaration in support of Sierra Club's  
5 response to the opposition to its motion for subpoenas, vacatur of hearing and briefing, and  
6 suspension of permit and injunction against construction and related site preparation activities.

7 2. Exhibit 1 provides a faithful copy of a letter to myself from Attorney General  
8 Cortez Masto, written by Dep. AG Carolyn Tanner, of Sept. 21, 2010.

9 3. Exhibit 2 constitutes the text of a voicemail left for me by Dep. AG Tanner on  
10 Oct. 7, 2010. Grammatical errors and ungrammatical sounds were not transcribed from the voice  
11 recording.

12 4. Exhibit 3 constitutes a delineation of the specific documents requested from  
13 NDEP and NV Energy at issue in this motion, the date of the request, and an explanation of the  
14 relevance to Sierra Club's evaluation of NEV 91022.

15 5. Exhibit 4 constitutes a faithful reproduction of a memo provided to me on Oct. 5  
16 by hydrogeologist Elliott Lips describing water pooling on otherwise dry ground in the  
17 floodplain of the Muddy River, below Reid Gardner wastewater pond E.

18 6. I declare under the penalty of perjury that the foregoing is true and correct to the  
19 best of my knowledge.



Daniel Galpern, Staff Attorney  
Oregon Bar No. 06195  
Western Environmental Law Center  
1216 Lincoln Ave.  
Eugene, OR 97403  
(541) 359-3243  
[galpern@westernlaw.org](mailto:galpern@westernlaw.org)

Oct 19. 2010



STATE OF NEVADA  
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street  
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO  
*Attorney General*

KEITH G. MUNRO  
*Assistant Attorney General*

September 21, 2010

JIM SPENCER  
*Chief of Staff*

VIA FACSIMILE AND U.S. MAIL

Dan Galpern, Esq.  
Western Environmental Law Center  
1216 Lincoln Street  
Eugene, Oregon 97401

Re: Reid Gardner Station Permit Appeal

Dear Dan:

In response to your letter dated September 13, 2010, and related correspondence regarding a request of public records, I submit this letter, the attached Division of Environmental Protection – Bureau of Corrective Actions ("NDEP – BCA") Redline Edit of your document entitled, "Documents Required by Sierra Club," and a copy of a letter from Shannon Harbour, NDEP – BCA, to Legal Copy Cats & Printing dated September 21, 2010.

Your records request, as set forth in the "Documents Required by Sierra Club," indicates that the records requested are all referenced in a document titled "Reid Gardner Station AOC Groundwater Investigation Encyclopedia of Supporting Documentation." Please be advised that this encyclopedia was prepared by Nevada Power Company, now known as NV Energy ("NVE"). This document was submitted by NVE to NDEP – BCA and is thus a part of the public record; however, NDEP cannot account for the accuracy of the information listed therein. For instance, Document 138, Renewal of Authorization to Discharge Permit dated 2/19/2004, does not accurately reflect the date of the permit renewal issued by NDEP for that time period. Accordingly, I have listed the document as not submitted.

In the attached redlined "Documents Required by Sierra Club," please note that NDEP – BCA highlighted in yellow are those documents that are in the possession of the NDEP – BCA. These have been submitted to Legal Copy Cats for reproduction. I trust you have set up an account to retrieve these documents. The documents that are highlighted in red are not in the possession of NDEP – BCA. It appears that most of these documents were not submitted to NDEP – BCA, and thus they are not a part of the public record. There are a few that I have noted will be cross-referenced with documents at the NDEP Bureau of Water Pollution Control ("BWPC"). I will advise you

Dan Galpern, Esq.  
September 21, 2010  
Page 2

on whether and where these documents exist within the public record as soon as possible.

In regards to the additional information you have requested in your letter of September 13, 2010, specifically items (1) through (5), NDEP BWPC is investigating whether and where these documents exist within the public record. On these, I will also get back to you as soon as possible.

As I previously indicated to you via e-mail, I can find no authority that would require NDEP to track down documents for the Sierra Club that were never a part of the public record and are solely in the possession of the intervenor, NVE. Similarly, I can find no authority that would require NDEP, as the regulator, to organize a site visit on NVE property for the Sierra Club. I suggest that you contact Tom Woodworth, Esq. at NVE to see what accommodations NVE will make for you.

Finally, at this stage of the appeal, I am not inclined to make NDEP staff available for questioning on the permit appeal. Obviously, you may ask questions of subpoenaed witnesses at any hearing on this matter, subject to objections by NDEP.

If you have any questions, please do not hesitate to contact me.

Sincerely,

CATHERINE CORTEZ MASTO  
Attorney General

By:

  
CAROLYN E. TANNER  
Deputy Attorney General  
(775) 684-1270

CET/lzd  
Enclosures

cc: Jon Palm, Chief, NDEP BWPC  
Jim Najima, Chief, NDEP BCA  
Shannon Harbour, NDEP BCA  
Alan Tinney, NDEP BWPC  
Jeryl Gardner, NDEP BWPC  
Tom Woodworth, Esq., NVE

**From:** <message-center@welc.voipbxsite.net>  
**Date:** Thu, 7 Oct 2010 13:15:53 -0700  
**To:** Daniel Galpern <galpern@westernlaw.org>  
**Subject:** Voicemail from 7758501468, 66 seconds

You have received a 66 second voice mail from 7758501468

"Hey Dan, this is Lina Tanner with the Nevada Attorney General's office. I got your message. Unfortunately, I would oppose that. While I appreciate that...any entity can do a public records request, the question is whether or not they're relevant. You appealed the Bureau of Water Pollution Control's water permit. Issues in regards to corrective actions, issues in regards to the landfill, issues in regards to air permits are completely irrelevant. So, I appreciate that you have a lot of documents to look through but, my position will be to the Environmental Commission that they have nothing to do with this appeal...As far as I understand, you had the opportunity to look at Water Pollution Control's documents a long time ago. I don't really know what else to say. So, I just got it in, it's about 1:15. I gotta call Rosemarie. I got a message from her. So, I'll figure out when I can do an opposition but it will probably be by the close of business tomorrow. Thanks. Bye."

Table of document requests and status

Document	Date Requested	Relevance to NEV 91022	Status (as of 10/18/10)
<b>Quarterly Ground Water Monitoring Reports</b> (2002 1Q-4Q, 2003 1Q-4Q, 2004 1Q-4Q, 2005 1Q-4Q, 2006 1Q-3Q, 2008 1Q-4Q, 2009 1Q-3Q, 2010 2Q)	9/13/2010	These reports contain data on the performance of the ponds that are authorized to receive waste water. Collection and reporting of these monitoring data are required under the 2005 permit.	Not Received
<b>Interstitial Layer Monitoring</b> Data or reporting of water detected and recovered from the interstitial leak detection / leak collection layer between the primary and secondary HDPE liners for the existing double-lined ponds	9/13/2010	These reports should contain data on the performance of the ponds that are authorized to receive waste water. Collection and reporting of these monitoring data are required under the 2005 permit.	Not Received
<b>Proposed Mesa Ponds Documentation</b> Hydrogeologic Site Characterization Reports Engineering Design Reports Updated Sampling and Analysis Plan	9/13/2010	These reports should contain data on site conditions and detailed engineering designs of the ponds (including liner systems) for ponds proposed under the 2010 permit	Not Received
<b>Updated O&amp;M Manual</b>	9/13/2010	Submittal of this document to NDEP by September 25, 2010 was required in the 2010 permit	Not Received
<b>Administrative Order on Consent (AOC) Documents</b> Quarterly Meeting Notes Monthly Status Reports	9/29/2010	Submittal of this document to NDEP by September 25, 2010 was required in the 2010 permit	Not Received
<b>Permit Supporting Documents</b> (Specific documents listed below)	9/8/2010	Specific work items in the AOC address prior permit compliance actions and corrective action plans for the existing ponds that receive waste water. These documents contain information on <i>inter alia</i> , site hydrogeologic conditions, data collection and analysis of water quality, engineering design reports, construction "as-built" reports, construction quality assurance and quality control reports, and liner design details necessary to demonstrate to NDEP that the evaporation ponds are both designed and have functioned in compliance with the 2005 permit	Not Received
Converse, 2003, Final Grading and Quality Control Quality Assurance Report – Reconstruction of Ponds D & E, 12/23/2003 (Document No. 20)	9/8/2010	Pond E currently receives waste water. This document should contain information on the liner system.	Not Received
Kleinfelder, 2001, Addendum 1 – Reid Gardner Station – Hydrogeologic Characterization 2000 to NPC, 4/10/2001	9/8/2010	This document should contain information on background hydrologic conditions and provide a means to evaluate	Not Received

(Document No. 29) Intellus, Corporation, 1986, Hydrogeologic Study, 9/15/1986 (Document No. 52)	9/8/2010	existing pond liner systems. This document should contain information on background hydrologic conditions and provide a means to evaluate existing pond liner systems.	<b>Not Received</b>
Converse, 1993, Report of Professional Engineering Services, 5/14/1993 (Document No. 60)	9/8/2010	This document should contain information on background hydrologic conditions and provide a means to evaluate existing pond liner systems.	<b>Not Received</b>
NDEP, 1999, Hydrogeologic Assessment; Principal Components and Data Needs, 9/15/1999 (Document No. 87)	9/8/2010	This document should contain information on background hydrologic conditions and provide a means to evaluate existing pond liner systems.	<b>Not Received</b>
NPC/NDEP, 2001-2007, NPC/NDEP Correspondence, 9/2001 - 5/2007 (Document No. 97)	9/8/2010	This document should contain information on the 2005 and 2010 permit renewals.	<b>Not Received</b>
NPC, 2004, Renewal of Authorization to Discharge Permit #NEV01022, NPC 2/19/2004 (Document No. 138)	9/8/2010	This document should contain information on the 2005 permit renewal.	<b>Not Received</b>
NPC, 2002, 4C-1 Pond Liner Installation Quality Control/Quality Assurance, 2/27/2002 (Document No. 146)	9/8/2010	Pond C-1 currently receives waste water. This document should contain information on the liner system.	<b>Not Received</b>
NPC, 2001, Soil and Water Sampling, 5/31/2001 (Document No. 279)	9/8/2010	This document should contain information on background hydrologic conditions and provide a means to evaluate existing pond liner systems.	<b>Not Received</b>
Stanley Consultants, 2005, NPC Reid Gardner Pond F and G Permit Application to NDEP, 10/1/2005 (Document No. 286).	9/8/2010	Pond F currently receives waste water. This document should contain information on the liner system.	<b>Not Received</b>
Converse, 2002, Geotechnical Investigation Retrofit Ponds D and E, 5/17/2002 (Document No. 291)	9/8/2010	Pond E currently receives waste water. This document should contain information on the liner system.	<b>Not Received</b>
Converse, 2008, Pond D Restoration Evaluation, 9/28/2008 (Document No. 309)	9/8/2010	Pond D is adjacent to Pond E and therefore restoration evaluations should contain hydrologic information of the area adjacent to Pond E, which receives waste water.	<b>Not Received</b>
Kennedy Jenks, 2002, Pond D and E Record Drawings, 4/30/2002 (Document No. 311)	9/8/2010	Pond E currently receives waste water. This document should contain information on the liner system.	<b>Not Received</b>
Converse Consultants, 2009, Geotechnical Evaluation Pond D, 1/27/2009 (Document No. 318)	9/8/2010	Pond D is adjacent to Pond E and therefore geotechnical evaluations should contain hydrologic information of the area adjacent to Pond E, which receives waste water.	<b>Not Received</b>
Converse Consultants, 2008, Geotechnical Evaluation Pond D, 10/10/2008 (Document No. 319)	9/8/2010	Pond D is adjacent to Pond E and therefore geotechnical evaluations should contain hydrologic information of the area adjacent to Pond E, which receives waste water.	<b>Not Received</b>

Bio-West, Inc, 2008, Final 2007 Muddy River Report, 5/1/2008 (Document No. 325)	9/8/2010	This document should contain information on background hydrologic conditions and provide a means to evaluate existing pond liner systems.	Not Received
Mifflin and Associates, 1995, 1994 Hydrologic Impacts from Groundwater Withdrawals in the Upper Muddy River Valley, Nevada, 4/1/1995 (Document No. 338)	9/8/2010	This document should contain information on background hydrologic conditions and provide a means to evaluate existing pond liner systems.	Not Received
Water Resource Center, Desert Research Institute, Analysis of 1994 Groundwater Level Trends in the Upper Muddy River Valley, Nevada, 6/1/1995 (Document No. 339)	9/8/2010	This document should contain information on background hydrologic conditions and provide a means to evaluate existing pond liner systems.	Not Received
Converse, 2008, Geotechnical Evaluation of Pond 4A, 10/20/2008 (Document No. 358)	9/8/2010	This document should contain basic data on existing ponds receiving waste water.	Not Received
NPC, 2004, Table 1 Pond Size Data, 2/18/2004 (Document No. DP-04)	9/8/2010	This document should contain information on background hydrologic conditions and provide a means to evaluate existing pond liner systems.	Not Received
NPC, 2003, Reid Gardner Hydrogeologic Report Summary History, 7/29/2003 (Document No. DP-05).	9/8/2010	This document should contain information on background hydrologic conditions and provide a means to evaluate existing pond liner systems.	Not Received
Converse, 2005, Hydrogeologic Investigation Summary, 4/14/2005 (Document No. DP-12)	9/8/2010	Ponds E-1 and C-2 currently receives waste water. This document should contain information on the liner system.	Not Received
Leak Location Services, Inc., 2005, Geomembrane Leak Location Survey for Pond E-1 and C-2, 7/6/2005 (Document No. DP-16)	9/8/2010	This document should contain information on background hydrologic conditions and provide a means to evaluate existing pond liner systems.	Not Received
NPC, 2007, Monitoring Well Data, 10/19/2007 (Document No. DP-38)	9/8/2010	This document should contain information on background hydrologic conditions and provide a means to evaluate existing pond liner systems.	Not Received
NPC, Revised Hydrogeologic Characterization Report Response to NDEP comments letter dated August 11, 2003, 5/21/2004 (Document No. 116)	9/8/2010	Pond F currently receives waste water. This document should contain information on the liner system.	Not Received
NPC, 2004, Corrective Action Plan for Ponds F & G, 9/10/2004 (Document No. 211)	9/8/2010	Pond E currently receives waste water. This document should contain information on the liner system.	Not Received
NPC, 2003, Corrective Action Plan for Ponds D & E, Response to NDEP Comments Letter Dated December 16 <sup>th</sup> , 2002 and As-Built Drawings, 9/3/2003 (Document No. 217)	9/8/2010	Pond E currently receives waste water. This document should contain information on the liner system.	Not Received
NPC, 2005, E2 Evaporation Pond Repair Plan Permit No. NEV91022, 9/9/2005 (Document No. DP-22)	9/8/2010	Pond E currently receives waste water. This document should contain information on the liner system.	Not Received

NDEP, 2004, Corrective Action Plan for Ponds F and G, 9/21/2004 (Document No. NDEP-120)	9/8/2010	Pond F currently receives waste water. This document should contain information on the liner system.	Not Received
Converse, 2007, Geotechnical Data Report, 320-acre Mesa Fly Ash Storage, Feb 20, 2007 (Document No. 332)	9/28/2010	This document should contain information on background hydrologic conditions near the area of the proposed Mesa evaporation ponds.	Not Received
Kleinfelder, 1998, Site Characterization Proposed Wastewater Ponds, 7/28/1998 (Document No. 31)	9/8/2010	This document contains information on background hydrologic conditions and provides a means to evaluate existing pond liner systems.	Received 9/30/2010
Kleinfelder, 1998, Geotechnical Pre-Design Report - Proposed New 27 and 14 Acre Discharge Ponds, 9/2/1998 (Document No. 32)	9/8/2010	This document contains information on background hydrologic conditions and provides a means to evaluate existing pond liner systems.	Received 9/30/2010
Kleinfelder, 1998, Hydrogeologic Assessment, 7/8/1998 (Document No. 61)	9/8/2010	This document contains information on background hydrologic conditions and provides a means to evaluate existing pond liner systems.	Received 9/30/2010
Kleinfelder, 2000, Hydrogeologic Characterization 2000, 12/7/2000 (Document No. 86)	9/8/2010	This document contains information on background hydrologic conditions and provides a means to evaluate existing pond liner systems.	Received 9/30/2010
NPC, 2002, Revised Hydrogeologic Characterization Report, Volume 1 and 2, 2/20/2002 (Document No. 109)	9/8/2010	This document contains information on background hydrologic conditions and provides a means to evaluate existing pond liner systems.	Received 9/30/2010
NPC, 2002, Discharge Permit #91022 and Administrative Order #NV083199W1, 9/30/2002 (Document No. 148)	9/8/2010	This document is a compilation of correspondences and contains information on background hydrologic conditions and permitting activities.	Received 9/30/2010
NPC 2003, Background Water Quality Data for the Reid Gardner Generating Station, 6/25/2003 (Document No. 222)	9/8/2010	This document contains information on background hydrologic conditions and provides a means to evaluate existing pond liner systems.	Received 9/30/2010
NDEP, 2005, As-Built Drawings Ponds C1 and C2, 5/26/2005 (Document No. 285)	9/8/2010	Ponds C-1 and C-2 currently receives waste water. This document should contain information on the liner system.	Received 9/30/2010
Converse, 2004, Preliminary Findings: Geotechnical and Dewatering Investigation Pond 4A Closure, 7/14/2004 (Document No. 293)	9/8/2010	This document contains information on background hydrologic conditions and provides a means to evaluate existing pond liner systems.	Received 9/30/2010
NPC, 2002, NDEP Letter Dec 2002, 12/16/2002 Document No. 310)	9/8/2010	This document contains information on the corrective action plan for pond E, which currently receives waste water.	Received 9/30/2010
NDEP, 2003, Revised Hydrogeologic Characterization Report, 8/11/2003 (Document No. 316)	9/8/2010	This document contains information on background hydrologic conditions and provides a means to evaluate	Received 9/30/2010

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<p>NPC, 2007, Damaged Monitoring Well Repair/Replacement Report, 8/28/2007 (Document No. DP-34)</p>	<p>9/8/2010</p>	<p>existing pond liner systems. This document contains information on replacement of damaged water wells and provides information on background hydrogeologic information.</p>	<p>Received 9/30/2010</p>
<p>Kleinfelder, 1992, Hydrogeological Study of Surface Impoundments, Volume 1 and 2, 6/1/1992 (Document No. NDEP-016)</p>	<p>9/8/2010</p>	<p>This document contains information on background hydrologic conditions and provides a means to evaluate existing pond liner systems.</p>	<p>Received 9/30/2010</p>
<p>Converse, 2000 Geotechnical Investigations - Retrofit of 4B and 4C Ponds, 9/18/2000 (Document No. NDEP-047)</p>	<p>9/8/2010</p>	<p>Ponds B and C currently receive waste water. This document should contain information on the liner system.</p>	<p>Received 9/30/2010</p>
<p>NPC, 2002, Corrective Action Plan for Ponds D and E, 11/11/2002 (Document No. NDEP-052)</p>	<p>9/8/2010</p>	<p>Pond E currently receives waste water. This document should contain information on the performance of the liner system.</p>	<p>Received 9/30/2010</p>
<p>Converse, 2005, Groundwater Investigation Pond 4A Closure, 5/13/2005 (Document No. NDEP-063)</p>	<p>9/8/2010</p>	<p>This document contains information on background hydrologic conditions and provides a means to evaluate existing pond liner systems.</p>	<p>Received 9/30/2010</p>
<p>NDEP, Pond B1 and B2 Relining Project, 1/22/2007 (Document No. NDEP-076)</p>	<p>9/8/2010</p>	<p>Ponds B-1 and B-2 currently receives waste water. This document should contain information on the liner system.</p>	<p>Received 9/30/2010</p>
<p>NPC, 2007, Evaporation Pond Relining Schedule, 4/17/2007 (Document No. NDEP-080)</p>	<p>9/8/2010</p>	<p>This document contains information on the relining on the ponds currently receiving waste water.</p>	<p>Received 9/30/2010</p>
<p>NDEP, 2003, Response to Background Water Quality Data June 2003, 9/8/2003 (Document No. NDEP-119)</p>	<p>9/8/2010</p>	<p>This document contains information on background hydrologic conditions and provides a means to evaluate existing pond liner systems.</p>	<p>Received 9/30/2010</p>
<p>Kleinfelder, 2000, Reid Gardner Station Site Characterization Status, 8/22/2000 (Document No. SKOTI-06)</p>	<p>9/8/2010</p>	<p>This document contains information on background hydrologic conditions and provides a means to evaluate existing pond liner systems.</p>	<p>Received 9/30/2010</p>

## Great Basin Earth Science, Inc.



2241 East Bendemere Circle  
Salt Lake City, Utah 84109  
Phone (801) 599-2189  
Fax (801) 487-8473  
elips@gbearthscience.com

### MEMORANDUM

TO: Dan Galpern, Western Environmental Law Center  
FROM: Elliott W. Lips, P.G., Principal Engineering Geologist  
DATE: October 5, 2010  
RE: Observations of Pounded Water near Evaporation Pond E at NV Energy's Reid Gardner Station

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On October 4, 2010 I was present on the mesa above the evaporation ponds approximately 2000 feet southeast of the southern corner of Ponds E and G. The time of my visit was between approximately 7:45 and 8:15 am. At this time I observed and photographed<sup>1</sup> the following:

1. Pond E contained a significant amount of water – the freeboard appeared to be about 5 feet. Water was being discharged into Pond E from at least three discrete locations. Pond G was completely dry.
2. I observed several ponds of standing water on the Muddy River flood plain south and east of Pond E.
3. The area of the flood plain covered by these ponds was approximately 400 feet by 450 feet. This estimate is based on comparing my field observations and photographs to scaled drawings of the pond area, which are on a photographic base map, and from measurements made on Google Earth.
4. Examination of satellite imagery (USDA Farm Service Agency, GeoEye, U.S. Geological Survey Map Data) taken in 2010 reveal that the ponds I observed on October 4<sup>th</sup> are not permanent features of the flood plain.
5. The ponds appeared to be hydraulically connected to each other and extended east of Pond G on the flood plain towards the Muddy River itself; however, due to vegetation and my vantage point, I could not determine whether or not these ponds are discharging directly into the Muddy River.
6. The eastern edge of the ponds was linear and appeared to be controlled by a man-made berm. There were no other areas of ponding water observed on the flood plain further east of the berm.

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<sup>1</sup> I can provide you with electronic copies of the photographs on October 6<sup>th</sup>.



7. Based on my observations, I believe that the source of water for these ponds could have either been from: 1) Pond E, or 2) the arroyo coming off the mesa southeast of Pond G.
8. My observations of the confluence of the arroyo and the Muddy River flood plain (aided by 8x binoculars) revealed that there was no surface water present, or indication of recent flow at the mouth of the arroyo. In addition, examination of nearby arroyos indicated that there had not been recent surface-water runoff in the area.
9. Because the flood plain slopes gently to the east, coincident with the gradient of the Muddy River, the ponds of standing water would be immediately down slope of Pond E. Because no other potential sources of water were observed, it is reasonable to conclude that the source of the ponded water on the flood plain was likely Pond E.
10. While observing the ponds and taking photographs, I observed three landings on the ponds by avian wildlife. One bird I identified as a snowy egret; I was not able to identify two smaller brown and white birds.
11. Pond E is supposed to be constructed with a double-liner system and is required under NVE's discharge permit to not leak to waters of the state.
12. Based on my observations, and conclusions that the most likely source of water for the ponds is related to Pond E, I believe that NDEP should immediately conduct an investigation of this area, review monitoring of leakage from Pond E, collect and analyze samples of water from these ponds and take appropriate measures to assess whether these ponds are the result of an unauthorized discharge to waters of the state.

1 Daniel M. Galpern  
Oregon Bar No. 06195  
2 **Western Environmental Law Center**  
1216 Lincoln St.  
3 Eugene, OR 97401  
galpern@westernlaw.org  
4 541.359.3243

5 Christopher W. Mixson  
Nevada Bar No. 10685  
6 **Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP**  
3556 East Russell Rd.  
7 Las Vegas, NV 89117  
cmixson@wrslawyers.com  
8 702.341.5200

9

10 **BEFORE THE NEVADA STATE ENVIRONMENTAL COMMISSION**

11 In Re: Appeal of NV Energy Permit  
12 NEV91022 to Discharge Wastewater  
at Reid Gardner Generating Station

**NOTICE OF APPEARANCE  
OF LOCAL COUNSEL**

13

14 **Please take notice** that Appellant Sierra Club has retained Christopher W. Mixson of the  
15 law firm of Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP as local counsel in this matter.

16 Please add the mailing address and contact information Mr. Mixson to all service lists in this  
17 matter.

18 Christopher W. Mixson  
Nevada Bar No. 10685  
19 **Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP**  
3556 East Russell Rd.  
20 Las Vegas, NV 89117  
cmixson@wrslawyers.com  
21 Ph: 702.341.5200  
22 Fx: 702.341.5300

23 Respectfully submitted this 20th day of October, 2010.

24

25 /s/ Christopher Mixson  
Christopher W. Mixson  
Nevada Bar No. 10685  
26 **Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP**  
3556 East Russell Rd.  
27 Las Vegas, NV 89117  
*Attorney for Appellant Sierra Club*

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STATE OF NEVADA  
STATE ENVIRONMENTAL COMMISSION

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IN RE THE MATTER:  
APPEAL OF NDEP RENEWAL OF  
NEVADA POWER COMPANY  
DISCHARGE PERMIT NEV91022  
FOR THE REID GARDNER STATION

TRANSCRIPT OF ELECTRONICALLY-RECORDED HEARING  
PRELIMINARY HEARING VIA TELECONFERENCE

THURSDAY, OCTOBER 21, 2010

CARSON CITY, NEVADA

The Commission:

JIM GANS, CHAIRMAN  
ALAN COYNER, Panel Member  
PETE ANDERSON, Panel Member

For the Commission:

ROSEMARIE REYNOLDS,  
Deputy Attorney General

JOHN WALKER,  
Executive Secretary SEC

KATHY REBERT,  
Recording Secretary SEC

TRANSCRIBED AND  
PROOFREAD BY:

CAPITOL REPORTERS  
Certified Court Reporters  
BY: CARRIE HEWERDINE, RDR  
Nevada CCR No. 820  
1201 N. Stewart St., #131  
Carson City, Nevada 89706  
(775) 882-5322

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APPEARANCES VIA TELECONFERENCE:

For the Appellant, Sierra Club:

DAN GALPERN, ESQ.  
Western Environmental Law Center

CHRISTOPHER MIXSON, ESQ.  
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP

For the Intervenor, NV Energy:

THOMAS WOODWORTH,  
Assistant General Counsel  
NV Energy, Inc.

For the Respondent,  
Nevada Division of Environmental Protection,  
Bureau of Water Pollution Control:

WILLIAM FREY,  
Senior Deputy Attorney General  
Office of the Attorney General

CAROLYN TANNER,  
Deputy Attorney General  
Office of the Attorney General  
COLLEEN CRIPPS, Acting Administrator

NDEP

MIKE ELGES,  
Chief of the Bureau of Air Pollution Control

Alan Tinney from Water Pollution Control, Shannon Harbor  
and Gerald Gardner from Water Pollution Control.

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APPEARANCES (CONTINUED):

ALSO APPEARING VIA TELECONFERENCE:

TONY GARCIA,  
Environmental Services Manager  
NV Energy, Inc.

ALAN TINNEY, NDEP  
Bureau of Water Pollution Control

ELLIOTT LIPS, Hydrogeologist  
Great Basin Earth Sciences

COLLEEN CRIPPS, NDEP Acting Administrator

MIKE ELGES, NDEP  
Chief of the Bureau of Air Pollution Control

SHANNON HARBOR,  
Water Pollution Control

GERALD GARDNER,  
Water Pollution Control

1 TELECONFERENCE ON THURSDAY, OCTOBER 24, 2010

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3  
4 TELECONFERENCE MONITOR: Conference for Cathy  
5 Rebert, Conference I.D. ZKR1064.

6 Please excuse the interruption. Recorder has  
7 been added.

8 COMMISSIONER COYNER: Hello, it's Alan.

9 MR. WOODWORTH: Hello, Alan. Tom Woodworth on  
10 the line for NV Energy. I'm not sure who you are, but --

11 COMMISSIONER COYNER: Oh, that's all right.  
12 It's just Alan Coyner. I'm one of the panel. Thank you,  
13 Todd (sic).

14 MS. CRIPPS: Hi, this is NDEP. This is  
15 Colleen, and Alan Tinney, Shannon Harbor, Mike Elges, and  
16 Gerald Gardner.

17 (Proceedings paused briefly)

18 MS. REBERT: Hi, is someone on the line?

19 COMMISSIONER COYNER: This is Alan Coyner.

20 MS. REBERT: Hello, Alan Coyner. John, and I,  
21 and Pete are here.

22 MR. WALKER: How are you doing, Alan?

23 COMMISSIONER COYNER: Fine. We need our  
24 Chairman.

25 MR. WALKER: Well, apparently they're not on

1 the line yet.

2 COMMISSIONER COYNER: Okay.

3 MR. WALKER: How's -- how's it going in Reno,  
4 Alan?

5 COMMISSIONER COYNER: You've got NDEP on the  
6 line, and you've got Todd (sic) Woodworth on the line as  
7 well.

8 MR. WALKER: Oh, excellent. Thank you.

9 MS. REBERT: Who's on the line?

10 MR. WALKER: NDEP and NV Energy.

11 (Proceedings paused briefly)

12 MS. REYNOLDS: Hi, it's RoseMarie Reynolds  
13 with the A.G.'s Office, and I have Jim Gans with me.

14 MR. WALKER: Hi, RoseMarie. This is John  
15 Walker.

16 MS. REYNOLDS: I'm going to put you on  
17 speaker.

18 Can you hear us?

19 MR. WALKER: Yes, RoseMarie. This is John  
20 Walker. I'm here with Pete Anderson and Kathy Rebert.

21 MS. REYNOLDS: Okay. Has anybody else joined  
22 the call yet?

23 MR. WALKER: My understanding that -- Mr. Tom  
24 Woodworth, are you on the line?

25 MR. WOODWORTH: I am, yes.

1 MR. WALKER: And Alan Coyner?  
2 COMMISSIONER COYNER: I'm here.  
3 MR. WALKER: And NDEP, are you on the line?  
4 (No audible response)  
5 UNIDENTIFIED SPEAKER: NDEP is but Bill is  
6 not.  
7 MR. WALKER: So, RoseMarie, it looks like  
8 we're waiting for Mr. Frey.  
9 MS. REYNOLDS: Okay. Mr. Galpern's on the  
10 phone?  
11 MR. WALKER: I'm sorry. I don't know.  
12 Apparently not.  
13 Did someone just join the call?  
14 MR. LIPS: Yeah, this is Elliott Lips.  
15 MR. WALKER: We're still waiting, Mr. Lips,  
16 for Mr. Frey and Mr. Galpren. Everyone else is on the  
17 call.  
18 MR. LIPS: Okay.  
19 (Proceedings paused briefly)  
20 MR. WALKER: Did someone just join?  
21 MR. MIXON: Yes. Hi, this is Chris Mixon from  
22 Las Vegas on behalf of the Sierra Club.  
23 MR. WALKER: Thank you. Everyone is on the  
24 call with the exception of Mr. Galpren and the State's  
25 attorney, Mr. Frey.

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MR. MIXON: Okay.

(Proceedings paused briefly)

MR. WALKER: Did someone just join the call?

MR. FREY: Yes, it's Bill Frey.

MR. WALKER: Hi, Bill. Everyone is on the line except Mr. Galpren.

MR. FREY: Oh, okay.

(Proceedings paused briefly)

MR. WALKER: Did -- is that Mr. Galpren that joined the call?

MR. GALPREN: It is. Hello.

MR. WALKER: Oh, excellent. Mr. Galpren, everyone is on the line. We're ready to go here. I'm going to turn it back over to RoseMarie Reynolds.

MS. REYNOLDS: Hi, I'll introduce myself. I'm RoseMarie Reynolds. I'm with the Attorney General's Office, and I am of Counsel to the State Environmental Commission.

I'm going to go ahead and turn this hearing over to our Panel Chair, who is also the Chairman of the SEC and that's (recording obliterated by beeping) Gans.

MS. TANNER: Hi, this is Lyna Tanner with the Nevada Attorney General's Office.

MR. WALKER: Lyna, everyone is on the line, and we're about to begin.

1 MS. TANNER: Thank you.

2 COMMISSION CHAIRMAN GANS: John, I'll proceed.  
3 Thank you.

4 First of all I want to welcome everybody. My  
5 name is Jim Gans, and I'm Chairman of the State  
6 Environmental Commission. And joining me today on this  
7 panel are two other Members of the Commission, Mr. Alan  
8 Coyner and Mr. Pete Anderson.

9 Before we start I want to advise everybody  
10 that we are recording today's proceedings from the Carson  
11 City location. John, I assume that you are taking care of  
12 that; is that correct?

13 MR. WALKER: That's correct.

14 COMMISSION CHAIRMAN GANS: Okay. So what I  
15 want to begin with is asking each of the parties to  
16 introduce themselves. I want to start with the Appellant,  
17 and we'll follow with the State and the intervenor. And  
18 please, as the -- as each of these three parties introduce  
19 themselves from these various locations, please let us  
20 know who else is with you in your office or on the phone.

21 So with that we'll start with the Appellant.

22 MR. GALPREN: Mr. Chairman, Dan Galpren. I'm  
23 an attorney with the Western Environmental Law Center, and  
24 in this I'm representing the Sierra Club.

25 Now, I came after, perhaps, other people had

1 signed up, but I believe that Mr. Elliott Lips is on the  
2 line from Utah. Is that correct?

3 MR. LIPS: Yes, it is.

4 MR. GALPREN: And he is our expert  
5 hydrogeologist in this matter. And his memorandums form a  
6 couple of the exhibits in this case.

7 And then I believe that we also may be joined  
8 from Las Vegas by Chris Mixon. Chris, are you there?

9 MR. MIXON: Yes, I am.

10 MR. GALPREN: Okay. And Chris is our local  
11 Nevada Counsel, and he is assisting us on this matter.

12 I'm not sure if Megan Anderson is on.

13 (No audible response)

14 MR. GALPREN: Okay. So I believe that those  
15 are the only other people that are on. With me in my  
16 office is nobody else.

17 COMMISSION CHAIRMAN GANS: And with Mr. Mixon,  
18 Mr. Matson (phonetic), is anybody in those offices?

19 MR. MIXON: Hi, this is Chris Mixon from the  
20 Wolf, Rifkin, Shapiro, Shulman and Rabkin law firm in Las  
21 Vegas for the Sierra Club, and I am by myself in my  
22 office.

23 MR. LIPS: This is Elliott Lips with Great  
24 Basin Earth Science in Salt Lake City, Utah, and nobody is  
25 in my office with me.

1                   COMMISSION CHAIRMAN GANS: Okay. Mr. Galpren,  
2 that should cover the Appellant. Let's go on to the  
3 State.

4                   MR. FREY: Good afternoon. This is Bill Frey,  
5 and I'm in my office by myself. And also on the phone is  
6 Lyna Tanner from the A.G.'s Office.

7                   And there are several people attending from  
8 the NDEP offices, and I'll let -- it might be easiest if  
9 Acting Administrator Cripps introduces everyone from that  
10 office.

11                   MS. CRIPPS: Thanks, Bill. This is Colleen  
12 Cripps. I'm the Acting Administrator for NDEP, and with  
13 me in my office is Mike Elges, Chief of the Bureau of Air  
14 Pollution Control, Alan Tinney from Water Pollution  
15 Control, Shannon Harbor and Gerald Gardner from Water  
16 Pollution Control.

17                   COMMISSION CHAIRMAN GANS: Okay. Does that  
18 cover the State? John, I'm assuming that you're -- you're  
19 in an office by yourself or is Kathy with you?

20                   MR. WALKER: Kathy and I are here along with  
21 Commissioner Anderson.

22                   COMMISSION CHAIRMAN GANS: Okay. And then  
23 we'll go on to the Intervenor, Nevada Energy.

24                   MR. WOODWORTH: Hi. Yes, this is Tom  
25 Woodworth, in-house Counsel with NV Energy, the

1 Intervenor. In my office is our Manager of Environmental  
2 Services, Tony Garcia.

3 COMMISSION CHAIRMAN GANS: And, Mr. Coyner,  
4 you're up there too, correct?

5 COMMISSIONER COYNER: I am, and I'm in my  
6 office by myself.

7 COMMISSION CHAIRMAN GANS: Okay. Are there  
8 any questions by any of the parties now of who's on the  
9 phone and who will be listening and talking today?

10 MR. FREY: Mr. Chairman, this is Bill Frey.  
11 Could I request that everyone introduce themselves before  
12 we -- as we go along, as we talk? I'm unfamiliar with  
13 some of the voices.

14 COMMISSION CHAIRMAN GANS: Sounds like a good  
15 idea. We are recording also.

16 MR. FREY: Oh, great.

17 COMMISSION CHAIRMAN GANS: Okay. Let me --  
18 let me proceed.

19 Today I'll be acting as the Appeals Panel  
20 Chair for this Preliminary Hearing, and it's regarding the  
21 Appeal of the Water Pollution Control Permit Number  
22 NEV91022. The Notice for this Preliminary Hearing was  
23 issued by the State Environmental Commission on  
24 October 8th, 2010.

25 As way of background to this hearing, the

1 Water Pollution Discharge Permit in question was issued on  
2 June 24th, 2010 by the Nevada Division of Environmental  
3 Protection to NV Energy for the Reid Gardner Power Station  
4 in southern Nevada.

5 The permit authorizes discharge of process and  
6 non-processed water to evaporation ponds located at the  
7 Reid Gardner Station. The permit was subject --  
8 subsequently appealed by the Sierra Club through its  
9 Counsel, the Western Environmental Law Center. The  
10 hearing currently scheduled for November -- the hearing is  
11 currently scheduled for November 4th and 5th in Reno,  
12 Nevada.

13 On October 7th the Sierra Club filed a motion  
14 with the Commission which will be addressed today in  
15 today's Preliminary Hearing.

16 The Sierra Club's motion seeks the  
17 following -- there are three items.

18 One, issuance of subpoenas to compel  
19 production of documents;

20 Two, vacatur and continuance of the November  
21 hearing;

22 And, Three, a preliminary injunction to  
23 suspend the effectiveness of the permit and halt  
24 construction of the new waste water ponds.

25 Accordingly, in order to focus today's

1 proceedings, we will confine -- and I want to  
2 re-emphasize -- we will confine oral arguments to the  
3 following specific issues:

4           Number one, whether to issue the requested  
5 subpoenas pursuant to the Nevada Administrative Code  
6 445B.9 -- .892. Excuse me.

7           Number two, whether the November hearing -- if  
8 you'll recall -- should be continued pursuant to Nevada  
9 Administrative Code 445B.894, paren 1, end of paren.

10           And, three, whether to issue a preliminary  
11 injunction as requested.

12           The Commission's October 8th Notice also  
13 offered the opportunity to State and Intervenor to file  
14 written opposition to the Sierra Club's motions. Both the  
15 Nevada Division of Environmental Protection and NV Energy  
16 have filed such opposition with the Commission. In  
17 addition, a final response to these oppositions was also  
18 filed with the Commission by the Sierra Club at the close  
19 of business on October 19th.

20           Which -- John, I want to make sure that -- I  
21 know you called me. I'm assuming you called the other two  
22 panel members, and we all have that final answer from the  
23 Appellant.

24           MR. WALKER: That is my understanding.

25           COMMISSION CHAIRMAN GANS: Okay. And, Pete,

1 do you have yours?

2 COMMISSIONER ANDERSON: Yes, I do,  
3 Mr. Chairman.

4 COMMISSION CHAIRMAN GANS: And, Alan, do you  
5 have yours?

6 COMMISSIONER COYNER: I do, sir.

7 COMMISSION CHAIRMAN GANS: Thank you very  
8 much.

9 With this background, and noting that each  
10 panel member has reviewed the motion from the Appellant  
11 and opposing arguments from the State and Intervenor, we  
12 would like to proceed by hearing any oral arguments as  
13 warranted from the Appellant, followed by the Counsel from  
14 NDEP and ending with the Counsel of Nevada Energy.

15 We would also request that any oral arguments  
16 presented be strictly confined to these three points of  
17 contention raised in the Appellant's motion. And I  
18 will -- I will set pretty firm on that as we go through  
19 the arguments. I don't want us getting off track, off  
20 course. I'm going to try to keep this focused.

21 After the panel decides to the -- what we  
22 would like to do first is hear the arguments from the  
23 parties on the preliminary injunction issues. So we want  
24 to take Number 3 first.

25 After hearing from the respective parties, we

1 will then move to deliberations -- "we," meaning the  
2 panel -- on that issue only.

3 If possible, I would like to come to decisions  
4 on each of these three items today. I certainly don't see  
5 us continuing this for another 30 days while we  
6 deliberate. We'd like to do it today.

7 After the panel decides the preliminary  
8 injunction issue, we will hear arguments regarding the  
9 remaining two issues concerning subpoena and request for  
10 continuance. After hearing from the respective parties on  
11 those issues, we'll then move to deliberations, and by the  
12 panel on those two issues.

13 Have I left anything out? Does anybody have  
14 any questions of how I would like to proceed today?

15 Okay. If not, we will start with Mr. Galpren,  
16 and we'll start on the issue of the injunction.

17 Mr. Galpren, are you can proceed.

18 MR. GALPREN: Okay. Thank you, Mr. Chairman.

19 As we indicated in our motion and response,  
20 we -- actually, there are two parts to this part of the  
21 motion.

22 The first is that we sought suspension of the  
23 effectiveness of the permit, and, secondly, we have sought  
24 an injunction against construction activities that appear  
25 to be underway on the mesa to construct the new waste

1 water ponds. Those aim to deprive NV Energy of the  
2 ability to essentially nullify the -- much of the  
3 importance of this hearing and your decision today.

4 The concern and the threat to public health  
5 that we see is that if these ponds are constructed, and  
6 filled, and begin to be utilized during the pendency of  
7 this appeal, and they are designed and constructed  
8 similarly to the existing waste water ponds, which are  
9 leaking to groundwater, and threatening groundwater,  
10 and -- the Muddy River downstream, then you will -- then  
11 we will essentially repeat the same problem.

12 We grant that, all things equal, it's better  
13 to have the pond -- to have these waste water ponds on the  
14 mesa than in the flood plain of the Muddy River, but the  
15 question is not whether their placement in that location  
16 is better than the existing -- than the existing location  
17 of the exists ponds. The question is whether the permit  
18 attaches sufficient conditions and whether the  
19 Department's evaluation of the application sufficiently  
20 ensures that the environment will be protected.

21 Once that waste water is there, there's no  
22 going back. If it -- as has occurred on the -- on the --  
23 in the ponds in the flood plain. If that waste water  
24 leaches through the liners and into the environment, its  
25 appearance in groundwater and then eventually in lower

1 reaches of the Muddy River, is inexorable. It's not  
2 immediate, but it's inexorable. And so while it's better  
3 to be placed up there, it would be even more -- it would  
4 be -- it is required under the law that the ponds be  
5 constructed in such a way that they are truly zero  
6 discharge.

7           And so the time to act is now, even though the  
8 threat to groundwater as drinking water supply --  
9 potential drinking water supply or the Muddy River, may  
10 not materialize for months, perhaps, after the waste water  
11 is actually put in place. So there is need for immediate  
12 action, as is required under the relevant statute, to  
13 avoid a substantial threat to public health, and that is  
14 why we are turning to you seeking the injunction against  
15 the construction, at least until you have decided if this  
16 case as a whole.

17           COMMISSION CHAIRMAN GANS: Okay.

18           MR. GALPREN: I think I can rest there.

19           COMMISSION CHAIRMAN GANS: The things that I  
20 would like you to address is my concern on whether or not  
21 the Commission has the authority to do what you're asking  
22 it to do.

23           MR. GALPREN: I -- yes, the Commission has the  
24 authority under the law, if it finds that there is a  
25 threat that requires -- to public health or safety that

1 requires immediate action. And not that the action is  
2 required to stop an immediate threat to public health, but  
3 immediate action is required to stop a threat that will  
4 materialize to public health. And so, yes, I think that  
5 you have -- you have the authority.

6 Now, you are required, I think, to give proper  
7 notice and procedure to NV Energy to be able to -- for  
8 them to be able to demonstrate that they -- that there is  
9 no threat. Basic procedural safeguards need to be played  
10 out.

11 But unless you exercise this authority, then  
12 what may well happen is that, assuming you take any  
13 considerable time to decide this case, that will be a fait  
14 accompli. They will perhaps rush to construct, and to  
15 fill, and then it will be very difficult -- much more  
16 difficult to resolve a problem in place than to demand a  
17 temporary suspension of their activities.

18 I should also say that, in the alternative, as  
19 we indicated in our response to the opposition to the  
20 motion, if you decide against the injunction, we at least  
21 request that the Commission not entertain any arguments  
22 from NV Energy that their expenditure of money so far in  
23 the construction of these permits is any reason to  
24 continue with the project, in other words, any reason for  
25 you to grant -- to approve the permit.

1                   They've been on notice since we filed our  
2 Notice of Appeal in late July that we are challenging this  
3 permit, in part because of the threat posed by expanded  
4 waste water ponds that that maybe inadequately designed,  
5 and so that would be our alternative formulation of our  
6 request.

7                   COMMISSION CHAIRMAN GANS: Mr. Coyner,  
8 Mr. Anderson, do you have any questions or comments for  
9 Mr. Galpren?

10                   COMMISSIONER COYNER: Not at this time. This  
11 is Alan.

12                   COMMISSIONER ANDERSON: This is Pete Anderson,  
13 not at this time.

14                   COMMISSION CHAIRMAN GANS: Okay. I want to  
15 make sure now, Mr. Galpren, that Mr. Mixon is -- really,  
16 you're taking care of this. You are going to be the lead  
17 Counsel, and we're going to hear from you today from the  
18 Appellant. Is that correct?

19                   MR. GALPREN: That's correct.

20                   COMMISSION CHAIRMAN GANS: Okay. I just want  
21 to make sure we're done. So are you -- are you -- have  
22 you completed your arguments on Item Number 3, taking it  
23 first?

24                   MR. GALPREN: I have. Thank you.

25                   COMMISSION CHAIRMAN GANS: Then we will go on

1 from there to the State, and I think that's Mr. Frey, if I  
2 remember correctly.

3 MR. FREY: Yes. Thank you, Mr. Chairman.

4 What I heard from Mr. Galpren's argument was  
5 probably the best argument as to why the hearing should  
6 not be delayed and should move forward on November 4th and  
7 5th.

8 There's a -- a legal presumption that the  
9 permit is valid, and I've got to disagree with Mr. Galpren  
10 that it's not NV Energy's burden to show that these ponds  
11 are not a threat. They have a valid permit, and to get an  
12 injunction, it's actually the Sierra Club's burden to show  
13 that there's an immediate threat, not a long-term or  
14 hypothetical threat in the future, but an immediate threat  
15 that they'll be harmed. And I think if we move forward,  
16 we'll be -- there'll be time to address that, the -- the  
17 permit as it's written -- as it's scheduled now.

18 Additionally, you know, there's a -- there's a  
19 risk that NV Energy undertakes, and -- and that's up to  
20 them. That's a business decision as to the speed with  
21 which they move forward, but they have a valid permit, and  
22 they're entitled to take that risk.

23 The permit -- the new permits are an  
24 improvement to the existing permit and that's why DEP is  
25 opposed to either staying the permit or any injunctive

1 relief. The permit requires that double-lined ponds be  
2 used, and it requires that they be relocated from the  
3 flood plain of the Muddy River up onto the mesa.

4 I think Mr. Galpren made an -- an admission  
5 against interest or -- or joins us, in that what he said  
6 at the beginning of his argument, that there's no doubt  
7 that this is an improved location. And one of the -- the  
8 reasons that NV Energy and the State wants them to move  
9 forward is they want to give -- relocate the ponds as soon  
10 as possible in advance of any sort of high water come next  
11 spring.

12 And I think that -- that, to the extent  
13 there's a concern, having a hearing, and I know I'm mixing  
14 these two, but moving forward, having the hearing in two  
15 weeks should be certainly sufficient time to resolve these  
16 issues, without the need to -- to stay the permit or to  
17 stop the construction.

18 Thank you.

19 COMMISSION CHAIRMAN GANS: Mr. Coyner,  
20 Mr. Anderson, any questions or comments of Mr. Frey?

21 COMMISSIONER COYNER: This is Alan. I have a  
22 question for Bill. Does the permit allow for both  
23 construction and filling? In other words, the waste water  
24 actually being put in the pond? Is it a complete permit  
25 to that point or is it just construction only or not?

1 MR. FREY: No, it's both it's construction and  
2 use.

3 COMMISSIONER COYNER: Okay.

4 MR. FREY: And it's a -- just so you know,  
5 it's a five-year permit.

6 MR. WOODWORTH: If I -- if I may just on a  
7 factual point -- this is Tom Woodworth with NV Energy, and  
8 I'm being told by our permit person, here, Tony, that  
9 technically, you know, we obviously can't build the ponds  
10 until we get the final designs approved by the regulator.

11 MR. GARCIA: Which has been done.

12 MR. WOODWORTH: Which has been done. Okay.

13 MR. GARCIA: That point also is the once the  
14 con --

15 COMMISSION CHAIRMAN GANS: Please identify  
16 yourselves when you speak.

17 MR. WOODWORTH: I'm sorry. This is Tony --  
18 Tom Woodworth with NDEP -- with -- Tom Woodworth with NV  
19 Energy.

20 MR. GARCIA: Tony Garcia with NV Energy.

21 So the way the permit is, is it authorizes us  
22 to construct the ponds, as well as discharge into the  
23 ponds, but under the final design and as-builts, we have  
24 to get approval from -- I believe it's the Division of  
25 Water Resources, confirming that the pond was constructed

1 properly, and then they give us the authority to discharge  
2 it into the pond.

3 MR. FREY: Yeah, you know -- this is Bill  
4 Frey, and I should have made that -- that point, and maybe  
5 this goes to Commissioner Coyner's question, is that it is  
6 a two-part per -- it's -- to the extent that -- or I  
7 should not say two-part, but it's a phased approach where  
8 NV Energy has to come back with design plans for approval.

9 COMMISSION CHAIRMAN GANS: So in your opinion,  
10 Mr. Frey -- this is Jim Gans -- is NV Energy taking a  
11 risk? You mentioned this -- this risk that they're  
12 entitled to take the risk, but there is a risk involved is  
13 what you're saying. This is not a clear goal signal at  
14 this point?

15 MR. FREY: Right. This is a risk, because on  
16 the hearing on the 4th and 5th, you know, the Commission  
17 is free to modify the permit. So -- so that's the risk  
18 I'm talking about.

19 COMMISSION CHAIRMAN GANS: Okay. Any other  
20 comments from the panel?

21 COMMISSIONER ANDERSON: Pete Anderson.  
22 Nothing here, Mr. Chairman.

23 COMMISSION CHAIRMAN GANS: I think now we can  
24 let Nevada Energy proceed. Tom Woodward, please.

25 MR. WOODWORTH: Thank you. This is Tom

1 Woodworth. I'm representing NV Energy.

2 I -- there are a lot of -- first of all I  
3 would probably second the great majority of what Counsel  
4 Frey said for NDEP. We certainly agree with those points.

5 I am -- I am very tempted to respond to many  
6 of the allegations that were made by Sierra Club's  
7 Counsel, but I'm -- I'm going to take the -- the  
8 instructions of Commissioner Gans seriously. I'm going to  
9 kind of let some of those things go. So I'll just kind of  
10 stick to what I think is the procedural issue that's been  
11 asked of us here.

12 And I guess it just comes down to saying that  
13 when the original motion was made, there was not really --  
14 they requested the preliminary injunction did not really  
15 cite to any regulatory authority for it, much less why the  
16 Commission would have such authority and what would the  
17 standard be for granting it.

18 I had to take my best guess, and I -- I  
19 obviously do not want to debate whether the Commission has  
20 authority to issue a preliminary injunction, though I'll  
21 say that that's an open question.

22 But if that authority were to exist, I think  
23 it would come through NRS 233B.140, and it's clear -- and  
24 it's clear -- as outlined in our response, and it's --  
25 it's very clear from a strict reading -- from a simple

1 reading of the statute that what -- such a request would  
2 have to have been made at the time they made their appeal  
3 request. That obviously did not happen, and I pointed  
4 that out in our response.

5           So since then we've gotten a reply from the  
6 Sierra Club saying that really what they meant was just a  
7 temporary suspension. And I would argue that when you  
8 look at the temporary suspension provisions I -- it's hard  
9 for me to understand how continued operation of our waste  
10 water -- of -- continued operation pursuant to our  
11 approved permit would, right now, have a proven public  
12 health or safety risk that requires emergency action.

13           NDEP has, in fact, already concluded it does  
14 not. So I guess from a procedural standpoint what  
15 Mr. Galpren is asking for you to overlook your agency's  
16 expert advice on that position and ask you to overrule  
17 them.

18           I think that's inappropriate, and I think it's  
19 fairly clear that they are attempting to utilize the  
20 temporary suspension provisions for an emergency event to  
21 kind of circumvent the fatal flaw they have in requesting  
22 a preliminary injunction.

23           I believe it's somewhat of a procedurally  
24 confused request. Even if you look past that, that there  
25 is no, I think, relief they're entitled to under the

1 regulation, then you look to the merits of whether a  
2 preliminary injunction is appropriate. I think they  
3 clearly fail the well established case law in  
4 identifying -- in suggesting there is some sort of  
5 irreparable harm.

6 We know there is contaminated groundwater  
7 on-site. We have been working with NDEP for several years  
8 in the active characterization of those impacts that are  
9 associated with historic operations at the facility. And  
10 there is just simply not any irreparable harm or emergency  
11 risk at this point.

12 So I guess I can leave it at that. And I want  
13 to respond to the risk we have in proceeding. I think --  
14 I guess I do agree with Bill when he says -- we obviously  
15 understand that if the Commission were to overrule our  
16 approved permit, we will have to cease actions pursuant to  
17 our approved permit, and we'll have to appeal that or  
18 whatever next steps we would take.

19 But I think we are fully within our right, and  
20 it should be expected that once we have an approved  
21 permit, that we are going to continue with our projects.  
22 We have timelines. We have contractors, and to wait until  
23 Mr. Galpren is finished with all of his appeals, we  
24 believe, is just unreasonable.

25 And that -- that concludes my rambling

1 comments. Thank you.

2 COMMISSION CHAIRMAN GANS: Thank you.

3 Mr. Anderson or Mr. Coyner, do you have  
4 questions of Tom?

5 COMMISSIONER COYNER: I do. This is Coyner.

6 Mr. Woodworth, where is the project currently?  
7 Could you describe it for us? Is it the -- are the  
8 scrapers out there running today? Is there -- you know,  
9 where are you in the contracting process with  
10 construction, just sort of a quick summary on that?

11 MR. GALPREN: Understood. Let me  
12 defer that -- let me point that question to our  
13 Environmental Manager, who's in the room and has a better  
14 understand than I do on that.

15 MR. GARCIA: This is Tony Garcia, NV Energy.

16 So upon the issuance of the permit, on the  
17 25th of July -- I believe that's the date -- we then were  
18 authorized to begin construction of the newly -- the new  
19 ponds up on the mesa. We have, to date, already completed  
20 the construction of the tortoise fencing around those  
21 ponds. We have already began the excavation as well as  
22 borrow material for that area. We are -- for lack of  
23 better word, we are well into the construction of those  
24 evaporation ponds.

25 As it stands right now our first pond should

1 be completely constructed and in operation by February of  
2 2011, and the second one, as approved, is supposed to be  
3 constructed and ready for operations -- I believe it's  
4 May -- I'm sorry -- April of 2011.

5 So given that we have the construction  
6 requirements, as well as the submittal of the as-builts to  
7 the state agency from final approval and approval to  
8 discharge, if I had to take a guess, we're probably 35 to  
9 40 percent in to the construction.

10 COMMISSIONER COYNER: Thank you. This is  
11 Alan.

12 And did I understand correctly, then, Tony,  
13 that there wouldn't be fluid placed in the ponds, at least  
14 on your timeline, until February of 2011?

15 MR. GARCIA: That's the plan today, yes.

16 COMMISSIONER COYNER: All right. Thank you  
17 very much.

18 COMMISSION CHAIRMAN GANS: Mr. Anderson?

19 COMMISSIONER ANDERSON: One quick question for  
20 Mr. Garcia. As you're constructing, there is an  
21 inspection process, I assume, that's in place and going  
22 on?

23 MR. GARCIA: As required, under the approval  
24 of the preliminary design specifications from the State,  
25 Engineer -- I should say technical service with the state,

1 the`-- I'm not specifically sure of any inspections, but  
2 whatever requirements were outlined in the approval  
3 process are being followed.

4 COMMISSION CHAIRMAN GANS: Thank you very  
5 much.

6 I have a question also, but I'm not going to  
7 address it to Mr. Woodward. I'm going to address it to  
8 the Commission Counsel RoseMarie Reynolds. I'd like the  
9 have her weigh in and give me some advice or give the  
10 panel some advice on what her take is on the authority  
11 that we have on behalf of the Commission.

12 MS. REYNOLDS: Thank you. This is RoseMarie  
13 Reynolds for the record.

14 I have am not heard any arguments or any cite  
15 to any authority for the Commission to issue a preliminary  
16 injunction. I have to state that I disagree with Nevada  
17 Energy when it cites to 233B.140 of the Nevada Revised  
18 Statute as a possible grounds for issuing a preliminary  
19 injunction. Just so the panel knows and is familiar with  
20 that particular statute, that is addressed to the  
21 procedure that is to be followed once this Commission  
22 makes its decision in this case and the matter would be  
23 appealed to District Court.

24 At the time that that appeal is filed with  
25 District Court, a motion for a stay would also be need to

1 be filed. So it's addressing a District Court procedure,  
2 not a procedure before this commission.

3 The Commission has very specific enumerated  
4 duties, and those duties and its authority is found in  
5 Nevada Revised Chapter 445A, specifically NRS 445A.425,  
6 subsection 4 states, "The Commission may hold hearings,  
7 issue notices of hearings, issue subpoenas requiring the  
8 attendance of witnesses and the production of evidence,  
9 administer oaths and take testimony as it considers  
10 necessary to carry out the provisions of this section and  
11 for the purpose of reviewing standards of water quality."

12 In addition, NRS 445A.605 on appeals states  
13 that "The Commission shall affirm, modify, or reverse any  
14 direction or" -- excuse me -- "The Commission shall  
15 affirm, modify, or reverse any action of the director  
16 which is appealed to it."

17 It's my opinion that the Commission does not  
18 have any authority under the statutes to issue preliminary  
19 injunctions.

20 COMMISSION CHAIRMAN GANS: Any questions or  
21 comments from the panel, Mr. Anderson or Mr. Coyner?

22 COMMISSIONER ANDERSON: No. That helps a lot  
23 to clarify the issue. Thank you.

24 MR. WOODWORTH: And could -- this is Mister --  
25 this is Tom Woodworth from NV Energy. Can I respond

1 quickly to Ms. Reynolds' comments?

2 COMMISSION CHAIRMAN GANS: Sure. Go ahead.

3 MR. WOODWORTH: Okay. I just wanted to say  
4 that I -- I -- I totally agree, and perhaps I was being a  
5 little too polite in my response. I did not want to -- I  
6 did not want to turn this proceeding into an argument on  
7 the Commission's authority.

8 So how I tried to phrase it was to the extent  
9 they had such authority, that was the best answer I could  
10 come up with was 233B.140, but for what it's worth and for  
11 the record, I certainly agree, and perhaps I should have  
12 said that more clearly in my response.

13 MR. GALPREN: This is Dan Galpren. Can I  
14 respond, as well?

15 COMMISSION CHAIRMAN GANS: Absolutely.  
16 Proceed.

17 MR. GALPREN: First of all, I agree with your  
18 Counsel that 233B.140 is inapposite. That only allows  
19 for -- that allows for petition for judicial review to  
20 contest a final decision in a contested case. That  
21 decision has not yet been made by you.

22 But I do believe that under NRS 233B.127 the  
23 Commission is able to suspend -- and the term is "any  
24 license," but license's otherwise -- is defined elsewhere  
25 to include permits. You are permitted to suspend a permit

1 so long as the standard is met, and that is that the  
2 agency finds that public health -- I'm quoting -- "the  
3 agency finds that public health, safety, or welfare  
4 imperatively require emergency action and incorporates the  
5 findings to" -- "to that effect in its order."

6 And previous to that, as I indicated before,  
7 you're required to give the Applicant due process to  
8 discuss the facts of the matter. So I think that you --  
9 do you have the authority. It probably has rarely, if  
10 ever, been exercised by the Commission, but it's there in  
11 the Administrative Procedures Act, which also applies to  
12 the Commission.

13 Now, in terms of sufficient evidence to ground  
14 a decision, that would require us to have -- to get into  
15 an evidentiary discussion about the actual performance of  
16 the existing prongs and whether that foretells similar  
17 problems with the ponds in the mesa.

18 Much of that evidence has, as we will be  
19 discussing soon, been withhold from the Sierra Club,  
20 despite our repeated requests for it. It was very  
21 interesting for me to hear Mr. Garcia note that the  
22 authorization for construction had been provided to NV  
23 Energy by NDEP after NV Energy had submitted the required  
24 design documents. We have been seeking those design  
25 documents from NDEP for months now.

1           We, in addition, however, have provided to the  
2 Commission the same visual and photographic evidence of  
3 substantial contamination from the existing ponds on the  
4 mesa, which we have presumed are going to be of  
5 essentially the same design as the ponds -- I'm sorry --  
6 the ponds on the flood plain of the Muddy River, which we  
7 have had to assume would be of similar design as the ponds  
8 in the mesa.

9           And we provided to -- we provided to you the  
10 memorandum that Mr. Lips provided to me of his  
11 observations of likely leaching from those ponds. If you  
12 allow, then, I would like to ask Mr. Lips to describe what  
13 the existing evidence, that has been provided to us in the  
14 few documents that have been provided to us, as to  
15 groundwater monitoring say about the existing design of  
16 the ponds, and also what he observed looking down at  
17 existing ponds E and the -- and the apparent leachate  
18 below them, because it goes to the question of whether  
19 imperative emergency action is required.

20           MS. TANNER: This is Lyna Tanner with NDEP. I  
21 would interpose an -- an objection to that, if I may,  
22 Mr. Commissioner.

23           COMMISSION CHAIRMAN GANS: Yes. I agree.  
24 I -- Mr. Galpren, I do not want to get involved out too  
25 far in this. I mean, we're getting into the hearing part

1 of it now. We're just trying to address the injunction.  
2 I understand where you're going with the irreparable  
3 emergency action.

4 I certainly am having a tough time getting my  
5 hands around the fact that you don't want to Reid Gardner  
6 to do -- to do any construction because of potential  
7 leakage, and yet it seems to me, from what I heard from  
8 all parties, is that this action is to address exactly  
9 what you're afraid is happening or will happen in those  
10 existing ponds.

11 It sounds to me like we really need to go  
12 forward and get this going right away. I -- I personally,  
13 so far, don't see the emergency nature -- the immediate  
14 emergency, right now, of what's going on out there.  
15 You've not swayed me or given me enough information  
16 that -- I'm not afraid to afraid to work on power of  
17 injunction if we have to. I'm concerned that we don't  
18 have it, and I'm -- and I'm also concerned even if we do  
19 have it that we don't meet the requirement of this  
20 emergency action that you spoke of earlier.

21 So I'm just sharing with you my concern, my --  
22 my confusion, my hesitancy here, and I think we're at a  
23 point now where I'd like to go into the deliberations of  
24 the whole panel. I think I have heard what I need to  
25 hear.

1 Mr. Anderson, Mr. Coyner, if there's something  
2 more you have questions of any of these three gentleman,  
3 please be my guest, but I do want to get into the -- the  
4 deliberation.

5 Before we do, I do want to give RoseMarie  
6 another opportunity to address Mr. Galpren, because they  
7 are looking at these NRS's. RoseMarie?

8 MS. REYNOLDS: I am not certain -- this is  
9 RoseMarie Reynolds for the record.

10 I am not certain that NRS 237B.127 applies to  
11 this Commission. Typically 237B.127 is used in the  
12 context of license proceedings, for example, for a doctor  
13 who's going out and is harming the public. And the  
14 problem is that those agencies that hand out licenses and  
15 that would be operating under this specific Chapter  
16 237B.127, within their statutes I believe that there are  
17 statutes that address that agency's ability to issue a  
18 preliminary injunction. We don't have that equivalent in  
19 445A. 445A.145, subsection 4 says nothing about being  
20 able to issue preliminary injunctions.

21 So I'm just not sure that under 127 that that  
22 overcomes what's in 445A.425(4). Thank you.

23 COMMISSION CHAIRMAN GANS: Okay. This is the  
24 time that we are going to deliberate.

25 Mr. Anderson, Mr. Coyner, do you have any

1 comments, any discussions that you would like to share?

2 COMMISSIONER COYNER: This is Alan Coyner for  
3 the record.

4 I'm -- I'm of the opinion that we don't have  
5 the ability to go into a preliminary injunction on the  
6 permit, itself.

7 I have a question for RoseMarie, though.  
8 RoseMarie?

9 MS. REYNOLDS: Uh-huh.

10 COMMISSIONER COYNER: Does the Appellant have  
11 the ability -- are there means of relief for the  
12 Appellant? In other words, can they go to court, to a  
13 judge, and get an injunction if they believe there's  
14 imminent harm?

15 MS. REYNOLDS: I'm hesitant to answer that  
16 question because I don't believe that that is within my --

17 COMMISSIONER COYNER: Okay.

18 MS. REYNOLDS: -- authority.

19 COMMISSIONER COYNER: So they may or may not  
20 have other legal remedies?

21 MS. REYNOLDS: They may or may not have other  
22 legal remedies. What those specific remedies are, I don't  
23 believe I can say.

24 COMMISSIONER COYNER: Okay. My second  
25 thought, Mr. Chairman, is that any threat to the

1 environment or to the public doesn't occur until the first  
2 drop of waste water hits the pond. And up until that time  
3 Nevada Energy is essentially proceeding on the basis that  
4 their design and construction will be found satisfactory  
5 during the course of the appeal. So that's a business  
6 risk that they undertake.

7 But, again, the point of crossover -- and you  
8 can argue whether one drop is going to cause an imminent  
9 public health risk, but that is the event that -- it's the  
10 water that goes into the pond that's going to cause that.

11 So I would be thinking along the lines of a  
12 motion that would deny the preliminary injunction request,  
13 number three. And -- and perhaps an amendment to that or  
14 a rider to that, that would ask that Nevada Energy notify  
15 the panel or notify the Environmental Commission prior to  
16 putting any waste water into the pond.

17 In other words, I want that date -- I  
18 understand Mr. Garcia to say it was February of 2011, but  
19 I'd like that date sort of a known date to us, so that if  
20 we do get extended, if we're still in appeals, and if  
21 we're so forth and so on, that perhaps another look could  
22 be taken at the need for imminent harm at that point in  
23 time.

24 That -- that's sort of the way I'm thinking,  
25 Mr. Chairman.

1 COMMISSION CHAIRMAN GANS: Thank you.

2 Mr. Anderson?

3 COMMISSIONER ANDERSON: I would concur with  
4 Commissioner Coyner in the fact that I do not see any  
5 evidence of an imminent threat to public health, and I  
6 also agree that I don't believe this Commission has the  
7 power under the statutes at this point to grant what's  
8 being requested.

9 So I would be happy to second the motion as  
10 prepared by Commissioner Coyner.

11 COMMISSION CHAIRMAN GANS: Commissioner  
12 Coyner, was that form of a motion, please?

13 COMMISSIONER COYNER: Well, I'd ask  
14 Commissioner Anderson if he has objection to this -- this  
15 riding thought with the motion that would require the  
16 Nevada Energy to notice the Commission prior to -- prior  
17 to placing any significant amount of waste water into the  
18 pond?

19 I don't know if there's a testing phase that  
20 goes on, or a leak testing phase that happens, but that's  
21 sort of a watershed type of crossover point, and I'm  
22 wondering if -- I would want to know that.

23 MR. FREY: Mr. Chairman, this is Bill Frey.

24 I hate to do this, could I be recognized just  
25 very briefly? I think I can -- I think that what

1 Mister -- Commissioner Coyner is asking for, may already  
2 be in -- in the permit.

3 COMMISSION CHAIRMAN GANS: This is Jim Gans.  
4 Mr. Frey, are you saying to specifically  
5 notify the SEC?

6 MR. FREY: Oh, that party isn't, but -- but  
7 there's a -- there's a requirement to, one, notify --  
8 specifically to submit the engineered documents prior to  
9 construction of the actual pond, and then there's also a  
10 requirement to notify when fluid goes into them. So  
11 maybe -- maybe those documents could be forwarded to you.  
12 I was just trying to help.

13 COMMISSION CHAIRMAN GANS: Okay.

14 MR. FREY: I'm sorry.

15 COMMISSIONER COYNER: Chairman, this is  
16 Commissioner Coyner.

17 So NDEP would have the ability to notify the  
18 SEC of -- of that event taking place. And, again, my  
19 reference is to the imminent harm thought. You know,  
20 again, I don't currently see imminent harm, but I might  
21 rethink that upon the beginning of placement of waste  
22 water into the pond.

23 COMMISSION CHAIRMAN GANS: Okay. We have a  
24 motion.

25 And Mr. Anderson, we have a second?

1                   COMMISSIONER ANDERSON: That's correct. And I  
2 would just add that there is an approval process by the  
3 Division of Water Resources, Dams Section, I believe, that  
4 will also notice us once the construction has met the  
5 requirements of the design as-builts, so forth.

6                   COMMISSIONER COYNER: Well, Mr. Chairman, this  
7 is Commission Coyner again.

8                   Could I get some kind of assurance that will  
9 be provided to the SEC, that the placement of waste water  
10 into the ponds will be noticed to us? That's my point of  
11 concern, and who is going to do it? Who is responsible  
12 for that?

13                   COMMISSION CHAIRMAN GANS: Mr. Frey, I'm  
14 assuming that would be your client?

15                   MR. FREY: Yes, we can do that. We'll take  
16 that on.

17                   COMMISSIONER COYNER: Okay. I'll -- I'll make  
18 a formal motion then, Mr. Chairman, to deny Item Number 3,  
19 which is the preliminary injunction to suspend the  
20 effectiveness of the permit and halt construction of new  
21 waste water ponds, with the addition that the State  
22 Environmental Commission be noticed by NDEP prior to the  
23 placement of waste water into the ponds.

24                   COMMISSION CHAIRMAN GANS: Mr. Anderson?

25                   COMMISSIONER ANDERSON: I'll second that

1 motion.

2 COMMISSION CHAIRMAN GANS: Okay. It's been --  
3 motion's been made and seconded.

4 Is there any discussion on the motion by the  
5 panel?

6 COMMISSIONER COYNER: None here.

7 COMMISSION CHAIRMAN GANS: Okay. If none,  
8 signify -- all those in favor signify by "Aye."

9 COMMISSIONER ANDERSON: Aye.

10 COMMISSIONER COYNER: Aye.

11 COMMISSION CHAIRMAN GANS: Aye.

12 Those not in favor signify by "Nay."

13 (No response)

14 COMMISSION CHAIRMAN GANS: Okay. It's  
15 unanimous. The motion passes.

16 (The vote was unanimously in favor of motion)

17 COMMISSION CHAIRMAN GANS: Well, that is the  
18 first item. I want to now proceed to Items 1 and 2, which  
19 is the subpoena and the continuance of the hearing.

20 Again we'll go in the same order. We'll use  
21 the same process. In this case, however, looking over the  
22 documents that was given to me by Mr. Walker, it seems  
23 like these two items kind of go hand in hand or they at  
24 least affect each other.

25 Mr. Galpren, would it be acceptable to you if we take

1 these two together? If you think there's some harm in  
2 that, please -- please tell me and let me know.

3 MR. GALPREN: I think there's no harm.

4 COMMISSION CHAIRMAN GANS: Okay. So will you  
5 please proceed then with your arguments on Items 1 and 2,  
6 which is the subpoena and the continuance?

7 MR. GALPREN: Thank you very much,  
8 Mr. Chairman.

9 The Sierra Club has made every effort at  
10 considerable expense to secure the documents that are  
11 relevant to its appeal. In our motion and in our response  
12 to the opposition to the motion, we have detailed some of  
13 Sierra Club's efforts that were made in September, either  
14 to or through Gerald Gardner or Shannon Harbor at NDEP,  
15 and since her entry in this case, Deputy Attorney General  
16 Carolyn Tanner.

17 But I also want to let you know that the  
18 Sierra Club made three on-site visits to NDEP's Carson  
19 City offices, to review NV Energy Reid Gardner files  
20 related to this permit, and on each occasion NDEP provided  
21 us six but highly incomplete files for us to review.

22 At the same time, on each occasion we flagged  
23 all the documents that were arguably relevant to this  
24 matter, for copying, and -- through an independent service  
25 in our later analysis. That process, of course, added an

1 additional amount of time, about 10 days on the back end  
2 of each visit.

3 Our first attempt was by or through John  
4 Barth, who's an attorney with the Western Clean Energy  
5 Campaign and me on June 30. Most importantly for  
6 today's -- for this hearing, despite our request prior to  
7 June 30th, for all permit and compliance documents that  
8 were relevant to NV Energy's Reid Gardner files, those  
9 files that were provided failed to include the additional  
10 quarterly groundwater monitoring reports that we're still  
11 seeking, any additional -- any interstitial leachate  
12 collection data from the existing double-lined ponds, any  
13 pond design documentation, either for the newly proposed  
14 mesa ponds or the existing ponds, and failed to provide  
15 any site characterization for the mesa in terms of data or  
16 documents.

17 The second trip was by a Sierra Club activist,  
18 Emily Rhodenbaugh, formerly a professional staff with the  
19 Sierra Club, on July 29. That was done in conjunction  
20 with hydrogeologist Elliott Lips, who is on the phone, and  
21 was on the phone with Emily then as she sorted through  
22 hundreds of documents and maps. And we had many of those  
23 flagged again for copying. Those included design  
24 documents for some, but not all of the existing ponds  
25 only, but none of the other requirements -- none the other

1 required documents, including design documents for the  
2 mesa ponds, the quarterly monitoring reports, the  
3 interstitial leak detection data, and reports, and so on.

4           The third trip occurred on August 12. Again,  
5 this was the Rhodenbaugh-Lipps duo. Again files were  
6 produced by NDEP, but these also failed to contain any  
7 information about the newly prosed ponds, again no  
8 engineering design reports, no site assessment reports.  
9 This is August 12. And I believe that Mr. Garcia just  
10 testified that approval, including approval of the design  
11 of the mesa ponds was -- I think you said July 25.

12           There was some additional relevant engineering  
13 reports about the design of the existing ponds provided to  
14 us at that time, but none about the newly -- about the new  
15 mesa ponds.

16           Now, in our October 6th motion to you, just  
17 two weeks ago, we explained our attempts in September to  
18 secure the missing documents, and also the reason they're  
19 needed for this appeal, and that is this: NDEP's failure  
20 to provide these data and NV Energy's refusal to provide  
21 any evidence -- documentation that NDEP says is with NV  
22 Energy, not it, simply impairs Sierra Club's ability to  
23 fully establish the record of NV Energy's compliance or  
24 non-compliance with the 2005 permit.

25           As we indicate in our filings, the issue of

1 non-compliance with the prior permit is directly on point  
2 in this appeal, because the long relevant regulations  
3 disallowed NDEP to renew a discharge permit, not to  
4 mention a permit to expand and alter operations, in  
5 addition to renewal, to an applicant that's failed comply  
6 with its existing discharge permit.

7           And in October -- in Exhibit 2 to our  
8 October 6th motion, we further delineated the type,  
9 nature, name, and date of the data and documents that have  
10 been withheld, that we believe are in the possession of  
11 NDEP and/or NV Energy, that is needed for the appeal.

12           That exhibit was a memo from Mr. Lips to me on  
13 October 4th, and I am prepared, if the Commission would  
14 like, to question Mr. Lips about the importance of these  
15 materials to his assessment of the question of NV Energy's  
16 compliance with the effluent limitations and other  
17 requirements from the 2005 permit.

18           In our October 19 response to the opposition  
19 to this motion, we further detail how this data and these  
20 documents are relevant to our appeal, and I should also  
21 say, as well, by implication, why review of those  
22 documents should have informed NDEP's decision making on  
23 this appeal.

24           This is done in Exhibit 3 to our October 19  
25 filing, and again since he helped produce this document, I

1 could examine Mr. Lips on the question of the relevancy of  
2 any of these documents to our appeal.

3 I think what -- what Sierra Club has clearly  
4 established is that the materials are relevant to its  
5 preparation, that we have made every reasonable effort to  
6 secure them, that all -- or at least much of these  
7 materials are in the possession of NDEP or NV Energy, that  
8 Sierra Club had the right to them, and that withholding  
9 impairs the Sierra Club from presenting to the Commission  
10 a full analysis of NDEP's compliance with the law or  
11 non-compliance in the course of granting this -- this  
12 fundamentally incoherent permit.

13 Now, lastly, the Intervenor, NV Energy, has  
14 argued that a lot of the documents that Sierra Club seeks  
15 were -- pertained to the February 2008 Administrative  
16 Order on Consent, which NV Energy has signed, to  
17 characterize and to remediate some of the substantial  
18 groundwater contamination that has occurred presumably  
19 from discharges from existing ponds or other facilities at  
20 the Reid Gardner site, and so since they pertain to that,  
21 they're not relevant to this proceeding and so can be  
22 withheld from Sierra Club.

23 Four points to make, I think, on this. First,  
24 we agree with the Attorney General. The relevancy  
25 question is a determination for the hearing, not here. I

1 mean, certainly if the materials are shown to be remotely  
2 important for Sierra Club to be able to fully understand  
3 the scope of the -- the scope of the question of NV  
4 Energy's compliance with the prior permit, then Sierra  
5 Club should have access to those public records. They  
6 should not be withheld.

7 But secondly, the point that I made -- and I  
8 think, in response, bears repeating here -- a document  
9 that is produced and that pertains to the Administrative  
10 Order on Consent can also be relevant to the question of  
11 NV Energy's compliance with his existing permit. And here  
12 that is the case I think was for all the documents that  
13 even arguably could be said to have been produced pursuant  
14 to the Administrative Order on Consent.

15 But thirdly, let's take a look at if we can,  
16 Sierra Club's Exhibit 2 to the Motion. Appendix A lists  
17 the documents that Sierra Club seeks from NDEP and from NV  
18 Energy.

19 COMMISSION CHAIRMAN GANS: Mr. Galpren, let me  
20 interrupt to make sure the panel members know exactly what  
21 you're talking about, that they have them in front of  
22 them.

23 MR. GALPREN: Okay.

24 COMMISSION CHAIRMAN GANS: Mr. Anderson and  
25 Coyner?

1 MR. GALPREN: I'm looking at Exhibit 2 to the  
2 motion. This is Appendix A to the October 4 memorandum  
3 from Elliott Lips to me. So here I'm considering the  
4 documents that arguably could be relevant to  
5 Administrative Order on Consent.

6 COMMISSIONER ANDERSON: Mr. Chairman, this is  
7 Pete Anderson. It's the one that starts out, "List the  
8 permit supporting documents requested from NDEP on  
9 September 13 but not received from BCA on September 30th,"  
10 that list, Appendix A?

11 MR. GALPREN: Yes.

12 COMMISSIONER ANDERSON: Okay. I've got it.

13 COMMISSIONER COYNER: I have it as five  
14 pages --

15 MR. GALPREN: That's right.

16 COMMISSIONER COYNER: -- page 1, 5, and so  
17 forth, and a long list of documents.

18 MR. GALPREN: Right, and so the pages that I'm  
19 looking at right now are pages 5 and 6 from that exhibit.

20 COMMISSION CHAIRMAN GANS: Okay. I have them  
21 in front of me. I think the other panel members have them  
22 also.

23 COMMISSIONER ANDERSON: Yes.

24 COMMISSION CHAIRMAN GANS: Okay. Please  
25 proceed, Mr. Galpren.

1 MR. GALPREN: Thank you. The Administrative  
2 Order on Consent was signed in February 2008. There are  
3 only a few of the documents listed on these two pages that  
4 were published subsequent, and so arguably even in  
5 compliance, or for the purpose of showing compliance with  
6 the Administrative Order on Consent. Many of these  
7 documents are published well before the Administrative  
8 Order on Consent was even signed.

9 And then secondly, looking two pages back in  
10 that same exhibit, if we can, starting on page 2 of 6 of  
11 the exhibit, Mr. Lips delineated the categories of other  
12 information that we have sought. The first on page 2 of  
13 six is the complete record of quarterly groundwater  
14 monitoring reports.

15 Now, these reports are required -- are  
16 directly required in the permit to be submitted, not to  
17 the Bureau of Corrective Actions only, but first to the  
18 Bureau of Water Pollution Control with a copy to the  
19 Bureau of Corrective Actions.

20 Secondly, with respect to interstitial layer  
21 monitoring, monitoring of the amount and characteristics  
22 of the waste water that makes it -- that has made it  
23 through the first liner in the existing ponds to the  
24 interstitial monitoring, this, too, is expressly required  
25 in the 2005 permit. By the way, these are also required

1 in the 2010 permit.

2 And it's unclear if this information has at  
3 all been reviewed by the Bureau of Corrective Actions, but  
4 it's clearly required to be reviewed and reported to the  
5 Bureau of Water Pollution Control.

6 The third item, the proposed mesa pond  
7 documentation -- clearly it's essential for -- for the  
8 Bureau of Water Pollution Control to have evaluated that  
9 information, and we've just learned that, in fact, they  
10 did evaluate that information. But still those design  
11 documents and the site characteristics of the mesa, the  
12 hydrogeological site characteristics have been withheld,  
13 despite our repeated requests for that information.

14 And so the -- NV Energy's arguments, that  
15 because some of -- some of this information is relevant to  
16 the AOC, all of this information can be withheld, simply  
17 fails, not only with respect to this additional  
18 information, that is required to be reported directly to  
19 the Bureau of Water Pollution Control, but also with  
20 respect to the documentation that even arguably could be  
21 said to be relevant to the build-up of the history, the  
22 context in which the Administrative Order on Consent was  
23 finally signed in February 2005.

24 And finally let me note that by its own terms,  
25 that February 2008 Administrative Order on Consent cannot

1 be used as a shield by NV Energy or the Department to  
2 relieve the Department from evaluating NV Energy's  
3 compliance with the express terms in the permit.

4 And I will cite just two sentences from the  
5 2008 Administrative Order on Consent. On page 41 it says  
6 that "This AOC in no way relieves NV Energy of its  
7 responsibility to comply with any federal, state, or local  
8 law or regulation."

9 And finally the first sentence of Section  
10 22.10, on page 42, flatly states that "This AOC is neither  
11 a permit nor a modification of a permit." So whatever  
12 relation any particular document may have to the context  
13 in which the AOC was drafted or to potential compliance  
14 demonstrations where the AOC, provides absolutely no  
15 argument that those documents can be withheld -- no  
16 support for any argument that those documents could be  
17 held from the Sierra Club or any other member of the  
18 public that is seeking them.

19 So the information is clearly needed by the  
20 Sierra Club to undertake this appeal. The Sierra Club has  
21 the right to it. And because of our repeated requests for  
22 this information, site visits, and so on to NDEP have  
23 not -- have not resulted in our ability to secure those  
24 documents, we seek the Commission's equitable -- the use  
25 of its equitable power under the statute that your Counsel

1 cited, NRS 445A.425 and the corresponding regulation, to  
2 issue subpoenas for those documents and for those  
3 documents to be produced to Sierra Club in sufficient time  
4 for Sierra Club and its experts to be able to analyze  
5 those documents and utilize them in its briefing and in  
6 its argument.

7           And then that then, if I can, Mr. Chairman,  
8 turn to Section 2 of the motion, vacatur and continuance  
9 in the proceedings, we seek the Commission's setting of a  
10 new hearing date and a new briefing schedule that is  
11 established with sufficient time for Sierra Club, and for  
12 that matter, for NDEP and NV Energy, to be able to  
13 evaluate these documents in the context of briefing and  
14 the hearing.

15           If these documents were produced for the  
16 Sierra Club in the morning of November 4 -- and we're  
17 talking about several score of them -- we would simply not  
18 have the opportunity to even become familiar with them.  
19 These often require some considerable thought and  
20 analysis, and we want to be able to give them the  
21 attention that they deserve. That's the reason why we  
22 have joined our motion for subpoena of the documents with  
23 a request for a vacatur, both of the hearing schedule and  
24 of the briefing schedule, and seek action by the  
25 Commission to set a -- to a set time that is -- that is

1 sufficient for the documents to be provided to the Sierra  
2 Club or at least provided to a copying service and thence  
3 transmitted to the Sierra Club in time enough for us and  
4 who else wants to, to analyze the materials, to  
5 incorporate that into our briefing and into our  
6 presentation at hearing.

7 Thank you.

8 COMMISSION CHAIRMAN GANS: Okay. Mr. Anderson  
9 and Mr. Coyner, questions of Mr. Galpren?

10 COMMISSIONER COYNER: This is Commissioner  
11 Coyner for the record.

12 Mr. Galpren, with regards to the list of the  
13 documents, how did you know that these documents even  
14 exist? You haven't been given up them yet, but yet you  
15 note -- obviously they're very detailed. They have names,  
16 dates, titles, so forth. Are they referenced in other  
17 documents that you were provided, and you just haven't  
18 been able to get those documents yet? Is that a correct  
19 assumption?

20 MR. GALPREN: That's correct. So are you  
21 looking then -- is it Mr. Coyner to whom I'm speaking?

22 COMMISSIONER COYNER: Yes.

23 MR. GALPREN: At Exhibit 3 in response to  
24 opposition to the motion?

25 COMMISSIONER COYNER: I am. I'm now looking

1 at the table and --

2 MR. GALPREN: Okay.

3 COMMISSIONER COYNER: -- your response to the  
4 five-page table.

5 MR. GALPREN: Exactly.

6 COMMISSIONER COYNER: There's get a list here,  
7 and you've broken them nicely into not received and  
8 received. And I'm assuming -- that was any assumption  
9 there it most -- in a lot of these cases, although as you  
10 say, groundwater monitoring reports are required by the  
11 permit, so they should be there.

12 MR. GALPREN: Yes.

13 COMMISSIONER COYNER: But others of these are  
14 detailed, you know, assessments by a geotechnical company  
15 or so forth. So they must have been referenced in another  
16 document and then --

17 MR. GALPREN: Yes.

18 COMMISSIONER COYNER: -- you were asking for  
19 that. So --

20 MR. GALPREN: Yes.

21 COMMISSIONER COYNER: -- that was my  
22 understanding.

23 MR. GALPREN: Yes.

24 COMMISSIONER COYNER: Okay.

25 MR. GALPREN: And just to briefly elaborate,

1 the first five categories or up threw updated operation  
2 and maintenance manual, these are all required under the  
3 permit, or we presumed that they are documents, such as  
4 the site characterization reports and the engineering  
5 design reports that we presume that the department would  
6 have evaluated prior to granting this permit.

7           And then the rest of these were all listed on  
8 what was called the encyclopedia of supporting  
9 documentation, a document that had been produced by  
10 contractor, I believe, for NV Energy, when it provided a  
11 host of other documents to NDEP. We were provided with  
12 that, along with a number of other documents during my  
13 June 30th review of files at NDEP, and many of these  
14 documents provide the kind of information that we believe  
15 were or should have been evaluated by NDEP before coming  
16 to the conclusion that placement of -- that continuation  
17 of the permit would be sufficiently protective of the  
18 environment both with respect to the ponds in -- that  
19 currently exist in the flood plain of the Muddy River and  
20 with respect to the newly proposed ponds on the mesa.

21           And I should also note that I believe that  
22 this entire list -- yes, this entire list is -- the first  
23 three pages are all not received, and then we have listed  
24 a number of the documents that were received. And I  
25 should hasten to add that the Department did partially

1 respond to our September 8th request, and was able to  
2 find, and secure, and provide to a copying service, about  
3 half of the documents that we are seeking.

4 But those do not provide sufficient  
5 information to fully characterize the site conditions that  
6 are relevant both are respect to the Muddy River flood  
7 plain, the ponds, and the mesa area.

8 COMMISSIONER COYNER: And, Mr. Chairman, if I  
9 might, one quick follow-up.

10 I understand that, Mr. Galpren. I understand  
11 the historic contents of the documents of the reason why  
12 you might seek them. What I don't see in this list of  
13 documents is the documents that would have been submitted  
14 most recently for the most recent permit.

15 Am I -- am I missing something here? Am I  
16 flat -- flat missing something? These all look they're  
17 historic documents that pertain to the current pond, the  
18 ones that are out there, not the ones that are under  
19 construction. There must have been engineering reports,  
20 investigations, and evaluations that were done from the  
21 new permits for the --

22 MR. GALPREN: Yes. That's -- that is our  
23 understanding, too, and that would be the reason why we  
24 continue to seek those documents, and they have not been  
25 provided. That's category 3.

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COMMISSIONER COYNER: Okay.

MR. GALPREN: Proposed mesa ponds  
documentation.

COMMISSIONER COYNER: But not in this list of  
five pages here. These are all essentially historic  
documents.

MR. GALPREN: Yes.

COMMISSIONER COYNER: Okay. I just wanted to be  
clear. So there's another whole, you know, pile of paper  
that you're seeking that is basically relevant to the  
current permit, the new permit, we should call it?

MR. GALPREN: Well, the first five items --  
well, okay. Let -- let me put it directly here.

The central theory of our case is that there  
is a history of non-compliance on the part of the  
Applicant with its prior permit. In order to fully  
characterize that history, we need to have the documents  
that explain what has happened. That includes clearly  
monitoring reports at least from 2005 through present. It  
includes the reports to the second category there, of data  
and analysis as to the amount of and characteristics of  
the water -- waste water that is detected between the two  
liners of the existing ponds. That's required to be  
reported under the permit. It includes, as you indicated,  
the -- you know, the design reports and the hydrogeologic

1 site characterization reports that should have been  
2 provided to NDEP with respect to the newly proposed ponds  
3 in the mesa and so on.

4 All that information we have been seeking and  
5 continue to seek. We received a portion of the first, a  
6 portion of the groundwater monitoring reports, but as you  
7 can see, we have not received many of those, including for  
8 2002, 2003, '4, '5, '6 -- '8 -- three-quarters -- and  
9 three-quarters of '9. None of those -- we have not been  
10 able to secure those.

11 All that information clearly should have been  
12 provided to NDEP in the -- with the application materials.  
13 We, of course, did receive the draft permit. We did  
14 receive the comments. We did receive the prior permit,  
15 the current permit, the response to comments and so on.

16 I didn't indicate -- we did not indicate  
17 that -- those documents in this listing.

18 COMMISSIONER COYNER: One -- sorry,  
19 Mr. Chairman. One more quick follow-up.

20 I assume there was a hearing or at least a  
21 permit hearing held by NDEP with regards to the permit.  
22 Did you attend it, and were any of those documents present  
23 at that hearing?

24 MR. GALPREN: I -- I did not. I provided  
25 extensive -- I, myself, provided extensive comments, but

1 there were activists with the Sierra Club, members of the  
2 Sierra Club who did attend, and did secure any documents  
3 that were there, but none of the documents that we're  
4 still seeking were there at the time.

5 COMMISSIONER COYNER: Thank you. That's what  
6 I need to hear.

7 COMMISSION CHAIRMAN GANS: Mr. Anderson?

8 COMMISSIONER ANDERSON: Mr. Chairman, I'd like  
9 to hear from NDEP before I have any questions. Thanks.

10 COMMISSION CHAIRMAN GANS: Very good.

11 I have a question, again, of RoseMarie. We do  
12 have subpoena authority? I mean, I'm asking the --

13 MS. REYNOLDS: Yes.

14 COMMISSION CHAIRMAN GANS: -- the same thing  
15 that I asked before.

16 MS. REYNOLDS: Yes. This is RoseMarie  
17 Reynolds, for the record.

18 Yes. Under NAC 445B.892, the -- as well as  
19 NRS Chapter 445A, the Commission does have the power to  
20 issue subpoenas.

21 COMMISSION CHAIRMAN GANS: Okay. So that's  
22 not a question on this particular motion.

23 Mr. Galpren, one of the things that -- that I  
24 again have to get my arms around is, you know -- and I  
25 agree with your first statement when you said the

1 relevancy question is not -- is for the hearing, not here.  
2 I do agree with that.

3           However, I'm wondering how -- how many of  
4 these documents you're really looking for. I -- I think  
5 at least now that I've got your motion, which you gave us  
6 on the 19th, gives me a little more information about what  
7 documents we're talking about.

8           My question to you would be on the second --  
9 on the second motion you have. How long are you thinking  
10 you need to review and analyze all these documents?  
11 Because that's going to affect the second motion -- your  
12 second motion.

13           MR. GALPREN: Yes. Was this Mr. Chairman  
14 speaking?

15           COMMISSION CHAIRMAN GANS: Yes. I'm sorry.

16           MR. GALPREN: Yes. Yes, Mr. Chairman.

17           Elliott? May I -- Elliott, are you still on  
18 the line?

19           MR. LIPS: Yes.

20           MR. GALPREN: Mr. Chairman, could I have our  
21 expert, who would be compelled to review each and every  
22 document, including all their footnotes, answer that  
23 question first?

24           COMMISSION CHAIRMAN GANS: Certainly.

25           MR. LIPS: If we received all of the documents

1 that are on this Exhibit 3 to the reply, it would probably  
2 take me two to three weeks to go through them and review  
3 the relevant information, and understand, and prepare a  
4 full, you know, picture for a hearing, probably a minimum  
5 of three weeks.

6 COMMISSION CHAIRMAN GANS: Okay. Mr. Galpren,  
7 does that satisfy you? Is that something that you feel is  
8 reasonable?

9 MR. GALPREN: Yes. I mean, Mr. Chairman,  
10 we -- I -- I think that we stated in our opening that we  
11 seek an additional three weeks for that purpose,  
12 subsequent to actually receiving the documents.

13 COMMISSION CHAIRMAN GANS: I understand. So  
14 what I am to understand -- and correct me -- I'm not  
15 trying to put words in your mouth -- from your argument,  
16 is that about three months have gone by, and you have been  
17 unable to prepare for the hearing, because you have not  
18 had the documents you need to prepare.

19 I'm really simplifying this, but I'd like to  
20 know what's -- what's happened for three months, and now  
21 we're going to have to have another three weeks, at least,  
22 by the time you get -- after you get the documents.

23 MR. GALPREN: Thank you.

24 Well, what's happened, as I tried to indicate.  
25 Is that we three times went to Carson City and reviewed

1 the files, and we have made repeated public records  
2 requests. And then since the entry of the Deputy Attorney  
3 General, Carolyn Tanner, we have also submitted requests,  
4 at her request, through her to NDEP.

5 In addition, we submitted a request to NV  
6 Energy. We have received some documents, some -- a  
7 considerable amount of documents, as you can see in the  
8 last several pages, and we have reviewed those.

9 And we have received some considerable data  
10 from NDEP, but not sufficient for us to know, with any  
11 degree of precision, what exactly has been going wrong and  
12 what we can recommend, reasonably, at hearing. I mean, we  
13 certainly will do the best that we can, if we are required  
14 to go forward with only a partial record.

15 And we believe that, for example, the sparse  
16 groundwater monitoring information that we have been given  
17 access to is -- is some evidence, but we believe that we  
18 need to provide significant evidence, and we believe that  
19 the evidence that's being withhold from us will enable us  
20 to provide a much stronger account and -- and provide --  
21 and put on a much stronger case at hearing.

22 So we have been -- the -- the short answer to  
23 your question is that we have been trying, repeatedly, in  
24 every way that we know how, to get this information to  
25 which we believe we have a right.

1                   COMMISSION CHAIRMAN GANS: Okay. Thank you.  
2 I will reserve any other questions I have until after we  
3 hear from the State and NDEP.

4                   So, Mr. Frey, I think it's your turn.

5                   MR. FREY: Thank you, Mr. Chairman.

6                   You know, after high school I swore off  
7 reading Franz Kafka or any other Kafka-esque type novel,  
8 but these hearings or what Sierra Club's is asking for at  
9 these hearings is very difficult to for me to get my arms  
10 around. They seem to be requesting: Give us all the  
11 documents we need to put on a hearing against you, and  
12 don't leave any out or it will be your fault.

13                  Now, Mr. Galpren and his associates have come  
14 for -- in three times into the office. They're entitled  
15 to get any document we have that hasn't been determined to  
16 be confidential, and I don't think that's even an issue in  
17 this matter. But they are certainly are entitled to the  
18 documents. But as Mr. Coyner -- Commissioner Coyner  
19 pointed out, some of these documents are 10 years old.

20                  And I have two responses to that: One, what  
21 were they doing in the intervening 10 years and how could  
22 that possibly be relevant?

23                  What Mr. Galpren is trying to do -- and he's  
24 made no bones about this -- is to put on a case  
25 challenging the 2008 AOC, and this is the wrong forum.

1 The Commission has no jurisdiction over that AOC. What he  
2 keeps asking us for is -- Sierra Club wants to get  
3 documents to determine that NV Energy is out of compliance  
4 with that AOC, take that information, and then use that to  
5 demonstrate non-compliance with the previous permit.

6 That's unacceptable. What Mr. Galpren  
7 needs -- and if he keeps asking the State to give him all  
8 the documents that he needs -- is simply this: Are there  
9 any findings of alleged violations and orders that were  
10 issued as a result of the 2008 AOC, or, more importantly,  
11 what are the violations that occurred under the 1995  
12 permit? Those are the non-compliance issues relevant to  
13 the reissuance of this permit.

14 If he had a beef with non-compliance of the  
15 2008 AOC or anything else, he needs to go to court. Now,  
16 it's not my job to direct him how the law works, but I  
17 feel I have to.

18 There are laws out there, independent of the  
19 SEC jurisdiction, that allows people to get injunctions,  
20 allows them to get subpoenas, allows them to get  
21 documents, allows them to bring suit to enforce  
22 environmental laws. But the way to do that is not under  
23 the guise of attacking the 2010 permit, and that's exactly  
24 what he's doing.

25 What he need -- can ask is: Did you review

1 this document or not, in enforcing -- (unintelligible)  
2 issued the permit. That's the end of it. We either  
3 reviewed it or we didn't, but a discussion as to why we  
4 didn't review some document that was put into it an  
5 appendix that NV Energy consultant prepared for some  
6 reason has nothing to do with this permit appeal.

7 I -- I don't want to go through the details of  
8 every single one of these documents. We will have the  
9 office open eight hours a day from here, you know, until  
10 the hearing. He can have any document he wants.

11 MS. TANNER: May I add, Bill, if you're --

12 MR. FREY: Yes, please.

13 MS. TANNER: This is Lyna Tanner from the  
14 office -- from the Nevada Attorney General's Office, just  
15 because I'm sort of being implicated, personally,  
16 interestingly enough in these documents.

17 I think it is a very simple issue. Obviously  
18 they can ask for whatever they want under the public  
19 records law. The question is asking for whatever they  
20 want, whether or not it's available, is grounds for  
21 continuing the appeal hearing on a water permit. And we  
22 would submit that it is not.

23 You know, the motions filed here are sort of  
24 out -- you know, an outrage that when they sent a request  
25 on September 13th, and -- and I responded to them as best

1 I could, on September 21, which, by the way, is within the  
2 public records deadlines of five working days, for  
3 documents that had what I would argue little relevance to  
4 this proceeding, and then to say that because I indicated  
5 that we would provide them as soon as possible, that  
6 somehow I'm stipulating that they're relevant to this  
7 appeal, is outrageous.

8           You know -- and to say -- and to say, before  
9 the Commission, that we provided an incomplete response is  
10 also disingenuous. The -- I provided to Mr. Galpren a red  
11 line of the location of those documents that were listed,  
12 as Mr. Frey indicated, from an encyclopedia provided by a  
13 consultant to Nevada Energy, of those documents that were  
14 part of our public record.

15           Now, if they think other documents should have  
16 been considered by NDEP, that's an argument for them to  
17 make in their appeal, but we don't have any obligation to  
18 provide them with documents that were never provided to  
19 us. That was the point.

20           Now, as far as some of the documents -- I  
21 think Mr. Coyner correctly asked, you know, are you --  
22 you're look at these historic documents. What about the  
23 documents that are -- that are relevant to the issuance of  
24 this permit? Now, some of them, Mr. Commissioners, deal  
25 with permit documents that are required post-permit

1 issuance. And so those documents are coming in, and as  
2 they're coming in we would certainly would proceed them to  
3 them, but at the time that they were asking for them they  
4 were not yet available.

5 So we're doing our best to comply with their  
6 public records request, but that's a very different issue  
7 than saying, well, now I need a continuance, because you  
8 haven't given me Bureau of Corrective Action documents  
9 that have no application to the appeal of a water permit.

10 MR. GALPREN: Mr. Chairman, can I respond or  
11 should we --

12 COMMISSION CHAIRMAN GANS: Excuse me just a  
13 moment. Mr. Frye, this is still your floor.

14 MR. GALPREN: Ah.

15 COMMISSION CHAIRMAN GANS: Do you have any  
16 other comments, Mr. Frey?

17 (No response)

18 COMMISSION CHAIRMAN GANS: I heard a beep.  
19 Did -- did somebody leave?

20 MS. TANNER: Oh, maybe we lost him. Can we --  
21 can we take a quick -- I'll try to email him. If we can  
22 take a quick break, I'll try to find him again.

23 COMMISSION CHAIRMAN GANS: Okay. We will take  
24 a quick five-minute break, and we're coming right back  
25 together. We're going to stay on and stay right by this

1 phone, so don't anybody leave. Ms. Tanner, please see if  
2 you can get him back.

3 MS. TANNER: Well, I need him.

4 (Proceedings paused briefly)

5 COMMISSIONER COYNER: So can we say we'll  
6 resume at a certain time.

7 COMMISSION CHAIRMAN GANS: Yes.

8 COMMISSIONER COYNER: When what time will you  
9 set, Mr. Chairman?

10 COMMISSION CHAIRMAN GANS: The time here,  
11 Alan -- it says three minutes after 3:00. So we'll get  
12 back in eight minutes after 3:00. I want to keep this  
13 going. I do not want to drag it out.

14 COMMISSIONER COYNER: Thank you.

15 (Proceedings recessed as indicated)

16 MR. FREY: Hi, this is Bill Frey. I don't  
17 know what happened, but I was cut off.

18 COMMISSION CHAIRMAN GANS: Okay. We've  
19 gone -- Ms. Tanner is looking for you. Is she still  
20 there?

21 MS. TANNER: I'm here.

22 COMMISSION CHAIRMAN GANS: Oh, good.

23 MS. TANNER: We're good.

24 MR. FREY: I think my phone and my computer  
25 all went off at the same time.

1 COMMISSION CHAIRMAN GANS: Okay. Hold on just  
2 a minute, because I think Mr. Coyner wanted to leave for  
3 just a couple minutes.

4 MR. FREY: Okay.

5 COMMISSION CHAIRMAN GANS: When he gets back,  
6 we'll start.

7 (Proceedings paused briefly)

8 COMMISSION CHAIRMAN GANS: Mr. Coyner, are you  
9 back yet?

10 (No audible response)

11 (Proceedings paused briefly)

12 COMMISSION CHAIRMAN GANS: Mr. Coyner?

13 COMMISSIONER COYNER: I am here.

14 COMMISSION CHAIRMAN GANS: Thank you very  
15 much.

16 Mr. Frey is back on the line. He just had  
17 gotten disconnected somehow. So we proceed.

18 Mr. Frey, Ms. Tanner made some statements.  
19 You may not have heard them all, but I -- you still have  
20 the floor as far as I'm concerned, and I want to make sure  
21 you're -- that you were done.

22 MR. FREY: Yeah. I -- thank you,  
23 Mr. Chairman. I'm sorry. I don't know what went wrong  
24 here, but my computer and phone all went dead at the same  
25 time.

1 I just want to add one comment at the end,  
2 and -- and then we can move on.

3 We -- Sierra Club has brought up this Bureau  
4 of Corrective Action, AOC, a number of times. What -- the  
5 obligation that the Bureau of Water Pollution Control has  
6 or NDEP has, statutorily, is to look at the preceding  
7 permit, not anything else, but the preceding permit, and  
8 see if they're in compliance with that. And I guess I'm  
9 repeating myself. That's a pretty simple step, and if  
10 they have a problem with that, they need to be in a  
11 different forum. Thanks.

12 Thank you. And I apologize again for the  
13 being cut off.

14 COMMISSION CHAIRMAN GANS: Okay. Before you  
15 leave the floor here I want to make sure that Mr. Anderson  
16 or Mr. Coyner doesn't have any questions or comments of  
17 you.

18 COMMISSIONER COYNER: I'll wait to hear in NV  
19 Energy.

20 COMMISSION CHAIRMAN GANS: Okay. I do have  
21 one question, pretty simple.

22 Ms. Tanner, do I get from your comments that  
23 you have provided Sierra Club with any and all documents  
24 that you have or they have the opportunity to get any and  
25 all documents you have?

1 I mean, does the subpoena power apply to NDEP  
2 because they haven't given documents? I -- I'm a little  
3 confused on this.

4 MS. TANNER: Well, I guess I'm a little  
5 confused on what they're asking, as well. I will say that  
6 since this motion came up, I -- I was transferred to  
7 another case. So I'm no longer lead Counsel, and I had  
8 some follow-up.

9 I sent -- on my letter that I sent to  
10 Mr. Galpren on September 21st, I went through, line by  
11 line, each one of those documents that was in our  
12 possession, and there were a few that I needed to follow  
13 up on. And I have since followed up on. I probably need  
14 to just final follow-up, but there was some confusion on  
15 our part, you know, for what (unintelligible) brought up  
16 the groundwater monitoring reports, for instance, and it  
17 was unclear if they were asking for Bureau of Water  
18 Pollution Control monitoring, reports, which would have  
19 been provided already, or if they were asking for  
20 Corrective Action's monitoring reports. So there was some  
21 confusion there.

22 So I certainly have a response, and I do  
23 believe that some of the things that they were asking for  
24 were not yet provided, but as was indicated earlier on the  
25 call, I think some of the design for the -- for the mesa

1 ponds -- I believe -- and I'll defer to NDEP, that that  
2 has since been provided. But, again, those were pending  
3 documents -- documents pending the issuance of this  
4 permit.

5 So -- but as far as, you know, the statement  
6 that, well, we gave an incomplete response, it's not  
7 necessarily true. There were a number of documents, and  
8 we highlighted each and every one that were never in our  
9 possession, and I referred them to Nevada Energy.

10 They are entitled to the documents that are in  
11 our possession, because those are public records, and we  
12 don't have a dispute with that, and they don't really need  
13 to subpoena to get that. What they need -- if they need a  
14 subpoena from Nevada Energy, that's a different issue, and  
15 I won't speak to that.

16 But -- or if they have a problem saying that  
17 those documents in Nevada Energy's possession should have  
18 been in our possession, which is unfortunately much of  
19 what Mr. Galpren was saying, he was saying you -- NDEP,  
20 you need to go get us those documents, and my response  
21 was, no, that's not part of our public records. I don't  
22 have an obligation to go pick those up for you. You go  
23 talk to Nevada Energy.

24 Same thing with the site assessment, their --  
25 or their site access. They were very upset that NDEP

1 didn't give them access to NV Energy's private property.  
2 Again, that's not our position. That's not our duty, nor  
3 would we ever be able to do that. Again, they'd have to  
4 deal with Nevada Energy.

5           So we gave them what we had in our public  
6 record at the time of my response, September 21st, and I  
7 do have a follow-up, and we -- and we can talk about that,  
8 but it's not extensive. It's certainly not anywhere near  
9 the number of documents that he's looking for. And,  
10 again, whether or not those are relevant to the issue of  
11 this permit appeal is a totally separate issue. And so by  
12 me simply responding to the public records request, I'm  
13 not stipulating that any of those documents are relevant  
14 to the issue of the water permit.

15           COMMISSION CHAIRMAN GANS: Question -- I  
16 probably don't have to ask, but I will, anyway: So what I  
17 hear you saying is you're not making any relevancy  
18 decisions on behalf of anyone, because I see -- I note,  
19 and I know Mr. Galpren said this is in -- in his motion.  
20 He says: The failure of NDEP. So it's like you failed to  
21 do so you were supposed to do or give something that you  
22 had, and you're telling me that is not the case.

23           MS. TANNER: Yes.

24           COMMISSION CHAIRMAN GANS: Okay. Okay. I'm  
25 with the other panel members. I don't have any other

1 comments until we hear from Nevada Energy. So we'll go to  
2 Nevada Energy next.

3 MR. WOODWORTH: Are you ready for me? This is  
4 Tom Woodworth, NV Energy.

5 COMMISSION CHAIRMAN GANS: Yes, sir.

6 MEMBER WOODLAND: Thank you. And, again, we  
7 very much parrot the responses that have been made by  
8 NDEP's Counsel, Mr. Frey and Ms. Tanner.

9 You know, I was also a little -- a statement  
10 was made several times by Sierra Club's Counsel that NV  
11 Energy has argued that NDEP has a right to withhold  
12 documents, and I have to take issue with that, because I  
13 have not certainly not said that in any of our pleadings.  
14 In fact, we said quite the opposite, in quote, "Sierra  
15 Club is always free to submit requests for public records  
16 pursuant to the Nevada Open Records Law, regardless of  
17 relevance to this proceeding."

18 And I think that's the point we're trying to  
19 make that. He -- Mr. Galpren and Sierra Club have the  
20 right under the Nevada Open Records Law to get whatever  
21 documents NDEP has, whether it's relevant to this  
22 proceeding or not. And if -- and I would have every  
23 reason to suspect that NDEP is doing everything in their  
24 power to get those documents to them.

25 The separate issue at relevance to this

1 proceeding, is whether or not they have the right to  
2 subpoena for documents. And I don't feel Sierra Club has  
3 been constrained by the law or regulations in place that  
4 are -- for this proceeding, but I do feel constrained to  
5 go by them, and I'm going to look to NAC 445B.892, which  
6 provides the Commission subpoena power, and the  
7 Commission -- the Commission's subpoena power is upon good  
8 cause shown.

9           What our argument is, is that there's been no  
10 good cause shown to allow for a subpoena. I say that for  
11 two reasons. One, something that's already been mentioned  
12 numerous times, and we feel strongly about it on our end  
13 is relevance. There is no argument, and there is no  
14 disagreement on our end that there is existing groundwater  
15 impacts in the vicinity of the site associated with  
16 historic operations or at least likely associated.

17           We have entered into an AOC with NDEP. We  
18 have spent large sums of money and will for several years  
19 going forward, to investigation, characterize, and  
20 remediate those impacts, not relevant to this proceeding.  
21 None of those ponds, subject to the AOC, are subject to  
22 this permit.

23           And with respect to the timeframe it has taken  
24 the -- for the response to Mr. Galpren's point that  
25 they've tried for several months to get documents that

1 they feel are relevant, and they haven't been able to get  
2 them, I'll just remind everyone of the timeline here.  
3 This permit was the notice of proposed action by the  
4 agency with was issued -- make sure I said this right --  
5 October 21st, 2009. Here we are a year after that.

6 So they have had -- they were involved in the  
7 public hearings. They submitted written comments. I  
8 don't understand -- now, I know they've become much more  
9 aggressive in the last few months, but again it's not like  
10 they've been -- it's not like they haven't had ample time  
11 to pursue this. There -- it's been a year, and it's been  
12 a year where they feel they still haven't received all the  
13 documents they requested. Well, maybe that's the case.  
14 Maybe it isn't.

15 But did they take those actions at the proper  
16 time, during the public comment period? Are those  
17 materials even relevant to this proceeding? Those are the  
18 issues that I think are relevant and I think they're  
19 relevance specifically to your stat -- your regulatory  
20 authority in 892.

21 I do not believe, and we do not believe here,  
22 as Intervenors, that Mr. Galpren, the Sierra Club have  
23 given any evidence of good cause to issue a subpoena and  
24 related, obviously, for the same reasons, to vacate the  
25 hearing date issue a new scheduling order.

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And that's it.

COMMISSION CHAIRMAN GANS: Okay. Mr. Anderson and Mr. Coyner, again?

COMMISSIONER ANDERSON: This is Pete Anderson. Just a question for Mr. Galpren. The table that arrived on October 19th, when was that produced?

MR. GALPREN: In Exhibit 3?

COMMISSIONER ANDERSON: Yes, sir.

MR. GALPREN: Probably we finished that the day before. And this is just a summary with some comments as to their relevance of the -- I think it's Exhibit Number 2 from the motion on October 6th.

COMMISSIONER ANDERSON: Okay. So --

MR. GALPREN: But I wanted to -- we wanted to show the specific relevance since that was -- since the question was raised about that, by the opposition, specific relevance each of these documents.

COMMISSIONER ANDERSON: Okay. So when you went to the visit NDEP's offices in Carson City, did you have a table such as this to go down to request your information?

MR. GALPREN: No, we didn't. We asked for -- well, in June 30th, all information as to compliance, and -- compliance with the prior permit of NV Energy's Reid Gardner site. And then we asked for specific

1 additional documents that weren't in the first -- that  
2 were not available to us by follow-up email to Gerald  
3 Gardner, both before the July visit and before the August  
4 visit.

5           And those documents -- some of those were  
6 determined to be in the archives. Some of those documents  
7 were determined to be with the Bureau of Corrective  
8 Action. So we needed to, you know, coordinate with NDEP  
9 to be able to view the documents.

10           But we never were able to -- they -- they  
11 never were able to produce -- or never did produce any of  
12 the first three sets of critical documents that are in  
13 Exhibit 3, the balance of the quarterly monitoring  
14 reports, and any information with respect to the quantity  
15 or characteristics of the waste water in the -- analyzed  
16 by the interstitial layer monitoring, and have provided --  
17 and still have not provided any information as to the  
18 characterization of the site on the mesa or any of the  
19 engineering design reports for the newly proposed ponds.

20           Categories 4 and 5 were supposed to be  
21 submitted pursuant to the current permit, and we certainly  
22 want to be able to review that prior to the hearing.  
23 Those were required to be submitted by NDEP by the end  
24 of September. We still haven't received those. And none  
25 of those were part of the list -- the larger list that

1 comprises the balance of this, that we received, the list,  
2 itself, from NDEP at the end of June.

3 So the balance of this are documents that we  
4 sought so that we could fill in the holes, given the  
5 absence of information that was provided in June, so that  
6 we could piece together what is happening in the absence  
7 of their providing us with the direct documentation as to  
8 the design of the mesa ponds and site characteristics.

9 And -- and any of the historical and current  
10 monitoring of groundwater -- I'm sorry -- of the  
11 interstitial waste water monitoring and the balance of the  
12 quarterly groundwater monitoring reports.

13 The first one is expressly required to be  
14 provided to the Bureau of Corrective Action pursuant to  
15 the permit in 2005, Section 2B2. The second interstitial  
16 layer monitoring is required to be provided to the Bureau  
17 of Water Pollution Control pursuant to the permit Sections  
18 1A2 and Sections 1A1.

19 And then the characterization -- character --  
20 characteristics of the mesa site and the engineering  
21 design reports for the proposed ponds, those were  
22 obviously required to be provided to NDEP, and we simply  
23 have sought them and have not received them.

24 COMMISSION CHAIRMAN GANS: Mr. Woodworth, this  
25 is Jim Gans. I guess I don't understand what you're

1 saying. The Item 3 -- let's start there, the most recent  
2 one you just talked about.

3 They were supposed to be -- I mean, you're  
4 trying to find them, or they weren't submitted, or I -- I'm  
5 not understanding what you're saying.

6 MEMBER WOODLAND: Was that addressed to  
7 Mr. Galpren or Mr. Woodworth? I'm sorry.

8 COMMISSION CHAIRMAN GANS: Mr. Woodworth.  
9 Excuse me.

10 MEMBER WOODLAND: NV Energy?

11 COMMISSION CHAIRMAN GANS: Yes. You just  
12 made --

13 MS. REBERT: Galpren just made that statement.

14 COMMISSION CHAIRMAN GANS: Who made that last  
15 statement?

16 MEMBER WOODLAND: That was Mr. Galpren.

17 COMMISSION CHAIRMAN GANS: Oh, I'm sorry.  
18 Then it is to you. I thought it was still -- I -- what I  
19 don't understand is: You're saying these are documents.  
20 You got them on a list. You haven't gotten them, and yet  
21 I understand that they were supposed to be submitted.  
22 These are documents that you believe NV Energy has?

23 MR. GALPREN: So this is Dan Galpren. That  
24 question is addressed to me?

25 COMMISSION CHAIRMAN GANS: Yes.

1 MR. GALPREN: Yes. Okay. We're -- we're  
2 again looking at Exhibit 3 in response to the opposition  
3 to the motion.

4 So the first five sets: Quarterly groundwater  
5 monitoring reports, interstitial layer monitoring,  
6 proposed mesa ponds documentation, updated sampling and  
7 analysis plan, and updated operations and maintenance  
8 manual, those sets of documents were not on any list.

9 Those documents are -- were either required to  
10 be -- and -- and data, were either required to be  
11 submitted to the Bureau of Water Pollution Control on a  
12 regular basis pursuant to terms of the 2005 permit. And  
13 also I should say identical terms in the 2010 permit, or,  
14 with respect to the documentation as to the proposed mesa  
15 ponds, we believe were obviously required to be reviewed  
16 by NDEP before it could make its relevant findings and  
17 determinations precedent to issuing the permit.

18 Then the balance of these documents, we  
19 believe, many of them were reviewed or should have been  
20 reviewed by NDEP, and so we believe that many of them  
21 should be in the files of NDEP. For example,  
22 correspondence between the Applicant and NDEP. That  
23 correspondence should be with NDEP. That's on the fourth  
24 item of page 2 or -- for example, the item right above  
25 that, NDEP's 1999 Hydrogeologic Assessment Principle

1 Components and Data Needs. That's an NDEP document. It  
2 should be with NDEP, and we should not be forced to go to  
3 NV Energy for documents that clearly should be with NDEP.

4 And then another -- a number of these  
5 documents, it's true, are fairly old. For example, some  
6 of these documents have to do -- were -- were published in  
7 2004 or 2005; one in 2003, having to do with the  
8 hydrogeologic characterization of the existing waste water  
9 pond sites or proposed sites.

10 But let's have that information because we  
11 have no other information as to the background  
12 hydrogeologic conditions, and in order to be able to  
13 fairly assess what is happening to groundwater, you want  
14 to also be able to assess what the natural background  
15 conditions should be, and so that's the reason why those  
16 are relevant.

17 COMMISSION CHAIRMAN GANS: Well, I'm not going  
18 to judge the relevancy yet. I'm just trying to figure out  
19 where these documents are. Ms. Tanner and -- and -- do --  
20 you don't have these five?

21 MS. TANNER: I can go through -- (coughing)  
22 excuse me.

23 Sorry. I've been operating under bronchitis  
24 (coughing).

25 MR. FREY: While -- while Ms. Tanner is

1 coughing, may I say something, Mr. Chairman? This is Bill  
2 Frey.

3 COMMISSION CHAIRMAN GANS: Sure.

4 MR. FREY: On the first page -- and I've  
5 already scrolled past -- past it. I'm on the computer,  
6 but about -- go down one, two, three, four -- the fourth  
7 document that they're requesting. Updated sampling  
8 analysis plan was requested September 13th. It was due  
9 September 25th of 2010, but this document that they're  
10 asking for had no role in whether to issue the permit or  
11 not. This document was required as part of the permit.

12 So in their case -- I mean, there's a lot of  
13 documents in here. I just singled those -- that one and  
14 the next one out. But, you see, these are documents, it's  
15 true. I don't know if they have them or not. Certainly  
16 they're entitled to them. But we're being asked to  
17 provide these documents and allow time to review them when  
18 on their face we know that they were not decision  
19 documents.

20 UNIDENTIFIED SPEAKER: Well --

21 MS. TANNER: And I -- I would -- this is Lyna  
22 Tanner. I would concur with that and (coughing) I believe  
23 Item Number 3, 4, and 5 all were conditions of the permit,  
24 including -- engineering design reports were required to  
25 be submitted prior to construction. The site preparation

1 is not construction. So that -- at least as of last week  
2 that was not yet available, although I do believe we  
3 thought that might have been coming in, and I think there  
4 was a reference to that, in fact, that it did come in.

5 In regards to the quarterly groundwater  
6 monitoring report, I had indicated earlier that there was  
7 some confusion on that point, and this has sort of been  
8 put on hold, given all of this motion work, but  
9 essentially we were under the impression that all the BCA  
10 monitoring reported been provided through Legal Copycats,  
11 that they did, in fact, have those.

12 And with the exception of archives 2002, 2003  
13 discharge monitoring reports generated as a condition of  
14 the per -- of the prior permit, Sierra Club had access to  
15 and did, in fact, according to our records, copy those  
16 back in August.

17 So -- and then as far as the interstitial  
18 layer monitoring, this one is a little bit unusual, and  
19 I'll defer to NDEP as that this actually has been  
20 provided, I believe it was an error in the prior permit.  
21 It was required, but there was no deadline, and so the new  
22 permit corrects that. They are to provide that  
23 information on a certain schedule.

24 So under the prior permit it just said, you  
25 know, thou shalt provide, and so that -- that information,

1 I believe, was in the process of being cleared up. And I  
2 think it -- again I would defer to NDEP, but I believe  
3 that if that information came in, it's come in -- come in,  
4 in just the past few days.

5 MR. GALPREN: Mr. Chairman, is it possible to  
6 respond to some of these points?

7 COMMISSION CHAIRMAN GANS: Well, I want to  
8 hold on just a second. I've let this go. I didn't ask  
9 Mr. Woodworth if he was done or not.

10 MEMBER WOODLAND: Oh, absolutely, sir, yes.  
11 This is -- this is Tom Woodworth and I was finished with  
12 my remarks.

13 COMMISSION CHAIRMAN GANS: Okay. I want to  
14 make sure. And also I want to make sure that Mr. Coyner  
15 and Mr. Anderson -- I want to make sure that you have your  
16 questions and comments answered before I go any further.

17 COMMISSIONER COYNER: This is Commissioner  
18 Coyner.

19 I've kind of got, you know, three bags of  
20 documents here. I've got these older documents, which may  
21 or may not be relevant, and which may or may not be in the  
22 position NDEP.

23 It would be convenient, although I guess that  
24 because of the timing, NDEP didn't have to be able to go  
25 through this list and say, not in our possession, you

1 know, we don't got the Intelligence Corporation 1986  
2 Hydrogeologic Study that's referred to here, whether  
3 they're relevant or not, but at least to be able to  
4 respond to that.

5 Any documents that were relevant to the new  
6 permit, the one that was just issued, I would think --  
7 unless, as Mr. Frey has indicated, they are conditioned on  
8 the permit, I would have think those would be all in a box  
9 somewhere, all in a bunch, and that you'd have ready  
10 access to those.

11 So I'm a little confused why the Appellant  
12 seemingly doesn't have the ability to have those or -- or  
13 they can't be provided. That one's still a question in my  
14 mind.

15 The third bag is stuff that's ongoing all the  
16 time, the groundwater monitoring reports. I should be  
17 able to walk over the two blocks to NDEP, tomorrow and my  
18 lunch break and pull out the first quarter report of 2009  
19 for these groundwater reports. I mean, it should be that  
20 simple. And why three visits to NDEP didn't result in  
21 that is -- I can't understand that in my head. Whether  
22 it's relevant or not. It may or may not be. That will be  
23 decided at the hearing.

24 But you know, that -- that type of data, you  
25 know, should be just right at people's fingertips or

1 should be posted on the Internet as some have advocated.  
2 So I'm thinking about those three bags. I'm less  
3 concerned about the first one, because that's historic.  
4 It may or may not be relevant. That will be decided at  
5 the hearing.

6 The second, which was the stuff that was  
7 essentially in the box where the new permit was  
8 discussed -- you know, like -- I'm sure someone went out  
9 and did a site characterization on the soils, for where  
10 they want to put these new ponds. Was that considered  
11 when the permit was being vetted? You know, what  
12 documents were considered when the permit was under  
13 consideration by NDEP of the current data, not stuff  
14 historic, not stuff down below. And I don't see that  
15 list. I will have a -- I wasn't at the NDEP hearing, so I  
16 don't know what they provided at the permit hearings.

17 And then the third thing about ongoing  
18 groundwater monitoring data, that should be as plain as  
19 the nose on your face. So I'm really a little bit  
20 confused, and I can sympathize a little bit with the  
21 Appellant here. If I'm confused, then certainly they are.

22 COMMISSION CHAIRMAN GANS: Okay. Can either  
23 Mr. Woodworth or Bill, can you shed any light on  
24 Mr. Coyner's confusion?

25 MEMBER WOODLAND: This is Mister`-- this is

1 Tom Woodworth with NV Energy.

2 I really can't speak to the issues in terms  
3 of -- all I can say is NV Energy has certainly submitted  
4 everything that they've been required to do to NDEP, and  
5 I -- I have every reason to understand that NDEP's doing  
6 everything in its power to get those documents to -- to  
7 the Appellant.

8 I mean, our issue has always been two --  
9 two-fold. Relevance -- I mean, we know they're entitled  
10 to the documents, but is it relevant to this proceeding,  
11 and should it be a basis to suspend their subpoena?

12 But, yeah, I won't go into that a lot any  
13 further already. So -- but that's all we can add to this  
14 discussion.

15 COMMISSION CHAIRMAN GANS: Well, in the -- in  
16 the motion -- I think this is the October 6th motion --  
17 Sierra Club is alleging that you have refused -- very  
18 simply, the word is in the motion -- you have refused to  
19 provide the materials.

20 MEMBER WOODLAND: NV Energy has -- NV Energy  
21 has directed -- we had a -- I had a personal conversation  
22 with Mr. Galpren, and I instructed him that any requests  
23 for documentation he should direct them to NDEP, and that  
24 we have provided everything to NDEP that we are required  
25 to under the application.

1                   But I can't imagine it would be surprising to  
2 anybody that we're not -- we have no obligation to provide  
3 anything to somebody who is suing us at this point. We  
4 provided everything we're required to, to the regulator.  
5 And if they have -- if they have a request of those  
6 documents, they're entitled to request them from the  
7 regulator.

8                   (Participants talking at the same time)

9                   COMMISSION CHAIRMAN GANS: I have a further  
10 question to follow up with Mr. Woodworth.

11                   So am I correct in simply assuming, from what  
12 you said, that the subpoena isn't going to do -- make any  
13 difference as far as NV Energy is concerned, anyway? Is  
14 that what you're saying.

15                   MEMBER WOODLAND: No, no, no. Of course, not.  
16 If -- I mean, I was trying -- I mean, I didn't want  
17 to explain to Mr. Galpren how he should go about doing  
18 this, but obviously if we have an enforceable subpoena,  
19 we're going to comply with it, but we don't have one right  
20 now.

21                   And we don't think they're entitled to  
22 subpoena documents that are irrelevant to this proceeding.  
23 And so that's why we were challenging the subpoena aspect  
24 of it. If they -- what I explained to Mr. Galpren is: He  
25 is entitled to anything he wants from NDEP under the Open

1 Records Act. I don't believe what he's requesting of us  
2 is relevant to this permit proceeding. So I'm not willing  
3 to provide it to him.

4 Obviously, he's -- if he goes to you guys and  
5 is able to get an enforceable subpoena, and you guys  
6 believe, in your judgment, it's relevant, and that's  
7 forced upon us, we're obviously going to comply.

8 COMMISSION CHAIRMAN GANS: Thank you.

9 MEMBER WOODLAND: Yeah.

10 COMMISSION CHAIRMAN GANS: Mr. Coyner,  
11 anything else?

12 COMMISSIONER COYNER: Well, I would be more  
13 comfortable if I knew what documents were provided to the  
14 public at the permit hearing, when the new permit was  
15 discussed, if there was a list, if there was a map, if  
16 there was a picture, if there was a cartoon. I would be  
17 very happy -- you know, that would make me feel a little  
18 bit better, because that should be readily available. As  
19 I said, that should be in the box, and constrained, and --  
20 and simply should be able to be provided to anyone.

21 If he -- if the Appellant is having a problem  
22 getting those types of documents, I`-- I'm a little  
23 concerned. These historic ones, I'm not -- I'm not too --  
24 you know, somebody read a report, and it referenced a 2002  
25 document, and the 2002 document is not there, I'm not

1 really concerned about that, and that's a subject for  
2 another day.

3           Stuff that was provided at the permit  
4 hearing -- you said, the activists were there. I would  
5 assume that they picked up any documents that were made  
6 available to the public. So those should be available to  
7 Mr. Galpren. He should have them.

8           And then this -- the groundwater monitoring  
9 stuff, again, there may or may not be relevant, but if  
10 people are having trouble obtaining those, that makes me  
11 not happy with the system. So that's -- that's my  
12 commentary, Mr. Chairman.

13           COMMISSION CHAIRMAN GANS: Mr. Commissioner  
14 Anderson?

15           COMMISSIONER ANDERSON: Well, all of the  
16 discussion, I think, we're on the about the same place  
17 here, Mr. Chairman. I agree. I think if there's an issue  
18 with not being able to get the current documents that were  
19 a part of the decision making process for this permit,  
20 then that needs to be resolved. And I guess I'd like to  
21 hear from Mr. Frey to that respect.

22           MR. FREY: Sure. This is Bill Frey.

23           And we are not hiding or keeping the  
24 Appellants from any documents. I hope I've made it clear  
25 that whatever documents we have, unless they're

1 confidential, they're entitled to have.

2 Ms. Tanner identified one group of documents,  
3 monitoring reports, that we were confused as to which  
4 monitoring reports they were referring to, the monitoring  
5 reports at Bureau of Corrective Actions or the monitoring  
6 reports at the Water Pollution Control, but that's simple  
7 to -- to straighten -- to fix.

8 She was going to send out a letter to that,  
9 and I said hold off. We're having the hearing today.  
10 Let's just get it all over with at one time.

11 MS. TANNER: And --

12 MR. FREY: The problem is I -- I can't keep  
13 saying, you know -- Sierra Club's position is we keep --  
14 we keep not giving them documents, but when they come in  
15 we copy them -- we send to the Copy Store any document  
16 they select. You see, I'm being put in a position of  
17 trying -- I will always lose this argument that you  
18 haven't supplied the documents I need.

19 Because no matter what I do, they're going to  
20 say, uh, that's not the ones we need. We need the ones  
21 that show that you're guilty. I don't know what those  
22 ones are, but --

23 (Participants talking at the same time)

24 MR. GALPREN: That's very objectionable.

25 MR. FREY: (Unintelligible) and they can have

1 everything -- like I say, every document we have is a  
2 public document.

3 Mr. Coyner, you've been right on that. I  
4 understand your -- your three groups of documents.  
5 Obviously the one in the future, we can't supply. The  
6 ones, you know, in -- what do you call it -- the  
7 warehouse, you know, those may be way over. But if it's  
8 in the building -- and there are some documents down in  
9 the Las Vegas, a shelf of documents there, but if we have  
10 the document and -- we will provide it.

11 I can't -- you know, until this list came out,  
12 I don't have a way of reading their minds as to what --  
13 not only don't I have that capability, if I had it, I  
14 don't have to use it.

15 MS. TANNER: This is Lyna Tanner. May I --  
16 Bill, may I put a finer point on that?

17 MR. FREY: Sure.

18 MS. TANNER: I -- I do appreciate the comment  
19 by Chairman Coyner that, you know, certain documents  
20 should be readily available.

21 And I think if you -- you know, think back  
22 about what was said today, Mr. Galpren indicated that  
23 their first visit, that they came to NDEP in Carson City,  
24 which is where Water Pollution Control permit files are  
25 located, to look at all of those documents that were

1 relevant to the issuance of the permit. That was back in  
2 June.

3 Now, in September they -- they list out a  
4 number of documents that, with all due respect, are  
5 primarily related to Bureau of Corrective Action. Those  
6 files are located in Las Vegas. So, again, there was some  
7 confusion on -- on whether (sic) they mean by monitoring  
8 reports, groundwater monitoring reports.

9 Are they talking about the discharge  
10 monitoring reports to which we have a record that they  
11 copied, that, by the way, contain actually the similar  
12 data to the groundwater monitoring reports that they're  
13 requesting from the Bureau of Corrective Action? And  
14 then, more importantly, is that relevant to the  
15 issuance -- to the issue of whether or not they get a  
16 continuance?

17 So, again, it's not that we're refusing to  
18 provide it. It's that they -- they have been given  
19 opportunity to -- to access those documents that were  
20 relevant to the issuance of the permit. They got that  
21 back in June. Three months later they make a request for  
22 Bureau of Corrective Action documents, which I would argue  
23 are not relevant.

24 And, yes, they're entitled to see them, but  
25 the question is: Does that entitled them to a continuance

1 of the appeal of a water permit? And I would say the  
2 answer is no.

3 COMMISSION CHAIRMAN GANS: Thank you.

4 MS. TANNER: And -- and, your Honor, and  
5 I'm -- excuse me. I always say your Honor.

6 And -- and Mr. Chairman, NDEP is on this call,  
7 and they can certainly answer any questions about  
8 documents that were provided and the manner in which they  
9 were provided if there are any specific questions that I  
10 haven't -- that I or Mr. Frey haven't answered.

11 COMMISSION CHAIRMAN GANS: Thank you.

12 Mr. Galpren, I think I cut you off a little  
13 earlier. We're about ready -- the panel is about ready to  
14 go into deliberation. Is there anything else that you  
15 wanted to add?

16 MR. GALPREN: Yes. Absolutely, Mr. Chairman.  
17 Thank you for the opportunity.

18 The -- I can't -- I can't respond to all of  
19 these things that were said, but let's be very clear about  
20 this. The quarterly groundwater monitoring reports are  
21 required under the permit to the Bureau of Corrective  
22 Actions, under the permit Section 2B2.

23 And there can be no doubt that those documents  
24 are within the control of the Bureau of Water Pollution  
25 Control, not merely the Bureau of Corrective Actions.

1           It's true that the permit requires a copy of  
2 them to be sent to BCA, but the primary repository -- the  
3 agency that -- the bureau that is responsible to oversee  
4 permit compliance, is the Bureau of Water Pollution  
5 Control.

6           Second, with respect to the interstitial layer  
7 monitoring, contrary to what Ms. Tanner told you a few  
8 minutes ago, the 2005 permit and the 2010 permit are no  
9 different with respect to the reporting periods. Each  
10 requires that leakage rates shall be reported in units of  
11 average gallons per day, per month, per pond, so monthly  
12 reporting.

13           That material is -- or is -- is required to be  
14 reported to the Bureau of Water Pollution Control. NV  
15 Energy has just stated that they provide all the  
16 information that they're required to, to the Bureau of  
17 Water Pollution Control, and I don't know how we could  
18 have been any more clear about what we were seeking than  
19 when we asked for -- asked for this data.

20           The information as to the hydro --  
21 hydrogeologic site characterization of the mesa, we've  
22 already heard that that material -- well, at least the  
23 engineering design reports -- I'm presuming that they also  
24 provided site characterization reports -- was provided and  
25 formed the basis for NDEP's approval on July 25 of -- of a

1 construction permit.

2           So why then could we not receive that  
3 documentation that we asked for, hydrogeologic site  
4 characterization of the mesa and the engineering design  
5 reports? There's been no claim of confidential business  
6 information. There's been no explanation for failing to  
7 give us those materials.

8           So these are materials, at least the first  
9 three categories, that are clearly required to be provided  
10 to NDEP on a regular basis or clearly required to be  
11 provided to NDEP through the permitting process.

12           As to the other documents with -- that have  
13 been identify through a document that was provided to us  
14 by NDEP, in response to our request for information, we  
15 need those documents in part because they have declined to  
16 give us the -- the other relevant information, the  
17 quarterly -- the historical quarterly groundwater  
18 monitoring reports, including through 2009, the historical  
19 and current interstitial layer of monitoring reports,  
20 and -- and so on.

21           And we need them also so that we can be able  
22 to come up with an assessment as to the background  
23 conditions of -- the hydrogeologic background conditions  
24 against which the performance of the existing ponds, which  
25 continue under the current permit, and the performance of

1 the proposed new ponds can be adequately predicted.

2 Without that information, we will not be able  
3 to make the kind of arguments that we wish to make at the  
4 hearing and in briefing that namely the permit terms are  
5 either sufficiently protective or insufficiently  
6 protective of the environment.

7 I think I can leave it there.

8 COMMISSION CHAIRMAN GANS: Okay. Thank you  
9 very much.

10 We will now go into our deliberations, the  
11 panel deliberations. I'd ask -- or give the panel a  
12 couple of thoughts.

13 Number one, I think the law is pretty specific  
14 about good cause for our deliberation or our decision. I  
15 think there may be also -- if we decide not -- are  
16 inclined not to do the subpoena, we could also ask that  
17 certain public documents be made available as soon as  
18 possible or as a -- as a condition of our deliberation.

19 And I want to bring to the attention of the  
20 panel, on page 7 of 8, of the motion by Sierra Club,  
21 October 6th. There's a sentence at the very end that  
22 says, "In the alternative, in the event the SEC denies  
23 requested action on Number 1, Sierra Club requests a  
24 one-week delay in the presentation of brief" -- "of  
25 briefing schedules."

1                   So Mr. Coyner and Mr. Anderson, I'd like to  
2 make sure that you kind of keep these in the back of your  
3 mind, and at least provide the panel with your thoughts on  
4 where we should go with this.

5                   COMMISSIONER COYNER: This is Commissioner  
6 Coyner. Did we have a date certain for submittal of  
7 briefs, RoseMarie?

8                   MS. REYNOLDS: Yes, we did.

9                   COMMISSIONER COYNER: And that was?

10                  MS. REYNOLDS: The date for the Appellant's  
11 opening brief was earlier this month, and the Appellant  
12 did file their brief, although they've requested the right  
13 to supplement their brief based on what happens at this  
14 hearing today.

15                  If I -- my memory serves me correctly, I  
16 believe that the State and the Intervenor's brief, in  
17 response to that opening brief, are due today, and then  
18 the reply brief, if the Appellate chooses to file one, I  
19 believe is due either at the end of next week or at the  
20 beginning -- like November 1st or 2nd.

21                  COMMISSIONER COYNER: Which is the week of the  
22 currently-scheduled appeal hearing, November 4 and 5.

23                  MS. REYNOLDS: Right.

24                  COMMISSION CHAIRMAN GANS: Correct.

25                  COMMISSIONER COYNER: Mr. Chairman, could I

1 ask NDEP a question?

2 COMMISSION CHAIRMAN GANS: Absolutely.

3 COMMISSIONER COYNER: With regards to the  
4 grouping of the documents -- and, Bill, if you're going to  
5 respond, I'm looking at the five-page document list, the  
6 hit list.

7 MR. FREY: Yes, sir. I -- need to reopen it  
8 on my computer.

9 COMMISSIONER COYNER: Okay.

10 MR. FREY: But just a second.

11 COMMISSIONER COYNER: Well, I can you can do  
12 this off the top of your head.

13 MR. FREY: Yeah, sure.

14 COMMISSIONER COYNER: Can you tell me in group  
15 one, which is the quarterly groundwater monitoring  
16 reports -- I understand they're in two different sections  
17 of NDEP -- but do they exist?

18 MR. FREY: I believe so.

19 COMMISSIONER COYNER: They exist.

20 MR. FREY: Yes.

21 COMMISSIONER COYNER: So they were submitted  
22 by the company promptly, and they -- they all exist. So  
23 they should be available, and I think a part of what I  
24 heard they've already been copied -- some of them. So --

25 MR. FREY: Some of them have been. I mean,

1 they can be put in a room to go through.

2 COMMISSIONER COYNER: Right. So --

3 MR. TINNEY: Can I -- can I poke in? This is  
4 Alan Tinney.

5 COMMISSIONER COYNER: Sure.

6 MR. TINNEY: I have a question,  
7 Mr. Commissioner.

8 Bill, is that okay?

9 MR. FREY: If it's okay with the Commissioner  
10 it's, fine.

11 COMMISSION CHAIRMAN GANS: Absolutely. Go  
12 right ahead.

13 MR. TINNEY: Thank you, Mr. Chair. This is  
14 Alan Tinney for the record.

15 To answer those questions, number one, I want  
16 to make sure that everybody understands. We've given  
17 everything that we have -- that we know that we have.  
18 They've never been -- we've never blocked them from any  
19 document, as both of the attorneys have said -- have said.

20 Number two is at the hearing there was never  
21 no request of any documentation, because the only thing  
22 that was done at the hearing, Mr. Coyner, that asked  
23 earlier, was -- it was a hearing, and that was the first  
24 time that Sierra Club had ever shown up, and there was no  
25 request of any documents to be brought to the hearing. So

1 the only thing at the hearing was the permit and the fact  
2 sheet at the time.

3 You know, we cannot provide documents that are  
4 not in our building. So the only thing we can provide is  
5 what we have. We have no other way to provide it. So  
6 they've been in our building. We provided them everything  
7 that we know that we have.

8 So, you know, I'm not sure if I've answered  
9 your question, but we can only provide what we have in the  
10 building, and we've provided everything that we have.

11 COMMISSIONER COYNER: So they -- Mr. Chairman,  
12 if I might ask Mr. Tinney a question.

13 Quarterly groundwater monitoring reports, and  
14 they've got a long list here -- multiple years, your  
15 position is they have those?

16 MR. TINNEY: Mr. Chairman, thank you,  
17 Mr. Coyner.

18 Those quarterly monitoring reports, we ran  
19 that as out of the quarterly monitoring reports was part  
20 of the AOC. They were provided that through an email from  
21 Mister`-- Mrs. Shannon Harbor out of BCA. We did not --  
22 we did not read that as the discharge monitoring reports  
23 as part of the permit. They're two different reports, but  
24 they were provided those, anyway. So, yes.

25 COMMISSIONER COYNER: This is yes.

1                   Interstitial layer monitoring -- again,  
2 Mr. Tinney, you don't have to answer this -- whoever knows  
3 this.

4                   The company provided all of those according to  
5 the conditions of the first permit, the 2005, I believe it  
6 is permit. To your knowledge, they've submitted their  
7 required interstitial layer monitoring reports?

8                   MR. TINNEY: Would you like me to answer that  
9 one, again, Mr. Commissioner? This is Alan.

10                  COMMISSIONER COYNER: Whoever has the  
11 knowledge.

12                  MR. TINNEY: Okay. Ms. Lyna -- Ms. Lyna  
13 Tanner actually said that correctly earlier. That was a  
14 part of the permit that has no date time of when those are  
15 submitted. They're getting those submitted as we speak  
16 right now and will provide them as soon as we get them in  
17 the building.

18                  The units that Mr. Galpren was talking about  
19 was a unit on how they deliver them to us, not of when  
20 they're supposed to deliver it to them.

21                  It's the units of -- of -- the dimensional  
22 unit of what they're supposed to deliver them to us in,  
23 not when they're supposed to give them to us. We have  
24 fixed that in the 2010 permit to make sure that they're  
25 part of the quarterly monitoring report, the DMR's of the

1 2010 permit.

2 MEMBER WOODLAND: And this is Tom Woodworth  
3 with NV Energy, and that is absolutely correct. We have  
4 recently learned that this was something that was -- there  
5 was just a confusion in interpretation for exactly the  
6 reasons that were said, and this had been fixed now,  
7 whereas -- contrary to what Mr. Galpren said, there is  
8 very distinct difference between a 2005 and 2010 permit.

9 The 2005 permit does not include the following  
10 sentence I'm going to read from the 2010 permit, "All  
11 leakage rates to be reported with quarterly report." That  
12 wasn't in there before and now it is. And now that  
13 situation has been clarified. As soon as NDEP brought  
14 this to our attention, our people have been immediately  
15 working to get that information collected.

16 COMMISSIONER COYNER: So I guess -- again,  
17 this is Commissioner Coyner for the record -- the reports  
18 that would have been generated from 2005, with regards to  
19 leak monitoring, report monitoring, exist or they don't  
20 exist? They don't exist?

21 And I'm a geological engineer, and the mining  
22 industry, I think, reports this stuff all the time. It's  
23 not like it's some kind of foreign -- foreign thing to us.  
24 We are very capable of leak monitoring and detection with  
25 regards to cyanide heap leach.

1                   So -- so do or do not the interstitial layer  
2 monitoring reports exist?

3                   MR. TINNEY: I -- I just make -- I want to  
4 make sure that -- before I said it on the record, but,  
5 yes, the information does exist. We are right now  
6 compiling it to make sure that we have everything, all the  
7 dates, the entire terms -- entire terms properly  
8 documented, but, yes, the information does --

9                   (Participants talking at the same time)

10                  COMMISSIONER COYNER: Back to 2005?

11                  MR. TINNEY: Yes.

12                  COMMISSIONER COYNER: And -- and, again,  
13 Mr. Chairman, I don't want to belabor the point, but I  
14 think the Appellant has a point, that if -- let's just  
15 that NV Energy was going to come in and propose to  
16 construct an identical cell up on top of the hill as to  
17 what they're building down below, and if the building --  
18 ones down below, for whatever reason, are adjudged at the  
19 hearing as inadequate, that would be relevant to me --

20                  COMMISSION CHAIRMAN GANS: Point taken.

21                  COMMISSIONER COYNER: -- and I would want to  
22 know that --

23                  COMMISSION CHAIRMAN GANS: Yeah.

24                  COMMISSIONER COYNER: -- if the plastic was  
25 thicker, or thinner, or whatever.

1                   So with regards to that, it would seem like  
2                   that -- those -- that material -- again, it's from a  
3                   historic system. The system may not have been adequate to  
4                   current standards. I don't know. So how relevant is it  
5                   to the new permit? I'm not sure.

6                   But I can tell you if they're coming in and  
7                   saying, "I want to build the same one that I did down  
8                   there," and the other one didn't work -- the first one  
9                   didn't work, that would be relevant to me.

10                  So it's good that that information is going to  
11                  be available. I would like to think that the Appellant  
12                  could be provided that information with adequate time to  
13                  do that sort of analysis that I just did in my head, sort  
14                  of on the fly. So I mean, okay. I'm there.

15                  How about this hydrologic -- okay -- those are  
16                  both kind of historic, you do a sort of comparative  
17                  analysis, all that sort of thing. It could be relevant.  
18                  But this Number 3 -- wasn't there or isn't there available  
19                  a geological engineering report on the proposed site for  
20                  these ponds?

21                  Being a geological engineer, I would think  
22                  there would be one.

23                  MEMBER WOODLAND: This is Tom Woodworth at NV  
24                  Energy. There certainly are, and they would --

25                  COMMISSIONER COYNER: And was it in the

1 possession of NDEP or is in the possession of NDEP?

2 MR. GARCIA: This is Tony Garcia with NV  
3 Energy.

4 So as required for any engineering technical  
5 designs like that, we have to do the hydro -- the  
6 geotechnical study. That study has been done. I'd have  
7 to confirm it, but I believe when the application was  
8 submitted, it was referenced and the specifications and  
9 design -- again, I'm not sure that the actual report was  
10 submitted, but it was probably referenced. We'd have to  
11 follow up on that, but we can confirm that it was done.

12 COMMISSIONER COYNER: Does NDEP want to  
13 comment? Do you have a copy that report in your  
14 possession?

15 COMMISSION CHAIRMAN GANS: Mr. Frey?

16 MR. FREY: I'd have to defer to Alan. Alan  
17 Tinney.

18 MR. TINNEY: Mr. Chairman, Alan Tinney,  
19 Mr. Commissioner Coyner.

20 We would have to look at that. But let me  
21 take it back just for a second on what's required to issue  
22 a permit. The issuance of a permit is required upon an  
23 application. All this other information is -- all these  
24 other documents, and the documents -- and I also want to  
25 make sure that the interstitial fluid leakage rate of the

1 2005 permit -- there was no specific date that that was  
2 required to be turned in. So there's no compliance  
3 issues.

4 I'm sure they have the ability to do it. I'm  
5 sure that they can do it. I'm sure they will have the  
6 reports into us, and we'll provide them once we have them  
7 in our building.

8 The second question is the hydrogeological  
9 report. We'd have to look and see if actually that report  
10 was in the building.

11 But, you know, please remember that all these  
12 ponds are zero discharge per mo -- ponds. They're not  
13 going to be going into the -- you know, into any of the --  
14 any of the soil. So we'll be reviewing the document of  
15 the construction and the -- and the -- and the engineering  
16 design documents of the pond once submitted prior to  
17 construction of the ponds.

18 COMMISSIONER COYNER: Well, I guess I thought  
19 I heard NV Energy -- this is Commissioner Coyner again,  
20 for the record -- that NV Energy is out there with the  
21 scrapers building the ponds.

22 MR. WOODWORTH: And -- and this is Tom  
23 Woodworth. I think we misspoke earlier, because there was  
24 on some confusion on our end. But the site that -- I'll  
25 let Tony Garcia state it, because the information was sent

1 to NDEP. It's just a different department, apparently,  
2 that receives it. So --

3 MR. GARCIA: This -- this is Tony Garcia of NV  
4 Energy. So the way that we -- the way we have handled and  
5 work with NDEP, it's -- it's multiple departments within  
6 NDEP, where the application to renew the waste water  
7 discharge permit was directly in communication -- in -- in  
8 cooperation with the Bureau of Water Pollution Control  
9 permitting. That would be Alan Tinney's group.

10 As far as the design and specifications of the  
11 new ponds, that design specification, and along with  
12 whatever additional supporting documents, went to NDEP  
13 Technical Services.

14 The third party that we dealt with, in getting  
15 the dam safety part of that approved, was with the NDEP  
16 Bureau of Water Resources, which is another different  
17 department. So where we kept hearing about we can't find  
18 the document, there's three different divisions or  
19 departments within NDEP that we've been cooperating with,  
20 all of which have regulatory authority to either, number  
21 one, grant the permit, authorize the design and  
22 specifications, and then the final design for the dam  
23 safety part and the authority to discharge water is a  
24 different division.

25 So there's -- there's documents throughout

1 NDEP. They're not all just in one department.

2 MR. TINNEY: So we misspoke when we said we  
3 hadn't submitted the information to NDEP. What was meant  
4 was that it was submitted to NDEP, but it was sent to the  
5 appropriate department within NDEP.

6 UNIDENTIFIED SPEAKER: That is correct.

7 MR. GALPREN: Mr. Coyner? This is Dan  
8 Galpren. I would just like to say, if I can, that I can  
9 quickly for the record in responding to Mr. Tinney and  
10 also to Mr. Woodworth, I -- I cannot let it stand without  
11 objecting to the characterization of the 2005 permit as  
12 not requiring reporting of interstitial layer monitoring  
13 analysis.

14 The permit clearly says that it will be  
15 reported separately for each month, and daily flow for  
16 each month shall also be reported. And it also says  
17 leakage rates shall be reported in units, of average  
18 gallons per day, per month, per pond.

19 So I think that the Applicant was on fair  
20 notice, not as to what particular day of any particular  
21 quarter they need to report this information, but that  
22 information needed to be reported on a monthly basis  
23 rather than simply maintained within the offices of NV  
24 Energy.

25 COMMISSION CHAIRMAN GANS: Mister --

1 MR. GALPREN: That's -- that's an important  
2 compliance issue with respect to the 2005 permit.

3 COMMISSION CHAIRMAN GANS: We understand your  
4 point, and I think that's been asked and answered.  
5 Whether you accept that answer or not, I don't know, but I  
6 do know I feel it's been answered. And I don't want to  
7 being back and revisit that any more.

8 MR. GALPREN: Okay.

9 COMMISSION CHAIRMAN GANS: Mr. Anderson?

10 COMMISSIONER ANDERSON: You know, this is a  
11 very complex situation here. I guess if I understand the  
12 discussion with Commissioner Coyner, there is a lack of  
13 information today regarding interstitial layer monitoring,  
14 and I guess to some degree we need a clear roadmap here of  
15 how the process is to work.

16 I feel like I'm at a bit of a loss to make  
17 a -- come to a conclusion here until I fully understand  
18 what the process for the permitting and the three  
19 different areas of NDEP or Water Resources, and how it all  
20 fits together.

21 COMMISSION CHAIRMAN GANS: Let me just make a  
22 comment as part of the panel. I understand what  
23 Mr. Anderson is saying, because I had to share some of  
24 that concern or confusion.

25 Where I stand is I -- I don't have a problem

1 with continuing the hearing. I am -- I'm reluctant to  
2 pursue a subpoena power, given what I've heard today.

3 So my -- the direction I would probably go  
4 with this or certainly consider, if the other panel  
5 members concur, would be a direction of, okay, let's give  
6 some more time, which would also give, in the alternate, a  
7 little more time with the briefing schedule, and a little  
8 more time with the hearing.

9 I'm reluctantly saying this, because I hate to  
10 drag these things out. It -- these things can just go on  
11 and get a life of their own. If the panel wants to  
12 consider -- and I'm trying to do this so we can get on  
13 with this -- maybe a 30-day extension until early  
14 December. I want to be careful. We're all getting into  
15 the holiday season, but I'd like to get this thing done as  
16 soon as possible.

17 So with that, as a suggestion, Mr. Coyner,  
18 Mr. Anderson, if you've got any alternatives or ideas  
19 other than, I'd certainly like to hear it.

20 COMMISSIONER COYNER: This is Commissioner  
21 Coyner.

22 I came in reluctant to extend the schedule,  
23 because NV Energy has put at business risk, as they move  
24 forward. We have a February date for -- for the pond  
25 filling that's in front of us, that I view as a sort of a

1 watershed date.

2 But I'm -- I'm still uncertain -- I don't  
3 have -- I don't have, although I've heard from NDEP, that  
4 they've provided everything they have in the building,  
5 and -- but yet I hear relative -- two offices, and three  
6 different agencies, that might have relevancy to this  
7 permit or not. That's led me to be a little less certain  
8 of moving forward.

9 I guess I'd like to hear from the three  
10 parties -- this would be briefly -- from Nevada Energy,  
11 and Sierra Club, and from NDEP, their feelings about a  
12 continuance.

13 COMMISSION CHAIRMAN GANS: We'll take them in  
14 the same order before, and the Appellant first.

15 MR. GALPREN: Thank you, Mr. Chairman and  
16 Members.

17 Well, a 30-day extension would be adequate  
18 if -- if there's not a tremendous delay in getting the  
19 necessary data and documents. To expedite, it probably it  
20 would be good if I and my expert could speak directly to  
21 NDEP officials who would be in charge of trying to, you  
22 know, aggregate this information and convey it to us.

23 As I said in the opening, I think that we need  
24 about -- at minimum of three weeks subsequent to actually  
25 receiving the information to be able to, you know, fully

1 digest it and utilize it in our briefing and the hearing.

2 So 30 days -- if we're talking about 30  
3 working days that could work, so long as -- so long as the  
4 information is received within the first 10 days. Now, I  
5 don't know how else to answer that question. We need  
6 sufficient time to be able to read the documents and to be  
7 able to analyze it.

8 COMMISSION CHAIRMAN GANS: Okay. I -- I will  
9 say, to clarify, before we go on to NDEP, I was thinking  
10 of 30 calendar days, not 30 work days. So I guess I'm not  
11 absolutely tied to that, but that's what I would  
12 recommend.

13 So let's go on to NDEP.

14 MR. FREY: Yeah, thank you, Mr. Chairman,  
15 yeah. You know, in the course of an hour and a half we  
16 went from three weeks to six weeks.

17 We're opposed to the continuance because  
18 they'll will be another one and another one. Because -- I  
19 mean, we're going the supply documents -- and I hear what  
20 you're saying on this, and I hear what the other  
21 Commissioners are saying, too.

22 But we have a list, and we'll provide those  
23 documents, but is there going to be another list and then  
24 another list, and then what about these documents? You  
25 see, we've had them -- we've had the Sierra Club over

1 three times, and we give them the documents that we have.  
2 And I understand you're in a difficult position that  
3 it's -- we said and then they say.

4 But we need some finality to this, and we need  
5 to get this on so that if, in fact, we do prevail, that  
6 the construction of these new ponds can go on, because  
7 they are an improvement to the environment.

8 I take what Commissioner Coyner said. You  
9 know, he wants to know if they leak or not, but whether  
10 they leak or not, I -- I have to just conclude that brand  
11 new ones are going to be better than two- or  
12 three-year-old ones. I mean, maybe there's something  
13 wrong with that, but I just think that way.

14 And so -- if you're -- and I understand your  
15 entertaining this continuance, but I have to just plead  
16 with you to put some kind of control on this, because we  
17 are you at the mercy of all these hearings, no, we didn't  
18 get the documents.

19 COMMISSION CHAIRMAN GANS: Understood.

20 MR. FREY: Thank you.

21 MR. WOODWORTH: And this is Tom Woodworth from  
22 NV Energy. We -- we would, of course, obviously second  
23 what Mr. Frey said. We could just point out two things.

24 I mean, we certainly do understand that  
25 Appellant has the right and it's certainly relevancy to

1 look at documents that were part of this application  
2 process.

3 But we would just make two points that we made  
4 earlier. It should be limited to what is truly relevant  
5 to this proceeding, and, secondly, I would still argue  
6 that this is coming late in the process. They had the  
7 opportunity to make these requests as early as  
8 October 2009.

9 They didn't decide to make this request -- and  
10 I might be off by a week here, and I'm sure Counsel will  
11 correct me, but they came in to NDEP's offices in around  
12 June 2010, and they made requests in June. Then when the  
13 got the abeyance of their appeal, no more action until  
14 September.

15 I feel that they could have done this stuff  
16 well -- well earlier, during the public comment phase, and  
17 I feel like NDEP and particularly us are left to suffer  
18 because they're now going to be making these requests now,  
19 this late, and that kind of impacts our finality.

20 That all said, I don't think we're going win.  
21 I don't know if we're going to persuade you on that point,  
22 but if the documents were relevant, and we had a  
23 limitation to these continuances, NV Energy doesn't  
24 necessarily disagree with the point that they should have  
25 the ability to look at documents that are relevant to the

1 application.

2 COMMISSION CHAIRMAN GANS: Gentlemen, with  
3 that, I want to make clear that all, you know, as far as  
4 I'm willing to go is 30 calendar days, period. No more  
5 extensions. It's the end. We've got to move forward with  
6 this, if we even go that far.

7 I would also suggest that maybe the Items 1  
8 and 2 -- I agree with Mr. Coyner. I think that as soon as  
9 those are available or wherever they are, we -- we can --  
10 we can see some -- some amount of legitimacy to those, but  
11 as far as the rest of the list goes and everything else  
12 going on, there's not going to be any more lists. We're  
13 not going to continue to delay this, for the very reasons  
14 that NV Energy is saying and NDEP.

15 So that's where I am. Mr. Coyner,  
16 Mr. Anderson, anything you can add or want to change is  
17 fine with me.

18 COMMISSIONER COYNER: Mr. Chairman, this is  
19 Commissioner Coyner. I -- I believe -- and I'm just going  
20 to group them into three items, one, two, and three, and  
21 they're the first three items on the list of documents.  
22 I'm really not concerned about the rest.

23 It would seem to me that there's been evidence  
24 presented that they already copied some of these, maybe  
25 not some of the other ones, because they were in two

1 locations, but that should be readily resolved, like next  
2 week, on the quarterly groundwater monitoring reports.

3 The interstitial layer monitoring, there's  
4 obviously some sort of miscommunication or difficulty. It  
5 looks like it's being handled, being resolved. I'd like  
6 to see that in some somebody's hands, if somebody could  
7 provide me with a timeframe, that could tell me that would  
8 be done by the end of next week, I'd appreciate it.

9 The hydrologic site characterization report, I  
10 believe exists. I think it told it exists. Again,  
11 speaking as a geological engineer, that document should be  
12 easily provided, unless there's a reason not to provide  
13 it.

14 And that one I would even venture into the  
15 subpoena realm, because it could be a very key document  
16 with regards to the site and the suitability of the site.  
17 But, again, if it exists, it's as easy as tomorrow, if the  
18 subpoena is issued, it has to be produced. So in my mind,  
19 I see most of those three things being resolved within a  
20 week.

21 Knowing the difficulty of getting everyone  
22 together, and Mr. Walker went quite a -- quite a length to  
23 get those two dates secured, I'm almost willing to go with  
24 the assurances the -- with assurances that those three  
25 documents, nothing else could be provided, with the

1 original hearing date.

2 And I believe that they can be provided by the  
3 end of next week.

4 COMMISSION CHAIRMAN GANS: Mr. Anderson?

5 COMMISSIONER ANDERSON: I would concur,  
6 Mr. Chairman. I think that all three of those can be  
7 produced readily, quickly. And that would certainly give  
8 the Appellant enough time to take a look at them before  
9 the November 4th hearing. I concur without objection.

10 COMMISSION CHAIRMAN GANS: Okay. Then what I  
11 need is a motion.

12 COMMISSIONER COYNER: Well, I would give --  
13 before I make a motion, I would give NDEP one more shot  
14 at: Is that a realistic expectation? And if it's not, I  
15 need to hear that, because then I'd entertain the idea of  
16 a continuance.

17 MS. TANNER: This is Lyna Tanner for the  
18 Attorney General's Office. We'd defer to Ms. Cripps' and  
19 her staff as far as whether or not dealing with 1, 2, and  
20 3 can be provided.

21 And I guess I just want to make sure I  
22 understand, on top of that, that the remaining documents  
23 listed as not received, we're not going to worry about for  
24 the purposes of the appeal. I'm not saying that they  
25 can't get what's in our possession, but for purposes of

1 the appeal, we're not -- those would not be subject to  
2 further continuance.

3 COMMISSIONER COYNER: That's my intent,  
4 Mr. Chairman. I -- I -- we can't have interminable  
5 fishing trips that just go on and on for more and more  
6 fish.

7 COMMISSION CHAIRMAN GANS: I agree.

8 MS. TANNER: So I would defer to Ms. Cripps  
9 and her staff as to whether or not 1, 2, and 3 can be  
10 provided within the -- a week's timeframe.

11 COMMISSION CHAIRMAN GANS: (Unintelligible),  
12 please?

13 MR. TINNEY: Thank you. This is Alan Tinney  
14 for the record. Thank you, Mr. Chairman.

15 We're more than happy to give -- we -- we  
16 already gave quarterly monitoring reports, but we will  
17 give them again, and make sure that everybody's cc'd to  
18 see that we've shown those also again.

19 Interstitial layer monitoring, as soon as we  
20 get them in the door, we'll be more than happy to get  
21 them. So we'll -- we don't have it this right this  
22 second, but we're more than happy to give them. The  
23 second we can get them in the door, they can -- we'll make  
24 sure and we'll cc everybody on that.

25 The proposed mesa pond documentation, the

1 hydrogeologic site characterization report, we will go  
2 downstairs and look for that, and if we have it in the  
3 building, we'll get it to you right away.

4 So that's -- so I want to make sure those are  
5 your three reports, Mr. Chairman and Commissioner  
6 Coyner -- those are the three that we have to give under  
7 your proposed thoughts.

8 MS. TANNER: Engineering design reports, as  
9 well? Is that -- was that also included --

10 COMMISSIONER COYNER: I don't know that means,  
11 Mr. Chairman. I'm not sure that those have been produced  
12 yet by the company. So I can't really say.

13 MR. WOODWORTH: Yeah. This is -- this is Tom  
14 Woodward for NV Energy. I've confirmed this with our  
15 people. We are -- we've been working diligently on this  
16 interstitial monitoring information, since it was brought  
17 to our attention, and we worked out that confusion.

18 We are -- we seem confident that we will be  
19 able to make -- get that information to NDEP timely, so  
20 that they could make the commitment to have all this  
21 information out by the end of next week.

22 COMMISSION CHAIRMAN GANS: All right.

23 COMMISSIONER COYNER: And can we touch on the  
24 hydrogeologic site characterization report? To Nevada  
25 Energy's knowledge, is that in the hands of it some branch

1 of NDEP?

2 MR. WOODWORTH: We were just talking about  
3 that. We -- we don't know -- we don't know, but if it  
4 isn't, we will have no problem getting it to the --  
5 getting it to everybody by the same timeframe.

6 MR. GARCIA: This is Tony Garcia, NV Energy.  
7 So, again, talking about the different branches within --  
8 within NDEP, I believe the document that you're seeking  
9 may have been submitted to the Technical Services Group,  
10 and it may be in the Las Vegas office as opposed to the  
11 Carson City office. So I would suggest you check there  
12 also.

13 MR. WOODWORTH: But we'll -- we'll definitely  
14 work with NDEP to make sure -- if -- if they -- if they  
15 can't find it, or if they haven't submitted it yet, it  
16 will get there.

17 COMMISSIONER COYNER: So, Mr. Chairman, this  
18 is Commissioner Coyner again for the record. I don't  
19 think a subpoena is necessary for that document seeing as  
20 how the company, at least, believes that it's in the  
21 possession of NDEP.

22 COMMISSION CHAIRMAN GANS: Yes, I -- I agree  
23 with you.

24 COMMISSIONER COYNER: So given the fact that  
25 that those materials can be provided by the end of next

1 week, which it sounds like I've gotten an assurance from  
2 them that those -- that the three can, I'm willing to go  
3 forward with the current appeal hearing.

4 COMMISSION CHAIRMAN GANS: Okay. So let's  
5 make sure we clarify what we just discussed.

6 First of all, the documents that we've agreed  
7 to, which are the quarterly groundwater monitoring  
8 reports, the interstitial layer monitoring, and the  
9 hydrogeologic site characteristics reports, will be  
10 available and presented by the end of next week.

11 Now, do we have any holidays to consider  
12 during this next week period?

13 COMMISSIONER COYNER: Nevada Day.

14 COMMISSION CHAIRMAN GANS: Nevada Day is what?  
15 On Friday?

16 COMMISSIONER COYNER: Friday. Go to the next  
17 Monday. But then you're bumping up against the Thursday  
18 hearing, and I know -- I'm weakening on my continuance.

19 MR. TINNEY: If we -- if we can -- this is  
20 Alan Tinney, Mr. Chairman. Can I make a simple -- if we  
21 can get all these documents together, we'll -- we'll  
22 provide them by Thursday.

23 COMMISSION CHAIRMAN GANS: Okay. That -- but  
24 that's what we're basing this motion on. They will be --  
25 they will be available by Thursday.

1 MR. GALPREN: Mr. Chairman, the design  
2 reports? What was the conclusion there? Those are  
3 essential for us to be able to evaluate the -- the degree  
4 to which the mesa ponds will be structurally sound and  
5 will not leak.

6 COMMISSION CHAIRMAN GANS: Mr. Garcia, what  
7 was the story on that?

8 MR. WOODWORTH: This is Tom Woodward, and I'm  
9 looking at my Environmental Services Manager to make sure  
10 I don't say this incorrectly, but we believe all that  
11 information has been provided to the NDEP's Technical  
12 Services Group -- (indistinct voice in the background) --  
13 and the Bureau of Water Resources.

14 But when we leave this room we will make sure  
15 that that has been the case. So if there's any confusion  
16 on that, or people can't find it, we will get it to them.

17 COMMISSION CHAIRMAN GANS: Mister  
18 (unintelligible), we'll add that --

19 (Participants talking at the same time)

20 COMMISSIONER COYNER: Mr. Chairman, this is  
21 Commissioner Coyner, just for the record.

22 And am I to understand, when you say,  
23 "engineering designs," that would be like, well, the  
24 pond's going to look like in profile, it's going to have  
25 this kind of slope, it's going to have this kind of base

1 underneath of it, it's going to have this thickness of  
2 plastic, that sort of thing?

3 MR. GALPREN: Mr. Coyner, yes, that's correct.

4 COMMISSIONER COYNER: Well, I'm asking the  
5 company.

6 MR. GALPREN: Oh, I'm sorry.

7 COMMISSIONER COYNER: I think that was  
8 Mr. Galpren.

9 UNIDENTIFIED SPEAKER: That was our  
10 understanding as well, yes.

11 COMMISSIONER COYNER: And that's what --  
12 that's what you believe you've already provided and you  
13 just need to locate.

14 UNIDENTIFIED SPEAKER: That is correct.

15 COMMISSION CHAIRMAN GANS: So now we know what  
16 documents are going to be provided, and we know they're  
17 going to go provided by Thursday.

18 And now the next question I have is: Can we  
19 stay with the existing hearing date? I would prefer to do  
20 that if at all possible. Mr. Coyner, Mr. Anderson?

21 COMMISSIONER ANDERSON: Yes, Mr. Chairman, I  
22 would suggest we stick with the current date of  
23 November 4th and 5th, 2010.

24 COMMISSION CHAIRMAN GANS: Mr. Coyner?

25 COMMISSIONER COYNER: As long as they're

1 provided by Thursday. I think there needs to be an  
2 allowance for the fact if we don't make that deadline,  
3 that gives essentially, them the weekend, and Monday,  
4 Tuesday, Wednesday to consider the content of those  
5 documents. It's a fairly short timeframe, a fairly short  
6 fuse, but as we've heard, we've been at this since last  
7 October.

8 COMMISSION CHAIRMAN GANS: That's correct.  
9 Okay. I need to motion.

10 COMMISSIONER COYNER: Okay. I think I'll take  
11 a shot at it. This is Commissioner Coyner.

12 I would move that the hearing -- the scheduled  
13 hearing -- the hearing scheduled be maintained for  
14 November 4th and 5th. Is the correct dates, John Walker?

15 MR. WALKER: That is correct.

16 COMMISSIONER COYNER: Okay. November 4th and  
17 5th, with the stipulation that -- and it should come from  
18 NDEP, so there won't be a subpoena involved here -- but  
19 from NDEP three groups of documents.

20 One, the quarterly groundwater monitoring  
21 reports. I understand there's two types, but  
22 essentially -- Xerox both of them. You know, it's just  
23 the time at the Xerox machine. So three groups of  
24 documents.

25 The quarterly groundwater monitoring reports,

1 the interstitial layer monitoring data, and the  
2 hydrologic, and the third category would be hydro --  
3 hydrogeologic characterization report and engineering  
4 design reports.

5 And that's my motion.

6 COMMISSIONER ANDERSON: I'll second that  
7 motion.

8 COMMISSION CHAIRMAN GANS: Okay. Before we go  
9 on is there any -- any discussion by the panel of the  
10 motion?

11 COMMISSIONER COYNER: Did I have in motion by  
12 Thursday? I'm sorry. Kathy, can you help me? That was  
13 my intent. If not, that those be documents be provided by  
14 Thursday. And somebody help me with the date.

15 MS. REBERT: October 28th.

16 COMMISSIONER COYNER: Thursday, October 28th.

17 MS. REBERT: Yes.

18 COMMISSIONER COYNER: Okay.

19 COMMISSION CHAIRMAN GANS: Okay.

20 MR. GALPREN: Mr. Chairman, Dan Galpren with  
21 the Sierra Club. Our -- the briefs -- our reply brief, in  
22 which we would have to cram all this analysis, would be  
23 due on November 1st. So it would essentially give us  
24 Friday, Saturday, and Sunday to incorporate what is likely  
25 to be -- when you're including the design reports, and the

1 hydrogeologic site characterization reports, all the  
2 monitoring data, a very substantial amount of material.

3 COMMISSION CHAIRMAN GANS: From my part -- and  
4 I would have to get input from both Mr. Anderson and  
5 Mr. Coyner -- I'd be willing to go to November 2nd.

6 MR. FREY: Mr. Chairman, this is Bill Frey.  
7 Given -- oddly enough, the day from my brief was today,  
8 and then the dispute over the documents and the  
9 continuation came up. And is it possible that I could  
10 have one-day extension to file my -- my brief, until  
11 tomorrow?

12 COMMISSION CHAIRMAN GANS: If my fellow  
13 Commissioners have no problem with it, I have no problem  
14 with it.

15 COMMISSIONER COYNER: Well, let's discuss that  
16 point, Mr. Chairman. This is Commissioner Coyner.

17 Those are fairly onerous timeframes, it seems  
18 like, given what we went through today. I'm not  
19 certain -- I'll throw this on the table, Mr. Chairman, and  
20 let's see what you have to say in terms of the briefs.

21 Perhaps -- maybe given the tight timeframes  
22 that we're trying to adhere to here with regards to the  
23 hearing, are briefs still necessary? And I'm going to put  
24 that on the table and let you shoot bullets at it.

25 COMMISSION CHAIRMAN GANS: Let me let

1 RoseMarie Reynolds weigh in on this.

2 COMMISSIONER COYNER: The reason -- excuse me,  
3 Mr. Chairman.

4 The reason we require briefs is to focus the  
5 argument. Essentially, that's what the purpose of the  
6 briefs are, and I'm a great proponent for briefs.  
7 Don't -- don't get me wrong, because that's exactly what  
8 they're designed to do is to, you know, get the extraneous  
9 out and focus exactly what it is that we're appealing  
10 here.

11 So -- but we have now created a fairly tight  
12 timeframe box, especially with the fact that we've added  
13 some document requirements and so forth. What -- I just  
14 want that to be considered.

15 COMMISSION CHAIRMAN GANS: Okay.

16 MS. REYNOLDS: And you should -- this is  
17 RoseMarie Reynolds for the record, and you should remember  
18 that the reply brief that Mr. Galpren was referencing, is  
19 optional. So if the Commission wants to change their  
20 order on the briefs, they are able -- you can do that, if  
21 that's what the Commission wants to do.

22 COMMISSION CHAIRMAN GANS: Any comments,  
23 Mr. Anderson or Mr. Coyner?

24 COMMISSIONER COYNER: Again, Mr. Chairman,  
25 this is Alan Coyner for the record.

1           You know, I don't want to create a monster. I  
2 don't want to put people into boxes where they have to  
3 burn 24 hour candles to make things happen, especially  
4 with regards to the briefs. I'm sympathetic to the  
5 attorneys, believe it or not.

6           So I guess, again, if -- if it's humanly  
7 possible, that would be a good thing. I think a lot of  
8 this is going to be end -- end up in the hearing, anyway,  
9 with regards to relevancy. It will be decided upon there  
10 regardless of the briefs.

11           So, again, I'm leaving it up to your judgment,  
12 I guess, on -- on that point.

13           COMMISSION CHAIRMAN GANS: Let me ask the  
14 three parties, the Appellant, NDEP, and Intervenor, what  
15 opinions they hold on these briefs, and we'll start with  
16 Appellant.

17           MR. GALPREN: Well, Mr. Chairman, to receive,  
18 you know, this amount of material just one week prior to  
19 the hearing, even without -- without respect to the  
20 briefs, means that at least from my part and probably my  
21 expert, we will be working twenty -- around the clock.

22           I would greatly prefer to see at least a week  
23 or two weeks of delay, so that the Commission can have the  
24 benefit of our most considered judgment and the best  
25 decision could be made by the Commission.

1                   You know, so to receive this amount of  
2 material on Thursday and need to crank out a brief by  
3 Monday would be almost impossible. And so -- and so,  
4 again, I am urging that we have some reasonable amount of  
5 time after receipt of -- after the deadline for the  
6 receipt of all these materials, to be able to work that  
7 into our presentation, both in the briefs and in the  
8 hearing.

9                   These materials are not intuitive to many  
10 persons, including myself, and though we have a tremendous  
11 expert assisting, we -- we want to be sure that we fully  
12 understand them and their significance, so that we can  
13 fully work that into -- into both our briefs and the  
14 presentation.

15                   We'd like to see the second or third week of  
16 November, at minimum, rather than holding to the current  
17 schedule, both with respect to the hearing and with  
18 respect to the briefing schedule.

19                   COMMISSION CHAIRMAN GANS: Okay. We have a  
20 motion on the (unintelligible due to electronic beeping),  
21 as you know, and I take your answer as because of the  
22 shortness of time, you would prefer not to have to do  
23 briefs. And that's -- that's what I'm going to take the  
24 answer to my question, and I'm going to go on now to NDEP.

25                   MR. FREY: You know, you -- I -- I appreciate

1 what -- what's been said, and, you know, rather than waive  
2 the brief entirely, we could -- I would be happy to just  
3 provide sort of a road -- roadmap of what our rebuttal to  
4 the opening brief that's been filed is, in the interest of  
5 just giving the Commission where we're headed, so -- to  
6 make things smoother on -- on the 4th and 5th.

7 MS. REYNOLDS: Just for the record, this is  
8 RoseMarie.

9 Bill, you're assuming that the Commission has  
10 read that opening brief, and that has not been provided to  
11 them.

12 MR. FREY: Oh, I wasn't assuming it, but I was  
13 saying that at some point they may read that. Again --  
14 okay --

15 MS. REYNOLDS: Okay. Because usually what  
16 happens --

17 MR. FREY: Yeah.

18 MS. REYNOLDS: -- for clarification for the  
19 other attorneys, as well, is once the complete -- once all  
20 of the briefs have been received, once then a packet will  
21 go out the Commission containing all those briefs. They  
22 don't receive it, you know, one at a time as they are  
23 filed. So I just want to make sure everyone understands  
24 that.

25 MR. FREY: Yes, thank you. So, Mr. Chairman,

1 what I was thinking was that you would read them all at  
2 one time. And since one has been filed, at least, I'd  
3 like to have -- I don't know -- something to direct where  
4 we're headed, but if you're not going to read theirs, then  
5 there's no need for me to file one.

6 COMMISSION CHAIRMAN GANS: Mr. Woodward?

7 MR. FREY: I don't know if that made sense.

8 COMMISSION CHAIRMAN GANS: Yes, it does.

9 Mr. Woodworth?

10 MEMBER WOODLAND: Yes, thank you.

11 Actually, with RoseMarie's clarification,  
12 which was very helpful, I think I've changed my answer. I  
13 was originally leaning towards the fact that we would like  
14 to have at least have submitted our response brief to the  
15 Appellants, just for some parity, but if -- if what I'm  
16 hearing is correct, and they won't see any of the briefs,  
17 then we're certainly fine not filing any briefs.

18 MS. REYNOLDS: Well, and that's something that  
19 is up for question right now, is whether or not you want  
20 them not to see briefs at all.

21 MEMBER WOODLAND: From our per -- from NV  
22 Energy's perspective, if they're going to see Appellant's  
23 brief, we would certainly like to -- I mean, we've already  
24 drafted it. I was actually getting worried about my -- my  
25 27 minutes left to file it. But, I mean, we would like to

1 send our response to that, if they're going to look at  
2 one, but if they're not going to look at one, then I don't  
3 need to send mine. That's kind of our view.

4 COMMISSIONER COYNER: And, mr. Chairman if  
5 I -- Mr. Woodward, are you done?

6 MEMBER WOODLAND: I'm sorry. I am, yes.

7 COMMISSIONER COYNER: Mr. Chairman,  
8 Commissioner Coyner again for the record. I'm a little --  
9 I'm getting a little nervous now, because of the jamming  
10 all this into one tight frame around 10 days or so. And  
11 again I think what we need to remember, as an appeal  
12 panel, is we essentially create a record that is useful to  
13 the Court, because the next stop after us is court.

14 And so, you know, if there is a -- if there's  
15 an indication that we tried to make the process overly  
16 impacted, as far as time goes, and the attorneys --  
17 RoseMarie can maybe tell me better -- does that create a  
18 sort of a fait accompli with regards to the quality of our  
19 decision?

20 MS. REYNOLDS: I'm not sure I understand.

21 COMMISSIONER COYNER: Did I give you -- did I  
22 give you the question correctly? I'm always a little  
23 nervous about appeal hearings in terms of creating a good  
24 record for the Court. That's essentially what we want to  
25 do, if it's going to go to trial, beyond us.

1                   And so, you know, I hate to -- I hate the  
2 hurry things and make things inconsiderate and rushed to  
3 the extent that it renders the quality of the decision  
4 that we make, as an appeal panel, vulnerable or weak. And  
5 that's kind of where I'm getting with this, is we're  
6 almost trying to put on square peg in a round hole.

7                   Because to me, personally, a continuance is  
8 fine. I don't have a problem with a continuance, as far  
9 as my schedule goes, but that would have to be the wisdom  
10 of the panel, I guess, and -- after you've heard what  
11 you've heard. And I'm certainly willing to change my  
12 motion if, in our wisdom, after hearing issues about  
13 briefs and so forth we want to extend the time frame.

14                   COMMISSIONER ANDERSON: Mr. Chairman, this is  
15 Pete Anderson. After the three hours today and having two  
16 days in our hearing schedule coming up, I feel fully  
17 informed regarding the situation, and look forward to the  
18 discussions on the 4th and 5th. So I'm inclined to forge  
19 ahead without briefs at this point.

20                   COMMISSION CHAIRMAN GANS: Okay.

21                   Mr. Coyner, we have a motion on the table from  
22 you. Did you want to modify the motion or shall we go  
23 forward with the motion?

24                   COMMISSIONER COYNER: Well, the motion as set,  
25 makes certain document requirements that have to be

1 provided timely. It could continue with the November 4th  
2 and 5th hearing schedule, and I think the motion would  
3 have to be amended to meet Mr. Anderson's thought to  
4 include a waiver of briefs.

5 COMMISSION CHAIRMAN GANS: Okay.

6 COMMISSIONER COYNER: And I will so move that.  
7 So if Mr. Anderson will second that amendment to the  
8 motion.

9 COMMISSIONER ANDERSON: Pete Anderson for the  
10 record. Yes, I second that motion.

11 COMMISSION CHAIRMAN GANS: Okay. Any further  
12 discussion to the panel on the motion and second?

13 Hearing none, all those in favor signify by,  
14 "Aye."

15 COMMISSIONER COYNER: Aye.

16 COMMISSIONER ANDERSON: Aye.

17 COMMISSION CHAIRMAN GANS: And all those  
18 against, signify with, "Nay."

19 (No response)

20 COMMISSION CHAIRMAN GANS: Okay. The ayes  
21 have it. It's unanimous.

22 (The vote was unanimously in favor of motion)

23 COMMISSION CHAIRMAN GANS: RoseMarie, is there  
24 any other business we need to conduct on this hearing?

25 MS. REYNOLDS: No.

1 COMMISSION CHAIRMAN GANS: Okay.

2 COMMISSIONER COYNER: Mr. Chairman, a final  
3 question for the -- Commissioner Coyner. Then I assume,  
4 RoseMarie, we will not see the brief that was filed by the  
5 Appellant.

6 MS. REYNOLDS: That is correct.

7 COMMISSIONER COYNER: Okay. That's fine. I  
8 just wanted to make that clear.

9 COMMISSION CHAIRMAN GANS: All right.

10 COMMISSIONER COYNER: We'll see everybody on  
11 the 4th.

12 COMMISSION CHAIRMAN GANS: We'll thank all the  
13 tones for your patience and the respect you've shown  
14 today. We'll do the same thing and have the same type of  
15 a hearing coming up.

16 Thank you very much.

17 UNIDENTIFIED SPEAKER: Thank you.

18 MR. MIXON: I'm sorry. I'm sorry. This is  
19 Chris Mixon in Las Vegas. I understand that this  
20 preliminary hearing was recorded, and I'm just curious if  
21 a transcript will be made of the hearing and available to  
22 the parties?

23 COMMISSION CHAIRMAN GANS: Mr. Walker?

24 MR. WALKER: This is John Walker. If you send  
25 us a letter, we can look at that. However, you may have

1 to pay for that transcript. We don't have that ability to  
2 make people pay for transcripts, but if you send me a  
3 letter or an email, we'll see what we can do.

4 I can definitely get you an electronic copy as  
5 soon as -- as soon as you contact me.

6 MR. MIXON: Okay. Very good. Thank you.

7 COMMISSION CHAIRMAN GANS: Thank you all.

8 Good-bye.

9 MS. TANNER: Thank you.

10 COMMISSION CHAIRMAN GANS: Thank you.

11 AUTOMATED RECORDING: We're sorry. Your  
12 conference is ending now. Please hang up.

13 TELECONFERENCE MONITOR: Thank you. Thank you  
14 for calling the AT&T Teleconference Replay System.

15 (Recorded proceedings concluded)

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I, CARRIE HEWERDINE, the undersigned, do hereby certify that the foregoing pages, numbers 1 through 140, inclusive, are the true, accurate and complete transcript prepared from the CD made by electronic recording by the Nevada Environmental Commission, Carson City, Nevada on October 21, 2010, and that I have verified the accuracy of the transcript by comparing the typewritten transcript against the verbal recording to the best of my ability and skills considering the quality of the recording provided.

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CARRIE HEWERDINE, RDR  
Nevada CCR NO. 820  
California CSR No. 4579

1 Carrie Hewerdine  
2 Capitol Reporters  
3 1201 N. Stewart St., Ste. 131  
4 Carson City, Nevada 89706  
5 (775) 882-5322

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8 AFFIRMATION

9 Pursuant to NRS 239B.030

10 The undersigned does hereby affirm that the  
11 following document DOES NOT contain the social security  
12 number of any person:

- 13 1) Nevada Environmental Commission,  
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19 CARRIE HEWERDINE, RDR  
20 Nevada CCR #820

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