

1 BEFORE THE STATE OF NEVADA, STATE ENVIRONMENTAL COMMISSION

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4 In Re:)
5 Appeal of water Pollution Control)
6 Groundwater Permit No. NEV 91022)
7 Reid Gardner Station)

7

8 BEFORE STATE ENVIRONMENTAL COMMISSION BOARD MEMBERS:

9

Jim Gans - Chairman

10

Alan Coyner - Commissioner

11

Pete Anderson - Commissioner

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Held at:

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Department of wildlife
1100 Valley Road
Reno, Nevada
November 4, 2010

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REPORTED BY: AMY JO TREVINO, CRR #825, CSR #5296

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1 THURSDAY, NOVEMBER 4, 2010 10:07 A.M.

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3 CHAIRMAN GANS: We will open this hearing on the time
4 according to our clock is 10:07 a.m. on November 4th, 2010.
5 Good morning everyone, my name is Jim Gans and I am Chairman of
6 the State Environmental Commission. Serving with me today is
7 Commissioner Pete Anderson and Commissioner Al Coyner today on
8 behalf of the appeal panel chair regarding the appeal of
9 groundwater permit number NEV 91022.

10 For the record this appeal hearing is being convened
11 at 10:07 on Thursday, November 4th in the Nevada Department of
12 wildlife which is located at 1100 Valley Road in Reno, Nevada.

13 Written notice pursuant to NRS 233 B has been provided to all
14 affected parties to this appeal.

15 Are members of the public in the audience today? Are
16 there any members of the public? You are a public member?
17 Okay, I just want to make sure then I would like to advise
18 everyone that today's proceeding is a hearing of a contested
19 case pursuant to NRS Chapter 233B.121. This hearing is a quasi
20 judicial proceeding exempt from the open meeting law, which
21 means this panel is not obligated to take public comments. We
22 would ask everyone including members of the public to conduct
23 themselves respectfully as if they were in court.

24 Before we start please note that we are recording

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1 today's proceedings. Our court reporter whose name is Amy
2 Trevino will administer the oath to witnesses testifying here
3 today. So we will have oaths administered by Amy.

4 I would also like to remind you that I may at my
5 discretion limit repetitive testimony and evidence. We've
6 scheduled two days for this and quite frankly I am not patient
7 with repetitive testimony, so you will hear me if I feel you
8 are doing that.

9 I also want to put on the record that I am a former
10 member of the Sierra Club as far back as the '60s and as most
11 recently in the early '90s, so I just want to put that on the
12 record so all the attorneys know this.

13 I would like to begin by asking the parties to the
14 appeal to introduce themselves starting with the Appellant
15 followed by the State, and then the Intervener

16 MR. GALPERN: Thank you, Mr. Chairman, Dan Galpern,

17 I'm an attorney with the Western Environmental Law Center, and
18 I am here representing the Sierra Club in this appeal.

19 MR. FREY: Good morning, Mr. Chairman, I am Bill Frey
20 with the Nevada Attorney General's Office, representing the
21 Division of Environmental Protection, and seated next to me is
22 the acting administrator for NDEP Colleen Cripps.

23 MR. GALPERN: I should have introduced also Chris
24 Mixson. Chris, could you introduce yourself?

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1 MR. MIXSON: Good morning, Mr. Chairman and members of
2 the Commission. I am Christopher Mixson of the Las Vegas law
3 firm of Wolf, Rifkin, Shapiro, Schulman & Rabkin with the
4 Sierra Club.

5 MR. GALPERN: Mr. Chairman, also we have with us a
6 testifying expert Mr. Elliott Lips. Elliott, would you
7 introduce yourself?

8 MR. LIPS: My name is Elliott Lips, Engineering
9 Geologist with Great Basin Earth Science in Salt Lake City,
10 Utah.

11 MR. WOODWORTH: Good morning Commissioners, my name is
12 Tom Woodworth, attorney with NV Energy, and I am representing
13 NV Energy.

14 CHAIRMAN GANS: Okay, thank you. After the
15 preliminary hearing on October 21st the Sierra Club filed two
16 additional motions with the Commission on October 29th and
17 31st. The first is entitled Motion to Specify Issues and for
18 Subpoenas to Produce Witnesses At Hearing; and the second is
19 entitled, Notice of NDEP and NV Energy's Failure to Comply with
20 SEC Order to Produce Documents and Offer to Continue the
21 Hearing with Certain Conditions.

22 NV Energy filed its response to the motion on
23 November 1st, and I had the opportunity to read that this
24 morning. And the State filed a response too, just for the

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1 record.

2 I would like to proceed with hearing oral arguments on
3 these two motions from the Appellant followed by the counsel
4 for NDEP and ending with counsel for NV Energy. We will
5 address each motion separately, and I would like to begin with
6 the Notice of NDEP and NV Energy's failure to comply with SEC's
7 order to produce documents and offer to continue the hearing
8 with certain conditions. After hearing from the respective
9 parties on this first motion I will close the hearing and move
10 to deliberate for deliberations by the panel and we will then
11 follow the same procedure for the second motion. We will be
12 very organized this morning and very civil, I hope. So with
13 that you can proceed, Mr. Galpern.

14 MR. GALPERN: Thank you, Mr. Chairman. So we are
15 proceeding first with the Notice. We are here and we are
16 prepared to proceed. Now, the problem resides with the fact
17 that the documents and data that were provided by NV Energy to
18 the Department and then provided to us late on October 28th
19 have a number of missing pieces of information that the
20 Commission ordered to be provided. And when we received this
21 late on October 28th, we only reviewed on October 29th,
22 October 30th, we believe that there was a fundamental
23 substitution data for the interstitial collection system. We
24 believe that they were providing data from pond samples, and

1 substituting that for the interstitial monitoring data.

2 we have since done further reading and scrutiny of
3 this and understand that the substitution goes the other way.
4 So that was an inaccuracy. Still the same as we will get into
5 during the main course of the hearing, and our view still the
6 same kind of permit violation, but since that kind of
7 substitution was made whole scale there is no point in delaying
8 the hearing for that because that's the information that they
9 have and apparently they did not sample separately for the
10 ponds, so there is no way that we can get that data that has
11 never been analyzed or never been produced even internally by
12 NV Energy.

13 we are also concerned that some of the data that was
14 supplied is manifestly incorrect or impossible, but again those
15 are the readings. We will have to get into a questioning the
16 accuracy of that data in the course of our over-all
17 presentation. Again, that is not a reason to delay the
18 hearing.

19 After speaking with Mr. Frey yesterday morning, I
20 didn't get a chance to speak with Mr. Woodworth but he assured
21 me that NDEP was going to produce the relevant witnesses who
22 could testify to the Department's decision making with respect
23 to the construction of the 2010 permit and also with respect to
24 the enforcement of the terms of the 2005 permit. And also

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1 indicated that NV Energy would produce the people who can speak
2 to those topics. So that was part of this point and that is
3 satisfactory.

4 Mr. Frey also noted that two of the pieces of
5 information that we have been seeking for a number of months
6 that we really could use for our analysis would be provided to
7 us as quickly as he could. One is the Operations and
8 Maintenance manual that was submitted to govern the 2005 permit
9 term, and also the new Operations and Maintenance manual that
10 was supposed to be submitted on September 25 pursuant to the
11 2005 -- 2010 permit. And the other is the sampling, the
12 over-all facility sampling plan both governing the 2005 permit
13 and the 2010 permit. I think Mr. Frey perhaps in the press of
14 everything wasn't able to attend to that so we still don't have
15 those two documents.

16 Mr. Tinney from the Department is working on trying to
17 get those to us even this morning, and at a certain point if
18 those can be produced we are going to want to have a brief
19 recess so that we can evaluate them and incorporate that into
20 our presentation if that would be acceptable with the Chair.
21 Apparently these are not huge documents, we haven't seen them
22 yet.

23 we did secure one page of the Operation and
24 Maintenance plan, I believe it is from 2006, that was helpful

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1 in some of our analysis, but we need to see more so that we can
2 be thoroughly competent of the points that we are going to be
3 making with respect to certain alleged violations of the prior
4 permit and the unenforceability of the existing.

5 So long story short we are largely prepared to go
6 forward, we are still hoping to get these documents that we
7 requested long ago and when we get those, we at least would

8 like to take a few minutes to evaluate those.

9 Okay, then on the motion, the second --

10 CHAIRMAN GANS: Well, let's wait on that, I want to do
11 these motions separately, unless you are withdrawing the
12 motion.

13 MR. GALPERN: I don't think that there -- that was a
14 notice, and to inform the Commission and NV Energy and the
15 Division as to what we really need to go forward, and I believe
16 that what I am saying is we have, we are here, we are ready to
17 go forward. We would very much like to still have these still
18 outstanding documents to fully inform the analysis that we are
19 prepared to provide, but we have no motion to, we have no
20 motion at this stage to continue the hearing. I mean as a
21 practical matter, Bill wasn't able to get to me on Tuesday, he
22 finally got to me when I was sitting waiting for, to board my
23 flight. I had already checked our two boxes, 92 pounds of
24 evidence and the tickets were unrefundable. My expert from

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1 Salt Lake was already underway. We stayed up around the clock
2 for the last four days figuring this out and feel that we have
3 enough to move forward and to prove our issues.

4 CHAIRMAN GANS: So what I am hearing from you is your
5 first motion we can dismiss, because you do have the witnesses
6 that you wanted, there is no need --

7 MS. REYNOLDS: That's separate. This is a separate
8 motion. You are just dealing with the Notice.

9 CHAIRMAN GANS: I know, but I understand you are
10 telling me that you have the witnesses.

11 MR. GALPERN: Yes. Bill, Mr. Frey just told me that
12 one of the witnesses Diana Silsby is sick and couldn't make it
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13 but --

14 MR. FREY: Val King.

15 MR. GALPERN: Val King her supervisor is here and she
16 can speak to questions of enforcement of the permit also, so we
17 are fine with the witnesses. Is Jeryl Gardner here and Shannon
18 Harber? Okay, Bill noted that everyone is here that we sought
19 to call, so we are fine with respect to that.

20 Now, another part of the motion that we had to make on
21 October 29th, so this was only, we only had at most seven hours
22 to start reviewing the material including to understand what
23 wasn't produced is we sought to lay out the issues. Now, as
24 the Commission will recall we have been attempting to secure

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1 critical documents that we thought were necessary for us even
2 to be able to flush out the issues on appeal. Under your rules
3 there is a requirement to provide any motion for a subpoena of
4 witnesses at least no less than five days in advance of the
5 hearing so that put me, that put us back to October 29th and
6 because of the, because on October 21 memorialized in the
7 Commission's order of October 28th to receive on October 28th,
8 there was a waiver of the briefing schedule in order to assist
9 the various parties and trying to get everything done prior to
10 hearing. I recognized then that there was a problem
11 potentially and that is that we had outlined the issues quickly
12 on the night of October 29 after receiving the materials the
13 night before. And so in addition to the witness list in that
14 motion we produced a number of issues on appeal in the event
15 that our filing of October 7th, pursuant to the Commission's
16 order, which required us to outline the issues on appeal with

17 specificity, if that was gone then we would not have had the
18 opportunity to provide you with our issues on appeal. And
19 there were seven there.

20 Subsequent to that Mr. Frey and Mr. Woodworth -- am I
21 getting your name wrong? I'm sorry.

22 MR. WOODWORTH: No, you got it.

23 MR. GALPERN: Okay. Issued responses and there are a
24 couple good points I thought made there as to lack of

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1 specificity. And so on the question of the issues for appeal I
2 wanted to as much as possible narrow them and further specify
3 those now, and if it is fine with the Chair I can hand this
4 out. We now have reduced them for purposes of ease from seven
5 to three.

6 CHAIRMAN GANS: Has counsel seen these yet? Is this
7 the first time anyone has seen these?

8 MR. GALPERN: No, no one has seen them. We did these
9 last night.

10 MR. WOODWORTH: Can I just ask, this is the
11 Intervener, I guess we don't need to say that anymore, but
12 where are we exactly right now, are we moving past the motion
13 at this point?

14 CHAIRMAN GANS: No, we are not. We are doing
15 preliminary motions.

16 MR. WOODWORTH: So this is going to what? Where are
17 we going with this right now? Are we defining the --

18 MR. GALPERN: What I am saying is that I am attempting
19 to amend the motion pursuant to concerns that you have raised
20 and Bill has raised and for purposes of expediting the hearing
21 and making it more easier by reducing those seven issues to

22 just these three basic ones.

23 One was the Division's decision to issue the permit,
24 and I beg your pardon, it's NEV 91022, people can make that

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1 correction. Was that decision unlawful in light of NV Energy's
2 violations of its 2005 permit?

3 Two, was NDEP's decision to issue the permit unlawful
4 in light of the available evidence as to whether NV Energy
5 could meet the schedule of compliance from day one pursuant to
6 that listed permit term 182.

7 And third, was NDEP's decision to issue the 2010
8 permit unlawful in light of its unsubstantiated or erroneous
9 presumptions as to the performance of the newly authorized Mesa
10 ponds or its unenforceable no discharge requirements.

11 what we would propose to drop as a contested issue
12 here was prior issue two in which we were alleging an
13 incomplete application. NV Energy in the October 28th document
14 conveyance did produce the design and engineering drawings for
15 two of the nine Mesa ponds.

16 Three, dropping the allegation that the compliance
17 schedule itself was lax. One of the opponents had noted that
18 term was insufficiently defined in law and for that reason I
19 don't know if this was you, Tom, too vague.

20 One was an allegation of violations of Nevada drinking
21 water standards, that was number four. The prior list.

22 Number five in the prior list was violation of the
23 water quality standards in the muddy river. And when I say
24 that we are dropping this, I am saying that we are dropping

1 this for purposes of this appeal. We are not, Sierra Club is
2 not conceding that everything is fine in the muddy river and
3 that the drinking water standards are not being degraded. We
4 are saying we are no longer contesting those issues for
5 purposes of this appeal.

6 And six, there was an allegation that their decision
7 was unreasonable in light of the available evidence. That is
8 incorporated in one and two and need not be a separate issue on
9 appeal. So these three basic issues are the ones that we are
10 left with.

11 One other thing I should say with respect to the
12 Notice and that is an additional concern that animated the
13 Notice was that in the letter of transmittal by Tony Garcia of
14 NV Energy, NV Energy reserved the right to supplement the data
15 and noted that it was possible that in searching their archives
16 they could find more of the information, and this I believe had
17 mostly to do with the data as to waste water in the
18 interstitial, that had reached or passed the primary liner and
19 had been captured in the interstitial leak detection system.
20 And our concern was that, was the guard against the possibility
21 that on the eve or the morning of trial there would be another
22 document dump that we would not have the opportunity to
23 analyze, but I don't believe that is happening; is that
24 correct, counsel?

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1 Okay, so that too is alleviated and so the only
2 documents that we had requested that we believe we need to
3 fully perform our presentation during this two-day period are

4 the ones to which I refer the 2005, 2010 Operations and
5 Maintenance manuals and the sampling ponds for the facility.
6 And with that we are prepared to proceed.

7 CHAIRMAN GANS: Any questions from the panel?

8 MR. FREY: Mr. Chairman and members of the Commission,
9 I just want to be clear I think on what I am hearing. We
10 received two documents, one had a list of issues and a request
11 for the witnesses, I have no objection to the request for
12 witnesses, we have never tried not to produce anybody, that's
13 fine, we will get everybody here that we need to. I apologize
14 Diana is sick but we have other people who can testify as to
15 what she does. I don't think that should be a problem.

16 But we specified the issues here and then this morning
17 we got sort of a narrowed down version of the issues. And you
18 know, one of the things that is of, I want to raise is that the
19 State has devoted a lot of time to reading documents that go
20 nowhere. We read the opening brief and started drafting a
21 reply and then that was canceled and I'm not blaming anyone, it
22 was canceled but we put effort into that document. Then we put
23 effort into the document demanding subpoenas and more document
24 production, and then we had to put effort into this document

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1 here, the motion to specify issues and the Notice of failure to
2 comply with the previous orders. So every time we get one of
3 these documents we react to it, and we have people go and we
4 ask did we get all the documents, we review them again and try
5 to puzzle out exactly what the problem is.

6 So in the course of the preparation of this we sort of
7 felt like we have been spinning our wheels, every time we get a

8 motion, we have to run off and do it and stop preparing for
9 this, but we are prepared to go forward.

10 So what I hope I am hearing is that they have every
11 document they need and they are ready to go, because I don't
12 want to be prejudiced that on appeal the appeal is based upon a
13 lack of documents.

14 They argued in the Offer to Continue the Hearing with
15 certain conditions, I don't know if I even know what,
16 understood the conditions, but so we responded and said if you
17 don't have the documents, we are happy to continue it, get the
18 documents, it's open house at the Bryant building. But with
19 this more narrow scope, and I appreciate that it has been
20 narrowed down considerably so that we don't have to waste time
21 with some others, and it seems like we are blending in
22 different things here in addition to these two that the motion
23 on the 29th and the Notice of the 31st as to what is going on.
24 We are ready to go, but I am just having a fundamental

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1 objection as to how this is proceeding at this point. And
2 going forward I would ask that we just have a few minutes at
3 least to review the three issues and to revise our plan if that
4 is possible. With that I will conclude.

5 COMMISSIONER COYNER: Question, Bill, this is Al
6 Coyner, it is the agency's position that the documents that
7 were stipulated at our preliminary hearing have been provided?

8 MR. FREY: Yes, sir.

9 COMMISSIONER COYNER: And I think that I heard from
10 the Appellant that that is substantially correct. There could
11 be 2002 one report that might be somehow not quite conveyed or
12 understood, but it is your position that those documents have

13 been provided?

14 MR. FREY: We even developed an exhibit where we try
15 and identify the status of the documents that we would put on,
16 so that some of them are older documents, some of them, some of
17 the documents that were requested was a legitimate
18 misunderstanding. Sometimes a term means something to one
19 group of people and it means something different to another.
20 For example, DMRs, not the same document, so that's correct.

21 CHAIRMAN GANS: Bill, I did hear the Appellant say
22 that there were a couple of things that you were working on
23 right now.

24 MR. FREY: Yes, sir.

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1 CHAIRMAN GANS: Will you give us the status of that?

2 MR. FREY: Yes, I can. We are going to receive here
3 by e-mail the '05 O & M report and the 2010 O & M report, and
4 we are getting the 2005 sample. I don't know when that will
5 arrive. I suspect the other ones are going to be delivered to
6 somebody's computer here. If I can have one minute.

7 So let me go back, the '05 and 2010 O & M reports are
8 here, all we have to do is print them, and the '05 we are
9 waiting to get. Oh, I am misreading this, we are missing the
10 '05 sampling plan and we have the 2010 O & M sampling plan and
11 the '05 O & M, but not the '05 sampling plan.

12 MR. GALPERN: Do you have the 2010 sampling plan?

13 MR. FREY: Yes. Sampling plan.

14 MR. GALPERN: Because we did receive one page, we did
15 receive from NDEP two days ago as we were scrambling to prepare
16 a sampling plan governing the 2005 permit term, I believe it

17 actually may have been conveyed in 2006. So you are saying
18 that you cannot locate the '05 --

19 MR. FREY: We are still looking. I'm not saying we
20 can't locate, but we are looking.

21 MR. GALPERN: Okay.

22 MR. FREY: And I believe that these are not voluminous
23 documents. I believe that they are relatively short. I don't
24 know what that means.

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1 COMMISSIONER COYNER: Thank you. Al Coyner for the
2 record. Bill, those weren't documents that were in our
3 stipulation or what do you call that our requirement that we
4 set forth in the other conflicts, so I don't think it is
5 germane essentially for moving forward. And Bill, would you
6 represent that those, I think there were four documents we are
7 talking about, were always available at the Division in the
8 past? Certainly the '05 ones were. 2010 ones --

9 MR. FREY: The '05 would have been there, I just am at
10 a loss as to why we can't get a hand on the '05 sampling report
11 right now.

12 COMMISSIONER COYNER: There certainly would have been
13 the opportunity at some point --

14 MR. FREY: The '05 has been at the office, the 2010 we
15 got last week.

16 COMMISSIONER ANDERSON: Pete Anderson for the record.
17 But that document wasn't due until just recently.

18 MR. FREY: That's correct. That was a document
19 required as a result of the 2010 permit and it had a four-month
20 lead time before it needed to be produced, and the '05, I don't
21 want to just repeat this, but we are looking and that should be

22 around.

23 CHAIRMAN GANS: Is that your understanding now what we
24 got and what we don't have?

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1 MR. GALPERN: Yes, sir. Just to clarify, 2010 permit
2 I believe requires submission of the Operations and Maintenance
3 manual and the sampling plan by September 25, 2010, and we did
4 request that actually on September 13th and we requested it
5 again and I don't, I can't say I have a clue as to where the
6 2005 sampling plan is in the files at NDEP, but we did review
7 the files on two different occasions and looked for these
8 documents and didn't see them then, so that's the reason why we
9 have been continuing to request it. But Mr. Coyner is correct
10 that these were not among the set that you essentially ordered
11 on October 21 and if necessary, if they are not all produced
12 today, as I said before, we are prepared.

13 MR. FREY: Mr. Chairman and Commissioners, I just want
14 to be clear I know everyone is concerned about using our
15 State's resources wisely, I just want to be clear that as we go
16 forward, if we go forward and there is not an objection then
17 that the documents aren't here for the case. I mean either
18 they are ready and we produced all the documents or they are
19 not. Am I wrong on that? I think that is a legitimate
20 question.

21 CHAIRMAN GANS: What I am hearing is the Appellant is
22 ready to go forward. He would like those documents but he is
23 ready to proceed and I have heard that from you also; is that
24 correct?

1 MR. FREY: Yes, sir.

2 CHAIRMAN GANS: That's what I am hearing.
3 Mr. Woodworth, your turn.

4 MR. WOODWORTH: Thank you. There is a lot here, but
5 kind of all over the place here but let me try to succinctly
6 address one point for the record. There was no obligation in
7 your latest order to compel documentation of NV Energy at all.
8 NV Energy has already been on the record that we provided NDEP
9 every document that is provided under law that has ever been
10 requested by NDEP, so the allegation in Mr. Galpern's
11 October 29th I believe motion or notice that suggested we
12 failed to comply with the order, I believe is groundless so not
13 really relevant, we are past that, but I want to make that
14 point for the record.

15 In terms of missing documentation I think either
16 Mr. Gans or Mr. Coyner spoke to it, but you specified what
17 documentation NDEP was to provide them, that they were unable
18 to get in the numerous times they have been over to their
19 offices trying to collect documentation. I believe that was
20 the discharge monitoring report, design documentation,
21 interstitial data. That documentation has been provided. I
22 don't know, we certainly provided it. We have worked with
23 them. We have worked with NDEP after this preliminary hearing
24 to make sure they still had it and could get it more quickly if

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1 it was in some other office, some other city. Our folks worked
2 with them to make sure they could get it even more quickly
3 documents we submitted to make sure they got this matter to

4 Mr. Galpern.

5 I would argue Mr. Galpern had months and months and
6 months to collect this information, but so be it the NDEP folks
7 are trying to run around with limited resources trying to
8 collect all this documentation and we are trying to help out.

9 Now here we are I guess two or three days ago, I
10 probably have the, day ago now there is an allegation that they
11 don't have a 2005 sampling plan and 2005 O & M plan. At least
12 they don't have the complete 2005 O & M plan. I don't see that
13 anywhere in your order. I mean we have been dealing with
14 groundwater investigations at that site since I was in college.
15 I mean there are, I can only imagine how many file cabinets
16 there are worth of documentation at NDEP, and they can come
17 back every few days and request a new document based on the
18 latest thing that NDEP is requesting. And I think we lose
19 sight, and part of my opening will address this, but we lose
20 sight on what this appeal is about.

21 This appeal is about whether NDEP complied with your
22 regulatory requirements when renewing our permit. It's not
23 about reinvestigating all the groundwater characterization
24 efforts we have done at this plan. And all of our previous

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1 filings under our 2005 permit. There are specific guidelines
2 that are set forth for renewing the permits. They have
3 complied with it. Apparently Sierra Club is going to offer us
4 a lot of evidence over the next day or two and hopefully no
5 longer than that, that is going to allege that NDEP came to the
6 wrong decision. But I would argue that's not their job. They
7 don't get to substitute their judgment for NDEP. NDEP did an

8 in depth effort, they made a conscious effort, they complied
9 with their laws --

10 CHAIRMAN GANS: Are you giving your opening statement?

11 MR. WOODWORTH: We probably are, so I would argue they
12 received everything that was required in your order, and I'll
13 reserve this list of issues, I'm sorry I got into my opening,
14 these issues got me thinking about it, but I would like to
15 speak to the list of issues now or I can speak to it later, but
16 we can, we can deal with some of this stuff now, but their
17 allegation here to some of the citations they offered I believe
18 for the first time I can argue those now or argue them later
19 but I will stick to the motion.

20 COMMISSIONER COYNER: No questions.

21 CHAIRMAN GANS: Okay. Where I think we are is we have
22 two motions on the floor, preliminary motions. I would like
23 now for the panel to deliberate first on the first one we were
24 heading towards, which is the issue of the Notice and the

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1 failure to comply with SEC order to produce documents. I will
2 ask my panel members if they have any comments or questions or
3 you want a motion here to proceed?

4 COMMISSIONER ANDERSON: No questions.

5 COMMISSIONER COYNER: I think we substantially
6 complied with their issues, so I am ready to proceed. I think
7 we have substantially complied with the issues raised in the
8 two motions and I will call a motion, if that is the property
9 terminology, one is notice and one is a motion.

10 MS. REYNOLDS: Right.

11 COMMISSIONER COYNER: So that we properly complied
12 with the issues raised in the Notice and the motion. So my

13 motion and I will turn to Rose Marie again, is that deny both
14 of these, is that the proper --

15 MS. REYNOLDS: Not exactly, because there is different
16 things that are being asked for here. Going through these in
17 order you have got one that is a notice about the failure to
18 comply, that is something that you could say yes or no did they
19 comply or didn't they comply. Coupled with that particular
20 notice is an issue about whether or not the hearing should be
21 continued, so that is something separate to address.

22 You have also got combined in there this issue on the
23 two categories of documents, the operations manual for 2005 and
24 2010, and then the sampling plan for 2005 and 2010 to be

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1 addressed.

2 COMMISSIONER COYNER: I would respectively disagree,
3 there is nothing in here about O & M manuals, nothing in this
4 particular --

5 MS. REYNOLDS: He has brought it up now in his
6 argument, so I think the Commission should address it.

7 Then you have got on the motion to specify issues and
8 subpoenas, the subpoenas I think are moot, you already heard
9 from NDEP and from NV Energy that they have got the witnesses
10 here so subpoenas aren't necessary, so you could dismiss that
11 as being moot.

12 And then on the motion to specify issues the question
13 is are you going to accept this abbreviated list of three
14 issues.

15 CHAIRMAN GANS: what I heard is that counsel wants to
16 get together --

17 MS. REYNOLDS: And address that.
18 MR. FREY: If I may, however you proceed, proceed. If
19 these are the issues that we should address at hearing, I just
20 need a few minutes to make sure that we are ready to go on
21 these three issues.
22 COMMISSIONER COYNER: Mr. Chairman, I would advise you
23 set this aside for the moment.
24 MS. REYNOLDS: Okay.

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1 COMMISSIONER COYNER: We don't have to rule on this
2 document, which is the three issues that were submitted. What
3 should we call this? List of issues and associated statutes
4 for hearing if this is the proper title of this particular
5 document. So could I get rid of the easy one first,
6 Mr. Chairman?
7 CHAIRMAN GANS: Yes.
8 COMMISSIONER COYNER: I believe that we should dismiss
9 is that the term I use? For the subpoena for witnesses.
10 MS. REYNOLDS: You can dismiss that request --
11 COMMISSIONER COYNER: So I would like to move that we
12 dismiss the motion to specify issues and force subpoenas to
13 produce witnesses at the hearing.
14 CHAIRMAN GANS: Second?
15 COMMISSIONER ANDERSON: I will second that motion.
16 CHAIRMAN GANS: Any more discussion on the motion?
17 MS. REYNOLDS: You just need to say the reason why you
18 are going to dismiss it.
19 COMMISSIONER COYNER: Because it is moot because it
20 has been substantially complied with.
21 CHAIRMAN GANS: All those in favor signify by aye.

22 COMMISSIONER COYNER: Aye.

23 COMMISSIONER ANDERSON: Aye.

24 CHAIRMAN GANS: Aye. Any nay? None heard.

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1 COMMISSIONER COYNER: Now this one gets a little more
2 complicated, this other notice and you want to break it down
3 into separate pieces, Rose Marie? And what is going to be the
4 action to accept, deny, dismiss?

5 MS. REYNOLDS: You have got a potential request to
6 continue but from what I have heard here I don't think anybody
7 wants to continue, we want to go forward. Mr. Galpern is
8 nodding his head.

9 MR. GALPERN: May I speak to it?

10 CHAIRMAN GANS: Yes.

11 MR. GALPERN: We did not in our motion or in our
12 notice request a continuance.

13 MS. REYNOLDS: Okay. So then we don't need to decide
14 that. We won't touch that. So then the only issue then that
15 this raises, I think has to do with the documents whether or
16 not you find that NDEP and NV Energy -- well, it was actually
17 the order was only directed to NDEP, complied with the
18 documents that you ordered in your preliminary hearing, and
19 then the outstanding question is on the categories of documents
20 which you heard that NDEP is ready to provide everything that
21 they are asking for now. They are just looking for, like if I
22 get this right a sampling plan for 2005, that's what you are
23 still looking for?

24 COMMISSIONER COYNER: I find that to be a matter for

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1 the actual appeal hearing, not this particular document. This
2 document is outlined, the documents that were asked for and
3 discussed at length in the preliminary hearing, and I believe
4 that the Department has substantially complied with, the
5 Division has substantially complied with it.

6 MS. REYNOLDS: Then that's your motion.

7 COMMISSIONER COYNER: I would like to move that we
8 affirm that the Division has complied with the document list
9 that we specified in the preliminary hearing on October 21st.

10 COMMISSIONER ANDERSON: I will second that motion.

11 CHAIRMAN GANS: Any discussion, any comments? Okay.
12 All in favor signify by aye.

13 COMMISSIONER COYNER: Aye.

14 COMMISSIONER ANDERSON: Aye.

15 CHAIRMAN GANS: Aye. Any nays? None heard, motion
16 passes.

17 Now with that is there anything else we need to
18 address?

19 MS. REYNOLDS: Why don't we take a 15-minute break.

20 CHAIRMAN GANS: We set aside the issues --

21 COMMISSIONER COYNER: Excuse me, Mr. Chairman, but I
22 would urge that we essentially act on this list so that we give
23 them direction as to what to do here with this list.

24 MS. REYNOLDS: Well, they wanted a chance to review

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1 the list, so during this break what I anticipate happening is
2 that the attorneys can look at the list, discuss it amongst
3 themselves and hopefully you have got your documents that are

4 being printed via e-mail that you can deliver.

5 MR. FREY: Yes. One of the problems we are having is
6 that everybody who would normally be down in Carson who could
7 get us the documents is here so that the one document, the '05
8 sampling we are tracking down, the other documents we have
9 electronically here and we are out making copies.

10 CHAIRMAN GANS: But you have requested say 15 minutes,
11 is that enough time to recess for this purpose?

12 MR. GALPERN: We haven't seen the documents so we
13 don't know how fast it can be -- do you know the size of them?

14 MR. FREY: No, but I think this 15 minutes is just to
15 address this.

16 CHAIRMAN GANS: Issues.

17 MR. GALPERN: I'm sorry.

18 MS. REYNOLDS: Hopefully to give those documents to
19 you so you can start looking at them now.

20 MR. GALPERN: That's perfectly fine, and if I can
21 address the manual and the sampling plan issue even if they are
22 voluminous, we appreciate the Department's efforts to secure
23 them for us and if we don't have time to immediately
24 incorporate them after taking a quick review, we would simply

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1 request the ability to supplement the record with our comments
2 after we have the opportunity to analyze them.

3 MR. FREY: I think I object to that, but the good news
4 is that the '05 document has been located and it also is being
5 printed.

6 CHAIRMAN GANS: Mr. Woodworth, you have some comments?

7 MR. WOODWORTH: I want to clarify for the record on

8 the motion, on these two documents, the 2005 O & M plan and
9 2005 sampling plan is that something this Commission is
10 requiring that NDEP produce for purposes of this hearing?
11 Because I was under the impression that you, that they have
12 substantially complied with their production.

13 MS. REYNOLDS: They have.

14 MR. GALPERN: It was definitely not required, that has
15 been established.

16 CHAIRMAN GANS: That's right.

17 MR. GALPERN: And if I can just say, Mr. Chairman, our
18 expert believes that he can figure it out within 15 minutes of
19 actually having them in his hands.

20 MR. FREY: If I can make a suggestion, take a break,
21 we will look at this first and then report back in 15 and if
22 you need some extra time from there we can do that.

23 COMMISSIONER ANDERSON: Pete Anderson, for the record.
24 Just one thing to clear up in my mind from the post of this

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1 appeal there were five issues, correct?

2 MS. REYNOLDS: It's been refined.

3 COMMISSIONER ANDERSON: Refined to seven issues --

4 MS. REYNOLDS: No, it has been refined to three.

5 CHAIRMAN GANS: There was seven, but you are right
6 there was seven, now we are down to three.

7 COMMISSIONER ANDERSON: There were five originally.

8 CHAIRMAN GANS: Five, seven, three.

9 COMMISSIONER ANDERSON: All right.

10 MR. FREY: I just want to make sure that the three are
11 what we are prepared for.

12 COMMISSIONER ANDERSON: Sure.

13 CHAIRMAN GANS: We will recess, it is now 10:55, we
14 will return at ten minutes after 11:00, 11:10, so take a 15
15 minute recess. Okay.

16 (Break taken.)

17 CHAIRMAN GANS: Reconvene the appeal hearing of water
18 pollution control groundwater permit NEV 91022 after a recess.

19 Mr. Frey, do you want to proceed with us and tell us
20 what conclusions you came to on the list of issues?

21 MR. FREY: On this document we have gone as previously
22 noted from five issues to seven issues and now down to three,
23 which is fine, I mean this is, the purpose of the briefing was
24 to identify issues that frequently don't get identified in the

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1 form of three. The form threes are often very confusing, and
2 it is more of a shotgun, and over the years we have had
3 difficulty trying to pin down what an appellant is trying to do
4 with, in the form three.

5 Now that we have these three issues before us, and
6 these are the issues that Sierra Club has said those are the
7 ones, these are the ones, I would like to make a motion to
8 dismiss this case, because these three issues that they have
9 identified are not issues that would be grounds for any action
10 by the SEC regarding affirming, denying or modifying this
11 permit. And I can go through them one at a time with this.

12 we have a right to know what the issues are on appeal
13 so that we can adequately respond, and Sierra Club has done
14 that, they gave us these three, but they don't form a basis for
15 today's proceeding. Sierra Club has never offered any specific
16 violations of the 2005 permit. This is number one. They say

17 that NDEP's decision to issue the 2010 permit is unlawful in
18 light of NV Energy's violations of its 2005 permit, but in all
19 the documents they have written and everything they said they
20 never said what that violation is that we can't proceed on.

21 On number two, in fact there are no, there will be
22 testimony if this was to go forward, there would be testimony
23 there were no violations of the 2005 permit, and a document
24 that has come up and been discussed on several occasions, 2008

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1 AOC, there has never been any violations of that, of compliance
2 violations.

3 The second issue that they raise is that NDEP's
4 decision to issue the 2010 permit unlawful in light of
5 available evidence as to whether NV Energy could meet the
6 schedule of compliance. I want you to think about that for a
7 second. Schedule of compliance is a part of the permit that
8 lays out actions that are going to occur in the future. If we
9 had to make a permittee demonstrate that in the future they
10 could perform such an action, we would never have a schedule of
11 compliance. We would always have immediate action taking
12 place, because it's very difficult to have a schedule of
13 compliance, these are future actions, that we have to have the
14 permittee demonstrate prior to issuing the permit.

15 And the third one is that NDEP's decision to issue the
16 2010 permit unlawful in light of its unsubstantiated or
17 erroneous presumptions as to the performance of the newly
18 authorized performance. They are saying that we can't issue
19 permits for new ponds because we don't know if they are going
20 to leak or not. Well, there is a lot of things we don't know.
21 I mean okay, I don't know if those ponds are going to leak or

22 not, that's a question of construction and engineering and
23 design and weather and all kinds of variables.

24 So when we issue the permit we just use what we think

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1 is state of the art requirements that require, we have certain
2 requirements that have to be met, but there is no way that we
3 can see into the future and know that they are never going to
4 leak, because if we buy into argument three we would never
5 issue a permit. And if you buy into argument three, the State
6 could never issue a driver's license because you know somebody
7 is going to get a driver's license and violate the law. On our
8 way back to Carson City I am going to see dozens of people
9 doing that. But if we have to, if we know they -- if there is
10 going to be a violation or if there is a violation, that is a
11 compliance issue and that's not a permit issue. If there is a
12 violation, if there is a potential violation out there, that
13 has nothing to do with moving forward on this permit. It has
14 everything to do with how we go about enforcing it. And those
15 are two completely separate issues. And I will stop there.

16 CHAIRMAN GANS: Mr. Woodworth?

17 MR. WOODWORTH: Well, first of all Intervener supports
18 NDEP's motion to dismiss, but in addition perhaps in the
19 alternative if you are not willing to grant the motion to
20 dismiss would ask at the very least we would offer a motion to
21 limit to what we believe are the relevant grounds that they
22 have identified in this list of issues if you determine there
23 to be any. And what I would like to do, and again for the
24 record we agree, I won't repeat all of the arguments that were

1 made but we support them.

2 But let, what I would like to do is they have cited
3 three statutory and regulatory bases for why they believe this
4 can go forward, and I want to turn your attention specifically
5 to the language they are citing is the authority. The first
6 one is 445A.495, that is the regulatory provision, that your
7 regulatory provision, if you are able to issue a permit there
8 is full or substantial compliance with the requirements of the
9 statute, and as I spoke to this before as of right now we have
10 no violation of the permit. I am sure we will hear many, many
11 allegations that we failed to comply, but at this point in time
12 there has never been a notice of violation of the 2005
13 discharge permit.

14 So I will end it with that. I will stop on that
15 ground one. The other regulatory provisions that they cite to
16 are NAC 445B.896, that is your Commission's Rules of Practice.
17 They state substantial evidence. So I was confused when I saw
18 that so I went to the provision and I want to read to you what
19 that provision says.

20 The section is titled, Findings of the Commission.
21 "At the conclusion of the hearing the Commission may take the
22 case under submission and will notify the appellant and any
23 other party to the hearing of its findings and recommendations
24 in writing within 30 days of the date of the hearing. Final

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1 recommendations of this Commission will be in writing and will
2 separately state findings of fact and conclusions of law.
3 Findings of fact and recommendations will be based upon

4 substantial evidence."

5 It's the only time substantial evidence is used in
6 this section. So apparently they believe that statement is
7 somehow relevant to this appeal, and I think it is only
8 relevant as to how you guys make a determination of whether the
9 appellant, who has the burden of proof has provided substantial
10 evidence, substantial factual evidence to support overturning
11 of a decision.

12 So then I want to go to their other section that they
13 cite in each instance, which is the Administrative Procedures
14 Act 233B.135, and they have cited the exact provision. They've
15 taken it out of my opening argument, so I will just read the
16 relevant sections of it.

17 Section two, and this section is titled Judicial
18 Review Manner of Conducting Burden of Proof Standard of
19 Approval. Section two, second sentence: "The burden of proof
20 is on the party attacking or resisting the decision to show
21 that the final decision is invalid, pursuant to subsection
22 three."

23 First sentence of subsection three: "The court shall
24 not substitute its judgment for that of the agency as to the

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1 weight of evidence on a question of fact."

2 I would contend that everything they intend to bring
3 to you right now I think is frankly supported by their list of
4 issues are questions of fact. As I read the Administrative
5 Procedures Act, you shall not substitute a judgment of the
6 agency, you're experts on questions of fact.

7 The only way you can set aside -- I will read it.

8 "The court may remand or affirm the final decision or set it
9 aside in whole or in part if substantial rights of the
10 petitioner have been prejudiced because the final decision of
11 the agency is clearly erroneous in view of the reliable,
12 probative and substantial evidence on the whole record,
13 affected by an error of law or arbitrary or capricious or
14 characterized by abuse of discretion."

15 The burden is on them to show they have acted
16 arbitrarily and in violation of the law. The only regulation
17 they cite, and they only cite it in their first list of issues,
18 is 445A.495, which is the relevant section for what they must
19 comply with. They only list it one time, on issue one. They
20 don't even list it in two or three. They talk about the
21 Administrative Procedures Act, which only sets forth their
22 burden, and they talk about 896, which is how you guys will
23 rule on a final decision.

24 The only relevant regulation they cite to is 445A.495,

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1 and they only list it in one part.

2 So I believe at the very minimum should you determine
3 that ground one is relevant for the fact that they at least
4 cite the right legal standard, they don't even cite to the
5 correct legal standard in two and three, and I believe it to be
6 irrelevant and should be dismissed. That's it.

7 CHAIRMAN GANS: I'm sure you want to answer to that.

8 MR. GALPERN: Thanks. As a preliminary matter I think
9 that we are, that Sierra Club is entitled to establish this
10 list of issues associated statutes for the hearing. We find
11 within an amendment to include 445A.495 under both two and
12 three as well. It's a good point, I didn't think I needed to

13 list it under each separate issue, but we have provided that
14 statute and I'm prepared, we are prepared to talk about that in
15 our opening statement and to prove that in the course of the
16 hearing.

17 The, counsel for NDEP, Mr. Frey and Mr. Woodworth
18 indicate that there are, say that there are no violations on
19 the record. We are prepared through our testimony to show
20 violation after violation after violation rising to the level
21 that you will be able to conclude that NDEP's determination
22 that NV Energy was either in full or substantial compliance
23 with all its, all the requirements of the permit, that that
24 decision was clearly erroneous and arbitrary or capricious

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1 contravention of law.

2 we haven't made the detailed substantive argument or
3 at least you have not seen it because we have not been able to
4 provide you yet with substantive briefs, but I can -- if I can
5 speak generally to the content of the opening brief that we did
6 submit timely on October 7th pursuant to the Commission's order
7 that was later waived, we provide that and we also provide the
8 citation to 445A.495 substantial compliance or full compliance
9 requirement in that opening brief, and we provide the reasons
10 for that. And we are prepared today to provide voluminous
11 reasons supporting our contention that NV Energy was not either
12 in full or substantial compliance with all of its permit terms,
13 including many of the permit terms that are the most important
14 to the goals of the permit itself, which is protecting the
15 environment, including ensuring against degradation of waters
16 of the State.

17 Is the burden on us? Yes, the burden is on us and we
18 are prepared to meet that burden if we can provide the evidence
19 that we are prepared to provide at this hearing.

20 Now, you know well that Sierra Club did not receive
21 the documents that you either ordered or arranged in short to
22 be conveyed to us that we had requested long ago that you
23 determined on October 21 were clearly or at least arguably
24 required to be provided by NV Energy to NDEP in fulfillment of

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1 the requirements of the permit. And you noted that that
2 material needed to be provided to Sierra Club before or on
3 October 28th. We received those documents late on
4 October 28th. It's our analysis of those documents that enable
5 us to plead arbitrary and capricious or clearly erroneous under
6 the Administrative Procedures Act. And then in order to
7 explain that now I need to touch on the substance of those
8 documents.

9 We were awaiting to review those documents. We tried
10 to secure them many times before, in July when we went to NDEP
11 offices and August as well. On September 13th when we issued
12 our request to NDEP and a copy of that was conveyed to NV
13 Energy, as to the design and construction details for the newly
14 proposed Mesa ponds, because we wanted to know whether those
15 documents contained detail supporting information that could
16 lead and could have led NDEP plausibly to conclude, reasonably
17 to conclude that the new Mesa ponds would not discharge waste
18 water into the environment. It was not until we were able to
19 analyze those documents on October 29 and 30 and 31, that we
20 satisfied ourselves that there was no information in them with
21 respect to the predicted performance of the ponds. There was

22 no test data, there were no model run data, there was nothing
23 that you would expect -- I'm not saying that this is the fault
24 of the contractor, what I am saying is that they, perhaps they

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1 were not required to provide that information, but there was
2 nothing on the basis of which NDEP could conclude that those
3 Mesa ponds would not discharge, would not leak like sieves like
4 the ones on the flood plains, especially E-1 and E-2. And it
5 was only after being able to analyze that information that we
6 could plead that their decision was clearly erroneous and
7 arbitrary and capricious.

8 It was also only then that we could satisfy ourselves
9 that there was no requirements in the engineering construction
10 documents that they finally produced by your deadline that
11 there was no liner, there was no leak detection system for the
12 pond as a whole, only for the interstitial layer. So that
13 there was no protection. NDEP is unable to learn in a timely
14 way whether there are discharges from these ponds, just as it
15 is unable to know in a timely way whether there are discharges
16 to the environment from the existing ponds, because there is no
17 leak detection system outside the ponds.

18 we needed to satisfy ourselves that the design
19 drawings in fact didn't include such a precaution, and we only
20 figured that out after we received the data and the drawings
21 and the engineering reports which we will be submitting into
22 evidence that failed to provide that level of protection that
23 is clearly required here.

24 Similarly, and while this was not in your order of

1 October 21, we have been, we have requested for many weeks and
2 sought to find ourselves in the files the O & M manuals for
3 2005, because 2010 hadn't been produced yet when we went there
4 in July and August, but we requested that on September 13 and
5 NDEP's attorney Ms. Tanner who is not here but it's in the
6 record of the preliminary hearing said that we would receive
7 those documents as soon as possible. They were due to NDEP
8 from NV Energy on September 25. This is November 4th. We
9 received them just now.

10 But they again support our proposal, our contention
11 that the permit, decision to approve the permit was clearly
12 erroneous and/or arbitrary and capricious because of its
13 insufficient protections of the environment. Astonishingly,
14 the 2010 sampling plan requires no sampling from groundwater
15 monitors. And we will show through the use of groundwater
16 monitoring data through the second quarter of 2010 that that
17 data shows violation after violation after violation of the
18 2005 permit. To remove that important check, the only real
19 check since there is no leak detection system outside the ponds
20 as a whole, it's an imperfect check because it takes time, as
21 our expert will testify, for the contamination to go from
22 outside of the ponds to the wells, sometimes on the order of
23 one to several months to the relevant groundwater monitoring
24 station, but there is no requirement in the 2010 sampling plan,

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1 and just as there is no requirement as far as we can see in the
2 2010 permit for groundwater monitoring. The decision to
3 approve a permit without groundwater monitoring is clearly

4 erroneous and arbitrary and capricious.

5 So we agree we have the burden, we are not
6 establishing our case based on notices of violations that NDEP
7 failed to provide because for whatever reason they didn't do
8 the basic analysis of the information that they received that
9 we did, and we are prepared to present to you, but our
10 judgment, sorry to have gotten a bit heated here, is that you
11 are the agency's last line of defense to ensure either that if
12 a permit is to issue to this company that it will be
13 sufficiently protecting the environment, or more favorably that
14 you will reverse the decision to grant the permit and send them
15 back to the drawing board so that basic statutory and
16 regulatory requirements to protect the environment can then be
17 addressed. But we can only do that if we are allowed to
18 proceed to convey to you our analysis, most of which comes
19 directly from the documents that we received from the agency
20 and indirectly from NV Energy less than a week ago.

21 CHAIRMAN GANS: Mr. Galpern, we do have a motion on
22 the floor, and I want the panel to discuss that now -- Bill, do
23 you have something else?

24 MR. FREY: I have a rebuttal, just a short one.

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1 Mr. Chairman, Commissioners, you know, the only violations that
2 NDEP can look at in the issuance of the permit are the actual
3 violations that have been somehow noted either by notice of
4 alleged violations by a company admitting that they violated it
5 in entering into some sort of agreement or court judgment.
6 Those are violations. You have to have some record of what
7 they are or some record that NDEP has made of the violations.

8 what I hear Sierra Club arguing is that they have looked
9 through the files and they have determined that there are
10 violations, and they are going to present what they think are
11 violations to you, but the SEC lacks jurisdiction to hear that
12 case, that's a separate case as to whether or not what they
13 found in the file is a violation.

14 In fact, the statute assigns the remedy for that to a
15 whole different process. If Sierra Club is here to argue that
16 NDEP failed in its obligation for enforcement of the permit,
17 that's a different process. What we are here for is, is
18 whether the permit was issued legally. Now, you can look at
19 the documents we have and say well, this is, these are the
20 documents, this is what NDEP reviewed, that's sufficient or
21 insufficient, but you can't go then back to those documents and
22 have sort of a mini hearing as to whether those documents are
23 correct or there should be other documents in existence.

24 what Sierra Club is trying to do is put on a hearing

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1 of the violations, not of the permit. Now, that's way beyond
2 the scope of this hearing. If they want to do that they need
3 to do that someplace else.

4 MR. WOODWORTH: You can put a clock on me chairman,
5 30 seconds. I won't speak anymore to ground one, I think it
6 has been well heard, you've heard what you need to hear. I
7 will just speak to Mr. Galpern's points on the list of issues
8 two and three, if it was an error to put, that they intended to
9 put 445A.495 into grounds two and three, let's look at it.
10 445A.495 says holder of the permit -- they may issue a permit
11 upon its expiration of the existing permit if the holder of the
12 permit is in full or substantial compliance with all of the

13 requirements and schedules of compliance of the expired permit.

14 So let's read their grounds. Was NDEP's decision to
15 issue the 2010 permit unlawful in light of available evidence
16 as to whether NV Energy could meet the schedule of compliance
17 per 182. They are talking there about the 2010 permit. Has
18 nothing to do with the 2005 permit. Has nothing to do with
19 whether there was substantial compliance with the 2005 permit.

20 Grounds three, and I would respectfully suggest that's
21 exactly the reason why 495 isn't in there, because they don't
22 think it's relevant. Item three, was NDEP's decision to issue
23 the 2010 permit unlawful in light of its unsubstantiated or
24 erroneous presumptions as to performance of newly authorized

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1 Mesa ponds or unenforceable no discharge requirements.

2 There is no mention of Mesa ponds in our 2005 permit.
3 This has nothing to do with our 2005 permit. They are talking
4 about how they don't like the way our 2010 permit is written.
5 That has nothing to do with 445A.495. So I would still even if
6 we assume they meant to put 445A.495 my motion stands that
7 those two are just simply not relevant to this appeal.

8 Thanks. I went over 30 seconds, you are right, I'm
9 sorry.

10 MR. GALPERN: Is it possible to do a surrepply?

11 CHAIRMAN GANS: If you keep it short. It sounds like
12 you almost got into your opening argument so keep it short,
13 Mr. Galpern.

14 MR. GALPERN: Okay, the violations, the failure to
15 substantially comply with the 2005 permit is relevant to
16 questions two and three because the Mesa ponds are, judging by

17 the design of construction are similar to the ones that have
18 been governed to date by the 2005 permit on the flood plain
19 that are leaking like sieves, so that's why the history of
20 noncompliance with the existing ponds is also relevant to
21 NDEP's determination to grant the permit that would allow
22 construction of the new Mesa ponds.

23 with respect to Mr. Frey's argument, the relevant
24 statute that Mr. Woodworth just read does not speak to

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1 violations. We are not limited, you are not limited to
2 assessing the legitimacy of the determination to issue the
3 permit simply by reviewing notices of violations that NDEP may
4 or may not have issued during the term of the 2005 permit. The
5 statute says that the permit may be issued if the holder of the
6 permit is in full or substantial compliance with all the
7 requirements and schedules of compliance of the expired permit.
8 We are not limited, the Sierra Club is not limited to proving
9 our case with respect to that point to merely citing to NDEP's
10 notices of violations and/or being silent in the event that
11 NDEP didn't do the requisite analysis with the data that they
12 received.

13 So we are prepared to establish that NDEP's decision
14 and its determination, at least implicit, that NV Energy was
15 either in full or substantial compliance with all the
16 requirements and schedules of compliance of the permit, the
17 2005 permit, we are prepared to show that that was clearly
18 erroneous because the information that is provided to them
19 pursuant to the permit demonstrates that they have not
20 substantially complied with all the requirements.

21 Some of these failures to comply are abject, total

22 failure to report for five years any of the data required to be
23 provided with respect to the waste water in the interstitial
24 liners. Some of this data was reported, groundwater monitoring

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1 information, and it shows clearly substantial violations of the
2 2005 term requiring no discharge from the ponds.

3 So the evidence is voluminous and it is significant
4 and we wish to present it to you so you can exercise your
5 judgment as to whether NDEP's decision was proper.

6 CHAIRMAN GANS: I'm going to ask our counsel since
7 Mr. Frey you made some statements about the scope of the SEC
8 Commission about what we can and can't do, so I think we need
9 to answer that right away, Rose Marie.

10 MS. REYNOLDS: NRS 445A.605 states on appealable
11 matters what you are able to do. It says, "The Commission
12 shall affirm, modify or reverse any action of the Director
13 which is appealed to." So that is what you are able to do on
14 the permit. That's what your options are. As far as what you
15 are looking at from what the agency has done, you are guided by
16 445A.495, sub one. And I will read it again, you heard it a
17 couple of times: "The holder of the permit is in full or
18 substantial compliance with all of the requirements and
19 schedules of compliance of the expired permit." That is what
20 you are going to be looking at.

21 I do think that you are able to go beyond just notices
22 of violation. I think you are able to look at what was in the
23 2005 permit and hear testimony on whether or not there was full
24 or substantial compliance for a particular term.

1 COMMISSIONER ANDERSON: Pete Anderson for the record.
2 Is there a definition for substantial compliance in the
3 statutes?

4 MS. REYNOLDS: No, there is not one in 445A chapter.

5 COMMISSIONER COYNER: This is Al Coyner for the
6 record. I am persuaded by Mr. Frey's argument that getting
7 into the failure of NDEP to issue an NOAV is beyond the scope
8 of this hearing. I believe that the NOV is prima facia
9 evidence whether they were in substantial compliance. I beg to
10 differ with Mr. Galpern's interpretation. And I will elaborate
11 shortly on that. In other words, if we have a 2005 permit,
12 2006 if you see something, you bring it before the SEC. 2007
13 if you see something, you bring it. There is ample opportunity
14 for people to monitor permits and bring those issues before the
15 SEC outside of an appeal of the issuance of the permit. There
16 is avenues of relief for that. I think that NOAV is the point
17 of compliance essentially.

18 CHAIRMAN GANS: We need to address this motion made by
19 Mr. Frey on whether to dismiss this right now or go on with
20 this hearing. So is there any comments or questions you have
21 of the attorneys or what direction, discussion do you have that
22 we can consider?

23 COMMISSIONER COYNER: I have a couple.

24 CHAIRMAN GANS: Okay, go ahead.

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1 COMMISSIONER COYNER: Al Coyner for the record. Two
2 issues, I think I can boil it down to that. If a witness from
3 the Division can substantiate that there is no NOAVs, because I

4 am hanging my opinion on this underlying data that shows that
5 there were violations. If an issue can be or a witness can be
6 put under oath that can tell me that there is no NOAVs, because
7 I don't know that off the top of my head, I suspect that there
8 aren't, but I would want that entered into the record. That
9 would satisfy me with regards to the substantial evidence,
10 substantial compliance argument, because I do believe that's
11 how we should judge whether they were in compliance was on the
12 basis of that.

13 So that would be one thing I could put out of the way
14 and it should be a fairly short argument.

15 Secondly, my interest is peaked in the permit
16 issuance under the ability to modify, which I think you just
17 read.

18 MS. REYNOLDS: Yes.

19 COMMISSIONER COYNER: And let me put a little
20 background to that. NDEP issues hundreds of pond permits in
21 this State and ponds that hold substantially materials that
22 could be very adverse to the environment. This isn't our first
23 rodeo with pond permitting. So that said I mean they have a
24 ton of experience in this area. I am a little peaked with

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1 interest by Mr. Galpern's assertion that there are not
2 monitoring wells associated with this permit and I just don't
3 know. I don't know, I haven't read it. Because I do know that
4 in many cases, in some cases that have been heard before the
5 SEC we have dealt with this issue of monitoring wells. So my
6 interest in the permit and possible modification of a permit is
7 peaked a little bit by that assertion that there is no

8 monitoring associated with it. I think I will leave it at
9 that. And of course, what I am suggesting or leaning towards
10 is I'm of the opinion, and again we regularly require
11 monitoring wells in a lot of our containment facilities in this
12 State, so if there is not monitoring wells associated with
13 these new ponds that would be of interest to me to explore and
14 actually potentially modify the permit to include those.

15 CHAIRMAN GANS: So you in essence have two questions,
16 one for a witness to tell you about NOAVs --

17 COMMISSIONER COYNER: I think that is a yes or no
18 answer. I don't think I want to hear testimony that includes
19 well in 2006 they exceeded the TDS by two PP am, and they
20 should have, no, I just want to know on the record were there
21 any NOAVs issued and it's an up or down question.

22 So, and then the other one is a little more involved
23 and would require opening the hearing to a more substantial
24 extent to get into the conditions of the permit, but that's

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1 just my thinking. I'm not saying that I would require that if
2 I hear substantial argument from either you or from
3 Mr. Anderson.

4 CHAIRMAN GANS: Pete?

5 COMMISSIONER ANDERSON: Pete Anderson for the record.
6 I think both your questions are good, Alan, and I certainly
7 would like to hear those responses, as well. I guess on top of
8 that, too, I guess I am a little confused with the conflicts
9 between the attorneys here and the lack of a clear definition
10 of substantial compliance. Perhaps testimony will get us
11 closer to that as we go forward, but I think definitely getting
12 the responses to your questions will help shape where we need

13 to go on this.

14 CHAIRMAN GANS: Mr. Frey?

15 MR. FREY: Yes, sir.

16 CHAIRMAN GANS: Can you provide someone to very
17 succinctly tell us about the NOVs?

18 MR. FREY: I believe I can.

19 CHAIRMAN GANS: On the '05 permit.

20 COMMISSIONER COYNER: The motion to dismiss is still
21 on the table.

22 CHAIRMAN GANS: well, is this substantial for us to
23 rule on that motion? I heard Mr. Anderson say he would like to
24 hear the answers first before --

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1 COMMISSIONER COYNER: I think just as a matter of
2 procedure.

3 MS. REYNOLDS: Right, what you can do, let's say let's
4 hold the motion to dismiss aside to have testimony on --

5 CHAIRMAN GANS: Those two questions.

6 MS. REYNOLDS: On those two questions. And then after
7 you hear the testimony you can ask the parties to present
8 argument in support or against the motion to dismiss and then
9 you can revisit it again.

10 CHAIRMAN GANS: So we need a motion to hold the
11 motion to dismiss --

12 COMMISSIONER ANDERSON: Pete Anderson for the record.
13 I would make a motion that we hold the decision on the motion
14 to dismiss until we hear the answer.

15 COMMISSIONER COYNER: I will second.

16 MR. WOODWORTH: I couldn't hear.

17 COMMISSIONER ANDERSON: I made a motion to hold the
18 decision on the motion to dismiss until we hear those
19 additional information with respect to Mr. Coyner's questions.

20 MR. GALPERN: May I ask a question procedurally? will
21 we have an opportunity to address legal questions any further
22 here?

23 MS. REYNOLDS: He is asking if he can.

24 CHAIRMAN GANS: He has not addressed that yet. You

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1 did not address that in your comments?

2 MR. GALPERN: Right, I wanted to raise it, point of
3 law specific to Mr. Coyner's motion that -- okay.

4 MS. REYNOLDS: Not now. Let's have the testimony --

5 MR. GALPERN: Sure.

6 MS. REYNOLDS: And then you can give us --

7 MR. FREY: I just need one minute to find the best
8 person. I think there is two questions you are asking.

9 CHAIRMAN GANS: Motion on the floor and a second, all
10 those signify by saying aye.

11 COMMISSIONER COYNER: Aye.

12 COMMISSIONER ANDERSON: Aye.

13 CHAIRMAN GANS: Aye. Nay? None heard, so motion
14 passes. We will go on with the two questions.

15 COMMISSIONER COYNER: This is Alan Coyner for the
16 record. Let me clarify the question with regards to NOAV. All
17 I want to hear is, is in the records of the NDEP and the SEC is
18 there an NOAV on file for the 2005 permit. That's all I want
19 to know. I don't want to know information as to whether an
20 NOAV should have or should not have been issued. And I'm
21 directing that to Mr. Galpern, because Mr. Galpern will have

22 the opportunity to cross-examine the witness, and I am not
23 interested in hearing on 2006 there was on my piece of paper
24 here says there is 12, all I want to know is was there NOAVS

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1 issued under this permit yes or no, and that's the limit I want
2 to know. I don't know whether you have in your command to be
3 able to dispute whether that is a fact or not, but it's not to
4 go to evidence of whether there was a potential violation and
5 NDEP failed to issue. That's all I want.

6 CHAIRMAN GANS: Look at the record.

7 MR. FREY: Yes, I can call or the Commission can call
8 Ms. Val King as a witness.

9 CHAIRMAN GANS: Call Val King.

10

11 VALERIE KING

12 BEING FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:
13

14

15 DIRECT-EXAMINATION

16

17 BY MR. FREY:

18 Q Could you state your full name and your place of
19 employment?

20 A My full name is Valerie King, and I work for the
21 Nevada Division of Environmental Protection.

22 Q And that's in Carson City?

23 A In Carson City.

24 Q what's your job title there?

1 A I'm the Enforcement Branch Supervisor.
2 Q How long have you worked for NDEP?
3 A 16 years.
4 Q And how long have you been the Enforcement Branch
5 Supervisor?
6 A Close to nine years.
7 Q And before being the supervisor what did you do?
8 A I worked in the underground injection control program
9 in the Bureau of Water Pollution Control.
10 Q Are you familiar with the Reid Gardner site?
11 A Moderately.
12 Q Have you reviewed any documents in your files
13 regarding the site?
14 A Yes.
15 Q Are there any outstanding or are there any violations
16 in the file of the 2005 permit?
17 A Yes.
18 Q There are? what were they?
19 A There were minor violations for failure to sample dust
20 control discharges.
21 Q Dust control discharges, is this dust from a pond that
22 has been emptied?
23 A No. It was for a coal pile and in one case I believe
24 a haul road.

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1 Q I'm confused. This is a discharge permit and you
2 issued a violation for dust?
3 A Yes, they use some of their discharge water from the

4 ponds that go into, they use some of their discharge water to
5 control dust at the facility.

6 Q And they weren't controlling the dust?

7 A They were controlling the dust, the violations were
8 that they failed to sample a, the water that was being used as
9 dust control for the coal piles.

10 Q Okay. Was there any other violation?

11 A I believe there was one violation for not sampling the
12 water for the haul roads in 2009.

13 Q Again, that's a spraying water on the road?

14 A Yes.

15 Q Failure to test it before spraying it on the road? So
16 that is two. In your professional opinion of working at NDEP
17 for 16 years do those two violations constitute substantial
18 noncompliance --

19 MR. MIXSON: Objection, that goes beyond the scope of
20 the issues for your questions to the witness.

21 CHAIRMAN GANS: I will sustain it.

22 MR. FREY: I don't think I have any other questions
23 unless Mr. Coyner had questions. I was just trying to cover
24 them for him.

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1 MS. REYNOLDS: Let them question.

2

3

CROSS-EXAMINATION

4

5

BY MR. WOODWORTH:

6 Q I just want to clarify. So in your recollection you
7 have received two notices of violation or alleged violation

8 relating to our groundwater discharge permit, 2005 groundwater
9 discharge permit?

10 A No, they were violations, minor in my opinion, minor
11 violations of the permit and there were no actual findings of
12 alleged violation issued to the permittee.

13 Q Let me make sure, I will ask you just to confirm that,
14 so has NV Energy received from NDEP any notice of violation or
15 notice of alleged violation relating to our 2005 groundwater
16 discharge?

17 A In the Bureau of Water Pollution Control we just label
18 it differently. We call it an FOAV, which is a finding of
19 alleged violation, and during the term of the 2005 permit an
20 FOAV was not issued to the permittee.

21 Q So with the Bureau of Water Pollution Control, I am
22 using the wrong terminology, finding --

23 A Alleged violation.

24 Q Finding of alleged violation, and am I -- did we

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1 receive a finding of an alleged violation during the term of
2 the 2005 water discharge permit?

3 A No.

4 MR. WOODWORTH: Thank you.

5

6 CROSS-EXAMINATION

7

8 BY MR. GALPERN:

9 Q Ms. King, did you specifically review the files with
10 respect to Reid Gardner to be sure you knew the numbers of
11 violations during the, or alleged violations that were noticed
12 or issued during the term of the 2005 permit governing Reid

13 Gardner?

14 A What do you mean by review the file?

15 Q Did you in the last few days look through the files to
16 be sure that you knew of all the violations or alleged
17 violations of the permit during that term?

18 A My staff reviewed the DMR files, which are the reports
19 that are submitted to us by the permittee and reported the
20 violations to me.

21 Q So they reviewed the DMRs that were submitted by NV
22 Energy and then give you a tally of the number of violations
23 over the five-year period?

24 A Correct.

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1 Q And what was that number?

2 MR. WOODWORTH: Objection. I mean I thought the
3 question was, was there a finding of the alleged violation or
4 not and the question, if the question Mr. Galpern is asking of
5 are there other violations that is identified that did not
6 result in a notice of alleged violation.

7 CHAIRMAN GANS: Is that what you are asking? Rephrase
8 your question, please.

9 COMMISSIONER COYNER: Excuse me, Mr. Chairman, DMR?

10 MR. GALPERN: Discharge monitoring reports.

11 COMMISSIONER COYNER: Thank you.

12 MR. GALPERN:

13 Q Yes, I would like to know what were the number. You
14 said that the number of issued findings of alleged violations
15 over the five-year period was zero.

16 A I didn't say that.

17 Q You didn't? Okay, what was the number?

18 A I don't know the specific number, it was somewhere
19 around, I want to say four or five throughout that, the course
20 of the five-year permit violations that we observed.

21 Q And then I am asking and please tell me, Mr. Coyner,
22 if this is outside the permissible, please tell me,
23 Mr. Chairman, if this is outside the scope of the questioning.
24 what I would like to know how many notices of alleged violation

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1 were issued in the five-year period?

2 A None. And again, we call them findings of alleged
3 violation.

4 Q Okay. The dust control violations that you are
5 talking about are covered by the 2005 permit?

6 A Yes.

7 Q One second. Can you explain what goes into your
8 decision as to whether to issue an FOAV?

9 A You know, every case is unique. In this case the
10 reason why we didn't issue a finding of alleged violation is
11 because the water used for the dust control has the same -- in
12 the cases that the violation where it wasn't sampled from that
13 point, it was actually sampled in the pond on the very same
14 frequency, and so we did have a representative sample of what
15 was going on, that was being used for dust control. So it was
16 a minor violation of the permit, but we did have the
17 information and it wasn't in our opinion an environmental
18 threat.

19 Q Okay, well, if I can, what I am trying to get at here
20 you are in charge of enforcement of the permit.

21 A I am.

22 MR. WOODWORTH: Can I offer an objection here? If he
23 is about to go to challenge Ms. King on a decision making
24 process regarding why she did or did not issue a notice of a

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1 violation to NV Energy, I believe it is clearly beyond the
2 scope that the Commissioner requested.

3 CHAIRMAN GANS: That is correct, we would agree.

4 MR. GALPERN: I wasn't planning to do that, I don't
5 believe but Tom has a better insight into my mind than I do, I
6 guess.

7 Q what I am trying to find out is in the 2005 permit is
8 all these requirements of reporting in the 2005 permit
9 reporting as to sampling from groundwater monitoring of wells
10 requirement for reporting on the waste water that gets beyond
11 the primary liner into the interstitial leak detection layer,
12 rate, chemistry analysis so on, requirement for sampling of the
13 ponds, and what I am asking is, do you analyze that data and
14 then based on your analysis decide whether or not to issue the
15 findings of alleged violation?

16 MR. FREY: Objection.

17 MR. WOODWORTH: Objection.

18 MR. GALPERN: Trying to figure out the scope --

19 MR. FREY: Doesn't matter.

20 CHAIRMAN GANS: It's irrelevant for what Mr. Coyner
21 asked for and what we asked for. Objection is sustained.

22 MR. GALPERN: I will speak to the relevancy when I
23 have a chance.

24

1 RE-CROSS-EXAMINATION

2

3 BY MR. WOODWORTH:

4 Q I just want to clarify, and it's probably my
5 confusion, Ms. King, and I just want to make sure it is clear
6 for the record and for myself. Have we, maybe just better to
7 back up because maybe I am not familiar with the regulations as
8 well as I could be. If we were to receive a formal what I call
9 notice of violation, what does that refer to under the Bureau
10 of Water Pollution Control regulations, what is the
11 terminology, is it a finding of alleged hazard, finding of
12 alleged violation?

13 A We call it a finding of alleged violation in our
14 bureau. In the regulations and statutes I believe it just
15 refers to formal enforcement action.

16 Q Have we received such a formal -- I know you
17 pronounced this several times, I apologize, just for the record
18 has NV Energy received a formal enforcement action, whatever it
19 is called, a finding of alleged violation, have we received a
20 formal enforcement action from NDEP relating to the 2005
21 groundwater discharge?

22 A No.

23 MR. WOODWORTH: Thank you.

24 CHAIRMAN GANS: Okay. Commissioners, do you have any

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1 questions?

2 COMMISSIONER COYNER: I have no question, the question
3 has been answered.

4 COMMISSIONER ANDERSON: No questions here.
5 CHAIRMAN GANS: Okay, you are dismissed.
6 COMMISSIONER COYNER: Are you willing to open up those
7 second questioning, it's 12:25?
8 CHAIRMAN GANS: Are we ready for a lunch break?
9 MR. FREY: I'm not sure where we are at.
10 CHAIRMAN GANS: We have the second question.
11 MR. FREY: The second question. About the monitoring
12 wells?
13 CHAIRMAN GANS: Yes.
14 MR. FREY: If you want to take a break that's fine, if
15 you want to have that witness on the stand we can do it right
16 now.
17 CHAIRMAN GANS: Finish this part of it. Let's go
18 ahead. Pete, is that okay?
19 COMMISSIONER ANDERSON: That's fine.
20 MR. FREY: We will call Al Tinney to the stand.
21 COMMISSIONER COYNER: Mr. Al Coyner for the record.
22 If we can confine the line of questioning to does the permit
23 require monitoring wells or doesn't it. I'm not prepared to
24 hear testimony on adequacy issues.

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1 MR. FREY: May I ask why? After I get the answer to
2 that can I ask why or why not?
3 COMMISSIONER COYNER: Sure.
4 MR. FREY: Thank you. Mr. Al Tinney to the stand.
5

6 E. ALAN TINNEY

7 BEING FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:
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8

9

DIRECT-EXAMINATION

10

11 BY MR. FREY:

12 Q Could you please state your full name and your place
13 of business?

14 A Alan Tinney, Nevada Division of Environmental
15 Protection.

16 Q How long have you been at the Division of
17 Environmental Protection?

18 A A little over eight years.

19 Q What was your job there?

20 A I'm supervisor of the permitting branch.

21 Q And what did you do there before you became
22 supervisor?

23 A Pardon?

24 Q What did you do there before becoming supervisor?

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1 A I was writing permits for the Bureau of Mining.

2 Q And where were you employed before the Division of
3 Environmental Protection?

4 A Nevada State Health Division.

5 Q How long were you there?

6 A 15 years.

7 Q What was your job?

8 A Bureau Chief of the Bureau of Water, Health Protection
9 Services.

10 Q Is that a permit writing bureau?

11 A Yes, it is.

12 Q So you have got a lot of years of writing permits?

13 A Yes, I do.

14 Q Is there a requirement in this, in the 2010 discharge
15 permit that has been given to NV Energy, is there a requirement
16 for monitoring wells?

17 A No.

18 Q why not?

19 A Because of the way the ponds are built and the way the
20 ponds have double lined leak detection.

21 Q Let me interrupt you, you say the ponds are double
22 lined?

23 A Yes.

24 Q And then on a double lined pond there is leak

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1 detection?

2 A Correct.

3 Q Explain that.

4 A It's the top liner which is the pond itself is 80 mil
5 liner, there is a leak detection then another 80 mil liner
6 underneath that. So there is two 80 mil liners with a leak
7 detection system in between two liners.

8 Q So let me see if I understand this right, if there is
9 a leak in the pond liner, the first one, it would be recorded
10 on your leak detection system?

11 A Correct.

12 Q So that would obviate the need for a monitoring well?

13 A Yes. Our monitoring system is in with our leak
14 detection system, yes.

15 Q Is this state of the art, this method?

16 A Absolutely. An 80 mil liner is state of the art.

17 Q Both liners are 80 mil?
18 A Yes, both liners.
19 MR. FREY: No further questions.

20

21 CROSS-EXAMINATION

22

23 BY MR. WOODWORTH:

24 Q Please tell me if I'm correct, the reason you did not

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1 require a ground monitoring well for our newly proposed ponds
2 is because you believe NDEP believes that the interstitial
3 liner accomplishes that, the monitoring of the interstitial
4 water substitutes for that requirement?

5 A Substitutes along with the state of the art whole pond
6 liner's design system.

7 Q And I just noticed that the 2010 permit I believe says
8 80 mil, and I just want to clarify this says 80 mil and 60 mil.

9 A That's correct.

10 Q You mentioned 80-80, why is that?

11 A Actually we heard that there is going to be 80-80 out
12 there and 80-60 was part of the permit and actually approved
13 for 80-60 in the engineered drawings but we understood they
14 actually are going to be putting 80-80.

15 Q So NV Energy, am I correct to say that NV Energy has
16 come to you guys, come to NDEP and explained instead of the
17 80-60 that we are allowed to do, we actually selected,
18 constructed 80-80?

19 A Yes, 80-60 will be the minimum, so if they wanted to
20 do larger than the minimum, obviously --

21 Q And NV Energy has come to you and indicated they

22 intend to do that?

23 A Yes.

24 MR. WOODWORTH: Thank you, that's all I have.

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1 CROSS-EXAMINATION

2

3 BY MR. GALPERN:

4 Q Mr. Tinney, are there any other understandings that
5 are relevant to question of leakage from the new Mesa ponds
6 that you want to share that were not in the engineering design
7 drawings or the permit that is before us?

8 MR. FREY: Objection, vague.

9 CHAIRMAN GANS: I don't understand your question,
10 Mr. Galpern.

11 MR. GALPERN:

12 Q well, our understanding from the permit and from the
13 engineering design drawings is that the thickness of the second
14 liner was supposed to be 60 millimeters that was the standard
15 and now you are saying that there is an understanding with NV
16 Energy that they will go to 80; is that correct?

17 A That's correct. And I explained that by our permit
18 saying 80-60, which is the minimum that we require, so if they
19 want to go above minimum we don't have objection to that.

20 Q Is there a leak detection system outside the second
21 liner, the 60 or 80?

22 A No.

23 Q The leak detection system to which you referred is in
24 between the liners?

1 A Yes.

2 Q And they are required to report to NDEP when the flow
3 through the first liner reaches how much?

4 A 500 gallons per acre per day.

5 Q So that there is no requirement to report if there is
6 490 gallons per acre per day streaming?

7 MR. WOODWORTH: Objection. I feel like you were clear
8 in your limit to the scope of his testimony.

9 CHAIRMAN GANS: I will let you proceed but you are
10 getting on the fringe.

11 THE WITNESS: I'm sorry, so please repeat the
12 question.

13 MR. GALPERN:

14 Q There is no requirement to report to NDEP, is this
15 correct, if the flow through the first liner is 490 or under
16 500 gallons per day per acre?

17 A That's correct.

18 Q If the amount of leakage can be less than 500 gallons
19 per acre through the first liner why do we presume, does the
20 permit presume that none will come through the second liner?

21 A We are getting into the designs of the ponds.

22 CHAIRMAN GANS: Yes, we are going a little further
23 than what Mr. Coyner wants.

24 THE WITNESS: I can get in there but --

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1 CHAIRMAN GANS: That's not our purpose. Mr. Coyner,
2 has your question been answered?

3 COMMISSIONER COYNER: Yes.

4 CHAIRMAN GANS: It's been answered.

5 MR. GALPERN:

6 Q Does the permit require you to continue the
7 groundwater monitoring for the existing ponds?

8 A No.

9 Q And your testimony was that there is no requirement
10 for groundwater monitoring outside the new Mesa ponds?

11 A For which, the 2010?

12 Q 2010.

13 A That's correct.

14 Q What about the 2005 permit, were there requirements
15 for groundwater monitoring in the 2005 --

16 MR. WOODWORTH: Objection, you requested 2010.

17 CHAIRMAN GANS: Yes, we are going too far.

18 MR. GALPERN:

19 Q So let me just ask this then, can you explain why it
20 is that NDEP is confident that while there may be waste water
21 streaming or leaking through the first liner there will be none
22 through the second liner if the standard for the second liner
23 is no greater than the first and if there is no leak detection
24 system outside the second liner?

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1 MR. FREY: Objection.

2 CHAIRMAN GANS: We are going too far. The question
3 has been answered now. Do you have any pertinent questions
4 please, otherwise no.

5 MR. GALPERN: I think not, thank you.

6 CHAIRMAN GANS: Questions from the panel?

7 COMMISSIONER COYNER: I have one. Alan Coyner for the

8 record.

9 Q Mr. Tinney, you worked in Bureau of Mine Regulations
10 correct prior?

11 A That's correct.

12 Q Prior doing permits?

13 A That's correct.

14 Q So, Mr. Frey, if this isn't the correct witness just
15 tell me, do the line ponds that we regularly require for the
16 mining industry require groundwater monitoring through wells?

17 A Some of them do, yes.

18 Q Some of them. Can you kind of give me a little bit
19 better feeling for some versus all, are we at 90 percent,
20 50 percent, and how is that dictated by what is in the ponds,
21 the size of the pond?

22 A Fair enough. The pond design in mining is held to an
23 80-60 pond liner system, most of the ponds in the Bureau of
24 Mining. The Bureau of Mining also holds a constituent of

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1 cyanide within those ponds. So we are holding a cyanide with a
2 very bad parameter, I guess you would consider, that could
3 really hurt a lot of things and it's sometimes hard to hold.
4 They hold it to an 80-60 liner system with leak detection with
5 some of them being monitoring. I don't know the percentage,
6 commissioner Coyner, that I would consider, I did ask is there,
7 do all of them and the answer is no. It's a decision making
8 upon each time that we do these liner systems what the
9 constituent is, what the parameter is, where they are at depth
10 to groundwater engineering designs, thickness of liner. There
11 is a whole bunch of decision making that goes into these liner
12 systems and decisions of monitoring wells or no monitoring

13 wells.

14 COMMISSIONER COYNER: Let me ask one follow up.

15 Q Mr. Tinney, are there any other power plants in --
16 let's not confine it to power plants, are there any other waste
17 water ponds to your knowledge within the State of Nevada of
18 this type that have groundwater monitoring wells associated
19 with them? And if you don't know, just say so.

20 A I probably don't know that answer off the top of my
21 head, Mr. Commissioner.

22 CHAIRMAN GANS: Mr. Anderson? Are you done?

23 COMMISSIONER COYNER: well, I can tell my fellow panel
24 members why I asked that question, obviously the point of the

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1 argument is that we are regulating and watching over the
2 groundwater of the State of Nevada's precious commodity and a
3 lot of cases we require groundwater monitoring wells and this
4 commission has shown a propensity to use groundwater monitoring
5 wells to solve problems, to help monitor problems, so the
6 reason I am pursuing the line of question with Mr. Tinney is
7 that that is sort of a last defense mechanism around adequacy
8 of design. So that's why I asked.

9 COMMISSIONER ANDERSON: I have no questions.

10 MR. FREY: Mr. Chairman?

11 CHAIRMAN GANS: I have a question.

12 Q Mr. King --

13 A Mr. Tinney.

14 CHAIRMAN GANS: Tinney, sorry.

15 THE WITNESS: No problem, I will answer anyway.

16 CHAIRMAN GANS:

17 Q The 2010 permit and the way you have structured it
18 would you say that Nevada is ahead of the game, behind the game
19 when you are looking at other states and how they also issue
20 permits like this for groundwater and for containment in ponds,
21 is this, is this state of the art, are we behind the curve or
22 ahead of the curve, where are we?

23 A 80-80 mil with leak detection pond is absolutely state
24 of the art ponds. There is no better pond systems out there.

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1 There is always the question of groundwater monitoring wells,
2 but then you know there is a point in time on depth to
3 groundwater, thicknesses of the liners, leak detection, past
4 history with the company itself, there is a whole bunch of
5 engineering thoughts and discussions that go into deciding
6 monitoring a well or not. We don't want to ever make things
7 automatic because then you are drilling monitoring wells of
8 whatever --

9 MR. MIXSON: Can I lodge an objection here, and I may
10 be overstepping my bounds because you are the chairman, but the
11 scope of the questioning is simply whether there are or are not
12 monitoring wells, and I think he is starting to argue the
13 effectiveness of the liners themselves.

14 CHAIRMAN GANS: Okay, I agree with you. We can stop
15 right there, you are correct. You are correct.

16 MR. GALPERN: Is it acceptable could our witness, to
17 put on our witness to rebut some of the testimony specifically
18 as to adequacy of the leak detection system and whether there
19 are better systems out there or that can be constructed?

20 CHAIRMAN GANS: I think that is exactly what your
21 assistant said it right, so if I can't ask it, you can't ask

22 it.

23 MR. GALPERN: I apologize for not listening, he is not
24 my assistant, but I apologize for not listening to my

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1 colleague. So I am a little confused.

2 MR. FREY: Are we on redirect?

3 CHAIRMAN GANS: Yes.

4

5 RE-CROSS-EXAMINATION

6

7 BY MR. GALPERN:

8 Q So you are unsure if there is, is it correct is it
9 your testimony that you are unsure if there is better systems
10 out there?

11 MR. WOODWORTH: Objection.

12 CHAIRMAN GANS: We don't care. That's the question
13 that Chris has brought forward and I agree with him.

14 MR. GALPERN: Okay.

15 Q You noted that the new Mesa ponds have requirements
16 for the thickness of the liner of 80 millimeters and 60
17 millimeters, but NV Energy has agreed to go to 80-80 and what
18 is the thickness of the liners on the existing ponds?

19 MR. WOODWORTH: Objection.

20 CHAIRMAN GANS: Again, we are getting way off track
21 here. I think the question we wanted to know was is there
22 groundwater monitoring and now we are getting into the
23 engineering of the, that's not where we are going, that's not
24 where Mr. Coyner was going at all.

1 MR. GALPERN: Okay, Mr. Chairman, I would just say
2 where I was driving at here. It's my understanding that there
3 are existing groundwater monitoring wells and reports are being
4 conveyed on a quarterly basis to NDEP throughout the term of
5 the 2005 permit and through the second quarter of 2010. They
6 are designed as a check to see if there is leakage from the
7 existing ponds. The 2010 permit does not merely authorize
8 construction of these new ponds on the Mesa.

9 MR. WOODWORTH: Objection. Is he testifying? This
10 is --

11 CHAIRMAN GANS: You know what I know where you are
12 going, I know what you are trying to accomplish but
13 Mr. Coyner's question was very specific. He just wanted to
14 know is there groundwater monitoring out there, and I think
15 that question has been asked and answered more ways than one so
16 I don't want to go there at this time. Not with this question.

17 MR. GALPERN: Thank you. No more questions.

18 CHAIRMAN GANS: Okay. You are excused. Go back to
19 the panel now.

20 COMMISSIONER COYNER: Do you want to open --

21 CHAIRMAN GANS: Yes, exactly.

22 MS. REYNOLDS: You were going to give them a brief,
23 the attorneys a brief opportunity to make a brief statement and
24 the Board --

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1 CHAIRMAN GANS: Of the motion?

2 MS. REYNOLDS: For or against the motion to dismiss
3 based on the --

4 CHAIRMAN GANS: On the testimony that we have heard?

5 MS. REYNOLDS: Yes.

6 CHAIRMAN GANS: Mr. Frey, I think that starts with
7 you. It's your motion.

8 MR. FREY: Yes.

9 CHAIRMAN GANS: Briefly. After we heard this
10 information for your motion.

11 MR. FREY: For my motion.

12 CHAIRMAN GANS: Yes.

13 MR. FREY: I don't know actually if I have anything to
14 add to this that I didn't say on the first go around that what
15 is being changed here is really not issues that are rightfully
16 before the Commission. There are compliance issues that may or
17 may not or should or should not have occurred or been issued,
18 there is a question about not having guaranteed that this isn't
19 going to leak in the future, which we can't do, but all we can
20 do is require the best we can think of right now and this
21 notion that we have to somehow prove that they can meet the
22 schedule of compliance before we issue the permit, I think
23 speaks for itself, that just doesn't make any sense to me, and
24 on that I just request that you dismiss it on the grounds that

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1 this doesn't state anything that you can act on.

2 MR. WOODWORTH: We support the motion to dismiss. I
3 think as much as the appellant would like to introduce a lot of
4 other issues I think that it has been put very plainly that we
5 are bound here with what the regulations require. The
6 regulations say that they are permitted to renew the permits if
7 there is full or substantial compliance. You asked the

8 questions you, the Commission has asked the questions it has
9 needed to be asked the it has been confined, there was no
10 findings of alleged violation, whatever they are called in that
11 program, and you are interested in questions regarding why we
12 didn't have discharge groundwater monitoring wells in the new
13 Mesa ponds.

14 I think it has been adequately testified that the
15 wells are state of the art and not having groundwater
16 monitoring wells to groundwater depth of over 100 feet. we
17 don't believe you have heard anything that would allow you, I
18 don't think you would have heard anything here that would allow
19 you, that NDEP acted inappropriately in proceeding standards
20 and NV Energy has completed a full and complete application,
21 and we think you should grant the motion to dismiss.

22 CHAIRMAN GANS: Mr. Galpern.

23 MR. GALPERN: Thank you very much. The question of
24 full or substantial compliance is directly at issue because of

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1 NRS 445A.495. I should also try to answer Mr. Anderson, the
2 Supreme Court has in fact interpreted the terms substantial
3 compliance and we are prepared in our opening statement to
4 discuss that interpretation.

5 The Commission is required to review the substantial
6 evidence, and I believe that Sierra Club is entitled to present
7 that evidence to you. NRS 233B.123, Administrative Procedures
8 Act on the evidence says that evidence may be admitted except
9 where precluded by statute if it is of a type commonly relied
10 on by reasonable and prudent persons.

11 The evidence that we wish to provide as to full or
12 substantial compliance squarely falls within that scope.

13 Accordingly, we urge you to deny the motion and allow us to
14 present the evidence most of which stems directly from required
15 reports submitted by the company to NDEP so that you can make a
16 decision on the merits here in light of all the relevant
17 evidence that we are prepared to provide to you today and
18 tomorrow. Thank you.

19 CHAIRMAN GANS: Well, gentlemen, we have a motion on
20 the floor for dismissal. Any discussion, any comments you
21 have, motion?

22 COMMISSIONER COYNER: Alan Coyner for the record. I
23 am inclined to approve the motion for dismissal with a
24 stipulation, and the reason I would want to put a stipulation

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1 on it is I believe that the permit ought to be modified to
2 include groundwater monitoring, and I guess I am not too
3 concerned if this is not standard practice at our power plants,
4 but it certainly is fairly standard practice at our mining
5 operations. And I'm a mining person, that's where most of my
6 experience lies, and I believe that they were in substantial
7 compliance at the time of the permit issuance based on the
8 testimony that was given by Mrs. King. I think that is the
9 point of proof, and I might question the Intervener, if allowed
10 to, on their willingness to supply us with an adequate
11 groundwater monitoring plan for the new ponds that would be
12 acceptable to NDEP and acceptable to us. That might help us
13 preclude a long appeal hearing about that if I can ask that of
14 them. I know it's I guess off the top of my head I am asking
15 them a question that they may not be prepared to answer but
16 that's where I am going with my motion if I'm the one who makes

17 it.

18 MR. WOODWORTH: Should we respond to that?

19 CHAIRMAN GANS: No.

20 COMMISSIONER ANDERSON: I think I agree with
21 Mr. Coyner that the fact of substantial compliance has I think
22 been answered by the testimony that we just heard, and I feel
23 comfortable with that. So at this point I would have to agree
24 with the motion to dismiss. I just don't see any other avenue

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1 to go based on what has been presented at this point.

2 CHAIRMAN GANS: Question for counsel with this motion
3 if we were to make, to have a motion to support the motion to
4 dismiss, can we add the criteria?

5 MS. REYNOLDS: No. A motion to dismiss perhaps as to
6 one issue, but if you want to go in and modify the permit you
7 have to have a basis for modifying that permit. If you are
8 going to come in and say they are in substantial compliance,
9 you are going to need to hear some additional testimony I feel
10 like if that's the way you want to go as far as why. Why you
11 need that groundwater monitoring. Maybe because it is not
12 adequately protecting waters of the State, which is in
13 violation of the statute, but you haven't really got there yet.
14 So it's like you could have a motion to dismiss and say, you
15 know, as to these issues whether or not you are in substantial
16 compliance we find that you were, we don't want to hear anymore
17 testimony on this, but as to these other issues --

18 CHAIRMAN GANS: Add conditions, no.

19 MS. REYNOLDS: To add conditions.

20 COMMISSIONER COYNER: So I understand, Mr. Chairman,
21 Mr. Coyner for the record, we cannot make modifications to the

22 permit without hearing the appeal in full?

23 MS. REYNOLDS: Right.

24 COMMISSIONER COYNER: Are you sure about that?

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1 MS. REYNOLDS: When you say hear the appeal in full, I
2 am talking about as to a limited issue. You got three issues
3 here. Having groundwater monitoring wells added to the permit
4 I don't think goes with all of these issues.

5 COMMISSIONER COYNER: Yeah, you probably got me there,
6 Rose Marie.

7 MR. GALPERN: If I could, could I be heard?

8 CHAIRMAN GANS: No.

9 COMMISSIONER COYNER: well, it only takes two
10 commissioners to dismiss. I guess I will probably signal you
11 that I won't order the motion to dismiss based on what I heard
12 so far because I still have a concern about groundwater
13 monitoring. I just heard that there is groundwater monitoring
14 going on at the other locations, so I think that brings up
15 another question in my mind, but I'm just one commissioner, you
16 two --

17 COMMISSIONER ANDERSON: Pete Anderson for the record.
18 But I did hear from Rose Marie that we could make a motion that
19 we narrow the scope of the testimony.

20 MS. REYNOLDS: Yes.

21 COMMISSIONER ANDERSON: Focus on whether or not the
22 water is protected with this permit; is that correct?

23 MS. REYNOLDS: I'm going back to look at what they
24 have identified as their three issues.

1 CHAIRMAN GANS: Let me ask this, Rose Marie, I think
2 what we have done is quite frankly given a look at where we are
3 headed, where Alan is headed, where Pete is headed, and I'm
4 headed the same way. What I think what is going to occur is
5 there is going to be two days of testimony about violations,
6 alleged violations about whether there should have been a
7 violation that wasn't a violation, whatever, to me as chairman
8 that's not the issue. And I am agreeing with Alan on this
9 also, that I don't have a problem of voting against the motion
10 to dismiss, but if I do it's going to have to be a drastically
11 narrowed perspective on where we are going on appeal.

12 MS. REYNOLDS: You wouldn't be voting against the
13 motion to dismiss, you would vote in favor of the motion to
14 dismiss as to certain issues, and then you would say the only
15 remaining issues to be heard before the Commission is this
16 issue, this is the only issue on which we want to hear
17 testimony.

18 CHAIRMAN GANS: Okay. Is that what you are looking
19 at, that I am looking at? I must admit I am following your
20 logic.

21 COMMISSIONER COYNER: Well again, Al Coyner for the
22 record. I have a little fear, as well that once we open the
23 full hearing we are just going to go full blown, but if I hear
24 Rose Marie correctly, I think I understand what she said is

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1 that in the motion to dismiss we can stipulate a very limited
2 scope of issues, and here is the limited scope of issue the
3 need or not need for groundwater monitoring on this new permit.

4 That's the scope.

5 MS. REYNOLDS: Correct.

6 MR. COYNER: Very defined. It has nothing to do with
7 the 2005 permit, has nothing to do with compliance of the old
8 area and the old ponds, I'm strictly concerned about the 2010
9 permit, and whether there should include groundwater monitoring
10 associated with that particular part of the facility. And if
11 we could accomplish that in a very limited way, with a very
12 limited hearing this afternoon, I might entertain that, but I
13 don't know. I don't know if we can.

14 CHAIRMAN GANS: I think we can. From what we have
15 heard from Rose Marie we can structure our motion to that
16 degree. I know we have a couple attorneys out there who are
17 just scrambling to talk. Mr. Frey, I will let you go ahead and
18 start.

19 MR. FREY: Thank you, Mr. Chairman, I appreciate that
20 and Commissioners. What I was trying to do is maybe help you
21 formulate a motion that I thought I heard and it was along the
22 lines of a motion to dismiss but addressing Commissioner
23 Coyner's notion that there is need for some, he feels more
24 comfortable with some monitoring, because the site is pretty

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1 heavily monitored right now, and I'm not testifying, but there
2 is probably over 70 monitored wells at the site right now --

3 CHAIRMAN GANS: That's the information that we have to
4 glean if we narrow the scope of this hearing.

5 MR. FREY: So with that in mind I mean I would like to
6 turn this over to NV Energy because maybe they have a
7 suggestion that might help you out in reaching a decision.

8 CHAIRMAN GANS: A decision -- we are focusing on the
9 motion now --

10 MR. FREY: Yes, that's all I am talking about.

11 CHAIRMAN GANS: -- if we go ahead with the hearing and
12 if we do what is the scope of the hearing.

13 MR. FREY: All I'm talking about is the motion.

14 CHAIRMAN GANS: Mr. Woodworth, you heard that now?

15 MR. WOODWORTH: I guess I'm on. We would respectfully
16 contend that NRS 445A.605 allows you on a motion to dismiss to
17 make a motion to dismiss with a stipulation that we would agree
18 to install groundwater monitoring wells pursuant to NRS
19 445A.605, which is what Ms. Reynolds quoted earlier as the
20 Commission's rights on appeals. We would respectfully contend
21 that this Commission could grant a motion to dismiss with a
22 stipulation to modify, the Commission shall affirm, modify, or
23 reverse any action of the director which is appealed. You have
24 a motion to dismiss the action, we think you are fully within

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1 your rights, at least we don't see anything in the statutory
2 language that says that you couldn't grant that motion to
3 dismiss if we were willing to agree, which we are, to submit a
4 groundwater monitoring plan to install the wells. That said,
5 we understand we are not your counsel, Ms. Reynolds is your
6 counsel, and if you are going to stay with the motion to
7 dismiss that we cannot make such a motion to dismiss with
8 stipulation, then obviously we will certainly support the
9 limiting of the scope as you see it.

10 CHAIRMAN GANS: Mr. Galpern?

11 MR. GALPERN: The motion presumes that groundwater
12 monitoring would be a reasonable check and the evidence that

13 Sierra Club was prepared to present was that it is not adequate
14 to identify in a timely way contamination of the environment,
15 which is the goal of the permit in the list of statutes,
16 regulations that we are seeking to enforce here. So without
17 being able to present our expert we can't adequately make that
18 point. Mr. Frey testified that there are 75 groundwater
19 monitoring wells. He did not testify though, about how many of
20 those are down gradient of the area on the Mesa, that the
21 permits permit them to put nine new Mesa ponds.

22 Without unduly repeating myself earlier, we believe
23 that the issue that, we cannot ignore the issue of full or
24 substantial compliance with the prior permit and so we object

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1 to the substitution. Again, we would urge you to reject the
2 motion entirely and allow us to produce pointed and targeted
3 evidence of the failure to demonstrate substantial compliance
4 which needed to be the predicate of NDEP's approval to begin
5 with. So we urge objection of the motion entirely so that
6 Sierra Club can present its relevant evidence with respect to
7 the relevant statute at issue at the hearing.

8 COMMISSIONER COYNER: Rose Marie, do you agree with
9 Mr. Woodworth's assertion that his reading of the regs or
10 statutes that we can make that stipulation within the motion to
11 dismiss? I think we are back to that again, but I want you to
12 weigh in here.

13 MS. REYNOLDS: My concern with doing it the way
14 Mr. Woodworth has identified is based on the limited amount of
15 testimony that you heard from Mr. Tinney. I am not sure that
16 there is an adequate factual record to support the resolution

17 that there needs to be additional groundwater monitoring. You
18 have made that decision that there needs to be additional
19 groundwater monitoring, and I'm not sure upon which that is
20 based. That's why, because you also heard testimony that you
21 didn't need additional groundwater monitoring, and so that's
22 the reason why I thought it would be useful to actually open it
23 up so that you could hear full testimony on that limited issue,
24 but if you are content, if you feel like you have got --

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1 MR. WOODWORTH: We are volunteering.

2 MR. FREY: We are volunteering it.

3 MS. REYNOLDS: Since you are volunteering to do it
4 kind of changes the issue. If they are going to volunteer to
5 do it, you could go ahead except it would be nice if there
6 were, if all three parties were in agreement but you also heard
7 no that that's not adequate.

8 CHAIRMAN GANS: I think the attorneys have heard that
9 the panel is serious about considering dismissing, I think
10 that's what I heard from Mr. Coyner and Mr. Anderson. So it
11 seems to me that we only have to satisfy ourselves that we are
12 protecting the environment, that this Commission is doing its
13 job. The only problem I have with NV Energy is what does it
14 mean when we are ready to volunteer it, which means the
15 monitoring, and what we are going to do. I would have to, I
16 would have to, if that's the way the panel wants to go I would
17 have to look into NDEP and say you know, I want to know what it
18 is that it is substantial, it's not lip service. It's got to
19 be substantial is what I am saying for any type of monitoring
20 from my perspective. Further discussion?

21 COMMISSIONER COYNER: That's why Rose Marie is an
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22 attorney and I am a geological engineer. We do these plans and
23 monitoring wells daily, weekly until we are blue in the face in
24 the State of Nevada. Now I have learned that there already is

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1 a monitoring well plan or monitoring well field partially in
2 place or in place at the facility which I didn't know. So I am
3 fully confident that the NDEP has the ability to judge a
4 groundwater monitoring plan that would be capable of monitoring
5 yet another line of defense beyond the lined ponds that are
6 planned and engineered at that site. Respectful of attorney
7 Galpern's comment that what about outside of that, well, if
8 what about outside of that is a question we have got hundreds
9 of facilities in this State that are in that ball park and you
10 have to draw the line somewhere. You can't just keep
11 defending.

12 I have the utmost confidence that the Division of
13 Environmental Protection is able to judge a groundwater
14 monitoring plan wells to be submitted by NV Energy that would
15 be adequate to make certain, and I am certain that they will be
16 watching, that will establish background and monitor employment
17 of these ponds. I am fully prepared to make a motion to
18 dismiss with that stipulation if Rose Marie can get herself to
19 a place that that is agreeable.

20 MS. REYNOLDS: Okay. Make your motion.

21 COMMISSIONER ANDERSON: You know, I have to agree with
22 Commissioner Coyner. I don't know how many the number is, how
23 many groundwater monitoring wells are out there, but certainly
24 the Division of Environmental Protection has the capacity, has

1 the knowledge and experience to develop in concert with Nevada
2 Energy, a monitoring plan, groundwater monitoring plan that
3 probably incorporates the existing wells that would be
4 extremely effective for the future at the site. So I am
5 thinking along the same lines as you are, Commissioner Coyner,
6 and I think this is doable and it's a good solution to this
7 situation.

8 MR. GALPERN: Would it be possible for me to say two
9 more minutes though prior to the vote?

10 CHAIRMAN GANS: Sure, go ahead.

11 MR. GALPERN: Thank you. From our perspective the
12 problem that we see with this motion is that for the existing
13 ponds on the flood plain of the muddy river there is an
14 existing groundwater monitoring requirement and reporting
15 requirement and it's been in existence for at least 11 years
16 that we know of, and there is reporting over the entire period
17 of the expired permit and what we, what our expert is prepared
18 to show is that that demonstrated that the ponds, especially
19 E-1 and E-2 and probably others are leaking like sieves and
20 NDEP has not done anything about it. So that is the reason why
21 we are saying this is insufficient, there needs to be another
22 layer of protection that provides, that alerts NDEP and NV
23 Energy on a more timely basis than two or three months after
24 discharges and take time to travel to the groundwater

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1 monitoring so that effective action can be taken before waters
2 of the State are contaminated, and we are prepared to testify
3 as to what that could be and it's not terribly novel and it's

4 not unprecedented.

5 So that is the reason why we have, are urging to deny
6 the motion and allow us to show you based on the groundwater
7 monitoring data that currently exists, as well as the data of
8 the flow through the primary liner that there is a significant
9 problem out there and it needs to be addressed in a different
10 way. We can't simply make the same mistakes and expect to have
11 different results. If we wish to protect the groundwater,
12 which is the waters of the State of Nevada, then we need to do
13 something differently than simply reprising the errors that
14 lead to the current stream of contamination into the
15 groundwater that we are prepared to prove.

16 CHAIRMAN GANS: Mr. Galpern, one of the things we have
17 to do up here is we have to listen to attorneys, obviously
18 three of them in front of us, plus our own counsel and try to
19 make sense or balance of what we are hearing, not to mention
20 the fact that we also have to take the technical considerations
21 also as part of what we to have do, and I heard Mr. Frey say
22 something earlier about this is not the forum, this is not,
23 this is not the time, this is not the process we should be in
24 right now for this particular question. And I am very curious,

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1 Mr. Frey, if you will expand on that a little bit, because it
2 strikes a note with me, and I'm trying to be mindful of what
3 our counsel is saying at the same time. I'm not trying to
4 belittle where you are going or what you are doing in my head,
5 but I am questioning why we are here doing what you want to do
6 on this particular permit and this particular process, I'm
7 uncomfortable with that. So it may be, Mr. Frey, that you are

8 right about this in my mind so if you will help me with that.

9 MR. FREY: I would be glad to, Mr. Chairman and
10 Commissioners. I don't have the statute off the top of my
11 head, but there is a statute that accounts for a resident of
12 Nevada to sue anyone who is violating an environmental law of
13 the State of Nevada. They have to add the NDEP to the lawsuit
14 to force compliance with statutes in the law. So when I hear
15 there was violations and NDEP paid no attention of, that they
16 should, that's the remedy for that, is that type of lawsuit.
17 And you see my concern, I don't want to encourage additional
18 lawsuits against the State, but the legislature has provided a
19 method or mechanism for addressing those concerns that when
20 people think that NDEP has failed to do its job or has done its
21 job poorly or haphazardly, there is a remedy out there.

22 what I see going on today is that there is this
23 collateral attack on that, that is being launched through the
24 appeal on the permit. The appeal on the permit is very narrow.

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1 There may be violations to this permit in the future and they
2 may or may not come up before the Commission like this. For
3 example, we issue NV Energy an order, they file an appeal, that
4 comes back here and you get to rule on it. So we are also
5 entitled to on some violations to go directly to court and we
6 don't come back to the Commission, we go directly to the court
7 and we've been in court against NV Energy.

8 what it is, is that the legislature has a scheme or a
9 remedy set out where I feel like Sierra Club wants to put on
10 evidence of what they consider past violations to build up the
11 substantial, the lack of substantial compliance, but that's not
12 this forum. The lack of substantial compliance is looking at

13 really all there is, is the documents of record that has
14 accumulated of compliance or noncompliance. And I mean I
15 understand what they are saying, but that's it, we can't, I
16 mean if you open the door then it's like there is an unlimited
17 opportunity to bring challenges on compliance, because a
18 statute says you have a window of opportunity, statute of
19 limitations for two or three years and you sit on your hands
20 and do nothing. well, you simply wait and then when the permit
21 comes up, you get your opportunity to go back and reopen those.
22 I'm not accusing them of doing that, but I'm trying to make
23 some sense of how the law works.

24 And so I just feel like going, when you look at these

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1 three things individually, they are not an attack -- they are
2 an attack on a lot of things, and I'm not, that is their
3 position but it's not subject to this hearing. I hope that
4 answers it.

5 CHAIRMAN GANS: It does.

6 MR. FREY: I would be glad to give you that statute at
7 some point if you want.

8 CHAIRMAN GANS: Mr. Galpern, that's where I am coming
9 from. I'm not comfortable with where I feel you are going in
10 this forum based just in regard to the permit. I am not
11 comfortable. I am really with Alan here, he asked the question
12 what is on the record, what NOAVs are out there, do we have a
13 record that would give us substantial evidence. I don't see
14 it, I personally don't see it. I think you may have a point, I
15 don't know, but I don't think it is here today. That's how I
16 feel about it.

17 MR. GALPERN: Well, if I could very briefly respond to
18 that, because I think it is important to put it on the record.
19 The statute at issue it's true enables the citizen to come to
20 this Commission, for example, and seek the suspension of an
21 existing license to allow NV Energy to continue to discharge,
22 and that could have been done during the 2005 permit and that's
23 correct, it could have been done and I don't believe Sierra
24 Club did that, or seek a revocation of an existing permit or

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1 perhaps Mr. Frye didn't know the statute but perhaps there is a
2 mandamus action that could be brought to enforce the law where
3 the agency perhaps is not enforcing the law but the same
4 statute clearly authorizes this Commission to deny the issuance
5 of a permit or to reject a permit for renewal of an existing
6 permit, and that is why we believe that this is precisely the
7 forum to bring to the attention not any documents but their own
8 documents that illustrate a substantial noncompliance with
9 their existing permit.

10 The logic of the statute at issue here is that the
11 agency should not be granting a permit, a renewal permit not to
12 mention a permit that allows a vast expansion here, for
13 example, of their edifice of waste water ponds where the
14 applicant has shown itself, cannot demonstrate adequately to
15 the department that it was in full or substantial compliance
16 and citizens are entitled to come to the Commission and say
17 that NDEP if it made that determination was clearly in error in
18 making that determination.

19 In proving that point we, of course, cannot rely on
20 notices of alleged violations that were never issued. If the
21 agency has failed to analyze the data that is supposed to be

22 publically available data that is provided by NV Energy or
23 their contractors directly to NDEP if they have not analyzed
24 that data, we are, the public is entitled to be able to analyze

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1 that data and bring it to you as a check on the agency to show
2 you as in this case where there is substantial noncompliance of
3 the term of the permit and that's what we wish to show you
4 here. We do not wish to provide redundant evidence, but we
5 wish to provide you with sufficient evidence so that you can
6 make an informed decision about as to the essential standard at
7 issue in the relevant statutes as to full or substantial
8 compliance.

9 So we believe that this is the best opportunity and
10 the most efficient opportunity because it's the only place
11 where we are able to come to you and ask you to stop the
12 issuance of a permit to a company that has shown itself to be
13 unable to comply to protect the environment and here especially
14 the waters of the state including groundwater.

15 CHAIRMAN GANS: Go ahead.

16 MR. WOODWORTH: We won't respond to the factual
17 allegations, but I will just speak that Sierra Club is well
18 aware and well capable and Sierra Club has many times requested
19 open records acts and voyeur requests, every piece of document
20 that is submitted in real time to an agency, Mr. Galpern is
21 well aware of that, I have been dealing with it for a decade.
22 They are well able to do that through the course of that five
23 year permit, they can track every single submittal we send to
24 that agency and a follow up letter saying NDOT is not doing

1 their job. They have the ability to do that and the regulatory
2 ability to do that and they have not done it.

3 what they are doing now at a time when renewing our
4 permit is to try to throw all that stuff they could have done
5 years ago on an instance by instance basis and dump it all into
6 495. It's inappropriate. There is no legal support for what
7 he is saying. You are well within your rights to do what you
8 are intending to do. I won't belabor the point.

9 COMMISSIONER COYNER: No more questions.

10 Mr. Chairman, for the record this goes to Rosemarie, you know
11 my intent with my motion can you, and again I go back to where
12 part of what the SEC appeal panel does is lay the ground work
13 for a court case, can you see a legal flaw one more time in
14 that motion in having a motion to dismiss with a stipulation
15 for modification of the groundwater, not to put you on the spot
16 or anything. And what is the relief, I guess I follow on the
17 point to that, what is the relief for any of the three posts,
18 Nevada Energy, NDEP or the appellant to do that, what is their
19 next stop after here?

20 MS. REYNOLDS: After here they would be able to file a
21 petition for judicial review and it would go up before the
22 District Court and they would be looking to see whether or not
23 substantial evidence supports your decision, substantial
24 evidence on the findings of fact on whether or not you are

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1 legally correct, those standards are set forth in NRS 233B,
2 that's arbitrary and capricious, there is a laundry list of
3 different avenues and issues that the court would look at.

4 I think given what the panel has stated probably the
5 best way to do your motion is to do a motion to dismiss where
6 you would affirm it based on 445A.495 in which you would find
7 that NDEP reviewed the permit and determined that NV Energy was
8 in full or substantial compliance because no findings of
9 alleged violation had been issued. At least that's what I
10 understood you earlier to say. So you have that as a motion
11 where you would dismiss the appeal as to that issue.

12 However, to modify the permit I would say that you
13 need a finding that the permit as issued does not adequately
14 protect groundwaters of the State and you would then modify the
15 permit in order to adequately protect groundwaters of the State
16 by requiring the groundwater monitoring wells to be determined
17 between NDEP and NV Energy.

18 CHAIRMAN GANS: And that takes care of --

19 COMMISSIONER COYNER: Excuse me, Mr. Chairman, in a
20 separate motion or in another hearing, another forum, the next
21 SEC meeting, where does that happen?

22 MS. REYNOLDS: As far as determining whether or not it
23 is adequate?

24 COMMISSIONER COYNER: No, I am fully past that, in

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1 terms of the substantial, I'm sorry, substantial compliance
2 argument, the three we are looking at I am firm on that, I have
3 no problem to dismiss --

4 MS. REYNOLDS: You are talking about --

5 COMMISSIONER COYNER: I don't want to compromise that
6 with this modification, and I'm sorry I interjected it but
7 it's something that I feel is relevant. So I am just looking

8 for the best forum to do that. If this is not the best forum I
9 am happy to wait until the next SEC meeting and call it up for
10 an item up on review of the permit and make a modification.

11 MS. REYNOLDS: No, this would be the forum in which
12 you are, if you are going to modify the permit you need to do
13 it here.

14 COMMISSIONER ANDERSON: Pete Anderson for the record.
15 Rather than jumping to modifying the permit why don't we have
16 NDEP take a look at what an adequate groundwater monitoring
17 plan might include and based on that information eventually
18 modify the permit but not jump to that level of action at this
19 point if that is something that can be done.

20 COMMISSIONER COYNER: Excuse me, Rose Marie, before
21 you answer what is the venue or opportunity outside of this one
22 right now then I guess is my question?

23 MS. REYNOLDS: That's the problem with the way you are
24 looking at it unless you have --

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1 COMMISSIONER COYNER: Clearly on appeal we can modify
2 the permit.

3 MS. REYNOLDS: Clearly on appeal you could modify the
4 permit. You could potentially ask NV Energy and NDEP to meet,
5 and I mean are you looking at something where you have the
6 final say on the groundwater monitoring? To say this has been
7 adequate, because just by way of example typically did any of
8 the three of you serve on the Ponderosa?

9 COMMISSIONER COYNER: I did, I heard it.

10 MS. REYNOLDS: You did because in that case you were
11 able to direct where the groundwater monitoring well should be
12 established, but you have no testimony here today to do that.

13 MR. WOODWORTH: I feel like you may be with respect a
14 misunderstanding of what we are willing, I shouldn't speak for
15 us but what NV Energy was willing to do. We certainly feel
16 that the permit is adequately protected of the environment. We
17 were willing to, we were frankly, we are already doing it to
18 some extent is what they are whispering into my ear, we were
19 already planning as far as the broader characterization effort
20 of the plan to put in groundwater wells in that vicinity. So
21 we are willing just to move on with our lives candidly and
22 submit a plan, install additional groundwater wells, but it's a
23 concession, something we are volunteering just to allow this
24 motion to proceed, it's not that we agree that we believe that

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1 NDEP's position a permit is not adequately protective, and I
2 don't believe NDEP would take issue with the characterization
3 that way. It's more something that I don't think there is any
4 appealable issue because we are volunteering, you are not
5 enforcing it upon us, you are not modifying the permit with us
6 standing there in opposition. We are agreeing, we are
7 stipulating to, we are agreeing to you adding that stipulation.

8 So that's kind of our view. It's not, if you were
9 imposing that on us, I understand the appellate risk we could
10 go in and challenge whether or not there was adequate evidence
11 presented to enforce that, but we are volunteering it. We are
12 saying that we will if it makes Commissioner Coyner and the
13 Commission more comfortable that we submit some sort of
14 groundwater monitoring plan to NDEP to make sure that NDEP is
15 comfortable that we have done what we need to do on the Mesa,
16 we are willing to do that, but we don't want it to be

17 mischaracterizing the record or maybe I am making NDEP's point,
18 maybe it's inappropriate, but I don't want to argue, I don't
19 want to suggest that we are conceding the point that we believe
20 this is a permit that is not adequately protective of the
21 environment.

22 MS. REYNOLDS: So there is no need for the Commission
23 then to modify the permit or are you saying --

24 MR. WOODWORTH: We could stipulate right now to NDEP

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1 that if it makes the Commission comfortable we can stipulate
2 that we will submit a groundwater monitoring plan to NDEP. It
3 might largely be, apparently and I don't want to testify, I do
4 not want to present additional facts to you guys, but
5 apparently we are doing something to that effect already. I
6 don't know what it is, I don't want to pretend I do but we are
7 willing to submit to the NDEP further plans regarding
8 groundwater monitoring wells in the vicinity of the Mesa ponds
9 and just agree to provide that to NDEP but not as some, not
10 because we believe the permit is not adequately protective of
11 the environment. Does that make sense?

12 COMMISSIONER COYNER: Mr. Chairman, Alan Coyner for
13 the record. Maybe it's in the syntax of the motion perhaps
14 rather than a direct modification of the permit where the words
15 understanding that a groundwater monitoring plan will be
16 submitted to the NDEP that will adequately monitor the 2010
17 permit conditions. Would that be satisfactory if it is like
18 more of a don't call it a modification of the permit, just an
19 understanding that that's being done. Maybe that's the way
20 out.

21 MS. REYNOLDS: So you would do a straightforward
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22 motion to dismiss and dismiss everything and then are you just
23 simply noting for the record that there has been stipulation
24 reached between NDEP and NV Energy to do --

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1 MR. WOODWORTH: We will agree on the record, outside
2 the motion, if this is the way the Commission would like to go,
3 we would state on the record, someone punch me if I overstate
4 what you told me, we will stipulate on the record that we will
5 provide a groundwater monitoring plan to NDEP to make sure that
6 they are adequately satisfied that we have sufficient
7 monitoring in place in the vicinity of the new Mesa ponds.

8 MS. REYNOLDS: And so would NDEP be willing to, would
9 you agree with that stipulation?

10 MR. FREY: I'm fine if they submit a groundwater
11 monitoring plan as part of their big picture of site
12 management.

13 MS. REYNOLDS: So it would just simply be then a
14 motion to dismiss because based on 495A there has been
15 substantial compliance because there has been no findings of
16 alleged violations issued by NDEP. That would be the sum and
17 extent of the motion, and then there would just be a
18 stipulation on the record. How does that sound?

19 MR. FREY: If I may, Mr. Chairman, Commissioners, I
20 have been at many of these hearings and had various parties
21 sitting with us and sitting on that side, we just agreed to do
22 things and we take them at their word and every time they have
23 done whatever the agreement was. I'm not worried about that.
24 If NV Energy says we will get you a monitoring plan, I am sure

1 they will. I really hate to have it connected to the permit as
2 a modification.

3 MS. REYNOLDS: Right.

4 MR. FREY: As volunteering to do something, because we
5 think the permit is adequate. I understand Sierra Club doesn't
6 but we think it is adequate, but if they want to do more we
7 never turn down more.

8 MS. REYNOLDS: So I don't think then, your motion
9 would just be very simple straightforward and you are not going
10 to modify the permit.

11 COMMISSIONER COYNER: Okay.

12 CHAIRMAN GANS: Anything else from you, Mr. Anderson?

13 MR. GALPERN: If I can --

14 MR. CHAIRMAN GANS: Okay.

15 MR. GALPERN: Thank you very much, Mr. Chairman. We
16 see the same problems that this kind of unenforceable agreement
17 requiring the company merely to submit a plan without any
18 enforceable triggers or standards only having to do with the
19 new ponds on the Mesa, allowing abandonment as the 2010 permit
20 does of the groundwater monitoring system, that is the
21 inadequate but still a check as to inform NDEP about the
22 contamination from the existing ponds, establishing some kind
23 of a program here without public review or public
24 participation. The evidence that we were prepared to provide

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1 to you will show the need for teeth, a need for triggers, for
2 action, need for accountability, and obviously this kind of
3 resolution of this hearing, rejection of the kind of

4 enforceable commitments that we believe are minimally necessary
5 to compel this company to protect the environment.

6 COMMISSIONER COYNER: Mr. Chairman, Alan Coyner for
7 the record. I will move that the SEC appeal panel dismiss the
8 appeal and confirm water pollution control, groundwater permit
9 NEV 91022.

10 COMMISSIONER ANDERSON: Second that motion.

11 CHAIRMAN GANS: Any discussion, comments on the
12 motion?

13 MS. REYNOLDS: You should state the reason why you are
14 granting the motion to dismiss.

15 COMMISSIONER COYNER: The reason that we are granting
16 the motion to dismiss is that the NDEP has met the substantial
17 compliance requirement.

18 COMMISSIONER ANDERSON: Second it again.

19 CHAIRMAN GANS: All in favor signify by saying aye.

20 COMMISSIONER ANDERSON: Aye.

21 COMMISSIONER COYNER: Aye.

22 CHAIRMAN GANS: Aye. Any nays? Hearing none, motion
23 carried.

24 Any other business Rosemarie, that we need to discuss?

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1 Meeting is closed.

2 (Proceedings concluded at 1:30 p.m.)

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1 STATE OF NEVADA)
2 COUNTY OF WASHOE) SS.

3
4 I, AMY JO TREVINO, CERTIFIED COURT REPORTER OF THE
5 STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE, HEREBY
6 CERTIFY:

7 THAT I WAS PRESENT AT THE TIMES AND PLACES HEREIN SET FORTH
8 AND THAT I REPORTED IN SHORTHAND NOTES THE PROCEEDINGS HAD;
9 THAT I THEREAFTER TRANSCRIBED MY SAID SHORTHAND NOTES INTO
10 TYPING, THE FOREGOING BEING A FULL, TRUE AND CORRECT
11 TRANSCRIPTION THEREOF, AND A FULL, TRUE AND CORRECT
12 TRANSCRIPTION OF THE PROCEEDINGS HAD.

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AMY JO TREVINO, CCR #825

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(Pages 1-109, inclusive.)

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