

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF NEVADA
DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
STATE ENVIRONMENTAL COMMISSION

In Re the Matter of:

JOHN BOSTA, ANTONIO GUERRA
MARTINEZ, AMARGOSA CITIZENS
FOR THE ENVIRONMENT (ACE),

Appellants,

and

NEVADA DIVISION OF
ENVIRONMENTAL PROTECTION,
BUREAU OF WATER POLLUTION
CONTROL,

Pollution Control Permit
#NV0023027

Volume II

Pages 312 - 530

Respondents,

and

ROCKVIEW FARMS, INC.
(PONDEROSA DAIRY),

Intervener.

_____ /

REPORTER'S TRANSCRIPT OF PROCEEDINGS
SEC APPEAL HEARING
WEDNESDAY, JANUARY 20, 2010
CARSON CITY, NEVADA

Reported by:

CAPITOL REPORTERS
Certified Shorthand Reporters
BY: CARRIE HEWERDINE, RDR
Nevada CCR #820
1201 N. Stewart St., Ste. 130
Carson City, Nevada 89706
(775) 882-5322

312

CAPITOL REPORTERS (775) 882-5322

□

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES:

The Commission: LEW DODGION, Chairman
ALAN COYNER, Member
STEPHANNE ZIMMERMAN, Member

For the Commission: ROSE MARIE REYNOLDS,
Deputy Attorney General
JOHN B. WALKER,
Executive Secretary
KATHY REBERT,
Recording Secretary

CAPITOL REPORTERS 313 (775) 882-5322

1 APPEARANCES (CONTINUED):

2
3 For the Intervener, JOHN L. MARSHALL,
Amargosa Citizens for Attorney at Law
4 the Environment: 570 Marsh Avenue
Reno, Nevada 89609

5 For the Appellants: JOHN BOSTA, Appellant
6 P.O. Box 42
Amargosa Valley, Nevada 89020

7 ANTONIO GUERRA MARTINEZ,
8 Appellant
HCR 70 Box 570
9 Amargosa Valley, Nevada 89020

10 BILL BARRACKMAN, President
Amargosa Citizens for the
11 Environment (ACE)

12 For the Respondents, CAROLYN "LINA" TANNER, DAG
Nevada Division of Office of the Attorney General
13 Environmental Protection, State of Nevada
Bureau of Water Pollution 100 N. Carson Street
14 Control: Carson City, Nevada 89701

15 VALERIE KING, DAG
16 Office of the Attorney General
100 N. Carson Street
17 Carson City, Nevada 89701

18 For the Intervener, JIM BUTLER, ESQ.
ROCKVIEW FARMS, INC. Parsons, Behle & Latimer
(Ponderosa Dairy) 50 West Liberty Street
19 Suite 750
20 Reno, Nevada 89501

21 JOHN R. ZIMMERMAN, ESQ.
22 Parsons, Behle & Latimer
50 West Liberty Street
23 Suite 750
24 Reno, Nevada 89501

25

314
CAPITOL REPORTERS (775) 882-5322

□

1 I N D E X

2 EXAMINATION OF WITNESSES: Direct Cross Redirect Recross

3 JOHN BOSTA

4 By Mr. Marshall 59

5 By Mr. Butler 63

6 By Ms. Tanner 64

7 By the Commissioners 65

8	ANTONIO GUERRA MARTINEZ			
9	By Mr. Marshall	72		97
10	By Ms. Tanner		75	
11	By the Commissioners		76	
12	CHARLES WILLIAM "BILL" BARRACKMAN			
13	By Mr. Marshall	77		96
14	By Mr. Butler		85	
15	By Ms. Tanner		86	
16	By the Commissioners		89	
17	ALAN TINNEY			
18	By Ms. Tanner	124		157
19	By Mr. Marshall		144	
20	By the Commissioners		150	
21	BRUCE HOLMGREN			
22	By Ms. Tanner	158,161		206
23	By Mr. Marshall (voir dire)	170	185	212
24	By Mr. Butler		197	
25	By the Commissioners		219	
		315		
	CAPITOL REPORTERS		(775) 882-5322	

□

1	I N D E X (Continued)				
2	EXAMINATION OF WITNESSES:	Direct	Cross	Redirect	Recross
3	JAY LAZARUS				
4	By Mr. Butler	246		332	
5	By Mr. Marshall		273		334
6	By Ms. Tanner		320		
7	By the Commissioners	342			
8	REBUTTAL WITNESSES:	Direct	Cross	Redirect	Recross
9	BRUCE HOLMGREN				
10	By Mr. Marshall	377		411	

11	By Ms. Tanner	398
12	By Mr. Butler	404
13	By the Commissioners	413
14	JOHN BOSTA	
15	By Mr. Marshall	422
16	By Ms. Tanner	431
17	COMMISSIONERS' WITNESSES:	Direct Cross Redirect Recross
18	ALAN TINNEY	
19	By the Commissioners	440
20		
21		
22		
23		
24		
25		

CAPITOL REPORTERS ³¹⁶ (775) 882-5322

□

I N D E X (Continued)

1			
2	APPELLANTS' EXHIBITS MARKED:		Ident/Evid
3	A	Document prepared by Tebbutt	112 112
4	A-1	Large Colored Map	16 105
5	A-2	SEC Google Web Map of Ponderosa Dairy	104 104
6	A-3	Ponderosa Dairy 2006	103 103
7	A-4	Not Noted in the Record	
8	A-5	Not Noted in the Record	
9	A-6	Not Noted in the Record	
10	A-7	A.C.E. Notification	111 111
11	A-8	Not Noted in the Record	
12	A-9	Potentiometric Map	18 105
13	A-10	Comprehensive Nutrient Management Plan	109 109

Page 5

01-20-10 SEC Ponderosa Hearing Volume II.txt

14	A-11	Glorieta Geoscience Letter dated 5-17-02	283	286
15	B	Ponderosa Chronology	112	112
16	C	Not Noted in the Record		
17	D	Not Noted in the Record		
18	E	Not Noted in the Record		
19	F	Mailing List	111	111
20	G	Email Chain Re Bruce Holmgren (8-6-07)	111	111
21	H	Nutrient Management - Code 590	111	111
22	I	Waste Utilization - Code 633	111	111
23				
24				
25				

317
CAPITOL REPORTERS (775) 882-5322

□

1	I N D E X (Continued)			
2	STATE'S EXHIBITS MARKED:		Ident/Evid	
3	1	Not Noted in the Record		
4	2	Not Noted in the Record		
5	3	Edward Alan Tinney Resume	124	126
6	4	NAC 445A.234	129	129
7	5	Notice of Proposed Action	129	130
8	6	Affidavit of Publication	130	130
9	7	Affidavit of Publication	130	131
10	8	Mailing List	132	164
11	9	NAC 445A.238	136	137
12	10	Collection of Letters	137	138
13	11	NAC 445A.239	138	139
14	12	Notice of Public Hearing	139	140
15	13	Affidavit of Publication	140	141
16	14	Affidavit of Publication	140	142

01-20-10 SEC Ponderosa Hearing Volume II.txt

17	15	Maggie Wimmer fax	142	143
18	16	NAC 445A.595	143	144
19	17	NAC 445A.237	168	169
20	18	FACT SHEET	170	174
21	19	Authorization to Discharge	170	174
22	20	Authorization to Discharge	175	184
23	21	NAC 445A.250	175	177
24	22	Alexi Lanza letter dated June 19, 2009	177	177
25	23	R. Ganta letter dated January 11, 2006	409	410

318
CAPITOL REPORTERS (775) 882-5322

□

1	I N D E X (Continued)		
2	STATE'S EXHIBITS MARKED:		Ident/Evid
3	24	David Albright letter to Jon Palm	181 181
4	25	Email chain re Bruce Holmgren	182 183
5	26	Bruce Holmgren Resume	159 164
6	27	NMP Required Elements 2003	207 208
7			
8	INTERVENER'S EXHIBITS MARKED:		Ident/Evid
9	3	Comprehensive Nutrient Management Plan	407 407
10	8	Jay Lazarus Curriculum Vitae	249 250
11	12	Notice of Decision	431 431

12
13
14
15
16
17
18
19

20
21
22
23
24
25

CAPITOL REPORTERS ³¹⁹ (775) 882-5322

1 CARSON CITY, NEVADA, WEDNESDAY, JANUARY 20, 2010, 9:01 A.M.

2 -o0o-

3

4 CHAIRMAN DODGION: All right. It is a couple
5 minutes past the appointed time to start this meeting, but
6 we will resume where we left off yesterday with
7 Mr. Lazarus.

8 You are still under oath, and I believe it's
9 Ms. Tanner's turn for Cross-Examination.

10 MS. TANNER: It is my turn. Good morning.

11 CROSS EXAMINATION

12 BY MS. TANNER:

13 Q I just had a couple of questions for you,
14 hopefully.

15 From my notes yesterday, you were discussing
16 the issue of, I believe, monitoring the soil versus or in
17 addition to groundwater monitoring, and I believe you
18 referred to it as a top-down approach versus a
19 bottom-approach. Am I quoting you correctly?

20 A Yes, ma'am.

21 Q So -- and I want to make sure I understand
22 that, that the soil monitoring for a land application, in

23 your view, would catch a problem much quicker than merely
24 groundwater monitoring?

25 A Yes.

CAPITOL REPORTERS 320 (775) 882-5322

1 Q Okay. And this permit that we're discussing
2 incorporates both the soil testing, the top-down approach,
3 as well as the groundwater monitoring, the bottom-up
4 approach?

5 A Yes.

6 Q Are you -- you're aware of the EPA regulations
7 regarding NPDS permits and CAFO permits in particular,
8 correct?

9 A Correct.

10 Q And it's my understanding that the EPA has
11 specifically stated that the best available control
12 technology to address nitrates and pathogens is through
13 crop consumption the nutrients; is that correct?

14 A Yes.

15 Q Can you expand on that a little bit, on how
16 they might have come up with that conclusion?

17 A I'll try.

18 Q Okay.

19 A Okay.

20 Q That's all we can ask.

21 A The 1993 CAFO NPDS permit expired in 1998, and
22 then -- and between 1998 and the end of 2008, the very
23 beginning of 2009, EPA spent a lot of time working
24 throughout the country, and with NRCS, on developing
25 the -- what we call the Federal CAFO Rule.

1 In their research, they specifically said that
2 the best control technologies for dealing with the green
3 water in manure solids was land application at agronomic
4 rates, and they specifically made a determination that
5 evaluation of pathogens being applied to fields or
6 pathogens migrating off the fields or below fields, was
7 not an issue that EPA thought was germane to water control
8 protection.

9 Q Okay. So in the 2003 CAFO rule included the
10 best available control technology; is that correct?

11 A The --

12 Q I guess it would have been the rule that would
13 have been applicable at the time of this permit?

14 A Correct.

15 Q Okay. And you're familiar with the water
16 keeper decision?

17 A Yes.

18 Q After the Water Keeper decision, was there any
19 change in this determination of best available control
20 technology?

21 A No.

22 Q There was some -- you've sat through this
23 entire hearing so far; have you not?

24 A Yes.

25 Q Okay. I don't know if you recall. There was

1 some testimony by Mr. Holmgren about a dry well, that the
2 monitoring well that's in existence on the clay-lined pond
3 has gone try?

4 A That's correct.

5 Q Are you aware of -- with your work at the
6 dairy, you handle also the compliance affects, as well,
7 correct, your company does?

8 A The dairy conducts the sampling, and we
9 receive the data and write the reports.

10 Q Okay. Has -- is there a plan in place to fix
11 that well or to -- I'm sorry -- to, you know, drill a
12 second well?

13 A Drill a replacement well, 1-A, yes. The
14 volunteering monitoring plan addresses that.

15 Q Okay. Now, as far as NPDS permitting, this
16 one issued in 2007, in your experience with these type of
17 permits with CAFOs, would you consider this -- and I might
18 use the wrong term -- bear with me -- progressive, a
19 progressive permit versus -- I mean, I guess maybe the
20 right word is restrictive permit, in that it actually --
21 in its ability to address both groundwater and surface
22 waters.

23 A I think the way the permit is written and
24 enforced by NDEP, it's protective of surface water and
25 groundwater quality.

CAPITOL REPORTERS 323 (775) 882-5322

□

1 Q Okay. There was some questions to you about
2 self-cleaning of the ponds. Are you aware whether or not

01-20-10 SEC Ponderosa Hearing Volume II.txt
3 the permit requires control of sludge in the ponds?

4 A I don't believe it's addressed in the permit.

5 Q You don't --

6 A If it is, I forgot it.

7 Q Okay. Let me see if I've got it here. I
8 think I know where it's at, but you just have to bear with
9 me for a minute.

10 I'm handing a copy of -- I believe it's
11 Exhibit 20, which is the permit. It would be page 6, at
12 the top of the page, section 1-A-4, and if can you look
13 through there and see whether or not sludge in the -- I
14 believe it's Section A -- read that out loud, please.

15 A (Reading)

16 "waters must be free from substances" --
17 okay -- "that will settle to form sludge or bottom
18 deposits in amounts sufficient to be unsightly,
19 putrescent, or odorous."

20 Q So the permit would require, then -- that
21 would address the water settling in the pond?

22 A I believe so.

23 Q And as far as the -- back to the monitoring
24 well -- replacement well that we just discussed, you said
25 that that is addressed in the plan, but that's still a

324
CAPITOL REPORTERS (775) 882-5322

□

1 required element of the permit regardless of whether or
2 not it's required of the plan; is that correct?

3 A That's correct.

4 Q Okay. In the CAFO rule that was applicable in
5 2003, are you aware of whether groundwater monitoring is

01-20-10 SEC Ponderosa Hearing Volume II.txt
6 required in that rule?

7 A By the Federal CAFO Rule?

8 Q Yes.

9 A It's not.

10 Q And in this permit, NDEP has applied
11 groundwater monitoring of the clay-lined lagoon?

12 A Correct.

13 Q There were several questions from Mr. Marshall
14 in regards to the amount of waste generated, amount of
15 nitrates generated, and I would ask you if you know
16 that -- how should I say this?

17 Regardless of the amount of that waste, does
18 the permit limit application rates to the environment that
19 are still protective of groundwater?

20 A Yes, it does.

21 Q Does the permit limit the volume of
22 agricultural waste stored in the ponds in its -- by any
23 measure?

24 A Well, first of all, with all due respect,
25 counsel, we don't consider it agricultural waste.

CAPITOL REPORTERS ³²⁵ (775) 882-5322

1 Q I understand that. I'm sorry.

2 A We consider this a resource that we're using
3 and recycling.

4 Q If I say, "processed waste water," that -- is
5 it more green water?

6 A Green water.

7 Q "Green water" works for you?

8 A Yes.

9 Q Okay. So does the permit put into place --
10 let me rephrase the question -- put into place any kind of
11 limiting factor in the ponds for the green water?

12 A The permit puts into place the effective
13 effluent limitations based on land appli -- the permitted
14 land application rate of a million gallons a day.

15 As I believe I testified to yesterday, right
16 now, within the past year, the dairy has been putting out
17 about six-hundred and thirty-eight or 640,000 gallons a
18 day, significantly under the million gallons a day.

19 But in terms of managing the lagoons, the
20 dairy applied for the million gallons a day to make sure
21 that we weren't going to discharge greater than the
22 permitted amount on an average daily basis calculated over
23 a quarter.

24 In other words, you know, it's -- right now
25 it's raining in Amargosa, as we speak. So if we've got a

CAPITOL REPORTERS ³²⁶ (775) 882-5322

1 few months of rain, where we want to store the water,
2 store the green water, we don't have to pump our
3 groundwater, but then use that same green water in the
4 second quarter of the year. Say, for January, February,
5 and March, there's quite a bit of moisture, we either
6 can't move our pivots or aren't -- don't need the moisture
7 for the fields, then we now have the ability to discharge
8 up to a million gallons a day, say in April, May, and
9 June, when the crops really need it, rather than being
10 limited to a smaller amount.

11 But our average is -- you know, the way we're

01-20-10 SEC Ponderosa Hearing Volume II.txt
12 managing the lagoons, it's about six-hundred and
13 thirty-eight, 640,000-gallon-a-day average going out to
14 the fields.

15 Q Okay. And it's not a significant -- it's not
16 necessarily an increase in what the dairy has been doing,
17 at least historically, at that point in the permit? It's
18 just reflective of what the dairy -- the increase in the
19 permit, in the gallons per day in the permit, was
20 reflective of the actual operations of the dairy, not an
21 increase in operations of the dairy?

22 A Well, the increase -- under the previous
23 permit, the average daily discharge was estimated.

24 Q Right.

25 A And then, once we operated -- were operating

327
CAPITOL REPORTERS (775) 882-5322

1 under that permit, it was determined that the average
2 daily discharge was being underestimated, and, by the way,
3 that we have to report in our DMR's, Discharge Monitoring
4 Reports, in terms of averages, and taken over a month,
5 three months for the quarter. That's why we went up to
6 the one MGD, to be able to give us that operational
7 flexibility, to use the water more efficiency.

8 Q And as far as the -- getting back to the limit
9 of the green water stored, as I recall, there's also --
10 within each of the active ponds there's a freeboard
11 limitation?

12 A Two feet of freeboard.

13 Q Okay. And so how is that handled, if you were
14 to hit in excess?

15 A Well, this excess would then be over a million
16 gallons a day over a 60-day period.

17 Q Okay.

18 A Because we're designed for 60 days of storage
19 plus the two feet of freeboard.

20 Q Okay. I understand that we have some
21 groundwater monitoring aspects of -- in -- in the permit.
22 Are you -- are you familiar with the schedule of
23 compliance items that are also in the permit that address
24 groundwater monitoring?

25 A I'd have to go back and look at the specific

CAPITOL REPORTERS ³²⁸ (775) 882-5322

1 sections of the permit.

2 Q Okay. I'm looking at the permit, page 10, and
3 I believe Item C-2 discusses possible additional
4 groundwater monitoring wells under certain conditions.

5 A For 1-A-34, C-2, that you're asking me to
6 read, it says, "Within 60 days of the permit effective
7 date, the permittee shall install groundwater monitoring
8 well and submit to the Division a groundwater monitoring
9 plan, including a map identifying each well, the well
10 locations, and the screened intervals to demonstrate that
11 the composting facilities are," slash, "have not degraded
12 groundwaters of the state, or submit a schedule completing
13 up-gradient replacement."

14 Q And so this, on their Item 3, that's already
15 been completed?

16 A Correct.

17 Q And that's why there was no groundwater

01-20-10 SEC Ponderosa Hearing Volume II.txt
18 monitoring well at that location?

19 A Correct. We have staff engineer plans for the
20 compost facilities, and with those plans the monitoring
21 wasn't required.

22 Q Okay. And then I believe -- and you don't
23 need to read this word-for-word. I'll have you summarize
24 it, if you can. Under -- let me make sure I have the
25 correct one. I believe there's also some groundwater

329
CAPITOL REPORTERS (775) 882-5322

1 monitoring well provisions in both D -- Items D and G
2 under certain conditions.

3 Can you -- you don't need to read them
4 word-for-word, but if you could explain them, that would
5 be great. You can read it word-for-word if you'd like.

6 A (Reading)
7 "Submit to the Division a certification
8 stamped by a Nevada licensed PE stating that the facility
9 production areas have been constructed to contain with no
10 discharge the waters of the state, all processed waste
11 water, including direct precip and runoff for the 25/24
12 (sic) storm," which has been done.

13 Q Okay. So then the next portion about
14 installing groundwater monitoring would not apply?

15 A That's correct.

16 Q And under G -- as I understand Item G, this
17 anticipates if those abandoned lagoons needed to be used
18 for emergencies more than twice -- or at the second event,
19 that the groundwater monitoring wells would be required.

20 A Or submit to the Division a design and

01-20-10 SEC Ponderosa Hearing Volume II.txt
21 schedule for the installation of a 60-mill HDPE liner for
22 the use for the lagoon, which has been done.

23 Q Okay. Okay. So those items, for additional
24 monitoring, are also for the projection of the
25 groundwater?

CAPITOL REPORTERS 330 (775) 882-5322

1 A Yes, ma'am.

2 Q Are you familiar -- I believe you have
3 testified that you're familiar with the Clean water Act
4 requirements for an NMP.

5 A Yes, ma'am.

6 Q And did you take into account these
7 requirements when you proposed -- when you created the
8 CNMP?

9 A The CNMP was created solely for the purpose of
10 obtaining NRCS funding, and the CNMP was completed
11 substantially before NMP's were required for the facility.

12 Q Okay. Does the CNMP include the requirements
13 of the EPA's NMP requirements?

14 A It's everything except for chemical handling.

15 Q And how is that addressed?

16 A That's addressed in the NMP.

17 Q So you have two separate documents?

18 A Unfortunately, yes.

19 Q Okay. So for the purposes -- for today's
20 purposes, we're just discussing the NMP. Did you take
21 into account EPA's NMP requirements in drafting your NMP?

22 A We have, yes.

23 Q And in your opinion did they meet all those

25 A Yes, ma'am.

CAPITOL REPORTERS 331 (775) 882-5322

1 Q Okay. And I believe you testified that at
2 this point in time the CAFO rule does not have any
3 requirement for air emissions.

4 A That is correct.

5 Q I think that's all I have -- oh, I have one
6 important question. I'm sorry.

7 In proposing your permit application, did NDEP
8 require you to do revisions over time?

9 A We worked through drafts with NDEP on the
10 permit, like we work through drafts with any regulatory
11 agency.

12 Q Okay. So your first submittal was not
13 necessarily accepted on its face. You continued to work
14 with staff to work out what the agency's needs were?

15 A I don't know if I would phrase it exactly that
16 way, but I think my answer is yes.

17 MS. TANNER: Okay. That's fine. Thank you.
18 I have no further questions.

19 CHAIRMAN DODGION: Mr. Butler, do you have
20 anything on redirect?

21 MR. BUTLER: I think just a few questions.

22 REDIRECT EXAMINATION

23 BY MR. BUTLER:

24 Q Mr. Lazarus, just to follow up on the animal
25 composting facility, when you were considering the

CAPITOL REPORTERS 332 (775) 882-5322
Page 19

1 Voluntary Groundwater Monitoring Plan, did you consider
2 the need for a well down-gradient of that facility?

3 A Yes, we did consider that.

4 Q And what did you decide?

5 A We decided, since there was no constant source
6 of water and no water added to the compost, for that
7 animal compost facility, that a monitoring well wouldn't
8 be necessary.

9 Q Now, just -- I just want to make sure that
10 it's clear on the increase in the permit. The prior
11 permit was 635,000?

12 A Either six-twenty-five or six-seventy-five. I
13 forgot what it was.

14 Q And that the revised NMP went to a million
15 gallons, and then the revised permit went to a million
16 gallons.

17 Did that -- in that change, did that reflect
18 an expansion of the dairy or did it reflect the need for
19 operational flexibility in the water management?

20 A It reflected the need for operational
21 flexibility in managing the green water.

22 MR. BUTLER: Those are my only questions.

23 Thank you.

24 CHAIRMAN DODGION: Did you want another shot
25 at it?

333
CAPITOL REPORTERS (775) 882-5322

1 MR. MARSHALL: Yes, and I think it's fairly
Page 20

2 clear that the State's cross is not a cross; it's a Direct
3 to elicit more testimony.

4 CHAIRMAN DODGION: I don't need your
5 commentary.

6 MR. MARSHALL: Although what I might suggest
7 is that I would be surprised if some of my questions are
8 covered by questions by the SEC members. So I don't know
9 if you want to go ahead now, or I can wait until after, to
10 see if those questions have been asked and answered, and I
11 don't have to provide any cross. whatever you'd like.

12 CHAIRMAN DODGION: I wanted to give you one
13 last opportunity --

14 MR. MARSHALL: Okay.

15 CHAIRMAN DODGION: -- right now.

16 MR. BARRACKMAN: Could he look at this for
17 just one second, please, so we can discuss this?

18 (Discussion off the record)

19 RE-CROSS EXAMINATION

20 BY MR. MARSHALL:

21 Q Good morning, Mr. Lazarus.

22 A Good morning, Mr. Marshall.

23 Q I'm trying to connect up a couple things, and
24 one being your comments yesterday that the dairy, by
25 converting to -- I can't remember what the -- wash or

1 scraping?

2 A From flush to scraping.

3 Q From flush to scraping, essentially became
4 more efficient, perhaps, or the concentrations in the

5 lagoon -- TKD (sic)?

6 A TKN.

7 Q TKN went down.

8 A Yes.

9 Q Okay. And was that also because -- did the
10 flow correspondingly go down, as well? The water, you're
11 not flushing, you're scraping out. Does the flow
12 discharge go down, as well?

13 A It's still the same amount of water. If you
14 remember my testimony from yesterday, how I said the water
15 from the air-cooled chillers was used to flush. Now,
16 the -- to flush the feed lines. Now, that water is
17 recycled, used to flush the barn. That same amount of
18 water goes into the ponds without being used again for
19 flushing.

20 Q So -- I'm sorry. I didn't -- I'm missing a
21 link. They are being -- the barns are being flushed?

22 A The barns are being cleaned.

23 Q And so --

24 A The barns -- remember earlier in my
25 testimony -- I believe it was my Direct testimony

1 yesterday, when I explained how the green water was
2 generated, that the cows and the barn floors are washed
3 down after the milking cycles. The cows -- the cows are
4 washed. The utters and teats are washed for milk quality
5 and herd health, and then the barn, itself, is washed --
6 is washed out, and that water becomes the green water, and
7 that's what goes into the ponds.

8 Q Okay. Now, under the Clean Water Act, states
9 are allowed to impose more restrictive or protective water
10 quality criteria; isn't that true?

11 A I think that's a legal question.

12 Q Well, I think you just answered a numbers of
13 questions regarding what the NMP and various Clean Water
14 Act regs require. But I'm asking for your lay opinion of
15 the regs, as you seem to be intimately familiar with them.

16 A I'm very familiar with the CAFO rule. I'm not
17 intimately familiar with the entire Clean Water Act.

18 Q Is there anything in the CAFO rule that's
19 precludes this state from imposing additional measures
20 that they deem necessary to protect the waters of the
21 State of Nevada, for example?

22 A I'd have to go back and look at it.

23 Q Do you know? But you're not -- sitting right
24 now, you're not -- you don't recall anything that would
25 preclude the state from doing that?

336
CAPITOL REPORTERS (775) 882-5322

1 A That's correct.

2 Q Thank you.

3 Now, in the permit -- Ms. Tanner asked about
4 Monitoring Well 1, and I think -- I'm handing you their
5 Exhibit Number 20, page 4 of 21, and -- Table 1-2 is that
6 it?

7 A I think that's I.

8 Q Roman I. There we go. And then down at Note
9 2, it says you can stop monitoring on the lining of Dairy
10 1 pond system; isn't that correct?

11 A Correct.

12 Q And has that pond been lined?

13 A The settling ponds that MW-1 is adjacent are
14 clay lined.

15 Q Okay. But the -- I think when you were
16 describing the dairy's operation -- let me use the exhibit
17 here that you were using.

18 This is this -- this is Intervener Exhibit 2
19 to this map. Where -- so milking barns is -- Dairy 1 --
20 so the one in the middle?

21 A Uh-huh.

22 Q Okay. And the lagoons or the ponds that are
23 referenced, I think you said, are directly south of the
24 barn; is that correct?

25 A That's correct.

CAPITOL REPORTERS ³³⁷ (775) 882-5322

1 Q Okay. And --

2 A But then there's two different -- different
3 sets of ponds.

4 Q Right, but then there's this -- what you call
5 a storage pond or settling ponds --

6 A Correct.

7 Q -- here?

8 A Yes.

9 Q And so then, if I understand it then, your
10 interpretation of this requirement is that all -- not only
11 the lagoon systems, but the settling and storage ponds
12 have to be lined before you can cease monitoring and
13 monitoring on well 1?

14 A And they are lined. These are synthetically
15 lined.

16 Q well, when you say, "these," what are you
17 referring to?

18 A Primary green water lagoons behind Barn 1 are
19 synthetically lined, and these ponds, that we use as
20 settling basins, are clay lined.

21 Q Okay. So they're just -- now, when -- and so
22 let's go back then to this note, and it says that
23 permittee may stop monitoring MW-1 upon lining the
24 Ponderosa Dairy 1 pond system.

25 Now, is that -- so, in your opinion, has the

338
CAPITOL REPORTERS (775) 882-5322

□

1 lining, that's referenced in Footnote 2 or Note 2, taken
2 place?

3 A Yes.

4 Q Okay. So you could stop monitoring under
5 Monitoring Well 1, using Monitoring M-1 to monitor under
6 Table 1.2; is that correct?

7 A That is correct.

8 Q Okay. And so that's why, presumably, the
9 dairy has not replaced the well, since it went dry two
10 years ago, or whatever, because you felt there was no
11 obligation under this condition; is that correct?

12 A Under the permit, yes, but we voluntarily
13 offered up a monitoring well to replace the well that went
14 dry.

15 Q Right, and I think you mentioned yesterday
16 that that monitoring well program is contingent on the

17 outcome of the SEC's hearing today; is that accurate?

18 A No, it's not.

19 Q So regardless of what the SEC does --

20 A You know, we volunteered the monitoring plan
21 regardless of what the SEC does. You know, I think it's
22 sort of like volunteering for the Army. Once you're in
23 and you sign up, I don't think you can back out so easy.

24 Q And have you had any feedback from the State
25 on the remonitoring plans you've submitted to them.

339
CAPITOL REPORTERS (775) 882-5322

1 A It has been approved.

2 Q Approved. Can you tell me what -- how that
3 happened?

4 A We submitted -- we discussed the monitoring
5 program -- the voluntary monitoring program with the
6 State. We discussed potential locations for monitoring
7 wells down-gradient of the lagoons and up-gradient of the
8 facility.

9 We discussed the length of screen for
10 constructing the monitoring wells, based what we felt were
11 regional water level declines, and after a series of
12 discussions we submitted the plan to install these four
13 wells to the State, and it was accepted by the State.

14 Q Did they initiate these discussions, or did
15 you initiate them with the State, regarding monitoring
16 wells?

17 A We initiated them.

18 MR. MARSHALL: Forgive me a second while I
19 hunt up -- that's all right -- the little package of --

20 you know, the maps that you had up here, was that -- did
21 you --

22 A The slide, yeah.

23 Q Did you present that information to the State?

24 A Yes.

25 Q So this all these documents went to the State?

340
CAPITOL REPORTERS (775) 882-5322

1 A I don't know if this top one -- if the USGS
2 one went to the State, but these other ones -- that went
3 to the State. That one went to the State. That one --

4 MR. BUTLER: Mr. Chairman, I object to this
5 line of questioning. This is outside the scope of what
6 anyone said today. He's getting -- he was talking -- he
7 was following up the State's questions, and now he's gone
8 back to yesterday's Cross-Examination. He had this
9 chance.

10 MR. MARSHALL: No, I think that the issue of
11 the monitoring wells and the monitoring well program were
12 mentioned both in -- in Ms. Tanner's questioning. So I
13 don't think it's outside.

14 CHAIRMAN DODGION: I agree with you. It was
15 mentioned, but at the same time I think this issue has
16 been covered. I think that you've asked these same
17 questions to Mr. Lazarus.

18 MR. MARSHALL: Let me fix on that. I was just
19 going to ask a another final question about --

20 CHAIRMAN DODGION: If would you wrap it up?

21 MR. MARSHALL: -- how it affected their
22 approval of the permit.

23 CHAIRMAN DODGION: You're getting to the
24 public participation.

25

CAPITOL REPORTERS 341 (775) 882-5322

1 BY MR. MARSHALL:

2 Q So could you -- did they send you a letter --

3 A Yes.

4 Q -- of the approval?

5 A Yes.

6 Q And so it was an approval of the program, but
7 was it a permit amendment?

8 A No.

9 Q Did you -- and so I guess I'm a little
10 confused as to why the State needed to approve the
11 program. Could you help me understand that?

12 A Because if we're going to expend the time,
13 energy, and effort, and make a commitment to drilling
14 these wells and sampling them, we wanted to make sure that
15 we're in agreement with the State on the locations, and
16 construction, and sampling parameters.

17 MR. MARSHALL: Okay. That's all I have.

18 Thank you.

19 CHAIRMAN DODGION: Thank you. All right. Our
20 turn.

21 Stephanie, you had some questions for him?

22 COMMISSIONERS' EXAMINATION

23 MEMBER ZIMMERMAN: A couple. Now, when you
24 were talking with Mr. Marshall, there was some discussion
25 about no monitoring wells were required because of the

1 lining ponds south of Dairy 1, but you're still required
2 to have one because of the storage ponds, the clay-lined?

3 THE WITNESS: You know, the -- Chairman,
4 Commissioner, that footnote that Mr. Marshall had me read
5 said, "lining." It didn't say synthetic or clay. It just
6 said, "lining." So I believe there's some room there for
7 interpretation, but regardless, we're going to be putting
8 in the well.

9 MEMBER ZIMMERMAN: Okay. well, let's look at
10 that again then. That was --

11 MR. MARSHALL: It's Exhibit 20, page 4 of 21.
12 It's that Note 2 at the -- kind of the bottom of the
13 chart.

14 MEMBER ZIMMERMAN: Okay. well, I guess this
15 is a little different. That's the composting.

16 were you referring to the composting equal
17 to -- that that's the same as the eight storage ponds that
18 are there? Is that the same facility?

19 THE WITNESS: Commissioner, I'm trying to
20 understand your -- I'm trying to understand your question.

21 MEMBER ZIMMERMAN: Okay.

22 THE WITNESS: And if you're asking about the
23 discussion I had with Mr. Marshall this morning, I believe
24 it was relative to the dead animal composting.

25 MEMBER ZIMMERMAN: That's what I was thinking,

1 okay, but as far as the monitoring wells go, you still are
2 required to have MW-1 because of the clay-lined storage
3 ponds below Dairy 1, south of Dairy 1?

4 THE WITNESS: I believe there's some room for
5 interpretation there, but we're going to drill one.

6 MEMBER ZIMMERMAN: And why do you believe
7 there was room for interpretation?

8 THE WITNESS: Because it says, "lining." It
9 doesn't say, specifically, synthetic lining, and --

10 MEMBER ZIMMERMAN: In the permit that refers
11 to that particular --

12 THE WITNESS: Yes, ma'am.

13 MEMBER ZIMMERMAN: Okay. Now, as an expert in
14 this area, are you aware of concerns, nationally, for
15 these CAFOs and their possible polluting the groundwater?

16 THE WITNESS: Yes.

17 MEMBER ZIMMERMAN: And what do you think
18 drives that concern?

19 THE WITNESS: I think lot of this concern is
20 driven more by emotional and more -- I'll be real frank --
21 like anti-CAFO, anti-business type groups that are active
22 in the area. I think that when you look at it all, that
23 that concern is driven by lot of groups that have formed
24 to fight CAFOs nationwide.

25 MEMBER ZIMMERMAN: And are you aware of any

□

1 evidence that groundwaters are polluted as a result of the
2 operations and driving some of these concerns, or is there

01-20-10 SEC Ponderosa Hearing Volume II.txt
3 no evidence?

4 THE WITNESS: In places, there is evidence of
5 that, and in a lot of other places there's no evidence of
6 it.

7 MEMBER ZIMMERMAN: Okay. Approximately how
8 much does it cost to drill a well, to put in a monitoring
9 well?

10 THE WITNESS: We're going to find out. We
11 haven't bid it out. These are -- you know, I'm guessing,
12 for the driller, alone, given the type of completion
13 techniques we have -- you know, I'm going to just give a
14 range now between five and \$10,000.

15 MEMBER ZIMMERMAN: Okay. And you have
16 existing wells that are drilled already, right? How would
17 you deal with MW-1? You'd have to redrill in a different
18 spot, where the groundwater is accessible, or would you
19 just dig deeper in that particular condition?

20 THE WITNESS: Okay. MW-1 would be plugged and
21 abandoned according to the State Engineer and NDEP
22 regulations, and we're going to move it from the south
23 side of the pond to the east side or closer to the
24 southeast corner of it. And that'll be drilled -- since
25 we know that MW-1 is dry at 95 or a hundred feet, then we

345
CAPITOL REPORTERS (775) 882-5322

1 would go past that to determine where we would encounter
2 our first water.

3 MEMBER ZIMMERMAN: And the reason for the
4 movement?

5 THE WITNESS: Well, we've got more groundwater

6 flow direction data than we had before. I mean, I just
7 think that where we've got it located, up there (witness
8 indicating), it also gives us the opportunity to catch any
9 potential seepage from the synthetically lined lagoons
10 behind Barn 1. So it serves to monitor seepage from the
11 clay-lined settling ponds and the synthetically lined
12 lagoons behind Barn 1.

13 MEMBER ZIMMERMAN: Okay. That's it for me.

14 CHAIRMAN DODGION: Alan?

15 MEMBER COYNER: That wasn't much.

16 MEMBER ZIMMERMAN: It wasn't much?

17 CHAIRMAN DODGION: Go through all those knows
18 notes you have.

19 MEMBER COYNER: I have copious notes. Good
20 morning, Jay.

21 I'm going have to jump around a little bit,
22 because I wrote them in order, and it may skip a little
23 bit. So -- and then, secondly, some of these may be
24 better answered by Mr. Holmgren. So don't hesitate to say
25 that's not a question that you wish to answer. And then,

CAPITOL REPORTERS ³⁴⁶ (775) 882-5322

□

1 thirdly, I have a quick question Mr. Butler, if I could do
2 that as a matter, of course.

3 CHAIRMAN DODGION: would you mind asking a
4 question?

5 MR. BUTLER: I'd be happy to --

6 MR. BARRACKMAN: Swear him in.

7 MEMBER COYNER: You've got other exhibits in
8 there, Intervener exhibits, and are you going to introduce

01-20-10 SEC Ponderosa Hearing Volume II.txt
9 them or not?

10 MR. BUTLER: Probably not. Most of those were
11 prepared to address Mr. Sagady, who we expected to --

12 MEMBER COYNER: Maybe we need to verify
13 that --

14 MR. BUTLER: Yeah, I do think that they're --

15 MEMBER COYNER: -- which ones are going to be
16 admitted and which ones aren't.

17 CHAIRMAN DODGION: When we get to our
18 deliberations.

19 MR. BUTLER: Yes, I have some questions about
20 exhibits.

21 CHAIRMAN DODGION: It's past the time of
22 introducing exhibits.

23 MEMBER COYNER: I just wanted that as a
24 housekeeping measure.

25 Okay. Exhibit 20, please, Jay, the permit.

CAPITOL REPORTERS ³⁴⁷ (775) 882-5322

□

1 If you could -- someone could hand him a copy of it, and
2 I'm going to go back to my two favorite tables here, on
3 page 4 and -- page 3 and page 4.

4 And since -- I think you testified that you've
5 worked with other companies, dairies in New Mexico, and
6 you've got fair knowledge of these issues, I'm going to
7 ask you about the numerical issue, the monitoring report.
8 In these columns, would that be typical of a permit that
9 you have seen in other states, that it's a monitoring
10 report rather than a quantitative number?

11 And by that I'm asking, again -- going back to

12 what I covered yesterday, which was: There's no limits
13 here. There's no violation of permit limits based on
14 these various constituents in both of these tables. Is
15 that common or not, to the best of your knowledge?

16 THE WITNESS: It's very common, because these
17 types of parameters and analyses, Commissioner, generally
18 refer back to the groundwater quality standards for that
19 individual state.

20 So, in other words, if nitrate -- total
21 nitrogen or nitrate was over 10 milligrams per liter, then
22 that would be in excess of the numerical standards that
23 the Commission has adopted.

24 MEMBER COYNER: Except that's the only one
25 that has a number, and you picked that one. How about all

348
CAPITOL REPORTERS (775) 882-5322

□

1 the other ones? Nitrate, ammonia, total phosphorus,
2 monitoring report. I don't see anything in there that
3 gives the common citizen reading this permit the comfort
4 level with regards to a violation, unless as you said it's
5 tied back to drinking water quality standards or
6 something. Again, maybe Mr. Holmgren is the best person
7 to ask that.

8 THE WITNESS: It's my understanding that these
9 are all tied back to the drinking water standards with the
10 groundwater samples.

11 MEMBER COYNER: Is the bi-annual and annual --
12 you figure that's pretty common in other permits that
13 you've seen around? Is that a fair sampling rate, in your
14 estimation, once a year, twice a year?

01-20-10 SEC Ponderosa Hearing Volume II.txt
18 professional opinion that discharge means a green water
19 that, through some upset or for whatever reason, has left
20 the property and flowed into waters of the U.S. or waters
21 of the state.

22 MEMBER COYNER: Okay. So that's an unusual
23 event? It's not a normal monitoring event? It's
24 something that -- from a flood, or excessive rainfall, or
25 something like that? That's why that's in there, in your

350
CAPITOL REPORTERS (775) 882-5322

1 opinion?

2 THE WITNESS: Correct. And I look at the --
3 yes.

4 MEMBER COYNER: I believe -- and I'll just
5 cover this for clarification. You talked a little bit
6 yesterday about soil sampling as a proxy for groundwater
7 monitoring with regards to field apps, and I think you
8 said that soil sampling really is kind of an early warning
9 system, and you're catching excess application rates or
10 other things that might go on that would be out of the
11 norm there; therefore, groundwater monitoring would be a
12 little excessive in that situation.

13 THE WITNESS: Yes, sir.

14 MEMBER COYNER: Is that correct?

15 THE WITNESS: Yes.

16 MEMBER COYNER: The pivot production wells,
17 let's talk about -- how many wells are out there? I'm
18 going to -- would you give this one to Jay, please, this
19 packet? Does somebody have it that he can borrow?
20 Thanks.

21 On page -- it would be my page -- either page
22 2 or page 3, there's a bunch of other wells on the
23 property. On page 3, there's a Barn 3 well, and then a
24 state well, a hay bale well. The windjammer, is that a
25 well? The Champion well? What are all those wells?

351

CAPITOL REPORTERS (775) 882-5322

□

1 THE WITNESS: May I suggest, Commissioner,
2 that we talk about this one.

3 MEMBER COYNER: Sure.

4 THE WITNESS: I think it may depicts it a
5 little easier for everybody.

6 MEMBER COYNER: Okay.

7 THE WITNESS: There are a series of production
8 wells on the property that are used to supply water for
9 cow drinking, barn cleaning, and other dairy related
10 activities, and there's another group of wells that are
11 used for irrigation of the fields.

12 MEMBER COYNER: Do those ever get sampled?

13 THE WITNESS: Yes.

14 MEMBER COYNER: Are they required to be
15 sampled?

16 THE WITNESS: I don't remember if they're
17 required to be sampled, but we've sampled them. I can go
18 back and look at the permit if you want me to, but we've
19 sampled them.

20 MEMBER COYNER: So those provide another level
21 of security, essentially, for monitoring the groundwater
22 on not -- wait a minute. Are they screened at a totally
23 different depth than where contamination of the

01-20-10 SEC Ponderosa Hearing Volume II.txt
24 groundwater might be happening, in your opinion, or do you
25 know how deep they are and where the screens are?

CAPITOL REPORTERS 352 (775) 882-5322

1 THE WITNESS: If I may, Commissioner,
2 monitoring wells are constructed to straddle -- for the
3 screens to straddle the top of the water table, to
4 allow -- they straddle the top of water table to allow for
5 seasonal fluctuations, and that's also showing -- would
6 show the first potential detection of any type of
7 constituents we're looking for at the top of the water
8 table.

9 Production wells have much longer lengths of
10 screening, because we're trying to get as much water into
11 the well efficiently as possible.

12 MEMBER COYNER: And it shows that the body is
13 being moved and so forth --

14 THE WITNESS: Yeah.

15 MEMBER COYNER: It would be -- it's not really
16 suitable as a sampling point. You can sample it, but what
17 does it really mean?

18 THE WITNESS: You know, I think I agree what
19 you said earlier, Commissioner, that, you know, it's
20 another data point for us to look at.

21 MEMBER COYNER: Stephanie asked you for the
22 cost of a monitoring well. You said 5,000 to 10,000.
23 Given that they're about -- they're planned to be 135 feet
24 deep, based on the schematic, it's probably close. I
25 mean, I don't know what current drilling costs per foot

CAPITOL REPORTERS 353 (775) 882-5322
Page 38

1 are, but probably in that neck of the woods.

2 Looking at that diagram, you -- and, of
3 course, it's going to vary, because you're going to have
4 to analyze this once you encounter the actual conditions,
5 but you're showing a screened interval from 95 to
6 135 feet, which would be about 40 feet.

7 Do you think that's adequate for a collection
8 column in the groundwater?

9 THE WITNESS: Yes, sir.

10 MEMBER COYNER: It sounds like it is, to me.
11 I would note it says, "the two new monitoring wells," up
12 here indicate -- probably needs to say four, just as a
13 point of reference, based on the fact that you're
14 proposing four of them.

15 Again, back to my favorite tables. If I look
16 at the surface table versus the groundwater table, if
17 you'd scan that list of stuff that we're checking on --
18 and which of those would be, in your opinion, the most
19 potentially hazardous to human health in that list of
20 things, and just sort of in a general way?

21 I mean, I -- nitrogen versus ammonia, versus
22 phosphorous, versus fecal coliform. If I was to look at
23 those five things, which one would be -- which one would
24 you most not like to drink, given some contamination?

25 THE WITNESS: I never thought about that.

1 which one would I like to drink?

2 MEMBER COYNER: Not like to drink. I'm trying
3 to get a feel for which of those "versus" in the
4 groundwater -- we're looking at pH, which is pure acid.
5 That wouldn't be so good. Chlorides, nitrate, total
6 nitrogen, total dissolved solids. Nobody likes to drink
7 water with lots of dissolved solids in it.

8 But I guess here -- I'm trying probing a
9 little bit here on the fecal coliform. It's my impression
10 that fecal coliform in your water is pretty hazardous to
11 your health.

12 THE WITNESS: Going back -- my -- my well at
13 home, I drink more than a thousand TDS water. Even --

14 MEMBER COYNER: Good strong bones.

15 THE WITNESS: What?

16 MEMBER COYNER: It makes good strong bones.

17 THE WITNESS: So I'm over -- my well is over
18 the drinking water standard at home, and we drink that.
19 okay?

20 You know, in terms -- I really wouldn't be
21 concerned, myself, personally, about consuming any of
22 these unless it was an acid. And the nitrate does
23 actually have the standard in it, in Table 1.2. It
24 actually has the 10-milligram-per-liter standard that has
25 to be met.

355
CAPITOL REPORTERS (775) 882-5322

1 MEMBER COYNER: well, okay. I guess I'm kind
2 of dancing and shadow boxing with you. I think fecal
3 coliform would be pretty bad. If I had in my well I would
4 be really concerned about it, I have a level of it that

5 was potentially hazardous to me.

6 And we're not requiring it in the groundwater
7 analysis, and I guess, if I recall correctly, it's because
8 the expert opinion was that chlorides are the proxy for
9 fecal coliform. I think that's what I heard yesterday
10 that.

11 THE WITNESS: And I would add that chlorides
12 would be the --

13 MEMBER COYNER: I see people shaking their
14 heads in the back.

15 THE WITNESS: Chloride would be the proxy for
16 any of these or constituents, too.

17 MEMBER COYNER: I think there's a difference
18 of opinion in the room if I read the head shakes.

19 I'm a little bit concerned that there's not
20 fecal coliform in this table, and that's not your job,
21 because we wrote the table. The State did.

22 How much -- let me ask you this: How much
23 does a fecal coliform sample cost, additionally, or in
24 water, any idea? Will it be a couple of bucks, 10 bucks,
25 a hundred bucks?

CAPITOL REPORTERS ³⁵⁶ (775) 882-5322

1 THE WITNESS: It's not the cost, because I
2 don't -- fecal coliform, we don't really -- I think we
3 sample one drinking water supply system for fecal coliform
4 in all the sampling our office does.

5 And the analysis isn't that expensive, but
6 given especially where the dairy is, your holding time for
7 fecal coliform analysis is only six hours. So, you know,

8 to be able to collect that sample in Amargosa, and get it
9 to a lab, and get it all analyzed within six hours, I
10 think is more of a logistical issue than worrying about
11 the cost of the sample, itself.

12 Plus, as I believe I said earlier this
13 morning, Commissioner, the EPA, you know, decided that
14 pathogens weren't an issue, in the CAFO rule.

15 MEMBER COYNER: well, we do analyze it for the
16 surface green water, so we're essentially -- we're
17 accomplishing -- it somehow got down there in Amargosa
18 valley, because it's required in the surface water.

19 So again, I am trying to kind of pry out of
20 you, of these things that we're looking for, that might be
21 harmful to the residents down there in Amargosa valley,
22 and providing them a little bit of assurance that we're not
23 putting stuff in the groundwater that are potentially
24 getting contamination in groundwater.

25 I hear you say fecal coliform is not that big

357
CAPITOL REPORTERS (775) 882-5322

1 a deal. In other words, that wouldn't be one that we
2 should -- if we said, "put fecal coliform in that table,
3 as part of an amendment to this plan," would it be a big
4 issue to you or not, other than the analysis issue with
5 getting the sample to Vegas and what have you?

6 THE WITNESS: It would be something that we'd
7 have to consider in a different way than we do the rest of
8 our groundwater samples.

9 MEMBER COYNER: All right. Fair enough.
10 Let's talk about groundwater flow rates. I am

11 a geologist, not a hydrologist, but I see on Exhibit --
12 let's go back to the -- I guess it's in the packet, on
13 page -- I've got to find the page with the flow rate on
14 it. It's an arrow -- here it is, page 3.

15 Local Potentiometric -- say that fast in
16 Amargosa Valley -- Potentiometric Surface Contour Map.
17 Groundwater flow direction hydrologic gradient .006 feet
18 per feet. That's 6,000 there's of a foot. That's about
19 (witness indicating) that much. It's a wienie, wienie,
20 wienie little bit.

21 Explain to me, if that's a lot, a little, not
22 so much, and where I want you to end up is: If I put a
23 drop of contaminant, that's leaking through one of those
24 ponds, how fast does it get to a monitoring well, off the
25 property, Antonio's house down there in -- what's the name

358
CAPITOL REPORTERS (775) 882-5322

1 of the town again, Antonio, Little Nevada?

2 MR. MARTINEZ: Little Nevada Subdivision.

3 MEMBER COYNER: Little?

4 MR. MARSHALL: Little Nevada Subdivision.

5 MEMBER COYNER: It's an actual name?

6 MR. MARTINEZ: Originally, since the --

7 MEMBER COYNER: How fast -- how fast is the
8 groundwater moving?

9 THE WITNESS: I was trying to pay attention to
10 all of the questions you were asking at that time, and so
11 let me try and go back to the first one that remember if
12 you may.

13 MEMBER COYNER: Sure.
Page 43

14 THE WITNESS: The hydrologic gradient of .006
15 feet per feet is not a groundwater flow rate. It's the
16 gradient. It's the slope of the water table. So this is
17 a very, very flat water table. So we -- there's nothing
18 in these maps that talks about groundwater flow rate.

19 MEMBER COYNER: Do you have an estimate of
20 what the groundwater flow rate is, based on the work
21 that's been done there or --

22 THE WITNESS: I know that the USGS looked at
23 vertical seepage under alfalfa fields in the Amargosa
24 valley. And please bear with me. If my memory is
25 correct -- I don't have the document in front of me, but,

359
CAPITOL REPORTERS (775) 882-5322

1 you know, we're on the order of, you know, significantly
2 slower than a foot per day vertical -- per year, a foot
3 per year.

4 MEMBER COYNER: I mean, we've got these big
5 blue arrows on the packet that you handed out, but I don't
6 know if that means hang on, Nelly, because tomorrow it's
7 going to be in my well or a hundred years from now it's
8 going to be in my well.

9 That's a little bit -- something I'm thinking
10 about with regards to proximity to the receptors.
11 There's, lots of times, in contamination we deal with, is
12 there a lot of contamination, or is it a little bit of
13 contamination, and is it moving really fast or is it
14 moving really slow? That's sort of the things we've got
15 to --

16 THE WITNESS: With a very flat -- I believe
Page 44

17 the map that you showed me, those arrows, ones there, are
18 just showing the direction of the groundwater flow --

19 MEMBER COYNER: Yes.

20 THE WITNESS: -- not a groundwater flow
21 velocity. So --

22 MEMBER COYNER: So we --

23 THE WITNESS: So in terms of where the water
24 would be flowing to, if we go to the last second to last
25 page or third -- this figure, here, with the groundwater

360
CAPITOL REPORTERS (775) 882-5322

1 flow vectors?

2 MEMBER COYNER: Yes.

3 THE WITNESS: Okay. What this shows is that
4 the cone of depression under -- beneath the dairy is
5 affecting the, let's say, static groundwater flow
6 directions. We're pulling the water back towards the
7 dairy. The Nye County Well Head Production Map,
8 Potentiometric Surface Map, show that same cone of
9 depression, shows those contours underneath the dairy.
10 And we're showing something analogous to that with this.

11 So in terms of flowing off-site, Commissioner,
12 we believe that the dairy's groundwater production -- and
13 based on the way that the model out puts, we would be
14 pulling it back forwards the dairy. It wouldn't be
15 leaving the dairy site.

16 MEMBER COYNER: Which is a positive?

17 THE WITNESS: I agree.

18 MEMBER COYNER: And especially when you think
19 about if the dairy since -- the dairy's been there -- I

20 forgot. I've got that somewhere. Twenty years?

21 THE WITNESS: Seventeen years.

22 MEMBER COYNER: Seventeen years? So some
23 contamination could have happened pre- -- pre- to this
24 permit. This permit, really, I think, looks at stuff
25 going forward, in terms of containment.

CAPITOL REPORTERS ³⁶¹ (775) 882-5322

1 It could be historic groundwater contamination
2 there, which would need to be sorted out. But in one
3 case -- or at least in this evidence on this data, that's
4 a good thing, because if there is historic contamination,
5 it may be flowing back towards the dairy, where we can
6 contain it and deal with it. Fair statement?

7 THE WITNESS: Correct.

8 MEMBER COYNER: Okay. How many employees are
9 there at the dairy, if you know?

10 THE WITNESS: I don't know.

11 MEMBER COYNER: Round number? I think we can
12 maybe get to that. There is an Annual Review and Permit
13 Fee on page 10 of 21. Again, Mr. Holmgren, I'm sure, can
14 answer this, but do you happen to know what it is? I'll
15 ask you.

16 THE WITNESS: I don't know what the permit fee
17 is.

18 MEMBER COYNER: Okay. So you're making notes,
19 Bruce?

20 Permit violation. We have a self-reporting
21 system in Nevada. So it's kind of a trust but verify.
22 Ronald Reagan said that; didn't he?

23 Are you aware, since '07, when this was
24 issued, of any permit violations that the dairy's reported
25 to the NDEP? I can go to Bruce and find that out, too.

CAPITOL REPORTERS ³⁶² (775) 882-5322

1 So --

2 THE WITNESS: Other than perhaps maybe a
3 report or two being turned in late, I don't know -- I'm
4 not aware of any violation.

5 MEMBER COYNER: Timing issues and so forth.

6 But let me step you back to page 4 of Exhibit
7 20, at the bottom of the table. And it's a little bit of
8 a picky point. I'm not sure it's going to influence my
9 decision one way or another, but I still want to point
10 out, it said, "The permittee may stop monitoring MW-1 upon
11 lining" -- you know where I am?

12 THE WITNESS: Yes, sir.

13 MEMBER COYNER: Sorry -- "lining the Dairy 1
14 pond system, providing documentation to the Division that
15 MW-1 has been properly abandoned, as required by Part
16 1-A-27," and so -- so essentially that first one is a
17 must.

18 I think I heard you say it hasn't been
19 P and A'd yet, in three years. So is MW-1 -- I know it's
20 dry. I heard testimony that there's no longer water in
21 the well, but has it been P and A'd?

22 THE WITNESS: No, it will be P and A'd once we
23 bring a rig on site.

24 MEMBER COYNER: So at this point it hasn't
25 been P and A'd?

1 THE WITNESS: Correct.

2 MEMBER COYNER: That's in violation of this
3 permit. Just a small point, because it said you couldn't
4 stop monitoring until it was properly abandoned.

5 Now, I understand you couldn't monitor,
6 because there was no water in it well. So it's a
7 chicken-egg thing. But in particular I would call that a
8 violation of a permit. Being a little picky, but true,
9 though, right?

10 Or don't you agree with that? And I don't
11 even know how to get around "and the groundwater total
12 nitrogen concentration at MW-1 does not exceed the
13 background total nitrogen level." I guess you'd have to
14 go back to the last sample that was taken before it went
15 dry.

16 THE WITNESS: That's what's holding me up
17 responding to you is that very end of the sentence.

18 MEMBER COYNER: Because you don't have the
19 ability to do that, because there was no water in the
20 well.

21 THE WITNESS: Correct.

22 MEMBER COYNER: We mentioned -- I mentioned
23 that the P.E. stamp and so forth for the lining design,
24 and that was what was done rather than -- I think there
25 was three choices back when Ms. Tanner was asking you

1 those questions about the -- you chose that alternatively,
2 and there were three alternatives. How many -- help me
3 here.

4 MS. TANNER: Under the Schedule of Compliance.

5 MEMBER COYNER: Yeah.

6 MS. REYNOLDS: Page 10, 1-A --

7 MEMBER COYNER: There we go. Sixty days from
8 the permit effective date, and you chose to do a P.E.
9 stamp on the design rather than installing monitoring
10 wells and so forth. And I'd say, yeah, that's a good
11 thing, but, again, I'd want your concurrence that the
12 design only is effective going forward. Obviously it
13 wouldn't have to be -- you couldn't deal with historic
14 contamination.

15 THE WITNESS: Correct.

16 MEMBER COYNER: Okay. We talked about the
17 P-A. We talked about the total cost of the analysis on
18 fecal coliform, and we talked about the exhibits. That's
19 it. Done.

20 CHAIRMAN DODGION: Are you done?

21 MEMBER COYNER: I'm done.

22 CHAIRMAN DODGION: I've got a kind of a
23 hodgepodge of questions here for myself. I'll start off.

24 Acronyms bug me, and I get confused, mixed up.
25 NRCS is who?

CAPITOL REPORTERS 365 (775) 882-5322

□

1 THE WITNESS: It's the old Soil Conservation
2 Service. It's the Natural Resources Conservation Service.

3 CHAIRMAN DODGION: And the CNMP, I know what
4 that stands for --

5 THE WITNESS: Okay.

6 CHAIRMAN DODGION: -- was prepared to submit
7 to NRCS, because there's some funding available --

8 THE WITNESS: Commissioner, Mr. Chairman,
9 dairy producers and all sorts of different type of
10 agricultural producers, nationwide, are eligible for
11 EQIP -- another acronym you won't like -- Environmental
12 Quality Initiatives Program.

13 So you can apply for that, if you're an
14 agricultural producers. Certainly nationwide the funding
15 is available, and it's basically delegated on a
16 county-by-county basis. And so if you want -- and it's a
17 type of cost share funding. So if you want to apply for
18 EQIP funds, and to obtain them, you have to complete a
19 CNMP, a non-regulatory document or -- using more
20 acronyms -- from NRCS. I'm sorry.

21 CHAIRMAN DODGION: The CNMP, as required by
22 NRCS, has requirements in it that are different -- are in
23 addition to requirements from the NMP, required by the
24 NPDS permit. I think I was jumping around a little bit.

25 You -- the permit requires soil samples in the

CAPITOL REPORTERS ³⁶⁶ (775) 882-5322

□

1 field on different frequencies based on the crop.

2 THE WITNESS: Yes, sir.

3 CHAIRMAN DODGION: I believe you testified
4 that you -- at that time dairy has gone to annual testing.

5 THE WITNESS: Correct.

6 CHAIRMAN DODGION: And that was done why?
7 THE WITNESS: Because we wanted to be able to
8 better manage the nutrient application on our fields, and
9 have an understanding what's going on, on a yearly basis,
10 rather than every three or five years. It's a
11 proactive --
12 CHAIRMAN DODGION: I agree. It's very
13 proactive.
14 There was a letter -- I believe it was
15 attached to the documents that I believe recommended that
16 you go -- this was from someone in New Mexico? Let me see
17 if I can find that.
18 THE WITNESS: If I may, without committing
19 myself, I think it may be a letter from Dr. Robert Flynn
20 at New Mexico State University. Is that what you're
21 looking for?
22 CHAIRMAN DODGION: Possibly. It's a short
23 one-page letter.
24 THE WITNESS: I'm -- yes.
25 MS. REYNOLDS: Do you want the letter? Is

CAPITOL REPORTERS ³⁶⁷ (775) 882-5322

□

1 this what you're looking for?
2 CHAIRMAN DODGION: All right.
3 MR. BUTLER: I think it was attached to one of
4 our briefs.
5 MS. REYNOLDS: Yes.
6 CHAIRMAN DODGION: It was, and --
7 MS. REYNOLDS: It's here. It was Exhibit 2 to
8 your brief.

9 CHAIRMAN DODGION: Not reading this thing
10 totally, but what I recall is that it recommended annual
11 sampling.

12 THE WITNESS: I have no reason to disagree
13 with what you're saying, Commissioner.

14 CHAIRMAN DODGION: But it is definitely
15 proactive, in my mind, that -- that you do that. But the
16 permit still would only requires three years on certain
17 crops and perhaps a longer interval.

18 THE WITNESS: Three years on annuals and five
19 year on perennials.

20 CHAIRMAN DODGION: Since you were doing it on
21 an annual basis, you wouldn't mind if it was incorporated
22 into the permit as an annual requirement? You probably
23 don't have the authority to answer that question.

24 THE WITNESS: Thank you, Mr. Chairman.

25 CHAIRMAN DODGION: You use a combination of

CAPITOL REPORTERS ³⁶⁸ (775) 882-5322

1 fresh water and processed effluent in the fields. Is
2 that -- does that combination add up to the million
3 gallons per day or is a million gallons per day processed
4 effluent, and irrigation is somewhat -- irrigation --
5 total irrigation water is more than that?

6 THE WITNESS: Total irrigation water is a sum
7 of the green water applied and groundwater from the wells.

8 CHAIRMAN DODGION: That million gallons a day
9 only applies to your green?

10 THE WITNESS: Yes, sir.

11 CHAIRMAN DODGION: So the total irrigation is

01-20-10 SEC Ponderosa Hearing Volume II.txt
12 how much plus or -- how much more?

13 THE WITNESS: We have 835 acres under the
14 permit for land application. At five-acre-feet-per-acre
15 duty that's around 4,000 acre-feet, and a million gallons
16 a day is three-acre-feet a day. So that's maybe 1100
17 acre-feet.

18 So, you know, we're looking at probably -- you
19 know, 3,000-some-odd acre-feet of fresh water, another --
20 whatever contribution the green water is, between 700,000
21 and the permitted -- maybe 1100, 1200-acre-feet.

22 CHAIRMAN DODGION: The fact that you use that
23 much additional irrigation water provides a lot of
24 flexibility for storing or using the green water.

25 THE WITNESS: Yes, sir.

369
CAPITOL REPORTERS (775) 882-5322

1 CHAIRMAN DODGION: Perhaps you can answer
2 this, and perhaps you can't. The nearest residence to the
3 dairy, we had testimony from someone that it was a mile,
4 but I have recollection from previous testimony or
5 discussions that it was some -- there was someone living
6 much closer than that.

7 THE WITNESS: There's dairy employees who live
8 on the dairy, and then the nearest residence to the north
9 and west is about a mile and quarter away. And there's --
10 there more res -- I have no idea how close -- I shouldn't
11 say "no idea," but there's no residences within a mile or
12 two down-gradient, to the south or east of the dairy.

13 CHAIRMAN DODGION: So the property -- perhaps
14 that exhibit there.

15

THE WITNESS: Yes, sir.

16

MR. BUTLER: This one?

17

CHAIRMAN DODGION: No, the one that's on the

18

board.

19

MR. BUTLER: Oh.

20

CHAIRMAN DODGION: All right. To the left of

21

the bottom of the fields, is that owned by Ponderosa, or

22

is that public land, or is it privately owned land?

23

THE WITNESS: I just know that that red

24

line --

25

MR. BUTLER: This?

370

CAPITOL REPORTERS

(775) 882-5322

□

1

CHAIRMAN DODGION: Yeah.

2

THE WITNESS: On the west side of the two

3

Gilligan pivots is the dairy property boundary, and I

4

don't know the ownership in Section 16.

5

MR. BUTLER: I can give you an answer if you'd

6

like it.

7

CHAIRMAN DODGION: I would like it.

8

MR. BUTLER: It's BLM land.

9

CHAIRMAN DODGION: And on the other side?

10

MR. BUTLER: BLM. Some of this -- you can see

11

some of this was -- was BLM land to begin with, but the

12

property that you're asking about, on both sides, is BLM

13

land.

14

CHAIRMAN DODGION: So it's not subdivided and

15

it's looking at someone --

16

MR. BUTLER: As I understand it, it's not even

17

in the Land Use Plan. It's not available for disposal.

18

19

20

21

22

23

24

25

MR. BUTLER: And it would take an act of Congress.

CHAIRMAN DODGION: Okay.

MR. BUTLER: It is not -- it is BLM land, and it's not subject to a disposal.

CHAIRMAN DODGION: Thank you.

Mr. Marshall, you were asking about licenses

371

CAPITOL REPORTERS (775) 882-5322

□

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

of Bruce Holmgren, and he wasn't able to answer that, but the question that I have about permits: Does the dairy have to have a permit from the State Health Division?

THE WITNESS: To the best of my knowledge, no, but I've never dealt with the State Health Division, and I don't know how that -- how the hierarchy of NDEP is with in the bureaucracy.

CHAIRMAN DODGION: And the policy -- then you don't know if the State Health Division makes inspections.

THE WITNESS: I do not know.

CHAIRMAN DODGION: Okay. You show, on one of the maps, and maybe this one over here will do, as well, where the dead animal composting facility is. Where is the main composting facilities?

THE WITNESS: If I may, it's here, where it says, "Compost Area."

CHAIRMAN DODGION: That would be a clue, right?

There was question about the number of dead animals, which you declined to estimate, but I recall

01-20-10 SEC Ponderosa Hearing Volume II.txt
21 seeing something like 390 on an annual basis.

22 THE WITNESS: You know, one a day, one or two
23 a day is probably -- you know, depending on how it's
24 operated, but a one day is a reasonable number.

25 CHAIRMAN DODGION: Is that dead animal

CAPITOL REPORTERS 372 (775) 882-5322

1 composting facility a source of noxious odors?

2 THE WITNESS: I don't believe so.

3 CHAIRMAN DODGION: It's handled by placing the
4 animals in a pit?

5 THE WITNESS: The animals are composted with
6 dry manure, and it's a long trench, if you may.

7 CHAIRMAN DODGION: So they're placed in a pit,
8 covered in, and mixed with manure, and the process is
9 controlled by a permit from DEP, the Bureau of Waste
10 Management, I believe. And it is permitted, right?

11 THE WITNESS: The compost facility, the
12 commercial compost facility is permitted under the Solid
13 Waste Bureau. The dead animal compost area is under this
14 permit. And we've got -- on the east side of it, we --
15 you know, I use the word, "trench." That's sort of a
16 geometry, but we have a road adjacent to it, to the east,
17 and it's a berm that the animals are composted adjacent
18 to.

19 CHAIRMAN DODGION: Does that road have public
20 access?

21 THE WITNESS: No.

22 CHAIRMAN DODGION: Does that answer your
23 question?

24 I guess I don't have anything else at this
25 time.

CAPITOL REPORTERS 373 (775) 882-5322

1 MEMBER ZIMMERMAN: I just have a couple more
2 questions.

3 CHAIRMAN DODGION: All right.

4 MEMBER ZIMMERMAN: The tests that you do on
5 the irrigation water, or the water wells that you have,
6 that are very deep -- it looks like they're about -- is
7 that about 2,000 feet deep?

8 THE WITNESS: No.

9 MEMBER ZIMMERMAN: No?

10 THE WITNESS: They're a few hundreds of feet
11 deep.

12 MEMBER ZIMMERMAN: A few hundreds of feet. Do
13 you turn those test results in to the State?

14 THE WITNESS: If they're required by the
15 permit, yes.

16 MEMBER ZIMMERMAN: Okay. And I think they
17 are. Does the dairy understand the background of total
18 nitrogen in the area, underneath the dairy?

19 THE WITNESS: We have historical data from
20 older monitoring wells, and when we complete our voluntary
21 monitoring program, we'll have an up-gradient monitoring
22 well near Mecca Road to the north that will provide the
23 up-gradient background.

24 MEMBER ZIMMERMAN: So you do have some
25 historical data that gives you background levels for total

CAPITOL REPORTERS 374 (775) 882-5322
Page 57

1 nitrogen?

2 THE WITNESS: Yes, ma'am.

3 MEMBER ZIMMERMAN: Okay. That was it for me.

4 MEMBER COYNER: That's it.

5 CHAIRMAN DODGION: Okay. You're excused.

6 THE WITNESS: Thank you.

7 MR. BUTLER: Are you going to allow any
8 further questions?

9 CHAIRMAN DODGION: well, I was only going to
10 allow further questions from this panel following the
11 opportunity -- I guess you're going to have an
12 opportunity.

13 MR. BUTLER: What I have is some of the
14 answers to your questions which I think I could jerry rig
15 through Jay, but if you -- and you can take these -- these
16 are representations from my client, and you can take them
17 into consideration or not.

18 The regulating authority and the suspecting
19 authority is the State Dairy Commission. That's how
20 the -- that is the regulatory body.

21 The -- there are -- designed in the record,
22 there are design documents for the dead animal composting
23 facility. And you can look at those, if you have
24 questions about how it's constructed. It is -- Jay said a
25 trench, but I think he misspoke.

375
CAPITOL REPORTERS (775) 882-5322

1 CHAIRMAN DODGION: He explained the berm.
Page 58

2 MR. BUTLER: Okay. It's above ground. And
3 the only other thing is -- my client's concerned about the
4 allegation that they were operating without a business
5 license. I have the business license. Since we objected
6 to it, the questions as being irrelevant, I expect you
7 won't admit it, but for whatever purpose it serves, my
8 client does have a -- there is a business license in the
9 name of Ponderosa Dairy.

10 CHAIRMAN DODGION: Thank you.

11 MR. BUTLER: Thank you very much.

12 CHAIRMAN DODGION: Now you're excused.

13 THE WITNESS: Thank you.

14 CHAIRMAN DODGION: Do not leave the premises.
15 I think at this time let's take ten minutes,
16 to 10:30.

17 (Proceedings recessed from 10:19 a.m. until 10:30 a.m.)

18 CHAIRMAN DODGION: It looks like we have
19 everyone back, and it's approximately 10:30. So we will
20 be back in session.

21 At this time we're ready for rebuttal.
22 Mr. Marshall, your turn.

23 MR. MARSHALL: Paper is mounting up.

24 CHAIRMAN DODGION: Yes.

25 MR. MARSHALL: We'd like to call Bruce

376
CAPITOL REPORTERS (775) 882-5322

1 Holmgren, please.

2 BRUCE HOLMGREN,
3 having been previously duly sworn,
4 was examined and testified as follows:
Page 59

5 DIRECT EXAMINATION

6 BY MR. MARSHALL:

7 Q You can't have my tea this morning.

8 A Well, if I start coughing, I'll go back and
9 get mine.

10 Q I'm handing you the State's Exhibit Number 20,
11 which is the permit, and I just want to ask you some
12 questions about your testimony.

13 First, let's turn to -- this is on page 5 of
14 21, and particularly at Table 1-3-D. That's the listing
15 of fields in which the manure and gray water can be spread
16 out legally. Is that -- is that what that table is?

17 A That's correct. It's a table showing the crop
18 rotations over a six-year period.

19 Q And it also identifies where they -- what
20 fields they --

21 A Which fields and the acreage of each of those
22 fields.

23 Q Right. And I'm going to use our Exhibit A-3,
24 which is this large map here, but it's -- the close-up
25 version is up on the chart there of -- and those 11 fields

377
CAPITOL REPORTERS (775) 882-5322

1 that are identified there, are those the 11 green fields
2 identified in the --

3 A Yes, they are.

4 Q Okay. And this was a document submitted by
5 Glorieta to the -- it came out of your files, and it has a
6 lot of other green fields associated with it. Do you know
7 why -- at one point were they proposing to distribute

8 manure on those additional fields? Are you aware of that?

9 A I am not aware of why the ones in between are
10 green. I am familiar with Beverly Hills Dairy.

11 Q Which is the green to the far left?

12 A Yes.

13 Q Okay. And so deposition of manure on these
14 fields would not be consistent with a permit?

15 A Not if they're owned by the same owner as the
16 dairy --

17 Q Okay.

18 A -- the same corporate entity.

19 Q Or leased, or have any sort of --

20 A Well, I think it's under the control of the
21 permittee, is the terminology. So if they were somebody
22 else's fields, they could be buying or distributing manure
23 to them.

24 Q And they could then go out and deposit manure
25 on those fields on a regular basis, if they're buying on a

1 regular basis?

2 A It's not regulated by the permit.

3 Q Could you turn to the front page of the
4 permit, number 21? And this is a permit to discharge
5 manure and processed waste water to the groundwater and
6 Amargosa River via storm overflow; is that correct?

7 A That's correct.

8 Q Okay. So the permit, itself, contemplates
9 discharge of manure and processed waste water to those
10 receiving waters?

11 A Well, it's not issued as a zero-discharge
12 permit. That's correct.

13 Q Okay. I'd like to -- darn, Jay has my packet
14 of exhibits.

15 (Discussion off the record)

16 MR. MARSHALL: Here we go.

17 Q This is a package of materials that the dairy
18 was using for their groundwater monitoring program, and if
19 you could turn to --

20 A I was trying to show them which one we were
21 discussing.

22 Q Oh. Turn to the actual -- this is their
23 proposals, and --

24 A It doesn't have a page number, but it's the
25 same as the --

379
CAPITOL REPORTERS (775) 882-5322

1 Q It's the same as for the monitoring. And I
2 guess what I'm interested in getting your opinion on is
3 the interplay between the irrigation wells and the
4 monitoring wells, and the influence of the irrigation
5 wells on the monitoring wells.

6 Can you, for example, look at the last page of
7 that document, which is the cone of depression --

8 A Second to last.

9 Q Second to last page, and that shows -- did you
10 hear Mr. Lazarus' testimony?

11 A Yes, I did.

12 Q So fundamentally what they're saying is
13 there's a cone of depression that's drawing groundwater

14 towards those --

15 A As you'd --

16 Q -- those pumps --

17 A -- expect with a large irrigation, right.

18 Q And so we've got -- are you familiar where
19 the -- I think it's the blue crosshatched circles, which
20 are the domestic and irrigation wells, that are indicated
21 on the map, and, for example, there's one located right on
22 the compost area, on the southwest corner of the storage
23 ponds.

24 In your opinion, is that going to influence,
25 at all, the volatility of that -- of Monitoring Well 1-A,

380
CAPITOL REPORTERS (775) 882-5322

1 for example, as to whether or not it's going to pick up
2 leakage from the lagoons that are closer to the -- it
3 looks like a little closer to the monitoring -- or the
4 pumping well than the monitoring well?

5 A Well, as Jay explained, the -- other one is
6 more of a regional map, and they did a detailed study of
7 the localized conditions. I don't have the information on
8 where these wells are screened, whether they're in the
9 same aquifer.

10 Q Would it be something that you'd want to look
11 at, though, those --

12 A The --

13 Q -- something that was probably --

14 THE REPORTER: I'm sorry. I'm sorry. I can't
15 hear the witness and the whispering in the back at the
16 same time.

17 MR. MARSHALL: I'm sorry. Did you catch the
18 question?

19 THE REPORTER: (Reading back) "Would it be
20 something that you'd want to look at, those" --

21 BY MR. MARSHALL:

22 Q -- when you were examining whether it is an
23 ineffective monitoring plan, the influence of those
24 irrigation wells on the monitoring wells, themselves?

25 A Yes, that would be something that would be

381
CAPITOL REPORTERS (775) 882-5322

1 looked at.

2 Q Okay.

3 A I was not with the Bureau of Water Pollution
4 Control when this monitoring plan was submitted. I'd
5 moved on to the Mining Bureau by that time.

6 Q Greener and different things, perhaps.

7 A Different, yes.

8 Q I believe you testified that the -- I think
9 there's maybe some questions from some of the Commission
10 members regarding a permit term that said that NDEP can
11 impose additional or monitoring wells as a minor
12 modification.

13 I'm handing you permit again Exhibit 20, page
14 4 of 21. I think it's Note 1. I think there's a
15 discussion about why it was viewed as a minor
16 modification. And you testified that, really, if there
17 was going to be monitoring you wanted to have it done
18 right away --

19 A Correct.

20 Q -- rather than going through a permit
21 modification that would require public notice and input?

22 A That's correct.

23 Q Okay. Does the State have authority to order
24 monitoring regardless of this condition, if it felt
25 appropriate?

CAPITOL REPORTERS ³⁸² (775) 882-5322

1 A Yes. I feel that we -- the State does have
2 that authority. The -- it was put in there for
3 clarification. This is an NPDS permit, and their rules
4 are a little bit different. They're very strict on what
5 can be considered a minor modification versus what's in
6 the State Groundwater Permit.

7 Q Okay.

8 A So this was put in for clarification, to make
9 sure that EPA understood that we were using our authority
10 under the State Groundwater Program and not necessarily
11 being held to the standards for the NPDS program, if we
12 felt additional wells were necessary.

13 Q So I guess what I'm getting at is that the
14 State could require monitoring in the short term, yet
15 still process a permit amendment, and to allow public
16 participation in the development of the full plan, if
17 there was an immediate need for monitoring?

18 A It probably would not be done that way,
19 because we would have made that determination.

20 Q I guess I'm asking --

21 A It would already be in place.

22 Q -- would it be possible?

23 A (No audible response).

24 Q Do you have the flexibility --

25 A These -- these permits are only issued for

383
CAPITOL REPORTERS (775) 882-5322

1 five years.

2 Q Right.

3 A So the monitoring plan would be reviewed at
4 each permit renewal.

5 Q And which is every five years?

6 A Every five years.

7 Q Okay.

8 A Which, this one, is two years into it already.

9 Q Can you turn to -- now I want to you turn to
10 Exhibit 23, I believe. Yes, State's Exhibit 23. Can you
11 describe for me what that document is?

12 A It's the Bureau of Water Pollution Control's
13 approval of the CNMP, Comprehensive Nutrient Management
14 Plan, back in January 2006.

15 Q Okay. So I want to ask you a couple of
16 questions about that. Now, first of all, it's the
17 approval of the comprehensive nutrient management plan,
18 and I --

19 A That's the document that was submitted to us,
20 yes.

21 Q Okay. So the State is, in fact, approving the
22 Comprehensive Nutrient Management Plan?

23 A They're approving the Nutrient Management Plan
24 portions of the Comprehensive Nutrient Management Plan.

25 Q Okay. But --

1 A It doesn't say -- it does not -- this letter
2 does not specify that, but we don't have time to review
3 every -- unnecessary parts of the document.

4 Q Okay. And what were the parts of the document
5 that were not reviewed?

6 A There's probably feed management, things like
7 that, that really are not part of the NPDS requirements.

8 Q And so would you say the vast bulk of the --

9 A The document was -- was reviewed, yes.

10 Q Okay.

11 A There's nine minimum elements to the Nutrient
12 Management Plan.

13 Q Okay.

14 A Those would have been reviewed. Other than
15 that, items may not have been reviewed.

16 Q All right. And could you turn back to the
17 permit on page -- let's see -- Exhibit 20. And -- and
18 page 5, and I -- I-A-3 or 1-A-3, the Nutrient Management
19 Plan, under the first body of that it says -- and I'll
20 speak slowly.

21 "The NMP shall be prepared in accordance with
22 Natural Resource Conservation Service, Conservation
23 Practice Standard Code 59, Nutrient Management, June 2002
24 or more recent, and NRCS Conservation Practice Standard
25 Code 633, Waste Utilization, October 2003 or more recent,"

1 and then it goes on, but that's what I want to focus on.

2 A Yes, sir.

3 Q Is that a correct -- so I understand it that
4 through this permit, you're requiring that the NMP be
5 designed consistent with Code 590 and Code 633.

6 MR. BUTLER: Objection. That's not what he
7 said.

8 MS. TANNER: And I'm going to object, because
9 this matter was fully gone -- covered on -- during the
10 case in chief. This is not a new issue. We've already
11 gone over this testimony.

12 MR. MARSHALL: No, I think there was
13 testimony --

14 MS. TANNER: I specifically asked him these
15 question on -- in my case on Direct, so Counsel had the
16 opportunity to cross-examine him.

17 CHAIRMAN DODGION: Let me hear what
18 Mr. Marshall has to say.

19 MR. MARSHALL: That -- this is in direct
20 rebuttal to -- whether I choose to do it in cross or in
21 rebuttal testimony, it's rebutting evidence that was
22 provided. And whether -- the testimony was that there
23 is -- what I'm trying to get at is: what is the permit
24 requiring of the applicant here, vis-a-vis how the NMP is
25 constructed.

□

1 Also, these questions have to do with the way
2 that the sentence is phrased, that "it shall be prepared

01-20-10 SEC Ponderosa Hearing Volume II.txt
3 in accordance with" --

4 CHAIRMAN DODGION: I'm going to allow you to
5 continue.

6 BY MR. MARSHALL:

7 Q Okay. So beating a dead cow again, this
8 sentence requires that the applicant shall prepare their
9 NMP consistent with --

10 MR. BUTLER: Objection.

11 MR. MARSHALL: -- Code 5890.

12 MR. BUTLER: He keeps changing the words. If
13 he wants to ask him what does "in accordance with" mean,
14 but Mr. Marshall keeps taking that phrase from the permit
15 and trying to make it say something else.

16 MR. MARSHALL: If you have an objection, you
17 can state the objection.

18 MR. BUTLER: If he wants to ask the witness
19 what it says -- if he wants to ask the witness what it
20 means, or how he applied it, that's fine, but he takes the
21 phrase, turns it, and then asks Mr. Holmgren to agree with
22 it.

23 MR. MARSHALL: I have no problem rephrasing
24 that question.

25 CHAIRMAN DODGION: Please rephrase it again.

CAPITOL REPORTERS ³⁸⁷ (775) 882-5322

□

1 And, Bruce, you understand what the question is, and then
2 you're not being --

3 MR. MARSHALL: I'm not trying to badger you.
4 I'm just --

5 THE WITNESS: I haven't heard the question

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8

yet. So --

BY MR. MARSHALL:

Q All right. Is it your understanding that this -- that this statement requires the Applicant, Ponderosa Dairy, to prepare an NMP consistent with --

MR. BUTLER: Objection. He just did the same thing again.

MR. MARSHALL: I'm not re -- I'm just stating -- asking Mr. Holmgren his understanding. He's free to disagree if he doesn't think that's what that says.

CHAIRMAN DODGION: I agree.

MR. MARSHALL: So can I get in geoscience out?

CHAIRMAN DODGION: Get the question out, and Bruce can answer it.

BY MR. MARSHALL:

Q Apparently we're touching a nerve here. The -- this sentence, as I understand it -- I'm asking if this is your understanding, as well, that it's requiring the permittee, Ponderosa Dairy, to prepare

CAPITOL REPORTERS ³⁸⁸ (775) 882-5322

their NMP in accordance with -- and I interpret that as consistent with -- resources -- excuse me -- Code 590 and Code 633 as published by the National Resource Conservation Service. Is that correct?

A The NRCS documents are guidance documents.

Q Yes.

A This is put into an NPDS permit. So we were focused on the water quality portions of those two

01-20-10 SEC Ponderosa Hearing Volume II.txt
9 documents.

10 Q Does it say that in there, that that's --

11 A No, it does not, but it is in an -- in an NPDS
12 permit.

13 Q Okay.

14 A If this were an air permit, it would have a
15 different title to it.

16 Q Yes. I would agree with that.

17 where I'm going to take you now is to the Fact
18 Sheet, which I think -- proposed action -- there we go.
19 This is Exhibit 18. And turn -- I'll have you turn to
20 page 9 of 10.

21 A 9 of 10.

22 Q For some reason my page numbers are --

23 A 9 of 10 or --

24 Q Under "Nutrients pH, chloride, total dissolved
25 solids, total suspended solids, and fecal coliform," it

CAPITOL REPORTERS ³⁸⁹ (775) 882-5322

1 says, "Monitoring of the nitrogen species," et cetera, et
2 cetera, "and fecal coliform of the discharge is required
3 because there are parameters most likely to be present in
4 the discharge."

5 I think there was some question earlier about
6 what discharge means. Can you -- what -- what's your
7 understanding of that phrase, "discharge"?

8 A Discharge. This is an NPDS permit. A -- with
9 the discharge, it would be a response to storm events
10 greater than the 25-year, 24-hour event, that they were
11 authorized to discharge.

12 Q Okay, but let's go back to the permit again.
13 And it says that they're authorized to discharge to the
14 groundwaters, as well?

15 A Correct.

16 Q But I'm following up on Mr. Coyner's concern
17 that the fecal coliform is not -- you're only requiring
18 discharge to surface waters but not concerned about
19 discharges to groundwater. Is that --

20 A That's because EPA had gone through their BCT,
21 Best Conventional Technology analysis. They had looked at
22 several different methods and decided that land
23 application adequately addressed pathogens.

24 So we're looking at discharges here from the
25 pond system. Not -- not to the fields. And the permit

CAPITOL REPORTERS ³⁹⁰ (775) 882-5322

1 does require fecal coliform analysis of the processed
2 waste water, as well.

3 Q Can you turn back to Exhibit 23, please? And
4 this is the approval document of the -- I'll say NMP. And
5 that was done in January of '06. That's -- that's the
6 date of this letter, right?

7 A That's correct.

8 Q Why wasn't that done as part of the approval
9 of the permit in '07?

10 MS. TANNER: Actually, I'm going to object to
11 this line of questioning. These matters were not raised
12 in the Appellants' case in chief, and they are not
13 appropriate for rebuttal.

14 Issues in regards to whether or not the CMP or

15 NMP was made available prior to approval of the permit,
16 acknowledge was raised in their opening brief, but was not
17 raised in either their case in chief, or in the case in
18 chief of the State, or in the case in chief of the dairy.
19 Thus, it is no longer appropriate to listen to it on
20 rebuttal.

21 CHAIRMAN DODGION: well, we have heard a lot
22 of testimony from a lot of different witnesses, and an
23 awful lot of it had been directed towards the NMP and
24 process of the permit and the permit's contents.

25 And while I agree with you that the way --

CAPITOL REPORTERS ³⁹¹ (775) 882-5322

1 that Mr. Marshall may be covering the same ground again --

2 MS. TANNER: Actually, that's not my
3 objection.

4 CHAIRMAN DODGION: -- I believe it that has
5 been covered, and he is soliciting testimony from
6 Mr. Holmgren in rebuttal of testimony that we have heard.
7 And it's directed towards, I believe, the public
8 participation concerns of the Appellants, and I'm going to
9 allow it.

10 BY MR. MARSHALL:

11 Q So, in other words, this -- are you
12 familiar -- do you know, was there any public
13 participation permitted for, in advance of this approval
14 or consideration? Was the NMP put out for notice and
15 comment on this?

16 A No, it was not. It was a time of changing
17 regulations. The regulations were -- that required the

18 public noticing the Nutrient Management Plan were not even
19 in effect when we put it out to public notice initially.

20 Q Okay. So, in other words, the public didn't
21 have input on your approval of the Comprehensive Nutrient
22 Management Plan?

23 A That is correct.

24 Q Okay.

25 A On the earlier version.

392

CAPITOL REPORTERS (775) 882-5322

□

1 Q Now, you testified --

2 A Now, there was a -- the permit requires
3 submittal of a revised plan, which your client did get
4 copies of.

5 Q The revised ones, though -- but, I mean, as I
6 understand it, your -- your revised -- your revisions were
7 just the -- the terms within the --

8 A But the terms were already in the permit when
9 it went out to public notice.

10 Q Right. So what you're saying is that --

11 A So there was public review of the terms of the
12 NMP.

13 Q The one that's already been approved, right?
14 The same one that was approved in January of '06?

15 A It was put out again, and it called for
16 revision. We were taking public comment on the permit,
17 which had the terms of the NMP in it.

18 Q Okay. So the -- so we're back to the permit
19 now. And so the permit has all the terms of the NMP, in
20 Exhibit Number 20, that -- is that all the terms of the --

21 A Not all the terms, but the terms that -- that
22 the State determined were adequate, that -- and EPA
23 concurred with us.

24 Q Right. The terms that -- or that were
25 different from what was in there?

393

CAPITOL REPORTERS (775) 882-5322

□

1 A No, most of them are the same as what's in
2 there, but we were still putting them out for public
3 comment then, and if we had received comments that
4 identified problems, we could have made modifications.

5 Q With those terms that were put out here?

6 A Correct.

7 Q Okay. And when you say that my clients got
8 copies, when did they get those copies?

9 A When they asked for copies.

10 Q And that was after --

11 A The copy -- the information was available in
12 the office -- in the Carson City office for public review
13 at any time, and it was specifically mentioned in the Fact
14 Sheet that was issued, what, February 2007.

15 Q I'm -- and if I asked this already, please --
16 I'm sure your Counsel will tell me I already have, but
17 did -- did the NMP, in your files, look like that?

18 A Yes.

19 Q That binder?

20 A Yes.

21 Q Okay. Now, you -- you testified that you
22 reviewed all the briefs in this matter, and the reports
23 that were issued to through Mr. Sagady, and none of that

01-20-10 SEC Ponderosa Hearing Volume II.txt
24 caused you concern to relook at or re-examine the permit;
25 is that -- is that correct?

CAPITOL REPORTERS 394 (775) 882-5322

1 A That's correct.

2 Q Okay. So I understand, so you must have
3 reviewed that fairly carefully to make that determination?

4 A well, but it's -- I wouldn't say I reviewed
5 his report carefully. There were other staff that did,
6 yes. It was reviewed by the -- by the Bureau.

7 Q By the Bureau?

8 A Yes.

9 Q Do you -- this is his report that was a part
10 of Exhibit E-1?

11 A Is that --

12 MS. TANNER: And I'm --

13 CHAIRMAN DODGION: Just a minute.

14 MS. TANNER: I'm going to object, and I'm sure
15 I'm going to be overruled, but the --

16 CHAIRMAN DODGION: well, let's not --

17 MS. TANNER: But it is our record, too. So --

18 CHAIRMAN DODGION: Yes.

19 MS. TANNER: So I would say this is an exhibit
20 that has been disallowed by the Commission. If
21 Mr. Marshall has knowledge of what that document says, and
22 wants to ask a question, based upon his knowledge of that
23 document, that's fine, and that's what I took the
24 Commission's ruling to mean.

25 But to cross-examine my witness -- or his

CAPITOL REPORTERS 395 (775) 882-5322
Page 76

1 witness at the moment -- on a report that is not allowed
2 in the record is inappropriate.

3 CHAIRMAN DODGION: All right. I agree with
4 you.

5 MS. TANNER: Thank you.

6 CHAIRMAN DODGION: Your understanding and my
7 understanding of my ruling are the same.

8 MS. TANNER: Thank you.

9 MR. MARSHALL: You got me.

10 CHAIRMAN DODGION: You can ask --

11 MS. TANNER: Yes. Finally.

12 CHAIRMAN DODGION: You can ask him questions,
13 and -- but, again I think --

14 MR. MARSHALL: Yes.

15 CHAIRMAN DODGION: -- we've heard objections
16 about --

17 MR. MARSHALL: Now, is it --

18 CHAIRMAN DODGION: -- new material and --

19 MR. MARSHALL: Yes.

20 CHAIRMAN DODGION: -- we're supposed to be
21 rebutting testimony, previous testimony.

22 BY MR. MARSHALL:

23 Q what -- you -- I believe a number of witnesses
24 have testified that the -- that they couldn't recall or
25 they didn't know whether or not the total amount of

2 CNMP or calculated. Have you ever seen that number
3 produced?

4 A I have seen calculations that were based on
5 probably book values for the nitrogen waste from the cows,
6 yes.

7 Q And do you have any -- do you have any
8 recollection of what that is?

9 A No, I don't.

10 Q And I think it's -- I think they projected
11 there's eight hundred -- or 8,200 milking cows.

12 A Yeah.

13 Q Yeah? And in that -- would it surprise you
14 that that number be generated in the hundreds of tons of
15 nitrogen per year or --

16 A It --

17 Q I'm trying to get a range of --

18 A It would be quite large, yes.

19 Q So the amount of nitrogen that would be
20 produced would be quite large?

21 A Yes.

22 Q So it wouldn't surprise you that it would be
23 in the hundreds of tons as opposed to the tons?

24 A I'm not sure.

25 MR. MARSHALL: Okay. That's all I have.

397

CAPITOL REPORTERS (775) 882-5322

□

1 Thank you.

2 CHAIRMAN DODGION: Recross?

3 MS. TANNER: Thank you.

4 CHAIRMAN DODGION: Do you want to recross your
Page 78

5 own witness here?

6 MS. TANNER: I do have a couple of questions.
7 Now -- and procedurally, I will ask you this, to speed
8 things up: I had to just couple of questions for him, if
9 I were to call him in -- for my rebuttal case. If I'm
10 allowed to ask those now, I would do that.

11 CHAIRMAN DODGION: I'll give you the same
12 latitude that I afforded Mr. Marshall.

13 MS. TANNER: Thank you.

14 CHAIRMAN DODGION: And it would speed things
15 up and we will not have to recall him two or three times.

16 MS. TANNER: Okay. Great.

17 CROSS EXAMINATION

18 BY MS. TANNER:

19 Q Let me get to those questions first. There
20 was some testimony by Mr. Lazarus in regards to what he
21 felt might be some latitude in the permit as far as
22 whether or not Monitoring well 1 needed to be replaced
23 based upon whether or not Dairy 1 pond system was lined.
24 Do you recall that?

25 A Yes, I do.

398
CAPITOL REPORTERS (775) 882-5322

1 Q Okay. And I believe his position was because
2 that pond is clay-lined, that he felt that perhaps the
3 dairy had some latitude in whether or not they would have
4 to replace Monitoring well 1, but they were going to do it
5 any ways.

6 Do you recall that, as well?

7 A Yes, I do.

8 Q So my question would be: As far as your
9 interpretation of this permit, would that be allowed by
10 the Division?

11 A No.

12 Q With the clay liner?

13 A It -- the material in the Pond 1 or the Dairy
14 1 pond system does not meet the State's definition of a
15 liner.

16 Q Okay. So --

17 A So -- so the replacement well would be
18 necessary.

19 Q All right. Or they would have to do a
20 synthetic liner?

21 A A synthetic liner or possibly document that
22 what's out there does meet the liner requirements, which I
23 don't think they -- it would be difficult to do. I think
24 it was constructed without the -- without a design, that
25 we know of, and it did not go through the QAQC process.

399

CAPITOL REPORTERS (775) 882-5322

□

1 Q Okay. There was some questions in regards to
2 the testing of -- for fecal coliform in groundwater
3 monitoring wells.

4 Is that an effective way to test for fecal
5 coliform versus -- versus the soil -- the soil test?

6 A (No audible response.)

7 Q Let me ask you this. Let me back up.

8 Does fecal coliform degrade faster than or in
9 different manner than some of the other substance that you
10 have tested for in monitoring wells?

11 A It would need for the soil column much slower
12 than the nitrate and chlorides. That's why we had the
13 monitoring for those two.

14 Q Okay.

15 A It's de -- it would be dependent on the fecal
16 coliform surviving the movement, 85, 95 feet through the
17 soil column.

18 Q And as it's spread on the land, does fecal
19 coliform break down from the sun faster than, say, some of
20 the others?

21 A It can be deactivated through UV V radiation,
22 desiccation. There's number of factors that would cause
23 mortality.

24 Q Okay. And do you know if that was part of the
25 consideration of the best -- is it Best Control

400
CAPITOL REPORTERS (775) 882-5322

1 Technology -- I believe if, I'm saying the C part right --

2 A Yes.

3 Q -- for land application?

4 A Yes. EPA did consider that.

5 Q Okay. There's been lots of questions asked
6 about the total amount generated of nitrogen. And does
7 that matter to -- to the administration or the act -- the
8 actual issuance of the permit in this case?

9 A No, not as long as the -- they have -- have an
10 adequate pond system, which is either a lined pond or a
11 semi-lined pond with a monitoring well, and the nutrients
12 are applied according to a Nutrient Management Plan.

13 Q Okay. Just one moment. I'll get back to

14 this.

15 There was some testimony by Mr. Lazarus about
16 yearly soil testing versus what is allowed for in the
17 permit, which I believe is three years for annual crops
18 and five years for perennial crops.

19 Do you accept -- well, first of all, tell
20 me -- the three years for annual crops and the five years
21 for perennial crops, is that the requirement of the EPA,
22 in the NPDS permit process?

23 A I don't believe they have a requirement for
24 EPA.

25 Q Where do those numbers come from?

CAPITOL REPORTERS 401 (775) 882-5322

1 A Those are numbers that the Bureau of Water
2 Pollution Control came up with.

3 Q Oakay. And what was that based on; do you
4 recall?

5 A It was based on crop disturbance. They were
6 giving five years with a perennial crop, so they weren't
7 damaging the crop when they were out taking composite soil
8 samples.

9 Q And you've seen the proposal at least to do --
10 I believe it's in the CNMP -- to do yearly?

11 A Annual, yes.

12 Q And is that acceptable to the Division?

13 A It's been recommended that the permit be
14 revised to require annual soil analyses.

15 Q Is that something that the Division would
16 entertain?

17 A Yes.

18 Q Okay. Is monitoring of total nitrogen more
19 protective than simply monitoring for nitrates?

20 A Yes, it is.

21 Q Can you explain?

22 A It's picking up of the other species nitrogen,
23 ammonia, things like that, which could be present in the
24 groundwater.

25 Q Okay. And what does this permit require total

402
CAPITOL REPORTERS (775) 882-5322

1 nitrogen or nitrates?

2 A It requires analysis of both in the
3 groundwater, but the limit is placed on the totality
4 nitrogen --

5 Q I want to go --

6 A -- which is more stringent than the drinking
7 water standards, which is 10 on the all nitrate.

8 Q I -- I know that the Commissioners will have
9 some questions for you, but I did want to go back and talk
10 about one that you received yesterday from Commissioner
11 Coyner about groundwater monitoring being the gold
12 standard in this case to pick up a problem at the dairy.
13 And do you agree with that assessment?

14 A No, I do not. The Division's position is it's
15 better to control sources rather than picking up problems
16 in the groundwater.

17 Q And what's the best way to control -- to
18 handle source control in this case?

19 A In this case the pond liner systems and the

20 land application of the nitrogen.

21 Q And that's -- and that's consistent with EPA
22 regulations in Nevada, as Nevada has adopted?

23 A That is correct.

24 MS. TANNER: I don't have any further
25 questions.

403
CAPITOL REPORTERS (775) 882-5322

1 CHAIRMAN DODGION: Mr. Butler?

2 MR. BUTLER: So this is my rebuttal and my
3 cross?

4 CHAIRMAN DODGION: No. You get to cross him.

5 MR. BUTLER: Okay. There was some -- I have a
6 question about the record for a moment. That -- we've
7 referred to some of the documents that are in the NDEP
8 record, the NMP, the Fact Sheet. There have been
9 questions about those.

10 My assumption is that the NDEP record is
11 before the Commission. Now, we've marked some things as
12 exhibits. We've used them, but I want to make sure I'm
13 clear on that. Is the NDEP record in front of the
14 Commission or do we need to --

15 CHAIRMAN DODGION: Only insofar as it has been
16 presented in the brief and at this hearing.

17 MR. BUTLER: Okay. Can I -- can you give
18 Mr. Holmgren Exhibit A-3 again? It's the map.

19 CROSS EXAMINATION

20 BY MR. BUTLER:

21 Q Now, Mr. Holmgren, the water pollution -- the
22 NPDS permit, the CAFO permit, authorizes the discharge or

23 land application of green water and manure solids to a
24 limited number of fields. which field are those?

25 A Those are the 11 fields in the lower

404
CAPITOL REPORTERS (775) 882-5322

1 right-hand corner of the Exhibit A.

2 Q Okay. Does the dairy also have, from the
3 Bureau of solid waste, a compost permit?

4 A The compost facility is covered by both, both
5 our permit, the NPDS permit and the solid waste permit.

6 Q So what do you require in your permit of the
7 compost?

8 A We require that it be protective of waters of
9 the state. That's why we had a schedule compliance item
10 in the permit that required -- that had either a
11 certification that it had been constructed to NRCS
12 standards, a monitoring well be installed, or to
13 reconstruct the facility to NRCS standards.

14 Q Is there a limitation in the permit on where
15 the composted manure goes?

16 A No. That's handled under the waste permit.

17 Q Do you require a nutrient analysis of that and
18 it that be somehow tracked?

19 A Yes.

20 Q Now, under the solid waste permit, can someone
21 come to the dairy, buy the composted manure, and apply it
22 on another field, in the valley or somewhere else?

23 A Yes.

24 Q And that is not regulated under the -- well,
25 under the water Pollution Control Permit; is that correct?

1 A It is monitored under the NPDS permit, but it
2 is not regulated.

3 Q Did the --

4 A They have to report -- they're retired to give
5 the chemical analysis of the material, nutrients
6 analysis -- excuse me -- and report the quantities and
7 things like that.

8 Q Okay. The -- I want to look at the permit for
9 a minute. It's Exhibit 20. There were some questions
10 about provision 1-A-3.

11 Do we -- I can give you -- and I'm looking
12 specifically at subparagraph A that says, "The NMP shall
13 contain provisions that."

14 Now, when you review the NMP, are these the
15 elements that you look at?

16 A Yes, they are.

17 Q And you don't look at elements beyond that --
18 or you don't review and approve elements beyond that?
19 Excuse me.

20 A Well, generally that is correct. Some of the
21 subsequent things, like D, Section D and E are reviewed,
22 as well, but they're pretty much coming from the items
23 listed under A.

24 Q And thank you for correcting me on that.

25 Look at 1-A-17, which is on page 8. That just

1 refers to an animal mortality plan. Is that the kind of
2 thing you're talking about, that you review some other
3 elements?

4 A That's correct.

5 Q Okay. Mr. Coyner, in his questions -- well,
6 can I -- first, your Honor, I would like to -- if we need
7 to do this, move the admission of the NMP exhibit into --
8 or Intervener's Exhibit 5?

9 MS. TANNER: No objection.

10 MR. MARSHALL: No objection.

11 CHAIRMAN DODGION: So this is Intervener's
12 Exhibit 5?

13 MR. BUTLER: Let me make sure I have the right
14 number.

15 No, I'm wrong. I apologize for that. It's
16 Intervener Exhibit Number 3. It's marked as Intervener
17 Exhibit Number 3.

18 (Intervener's Exhibit No. 3 marked
19 for Identification and received into
20 Evidence)

21 MR. MARSHALL: That's the cover sheet in
22 there, that's --

23 MR. BUTLER: Yes. The cover sheet is in the
24 small book.

25 MS. REBERT: You're going did move for the

CAPITOL REPORTERS ⁴⁰⁷ (775) 882-5322

□

1 whole book to be introduced?

2 MR. BUTLER: Yes.

3 MS. REBERT: Is this going to be copied and
4 presented to us for the record?
5 MR. BUTLER: Yes, it is.
6 MS. REBERT: Okay.
7 MR. BUTLER: The other thing that we've
8 referred to a number of times, that I don't believe has
9 been marked and entered as an exhibit, is the Fact Sheet.
10 Am I --
11 MS. TANNER: I believe I have that as an
12 exhibit, and I apologize, because I ended up giving all of
13 mine away.
14 MR. BUTLER: Here.
15 MR. MARSHALL: No, it is. What did we say,
16 19?
17 MS. TANNER: Yeah, I think it's 18 or 19,
18 yeah.
19 MR. MARSHALL: Yeah.
20 MR. BUTLER: Has that been admitted?
21 MR. MARSHALL: I believe so.
22 MS. TANNER: It should have been, and if it
23 was not, I would move to its admission.
24 MS. REBERT: Exhibit 18 is the Environmental
25 Protection Fact Sheet?

CAPITOL REPORTERS 408 (775) 882-5322

1 MS. TANNER: Yes.
2 MR. BUTLER: Yes. Thank you very much.
3 And Exhibits -- Mr. Marshall asked some
4 questions about Exhibit Number 23, which is the NDEP
5 letter. It's state's Exhibit 23.

6 MS. REBERT: I don't think I --
7 MR. BUTLER: Yeah, I don't have a note that --
8 MS. REBERT: I don't have 23.
9 MS. TANNER: You don't have --
10 MS. REBERT: I think we have 22, and then we
11 went to 24.
12 CHAIRMAN DODGION: So it was not --
13 MS. TANNER: It was not?
14 MS. REBERT: No, it wasn't.
15 CHAIRMAN DODGION: It was not.
16 MS. TANNER: well, then I would -- well, if --
17 I'm happy to move to admit it, if that's appropriate at
18 this time.
19 MS. REBERT: That will be 23.
20 (State's Exhibit No. 23 marked for
21 identification)
22 CHAIRMAN DODGION: we're pretty flexible with
23 that. Do you have any objection to that, Mr. Marshall?
24 MR. MARSHALL: No objection.
25 / /

CAPITOL REPORTERS ⁴⁰⁹ (775) 882-5322

1 (State's Exhibit No. 23 received into
2 Evidence)

3 BY MR. BUTLER:

4 Q Mr. Holmgren, in his questions this morning,
5 Mr. Coyner expressed the opinion, referring to Monitoring
6 well 1 -- and that's in permit -- it's the language we've
7 looked at quite a bit and talked about.

8 It's this footnote down here. He expressed

9 the opinion that because the -- there was not water in the
10 near the well, for the last sampling events, that's a
11 violation. Do you agree with that?

12 A The well should be replaced, but I believe
13 that the permittee has been directed to replace it.

14 Q Does the water well -- does the water level
15 fluctuate --

16 A Yes, it does.

17 Q -- seasonally?

18 A I don't know if it's seasonal, but I know
19 there was one quarter when the Fact Sheet was being
20 written that it was dry, and it came back the next two
21 quarters. So there is some fluctuations.

22 MR. BUTLER: Thank you.

23 Those are the only questions I have. Thank
24 you.

25 CHAIRMAN DODGION: Do you have any questions

CAPITOL REPORTERS ⁴¹⁰ (775) 882-5322

1 for Mr. Holmgren while he's here?

2 MR. MARSHALL: I'm sorry. I understood that
3 to be --

4 CHAIRMAN DODGION: He finished his
5 cross-examination of your witness.

6 MR. MARSHALL: Right.

7 CHAIRMAN DODGION: You would like to recross
8 him? Is that what you're asking?

9 MR. MARSHALL: Well, it's actually redirect.

10 CHAIRMAN DODGION: Redirect.

11 MR. MARSHALL: But just one or two questions

01-20-10 SEC Ponderosa Hearing Volume II.txt
12 about that.

13 REDIRECT EXAMINATION

14 BY MR. MARSHALL:

15 Q So this is again -- so on page 4 of 21, my
16 understanding, you're reading of that subparagraph 2, that
17 Ms. Tanner was --

18 A Footnote 2.

19 Q Footnote 2 or Note 2 --

20 A Note 2.

21 Q -- was that the continued existence of the
22 clay-lined pond system required monitoring through
23 Monitoring well 1?

24 A That's correct.

25 Q So only when they used a synthetic liner is

CAPITOL REPORTERS ⁴¹¹ (775) 882-5322

1 when they could close and stop monitoring Monitoring
2 well 1?

3 A Well, this does not say -- it does not say a
4 synthetic liner. If they had constructed a clay liner,
5 submitted a design to NDEP, and had it been approved, then
6 a clay liner could be used. But the clay liner that is
7 currently out there has not been approved to NDEP as a
8 liner.

9 Q So, in other words, the pre-condition to stop
10 monitoring has not been met?

11 A That's correct.

12 Q So they should be monitoring that pond system?

13 A Correct.

14 Q And have they been monitoring that pond

01-20-10 SEC Ponderosa Hearing Volume II.txt
15 system?

16 A They have been monitoring the well to
17 determine that it has been dry.

18 Q Okay. So --

19 A So --

20 Q -- in other words, they have not been
21 monitoring the groundwater?

22 A Not the groundwater, but they have been
23 looking at the water elevation and determined it's below
24 the bottom of the pond.

25 Q So that's been for the last two years.

CAPITOL REPORTERS ⁴¹² (775) 882-5322

1 A Correct.

2 Q And has NDEP done anything about the fact that
3 there's been no monitoring of the groundwater under the --
4 that is required by this condition?

5 A We have the voluntary monitoring system which
6 has been proposed, and --

7 MS. TANNER: Can I interject? This witness
8 hasn't been in this bureau for the last two years and
9 would probably not be the most appropriate person to ask
10 those questions.

11 MR. MARSHALL: I think the answers are
12 self-evident, but thank you.

13 CHAIRMAN DODGION: Let me just since -- since
14 you interjected, I'll interject. Do you have a witness in
15 the room or who has previously testified that can testify
16 to that?

17 MS. TANNER: I might have to ask a couple

18 questions off the record to figure that out. I think so,
19 but I'm not positive.

20 (Discussion off the record)

21 MR. MARSHALL: I have no further questions.

22 CHAIRMAN DODGION: All right. Now, you can
23 ask. Stephanie, do you have questions of Mr. Holmgren?

24 COMMISSIONERS' EXAMINATION

25 MEMBER ZIMMERMAN: Yes. You seem to be

CAPITOL REPORTERS ⁴¹³ (775) 882-5322

□

1 opposed to monitoring wells other than those associated
2 with the synthetically lined ponds. Is that a true
3 statement?

4 MS. TANNER: I'm going to object. That's
5 mischaracterizing his testimony.

6 MEMBER ZIMMERMAN: I'm just asking the
7 question.

8 MS. TANNER: well, okay.

9 THE WITNESS: I wouldn't say I'm opposed to
10 any monitoring wells. I just don't want to -- I don't
11 think the Division should be requiring them to be placed
12 in areas that where they're not necessary.

13 MEMBER ZIMMERMAN: And why do you think
14 they're not necessary?

15 THE WITNESS: Because the -- with the
16 synthetically lined ponds, there's no source of
17 groundwater contamination.

18 MEMBER ZIMMERMAN: In -- even in areas such as
19 the land application?

20 THE WITNESS: The land application -- in the

21 land application fields, the nutrients are being applied
22 in accordance with the Nutrient Management Plan.

23 MEMBER ZIMMERMAN: And do you know that those
24 are being applied in accordance with the Nutrient
25 Management Plan?

CAPITOL REPORTERS 414 (775) 882-5322

1 THE WITNESS: we have quarterly reports,
2 annual reports.

3 MEMBER ZIMMERMAN: Based on what the dairy is
4 reporting to you?

5 THE WITNESS: Right. In compliance with the
6 permits requirements, yes.

7 MEMBER ZIMMERMAN: Okay. And why do you
8 believe the land -- those types of reports satisfy the
9 idea that there would be no contamination to groundwater
10 because of the land application? where is that derived
11 from?

12 THE WITNESS: It's the -- it's pretty much the
13 basis of the program. You're putting down the nutrients
14 at the rate that the crops will be up-taking them.

15 MEMBER ZIMMERMAN: And those are based on best
16 practices --

17 THE WITNESS: Correct.

18 MEMBER ZIMMERMAN: -- is what I'm hearing.

19 THE WITNESS: Yes.

20 MEMBER ZIMMERMAN: And who puts out the best
21 practices?

22 THE WITNESS: I would say it's primarily the
23 Natural Resource Conservation Service.

24 MEMBER ZIMMERMAN: Okay. Okay. That's it.

25 CHAIRMAN DODGION: Alan, do you have

CAPITOL REPORTERS 415 (775) 882-5322

1 questions?

2 MEMBER COYNER: Quick ones.

3 Bruce in putting together the Fact Sheet, did
4 you determine the number of employees that are at the
5 dairy?

6 THE WITNESS: No. We did not go out and count
7 the employees.

8 MEMBER COYNER: Maybe I'll get that.

9 THE WITNESS: That would be provided by the
10 permittee.

11 MR. BUTLER: Okay. I -- I can also
12 represent --

13 MEMBER COYNER: Well, tell me, Jim, and then I
14 don't have to keep asking.

15 MR. BUTLER: It's -- right now it's 120.
16 There have been some cutbacks of 20 to 40 people in the
17 last -- I don't know if it's six months or a year, but
18 recently -- related to milk prices.

19 MEMBER COYNER: The flow rate of the
20 groundwater, any determination of that, when you were
21 studying the permit or any knowledge of it?

22 THE WITNESS: No.

23 MEMBER COYNER: What would it take to
24 determine the flow rate of the water?

25 THE WITNESS: Probably a more detailed study

CAPITOL REPORTERS 416 (775) 882-5322
Page 95

1 than what NDEP is prepared to do.

2 MEMBER COYNER: Would four monitoring wells
3 determine the flow rate of the groundwater?

4 THE WITNESS: You could determine the flow
5 rates from that.

6 MEMBER COYNER: At the time the Fact Sheet was
7 prepared, there were -- and I'm going to just
8 paraphrase -- there were excessive -- a number of
9 violations.

10 THE WITNESS: Yes. That was historic, yes.

11 MEMBER COYNER: Historic violations, right.
12 And would you have knowledge of any sense -- I understand
13 he hasn't worked there for two years -- since the 2007
14 permit was issued?

15 MS. TANNER: And may I respectfully object
16 again? And I -- I will state this in my closing, but
17 issues subsequent to the issuance of this permit are
18 irrelevant and beyond your jurisdiction.

19 MR. MARSHALL: I was --

20 CHAIRMAN DODGION: I would respectfully
21 disagree with your jurisdiction statement. It might not
22 be relevant, but they're not beyond our jurisdiction.

23 MS. TANNER: That it's not the purpose of
24 this --

25 CHAIRMAN DODGION: I'm not going to argue with

CAPITOL REPORTERS ⁴¹⁷ (775) 882-5322

1 you about it.

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. MARSHALL: I'd like to be heard on that.

CHAIRMAN DODGION: Yeah.

MR. MARSHALL: We've been having incredible -- those offered by the State and the Intervener about activities post -- the --

CHAIRMAN DODGION: I agree.

MR. MARSHALL: -- the permit.

CHAIRMAN DODGION: I agree.

MS. TANNER: Subject to my to objection --

CHAIRMAN DODGION: Subject to the objection.

MS. TANNER: -- that I made at the very beginning.

CHAIRMAN DODGION: And I'm going to allow the question and the answer.

MEMBER COYNER: Were you aware of any compliance issued post-the-permit?

THE WITNESS: No.

MEMBER COYNER: Thank you.

What was the permit fee annually, at the time the permit was issued, since --

THE WITNESS: Well, I think it's 2,500 is the annual fee.

MEMBER COYNER: All right.

THE WITNESS: Or -- yes.

418
CAPITOL REPORTERS (775) 882-5322

□

1
2
3
4

MEMBER COYNER: Right. Mr. Lazarus testified that the gradient is very flat, .006 -- so -- of a foot, which, like I said, is a pretty menial small depth. To me that implies there's no cone of depression present

5 underneath the dairy now or at the time the permit was
6 issued. Is that --

7 THE WITNESS: No --

8 MEMBER COYNER: Do you concur with that?

9 THE WITNESS: No. I would disagree with you.
10 I mean, there is a cone of depression, because the natural
11 gradient has been modified to flow towards the dairy.
12 That was not the condition previous.

13 MEMBER COYNER: So you concur with --

14 THE WITNESS: So when you -- yes, I would
15 agree that there's been some change to the groundwater
16 gradient due to the pumping of the irrigation wells.

17 MEMBER COYNER: And you would concur with
18 Mr. Lazarus with regards to the fact that at this time
19 probably the groundwater flow direction is towards the
20 dairy from basically all directions?

21 THE WITNESS: Right. So they could be pulling
22 contaminants in from all sides.

23 MEMBER COYNER: Do the liners on these ponds
24 at the dairy have leak detection ports?

25 THE WITNESS: No, they're single lined ponds.

419
CAPITOL REPORTERS (775) 882-5322

1 MEMBER COYNER: Now, is that less or more than
2 is required for the mine sites?

3 THE WITNESS: It's going to depend on the use
4 of the pond at the mine site. If it is a pond that is --
5 pregnant or barren pond that, under normal circumstances,
6 has cyanide solution, then it's required to be double
7 lined.

8 MEMBER COYNER: Then do --

9 CHAIRMAN DODGION: But there are storm water
10 ponds that are single lined.

11 MEMBER COYNER: And do most mining sites have
12 groundwater monitoring programs through wells?

13 THE WITNESS: Yes.

14 MEMBER COYNER: Thank you. That's it.

15 CHAIRMAN DODGION: First I want to let --
16 well, actually I won't.

17 Fecal coliform and groundwater flow,
18 Mr. Lazarus testified that the groundwater -- the rate of
19 groundwater flow is very, very slow. And I think that is
20 a -- just as a matter of knowledge is accurate.
21 Groundwater is very, very slow.

22 And fecal coliform, as a requirement to be
23 picked up in a monitoring well, is really a waste of time.
24 That's my opinion. I'm asking if you agree with that.

25 Because pathogens move through the soil very,

420
CAPITOL REPORTERS (775) 882-5322

1 very slowly, as well, and, in fact, in -- there have been
2 numerous studies, that I've been aware of in a past life,
3 where in four feet of graded sand, you filter out a very,
4 very large percentage of the pathogens.

5 THE WITNESS: I don't think it's necessary,
6 no, to monitor for fecal coliform --

7 CHAIRMAN DODGION: It's --

8 THE WITNESS: -- in the monitoring wells.

9 CHAIRMAN DODGION: It's a waste of time, but
10 the chemicals that travel through soils much faster than

11 chlorides and nitrates will appear in any monitoring
12 system --

13 THE WITNESS: And that's why we put those two
14 in --

15 CHAIRMAN DODGION: You know, will appear in
16 any monitoring --

17 THE WITNESS: Yes.

18 CHAIRMAN DODGION: -- much, much, much --

19 THE WITNESS: Yes.

20 CHAIRMAN DODGION: I means days, weeks, months
21 perhaps, before you'll pick up fecal coliform.

22 THE WITNESS: Yes, I agree.

23 CHAIRMAN DODGION: Thank you. I have nothing
24 else. You're excused.

25 THE WITNESS: Thank you.

CAPITOL REPORTERS ⁴²¹ (775) 882-5322

1 CHAIRMAN DODGION: Mr. Marshall, do you
2 have --

3 MR. MARSHALL: Yes. Mr. Bosta, please.

4 JOHN BOSTA,
5 having been previously duly sworn,
6 was examined and testified as follows:

7 THE WITNESS: I'm Mr. Bosta.

8 CHAIRMAN DODGION: You are sworn, sir.

9 THE WITNESS: Sorry. I didn't hear you.

10 CHAIRMAN DODGION: Remember that you are still
11 sworn.

12 THE WITNESS: Thank you.

14 BY MR. MARSHALL:

15 Q Okay. John, did you go to NDEP to inspect
16 the -- their files after the June 12th, 2007 hearing?

17 A Yes. I was told I couldn't go fishing in the
18 records. So finally, in June of 2008, I had the record --
19 went to the Carson City, and I looked at the book that
20 they had. And the book in the NDEP office was not as
21 clean and neat as the book you see there. It was over
22 stuffed and papers were just slipped in it.

23 MS. TANNER: Objection. Relevance.

24 THE WITNESS: I had --

25 CHAIRMAN DODGION: I agree. I don't -- I

422
CAPITOL REPORTERS (775) 882-5322

1 don't get the relevance. Are you --

2 THE WITNESS: well, my point is that the
3 record that was in the office, I believe, is different
4 than that record. I had 1200 pages copied of that record.

5 MR. MARSHALL: And --

6 CHAIRMAN DODGION: If I could just --

7 MR. MARSHALL: Yeah.

8 CHAIRMAN DODGION: -- get back to the
9 objection, here, and I think I'm going to have to sustain
10 that. You can't testify that it was different than that
11 document there without comparing it, page by page, or that
12 it's substantially different.

13 THE WITNESS: well, sir --

14 CHAIRMAN DODGION: It may have contained -- it
15 may have been contained notes, copies of the permit,
16 slipped -- slipped in. So the objection is sustained.

17 MS. TANNER: Thank you.

18 BY MR. MARSHALL:

19 Q Mr. Bosta, have you recently observed trucks
20 containing manure leaving the dairy?

21 A Yes, on the 11th of this month I was driving
22 down Mecca Road, and I saw track-off (sic) spills of
23 manure on the road, approximately 8:00 o'clock in the
24 morning.

25 I had to go down the road again around 1:30,

423
CAPITOL REPORTERS (775) 882-5322

1 and I took pictures, and around 3:00 o'clock I went down
2 the road. I followed one of the roads -- one of the
3 trucks down to Power Line Road, and Power Line Road went
4 to one of the fields on Power Line.

5 MR. MARSHALL: I'm handing him Exhibit A-3.

6 THE WITNESS: And I followed the truck down
7 Power Line Road, and then the -- the truck came down Power
8 Line Road and then came to this pivot (witness
9 indicating), and on this map.

10 MR. BUTLER: I'm going to object --

11 THE WITNESS: This pivot.

12 MR. BUTLER: -- as not being relevant.

13 THE WITNESS: This --

14 MR. BUTLER: We have beat this to -- the dairy
15 has, and Mr. Holmgren just testified for the second time
16 that the dairy has a compost permit from the Bureau of
17 solid waste. Yes, people come to the dairy, or -- the
18 manure is from the compost facility leaves the dairy, and
19 it goes to fields in the Amargosa valley and maybe

20 elsewhere. That is not relevant to the Water Pollution
21 Control Permit.

22 Now, I concede that Mr. Bosta is not happy
23 about that, but that's not -- this permit constraints the
24 application of green water and manure solids to these
25 fields, and as Mr. Holmgren has testified, requires

424
CAPITOL REPORTERS (775) 882-5322

1 monitoring and nitrate analysis of --

2 CHAIRMAN DODGION: I'm going to sustain your
3 objection.

4 MR. BUTLER: Thank you.

5 CHAIRMAN DODGION: I'm going to sustain your
6 objection.

7 MR. MARSHALL: Can I be heard?

8 CHAIRMAN DODGION: All right.

9 MR. MARSHALL: This goes directly on the point
10 of whether or not the permit is adequate, because we're
11 going to demonstrate here that this was not compost. This
12 was wet manure that has been -- and large amounts of it
13 that are applied to fields that -- that are apparently
14 within the control of -- or at least at one point were
15 indicated in this diaphragm as under the control --

16 CHAIRMAN DODGION: What we have here -- is if
17 you can prove that that was wet manure, and not compost,
18 then what you need to do is file that information with
19 DEP, and allege a violation of this permit and request an
20 enforcement action. That is -- that enforcement action,
21 that's what this goes to, and that is beyond the scope of
22 why we're here today.

23 That is not authorized by the permit, and it's
24 not a part of the permit. If your facts, as alleged, are
25 true, it's a violation of the permit and subject to

 425
CAPITOL REPORTERS (775) 882-5322

1 enforcement action. And I invite you to make that
2 available through the Division and request Mr. Porta to
3 follow up on it.

4 MR. MARSHALL: Okay. I am going to offer --
5 have him identify photographs of the track-out, okay,
6 which we to identify in our complaint as one issue --

7 CHAIRMAN DODGION: Yes.

8 MR. MARSHALL: -- that we're concerned about.

9 CHAIRMAN DODGION: Okay.

10 MR. MARSHALL: So I can hand --

11 CHAIRMAN DODGION: Yes.

12 BY MR. MARSHALL:

13 Q Can you -- are those two of the pictures you
14 took?

15 A Yes.

16 Q And can you -- where were these pictures
17 taken?

18 A This picture is coming out of Barn Number 2.

19 THE REPORTER: I'm sorry, Kathy. What number
20 are we marking this?

21 MS. REBERT: This would be A-12.

22 MR. MARSHALL: A-12? I identified it as A-13.
23 we'll just go with A-13?

24 MS. REBERT: Sure.

25 MR. MARSHALL: Thank you.

1 (Discussion off the record)

2 THE WITNESS: As you can see, that as the
3 truck turns, the manure spills over the side boards of the
4 truck because it is wet, and then the track-out continues
5 a few hundred feet down the road. Notice the track-out
6 goes right through the flow on -- or floodwater that would
7 cross Mecca Road and go into the Barn 2 area.

8 And those are pictures of the track-out of the
9 wet manure. I would take and say that if this -- if this
10 manure had have been composted in the composting plant --

11 MS. TANNER: May I object at this point? I
12 think before there's complete testimony on this document,
13 we should probably have a discussion on whether or not
14 it's actually admissible as an exhibit. Are you moving to
15 admit it?

16 MR. MARSHALL: No, he's talking about it, and
17 I'll move to admit it after he's done talking about it.

18 MS. TANNER: Well, I think that the -- that
19 the Commission has already ruled that the issue of wet
20 manure is more appropriate for an enforcement action, not
21 before the Commission today. So before we waste the
22 Commission's time in testifying about that, we should
23 probably discuss whether or not it's actually admissible.

24 CHAIRMAN DODGION: The issue of the wet
25 manure, as I've said, that would be a violation of the

1 permit and subject to an enforcement action.

2 Their complaint -- and there was no briefing
3 complaints -- did talk about track-out, and the claim that
4 they've made is that the -- that the permit fails to
5 regulate track-out. If that's --

6 MR. MARSHALL: That's correct.

7 MR. BUTLER: Mr. Chairman, I've now had the
8 chance to go back and look at their pleadings. Actually,
9 it's Mr. Sagady's statement which has not been admitted,
10 which talks about track-out. There's -- the brief
11 summarizes Mr. Sagady's statements, but there's no
12 citation to a regulatory provision -- this is just -- the
13 whole track-out issue is based on Mr. Sagady's opinion of
14 what the plan should be. There's no regulatory citation.
15 This is, again, a backwards way to get --

16 MR. MARSHALL: He can argue as to whether or
17 not under the substance, that's an argument is whether or
18 not there's that should be part of a permit. But you
19 raised the track-out issue, and this is evidence to show
20 that it's a real concern. And if they dislike it, then we
21 can argue about whether to you whether or not it should be
22 an appropriate part of the permit or not.

23 MS. TANNER: May I just add to my objection,
24 that the issue of track-out was not raised in the case in
25 chief. Yes, they might have been put it in their briefs,

□

1 but based upon the fact that the Sagady report was not
2 allowed, there were no questions to NDEP staff, there was

3 no questions to Mr. Lazarus in regards to whether or not
4 track-out is actually even a condition of an NPDS permit,
5 which it is not, we could have ironed that out. But it's
6 outside of the scope of the case in chief, and for that
7 reason, alone, it should be denied.

8 CHAIRMAN DODGION: All right. I have to
9 sustain you again.

10 Mr. Porta, I'm going to direct them to give
11 that information to you, and I think if this is met manure
12 and it's being spread out onto the public roads, then it
13 is probably a water pollution control issue. So that's
14 what my directions are.

15 Your objection is sustained. This will not be
16 admitted as an exhibit.

17 BY MR. MARSHALL:

18 Q Mr. Bosta, have you researched whether or not
19 synthetic liners leak?

20 A Yes.

21 MS. TANNER: I'm going to object. Objection.
22 This witness is not an expert.

23 MR. MARSHALL: He's not testifying as an
24 expert. He's testify's as to whether -- what his
25 examination of this question is, and it could be taken as

□

1 a lay opinion.

2 CHAIRMAN DODGION: I will allow it.

3 THE WITNESS: I testified at the June 12th
4 meeting that the liners leak. Mr. Bruce Holmgren agreed
5 with me that the liners would leak.

6 I pointed out to him that the San Gabriel
7 Water Company, in the State of California, sued the State
8 Water Board because they were saying that synthetic liners
9 was zero discharge. The State ruled that synthetic liners
10 are not zero discharge. It went to the Superior Court and
11 then went to an Appellate Court, and the Appellate Court
12 took and agreed that all of the liners would leak. It was
13 only when. And all of the experts that testified,
14 testified that they will leak. It is only when.

15 I -- I wanted to discuss that in the June 12th
16 meeting. Mr. Holmgren did not like it, and said we'll go
17 on. From that experience, I can take and say that the
18 synthetic liners will leak. There are several court cases
19 that state that.

20 I saw in the documents that I purchased from
21 NDEP that the company that put in the liner for the dairy,
22 had a document that said that the leakage factor of the
23 ponds was the same as the soil-lined pond. And
24 Mr. Lazarus took and said, "Oh, no, that is the
25 requirement for soil-lined ponds."

430
CAPITOL REPORTERS (775) 882-5322

□

1 My understanding of the leakage factor for
2 synthetic ponds and soil-lined ponds are the same.

3 MR. MARSHALL: That's all the questions I have
4 for Mr. Bosta.

5 MS. TANNER: Thank you.

6 CHAIRMAN DODGION: Cross?

7 MS. TANNER: Just very briefly.

8 CROSS EXAMINATION

9
10 Q Assuming that all liners leak, can --

11 A I'm only reporting what I read.

12 Q Let me get the question out.

13 A Okay.

14 Q Can you hear me okay? Do I need to turn a
15 little bit toward you?

16 Assuming that all liners leak, can you
17 definitively say that all liners leak catastrophically?

18 A I don't know with that means when you say,
19 "catastrophically."

20 Q well, a pin prick, a slice, overflow, you --
21 can you definitively say that every liner will leak in the
22 same fashion?

23 A The documents that I've read says that they
24 leak.

25 Q So your answer is no?

CAPITOL REPORTERS ⁴³¹ (775) 882-5322

1 A I don't -- I don't know.

2 Q Now, again, assuming that all liners leak, can
3 you definitively say that all liners will leak within five
4 years?

5 A The documents I've said is it's only when.

6 Q So your answer is no? You can't say whether
7 they will leak in five years?

8 A I can't say that.

9 Q Can you say whether or not they would leak in
10 10 years?

11 A I can't say that.

12 Q Are you aware of what the permit term is for
13 this permit?

14 A My understanding, it's for a period of five
15 years.

16 Q Are you aware that the State requirements for
17 liners are much more stringent than the NRCS?

18 A I don't know that to be a fact.

19 Q So you're not aware?

20 A I'm not aware.

21 MS. TANNER: That's all the questions I have.

22 THE WITNESS: I have one thing if I could
23 say --

24 MS. TANNER: That's all the questions I have.
25 Thank you.

CAPITOL REPORTERS 432 (775) 882-5322

1 THE WITNESS: Okay.

2 CHAIRMAN DODGION: Mr. Butler?

3 MR. BUTLER: The -- I believe in the record --
4 Mr. Bosta is testifying basically about the June 12th,
5 2007 hearing public hearing.

6 CHAIRMAN DODGION: Yes.

7 MR. BUTLER: I believe in the record there's a
8 transcript of that. I don't have it. I didn't bring it
9 as an exhibit, but I would like to move -- and we'll
10 prepare it and bring it in -- the admission of the
11 transcript of the SEC appeal hearing, and the State has
12 it, as an exhibit, so that we -- so that what we have is
13 the transcript rather than the characterization of the
14 hearing.

15 MS. TANNER: Please make sure that's the
16 correct one. That's the one I printed off. I think it
17 was the only one that was available.

18 CHAIRMAN DODGION: That is an actual
19 transcript.

20 MR. BUTLER: Well, this says -- oh, no. I'm
21 sorry. This is not -- this is our own hearing. This is
22 the SEC appeal hearing of July 9th.

23 MS. TANNER: Oh.

24 MR. BUTLER: I have seen it. I mean, I -- I
25 don't know if -- but we would like to move admission of

CAPITOL REPORTERS ⁴³³ (775) 882-5322

1 that, and we'll --

2 MS. TANNER: I don't have it.

3 CHAIRMAN DODGION: Pardon? I -- I don't know
4 how we can accept that with nobody having a copy of it in
5 the room. I think -- Mr. Bosta's testimony is that it's
6 his opinion about leakage of synthetic liners, and that he
7 made these same statements in the June 12th hearing.

8 MR. BUTLER: Well, he characterized his
9 testimony at the hearing, and he characterized others'
10 testimony at the hearing. And we have a transcript of
11 that.

12 I mean, it just seems to me that it's -- that
13 we should have that in -- if we're going to talk about the
14 hearing, and what people said, we should have that in the
15 record.

16 CHAIRMAN DODGION: We have an exhibit here.

17 MEMBER COYNER: An exhibit from the

01-20-10 SEC Ponderosa Hearing Volume II.txt
18 previous -- of the notice of the decision, which includes
19 response to public comments, thirty-five pages.

20 MR. MARSHALL: That's --

21 MEMBER COYNER: And it gives Mister --

22 CHAIRMAN DODGION: what exhibit is that?

23 MR. MARSHALL: That's --

24 CHAIRMAN DODGION: That's part of the --

25 MEMBER COYNER: Previous record, again, from

434
CAPITOL REPORTERS (775) 882-5322

1 the first hearing.

2 CHAIRMAN DODGION: Right.

3 MR. MARSHALL: The --

4 MS. REYNOLDS: what he's looking at is the
5 October 2, 2007 Notice of Decision. Has anybody even --

6 MR. MARSHALL: which has the response to
7 comments.

8 MS. REYNOLDS: which has response to comments.

9 MR. BUTLER: And that was going to be the
10 second thing that I asked to be admitted, because
11 it does -- because it -- what that does is it takes out
12 the comments. It extracts them from letters and from the
13 public hearing and gives responses. And I do have a copy
14 of that.

15 CHAIRMAN DODGION: We have that in our --

16 MS. REYNOLDS: well, it should go to them.

17 MR. BUTLER: I'd like to move admission of the
18 October 25th, 2007 Notice of Decision as Intervener's
19 Exhibit or State --

20 MS. TANNER: You can do it.

21 MR. BUTLER: -- as Intervener's Exhibit
22 Number -- let me find my book to make sure -- Intervener's
23 Exhibit Number 12.

24 CHAIRMAN DODGION: Mr. Marshall, do you have
25 any --

CAPITOL REPORTERS ⁴³⁵ (775) 882-5322

1 MR. MARSHALL: No objection.

2 CHAIRMAN DODGION: Ms. Tanner?

3 MS. TANNER: No objection.

4 (Intervener's Exhibit No. 12 marked
5 for Identification and received into
6 Evidence)

7 MR. BUTLER: So what did you decide on the
8 transcript?

9 CHAIRMAN DODGION: I have a problem with -- we
10 don't have the document, and I don't believe I've seen
11 that. I certainly have not seen in a transcript.

12 MR. BUTLER: May I -- with the Commission's
13 indulgence, give me a chance to find it and renew my
14 motion later?

15 MR. MARSHALL: Can -- I'm going to have a
16 solution. As I understood your initial comments, is you
17 were going to take that matter under submission at the end
18 of this hearing. Was that -- I mean, when you first
19 opened the hearing -- or are you prepared to rule at that
20 hearing?

21 CHAIRMAN DODGION: If we have enough time this
22 afternoon, the panel will decide whether we will go
23 forward and render a decision this afternoon or take it

01-20-10 SEC Ponderosa Hearing Volume II.txt
24 under submission. My intent is to take it to a decision
25 this afternoon.

CAPITOL REPORTERS 436 (775) 882-5322

1 MR. MARSHALL: Okay. Well, if you would -- if
2 you were going to take it under submission, then my
3 suggestion was that any party could submit to you elements
4 of the NDEP file, which would include the transcript as
5 exhibits to this proceeding, since, in essence, they're
6 reviewing --

7 CHAIRMAN DODGION: Are you familiar with the
8 transcript?

9 MR. MARSHALL: I -- I know that it exists.

10 MR. BUTLER: Mr. Chairman --

11 MR. MARSHALL: I know that I read it, but --

12 MR. BUTLER: To move things along I'll
13 withdraw my motion. We can proceed.

14 CHAIRMAN DODGION: Okay. All right. We have
15 other questions for Mr. Bosta?

16 MR. BUTLER: I do not. Excuse me. I have no
17 questions.

18 CHAIRMAN DODGION: Okay. That's it,
19 Mr. Bosta. You asked questions. You asked. It's our
20 turn.

21 MEMBER ZIMMERMAN: I have no questions.

22 MEMBER COYNER: No questions.

23 CHAIRMAN DODGION: I have no questions,
24 either. Thank you, Mr. Bosta.

25 THE WITNESS: Thank you.

CAPITOL REPORTERS 437 (775) 882-5322
Page 114

1 MR. MARSHALL: That's all the witnesses we
2 have on rebuttal.

3 CHAIRMAN DODGION: Ms. Tanner, rebuttal?

4 MS. TANNER: May I have a couple of minutes to
5 ask that question about the witness --

6 CHAIRMAN DODGION: well, we're at 10 minutes
7 to 12:00. It might be just as well to take our lunch
8 break.

9 MS. TANNER: That would be great.

10 CHAIRMAN DODGION: we'll reconvene at 1:00
11 o'clock, and you can start with your rebuttal.

12 (Proceedings recessed from 11:47 a.m. until 1:01 p.m.)

13 CHAIRMAN DODGION: All right. We will come
14 back to order.

15 All right. We'll be back in session. And if
16 I remember where we are, Ms. Tanner, you have done your
17 rebuttal and --

18 MS. TANNER: I do not have any further
19 rebuttal.

20 CHAIRMAN DODGION: Thank you.

21 Mr. Butler?

22 MR. BUTLER: I do not have any rebuttal.

23 CHAIRMAN DODGION: Oh, thank you. Maybe we
24 will -- all right. At this time, then --

25 MR. MARSHALL: Do I get any more rebuttal?

438
CAPITOL REPORTERS (775) 882-5322

1 If --

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CHAIRMAN DODGION: You're through.

The panel will take this opportunity, then, to recall any of the witnesses, and ask them any additional clarification questions or anything in follow-up that we may desire.

Stephanne, do you have anyone that you wish to call?

MEMBER ZIMMERMAN: No.

CHAIRMAN DODGION: Alan?

MEMBER COYNER: Can the State call someone that could answer my questions about permit violations or compliance history since the 2007 permit was issued?

CHAIRMAN DODGION: I think Mr. Tinney was the gentleman that you might wish to have up here.

MS. TANNER: I'm not going to call anyone. I understand -- if I understand the procedure correctly --

MEMBER COYNER: Do you have a witness -- do you have someone here that could answer that question?

CHAIRMAN DODGION: Mr. Tinney, please take the stand.

MS. TANNER: I object to those questions, so I'm not going to call, but I believe you can call.

MEMBER COYNER: All right.

//

□

1
2
3
4

ALAN TINNEY,
having been previously duly sworn,
was examined and testified as follows:

CHAIRMAN DODGION: You're still sworn.
Page 116

5 THE WITNESS: Yes, sir.

6 COMMISSIONERS' EXAMINATION

7 MEMBER COYNER: Hi, Alan. How are you. I
8 love how your spell your name, A-l-a-n. Very nice.

9 THE WITNESS: Yes.

10 MEMBER COYNER: It's the first name, not a
11 last name.

12 Can you answer the question: Since the
13 issuance of the 2007 permit, has there been any
14 violations -- what's the compliance history of the dairy
15 since the issuance of this permit?

16 THE WITNESS: What I can answer -- I haven't
17 reviewed. I'm going to be upfront. I haven't reviewed
18 the compliance. That's a different view or our bureau,
19 and so I haven't reviewed the compliance enforcement
20 before coming in here, because I wasn't prepared to answer
21 those type of questions.

22 what I can answer -- I believe you asked, and
23 so I'm going to go ahead and answer before you ask, is
24 that we -- we did write a letter and required the dairy to
25 place MW-1, and that happened, I believe, earlier this

440
CAPITOL REPORTERS (775) 882-5322

1 year, in January, somewhere around that time. I can't
2 give you a specific date, of this year that that happened.
3 That was --

4 MR. MARSHALL: This year or last year?

5 THE WITNESS: This year, '09.

6 CHAIRMAN DODGION: That's last year.

7 THE WITNESS: Oh, I'm sorry. January of '09.

8 Thank you very much.

9 MR. MARSHALL: Sure.

10 THE WITNESS: January of '09. Thank you.

11 That was wrapped up in -- we had told them to
12 give us -- we'd give them a specific date to get back to
13 us when they were going to redrill that MW-1 well.

14 They came back to us and said, hey, we've been
15 appealed, and we're going to actually offer some voluntary
16 monitoring, and what we would like to do would be to wrap
17 it all up in one big monitoring, drilling -- when we get
18 to that point.

19 And at that time we thought that was a
20 reasonable request, and we allowed that to happen. So
21 that's why, up to this day, MW-1 has not been drilled.
22 But as we had previously testified, that we still will
23 require MW-1. It does not matter where the Commission
24 goes on the rest of the wells today.

25 To answer your first question, Mr. Coyner,

441
CAPITOL REPORTERS (775) 882-5322

□

1 Commissioner Coyner, I can't speak to exactly compliance
2 history as of today. I would have loved to review that
3 file for you, and I didn't -- I wasn't prepared for that
4 question. I'll be honest.

5 MEMBER COYNER: Fair enough. Is there -- has
6 there been any groundwater monitoring since 2007? I may
7 have -- I know there was some -- there was some -- the
8 well went up, the well went down.

9 THE WITNESS: That's correct.

10 MEMBER COYNER: So I'm a little confused --
Page 118

11 over the last three years --

12 THE WITNESS: I can give you a little bit of
13 that.

14 MEMBER COYNER: Okay.

15 THE WITNESS: I can give you a little bit of
16 that, if that's acceptable to you.

17 In the last quarter of '06 we did have a
18 monitoring well sample, and then the first quarter of '07,
19 I believe it was dry, and then it rebounded in the second
20 and third quarter of '07. It rebounded in the second and
21 third quarter of '07, so we did get samples in the second
22 and third quarter of '07. And then it went dry again at
23 that point in time, in third quarter of '07, and it has
24 not been rebounded since that date.

25 MEMBER COYNER: And were throws samples in

442
CAPITOL REPORTERS (775) 882-5322

1 compliance, the ones you just mentioned?

2 THE WITNESS: Yes. That I know of, yes.

3 MEMBER COYNER: Sure. And Mr. Lazarus, I
4 think, testified that other than a few timing issues with
5 regards to submittal of reports -- I'm trying to get where
6 to: were these guys way out of the compliance and just
7 ignoring the law, or are they -- we have a very few very,
8 what I would call minor potential issues with the dairy,
9 in terms of compliance.

10 THE WITNESS: Yeah, you know, it's a large
11 CAFO, and we're constantly going become and forth with
12 them. It's a full -- you know, it's a big project out
13 there, and we have inspectors out there once in while. we

14 do get a complaint every once in while, and we do send an
15 inspector out there once in while. I mean, that comes out
16 of the compliance. I don't read all those different
17 reports that come back out of those.

18 We have not received that complaint until
19 today, that I understand. I did ask my guys that question
20 on the way out the door a while ago, and so we have not
21 seen that complaint until this morning, on track-out.

22 MEMBER COYNER: As you look at all the
23 industries you regulate, under your umbrella over there,
24 pretty good corporate citizen? I mean --

25 THE WITNESS: You know --

443
CAPITOL REPORTERS (775) 882-5322

1 MEMBER COYNER: -- do you get cooperation?

2 THE WITNESS: We definitely get cooperation
3 from them. When we call and tell them we need to do
4 something, then they do cooperate. They did blow us off
5 when we wrote them a letter and told them we needed a new
6 MW-1 well. Once we wrote the letter, they came back to
7 us, and that's when they said, how about -- we're going to
8 go ahead and offer some -- we're going to have discussions
9 of offering some monitoring wells. Can we do that and
10 wrap that all up in one, you know, well drilling
11 situation?

12 But then we thought we were going to have this
13 meeting a while back, and unluckily we didn't. And, you
14 know, we're sorry for that, but at the same time, we're
15 here today. And we're -- that's what we have given the
16 okay to, to wait through the SEC Commission, and we did

17 approve that.

18 MEMBER COYNER: Thank you very much. That's
19 all I have.

20 CHAIRMAN DODGION: Do you have any questions?

21 MEMBER ZIMMERMAN: No.

22 CHAIRMAN DODGION: Thanks, Alan.

23 THE WITNESS: Okay.

24 CHAIRMAN DODGION: Anything anybody else has?

25 MEMBER COYNER: I'm done.

444
CAPITOL REPORTERS (775) 882-5322

1 MEMBER ZIMMERMAN: No.

2 CHAIRMAN DODGION: All right. You guys are --
3 all the witnesses are off the hook.

4 with that, then, the -- are we ready for
5 closing arguments.

6 MS. TANNER: I just -- I want to make sure I
7 have the order correct, so that I do this strategically
8 correctly. I go first, and then I also have a rebuttal
9 close; is that correct?

10 CHAIRMAN DODGION: That's the way we normally
11 do that.

12 MS. TANNER: Okay.

13 CHAIRMAN DODGION: I'm not sure that's fair,
14 when -- you know, that basically gives them three shots,
15 and Mr. Marshall gets one. So we could be a little
16 flexible on that.

17 MS. TANNER: well, I guess I -- it's how I --
18 it's how I planned it. So if I can being that way --

19 CHAIRMAN DODGION: All right.

20 MS. TANNER: -- then that's how I'd prefer to
21 do it if you'll allow me.

22 CHAIRMAN DODGION: Do you want to go: You,
23 Intervener, and Mr. Marshall clean up, and then you go
24 back?

25 MS. TANNER: I can do that. Otherwise, I --

CAPITOL REPORTERS ⁴⁴⁵ (775) 882-5322

1 if I would prefer, I would waive my -- my opening
2 argument -- opening-close -- doesn't make much sense --
3 won't be that extensive. It will basically highlight, and
4 then my rebuttal close would be the longer one.

5 So I would leave it to you, if you would
6 prefer me to just go at the end, then I will do that.

7 MR. BUTLER: Mr. Chairman, I think it's the
8 Appellants' case. I think that they should go first. I
9 mean, I -- I don't know our case is to respond to theirs.

10 CHAIRMAN DODGION: well, I tend to agree with
11 you.

12 MS. TANNER: Okay.

13 MR. MARSHALL: I have no problem going first
14 and then having rebuttal. So that's -- I mean --

15 CHAIRMAN DODGION: All right. You're up. And
16 I guess before anybody gets started, I'd appreciate brief,
17 concise, to-the-point.

18 MR. MARSHALL: I'd like to start with kind of
19 setting the context. You know, we in Nevada make a big
20 deal about Yucca Mountain. And why do we do that? That's
21 because basically the United States is deciding to
22 locate -- you may argue about whether or not nuclear

23 energy is good or bad, but the determination was they're
24 going to locate the waste depository in Nevada. And that
25 I'm sure, as everybody is aware, stirs people up in

CAPITOL REPORTERS 446 (775) 882-5322

1 Nevada.

2 And basically the same thing is happening in
3 Amargosa Valley. We are locating, in Amargosa Valley, a
4 very large commercial milk-producing operation that I
5 don't think anyone -- we may call it different names,
6 whether it's waste product, or green water, or -- whatever
7 is it that it's called, but fundamentally it's the
8 disposal of this material that contains constituents that
9 are of grave concern to people of Amargosa Valley, and the
10 people of Nevada, and the United States because all these
11 constituents -- or a lot of constituents, named in the
12 permit, are regulated. And there's reasons why that is,
13 because they have substantial health effects, if they are
14 ingested through various ways.

15 It is also, I think, a nice comparison
16 because -- to Yucca Mountain, because it's critical that
17 we look closely at the process by which the State -- the
18 power of the State is utilized to basically impose on the
19 people of Amargosa Valley the unfortunate but the reality
20 of having a very large dairy in this area.

21 And it's -- while it's the dairy's choice to
22 operate there, the State is charged with regulating to
23 protect the waters of the State, both groundwater and
24 surface water, under both state law and the national -- or
25 the Clean Water Act, and the National Pollution Discharge

1 Elimination System. Did I get that right. NPDS?

2 So when we talk about notice, we're not
3 talking about notice regarding, you know, whether or not
4 there's going to be a gas station on the corner. When we
5 talk about the availability of documents, this is -- this
6 is, I think, really important stuff, and it's stuff that
7 the State should get right, and to make every effort to
8 involve the public, who are affected by it.

9 So with the kind of introduction, I'd like to
10 first talk about our process arguments. And fundamentally
11 they go to -- they're pretty straight up. I don't think
12 there's a lot of dispute as to facts here, but whether or
13 not the NDEP met their obligations under law.

14 And the first one is public notice for
15 permitting action, and the key language that we hammered
16 on in the opening, and probably have mentioned again and
17 again, but I'm going to say it again -- is that the
18 obligation is to provide notice -- a program for notice,
19 public notice, in a manner designed to informed interested
20 and potentially interested persons of the proposed
21 discharge.

22 And what form did that take place? We have
23 publication in the Las Vegas Review Journal, which is not
24 circulated in Amargosa Valley. We have publication once
25 in the Pahrump Times, which is not a weekly or a daily

1 circulating newspaper. There's posting in the -- I
2 believe, in the town hall. That's for the -- this initial
3 notice.

4 And the question that we put to you is: Is
5 that a program that's designed to inform interested and
6 potentially interested persons of the proposed discharge?
7 we think that under these circumstances, which is that the
8 impact is going to fall on a discrete relatively small
9 number of people within Amargosa Valley, more was
10 required, and in fact what was required is that they
11 attempt to provide notice to the individual residents of
12 Amargosa Valley, which -- you heard testimony that
13 Mr. Barrackman took it on his own initiative, and in two
14 days provided such notice, and actually had -- apparently
15 had a significant response to that notice, to get people
16 out. Of course, at this point it was for the hearing.

17 And NDEP's response to that is: well, we did
18 essentially what was required in the kind of set-out of --
19 here you must do at least this. I think they also posted
20 a notice on the website.

21 But we think the interests of the individuals
22 in Amargosa are so strong in this case that the program to
23 inform these people should have been more robust, and it
24 could easily have been done so.

25 Next I want to talk about the availability of

449
CAPITOL REPORTERS (775) 882-5322

□

1 documents. Now, imagine, if you will, that the Department
2 of Energy had said, well, we wanted to locate Yucca

01-20-10 SEC Ponderosa Hearing Volume II.txt
3 Mountain in Nevada, and any Nevadans who are concerned
4 about it, can come to Washington, D.C.

5 Again, we'll let you -- you can copy all
6 documents. We'll send -- or if you pay us, we'll send
7 them you to, but we're not going to locate any in Nevada.
8 That's essentially what happened here, that -- again, for
9 a discrete, relatively small population, the files -- for
10 example, that large document, over there, was only located
11 in Carson City. And citizens were repeatedly instructed,
12 well, if you want to see it, you've got to come to Carson,
13 or you can pay to have somebody copy it, but we're not
14 going to be -- I think Mr. Holmgren was pretty candid in
15 saying he didn't want to select any particular and be told
16 what document there was. And I'll give you that, but he
17 didn't want to select which document. So essentially you
18 get a feel, to get a review, you basically had to copy the
19 entire file. We don't think that is what was meant in the
20 statute by "available." We think that is not available.

21 Now, the State in its opening raised some -- I
22 would say -- policy objections to that, because what
23 about -- you know, what about people in northeast Nevada,
24 who are five hours away, who are -- what about -- you
25 know, you can probably posit with people who are even

450
CAPITOL REPORTERS (775) 882-5322

1 farther away than Amargosa Valley, but not by much.

2 The problem is that the State can easily
3 locate copies of documents, particularly critical ones,
4 like the NMP, in the library in Amargosa Valley. They
5 chose not to do that.

6 Now, they could have also made those critical
7 documents available on the website or available via an
8 Internet connection, which they actually had to staff,
9 Mr. Holmgren testified, but not to the public, but only
10 after the public hearing was closed.

11 And so we don't think that this meets the
12 requirements of NAC 445.271 that, in fact, documents be
13 made available. The interpretation of that term to mean
14 that you can come to us or copy of whole file, and we'll
15 send it to you at your cost is what available means, and,
16 in fact, that would be a poor policy if the state could do
17 that to its citizens. Essentially it's elevating the
18 convenience of the regulators over the concerns of the
19 individuals.

20 Kind of a last procedural issue is the
21 availability of the draft NMP prior to permitting, as
22 required by the water keeper decision. As I look at the
23 record, and particularly the State's Exhibit 23, the NMP
24 was already approved in 2006, prior to the major
25 permitting action here. And that, in fact -- again, we

CAPITOL REPORTERS ⁴⁵¹ (775) 882-5322

□

1 don't believe that availability, i.e., coming to Carson,
2 meets the requirement of the Water Keeper case.

3 And, finally, if you read the terms of the
4 permit, it is contemplated that, in fact, particularly --
5 this is on page 21-A-3, that the permit will be prepared
6 in the future. And we link that together with -- excuse
7 me -- the CNMP and NMP -- I'm doing it again -- forgive
8 me -- with 1-A-34-B -- this is on page 10 of 21 -- that

9 within 30 days of the permit effective date, the permit
10 shall submit to the Division an updated NMP. This, to us,
11 indicates that they are, in fact, not complying with the
12 federal mandate that they are required to do.

13 I'd like to now turn to our more substantive
14 issues, and they really breakdown to three, as we kind of
15 said in our opening. And that's where, I think, the
16 Commission has spent most of its time and attention is on
17 monitoring.

18 I want to talk about adequacy of the Nutrient
19 Management Plan. We believe that is inadequate, and we'll
20 touch on that, and I think what we'll all agree is kind of
21 a legal issue as to the applicability of the sewage
22 requirements of NAC 445A.107, et seq. But, fundamentally,
23 it's unclear what the -- we're unclear what the status of
24 the permit is related to water quality monitoring.

25 Now, the permit in the record seems to

CAPITOL REPORTERS ⁴⁵² (775) 882-5322

□

1 indicate that monitoring should have been going on for the
2 last two years, but has not, that in exchange for not
3 requiring them to put in a well, the State has approved --
4 or NDEP has approved a voluntary water quality management
5 program or monitoring program.

6 I think our -- at a minimum this program,
7 whatever it -- whatever it's going to turn out to be, in
8 other words, to be part of the permit. It cannot be
9 voluntary, because I think it's clear that the dairy has
10 different interpretations of regulatory language than the
11 State does, and they can decide not to monitor if they

01-20-10 SEC Ponderosa Hearing Volume II.txt
12 believe -- apparently, if they believe that the language
13 of the permit does not require it.

14 The dairy is also a fundamentally and
15 economically driven entity, and if it's not in their
16 fiscal interest to do a voluntary program, then it could
17 be that they choose not to comply with -- or excuse me --
18 to continue their voluntary testing, particularly if it
19 turns out that we have results that they not may not want
20 to follow up on. So our first position is that it has to
21 be a mandatory part of the permit.

22 We also believe strongly that there needs to
23 be monitoring wells down-gradient from the land
24 application fields. Okay. Fundamentally, there are
25 significant amounts of nitrates, various pollutants, fecal

453
CAPITOL REPORTERS (775) 882-5322

1 coliform going on to these fields. And notwithstanding
2 Mr. Holmgren's belief that the nutrient up-take plan is
3 going to remedy any potential discharge, the fact is the
4 permit recognizes there is going to be discharge to
5 groundwater. That's why they have the permit.

6 And so in order to adequately monitor this
7 immense operation and the large amount of materials, that
8 are potentially dangerous to those in Amargosa Valley, the
9 monitoring program has got to have elements in it that
10 look at the effect, the impact of groundwater, seepage
11 from these application areas into the groundwater, which
12 it does not have.

13 Next, I think -- this was one of Mr. Coyner's
14 points, and that is that we believe that the monitoring

15 sampling should include pathogens, fecal coliform. It
16 is -- you know, on the one hand we have testimony of
17 Mr. Barrackman and Mr. Bosta that they -- they, on their
18 own, initiated testing of their wells for fecal coliform.

19 It doesn't appear to be either expensive or
20 something that cannot be done, that these individuals can
21 do it. It doesn't seem to us unreasonable for a major
22 corporation to undertake the same obligation.

23 And I think -- just while we're on cost, I
24 think that all the testimony, given that this is a
25 multi-million dollar operation, annually, that the

CAPITOL REPORTERS ⁴⁵⁴ (775) 882-5322

□

1 addition of wells to monitor the groundwater near the
2 application fields, to some degree, it's not a cost issue.
3 It just -- I don't think anybody raised cost objections
4 to it.

5 And, finally -- I guess going back to our
6 process issues, but I think you can see from the evidence
7 that was presented to you that the determination of a
8 monitoring program really depends on a lot of technical
9 studies, and kind of policy determinations of risk, and,
10 you know, where should these monitoring wells be located.
11 And the reason why I think we heard testimony that the
12 reason why they're put in is basically the concern of the
13 citizens of Amargosa Valley. You know, we believe them to
14 be legitimate and others apparently don't, but that --
15 that determination of that critical program should be the
16 subject of public input in some fashion.

17 And so we think that the remedy for this is to

18 remand the permit to NDEP for the creation of a robust
19 effective monitoring program, and if there is information
20 that the public -- effective, the public can provide to
21 NDEP and the dairy, there should be an opportunity for
22 that.

23 I'd like to move on now to our next argument,
24 which is the adequacy of the Nutrient Management Plan. We
25 think it's fairly clear by both the terms of the permit

455
CAPITOL REPORTERS (775) 882-5322

1 and the obligations under the two guidance documents, the
2 NRCS 590 and 633, that a broader picture of nutrient
3 management must be taken than what was looked at here.

4 Fundamentally what was looked at here is
5 really the confines of what's coming out of the barns, the
6 waste water, and the manure, and applied to those
7 particular fields. What's not looked at -- we think that
8 it's critical for the residents of Amargosa Valley is
9 what's the -- where's the -- all the pollutants going?
10 How much is being created? Where is it being applied?
11 What's going off-site? What's remaining on-site? What is
12 being volatilized? What's the fate of this substantial --
13 tons and tons of potentially harmful material?

14 And that's what, when we read 590 and 633, is
15 a fundamental part of those considerations, not just --
16 let's try to take the most restrictive view we can of our
17 obligations, but let's try to look at the actual impact of
18 this particular commercial dairy, and they didn't do it.

19 I mean, fundamentally, they looked very
20 narrowly, and they think they should have looked more

01-20-10 SEC Ponderosa Hearing Volume II.txt
21 broadly. And so we -- are request to you is that you
22 remand for a broader look -- a disclosure to not only you
23 but to the public of the amount of waste that is being
24 generated and the fate of those many pollutants.

25 Lastly I'd like to talk about -- the animal

CAPITOL REPORTERS 456 (775) 882-5322

1 wastes from the dairy is required to be treated as sewage.
2 There really isn't any discretion here, from a direct
3 reading of the statute.

4 The material -- waste material coming off the
5 dairy meets squarely the definition of sewage. In fact, I
6 think that's what this Commission held as part of its
7 holding on ACE's petition process.

8 And, in fact, we -- it seemed to us to be the
9 indication that the appropriate place -- the end result of
10 that, the appropriate place to bring that question was in
11 the context of exactly this: Should that sewage -- those
12 sewage regulations apply to a dairy operation, a
13 commercial operation such as this?

14 There also isn't any dispute that the dairy
15 treats the waste, the waste stream. And under NAC
16 445A.2748, "treated effluent" means sewage that has been
17 treated by physical biological or chemical process.

18 So it's treated effluent. That triggers, in
19 turn, non-discretionary requirements, that if they are
20 going to land-apply, they have to meet secondary standards
21 and a series of buffers and miscellaneous items that are
22 listed.

23 Now, the arguments that we've heard in the

01-20-10 SEC Ponderosa Hearing Volume II.txt
24 briefs, and I think in the opening that -- well, there's
25 a -- a federal process over here, and that's how we

457
CAPITOL REPORTERS (775) 882-5322

1 regulate dairy waste. Well, that doesn't provide an
2 escape from a set of regulations that directly apply to
3 the situation.

4 You may have a policy dispute as to whether it
5 should apply, but as a matter of law, under the direct
6 applications of the definitions, those regulations apply
7 to this operation. And it's our position that NDEP does
8 not have the discretion to pick and choose between
9 requirements under which they can regulate. They have to
10 meet all their obligations.

11 Now, if it is, in fact, more strict than their
12 federal CAFO obligations, then that's a policy choice that
13 the State has made, to apply for strict regulations, and
14 NDEP is required to follow those.

15 So, again, our position is that you remand
16 this permit, because NDEP did not even consider -- in
17 fact, they refused to consider treating the waste coming
18 off this operation as dairy waste. They said those were
19 inapplicable, essentially. So we believe that the remedy
20 here is to, again, remand the permit for consideration and
21 application of those mandatory requirements.

22 And I think, just in conclusion we have, like
23 I said in the beginning, a major operation that produces
24 odors, that are causing substantial impacts to individuals
25 in Amargosa Valley. I mean, quite honestly, it's -- some

458
CAPITOL REPORTERS (775) 882-5322
Page 133

1 of these instances, I think, are just really, really
2 unfortunate that people have to deal with this.

3 And it may be that people moved to this area
4 after the dairy was there. Some of them were there before
5 the dairy was there, but the question really is: Does the
6 State have the authority to address these issues? And do
7 they exercise it? And the answer is, yes, they did, and,
8 no, they didn't, both in terms of the process that was
9 utilized to issue this permit, and the substantive
10 elements of the permit, and the NMP, itself.

11 And with that, I'll reserve the balance of my
12 time for rebuttal.

13 CHAIRMAN DODGION: The balance?

14 All right. Let's see.

15 MS. TANNER: I think I'm last.

16 CHAIRMAN DODGION: You're going to go last.

17 MR. BUTLER: I think that makes me next.

18 CHAIRMAN DODGION: All right, Mr. Butler.

19 MR. BUTLER: These Commission appeal hearings
20 are tough on appellants -- I'm sorry -- tough on
21 applicants for permits, because, understandably, there are
22 citizens here, as there are in every appeal you hear,
23 typically, who are discontented with the -- whatever has
24 been permitted, whether it's a mine, a refinery, a cat
25 food-making company, or a dairy.

459
CAPITOL REPORTERS (775) 882-5322

1 And from the applicant's side, you have to
Page 134

2 basically sit here, so that those people can have their
3 say, make their complaints, and flesh them out in front of
4 the Commission, and let that processing forward.

5 From the dairy's perspective, they've been
6 operating in the Amargosa Valley for 16, 17 years. They
7 are a productive member of the community. They produce
8 milk, which seems to me is not comparable to Yucca
9 Mountain in any way. They produce manure and manure
10 solids, which, if you go back through the record of the
11 program we're talking about, through the EPA regulations,
12 are identified, are recognized, and acknowledged as a
13 resource.

14 Now, if you look at this map, you see what,
15 you know, Amargosa Valley is. The existence of these
16 green fields and the existence of productive crop land in
17 other parts of the valley is a result of building up the
18 soil, of amending the soil. And that involves,
19 frequently, almost always, the application of cow manure
20 or whatever term we want to use for it.

21 So I think in terms of talking about the
22 context here, it's important to understand that the dairy
23 is an ongoing business concern. They feel, from their
24 perspective, that they have a progressive record. They
25 are the first dairy in the State of Nevada to get an NPDS

460
CAPITOL REPORTERS (775) 882-5322

1 permit. They're not the largest. There are other of the
2 same scale. There's the first dairy in Nevada to have a
3 Comprehensive Nutrient Management Plan.

4 So I think, just to make it clear, that the
Page 135

5 dairy is very proud of its record, its environmental
6 record and its economic record, as a member of the
7 community, and this is our chance to say, you know, okay,
8 we've taken that, but we're not going to take it any more.

9 In terms of responding to the arguments, I'm
10 going to defer on the notice arguments to the State. I
11 want to talk a bit about the NMP process. That is, the
12 question of when the NMP is approved, when it's available,
13 and how that fits with the permitting process.

14 Mr. Marshall now is making a different
15 argument. He's reading water keepers a different way than
16 he did when he filed his opening permits (sic). What
17 water keepers said is that the NMP -- and what we also
18 need to -- I need to footnote this, I can do that in
19 remarks -- that those relations didn't come into effect
20 until after this permit was approved, but, nonetheless, we
21 think that NDEP followed that procedure, that the NMP has
22 to be available during the public comment period.

23 Here's what happened with the dairy's permit.
24 They submitted an NMP. It was reviewed and approved. The
25 NMP is not an authorization to discharge. The NMP is not

461
CAPITOL REPORTERS (775) 882-5322

1 a permit. The NMP is not a license. It is a plan. NDEP
2 took that plan and folded it into the draft NPDS permit
3 and put that permit out for public comment.

4 If you look at the -- this is in the notice
5 section -- the Notice of Decision section. This is
6 explained. It says, "The terms of the NMP have been
7 incorporated into the permit and the Fact Sheet." There's

8 also another reference in here that explains when it was
9 approved.

10 Now, this is important, because at the
11 beginning what Mr. Marshall was saying is that the NMP was
12 updated after the permit was issued, so they didn't have
13 the appropriate NMP to comments on. But the NMP that was
14 available during the public comment period described the
15 impacts of the one-million-gallon-per-day facility and the
16 land application rates under that proposed plan. So this
17 is in advance of the permit. The plan explains: This is
18 the way we're going to manage the nutrients.

19 So you have the -- you have the NMP, that's
20 incorporated into the permit, a draft permit, as in Nevada
21 regs, is put out for review. The NMP is available. The
22 public comment is held. The hearing is held. All of --
23 it generates all this paper we've got here, responses to
24 comment, and then you get to the permit. And the permit,
25 then, incorporates the terms of the NMP and allows the

462
CAPITOL REPORTERS (775) 882-5322

1 permittee to discharge in accordance with the NMP.

2 Now, there were some changes made to the NMP
3 in the permit. Mr. Marshall notes that, but what he
4 doesn't note is the response from NDEP to Mr. Eddie, who
5 wrote on behalf of Mr. Barrackman, and this is on page 4
6 of the notice section. "The NMP is basically complete
7 except for minor revisions, such as correcting
8 typographical errors, incorporating a copy of the renewed
9 permit, and adjusting processed waste water sampling
10 locations."

14 processes and say we propose to cancel our monitoring
15 plan, and then the Division would have to act on that. I
16 don't see that as a substantial different issue.

17 Now, he says: We want wells down-gradient of
18 fields, and it should include pathogens. As a Commission,
19 you can act on the evidence that's before you. The only
20 evidence before you on the down-gradient wells from the
21 field is Mr. Holmgren, who says it's not necessary and not
22 technically justified, and Mr. Lazarus, who says it's not
23 necessary, and it's not technically justified. And
24 they've explained why that is. The soil sampling is more
25 effective at answering the question that is being asked,

CAPITOL REPORTERS ⁴⁶⁴ (775) 882-5322

1 than would the groundwater monitoring wells. Now, that's
2 what -- that's the evidence you've got. All you have on
3 the other side is: we would like these wells.

4 Now, we don't have -- what the Appellants have
5 failed to do here is to direct you to any aspect of the
6 law or the regulations that the Division has violated in
7 issuing the permit. That's their obligation. They
8 have -- all they're saying is: we're dissatisfied with
9 it. We don't like it. We want more.

10 But there's no evidence to justify that.
11 There's no legal requirement to justify that. There's no
12 regulation to force the Division to do that. They have
13 the authority. They have the expertise, and they have the
14 discretion. And they have made their decision here, and
15 you don't have any evidence before you that says that was
16 wrong, that was inconsistent with the regulations, or it

17 was a mistake.

18 Now, I want to talk about the adequacy of the
19 NMP. And Mr. Marshall -- the argument here hinges
20 entirely on the two National Resources Conservation
21 Service Practice Standards, and I want to go to the
22 permit, and this is -- I think it's Exhibit 20, and it's
23 page 5 of 91.

24 And the permit 1-A-3 -- this is the section
25 titled "Nutrient Management Plan." It says, "The facility

465
CAPITOL REPORTERS (775) 882-5322

1 shall be operated in accordance with the Division-approved
2 Nutrient Management Plan. The NMP shall be prepared, in
3 accordance with National Resource Conservation Service
4 Standard Codes 509 and 633."

5 Then it goes on. I want you to look
6 critically at the next paragraph in that section. It
7 says, sub A, "The NMP shall contain provisions that," and
8 it specifies eight areas. And if you look at the EPA CAFO
9 regulation -- and it's section -- oh -- it's -- I've got
10 the citation, but you'll find this. We can find the same
11 language. This is lifted from the EPA regulations.

12 The EPA regulations, incorporated in Nevada,
13 say, "The NMP shall contain," and it describes the things
14 that the NMP shall contain, and those are all here.

15 Now, Mr. Marshall doesn't want to talk about
16 this list. He doesn't want to talk about the regulations.
17 What he wants you to do is read the permit, to stop right
18 after the reference to the NRCS codes, but that's not what
19 it does.

23 Neither the Bureau nor the Division have the authority to
24 do that. Their authority is limited by the statute and by
25 the regulations.

CAPITOL REPORTERS 467 (775) 882-5322

1 So the system can't work the way they want it
2 to. And, again, they're dissatisfied with the system, but
3 the regulations of the law are limitations on how the
4 Division can act, how the Bureau or Division can act under
5 this permit.

6 The last point on the conservation standards,
7 the only specific complaints you get -- let's talk about
8 what's specifically wrong, in their judgment, with the
9 NMP. You've got a list of them in some of the briefs.
10 Most of those have dropped out. We're back just to this:
11 Take a broader look.

12 But just as a matter of practice, a lot of the
13 considerations that are identified in these standards, for
14 example, the drop-down sprinkler heads, the timing of some
15 of the land applications, those are part of the dairy's
16 practices, anyway. They're not part of the permit.
17 They're not part of the Water Pollution Control Permit,
18 but they're the way the dairy manages its business, and
19 there's not authority, under the Water Pollution Control
20 Permit, to require those.

21 The last point on the sewage. This has been
22 addressed. Mr. Marshall says there's no dispute that this
23 is treated effluent. Well, we disagree with that there.
24 We dispute that very strongly. Under the definition of
25 the statute, this is treated effluent.

1 what the legislature has done, what the Clean
2 Water Act does, is it creates a regulatory framework for
3 these animal feeding operations, just as there are
4 different regulatory frame works for other facilities.

5 The Commissions already heard this. We think
6 it's a moot point, and that's all I have. Thank you very
7 much.

8 CHAIRMAN DODGION: Thank you.
9 Ms. Tanner?

10 MS. TANNER: Thank you, Members of the
11 Commission. I would agree with Mr. Butler that much of
12 this case is about the Appellants' wanting more, more than
13 what is allowed by law, and their wanting more is not a
14 basis for you to grant their appeal.

15 Much of what I think drives this is this
16 notion that CAFOS are bad, and we're not to discuss that.
17 That's not the point. I certainly have sympathy for the
18 issue of nuisance complaints that they have, but, again,
19 we're not here to address that.

20 The State -- in this case, the Division, does
21 not have the authority to preclude the issuance of a
22 permit if the applicant meets all of the applicable
23 requirements. We must do it. We cannot pick and choose.
24 If they meet the requirements, we must issue it.

25 NDEP, in this case, has issued a very

1 protective permit at the time those regulations were
2 issued. There was the Water Keeper decision, as you've
3 heard, that was not in effect. Yet in this case -- it was
4 not the law of the Ninth Circuit, yet in this case those
5 protections were also given, over and above what was
6 required by law.

7 I want to give -- I want to give framework, I
8 guess. I think in the beginning I said my job, as I
9 viewed it, was to keep this as simple as possible, and I
10 know after a day and a half it probably doesn't appear
11 that way, but I want to really focus on the issues.

12 The substantive issues raised by this appeal
13 are ultimately seeking rule changes. In NAC 445B.866, it
14 addresses petitions to adopt, file, amend, or repeal
15 regulations. It sets forth the process to do that. That
16 is not this process. This is an appeal process.

17 In this case, NRS 445A.605, addresses
18 appealable matters under the Nevada Water Pollution
19 Control Law. Those are: The issuance, the denial,
20 renewal, suspension, or revocation of a permit.

21 This here -- this statute is what you are
22 empowered to address today.

23 Further, this Commission limited the issues in
24 this case in your decision of April 27th of 2009, by
25 allowing the intervention of ACE one year past their

CAPITOL REPORTERS 470 (775) 882-5322

□

1 deadline to appropriately be in this forum. And you did
2 so with the clear requirement that they were limited to

01-20-10 SEC Ponderosa Hearing Volume II.txt
3 the scope of the appeal of Messrs Bosta and Martinez.

4 And the scope of those appeals are largely
5 identical, and they address the issuance of this permit.
6 Not what's happened since. Not what happened way before,
7 but whether or not NDEP complied with law in issuing this
8 permit.

9 Under those -- under both the regulation, and
10 both the statute, and your ruling, that is your -- your
11 duty today is to address that issue. It is not how this
12 permit was administered after issuance. It is not issues
13 unrelated to the permit, such as air quality. It is not
14 related to nuisance. It is not related to the subsequent
15 actions of the dairy. It is not related to the technical
16 merits of the plans that NDEP approved based upon the
17 known science that was provided at the time.

18 As I indicated, once the Division determines
19 that there is compliance with the regulations, they must
20 issue the permit, and that's what they did in this case.
21 So, again, the sole issue is whether or not the Division
22 complied.

23 Appellants have failed to raise any claim
24 before you today and yesterday upon which relief can be
25 granted. I mentioned that in my efforts do a motion to

471
CAPITOL REPORTERS (775) 882-5322

1 dismiss when we first started.

2 Each argument by the Appellants is simply that
3 NDEP needed to do more than what the law required. So if
4 we back up a little bit and just look at some of the
5 relevant history -- and I'll try to be brief -- the

01-20-10 SEC Ponderosa Hearing Volume II.txt
6 original appeals, like I said, were largely identical.

7 They addressed issuance of the permit based
8 upon allegations of bias, of facts being withhold or
9 denied, and that NDEP cannot document that the waters of
10 the State will not be degraded by the dairy operation
11 without groundwater monitoring. That -- those are the
12 issues raised in the original appeals.

13 And they -- they raised several regulations as
14 required by the form. NAC regulations 445.228 to
15 445.263 -- I believe, actually they meant 445A -- those
16 are the precise regulations addressing discharge permits,
17 the NPDS standards for CAFOS under 40 CFR, and the Nevada
18 Water Pollution Control Law.

19 They also address opening meeting law. I'm
20 not sure where that statute comes from that they
21 reference, but we can at least presume that we're talking
22 about the notice issues that were raised, and we don't
23 object to that.

24 After argument on that motion, again, this
25 Commission bound ACE to those issues. The original

472
CAPITOL REPORTERS (775) 882-5322

1 appeals were rather a shotgun approach, but what you've
2 seen before you in the last two days, blows that spray
3 much wider, and I'd ask that you rein that back in.

4 All parties here are represented by Counsel,
5 as you know. We all know the rules, and we should all be
6 held to them. And I would ask that you deny any aspects
7 of the appeal -- of this appeal that are outside of the
8 original parameters.

9 Let's talk about -- I'm going to step -- let's
10 go into the meat of the matter. In regards to the
11 procedural issues, first is the inadequacy of public
12 notice, that the notice of the permit of the proposed
13 action and then the subsequent notice of proposed hearing,
14 and the availability of documents were inadequate.

15 All of these allegations fail on their face.
16 Contrary to Mr. Marshall's argument, the statute does not
17 differentiate between the perceived harm of the
18 appellants. So he can make arguments comparing this to
19 Yucca Mountain, but an appellant whose life is completely
20 altered by a gas station next-door might feel just as
21 horrible, and the statute does not differentiate, in the
22 notice requirements, between those two individuals. They
23 can't. It's too subjective.

24 NAC 445A.234 addresses the public notice of
25 the permit. NDEP published, above and beyond the

CAPITOL REPORTERS ⁴⁷³ (775) 882-5322

1 requirements of publishing in the paper. They were
2 required to publish in a paper of daily circulation. The
3 closest one was in Las Vegas. It could have been Las
4 Vegas Sun. It could have been the Las Vegas Review
5 Journal. We did the Las Vegas Review Journal.

6 In addition, although they were not required,
7 because it was not a daily circulation, they published in
8 the local newspaper, which was handed out by-weekly. It
9 is not the requirement of law that NDEP insure that notice
10 is received. They must comply with providing notice.

11 It is not NDEP's responsibility if people in

12 the community don't read the paper. They are required to
13 publish, and that is what they did, above and beyond that
14 particular provision of the regulation.

15 And as far as the issue of daily circulation,
16 that was raised in the closing argument of the Appellants,
17 and I would ask: what other option is there in a town
18 like Amargosa? If they don't have a paper of daily
19 circulation, what is it that they would have NDEP do to
20 satisfy that provision of that regulation? They have to
21 publish. So they did both.

22 At the point of the initial -- well, let me
23 finish. And NDEP also, of course, notified its official
24 mailing list that was in effect at that time. That is
25 what it was required to do. NDEP did more, because it

CAPITOL REPORTERS ⁴⁷⁴ (775) 882-5322

1 posted at the town hall, and it also posted on the
2 Internet, above and beyond what is required by the
3 statute.

4 At the point of the initial notice of the
5 proposed action, NDEP could have little knowledge as to
6 who would be interested. They couldn't know Appellants'
7 feelings at that point in time.

8 So let's move on to notice of the public
9 hearing. That is set forth in NAC 445A.238, and that
10 requires that the Division provide at least the same
11 notice, which they did. Whether Mr. Barrackman did
12 anything in addition is not relevant to whether or not the
13 Division complied with the statute.

14 He -- he testified that he couldn't say to you

15 how many people at that meeting got his notice, and how
16 many people got the notice that was provided by the
17 Division. He acknowledged that he, in fact, heard from
18 somebody who read the notice in the paper. He just didn't
19 read the paper. But that's -- the notice that is provided
20 under these circumstances, I think, it actually -- common
21 sense would indicate that it presumes that people talk,
22 and in a small community that news spreads.

23 Mr. Holmgren testified that it is the
24 practice, and, in fact, that it did happen in this case
25 that the Division provides written notice to anyone who

CAPITOL REPORTERS ⁴⁷⁵ (775) 882-5322

□

1 requests, in writing, to have a hearing. He testified
2 that he provided that notice, even though those people
3 were not on the official mailing list.

4 Now, Mr. Barrackman noticed that he didn't --
5 testified that he couldn't recall whether or not he,
6 himself, gave written notice of request of a hearing. He
7 just said he didn't receive an individual notice.

8 However, he also acknowledged, and
9 Mr. Holmgren confirmed, that his lawyer requested written
10 notice, and his lawyer did, in fact, receive it. So the
11 Division went above and beyond mailing simply to the
12 Division's official mailing list.

13 Now, there was testimony after that fact, by
14 Mr. Bosta -- I'm sorry -- that Mr. Bosta testified that
15 at -- at the hearing, to which they contest the notice, he
16 then requested to be placed on the official mailing list,
17 and he was. There has been no subsequent issue to give

01-20-10 SEC Ponderosa Hearing Volume II.txt
18 them notice, outside of these proceedings.

19 Most importantly, there was no harm caused to
20 any of the Appellants. They all were there. They all
21 participated. They all testified, and they all filed an
22 appeal in a timely fashion. Well, with the exception of
23 Mr. Barrackman, but we understand how that happened.

24 This is enough, according to the Nevada
25 Supreme Court. In the case of Edwards versus State of

CAPITOL REPORTERS ⁴⁷⁶ (775) 882-5322

1 Nevada, Department of Human Resources, Division of Health,
2 the Nevada Supreme Court addressed a hearing before the
3 State Personnel -- the Personnel Advisory Commission, and
4 in that case the Appellants contended that they did not
5 receive formal notice required under the APA, the
6 Administrative Procedure Act.

7 The Court denied the appeal, in part, because
8 the Appellants had actual notice, that they did appear and
9 they vigorously participated. That's exactly what you
10 have here. They're here. They vigorously participated
11 throughout the process in the last two years.

12 It is undisputed by Appellants that the
13 Division complied with both NAC 445A.234, 445A.238, and
14 445A.239.

15 Appellants' claim for more or better does not
16 hold water. The issue is not appropriate before you, and
17 it should be denied.

18 As far as inadequate availability of public
19 documents, again, Appellants ask for more than what is
20 required. Here again, Appellants acknowledge that the

21 availability of documents complied with the letter of the
22 law, but it was simply not good enough for them.

23 The regulation requires that the Division make
24 documents available. It does not require that they be
25 reasonably available, immediately available, conveniently

CAPITOL REPORTERS 477 (775) 882-5322

1 available, or more conveniently available, and it is
2 certainly does not require that the Division alter its
3 program of access to public documents as individual
4 appellants would like them to have it.

5 The Appellants' argument ultimately, as I
6 indicated in my opening argument, ignores the reality, and
7 it asks the Division to differentiate between these
8 appellants and other appellants who live much further away
9 from Carson City than they do, or Las Vegas. And I won't
10 repeat the argument. I think you got the point of that in
11 my opening.

12 As far as how those documents were provided,
13 when they were provided, again, I think Mr. Holmgren
14 testified that he did not feel comfortable with the
15 request from Mr. Bosta. Mr. Bosta would call up and say:
16 You tell me what you think I need to see.

17 That's not appropriate. The Division should
18 not be put into that position. His response was: If you
19 want me to send you a document, tell me what it is. I'll
20 send it you to. If you want to look at the entire file,
21 come and look at it. If you want to copy the entire file,
22 you hire a copy service, because these are complicated
23 documents. They've got fold-out color maps. You've got

01-20-10 SEC Ponderosa Hearing Volume II.txt
24 big documents, all involved in that -- in that NMP
25 document -- hire a copy service, get your documents.

478
CAPITOL REPORTERS (775) 882-5322

1 That's not making it inconvenient. That's
2 just reality. Think about what would happen if we showed
3 up here, Mr. Holmgren picked out what he thought was
4 relevant, what you would be faced with here today is the
5 appellant saying, well, Mr. Holmgren didn't give me that
6 document. I needed to see that.

7 That's not fair to the Division. That's not
8 what they're required to do under the law. Again,
9 Appellants asked for more. More is not what they're
10 entitled to, and that issue should be dismissed.

11 The final issue of notice is in regards to the
12 draft NMP, and I believe Mr. Butler explained that quite
13 well, and I concur with his thoughts on that, in that much
14 has been brought up about the Water Keeper decision,
15 especially in Appellants' opening brief and reply brief.

16 It's important to note, that, of course -- I
17 think Mr. Butler stated it -- that the Water Keeper
18 decision was not in effect at the time that this permit
19 was issued. Even so, the Division sought guidance from
20 EPA in light of the Water Keeper decision, and I
21 believe -- I believe it is my Exhibit 25. Again, I gave
22 them all away -- which is a letter from the EPA to the
23 Division specifically discussing issues with the draft
24 permit, and NMP, and what should be provided as notice.

25 The Water Keeper case does not require that

479
CAPITOL REPORTERS (775) 882-5322
Page 152

1 the entire document be noticed. It requires that the
2 critical terms be noticed. And you have heard testimony
3 from Mr. Holmgren and I believe from Mr. Lazarus that,
4 yes, the critical terms of the NMP were incorporated into
5 both the Fact Sheet and into the draft permit, both of the
6 which were noticed.

7 And, again, I would concur with Mr. Butler
8 that the minor modification issue does not require that
9 the entire NMP be posted prior to permit application.
10 And, again, I believe in Exhibit 25 it also discusses the
11 EPA's opinion on what a major versus a minor modification
12 would be, and NDEP complied with that guidance, even
13 though it was not authority.

14 In regards to the issue of sewage, there's
15 three reasons why the Commission should deny this issue.
16 First, it's moot. You've already ruled on it. Second,
17 it's outside the scope of the original appeal, in
18 violation of the Commission's decision on April 27th,
19 2009. And, third, it's outside the scope of the appeal of
20 an individual permit, because, in a sense, it's asking you
21 for a rule change.

22 It's moot, as I said, because you've already
23 ruled and disposed of the matter in your decision back
24 from June 2009. I'm sorry. I don't have the date on
25 that.

480
CAPITOL REPORTERS (775) 882-5322

1 In regards to it being outside the scope of an
Page 153

2 appeal of an individual permit, I would say that the
3 Appellants' attempt to link the disposal of agricultural
4 waste, under the definition of sewage, to the processes
5 required for municipal human waste falls outside of the
6 original appeal.

7 Again, Appellants reference 445A.228 to
8 445A.263 as the basis for their appeal. These regulations
9 that address municipal waste and treated effluent are set
10 forth in NAC 445A.274, et sequence. They're not included
11 in the original appeal. ACE was allowed to intervene
12 under those limited circumstances, and you should hold
13 them to that. They know the rules.

14 This is an improper forum to address this
15 issue. If -- even if you were to find that it was
16 appropriately before you, if you make a decision on it, I
17 submit to you that you're engaging in a rule change, that
18 requires notice to all interested parties.

19 The application of raw agricultural waste,
20 allowed by the dairy's permit, does not fall under the
21 definition of treated effluent. I disagree it is not
22 clear.

23 NAC 445A.2748 defines treated effluent as
24 sewage that has been treated by a physical, biological, or
25 chemical process. I would submit to you that those --

481
CAPITOL REPORTERS (775) 882-5322

1 that language, "that has been treated," requires some sort
2 of human effort to alter that waste.

3 And I see where he's going with in, based upon
4 some of the testimony that he elicited. I would also

5 submit to you that any implication by the Appellants to
6 state that the dairy's efforts to appease their neighbors
7 by using aeration and microbes to address odor -- all
8 right -- and I might -- I believe it might have actually
9 fall under NRCS guidance, as well -- does not turn this
10 into treated effluent. And that argument, frankly, is
11 slightly disingenuous, given the fact that they have odors
12 complaints. The Dairy is trying to address that by doing
13 something over and above they never have to do with raw
14 agricultural waste.

15 NDEP has never regulated agricultural waste
16 from a CAFO, outside of the CAFO rules set forth about the
17 EPA and the regulations of the State of Nevada. To hold
18 up that -- that raw agricultural sewage is now defined as
19 treated effluent, we submit would be a rule change, well
20 outside the scope of this hearing.

21 And I would cite to you in the Southern Nevada
22 Operating Engineers Conduct Compliance Trust versus
23 Johnson, which is the Labor Commission, that case stated
24 that -- and I quote, "A decision in a contested case,
25 before an agency" -- "a commission should determine only

482
CAPITOL REPORTERS (775) 882-5322

1 the rights of the parties involved in that particular
2 proceeding and not impact the rights of others not
3 involved in the proceeding."

4 I would suspect that any ruling today by this
5 Commission, that raw agricultural waste is treated
6 effluent, would involve many different parties' interests.

7 I'm going to next talk about the air pollution
Page 155

8 and nuisance issues. Appellants attacked the witnesses
9 for both the State and the dairy for what they believe is
10 failure to comply with the NRCS standards relating to the
11 CNMP.

12 Mr. Holmgren and Mr. Lazarus both told you
13 that CNMP standards for NRCS are over and above the NMP
14 standards that are required by the EPA. So those issues,
15 over and above what is required under the NMP, are
16 completely irrelevant to this proceeding.

17 NDEP, in issuing the NPDS permit, must comply
18 with the Clean Water Act, Nevada State Law in issuing this
19 permit, but they do not have to comply with NRCS
20 standards. Nobody stood up here and told you the NRCS
21 standards are the rule of law. They are not.

22 NDEP must insure that NMP standards are met in
23 regards to water quality. They do not have to insure --
24 the Bureau of Water Pollution Control does not have to
25 insure with air quality standards, forage amounts, things

483
CAPITOL REPORTERS (775) 882-5322

1 of that nature, all of those additional items that are
2 involved in a CNMP.

3 That CNMP, as you know, is a voluntary program
4 under the NRCS, which is an arm of the Department of
5 Agriculture, and in this case the dairy utilized the CNMP
6 in order to get cost share funding for the EQIP Program.
7 They are not a regulatory authority for the State of
8 Nevada.

9 There is certainly a forum for Appellants'
10 complaints in this area, but it's not in this forum. I

11 would submit that their time and money would better spent
12 in their county, addressing zoning, and planning, and
13 health matters before their County Commission, or filing a
14 nuisance complaint in the District Court, or addressing
15 air quality through the appropriate Bureau of the -- of
16 Nevada Department of Environmental Protection.

17 As these matters are not properly considered
18 in the NPDS permit, they are thus irrelevant to this
19 appeal. They are irrelevant to whether or not the
20 Division would approve an NPDS permit for this dairy, and
21 they must be dismissed.

22 The Appellants have failed to show that NDEP
23 violated the law in this case. They want more. They want
24 NDEP to impose more, but more is not required. NDEP
25 complied with law, and that should be dismissed.

484
CAPITOL REPORTERS (775) 882-5322

1 At best, Appellants' claim in regard to NRA
2 standards were not followed -- the claim that NRCS
3 standards are were not followed -- excuse me one moment,
4 please. I just got lost on my notes.

5 Again -- and I guess I would just quote --
6 yes, Mr. Marshall -- excuse me -- in fact, indicated, I
7 think in -- I would acquiescence, that there -- that there
8 is no violation of law, that they want -- he said, we want
9 a broader look. That acknowledges that they're going
10 beyond what is required.

11 I want -- I'm going to move now into the
12 groundwater monitoring issues, and then I think I'm about
13 done. But I did want to take a few moments to comment,

14 because this will be my only opportunity to speak to you
15 about what was said on -- on -- in Appellants' close.

16 First, that water quality -- I believe it was
17 raised that in the water quality portion of the permit,
18 that monitoring should be a part of the permit. They
19 asked that monitoring wells be applied down-gradient to
20 the fields. And I believe -- it was quoted that it was
21 Mr. Holmgren's belief that that was unnecessary.

22 I want to clarify. It's not Mr. Holmgren's
23 belief. That is what is allowed by the EPA. That is what
24 is required by the EPA. As it came out, time and time
25 again, EPA regulations say that nutrient up-take is the

485
CAPITOL REPORTERS (775) 882-5322

1 most effective means of handling nitrogen and pathogens in
2 the soils, and soil monitoring is the most effective
3 method to address whether or not there's a problem with
4 that land application.

5 Pathogens, fecal chloroform (sic), request
6 that that be handled in groundwater monitoring -- I think
7 it came out quite clear that that's not in conformity with
8 EPA regulations, with State of Nevada regulations, and in
9 essence, it's probably there for good reason. It's not
10 entirely effective. What's most effective is the soil
11 monitoring plan.

12 The term -- Mr. Marshall mentioned that
13 determination of the plan is solely dependent on the
14 technical studies that were provided, and they should be
15 the subject of public input.

16 I think, importantly to note, there was public
Page 158

17 input. There was a hearing on this document. That there
18 is an additional groundwater monitoring plan, voluntarily
19 submitted by the dairy, means that there's more. There's
20 even more protection being provided than that that was
21 noticed at the hearing and commented on. And the permit
22 specifically allows for the Division to do that as a minor
23 modification. That actually gives the Division
24 flexibility, if there is a problem, to add more
25 groundwater monitoring wells in the future.

486
CAPITOL REPORTERS (775) 882-5322

1 This permit was approved, because it addresses
2 source control. Most importantly, in this case -- and I
3 think we said it here today -- is that the Division views
4 source control as the gold standard in this case.

5 Groundwater monitoring is important, and it's
6 included, and it is -- but it is a representative portion
7 of the permit. The protective portion is source control.
8 And we really want to make sure that that point is quite
9 clear. This permit was issued pursuant to the CAFO rules
10 in existence at the time that it was issued, and those
11 were the CAFO rules of 2003.

12 In addition, as I indicated before, the
13 Division did utilize all the guidance from the EPA
14 applicable to comply with the water keeper decision, even
15 though that decision was not law.

16 The CAFO rule of 2003 did not require
17 groundwater monitoring in an NDPS permit, but the
18 Ponderosa permit is protective of groundwater of the
19 state. I think, as Mr. Holmgren called it, it's a bit of

20 a hybrid.

21 The Division required monitoring of the
22 clay-lined lagoon. The schedule of compliance and the
23 permit requires contingent groundwater monitoring wells to
24 address emergency use of abandoned ponds. The permit
25 requires two feet freeboard maximum limit on processed

CAPITOL REPORTERS 487 (775) 882-5322

1 waste waters in the ponds.

2 The permit allows the Division to seek
3 additional monitoring, as a minor modification, which
4 gives them the flexibility to address emergencies. The
5 Division has the accepted the monitoring plan, submitted
6 by the dairy for additional monitoring, and I would agree
7 with the dairy, that our acceptance makes that pretty
8 official for them. It would be very difficult for them to
9 back away from that.

10 There was some mention about pond lining --
11 pond liners leaking. Yes, pond liners will leak
12 eventually. This is not a zero-discharge permit. Pond
13 liners may leak, but this permit is reviewed every five
14 years, and that is an issue that is taken into account.

15 And even though pond liners may leak, that
16 doesn't mean that they leak catastrophically. It could be
17 a pin prick. It could be a slice. It could be something
18 catastrophic, but this document addresses those concerns.
19 And we can ask what if's, but that's not relevant to
20 whether or not the Division issued this permit.

21 This permit is progressive, and it is
22 preventative. The groundwater monitoring is responsive,

23 but the source control is preventative. The EPA
24 promulgated the CAFO rule of 2003. It went through the
25 water keeper case, and in 2008 it still determined that

CAPITOL REPORTERS 488 (775) 882-5322

1 the best control technology available for managing ag
2 waste is nutrient application on the land. That's still
3 the case.

4 As Mr. Lazarus testified, the dairy soil
5 testing conforms with EPA's best control technology, and
6 it is a top-down approach. You can catch the problem much
7 sooner.

8 The EPA standards include testing for fecal
9 coliform in the soil tested, and those are incorporated in
10 the permit.

11 As we -- I think -- well, I'll skip that. I
12 think we've got the point that it -- it's more effective
13 to test it that way, because of the capacity for it to
14 degrade and test it in the groundwater.

15 Groundwater monitoring and protection of the
16 waters of the state was addressed in the NDPS permit, and
17 the Division's decision in this regard must be afforded
18 great weight by the Commission. This is very important.

19 In FAS versus Miller, which is cited in our --
20 in our the opening brief, an administrative agency charged
21 with duty of administering an act is impliedly --
22 impliedly clothed with the power to construe the relevant
23 laws and set necessary precedent to administrative action.

24 The construction placed on a statute by the
25 agency charged with administering it is entitled to great

1 deference, so long as those interpretations of law are
2 reasonable and consistent with the legislative intent.

3 At the time this permit was issued, the dairy
4 was in compliance. That is the triggering point. That is
5 what allowed NDEP or -- required NDEP to issue permit.
6 They complied with the application process, and they were
7 in compliance. Anything subsequent to that, for this
8 decision here today, I submit, is irrelevant and should
9 not be considered.

10 Any subsequent issues with the dairy do not
11 nullify the fact that the Division complied with its
12 regulations at the time the permit was issued.
13 Moreover -- most importantly, the Appellants have failed
14 to show you -- to present any credible evidence that
15 there's a problem with the groundwater, since the time the
16 permit was issued. If anything, what's been shown in this
17 hearing is that this permit works.

18 The what-if's are not relevant to this
19 proceeding. They are not relevant to whether or not the
20 permit issues. Everything we do in the waters of the
21 state, a picnic, a swim, has the potential to pollute. We
22 know that. This is a pollution permit. We are dealing
23 with pollution.

24 Are there risks in any permit? Of course,
25 there are. But you cannot hold the Division to a higher

1 standard in the case because citizens are upset. They
2 have done their job in complying with the regulations.

3 Nutrient balance is the key, and that's what
4 shows you that this is actually working. As Mr. Lazarus
5 testified, this is -- this is a living document. And they
6 adjust, each year, to meet that nutrient balance. Those
7 fields that were out of balance are being addressed. This
8 permit is working. There's no credible evidence of any
9 threat to the groundwater that was presented. This permit
10 is working.

11 Appellants' case, again, in this instance,
12 asks you to provide them with more, and they are not
13 entitled to more. It is not enough to grant their appeal,
14 and I ask it be denied. Thank you.

15 CHAIRMAN DODGION: Thank you.

16 How long are you going to be?

17 MR. MARSHALL: Short.

18 CHAIRMAN DODGION: Five minutes or less?

19 MR. BARRACKMAN: Do you want to take a break
20 first?

21 MR. MARSHALL: I think five minutes, we can do
22 it.

23 CHAIRMAN DODGION: All right.

24 MR. MARSHALL: I think a lot of this case
25 comes down to where the risk should fall, when you're

CAPITOL REPORTERS ⁴⁹¹ (775) 882-5322

□

1 looking at the authorization to pollute groundwater. I
2 think monitoring, in particular -- we can talk about

01-20-10 SEC Ponderosa Hearing Volume II.txt
6 just have to be, quote, available.

7 well, you can post a document anywhere, and it
8 could be available. The question, I think that is
9 inherent in that statute, is a notion of what really does
10 "available" mean, in terms of how we want to treat our
11 citizens? And I could make argument it is available
12 simply by putting it in an office in Gerlach. You've got
13 to go to Gerlach to get it. Now, that's available,
14 publicly available. It's unreasonable. But I don't think
15 that meets what availability means within the statute.

16 And, lastly, I'd like to just touch on the
17 issues here regarding the sewage, and application of the
18 sewage regulations.

19 The State has offered three basic defenses as
20 to why that should not be considered in this case. And
21 the one that I think they rely on most is that somehow
22 this is outside -- or it's moot -- it's already been ruled
23 on? You know that's not true. I mean, what was moot was
24 whether or not the definition applied to waste coming off
25 of dairies, and you ruled that it was. It did.

493
CAPITOL REPORTERS (775) 882-5322

□

1 well, okay, now what we're asking for is the
2 application of that rule to the facts of this case.
3 That's what this contested case is about. It's not a rule
4 change. And they don't identify what rule would be
5 changed by it. It's asking you to apply those statutes to
6 the facts of this case. All right?

7 And that's directly within your authority. It
8 does not violate any -- come close to violating any sort

9 of obligations you have. You can't make a broader rule
10 change within the context of the contested change. Yes,
11 it might be precedent that would affect other
12 applications, but that's not -- that's, again, the
13 precedence of applying a statute to a set of facts.

14 And if you look at the definition, it's not --
15 somehow we're -- the State and the Interveners here are
16 saying that -- you know, this really has to do with
17 municipal sewage. Okay? The definition of "sewage" has
18 to do with water carried -- human or animal waste. Okay?
19 It's not human and animal waste, or human plus whatever
20 might be involved in human waste. It is a clear
21 regulation that applies to animal wastes that are carried
22 by water, which is what is going on in this dairy.

23 In closing, again the risks of this permit
24 should not be placed on the citizens of Amargosa Valley.
25 They should either be take -- be borne by the state as a

494
CAPITOL REPORTERS (775) 882-5322

□

1 whole, and by the applicant that is seeking permission to
2 pollute the state's groundwater.

3 And as a consequence we ask you to remand this
4 permit, or, on your own accord, to modify it to include a
5 robust groundwater monitoring program as we described
6 earlier, and to basically apply the definitions or the
7 straight-up law that applies to situations from the
8 sewage, the provisions of the NAC.

9 And with that, I think we'll close.

10 CHAIRMAN DODGION: Thank you. I think I'd
11 indicated I'd gave you last shot. Do you want it?

12 MS. TANNER: Oh, I won't really, except to
13 note one issue that I forgot, and that is that if a liner
14 leaks, it's a violation of the permit.

15 But other than that, I'll go ahead and rest.
16 I just forgot to mention that.

17 CHAIRMAN DODGION: Thank you. So we finally
18 arrived at the where we are going to take this under
19 submission. This is the conclusion of testimony and
20 arguments other than by us.

21 And when we get started on that I don't want
22 any interruptions outside of this area, right here. So we
23 will take a 10-minute break and come back and get to it.

24 (Proceedings recessed from 2:33 p.m. until 2:46 p.m.)

25 CHAIRMAN DODGION: We're back in session.

CAPITOL REPORTERS ⁴⁹⁵ (775) 882-5322

□

1 A couple of discussion issues here.
2 Preference of the panel. We can push forward, discuss
3 these issues, try to render a decision, and we should aim
4 at getting out of here by 4:30, or we can take the thing
5 under submission and arrange to some kind of a public
6 forum to discuss it at later date, certainly within 30
7 days, and then discuss it and make the decision.

8 what is your pleasure?

9 MEMBER ZIMMERMAN: I'd really like to catch my
10 plane. However, I would like to do this and get this
11 done. Everything's fresh. Let's just get it done if we
12 can.

13 MEMBER COYNER: I already have my mind totally
14 made up. It will take about five minutes to tell you

01-20-10 SEC Ponderosa Hearing Volume II.txt
15 exactly what it is that I want to see done.

16 CHAIRMAN DODGION: Okay. We will press
17 forward.

18 And before we start our deliberations, I would
19 like to ask our Counsel to instruct us and the audience as
20 to the powers of this panel with respect to this permit.

21 MS. REYNOLDS: Your powers are given by NRS
22 445A.605, subsection 2, which states, "The Commission
23 shall affirm, modify, or reverse any action of the
24 director which has appealed to it." So you can affirm the
25 permit, you can reverse any action that's within the

CAPITOL REPORTERS ⁴⁹⁶ (775) 882-5322

1 permit, or you can modify the permit.

2 Now, within modification, I think that
3 includes the power for the Commission to actually modify
4 the terms of the permit or remand it to the Division for
5 further proceedings.

6 CHAIRMAN DODGION: Thank you.

7 All right. We have basically six issues.

8 MEMBER COYNER: Where did you get that?

9 CHAIRMAN DODGION: This was done while I was
10 preparing for this last night by Rose Marie. Do you have
11 a copy of that?

12 MEMBER ZIMMERMAN: No, but I have them
13 segregated here similarly.

14 MS. REYNOLDS: Here.

15 CHAIRMAN DODGION: They are pretty much as
16 laid out in closing arguments. So I would propose that we
17 start our discussions and just go right down the line. Is

01-20-10 SEC Ponderosa Hearing Volume II.txt
18 that agreeable?

19 MEMBER COYNER: Sure.

20 MEMBER ZIMMERMAN: Yes.

21 CHAIRMAN DODGION: All right. Then the first
22 issue, let's discuss, is the question of adequate public
23 notice for the June 12th, 2007 Public Hearing.

24 what are your thoughts?

25 MEMBER ZIMMERMAN: Although I understand the

CAPITOL REPORTERS 497 (775) 882-5322

1 Appellants' frustration, I think the State did what was
2 required by the regulations.

3 And, you know, potentially interested parties
4 is mentioned in there. However, further, it lays out
5 exactly what needs to be done, and I think they did what
6 they needed to do. The State did what it needed to do.

7 MEMBER COYNER: Absolutely. In fact, the
8 current policy within my division is minimum only.
9 welcome to the new regime, gentleman, in these days of
10 tight budgets, furloughs, overworked bureaucrats. You're
11 not going to get a gold-plated notification system. They
12 met the minimum. That's all that's required.

13 CHAIRMAN DODGION: I agree, but I want to
14 underline "minimum" and perhaps add bare minimum.

15 You know, I think on this we will deny that
16 and uphold the action taken by the Division, but it's my
17 opinion that more should have been done. And in the
18 future I would hope that the Division would make greater
19 effort to make certain that the public is adequately
20 informed and involved, and the public participation is not

21 just proforma, it's something that you really need to push
22 forward.

23 With that, the motion I guess?

24 MS. REYNOLDS: Mr. Chairman, are you going to
25 do motions on each of the six issues or are you going to

498
CAPITOL REPORTERS (775) 882-5322

1 do one motion at the and?

2 CHAIRMAN DODGION: I think I'd like to deal
3 with them one at a time, but --

4 MS. REYNOLDS: Okay. Because if you're ready
5 to make a decision on that, which I think you've got a
6 consensus, I'd ask for a formal motion.

7 CHAIRMAN DODGION: Exactly.

8 MEMBER COYNER: Okay. You're the lawyer. I
9 figured all we needed was: This is what we're going to
10 do. But if you want to do anything else, I'll move that
11 on the issue of adequacy of the public notice, that we
12 find that it was adequate.

13 MEMBER ZIMMERMAN: I second.

14 CHAIRMAN DODGION: Any further discussion?
15 All in favor?

16 ("Aye" responses)

17 (The vote was unanimously in favor of motion.)

18 CHAIRMAN DODGION: The second issue: Did the
19 Nevada Division of Environmental Protection make relevant
20 documents, such as the draft permit, and Nutrient
21 Management Plan, reasonably available for public
22 inspection?

23 MEMBER COYNER: Ditto. Repeat. Welcome to

01-20-10 SEC Ponderosa Hearing Volume II.txt
24 the new reality. They were available in Carson City at
25 any time. NGO's come in to the NDEP regularly, and go

499
CAPITOL REPORTERS (775) 882-5322

1 through the files, and look for documentation with regards
2 to permits.

3 I've never had anybody come to me and say that
4 they were denied access to those files. We're not going
5 to set up a satellite office in Amargosa. Again, you
6 know, no gold plate systems in the current regime, with
7 the way things are.

8 So, yes, I think the documents were reasonably
9 and adequately made available under the minimum
10 requirement, which is here in Carson City.

11 MEMBER ZIMMERMAN: I agree. Again, I
12 understand the Appellants' frustration. We, as a company,
13 have the same issue, and we have to pay someone to copy
14 the information for us and mail it to us. It is
15 inconvenient, but they have met the regulations, it's my
16 belief.

17 CHAIRMAN DODGION: Again, I have to agree
18 that, again, the bare minimum requirement was met.

19 But, again, perhaps in the spirit of trying to
20 get public participation, more could have been done, and
21 perhaps locating these documents in the Amargosa library,
22 I guess I heard testimony that there is a library in
23 Amargosa. But I think that the bare minimum requirement
24 of the statutes and the regulations were met.

25 Again, we'll need a motion.

500
CAPITOL REPORTERS (775) 882-5322
Page 171

1 MEMBER COYNER: I move that on the item of
2 relevant documents being made available, that the Division
3 did so.

4 MEMBER ZIMMERMAN: I second that motion.

5 CHAIRMAN DODGION: All in favor?

6 ("Aye" responses)

7 MEMBER COYNER: And as a discussion point, the
8 danger with two sources of documents is it's a living
9 document. Which version? Which version of the draft
10 permit is in the Amargosa Valley library?

11 Again, one central place, one central place to
12 come to find them. It's the current version of the
13 document.

14 (The vote was unanimously in favor of motion.)

15 CHAIRMAN DODGION: All right. Let's go on
16 down to the third issue.

17 Did the Nevada Division of Environmental
18 Protection improperly defer completion of revised Nutrient
19 Management Plan until after it issued the permit for the
20 renewal and expansion?

21 MEMBER COYNER: Opinion, again, on my part, is
22 that it's a living document. It's going to change over
23 time. It's open for suggested revisions, as projects go
24 along, and as expansions or contractions take place. And
25 I don't know, to my knowledge, that it's relevant to the

1 exact timing of the issuance of the permit.

2 CHAIRMAN DODGION: If I understand --

3 MEMBER COYNER: It wouldn't make a difference
4 to me with regards to the permit if it was issued
5 immediately adjacent or immediately after.

6 CHAIRMAN DODGION: If I understand the
7 process -- I might not -- the Nutrient Management Plan
8 that had been reviewed and approved, and that was before
9 the action of the permit.

10 Then the permit is drafted, and issued, and
11 requires this Nutrient Management Plan to be updated to
12 include requirements that are placed on it by the terms of
13 the permit.

14 So that final -- having the Nutrient
15 Management Plan updated as a requirement of the permit is
16 only because the new conditions are placed -- are required
17 to be placed in it. Therefore, I have to agree with you.

18 MEMBER COYNER: The permit is the actual
19 document, because if it's going to be a compliance issue,
20 response issue, you're going to look at the permit.

21 Now, if the Nutrient Management Plan is
22 incorporated into it, then I guess those terms and
23 conditions would be part of it. But, again, since it's
24 referred to as living document, and probably should be,
25 because it's best management practice. It's something

502
CAPITOL REPORTERS (775) 882-5322

□

1 that the dairy looks to, to maximize their hay yield, or
2 their -- whatever -- again, I guess I'm going say the
3 permit is the ruling device here, not the Nutrient
4 Management Plan.

5 CHAIRMAN DODGION: All right.

6 MEMBER ZIMMERMAN: well, the substantive terms
7 of the Nutrient Management Plan were available, and the
8 subsequent changes were minor. That's the way I
9 understand it.

10 CHAIRMAN DODGION: That's true.

11 MEMBER ZIMMERMAN: So I think it was available
12 for review.

13 CHAIRMAN DODGION: Again, I think we have a
14 consensus. Can I have the motion?

15 MEMBER ZIMMERMAN: I will make a motion that
16 NDEP did make the -- wait. wait. wait. I'm in the wrong
17 one.

18 CHAIRMAN DODGION: Number 3.

19 MEMBER ZIMMERMAN: NDEP did not improperly
20 defer completion of the revised Nutrient Management Plan
21 until after it issued the permit for the renewal and
22 expansion of sewage discharge.

23 MEMBER COYNER: Second. Excuse me.

24 CHAIRMAN DODGION: Any discussion before we
25 vote?

CAPITOL REPORTERS ⁵⁰³ (775) 882-5322

1 MEMBER COYNER: No.

2 CHAIRMAN DODGION: All in favor?

3 ("Aye" responses)

4 (The vote was unanimously in favor of motion.)

5 CHAIRMAN DODGION: Fourth issue: Does the
6 permit adequately provide for groundwater quality
7 monitoring?

8 MEMBER COYNER: Can we dispose of 5 and 6
9 first and defer 4?
10 MEMBER ZIMMERMAN: Please.
11 CHAIRMAN DODGION: I see 5 as perhaps related
12 to 4.
13 MEMBER COYNER: Possibly, yeah. I guess I
14 could see that, but 6 isn't.
15 CHAIRMAN DODGION: Do you want to skip down to
16 6?
17 MEMBER COYNER: Let's get rid of it.
18 MEMBER ZIMMERMAN: Yes.
19 CHAIRMAN DODGION: Okay. Let's do 6.
20 Did the Nevada Division of Environmental
21 Protection fail to apply the regulations set forth in this
22 NAC 445A.274 through NAC 445A.280 regarding treated
23 effluent to Ponderosa Dairy's waste?
24 MEMBER COYNER: By opinion is they did not.
25 And, again, I concur with attorney for the Division, that

504
CAPITOL REPORTERS (775) 882-5322

1 that's rule making, better handled outside this permit.
2 I'm not saying it's not ripe for consideration
3 by the SEC, and I would perhaps urge you to revisit the
4 issue at an SEC meeting, but I don't think it has a proper
5 venue inside this permit.
6 CHAIRMAN DODGION: Stephanie?
7 MEMBER ZIMMERMAN: And it a -- you know, with
8 the CAFO regulations in existence, it appears that those
9 are the regulations that are deferred to in this
10 particular situation. So I -- I would not agree that the

11 agricultural waste would fall under the definitions of
12 445A.274 through 455A.280.

13 CHAIRMAN DODGION: I think that this issue was
14 kind of an add-on. It wasn't part of the original
15 appeals.

16 MEMBER ZIMMERMAN: Uh-huh.

17 CHAIRMAN DODGION: I think there are some
18 issues with respect to CAFO regulation, and these
19 regulations that need to be looked into, and I believe
20 that -- is outside of the scope of this hearing, and --
21 but it's something that needs to be brought back in front
22 of the full Commission and discussed with the Division at
23 a future date.

24 Any further discussion?

25 MEMBER COYNER: None.

CAPITOL REPORTERS 505 (775) 882-5322

1 MEMBER ZIMMERMAN: None.

2 CHAIRMAN DODGION: Let's may have a motion.

3 MEMBER COYNER: I move that on the matter of
4 whether NDEP failed to apply the regulations NAC 445A.274
5 through NAC 445A.280, regarding treated effluent of
6 Ponderosa Dairy's sewage -- my English is going to be
7 wrong. Why don't you -- the Division did not -- did not
8 fail --

9 CHAIRMAN DODGION: We can just say it's
10 something like --

11 MEMBER COYNER: -- did not improperly consider
12 that.

13 CHAIRMAN DODGION: We deny that issue.

14 MEMBER COYNER: I'm going to start all over
15 again. Is that okay?

16 MS. REYNOLDS: Okay.

17 MEMBER COYNER: That we rule that NDEP --
18 we -- you make the motion. I'm going to withdrawn my
19 motion.

20 MEMBER ZIMMERMAN: I move that the discussion
21 regarding whether the agricultural waste falls under NAC
22 445A.274 through NAC 445A.280 does not fall within the
23 scope of this appeal.

24 MEMBER COYNER: Okay. I second.

25 CHAIRMAN DODGION: You second.

CAPITOL REPORTERS ⁵⁰⁶ (775) 882-5322

1 Any further discussion?

2 MEMBER COYNER: No.

3 CHAIRMAN DODGION: All in a favor say, "aye."

4 ("Aye" responses)

5 (The vote was unanimously in favor of motion.)

6 CHAIRMAN DODGION: Let's go back up to
7 groundwater monitoring.

8 Does the permit adequately provide for
9 groundwater quality monitoring?

10 MEMBER COYNER: You first?

11 CHAIRMAN DODGION: Sure.

12 MEMBER COYNER: Me first, and the answer to
13 that is, no, absolutely not.

14 I am definitely of the opinion that
15 groundwater monitoring should have been seriously
16 considered in this permit, that this operation, according

17 to Mr. Holmgren's testimony, is rather unique in its size.
18 10,000 cows is a lot of cows.

19 I weighed in the issues of Nutrient Management
20 Plans, soil tests, lining. I agree that control at the
21 source is obviously your first line of defense, but I
22 strongly disagree with both Mr. Holmgren and the attorney
23 for the Division on the gold standard issue.

24 I don't know -- that's just a couple of words.
25 Groundwater monitoring is extensively used in this state

507
CAPITOL REPORTERS (775) 882-5322

1 for compliance. Every mine in the state, operating mine
2 has got water monitoring.

3 I'm sure there's other facilities that --
4 waste dumps have groundwater monitoring. Yucca Mountain
5 has groundwater monitoring. It's a very common practice,
6 and, in fact, I think in a contested case, in the Court,
7 you're going to want -- as I said earlier, yesterday,
8 you're going to want to be able to lean on the numbers,
9 the analyzed numbers from the groundwater.

10 And I think the citizens will want to lean on
11 that, to tell you the truth. I mean, we can get experts
12 up here to debate soils, and debate the uptakes, and does
13 the sun shine all the time in Amargosa? Does it rain a
14 lot? You know, and how that all affects those samples,
15 but at the end of the day it's what's in the groundwater
16 that these people are concerned about, and I'm concerned
17 about, and I think the very best way to get to that is
18 through a groundwater -- groundwater quality monitoring
19 program.

20 I'm especially disappointed that we only had
21 one well there, and it's kind of crippled. It's got a
22 crippled well. It comes and it goes, and so essentially
23 we've been almost three years -- I'm not sure what the
24 exact timeframe it is -- without real data on what's going
25 on with the groundwater.

CAPITOL REPORTERS 508 (775) 882-5322

1 I -- on the issue of adequacy of the number of
2 wells, I go back and forth. And I heard you say about the
3 bacteriological issues with soil profiles, and how that
4 would maybe render wells down-gradient from the land apps
5 not needed --

6 CHAIRMAN DODGION: I don't think that you're
7 interpreting something that I said.

8 MEMBER COYNER: Okay. Sorry.

9 CHAIRMAN DODGION: I think you misinterpreted
10 it.

11 MEMBER COYNER: In my mind I heard testimony
12 that, you know, that the soil sampling is adequate to
13 protect the groundwater, which is what we're after, as a
14 first line of defense, again.

15 But, again for two more wells down-gradient
16 from the land app areas, which would mean a cost of maybe
17 an initial \$20,000, and two samples quarterly -- eight
18 more samples a year, you could maybe lay to rest quite a
19 bit of indecision, or -- or things that are to be throwing
20 up in the air, both in this area and the areas where
21 composting might be land app.

22 It's just a thought. I'm not saying that I

23 would support requiring them, but that's the process my
24 mind went through with regards to additional wells
25 down-gradient.

509
CAPITOL REPORTERS (775) 882-5322

1 The four wells that are proposed in the
2 voluntary plan, absolutely. Absolutely. And I also would
3 urge us to modify the permit to have them in as a minor
4 modification and require that, so that this voluntary
5 business is moot.

6 I think it should go back to the Division to
7 modify it. I don't know whether we can just absolutely
8 say that today or we have to take it to them and say,
9 look, take the permit and --

10 CHAIRMAN DODGION: We can tell them to modify
11 the permit --

12 MEMBER COYNER: Well --

13 CHAIRMAN DODGION: -- to incorporate --

14 MEMBER COYNER: -- unless there's some
15 bureaucratic reason that that would cause a longer delay,
16 than two and a half years, which I heard was the number
17 for this permit to expire, and perhaps incorporate this as
18 a modification -- that's too long. That's absolutely too
19 long. Not after -- notwithstanding the fact that we've
20 been at this for a year and a half.

21 So the sooner the better with regards to the
22 groundwater quality monitoring plan. I'm very happy the
23 company came forward with it, and we didn't have to have
24 that see-saw with the company.

25 But I am still convinced, initially in the
Page 180

1 assessment that we didn't need a more robust groundwater
2 quality monitoring was an error the part of the Division,
3 and that that should have been a part of the permit, given
4 the size of the operation, given the fact that there was
5 historical use there prior to lining ponds, et cetera. So
6 there could go legacy issues involved with the
7 groundwater, and it's really the only way we'll get to the
8 button line, which is the assurance for the people that
9 groundwater's being protected.

10 So that's the direction I'm going to head with
11 this today, is a minor modification. Another small issue
12 with regards to the fecal coliform, and, again, I hear
13 people saying chlorides and nitrates are an indicator for
14 that, that you really don't need to analyze for it.

15 We've got homeowners analyzing for it, for
16 crying out loud. I mean, is it too much to ask for an
17 additional element, fecal coliform, to be analyzed for at
18 four monitoring wells, four times a year? That's, what,
19 16 more analyses, in total, sum for the year?

20 I just really don't -- I think that's --
21 again, maybe overkill, but next time you're down there in
22 Amargosa Valley, I'd like to stand up in front of these
23 people and show them all the wells with no fecal coliform,
24 because that's -- that's, again, pretty substantial proof
25 that there's not contamination from that source going on.

1 So, again, I can go either way, depending on
2 what you guys say, about the additional analysis from the
3 wells for fecal coliform or whatever else you think might
4 be necessary, and I can go either way on an additional
5 fifth and sixth well down-gradient, but within the
6 property boundary, and actually at the property boundary,
7 which is another nice consideration, because it's the
8 point that the groundwater leaves their property, which is
9 often what we look at. I can be flexible on those areas,
10 given the added cost.

11 The cost is a consideration. I think I saw
12 milk in the store a couple of days ago for 2.28 a gallon.
13 My gosh, we're basically giving it away, practically.

14 So, I mean, I want to be considerate of those
15 jobs that are down there in Amargosa valley. The last
16 thing we need these days is more people out of work. Was
17 that enough rhetoric for now?

18 CHAIRMAN DODGION: Let's hear from Stephanie.

19 MS. TANNER: Well, based on testimony I heard
20 I think that the State did what it was required to do.
21 And I hear you saying that maybe the State could have done
22 a better job, but I think they did what was required.
23 Although with the concern about these CAFOs, I would think
24 a groundwater monitoring plan would be appropriate.

25 I do appreciate the fact that the dairy comes

CAPITOL REPORTERS ⁵¹² (775) 882-5322

□

1 forward with a voluntary plan. I would like to see that
2 implemented as part of the permit. I'm okay with the

3 constituents that are proposed. There's a list of them,
4 the total nitrogen that, I`-- I'm not too worried about
5 the fecal coliform, because I think the others will
6 indicate such. But I can see Alan's point, in that you
7 can point to your neighbors and show that it isn't there,
8 hopefully.

9 I would also like to see the annual -- an
10 annual test on the areas where you do the land
11 application. Now, I don't know if that falls under this
12 particular issue or if that would be under the other, but
13 I would like to see that done.

14 I don't think there have been any tests
15 submitted at this point, right? And we talked to Bruce
16 about that. I don't think there have been any tests
17 submitted.

18 MEMBER COYNER: well, the soil testing --

19 CHAIRMAN DODGION: Soil testing.

20 MEMBER ZIMMERMAN: Soil tests?

21 MEMBER COYNER: For the land app inside that
22 white box --

23 MEMBER ZIMMERMAN: Right.

24 MEMBER COYNER: -- that's where the soil test
25 is.

CAPITOL REPORTERS 513 (775) 882-5322

□

1 MEMBER ZIMMERMAN: Are those submitted
2 quarterly? I thought there was something that was three
3 to five years.

4 CHAIRMAN DODGION: They're submitted on a
5 regular basis. If they want to know exactly, we can tell

01-20-10 SEC Ponderosa Hearing Volume II.txt
6 them from the permit, here, but they are probably
7 submitted on an annual basis. This is back to -- the
8 requirement is of the permit is three years and five
9 years.

10 MEMBER ZIMMERMAN: So crop yield is annually?

11 MEMBER COYNER: Maybe you want to suggest that
12 those soil tests are tightened up to annual tests, since
13 they're already doing it.

14 CHAIRMAN DODGION: well, I think --

15 MEMBER ZIMMERMAN: This is testing for -- this
16 is all. So we're talking the crop yield, which is a
17 requirement. Fourth quarter. Okay. So those are being
18 done annually. Okay. So if those are being done
19 annually --

20 CHAIRMAN DODGION: The -- I think the issue of
21 the soil testing, three years, five years, or one year,
22 would be better included in a discussion.

23 MEMBER ZIMMERMAN: In the next discussion.

24 CHAIRMAN DODGION: Yes, the Nutrient
25 Management Plan.

CAPITOL REPORTERS ⁵¹⁴ (775) 882-5322

□

1 MEMBER ZIMMERMAN: Okay.

2 CHAIRMAN DODGION: So --

3 MEMBER ZIMMERMAN: So then that's the
4 direction I'm headed.

5 CHAIRMAN DODGION: Okay. with respect to
6 groundwater, I agree with both of you, that the monitoring
7 plan is essential.

8 And, again, the fact that the dairy came

9 forward with their voluntary plan is commendable. I would
10 like to see, as well, a monitoring well, at least one
11 down-gradient of the land management area, the irrigation
12 areas. And I would like to see that incorporated in the
13 plan with the other four wells. And for that plan -- a
14 requirement for those five wells, minimum, incorporated
15 into the permit.

16 And I don't have problem with the proposed
17 constituents that are monitored for. Chlorides, nitrogen
18 will arrive in the monitoring well way, way, way before
19 you're going to get fecal coliform from the pollution of
20 groundwater.

21 MEMBER COYNER: I believe that. You believe
22 that. I'm not sure that the folks in Amargosa Valley
23 believe that. So that would be my comments.
24 Scientifically, I'm behind you. Do you want to dictate
25 that maybe it be located in the --

CAPITOL REPORTERS ⁵¹⁵ (775) 882-5322

1 CHAIRMAN DODGION: No, I don't want to dictate
2 the location.

3 MEMBER COYNER: Other than it be
4 down-gradient?

5 CHAIRMAN DODGION: Yes.

6 MEMBER COYNER: If it's on their property you
7 really sort of --

8 CHAIRMAN DODGION: Yeah.

9 MEMBER COYNER: Here, here, and here.

10 CHAIRMAN DODGION: Down into that area. I
11 would leave the exact location of it to Mr. Lazarus and

01-20-10 SEC Ponderosa Hearing Volume II.txt
the Division.

12

13 MEMBER COYNER: Fair enough, in terms of
14 directive. I just would -- well, if you put the other --
15 I guess I'd ask if they have a problem with that
16 directive, in terms of deciding. Down-gradient, there's a
17 pretty good swath --

18 CHAIRMAN DODGION: I think Mr. Lazarus
19 understands. Right?

20 MR. LAZARUS: We were told not to speak right
21 now.

22 CHAIRMAN DODGION: That's okay.

23 MEMBER COYNER: Okay. Stephanie? I'm
24 accepting to that, the fifth well.

25 MEMBER ZIMMERMAN: Yes, I am, too.

CAPITOL REPORTERS ⁵¹⁶ (775) 882-5322

□

1 CHAIRMAN DODGION: Okay. Is there a motion?

2 MEMBER COYNER: Well, we have to do a deal
3 with -- oh, we're going to deal with this one?

4 Motion -- let me make sure I've got all the
5 points. Did we come to agreement on the constituents of
6 analysis? He said leave it at the four. I said fecal
7 coliform. "Yes" or "no," you say --

8 MEMBER ZIMMERMAN: I'm indifferent to the
9 fecal coliform. So if that's important to you --

10 MEMBER COYNER: I'm not going to require it,
11 based on your analysis. The other -- I think for a fairly
12 minimal amount of money, you could lay that to rest,
13 though.

14 And then another issue I'd like to bring up,

15 before we make a motion, we heard a lot about access to
16 documents and so forth. These are quarterly monitoring
17 reports that are mailed to the NDEP.

18 CHAIRMAN DODGION: Yes.

19 MEMBER COYNER: The groundwater monitoring
20 reports, could we make it a condition of the permit that
21 it be mailed to ACE's address of record?

22 CHAIRMAN DODGION: I'm sure we can.

23 MR. MARSHALL: Or could I make a suggestion?

24 CHAIRMAN DODGION: No.

25 MEMBER COYNER: Does that kind of --

CAPITOL REPORTERS 517 (775) 882-5322

1 MEMBER ZIMMERMAN: Sure.

2 MEMBER COYNER: We could direct staff to
3 obtain that copy of the report from NDEP and mail it to
4 ACE's --

5 MR. WALKER: We put it on the web is what I
6 can do.

7 MEMBER COYNER: Well, everybody in Amargosa
8 Valley doesn't have the Internet, but if you get it to
9 ACE, I think it would be distributed to people. That's
10 what my thinking is, and then there's no question. You
11 know, it was mailed you to. I couldn't get on the
12 Internet that day. I couldn't -- my computer wasn't
13 working. I think --

14 CHAIRMAN DODGION: I would guess that there
15 are people in Amargosa Valley that don't belong to ACE.

16 MEMBER COYNER: I would, but --

17 CHAIRMAN DODGION: So -- I think I would go

01-20-10 SEC Ponderosa Hearing Volume II.txt
18 along with the Internet. I think that would --

19 MEMBER COYNER: All right. Well, on in DEP's
20 website or on ours?

21 MR. WALKER: On DEP's website.

22 MEMBER COYNER: And you can go on there right
23 now, and find a groundwater report from Newmont for the
24 Genesis Mine, filed three quarters ago, not this quarter,
25 and look it up. I not -- I'm serious.

518
CAPITOL REPORTERS (775) 882-5322

1 MR. WALKER: I agree, yeah.

2 MEMBER COYNER: You think it's that easily
3 navigable that you could do that?

4 MR. WALKER: Absolutely, since I'm the web
5 master for the NDEP. But, yes, it could be easily done.

6 MEMBER COYNER: Well, it's probably like one
7 or two pages of paper. I mean, this is not a lot.

8 MR. BARRACKMAN: I think it's more economical
9 for the State, also.

10 MEMBER ZIMMERMAN: Maybe he could just hook up
11 a link, also, to help them out the first time.

12 MEMBER COYNER: Well, I don't know that a --
13 oh, the first time. I'm sure. Yeah, okay. That's not a
14 bad thought.

15 You provide the link the first time, so that
16 they know where to go to get the report, and I guess we
17 could leave it with that.

18 MR. WALKER: Yes, and I might say that there's
19 a lot of information like that, that's put on NDEP's
20 website on a regular basis. So this would not be anything

01-20-10 SEC Ponderosa Hearing Volume II.txt
21 unusual from a web perspective.

22 MEMBER COYNER: Okay. Minor point.
23 I move that the Division be directed to
24 modify -- make a minor modification -- I should probably
25 have the number of the permit --

519
CAPITOL REPORTERS (775) 882-5322

1 MEMBER ZIMMERMAN: 23 -- 23027.

2 MEMBER COYNER: -- to include five
3 ground-water monitoring wells located per -- I don't know
4 what we want to call this -- located per the voluntary
5 groundwater monitoring plan submitted by Ponderosa Dairy,
6 and the fifth well located down-gradient from the field
7 application areas -- am I one column out?

8 well, yeah. Five and six -- I'd better
9 finish -- five and six, with a reporting schedule per
10 table -- if you can identify that table for me. It's in
11 20. I can get it. Table 1 -- is it I or --

12 MS. REYNOLDS: 1.2. Okay.

13 MEMBER COYNER: That's it. That gives the
14 constituents.

15 MEMBER ZIMMERMAN: And which constituents?

16 MEMBER COYNER: They're the ones in the table.
17 We didn't add any, so --

18 CHAIRMAN DODGION: And the location of that
19 fifth well?

20 MEMBER COYNER: I said down-gradient from,
21 and -- I didn't say that part? I didn't say where.

22 well, I said land app areas. Do you want me
23 to call it out as five and six?

24 CHAIRMAN DODGION: No, I was -- I wanted it to
25 be clear that we're not designating the exact point of

520
CAPITOL REPORTERS (775) 882-5322

1 that well. We're --

2 MEMBER COYNER: I said the land app areas. So
3 that gives you a pretty good --

4 CHAIRMAN DODGION: -- leaving the exact
5 location of it to the dairy and their consultant.

6 MEMBER COYNER: Okay. Location to be
7 determined by the dairy and their consultant.

8 CHAIRMAN DODGION: And approved by NDEP.

9 MEMBER COYNER: And approved by NDEP, its
10 alter ego. Now, do you think you got it or -- or do you
11 want to try it a second time?

12 THE REPORTER: Oh, I got verbatim what
13 everybody said.

14 MEMBER ZIMMERMAN: Second the motion.

15 CHAIRMAN DODGION: Further discussion?

16 MEMBER COYNER: Yeah, I would discuss briefly
17 the fact that we recall the dead animal disposal area, and
18 it might behoove the powers that be to locate that well
19 where it might intersect both, potentially, although I
20 realize it's close to the boundary of the property, and
21 that might not be possible, but rather place it above the
22 dead animal than place it below it and --

23 CHAIRMAN DODGION: Down-gradient.

24 MEMBER COYNER: Down-gradient of the dead
25 animal thing, too, and maybe kill two birds with one

521
CAPITOL REPORTERS (775) 882-5322
Page 190

1 stone. That's just an area for discussion.

2 CHAIRMAN DODGION: I'm sure that's understood.

3 Any further discussion, Stephanie?

4 MEMBER ZIMMERMAN: No.

5 CHAIRMAN DODGION: Anything else?

6 MEMBER COYNER: Just rhetoric.

7 CHAIRMAN DODGION: Okay. Do we have a second?

8 MEMBER ZIMMERMAN: Second. I seconded the

9 motion.

10 CHAIRMAN DODGION: All right. All in favor?

11 ("Aye" responses)

12 (The vote was unanimously in favor of motion.)

13 CHAIRMAN DODGION: Item 5: Is the

14 Comprehensive Nutrient Management Plan adequate?

15 And I think it's an issue here of the proof is

16 in the pudding. We're going to have to talk a little bit

17 about the soil monitoring, soil sampling, but with the

18 addition of the monitoring wells, then that will answer

19 the question: Is the plan adequate?

20 And we have had testimony from the Division

21 and from Mr. Lazarus that it is adequate. That the proof

22 will be in the pudding with the sampling of those

23 monitoring wells, and with that, the permit and the

24 Nutrient Management Plan apparently require sampling --

25 soil sampling every -- certain crops, three years, other

522
CAPITOL REPORTERS (775) 882-5322

1 crops, five years. But apparently the area is currently
Page 191

2 sampling on a yearly basis, which I think is more
3 appropriate.

4 MEMBER COYNER: So you're looking for a motion
5 that might include a change to the Nutrient Management
6 Plan that will require annual soil sampling?

7 CHAIRMAN DODGION: Yes.

8 MEMBER COYNER: Okay. My opinion is that the
9 plan's adequate. I view that -- again, it's a living
10 document. So it changes over time in response to
11 experience. And to draw you a parallel I kind of view it
12 like the gold miners view the Pump Act Plan for their
13 Cyanide solutions. You know, we want to make sure the
14 Cyanide stays in containment. No doubt. Hey, the miners
15 do, too, because that's where the gold is. They don't
16 want to lose it, either.

17 So there's an incentive for the dairy to
18 follow the Nutrient Management Plan, because the green
19 water is a resource for them. They don't want to over
20 fertilize or under fertilize their fields, to maximum crop
21 yield. So they have a -- they have standing in that
22 Nutrient Management Plan gain, if you will. And so --
23 make tweaks it to? Sure. That's going to happen, as you
24 have experience with it. But, I mean, it's a fairly
25 robust document, obviously. Look at the paper.

523

CAPITOL REPORTERS (775) 882-5322

□

1 So -- so, yeah, I think it's fully adequate.
2 I'd support a motion that requires annual sampling of the
3 soil, because it was presented as the first line of
4 defense by a couple of witnesses. And, yeah, that should

5 be robust if it's the first line of defense.

6 CHAIRMAN DODGION: Your thoughts, Stephanie?

7 MEMBER ZIMMERMAN: well, I agree with you that
8 the groundwater monitoring should keep that in check, but
9 they did say it was the first line of defense, and they
10 are actually testing on an annual basis. So I'm in favor
11 of -- I mean, there have been no reports today, I believe.
12 But it would be nice -- it would be appropriate to have it
13 on an annual basis, have it tested on an annual basis.

14 MEMBER COYNER: Is there a point -- an issue
15 with regards to the CNMP versus the NMP or just say it's
16 in both, so we're covered.

17 CHAIRMAN DODGION: well --

18 MEMBER ZIMMERMAN: I think it's in the NMP.

19 CHAIRMAN DODGION: In the NMP and the permit.

20 MEMBER COYNER: Okay. Fair enough.

21 I'll move that the NMP be modified to include
22 annual soil sampling and that be part of the permit.

23 MEMBER ZIMMERMAN: I second that.

24 CHAIRMAN DODGION: Any further discussion?

25 MEMBER ZIMMERMAN: No.

524
CAPITOL REPORTERS (775) 882-5322

1 MEMBER COYNER: Other than -- I mean, I guess
2 I should have said in the soil app areas, right? I think
3 that's understood, where it's currently being conducted.
4 So where it's currently being conducted.

5 CHAIRMAN DODGION: Any further discussion?

6 MEMBER COYNER: No.

7 CHAIRMAN DODGION: All in favor say, "aye."

8

("Aye" responses)

9

(Vote on the motion carries unanimously).

10

MEMBER COYNER: Anything else?

11

CHAIRMAN DODGION: I just want to make a

12

couple of comments with respect to flies and odors.

13

And I sympathize with you on both those

14

counts. Unfortunately -- maybe it's fortunate. We've

15

been involved in some permits that have odor requirements,

16

and it's really tough to solve them. So maybe I don't

17

wish I had the authority to handle those.

18

But the people that do are your County

19

Commissioners and your county Health Officer. I don't

20

know -- I just recently learned the State Health Division

21

no longer regulates dairies, or I would have said the

22

State Health Division.

23

So I don't know what the Dairy Commission does

24

with regard to regulating dairies with respect to

25

nuisances, but it might be worth checking.

525

CAPITOL REPORTERS

(775) 882-5322

□

1

All right. With that, thank you all very

2

much, and we are adjourned.

3

MEMBER COYNER: Wait a minute. Wait. I get

4

to say something. It say why you voted the way you did,

5

right? So I just have a little bit of rhetoric.

6

With regards to the groundwater impacts to the

7

Appellants, Bill, you're eight miles away, and you're

8

up-gradient, so unless you can come up with some real

9

tricky groundwater flow regime model, perhaps from a land

10

app across the road, but, boy, from the dairy, that's

11 going to be a tough push.

12 Antonio, you know, you're in a community water
13 system that's regulated, and regularly examined, and
14 monitoring. So I think you're okay with your drinking
15 water, and those results are easily available to you.

16 MR. MARTINEZ: I don't know what you mean
17 about monitoring.

18 MEMBER COYNER: From a water distribution
19 system is regulated by the state on a well.

20 MR. BOSTA: They do not regulate or test the
21 water because they are serving less than 14 people.

22 MEMBER COYNER: We can check that out.

23 John --

24 CHAIRMAN DODGION: Tinney will check that out.

25 MEMBER COYNER: John, you're less than a mile

CAPITOL REPORTERS 526 (775) 882-5322

1 from the dairy.

2 MR. BOSTA: Yes.

3 MEMBER COYNER: And God help you -- you know,
4 you and your wife. I drive by Lodi occasionally -- I've
5 not been by this dairy, but I drive by Lodi and -- Lodi is
6 a tough push on the freeway. I've had to almost pull over
7 sometimes. So I do sympathize with you entirely.

8 I will point out that you moved there
9 substantially after the dairy located there, in '93. You
10 moved in 2002. So, you know, why'd you go to
11 Minneapolis -- why'd you get on the train if you didn't
12 intend to end up in Minneapolis?

13 MR. BOSTA: I thank you for the --

14 MEMBER COYNER: But -- and that's no comfort,
15 and maybe the scale of the dairy has grown tremendously
16 since when you moved there.

17 But living in the rurals, that's part of the
18 things that you deal with is cows, and horses, and pigs
19 and -- I really don't like sheep. I really don't like
20 sheep. So I don't live in the rurals.

21 But, again, you're up-gradient. So I would
22 encourage both of you to continue to analyze your water,
23 because three times in a year and -- or three times since
24 you moved there, and -- I mean, I -- at least annually,
25 for sure, for the constituents of concern. And then, you

527
CAPITOL REPORTERS (775) 882-5322

1 know, if you get readings that are of concern to you, then
2 I think you've got to really speak up and begin to say
3 what's going on.

4 with regards to the sewage system, 99 percent
5 of these case are the septic tank, and the leach field,
6 and the well.

7 MR. BARRACKMAN: We're going to put a new one
8 in.

9 MEMBER COYNER: So that's a solution there.
10 The flies and the odors, I'm right with Lew on
11 that one. I bet you if you get a bunch of people from
12 Little Nevada, or whatever it's called, and you march up
13 to the Nye County Commission meeting, you may get some
14 attention on the flies issue. We can't help you. I mean,
15 I'd love to help you, but we can't help you here in this
16 forum with regards to that.

20
21
22
23
24
25

CAPITOL REPORTERS 529 (775) 882-5322

□

1 STATE OF NEVADA)
2 COUNTY OF CARSON CITY) SS.

3
4
5
6
7
8
9
10
11

I, CARRIE HEWERDINE, Court Reporter for the State of Nevada, State Environmental Commission Appeal Hearing, do hereby certify that the foregoing pages 312 through 530, inclusive, comprise a full, true and correct transcript of the proceedings held on wednesday, the 20th day of January of 2010, in the matter of the above-entitled matter.

12
13
14
15
16
17

Dated this 24th day of January, 2010.

18
19
20
21
22

CARRIE HEWERDINE, RDR
Nevada CCR No. 820

01-20-10 SEC Ponderosa Hearing Volume II.txt

23

24

25

CAPITOL REPORTERS 530 (775) 882-5322

□