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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 I

Pages 1 - 311

Respondents,

and

ROCKVIEW FARMS, INC.  
(PONDEROSA DAIRY),

Intervener.

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REPORTER'S TRANSCRIPT OF PROCEEDINGS  
SEC APPEAL HEARING  
TUESDAY, JANUARY 19, 2010  
CARSON CITY, NEVADA

Reported by:

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5 STEPHANNE ZIMMERMAN, Member  
6

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11 Executive Secretary  
12 KATHY REBERT,  
13 Recording Secretary  
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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	
		4		
	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	

01-19-10 SEC Ponderosa Hearing Volume I.txt

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 5 (775) 882-5322

□

1	I N D E X (Continued)		
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

01-19-10 SEC Ponderosa Hearing Volume I.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				

6  
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

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

7  
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  
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21  
22  
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1 CARSON CITY, NEVADA, TUESDAY, JANUARY 19, 2010, 9:29 A.M.

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4 CHAIRMAN DODGION: I'd like to call the  
5 meeting to order.

6 This appeal hearing is set for 9:30 on  
7 January 19th, today, and I believe it's been properly  
8 noticed. We'll get started.

9 I'm Lew Dodgion. I'm the Chairman of the  
10 Environmental Commission. I'll be chairing this panel  
11 today. Joining me are two other members of the  
12 Environmental Commission: Mr. Alan Coyner on my right,  
13 Ms. Stephanie Zimmerman on my left.

14 We will be hearing the appeals filed by John  
15 Bosta, Antonio Martinez, and ACE, Amargosa Citizens for  
16 the Environment. We have granted intervener status and  
17 consolidated the appeals of Mr. Bosta, and Mr. Martinez,  
18 and ACE at a hearing conducted by this same panel on  
19 March 17th, 2009. At that hearing, we also granted  
20 intervener status to the permittee Ponderosa Dairy.

21 It was further agreed at the March 17th  
22 hearing that Mr. John Marshall would represent the

23 Appellants, and that briefs and response briefs would be  
24 filed by all parties to help focus the issue for  
25 consideration in today's hearing, and I would hope that

1 that happens, that we are able to get through this hearing  
2 in one day, although I'm not all that optimistic.

3 At this time I'd like everybody in the room to  
4 introduce themselves, and note for the record who you are  
5 affiliated with and what status you're here in.

6 We'll start with John.

7 MR. WALKER: John Walker. I staff the State  
8 Environmental Commission.

9 MS. REBERT: Kathy Rebert, State Environmental  
10 Commission.

11 MS. REYNOLDS: I'm Rosemarie Reynolds, and I'm  
12 from the Attorney General's Office, representing the State  
13 Environmental Commission.

14 THE REPORTER: I'm Carrie Hewerdine. I'm your  
15 Court Reporter.

16 CHAIRMAN DODGION: Mr. Marshall?

17 MR. MARSHALL: John Marshall, Counsel for the  
18 Appellants.

19 MR. BARRACKMAN: Bill Barrackman, President of  
20 ACE.

21 MR. BOSTA: John Bosta, individual member of  
22 ACE.

23 MR. GUERRA: Antonio Guerra, an individual,  
24 and just a member of ACE.

25 MS. TANNER: Carolyn Tanner, Deputy Attorney  
Page 9

1 General on behalf of the Division.

2 MS. KING: Val King, NDEP.

3 MR. BUTLER: Jim Butler, Parsons, Behle, and  
4 Latimer on behalf of Ponderosa Dairy.

5 MR. ZIMMERMAN: John Zimmerman with Parsons,  
6 Behle, and Latimer, also on behalf of Ponderosa Dairy.

7 MR. LAZARUS: Jay Lazarus, Glorieta  
8 Geoscience, on behalf of Ponderosa Dairy.

9 MR. GANDA: Reddy Ganda, Senior Ergonomist for  
10 Glorieta Geoscience on behalf of Ponderosa Dairy.

11 MR. GOEDHART: Ed Goedhart, Ponderosa Dairy  
12 employer, taxpayer, citizen.

13 MS. VICKREY: Anna Vickery, Dairy Commission.

14 MR. PALM: Jon Palm, with NDEP.

15 MR. PORTA: Tom Porta with NDEP.

16 MR. HOLMGREN: Bruce Holmgren, NDEP.

17 MR. TINNEY: Alan Tinney, NDEP.

18 MS. LAFRANO: Jill Lafrano, NDEP.

19 MR. LANZA: Alex Lanza (phonetic), NDEP.

20 CHAIRMAN DODGION: All right. Thank you all  
21 very much.

22 As noted by the Court Reporter, today's  
23 proceedings are being recorded, and all testimony given  
24 today will be under oath, and Carrie will administer the  
25 oath and swear the witnesses in.

1           Again, in the hopes of having a one-day  
2 hearing out of this, I will, at my discretion, limit  
3 repetitive testimony and repetitive evidence. So I'd like  
4 everybody to try to be concise, and non-repetitive, and  
5 see if we can't move this among.

6           we'll begin today's appeal hearing with the  
7 Intervener's motion to dismiss that was filed on  
8 June 29th, 2009. We will first hear from Ponderosa Dairy,  
9 followed by comments from the Division of Environmental  
10 Protection, and the Appellants, and then this panel will  
11 deliberate and take action on the motion.

12           And if we happen to not to deny the motion,  
13 then the rest of the hearing will conclude. So I think  
14 we'll get started right there.

15           And Mr. Marshall?

16           MR. MARSHALL: I --

17           CHAIRMAN DODGION: Oh, excuse me. Mr. Butler.

18           MR. BUTLER: Thank you.

19           MR. MARSHALL: I was going to say, "we give up  
20 the motion," but -- well, I'm just trying to get us  
21 through this, in an effort to speed us along.

22           MR. BUTLER: Mr. Chairman, the question based  
23 on standing is whether the Appellants are an aggrieved  
24 party under the language of NRS 445A.605, which gives this  
25 Commission the authority to hear appeals of decisions

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1           of -- permitting decisions made by NDEP.

2           Now, the term "aggrieved" is not defined in

3 the statute, but there are Supreme Court cases which say,  
4 in the absence of a statutory definition, what aggrieved  
5 means is one whose personal or property right has been  
6 adversely and substantially affected.

7 Now, we filed the motion to dismiss because at  
8 that point in the record we had seen no evidence from  
9 either Mr. Bosta or Mr. Martinez that they are aggrieved  
10 in the sense that they have a personal or property right  
11 that is adversely affected by the agency's decision to  
12 renew the permit.

13 Now, it's important to remember this is a  
14 water Pollution Control Permit, and the statute is in --  
15 the standing statute is in the water Pollution Control  
16 Regs. So in context we believe that that means they need  
17 to show an interest in the water that is potentially  
18 affected by the permitting decision, and to this point  
19 they haven't done that.

20 Now, we provided some information in our  
21 motion to indicate that they live a substantial distance  
22 from the dairy, and that they are, in fact, not  
23 down-gradient of the dairy. We had evidence that we're  
24 prepared to put on. Mr. Lazarus has evaluated this  
25 situation. He can talk to you about groundwater flows in

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1 the area and where the groundwater goes. We're prepared  
2 to put that evidence on if you want to hear it.

3 And then -- so we filed the motion last  
4 summer, and we got a reply back last week. And the reply,  
5 I think, frames this issue probably better than our

6 original motion did, because in the first instance it does  
7 not mention Mr. Bosta or Mr. Martinez.

8 It doesn't tell you anything about their  
9 rights or their interest. It talks in general about  
10 residents of the Amargosa Valley or people who happen to  
11 live there. And it says nothing to link the interests of  
12 Mr. Bosta or Martinez, who come here today and ask you to  
13 review the NDEP decision to the water.

14 This is -- the reply brief talks about flies.  
15 It talks about odors. It talks about dead cows, but it  
16 tells you nothing about how they may be impacted by  
17 discharges to the groundwater under this permit.

18 Now, Mr. Marshall has a different view of what  
19 "aggrieved" means. He cites to a recent Supreme Court  
20 decision in -- that interpreted that, that the phrase  
21 "adversely affect" in a land use annexation statute, and  
22 that's the Cold Spring case, but that court in that  
23 case -- it says we're limiting our holding to this  
24 statute. It's not relevant to 445A.605.

25 But his view of aggrieved is anybody with a

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1 grievance, anybody that's unhappy with a facility that has  
2 been permitted by NDEP. So under his view, if there's a  
3 facility that has an air permit, the grievances aren't  
4 limited to air. If there's a permit that -- a facility  
5 that has a water permit, the grievances aren't limited to  
6 water. It is simply that if there is a person in the  
7 vicinity of the project who is unhappy with it and would  
8 have preferred that NDEP make a different decision, then

9 they can engage this Commission in an appeal.  
10 we don't think that's what the statute says.  
11 we think you should require, one, that they demonstrate an  
12 interest in the water resource, and, two, that they  
13 demonstrate they are potentially affected by the decision  
14 that they are appealing, not merely by the presence of the  
15 facilities.

16 CHAIRMAN DODGION: Thank you.

17 On the issue of Mr. Lazarus on the groundwater  
18 flow, I think we'll wait and hear from Mr. Marshall and  
19 the State before deciding whether went to go into that.

20 Mr. Marshall?

21 MR. MARSHALL: I think -- did you want to hear  
22 from the State next?

23 CHAIRMAN DODGION: No. I want to hear from  
24 you.

25 MR. MARSHALL: Okay. well, I think if you --

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1 if you wouldn't mind me kind of unrolling a big map here  
2 and then provide you copies of this. This is the same.  
3 It's just a map of the area.

4 CHAIRMAN DODGION: Okay.

5 MR. MARSHALL: If you want to spin that around  
6 so everybody can see it.

7 CHAIRMAN DODGION: Does anybody have any  
8 objection to this map?

9 MR. MARSHALL: This is A-1 is what we have it  
10 as.

11 (Appellant's Exhibit No. A-1 marked

12

13 MR. BARRACKMAN: Don't you have copies of that  
14 you can circulate?

15 MR. MARSHALL: So this is just some quick  
16 geography as to where we are, and then we will kind of  
17 talk about this concept of standing and aggrieved parties.

18 So the dairy is right here (indicating). So  
19 remember the dairy is a Confined Animal Feedings  
20 operation, which is basically a large agricultural  
21 industrial complex, right, with over the 9,000-plus  
22 cattle. It's a multi-million-dollar operation, right?  
23 we're not talking about a little mom-and-pop dairy here.  
24 we're talking about a major business.

25 And what we're prepared to do, with testimony

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1 from our Appellants, here, is to tell you how the dairy,  
2 the presence of this operation affects their daily lives.  
3 Okay?

4 And I'm going to summarize that testimony for  
5 you, and we can present it if you feel it's appropriate,  
6 and that is we have -- so the dairy -- the main dairy  
7 operation is here (indicating). Antonio Guerra, holding  
8 up the map, lives right down here. Okay?

9 MR. BUTLER: We can't see.

10 MR. BARRACKMAN: John, so it's clear --

11 MR. MARSHALL: In this area, here, and he owns  
12 property, not only his own home, but several other pieces  
13 of property. What do you call that neighborhood?

14 MR. MARTINEZ: Little Nevada.

15 MR. MARSHALL: Okay. Mr. Bosta owns property  
16 right here (indicating), and that's to the north -- that  
17 was -- the first one was to the south of the dairy. And  
18 basically if you can see on your individual maps, there's  
19 water courses that basically run from north to south in  
20 this area, and the water courses run right through the  
21 dairy, runs right through -- right adjacent to the Little  
22 Nevada neighborhood.

23 Mr. Bosta owns property up kind of to the  
24 northeast of the major dairy operation, and it's adjacent  
25 to a field that has received dairy wastes and spread on

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1 the dairy waste. He has wells right here (indicating).

2 Mr. Guerra is -- there's two wells that the  
3 community operates to provide water service for the  
4 community.

5 Mr. Barrackman -- let's see if I get this  
6 right. His operation and residence is on -- just above,  
7 over here, on the -- to the northeast -- or northwest of  
8 the dairy, and this is another field that the dairy  
9 spreads manure on.

10 These individuals will testify about the  
11 impact of the dairy on their lives, and that is kind of --  
12 I thin, Tony, that's good. We kind of have multiple areas  
13 in which they are affected, and they tell you of the  
14 incredible smell and odors that emanate from the dairy,  
15 how the flies, that are there as a result of the dairy's  
16 operations and manure, the threat to their groundwater.

17 In their motion, the dairy provided you with a

01-19-10 SEC Ponderosa Hearing Volume I.txt  
18 groundwater map. This is from the County.

19 MR. MARSHALL: This is marked. This would be  
20 A-9.

21 (Appellant's Exhibit No. A-9 marked  
22 for Identification)

23 MR. MARSHALL: I'm sorry. Is it on there? It  
24 says Exhibit B, but that's from a different proceeding.  
25 This will be A-9.

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1 And what this map shows is just a complex  
2 groundwater situation, and this was produced by Nye County  
3 for their well Head Protection Plan. What you can see is  
4 the groundwater at least is moving in multiple different  
5 directions, but at a minimum it's moving south.

6 And so we've got significant concerns about  
7 water quality, and, in fact, we know from past history in  
8 this dairy that there's been major spills, and  
9 operationally they have not, in the past, maintained water  
10 quality to the point where the State has is not taken  
11 affirmative enforcement actions against them.

12 So with this -- I mean, we can go into much  
13 greater detail about what happens when you come into the  
14 dairy area, and you have the smells. Mr. Bosta can tell  
15 you about the impacts on his wife, their health concerns.  
16 So I don't think there is too much debate that the  
17 presence of the dairy has a substantial impact, not only  
18 on the residents of Amargosa Valley, but these three  
19 people, in particular.

20 Now, the legal question that is before you is:

21 Does that type of aggrievement or injury constitute  
22 adequate -- I use "standing" as kind of a shorthand, as a  
23 legal term -- to bring these appeals. Okay? And this  
24 is -- in the statute it says that any party that's  
25 aggrieved can bring an appeal. So the question for you

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1 all is: what does that mean in the context of someone  
2 contesting the issuance of the permit by NDEP?

3 well, first off, let's talk about what the  
4 permit is. The permit is for the renewal permit. So  
5 without this permit, the dairy could not operate. And  
6 also it is a major expansion, right? It's going from six  
7 million gallons per day up to a million gallons per day  
8 of -- that's the capacity issue that is one of the major  
9 issues here. And so you not only do you have a renewal of  
10 the dairy permit, but you also have an expansion.

11 And the question therefore is: Does the  
12 issuance of the permit aggrieve these parties? So, in  
13 other words, from our perspective it's but for the  
14 issuance of the permit, these concerns regarding --  
15 multiple health concerns regarding odors, and flies, and  
16 smells, and water quality, would not be there, but for  
17 this permit. Otherwise they wouldn't be able to operate.  
18 So we believe that that satisfies an aggrievement  
19 standard.

20 If you want to talk about how the Nevada  
21 Supreme Court looks at standing, in general, what gives  
22 one the right to bring a court case, which is a little  
23 different than what brings one -- what has the ability --

24 what gives the person the ability to bring an  
25 administrative appeal? In a court case, really, what the

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1 Supreme Court has said, time and again, in these standing  
2 cases, not just the Cold Springs annexation case, but  
3 there's call Hangez (phonetic), which we put in our brief,  
4 that talks about fairly liberal standing requirements  
5 to -- that go to the protective purpose of the statute.

6 And in this case the statute that we're  
7 talking about has to -- there's many protective purposes,  
8 as they should have a broad interpretation of standing,  
9 particularly at an administrative level.

10 Then I'd like to address the Intervener's  
11 point about what can you consider? what impacts can you  
12 consider? They basically premise their argument on: You  
13 have to only look at a certain close slice, and that's  
14 water quality related issues.

15 We think that is a -- an incorrect reading of  
16 the statute. In fact, it reads -- the statute -- it  
17 reads -- it adds language to the statute. The statute  
18 just says, "aggrieved by the issuance the permit." And so  
19 you look at what was the impact of the permit, and were  
20 they aggrieved by it, and can they bring this action? And  
21 we believe that we've established that they can. And if  
22 you'd like to hear testimony, we can talk about that.

23 So that kind of in a nutshell is our response  
24 to the standing concerns. We also note that the State has  
25 not joined this motion to dismiss based on standing.

21

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1                   So if you have any questions, I'll be glad to  
2 answer them and also to put these individuals on the stand  
3 to confirm the general summary.

4                   CHAIRMAN DODGION: Thank you. We will wait  
5 until after the State's made its presentation to decide  
6 whether we want to take testimony.

7                   MS. TANNER: Thank you. Good morning. It is  
8 correct that the State has not filed a joinder to the  
9 motion to dismiss, and I don't think that we would under  
10 the limited circumstances that it raises, in that the  
11 State of Nevada, the Division, views its obligation to  
12 protect groundwater regardless of whether it's up-gradient  
13 or down-gradient.

14                   And so I would, for the most part, submit the  
15 motion, but I do believe it highlights -- the pleadings  
16 highlight the larger problem in this case. And I do have  
17 some oral -- an oral motion to dismiss on the points  
18 raised that I would like to address after this one, if the  
19 Commission will allow me to do so, in that it does  
20 raise -- I would agree with the dairy that it does raise  
21 issues that are outside of the scope of what we're here  
22 for.

23                   The statement is: Does the issuance of the  
24 permit aggrieve the parties? That's not the purpose of  
25 this appeal. That's not the jurisdiction of the

2 Not everybody can come in and say, "We object  
3 to a permit on groundwater," and then bring up every other  
4 reason why you don't like the dairy. The Division's  
5 obligation in issuing the permit is limited to issues of  
6 water quality and water pollution, not air quality, not  
7 flies, not odors.

8 So I do think that -- and in my oral motion to  
9 dismiss, if you'll allow it, will go into that in more  
10 detail.

11 CHAIRMAN DODGION: If I understand your  
12 remarks, then, you do not agree with the motion to dismiss  
13 on the basis of finding that these parties are not  
14 properly -- don't have proper standing?

15 MS. TANNER: No, not under the issue of  
16 whether or not their properties are up-gradient or  
17 down-gradient as I indicated the Division would view its  
18 obligation to protect groundwater regardless of whether or  
19 not there was a neighborhood -- it might increase the  
20 threat, but it certainly is the Division's position that  
21 they would look to see whether or not groundwater -- the  
22 waters of the state, waters of the U.S. are protected  
23 under the permit.

24 CHAIRMAN DODGION: Thank you.

25 At this point then, Mr. Coyner and Stephanie,

23  
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1 are you ready to discuss this or do you want to hear  
2 additional testimony?

3 MEMBER ZIMMERMAN: I'm ready to discuss.

4 MEMBER COYNER: I'm ready. I have a couple of  
Page 21

5 questions, though. Who do I direct them at? Sorry.

6 CHAIRMAN DODGION: Well, we don't normally  
7 have the opportunity to cross-examine the attorneys.

8 MR. MARSHALL: Please, ask away.

9 CHAIRMAN DODGION: All right. What would you  
10 like to ask?

11 MEMBER COYNER: I want to know from the State:  
12 Does the permit contemplate multiple sources or a SINGLE  
13 the source, when you're looking at a point -- a potential  
14 point of pollution to the groundwater?

15 MS. TANNER: Can you -- can you --

16 MEMBER COYNER: I'll give you where I'm going.  
17 The realization strikes me that the potential cause of the  
18 pollution, the manure, is basically not just a point  
19 source. It's put on fields around the area. So thinking  
20 of just the dairy as a point source, and then considering  
21 up-gradient and down-gradient may not be quite correct, if  
22 it's being deposited in multiple spots.

23 MS. TANNER: I believe that -- that under  
24 the -- the Clean Water Act, that the actual land  
25 application is considered a point source.

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1 MR. BUTLER: You know, I think I can address  
2 the question. The permit specifies which fields and at  
3 what levels the waste will be applied, and all those are  
4 within the dairy. Those are terms of the permit.

5 So the -- as a factual matter, we disagree  
6 with some of the things Mr. Marshall said about dairy  
7 waste being, you know, applied around the valley. The

8 permit -- the permit says: You will apply it at these  
9 levels on these fields.

10 MEMBER COYNER: Is that correct, Val?

11 MS. KING: Well, Bruce, correct me if I'm  
12 wrong.

13 CHAIRMAN DODGION: Don't get into too much a  
14 discussion on the terms.

15 MEMBER COYNER: Here's the purpose of the  
16 question, and the purpose of the question is: we're  
17 talking about proximity.

18 CHAIRMAN DODGION: we're talking about whether  
19 or not these people have standing.

20 MEMBER COYNER: well, and the closer they are  
21 to proximity, the more standing they have in my mind. You  
22 know, if they live in Pahrump, they have a little more  
23 standing, but if they have very proximal to where the --  
24 where the wastes are being deposited, then that, to me,  
25 increases the amount of standing that they're aggrieved.

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CAPITOL REPORTERS 25 (775) 882-5322

1 And it was mentioned, by Mr. Marshall, that  
2 Mr. Barrackman is immediately adjacent to fields upon  
3 which the manure is being deposited. Even though  
4 that's --

5 CHAIRMAN DODGION: Or rather has been  
6 deposited.

7 MEMBER COYNER: Yes. And that's like, you  
8 know, eight miles from the dairy.

9 MS. KING: Yeah, the source of the pollutant  
10 is the ponds. There are three ponds, and then there are

11 requirements -- there's several ponds that the -- the  
12 waste is stored in. And then it is applied pursuant to  
13 calculated rates, and I don't believe that that is the --

14 CHAIRMAN DODGION: Before we go --

15 MEMBER COYNER: That's correct.

16 CHAIRMAN DODGION: There's --

17 THE REPORTER: I'm sorry. Hey, whoa, whoa,  
18 whoa.

19 CHAIRMAN DODGION: Again, that's too much  
20 here. We're getting people testifying improperly, who  
21 weren't sworn, so we're not on the record.

22 And with respect to the situation of standing,  
23 I have often wished that we had a very good and concise  
24 definition in regulation or in statute to define who is  
25 properly aggrieved and who has proper standing to bring

26  
CAPITOL REPORTERS (775) 882-5322

1 appeals before the Commission, but we don't. We never  
2 have.

3 And as the State's attorney stated, the  
4 Division has always looked at this in a very, very broad  
5 manner and allowed virtually anyone to bring an appeal to  
6 the Commission over a permit issue, over a lack of an  
7 enforcement action permit violation or whatever.

8 And the Commission has historically taken that  
9 same approach, that the fact that these people live in  
10 the -- in the Amargosa Valley, and they are in somewhat  
11 proximity, and they do have concerns, legitimate concerns,  
12 I believe, about the groundwater. I mean, they're -- not  
13 everybody is a groundwater hydrologist and understands

14 these charts, and the direction of flow, and the influence  
15 by pumps the wells and their own wells, for that fact.

16 So I believe that following the practices by  
17 this Commission in the past, that they do have standing,  
18 and they are entitled to this proceeding before this  
19 Commission.

20 MEMBER ZIMMERMAN: I agree with what you said.  
21 I agree that they -- the broader interpretation of  
22 standing, and, you know, how else would it is general  
23 public be heard, if we become so technical about the rules  
24 of law and -- you've got to let the public be heard.

25 MEMBER COYNER: I'm going to dodge --

27  
CAPITOL REPORTERS (775) 882-5322

1 Dodgion -- ha -- none of that issue by saying I'm -- I  
2 want to find out whether the water pollution control  
3 permit is protecting the groundwater.

4 CHAIRMAN DODGION: And that is part of what  
5 this is.

6 MEMBER COYNER: That's what I want to find  
7 out.

8 CHAIRMAN DODGION: That's part of the hearing.

9 MEMBER COYNER: In part I've got to get to  
10 that through granting standing, because we have to hear  
11 the appeal in order to find that out. So that's what --  
12 that's my intent. That's why I asked it was to find out  
13 whether the water pollution control permit adequately  
14 protects the groundwater in this area, and I guess to find  
15 that out I'm going to have to hear the appeal.

16 CHAIRMAN DODGION: I think so. All right.

17 Then one of you can make a motion.

18 MEMBER ZIMMERMAN: I don't know what the  
19 appropriate statement would be, but I make a motion to  
20 reject the motion to dismiss.

21 CHAIRMAN DODGION: That's close enough. Do I  
22 have a second?

23 MEMBER COYNER: Second.

24 CHAIRMAN DODGION: All in favor say, "aye."  
25 ("Aye" responses)

28  
CAPITOL REPORTERS (775) 882-5322

1 (The vote was unanimously in favor of motion.)

2 CHAIRMAN DODGION: All right, with that the  
3 motion is denied. The motion to dismiss is denied.

4 And if I understand, from the State's  
5 attorney, she wants to make some oral motions, and I'm not  
6 sure of the appropriateness of that at this time.

7 MS. REYNOLDS: You've allowed it in the past.

8 CHAIRMAN DODGION: Precedence.

9 MS. REYNOLDS: Yes.

10 MR. MARSHALL: Can I be heard just on the --

11 CHAIRMAN DODGION: Briefly.

12 MR. MARSHALL: Briefly. I think we -- we've  
13 been here for -- this appeal has been pending for a very  
14 long time, and there's been no reason why the State, if  
15 they had legitimate grounds for a motion to dismiss, could  
16 not have filed appropriate papers and this could have been  
17 briefed and you could have had advance notice.

18 CHAIRMAN DODGION: Let's hear what she has to  
19 say, and what her motions are, and you will have an

20 opportunity to address them.

21 MR. MARSHALL: Okay.

22 MS. TANNER: Thank you. I -- and obviously  
23 I'm new to this case, and I understand that this case has  
24 gone on for long time. So I am operating somewhat under  
25 that constraint, but I did listen to hours of audio tapes,

29  
CAPITOL REPORTERS (775) 882-5322

1 and at the last hearing I do believe the issue of  
2 additional briefs was raised, and it was, in fact, denied  
3 by the Chairman Coyner. So I did not file anything,  
4 although I have only had this case for a few weeks.

5 I don't think that anything that I'm going to  
6 raise is a huge surprise. If it is, my apologies. But I  
7 think that it is important to take some time upfront,  
8 given the fact that all the parties have Counsel and  
9 all -- and all the parties are -- should be complying with  
10 the rules, that if we can assess the issues that have been  
11 outlined by Mr. Walker in the notice today, that we can  
12 limit what's presented today to what is relevant and what  
13 has been specifically allowed by the Commission.

14 And that's the reasons for my motion to  
15 dismiss, if you will entertain them.

16 CHAIRMAN DODGION: You are going to present  
17 motions to dismiss certain elements --

18 MS. TANNER: Yes.

19 CHAIRMAN DODGION: -- of the Appellants'  
20 Petition?

21 MS. TANNER: Yes, if you'll allow me.

22 CHAIRMAN DODGION: I guess we'll allow you --

23 MS. TANNER: Okay.

24 CHAIRMAN DODGION: -- since we have done so in  
25 the past.

CAPITOL REPORTERS 30 (775) 882-5322

1 (Discussion off the record)

2 MR. MARSHALL: I wonder if I could just  
3 mention that -- I think it's -- well, that's what she  
4 does. I mean if, in fact -- I think what Mr. Tanner  
5 indicated earlier with this is whether or not the SEC has  
6 jurisdiction to hear certain issues.

7 And I think the appropriate place -- at some  
8 point the attorney's going to get up, and we're going to  
9 say, "Here's the facts, here's the law, here's why you  
10 should rule in a particular way," deny the appeal, grant  
11 at appeal.

12 And, to me, this is part of the state's  
13 arguments why you should deny the appeal, that they don't  
14 believe that, for example, the concerns of the issues that  
15 have been raised are within your jurisdiction.

16 The issue, though, is they haven't -- I think  
17 once we get the testimony out, then the attorneys can  
18 argue over the merits of whether the particular -- what  
19 the particular claims are. And rather than hear those  
20 arguments upfront, I propose that we can streamline this  
21 whole deal by having the witnesses give testimony. We  
22 don't have that many witnesses, and particularly now the  
23 testimony can be reduced because of the standing -- your  
24 action on the standing issues, that we can move quickly  
25 through the testimony.

1 And then the attorneys can give legal argument  
2 as to whether or not the claims are valid or not, and then  
3 you can either render your decision, or take it under  
4 submission, or do whatever you want to do.

5 MS. TANNER: But if I could just respond  
6 briefly. Certainly the issue --

7 CHAIRMAN DODGION: Let me interrupt you just a  
8 minute. We haven't heard from Mr. Butler on the issue.

9 MR. BUTLER: Mr. Chairman, I hope you will  
10 entertain the State's motion. I fundamentally disagree  
11 with Mr. Marshall, because as we -- we go forward in the  
12 hearing, if there are issues that are outside the scope of  
13 the appeal, then the Commission is wasting its time, and  
14 we're wasting our client's time to hear those.

15 We think you can pare this thing down at the  
16 beginning. And depending upon how you address  
17 Ms. Tanner's motions, I have one of my own, and I'll tell  
18 what you that is. That's to ask you to restrict the scope  
19 of the testimony and the argument to the original appeal  
20 notices.

21 When you granted ACE intervention you said the  
22 condition of that was that they would be limited to those  
23 original notices filed by Mr. Bosta and Mr. Martinez.  
24 Well, we're way past that. And so dealing with her  
25 motions may address some of that. If it doesn't, I want

1 to ask you to address that. And, again, this is in the  
2 nature of streamlining.

3 This is an appeal of a water pollution control  
4 permit, whether the agency did what is required to do by  
5 the law and regulations, and as Mr. Coyner says, whether  
6 the groundwater was adequately protected by those actions.

7 We have seen, in the information that's coming  
8 forward, a lot of stuff has nothing to do with the permit,  
9 has nothing to do with the water, and so I think  
10 Ms. Tanner's motions will help us pare that down.

11 MR. MARSHALL: Just -- while you debate this,  
12 the issues -- just to recall, this is not just a water  
13 pollution control permit. It's also an NPDS permit, and  
14 there are certain applicable regulations that I think the  
15 state and the interveners would like to ignore, but, in  
16 fact, apply and require you to consider issues that we've  
17 raised in our briefing.

18 So, again, I mean, this is kind of going to  
19 the merits of whether these claims are legitimate or not,  
20 and obviously we believe that we should get the testimony  
21 in, and you can make your judgments as to whether or not  
22 you feel it's appropriate, and we can move on.

23 CHAIRMAN DODGION: All right. Members of the  
24 Commission, do you have a desire to hear these motions and  
25 rule on them or do you want to get into the meat of the

33  
CAPITOL REPORTERS (775) 882-5322

1 appeal and go forward with the hearing?

2 MEMBER COYNER: Do the motions refer to the

3 six -- I've got a list -- somewhere, in one of these,  
4 there are six issues that were part of the appeal.

5 MS. TANNER: Yes.

6 MEMBER COYNER: And you're just going to go  
7 through those six and ask us to rule on whether they're  
8 relevant, not relevant, relevant, not relevant?

9 MS. TANNER: whether or not there is a failure  
10 to state a claim, yes. I mean, I -- I would highlight --  
11 I'm not sure if I did them in the exact order. My  
12 apologies. I did them in the order that made sense to me.

13 MEMBER COYNER: Is that -- that's  
14 basically what I --

15 CHAIRMAN DODGION: what my concern is here is  
16 that here are the two or three motions from the State.  
17 Mr. Butler has already said if we consider those, he's got  
18 a motion. If we consider -- which we'll have to consider.

19 And we're going to have motions from  
20 Mr. Marshall for the Appellants, and we're going to be  
21 here all day on these motions before we get into the  
22 hearing. And rather than streamlining, I'm afraid that  
23 this tact might instead drag it out. I want to hear your  
24 thoughts.

25 MEMBER ZIMMERMAN: well, I'm not exactly sure

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1 where she's going, but there were some extraneous issues  
2 involved, but it almost appeared as if some of those  
3 issues pertained to looking at whether the groundwater was  
4 protected or not. So I'm inclined to just hear  
5 everything.

6 MEMBER COYNER: Having run many of these  
7 hearings, myself, the Chair and the Commission can rule at  
8 my point on relevancy. So it's not like we have to put  
9 things in boxes and say, "yes" or "no."

10 MS. TANNER: I understand that. And I -- I  
11 will obviously follow the ruling of the Commission, and I  
12 can, instead, somewhat convert it to an opening statement,  
13 because it would make my opening statement much shorter if  
14 you would allow me to do the motion to dismiss.

15 But specifically, not all of the issues have  
16 been raised thus far, and if I could just highlight -- I  
17 won't go into the motions. But, yes, certainly I am going  
18 to argue, in a motion to dismiss, that the Commission  
19 should deny, at the outset, any matters that are  
20 irrelevant to the requirements for the issuance of an NPDS  
21 permit. Yes, that's part of it.

22 The other part of it is that the Commission  
23 should deny at the outset any issues raised that fall  
24 outside of the original appeals filed by Mr. Bosta and Mr.  
25 Martinez, as -- as Mr. Butler raised. That's also part of

CAPITOL REPORTERS <sup>35</sup> (775) 882-5322

1 it.

2 And we're all attorneys here, and we know the  
3 rules, and the Commission issued a ruling, and -- and we  
4 should have to abide by that and not be allowed to go  
5 outside of that and waste everybody's time.

6 And, finally, the third point that I would  
7 make in these motions is that I would --

8 CHAIRMAN DODGION: You're doing a fine job of

01-19-10 SEC Ponderosa Hearing Volume I.txt  
9 getting the motions in.

10 MS. TANNER: well, I haven't gotten through  
11 the subject matter yet, but I would also --

12 CHAIRMAN DODGION: I think the mood of the  
13 Commission would be to say no to going forward with any  
14 more motions to dismiss. Let the Appellants put on their  
15 case, and let the Intervener and the State rebut and point  
16 out, as we go -- as you go along. You have the  
17 opportunity for cross-examination of witnesses.

18 MEMBER COYNER: And objections.

19 CHAIRMAN DODGION: And objections, and so on,  
20 and so forth, and that appears to be the desire of this  
21 panel.

22 MEMBER ZIMMERMAN: Yes. I'm in favor of that.

23 CHAIRMAN DODGION: All right. Just --

24 MR. BUTLER: whatever -- obviously, whatever  
25 you decide, but these issues -- as soon as the testimony

CAPITOL REPORTERS <sup>36</sup> (775) 882-5322

1 comes out, that is outside the scope of those original  
2 appeal notices, or is irrelevant, you're going to --  
3 you're going to have to deal with this issue. It's just a  
4 question of whether or not you do it now or you do it the  
5 first time we object to a statement that is outside of  
6 that.

7 CHAIRMAN DODGION: I anticipated having to  
8 deal with multiple objections during this hearing.

9 MR. BUTLER: All right.

10 CHAIRMAN DODGION: So with that, if you're  
11 both in agreement, then we will not hear these motions,

01-19-10 SEC Ponderosa Hearing Volume I.txt  
and we will go forward with the hearing.

All right. Let me lay out the procedures. We'll start with opening statements by the Counsel for the Appellants, followed by Counsel for the Division of Environmental Protection, and then the dairy. You may waive your opening statement if you desire and save it for your presentation of your case in chief.

The Appellants' Counsel will present their case. Witnesses will be called. Witnesses will be sworn prior to testify. The State and the Intervener may cross-examine the witnesses. This panel may ask questions of the witnesses, and then the Appellant can redirect, ask questions on redirect of that witness to rehabilitate him, I guess. And then we will follow the same procedure for

CAPITOL REPORTERS <sup>37</sup> (775) 882-5322

the Intervener, the dairy, and the State.

I'm not sure which -- I believe that we have it in the script here, for the Intervener to go first, followed by the State. I think they're in the last position.

After the cases in chief, any party can present rebuttal to any issues presented by the other two parties. The appeal panel members can ask questions of witnesses who have already testified, that is, following the resting of the cases, we can call witnesses back up if we have questions that we want to pursue. So what I'm getting to there is that all of the witnesses who testify are required to remain, so that they're available to us when we reach that point.

15                   And once we have done that, and this panel has  
16 asked all of the questions of the witnesses that it wants,  
17 we'll move on into the closing arguments. We're going to  
18 start with the State's Counsel, for the closing argument  
19 for the Division, followed by the Intervener, and then a  
20 final closing argument by the Appellant, and then the  
21 State's Counsel will be given a last opportunity for  
22 rebuttal, and then we'll close the proceedings and take it  
23 under advisement.

24                   With that, Mr. Marshall, you're up.

25                   MR. MARSHALL: Thank you.

CAPITOL REPORTERS                   38                   (775) 882-5322

1                   May I ask the Commission, would you prefer to  
2 have us present testimony standing or may I remain seated  
3 without --

4                   CHAIRMAN DODGION: However you're most  
5 comparable is fine with me.

6                   MR. MARSHALL: Thank you. I've got a lot of  
7 documents to move around, and I appreciate the  
8 informality.

9                   As you know, my name is John Marshall. I'm  
10 represent the Appellants. These are members of the  
11 Amargosa community, and they are here to address a range  
12 of issues that arise directly of the issuance of the  
13 permit by NDEP under both state law and federal law for  
14 the Ponderosa confined animal fielding operation or CAFO.

15                   As we mentioned earlier, this is not a small  
16 operation. This is a huge operation. It has a  
17 demonstrated potential to have significant adverse impacts

01-19-10 SEC Ponderosa Hearing Volume I.txt  
18 to groundwater, surface waters, and basic qualities of  
19 life issues.

20 The issues that the Appellants have briefed  
21 for you break down into two main categories. There's  
22 process issues. We have substantial and serious concerns  
23 with how NDEP went about conducting the public processes  
24 for this permit, and that these raise significant concerns  
25 regarding the notice that was given, or the lack of

39  
CAPITOL REPORTERS (775) 882-5322

1 notice, how they perceive their obligations under law as  
2 basically doing the absolute minimum that they think they  
3 can get away with versus looking at the more qualitative  
4 objective of the statute, which is to identify and notify  
5 people of who are interested and potentially interested in  
6 this process, and in the proceeding, and to get notice to  
7 them.

8 And we'll provide testimony that you'll see  
9 that, in fact, those -- their efforts to provide notice  
10 failed, and, in particular, regarding the June 12th 2007  
11 hearing, and how the residents of the community, in fact,  
12 had to unite the day before the hearing to get notices out  
13 on their own accord to show -- get people to actually show  
14 up, because of the absence of any notice -- despite the  
15 fact that the NDEP had lists available to them of  
16 interested people that were not provided with specific  
17 notice.

18 These procedural flaws also extend to the  
19 availability of documents, and one of the key issues,  
20 again, in this case is: Can the State run its operation

21 in such a way that it is permitting -- taking action on a  
22 dairy in southern Nevada, without making the documents  
23 available any place except Carson City, and then forcing  
24 people to either fly or travel to Carson City to look at  
25 the documents in order to be -- to evidently informed --

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1 participate -- informed participation in the process, or  
2 to go to the expense of each person copying all the  
3 documents and having the file sent to them. And is that  
4 the kind of government that allows citizens, or that  
5 basically precludes citizens, effectively, from  
6 participating in a critical process, such as this one,  
7 over a commercial enterprise that has major effects on  
8 their lives?

9           There's also some direct requirements for  
10 making documents available, stemming from federal law,  
11 that we've touched on in the briefs. I think that's  
12 briefed. We may address it specifically here.

13           But we also have -- kind of moving into the  
14 introduction of our specific substantive claims -- really,  
15 we've got three of them, three main issues that we're  
16 addressing. One is the groundwater monitoring.

17           And as a result of the citizens here pushing  
18 for additional monitoring, or actually monitoring that is  
19 effective at identifying whether there will be a threat to  
20 the groundwater, the Ponderosa CAFO has come up with a  
21 plan, apparently. I saw some documentation that the State  
22 has approved, that kind of modified, and we believe  
23 inadequate monitoring of groundwater, and we're going to

01-19-10 SEC Ponderosa Hearing Volume I.txt  
24 argue to why that is inadequate, because it, quite  
25 honestly, does not extend to the areas in which the

CAPITOL REPORTERS 41 (775) 882-5322

1 threats of pollution are of grave concern.

2 The constituents that are present that --  
3 admittedly, they're present. They're not being monitored  
4 for. And the fact that the process, again -- the public  
5 was really denied input into the process of the  
6 developments of a groundwater monitoring plan.

7 Then we will go into what we perceive as the  
8 substantive -- some of the more substantive issues  
9 regarding the Comprehensive Nutrient Management Plan,  
10 which is the requirement of the NPDS permit.

11 We attached to our opening brief, the report  
12 of Alex Sagady, which we would rely upon. He is not here  
13 today, and he describes in that report a number of  
14 different weaknesses in the Comprehensive Nutrient  
15 Management Plan.

16 And we think one of the main ones --

17 MS. TANNER: Excuse me. I hate to be so rude  
18 as to object during opening statement, but I believe that  
19 there needs to be determination as to whether or not that  
20 document is admissible before it's argued.

21 MR. MARSHALL: I think, in an opening  
22 statement, my -- I'm able to give you the road map of  
23 where we're going.

24 CHAIRMAN DODGION: I agree. I'll overrule  
25 your objection.

CAPITOL REPORTERS 42 (775) 882-5322  
Page 38

1 MR. MARSHALL: What that document does, is it  
2 presents to you an expert's assessment of the permit, and  
3 it emphasizes, I think, one of our major concerns about --  
4 almost a procedural and a substantive concern, which is  
5 the Ponderosa CAFO is producing an immense waste stream of  
6 nutrients, of -- you know, a range of materials, which  
7 they intend to -- they have to do something with. And any  
8 industry that produces a waste stream of potentially very  
9 dangerous chemicals has to deal with: what are we going  
10 to do with the waste stream?

11 well, part of the problem with this permit is  
12 it doesn't identify the fate of the waste stream, and that  
13 is identifies parts of it, but not all of it. And so  
14 that's one of our main concerns that we're going to  
15 address in the substantive portion.

16 Then finally we have this significant issue  
17 regarding how to treat sewage under state law. And right  
18 out of the Administrative Code, and the law, sewage has to  
19 be treated differently, and there were specific  
20 requirements for it. And although the State doesn't like  
21 it, and the Interveners don't like it, they still have to  
22 obey the requirements of the State law, and the State law  
23 requirements are here, that you can't use treated effluent  
24 for irrigation purposes unless it meets certain  
25 requirements, i.e., secondary treatment, and et cetera.

2           And so that's really the road map of where  
3 we're going with this presentation. I will be presenting  
4 testimony through the three Appellants, here, and we'll  
5 appreciate any questions that you might have for that.  
6 Thank you for your time.

7           CHAIRMAN DODGION: Thank you. Let's see. Who  
8 is up next?

9           MS. TANNER: I think I'm going last.

10          CHAIRMAN DODGION: Mr. Butler?

11          MR. BUTLER: Mr. Chairman, I'll be brief but  
12 give you an overview of how we see the issues that were  
13 raised in the notice.

14                 This is an appeal of an October 2007 decision  
15 by the Nevada Division of Environmental Protection to  
16 renew a permit to the Ponderosa Dairy that authorized a  
17 the discharge of manure and processed waste water to  
18 groundwaters of the state through irrigation and the  
19 Amargosa River via storm water overflow, and those  
20 specific parameters and limits are in the permit.

21                 The permit was issued in compliance with the  
22 provisions of the Clean Water Act, Nevada's Water  
23 Pollution Control Act, and regulations that were  
24 promulgated by EPA and by this Commission.

25                 The dairy currently milks about 8,000 cows and

1 produces about 40 percent of the milk produced in Nevada.  
2 They have 140 employees and pay millions of dollars in  
3 wages and taxes. The initial water pollution control  
4 permit was issued by NDEP in 2000, and in 2007 the

5 decision was to renew the existing permit.

6           The basic requirement of the permit is that  
7 the dairy monitor and control nitrogen that's applied to  
8 the lands, in the form of green water, and achieve a  
9 balance in the nitrogen application and the uptake of the  
10 vegetation that is grown on those fields in order to  
11 protect water quality. That is the central purpose of the  
12 permit, is to manage the nutrients that are contained in  
13 the manure and in the green water in a way that it's  
14 not -- doesn't accumulate in the soil or reach the water.

15           And to that end, I think -- you know, we  
16 object to Mr. Marshall's characterization of all of this  
17 as waste. It's not treated as waste. It's not managed as  
18 waste. It's managed as nutrients, and that's the way the  
19 EPA CAFO regs, that the State of Nevada has adopted, are  
20 set up. They are managing the nutrients that are  
21 contained in that, and that's where you'll see our  
22 testimony focus.

23           The dairy's position is that the NDEP's  
24 decision complied with all of the applicable requirements,  
25 and that the materials supporting the permit and the

45  
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1 permit application, including the Nutrient Management Plan  
2 that was submitted by the dairy, are complete and are in  
3 compliance with the regulatory requirements.

4           It's clear that Mr. Bosta, Mr. Martinez,  
5 Mr. Barrackman don't like the dairy. There's no dispute  
6 that they have strong feelings about the dairy's  
7 operations in Amargosa Valley. They don't like it. And

8 the record indicates -- and by this I'm referring to the  
9 June 2000 public hearing that NDEP conducted, there are  
10 strong feelings on both sides. The dairy has supporters  
11 and opponents. And that's not surprising. In Nevada many  
12 of the facility that are permitted by NDEP, whether it's  
13 mines, or power plants, or dairies, or refineries, have  
14 supporters and have opponents. That happens all the time.

15 But it's not NDEP's job, and it's not the  
16 Commission's job to resolve those public feelings or to  
17 address unhappiness with the permits. The agency's job is  
18 to enforce the law and the regulations as they are  
19 written.

20 And if there is a -- when there's opposition  
21 to what the agency does, it ends up here. And we think  
22 the question before the Commission is: Did the agency  
23 appropriately implement the laws and regulations that are  
24 applicable to this renewal? And in this appeal, despite  
25 all the briefings we've done, all the complaints you've

46  
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1 heard from Appellants, they don't point to any specific  
2 instance where NDEP fell short.

3 Now, for the issues that have been identified  
4 by the notice with regard to the procedural issues, we're  
5 going to agree with NDEP here. We think their briefing  
6 makes clear that the notice was adequate under the  
7 statute. Mr. Marshall wants more than that, and that  
8 might be nice, but that's not what the statute requires.  
9 NDEP did what the statute requires in terms of public  
10 notice.



14 Mr. Marshall referred to him as an expert. He's not been  
15 qualified as an expert. His statement indicates he looked  
16 at a limited number of documents, and his conclusions  
17 don't tie back to the regulations.

18 Finally, the last issue, and that is that the  
19 Appellants, once again, raise their claim that dairy waste  
20 should be treated as municipal sewage, if I had been  
21 allowed to make my preliminary motion, I would have asked  
22 that this be dropped. It is not in Mr. Bosta's Notice of  
23 Appeal. It is not in Mr. Martinez's Notice of Appeal.

24 ACE agreed to be bound by those notices. This  
25 issue is not there. Plus, the Commission has already

48  
CAPITOL REPORTERS (775) 882-5322

1 ruled on it.

2 we -- we don't know how that will come up in  
3 testimony. We expect there won't be testimony on it, but  
4 at the end of the day -- at the end the hearing, we'll ask  
5 the Commission to drop -- to drop that issue.

6 Thank you very much.

7 CHAIRMAN DODGION: Thank you.

8 Ms. Tanner?

9 MS. TANNER: It's a little longer than I  
10 expected, given how things have transpired so far, but I  
11 will say -- I will attempt to keep it simple during this,  
12 hearing because I do believe the issues are simple, and  
13 that is whether or not the Division followed all  
14 applicable regulations in issuing the NPDS permit, and if  
15 you found that they did, then you -- then you know that  
16 they had no choice but to issue the permit.

17           There are several issues that are raised on --  
18 the procedural issue, I think, we can knock out. Even in  
19 the opening statement by Mr. Marshall, with all due  
20 respect to his statement, and I quote, was that the State  
21 did the minimum that they thought they could get away  
22 with.

23           Even if that were true -- the evidence will  
24 show that's not true. Even if that were true, that's  
25 enough under the statute. There is no claim -- there is

49  
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1 no -- there is no relief that can be granted from those  
2 issues -- from THOSE claims.

3           Inadequate public notice of permit -- daily  
4 circulation was in two papers. You'll hear that today.  
5 The NDEP notified its personal mailing list, and it posted  
6 it at the town hall, above and beyond what is required by  
7 the statute.

8           It is not the rule of law that the Division  
9 has to guarantee that people actually receive notice. We  
10 have no control whether or not people read the two papers  
11 that it was published in. We have no control whether or  
12 not they chose to go through the motions to get onto the  
13 NDEP official mailing list. We have no control of whether  
14 or not they saw the posting at the town hall.

15           What the Division is required to do is to  
16 comply with the letter of the law, and they went above  
17 that, and the evidence will show that, and it is  
18 undisputed. There is no claim there.

19           Similarly, with the issue of whether or not  
Page 45

20 mailing was sufficient -- or notice was sufficient for the  
21 hearing on the permit, the evidence will show that the  
22 exact same process was used, and that did, in fact, comply  
23 with the law. There is no claim which this Commission can  
24 grants relief to the Appellants. That they want more is  
25 irrelevant.

CAPITOL REPORTERS 50 (775) 882-5322

1 Most importantly, they actually had actual  
2 notice, and under -- the Nevada Supreme Court has ruled  
3 that actual notice of an administrative hearing can be  
4 enough. In the Edwards versus State of Nevada, the Court  
5 so ruled. In a hearing before the Division of Health,  
6 Appellants contended that they did not have notice, yet  
7 they appeared and vehemently opposed the proceeding.

8 In this case all three of the gentlemen  
9 sitting at the table next to me appeared at that hearing  
10 and vehemently opposed it. So there is no harm to the  
11 Appellants in this case, and I don't believe that it is  
12 something that the Commission can grant relief on.

13 In regards to whether or not documents were  
14 appropriately posted or made available, similarly their  
15 request for more is not sufficient. The State can  
16 complied with the law. And honestly, it's a common sense  
17 argument. Here we are in -- Nevada is geographically the  
18 seventh largest state in the nation. We have a single  
19 capital, just like every other state in the nation, and  
20 that is Carson City. Every state agency has a main office  
21 in Carson City, where they keep their official forms, and  
22 they keep official files.

23                   we -- the Division is an agency of  
24 approximately 250 people. There's a small satellite  
25 office in Las Vegas of 25 people. And the official file

  51  
CAPITOL REPORTERS                   (775) 882-5322

1       of record is in Carson City. Every single staff worker  
2 who works on this case was in Carson City. It is  
3 undisputed that the official record and any parts  
4 specifically requested by any individual interested party  
5 in this case was made available for inspection and copying  
6 in Carson City.

7                   That is what we are required to do. It does  
8 not need to be reasonably available. It does not need to  
9 be convenient. And if you think about it, if you were to  
10 rule in favor of the Appellant today, what does that do  
11 for the residents in the northeastern part of the state?  
12 what kind of precedent does that state -- does that set,  
13 when you have residents of Elko County or White Pine  
14 County who are five hours from either Carson City or  
15 Nevada (sic). Do we then have to start a satellite office  
16 in northeastern Nevada, just to make it convenient? No,  
17 we don't have to do that. We have to make it reasonably  
18 available.

19                   If they had called and asked for copies, they  
20 got them. They had to pay for them, just like anybody  
21 else, whether they lived in Caliente or Carson City and --

22                   THE REPORTER: Hang on. If you don't start  
23 breathing, we're not going to get through today.

24                   MS. TANNER: They would still have to pay for  
25 them. So it doesn't really matter whether or not the

1 documents were available in Las Vegas. Asking the  
2 Division to monitor -- to maintain two officials files in  
3 two separate locations is merely a matter of convenience  
4 for the Appellants. And that -- but that is not what the  
5 letter of the law requires, and there is nothing that will  
6 be presented to you today that will change the fact that  
7 the Division complied with that statute.

8 In regards to the draft NMP, I think it will  
9 be clear that -- under the water keeper decision, that is  
10 actually the terms of the NMP that need to be noticed, not  
11 the actual document, itself. And the terms of the NMP,  
12 you will learn today, they are were actually provided.  
13 The critical terms were provided in both the findings, the  
14 fact statement, as well as the draft, and the Division met  
15 that issue, as well.

16 In regards to groundwater monitoring issues,  
17 groundwater monitoring is not necessarily a required  
18 element of an NPDS permit. However, the Division does  
19 include those provisions, because we are responsible for  
20 waters of the state. The Division may reasonably require  
21 monitoring at any point, at permitting or after.

22 The NPDS permit in this case is both -- is  
23 protective of both the waters of the state and the waters  
24 of the U.S., in compliance with the Clean Water Act and in  
25 compliance with state regulation. Groundwater

1 monitoring -- the protection of the waters of the state  
2 was addressed in this permit, and the Division's decision  
3 in this regard should be afforded great weight by the  
4 Commission.

5           There were discrete groundwater samples that  
6 were required in the permitting process. The lining of  
7 the ponds led to some modification of that monitoring, but  
8 as was indicated by the dairy in their opening statement,  
9 a voluntary plan of additional monitoring was also  
10 submitted and approved by the Division, and that is  
11 enough.

12           Appellants' request for public comment on the  
13 issue of the specifics of groundwater monitoring plan are  
14 without a basis in law. At the time the permit was  
15 issued, the dairy was in compliance. The permit was  
16 approved because it met all relevant state and federal  
17 regulations and because it was protective of the waters of  
18 the state, and the evidence will show that today, when you  
19 hear the testimony. There's no appealable issue there.

20           In regards to the issue of sewage, I agree  
21 with Mr. Butler. I would have asked you to knock this out  
22 right upfront. I'm not sure what testimony can be  
23 presented from lay witnesses to address the statutory  
24 authority of this issue.

25           There are three reasons why the Commission

54  
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1 should deny this issue. One is that it's moot. You  
2 already ruled on it. Two, it's outside of the scope of

3 the original appeal, in violation of your order. And,  
4 three, it's outside the scope of the appeal of an  
5 individual permit because it's asking you are for a rule  
6 change.

7 I'll get to that when -- I think we've talked  
8 about the first two through the other opening statements  
9 quite a bit. But as far as for the -- as far as a rule  
10 change, this is the improper forum for rule making. So  
11 even if you were to find that this issue was properly  
12 included and ripe for decision, a ruling in favor of the  
13 Appellants today, that agricultural waste must now be  
14 treated to a level of municipal human waste, would result  
15 in rule making not properly noticed in this appeal.

16 The Division has never treated the matter of  
17 treated effluent as agricultural waste. It is not  
18 included in the definition. The definition -- the  
19 definition actually implies that some sort of human action  
20 take place on that waste to turn it into treated effluent.  
21 what we're talking about here today is raw agricultural  
22 waste, held in a pond until it is land applied in  
23 accordance with the permit and in accord -- under the  
24 Clean Water Act.

25 And further in support of that, I would state

55  
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1 that there is a case, a Nevada Supreme Court case, Nevada  
2 Operation Engineers Contract Compliance Trust versus  
3 Johnson, which is the Labor Commission, which held that  
4 the decision in a contested case should determine only the  
5 right of the parties involved in that particular

6 proceeding and not impact the rights of others not  
7 involved in the proceeding. By making a ruling that raw  
8 agricultural waste is treated effluent, you would, in  
9 fact, be doing so. We don't believe it's properly before  
10 the Commission.

11 There are also a number of issues raised in  
12 regards to the air pollution and nuisance issues, and it  
13 will be my position and is my position that those -- those  
14 matters are not properly before the Commission, as well.

15 First of all, they were not included in the  
16 original appeal, and you have held the Appellants to their  
17 original appeal.

18 Second of all, I think that the  
19 fundamentally -- and the evidence will show that the  
20 Appellants seem to be confusing the difference between a  
21 CNMP and an NMP and what is required, and an NMP is what  
22 controlled the NPDS permit, not a CNMP. Even though the  
23 Dairy has a CNMP, and even though -- even though the  
24 CNMP -- the NMP rises -- meets the -- the -- I'm going to  
25 say this backwards. Even though the CNMP meets the level

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1 that would be required of the NMP, the additional aspects  
2 of the CNMP are not what the Division looks at in issuing  
3 the permit.

4 whether or not the dairy complies with the  
5 CNMP, in regards to air pollution, I'm not going to  
6 comment on. It's -- it's not the Division's duty to look  
7 at that. That's between them, and NRCS, and any  
8 additional funding that they get by doing an NMP. It

9 doesn't have anything to do with whether or not an NPDS  
10 permit should be granted with all the appropriate  
11 qualifications of an NMP.

12 And I think that's a fundamental problem in  
13 the Appellants' appeal, and so I would ask you, when  
14 you're looking at the evidence, to not consider those  
15 issues outside of the NMP.

16 I think hopefully I've covered everything.  
17 I'd submit it.

18 CHAIRMAN DODGION: All right. Thank you very  
19 much.

20 Mr. Marshall, are you ready to proceed with  
21 your case in chief?

22 MR. MARSHALL: I'm wondering if we could take  
23 a short break because --

24 CHAIRMAN DODGION: Yes.

25 MR. MARSHALL: -- given your ruling on

CAPITOL REPORTERS <sup>57</sup> (775) 882-5322

1 standing, we may be able to condense some of our  
2 testimony, and also allow me time --

3 CHAIRMAN DODGION: Oh, we'd appreciate that.  
4 So how short a break would you like?

5 MR. MARSHALL: Ten minutes? Is that fine?

6 CHAIRMAN DODGION: Ten minutes is fine. We'll  
7 reconvene in 10 minutes. I don't know when that will be.

8 (Proceedings recessed from 10:36 a.m. until 10:47 a.m.)

9 CHAIRMAN DODGION: All right. I'll call the  
10 meeting back to order.

11 And proceed, Mr. Marshall.

12 MR. MARSHALL: Thank you. We'd like to call  
13 John Bosta for our first witness. John?  
14 CHAIRMAN DODGION: Come forward and be sworn.  
15 (Discussion off the record)  
16 MR. MARSHALL: Mr. Chairman, is it all right  
17 if I stand here? Mr. Bosta has -- is a little hearing  
18 impaired, and so it's better if --  
19 CHAIRMAN DODGION: That's fine.  
20 MR. MARSHALL: -- I'm asking question -- is  
21 within visual range rather than off to the side. Is  
22 that -- is that okay?  
23 CHAIRMAN DODGION: That's fine.  
24 THE WITNESS: Do I have to taken an oath?  
25 CHAIRMAN DODGION: Yes, you do.

CAPITOL REPORTERS 58 (775) 882-5322

1 MR. MARSHALL: Come on over here.  
2 THE REPORTER: Over here. Raise your right  
3 hand.  
4 JOHN BOSTA,  
5 having been previously duly sworn,  
6 was examined and testified as follows:  
7 DIRECT EXAMINATION  
8 BY MR. MARSHALL:  
9 Q Mr. Bosta, where's your -- where's your home?  
10 A I live at 1830 East McCoy Street, Amargosa  
11 Valley.  
12 Q And can you walk over there and help point out  
13 where it is on the map?  
14 A The -- the location of my property is right

01-19-10 SEC Ponderosa Hearing Volume I.txt  
15 here (witness indicating).

16 Q Okay. Just for the Commission members, can  
17 you point out where the -- the main operation of the  
18 Ponderosa CAFO is?

19 A I'm sorry. I didn't hear.

20 Q Can you point out the location of the main  
21 operation of the CAFO?

22 A Well, the main operation of the CAFO is here  
23 (witness indicating) at 900 Mecca KAFO, and then these are  
24 pivots that they grow alfalfa and put manure on.

25 Q Okay. Mr. Bosta, why don't you have a seat?

59  
CAPITOL REPORTERS (775) 882-5322

1 Okay. Can you just briefly describe to the  
2 Commission how the presence of the dairy affects your  
3 life?

4 A Well, the presence of the dairy affects my  
5 life, first, from the odor coming from the ponds.  
6 Depending upon the wind direction -- not every day, but  
7 several days, the smell of the dairy comes through my  
8 house. If I'm running my swamp cooler, it pulls that  
9 smell into the house.

10 The smell of the dairy offends me. When I  
11 drive down Highway 373, and I get to the four-mile marker,  
12 and the stench of the dairy is so terrible, one day that  
13 my wife was driving, she had to pull the car over and puke  
14 out the door from the smell.

15 Q And --

16 A I maintain that there's a tremendous cone of  
17 depression underneath the dairy, and the possibility is

18 that it could affect my well and groundwater, and it could  
19 leave me high and dry, and I would have no water in my  
20 well.

21 MR. BUTLER: Objection. A question wasn't  
22 asked, and it's -- it didn't have anything to do with the  
23 water pollution control permit.

24 CHAIRMAN DODGION: Your objection is  
25 sustained.

CAPITOL REPORTERS 60 (775) 882-5322

1 THE WITNESS: Okay.

2 BY MR. MARSHALL:

3 Q Has manure from the dairy been spread close to  
4 your property?

5 A Manure of the dairy has spread on fields one  
6 quarter from my property.

7 Q One -- I'm sorry. One quarter?

8 A Of a mile.

9 Q And, Mr. Bosta, did you participate in the  
10 June 12th, 2007 hearing on the permit for a Ponderosa  
11 CAFO?

12 A Yes.

13 Q And how did you learn of that permit -- of  
14 that hearing? Excuse me.

15 A At 4:00 o'clock in the afternoon, on  
16 June 12th, I picked up my mail, and there was a notice  
17 there from ACE. There was a public hearing -- a public  
18 hearing was set for 6:00 o'clock.

19 I went on the Internet. I looked for the  
20 notice of the hearing. The notice of the hearing was

01-19-10 SEC Ponderosa Hearing Volume I.txt  
21 dated May 16th, and it was for an NPDS permit. I looked  
22 up what an NPDS permit was, and then I attended the  
23 hearing at 6:00 o'clock.

24 I testified in that hearing, I believe, three  
25 different times. The first time I asked what is the

CAPITOL REPORTERS <sup>61</sup> (775) 882-5322

1 difference between the ponds, and the sewer, and treatment  
2 plant, and the ponds of the dairy. I was told that --

3 MS. TANNER: Objection. Relevance. The issue  
4 of sewage treatment plants is not relevant to the NPDS  
5 permit.

6 MR. MARSHALL: We think it's directly relevant  
7 to the issue that --

8 CHAIRMAN DODGION: I think Mr. Bosta is  
9 testifying to what he testified to at the hearing, whether  
10 that's relevant or not, but he did bring that issue up at  
11 the hearing.

12 So I'm going to overrule your objection, but  
13 feel free if he gets too far afield on that.

14 THE WITNESS: Also at that hearing I took and  
15 asked about the leakage from the lagoons, and I was given  
16 the leakage factor for the synthetic ponds, which is the  
17 same leakage for an earth-lined pond. And I testified  
18 that I knew that there were court cases in California  
19 where experts in the Second Appellant Court -- the experts  
20 testified that synthetic ponds would leak. It was only  
21 when.

22 As soon as they put in the sep -- in the  
23 synthetic ponds, they said there was zero discharge, and

01-19-10 SEC Ponderosa Hearing Volume I.txt  
24 so therefore they do not take a look at the amount of  
25 water that possibly could leak through the synthetic pond

62  
CAPITOL REPORTERS (775) 882-5322

1 into the groundwater.

2 BY MR. MARSHALL:

3 Q So to kind of recap, you had about two hours  
4 to prepare for this hearing --

5 A That's correct.

6 Q -- with the notice you received?

7 A Yes.

8 MR. MARSHALL: Okay. I have no further  
9 questions for Mr. Bosta.

10 CHAIRMAN DODGION: Cross-Examination? And I  
11 forgot how we had this set up.

12 MS. TANNER: I think we might have switched  
13 that order. If that's okay with you, I'll be second, and  
14 the dairy will go third, and -- do you care, John?

15 MR. MARSHALL: No.

16 CHAIRMAN DODGION: I think that's fine.

17 MS. TANNER: Okay. Is that okay?

18 CROSS EXAMINATION

19 BY MR. BUTLER:

20 Q Mr. Bosta, can you hear me?

21 A Yes.

22 Q My name's Jim Butler. You testified --

23 A Pleased to meet you.

24 Q Thank you. You testified that manure from the  
25 dairy had been placed on a field a quarter mile from your

63  
CAPITOL REPORTERS (775) 882-5322  
Page 57

1 house.

2 A That's correct.

3 Q Who owns that field?

4 A I understand Bonnie Wall.

5 MR. BUTLER: Okay. Thank you very much.

6 That's the only question I have.

7 CHAIRMAN DODGION: Ms. Tanner, questions?

8 CROSS EXAMINATION

9 BY MS. TANNER:

10 Q How long have you lived in Amargosa Valley?

11 A I'm sorry. I can't hear you.

12 Q How long have you lived in Amargosa valley?

13 A I moved to Amargosa Valley in 2002.

14 Q Okay. So after the dairy was in the valley?

15 A The dairy -- my understanding is the dairy  
16 came to the valley in 1993 and operated without permits  
17 until 2000.

18 Q Do you read the paper, the Pahrump -- do you  
19 read the -- sorry. Let me rephrase that.

20 Do you read the Pahrump Valley Times?

21 A Yes.

22 Q Do you read the Las Vegas Review Journal?

23 A No. It's not circulated in the valley at that  
24 time. Today, it is.

25 Q Did you specifically request to be on a

1 mailing list?

2 A I'm sorry. I didn't hear you.

3 Q I'm sorry. Did you specifically request to be  
4 on a mailing -- on official mailing list of the Division?

5 A Yes, the day I attended the hearing.

6 Q You requested to be on the mailing list?

7 A On the mailing list, June 12th.

8 Q How did you do so?

9 A They had a form there, where everybody took  
10 and signed that they wanted to be notified.

11 Q You -- you signed a sign-in sheet on the  
12 meeting?

13 A No, we signed -- I signed the sign-in sheet to  
14 the meeting, and there was a second sign-up for all of  
15 those people who wanted to be noticed at any further  
16 hearings.

17 MS. TANNER: Okay. I don't have any further  
18 questions.

19 CHAIRMAN DODGION: All right. Do you have any  
20 questions for Mr. Bosta?

21 COMMISSIONERS' EXAMINATION

22 MEMBER ZIMMERMAN: Could you tell me, again,  
23 when you moved to your current residence?

24 THE WITNESS: When did I move to my residence?

25 MEMBER ZIMMERMAN: Yes. How long have you

1 been there?

2 THE WITNESS: In 2002.

3 MEMBER ZIMMERMAN: 2002? Okay. Thank you.

4 CHAIRMAN DODGION: Anything else?

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MEMBER ZIMMERMAN: That was it for me.

CHAIRMAN DODGION: Mr. Coyner, do you have any questions for Mr. Bosta?

MEMBER COYNER: Can they object to my questions?

CHAIRMAN DODGION: It won't do them any good.

MEMBER COYNER: Oh, good. Hi, John.

THE WITNESS: Hi.

MEMBER COYNER: I'm Alan. You're on well water?

THE WITNESS: Yes.

MEMBER COYNER: How deep is your well?

THE WITNESS: 160 feet.

MEMBER COYNER: And approximately when was the well drilled?

THE WITNESS: I think -- I would take and say four or five years before I purchased the property in 2002.

MEMBER COYNER: So say 1998, as a guess?

THE WITNESS: In and about that time. I'd have to look up the well log.

CAPITOL REPORTERS <sup>66</sup> (775) 882-5322

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MEMBER COYNER: And do you regularly submit samples of your well water for analysis?

THE WITNESS: Yes.

MEMBER COYNER: Have you ever --

THE WITNESS: I've had my well analyzed three times. I had my well tested approximately three weeks ago. I received a notice that I had a fecal coliform in

8 my well. The water company suggested that I have my water  
9 tested a second time. The second time I had my water  
10 tested it came back clear and good.

11 So on the first test it could have been the  
12 ambulent (sic) water moving underneath the aquifer, away  
13 from my well.

14 MEMBER COYNER: Do you know what the standing  
15 water level is in your well? How -- how deep is it to the  
16 water?

17 THE WITNESS: I -- I think the standing water  
18 level is around 80 to 85 feet. I have not had it measured  
19 lately.

20 MEMBER COYNER: You said three tests. Was the  
21 first test at December of 2009 or --

22 THE WITNESS: No, the first test -- I had a  
23 test of my well when I purchased the property --

24 MEMBER COYNER: Okay.

25 THE WITNESS: -- in 2002. I believe I had a

67  
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1 water test in and around -- after 2004, because there was  
2 a major pollution of the groundwater by the dairy, and  
3 there was a map of all wells within one mile of the dairy  
4 that the water had to be tested. And the water test was  
5 taken at my well at that time.

6 MEMBER COYNER: Did the 2002 and 2004 tests  
7 show anything?

8 THE WITNESS: No, they were clear.

9 MEMBER COYNER: And then the 2009 test, the  
10 first one came back with some contamination, but the

11 following-up test, it was clear?

12 THE WITNESS: That's correct.

13 MEMBER COYNER: Are you on septic tank?

14 THE WITNESS: I have a septic tank, yes.

15 MEMBER COYNER: And would it have been -- when  
16 would it had been constructed, do you think? How old is  
17 your house?

18 THE WITNESS: My understanding is that the  
19 Byrds (phonetic) moved on the property about 1995. Their  
20 water was supplied by a deep irrigation well that was on  
21 the original patented land, and then there was a dispute  
22 over that well. So the two houses on McCoy Street drilled  
23 their own wells. My well is a ten-inch casing, and so  
24 it's just not a small six-, eight-inch casing. It's a  
25 ten-inch casing there.

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1 MEMBER COYNER: So the septic tank is about 15  
2 years old or so?

3 THE WITNESS: I would --

4 MEMBER COYNER: Something like that?

5 THE WITNESS: I would estimate that, yes.

6 MEMBER COYNER: Any issues with it ever?

7 THE WITNESS: No.

8 MEMBER COYNER: No problems?

9 THE WITNESS: No.

10 MEMBER COYNER: Never had any guy come  
11 out and --

12 THE WITNESS: No failures in the septic  
13 system. It operates correctly. I make sure that I put

14 oatmeal down it, so that it helps the enzymes in the  
15 septic tank.

16 MEMBER COYNER: Okay. So as far as you know,  
17 the 2009 fecal coliform report, unknown at this time, you  
18 don't know -- don't have any idea why that failed or where  
19 that came from?

20 THE WITNESS: I have no idea where that come  
21 from. The only thing is, is that when you have a test  
22 within a one-week period, is that you do know that  
23 ambulent (sic) water moves underneath the ground, because  
24 all of the water in Amargosa valley is in the Death valley  
25 Flow Model, and all of the water is flowing from north to

69  
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1 south. It goes all the way down to Shoshone and turns  
2 around and goes back up into Death valley and ends up in  
3 Bad water.

4 So all -- all of water underneath is moving  
5 away. So the thing is, is when you take a water test,  
6 that water test tells you what is the quality of the water  
7 that day.

8 MEMBER COYNER: well -- and that's your  
9 understanding of how the water is moving --

10 THE WITNESS: That's my understanding of how  
11 the ground what the flow under Amargosa Valley.

12 MEMBER COYNER: Okay.

13 THE WITNESS: The Death valley water flow is  
14 probably one that --

15 MEMBER COYNER: well, you probably don't know  
16 about that.

17 THE WITNESS: I probably don't know about it.

18 MEMBER COYNER: That's what I needed to know.

19 CHAIRMAN DODGION: I have one question for you  
20 regarding your test.

21 THE WITNESS: Yes.

22 CHAIRMAN DODGION: Did you take chemical as  
23 well as bacteriological?

24 THE WITNESS: There's one area where the  
25 groundwater is out of the standard, and that's for

70  
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1 arsenic, and there is high --

2 CHAIRMAN DODGION: Okay.

3 THE WITNESS: -- there's high arsenic in the  
4 wells in Amargosa Valley.

5 CHAIRMAN DODGION: So the answer to my  
6 question is --

7 THE WITNESS: I'm sorry. I didn't understand.

8 CHAIRMAN DODGION: My question was: Did you  
9 sample it for chemical analysis as well as  
10 bacteriological?

11 THE WITNESS: Yes.

12 CHAIRMAN DODGION: And I believe --

13 THE WITNESS: Yes, it was the standard -- the  
14 standard --

15 CHAIRMAN DODGION: And the only thing that was  
16 out of whack on any of these three or four tests, that you  
17 did, was arsenic?

18 THE WITNESS: On the chemicals, yes.

19 CHAIRMAN DODGION: Okay. Thank you very much.

20 Nothing further.

21 THE WITNESS: Thank you. Am I finished?

22 MR. MARSHALL: Yes.

23 CHAIRMAN DODGION: For the time being, but  
24 don't leave the premises.

25 THE WITNESS: Okay.

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1 MR. MARSHALL: I'd like to -- Counsel would  
2 like to call Antonio Guerra, please.

3 THE REPORTER: Raise your right hand.

4 ANTONIO GUERRA MARTINEZ,  
5 having been previously duly sworn,  
6 was examined and testified as follows:

7 DIRECT EXAMINATION

8 BY MR. MARSHALL:

9 Q Can you state your full name, please?

10 A My full name is Antonio Guerra Martinez. I  
11 live in Amargosa Valley. My physical address is 1826 East  
12 Ninth Street.

13 Q And can you point out on the map where that  
14 is?

15 A It's right here in this area, (witness  
16 indicating) right there.

17 Q And --

18 A South of the dairy.

19 Q And, Mr. Guerra, why don't you have a seat?  
20 Thank you.

21 And can you tell your personal experience with  
22 impacts to your life from the dairy, please?

23           A     Well, to begin with, I used to be a really  
24 happy person, having the picnics with my family, without  
25 worrying about the flies, to begin with. They're nasty

72  
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1 things. We never have that problem until the dairy  
2 arrived.

3                     In conjunction, con, with -- they say that I  
4 don't have -- it is not relevant to the permit -- well, we  
5 are saying the more water that gets pulled out of the  
6 ground for the dairy, the more is going to produce waste  
7 that will produce flies, that will produce bad smell,  
8 which is horrible.

9                     I mean, my house is smells. My clothes is  
10 smells, and I use swamp coolers all these years, and I've  
11 been there a long time. And it sucks it in, and it's just  
12 impossible sometimes to be there. I sometimes just turn  
13 it off, and get hot, and walk outside, and receive all  
14 that smell.

15                    You driving on the road, it gets bad. It get  
16 close to the dairy, that -- like John say, on the mark  
17 four, it just -- it's unbearable. I wish you guys were  
18 there, so you know what I'm talking about. And it's not  
19 too hard. All you need to do is go out there and do some  
20 driving on 373.

21                    And the thing is that I don't say that the  
22 contamination is there, but it will happen. I don't know  
23 if you guys are aware of what happened in the nuclear  
24 contamination from there? It took many years, but  
25 essentially -- eventually it's there, getting close to the

1 people. It's going to happen, same thing, with the dairy,  
2 contamination.

3 They pour too much sewer water on the ground,  
4 and the more water you give them, the more water they  
5 going to have to put up there, because they're not going  
6 to hold it on the ponds. They're going to have to get rid  
7 of it. And they are not -- I don't want -- I'm not saying  
8 that I want the dairy out of there. I just want them to  
9 have the right control and ask you people to make it  
10 possible to follow the law, the regulations.

11 Q Mr. Guerra, did you appear at the June 12th,  
12 2007 hearing on the permit --

13 A Yes, I --

14 Q -- on the Ponderosa Dairy?

15 A Yes, I was there, and I asked to be showing  
16 where the well was going to be. I have opportunity to  
17 talk to Mr. Lazarus that time, but the person in charge of  
18 the projector say they cannot be possible to do so. All  
19 of a sudden he says that it takes too much time, and all  
20 kinds of excuses. They don't work. They're not there.  
21 we have the time to do it, but they refuses. They want --  
22 they show us on a little tiny -- tiny -- like a --

23 Q Monitor?

24 A -- laptop. Okay? Or to come away down here  
25 to look at it. His job was going there to show us. And

1 they -- they -- they refused to project this so everybody  
2 involved can see it. It's not the same thing you people  
3 can look at that. They looking at this one over here.

4 Q Mr. Guerra, how did you get notice of that  
5 hearing?

6 A Well, really, I just got called by John, and  
7 then I received the notices from Bill.

8 Q Was that the --

9 A I don't have no -- no email, and I didn't get  
10 nothing in the mail, other than I got it through them.

11 Q And so did you receive the notice in the mail  
12 on the day of the hearing?

13 A Yeah.

14 MR. MARSHALL: Okay. Thank you very much. I  
15 have no further questions.

16 CHAIRMAN DODGION: Mr. Butler?

17 MR. BUTLER: We don't have any questions.

18 Thank you.

19 CHAIRMAN DODGION: Ms. Tanner?

20 CROSS EXAMINATION

21 BY MS. TANNER:

22 Q How long have you lived in Amargosa Valley?

23 A Thirty-one years.

24 Q Thirty-one years? Have you been at the same  
25 residence for 31 years?

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□

1 A I've been the same residence for about 26, 27  
2 years.

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25

Q Okay. Okay. Do you read the --

A No, ma'am. I don't read newspapers.

Q No newspapers?

A No.

MS. TANNER: Okay. I have no further questions.

CHAIRMAN DODGION: Questions of the panel?

MEMBER ZIMMERMAN: I have no questions.

COMMISSIONERS' EXAMINATION

MEMBER COYNER: Same questions, Antonio. Are you on a well at your house?

THE WITNESS: Not at my house. In the community well.

MEMBER COYNER: Okay.

THE WITNESS: I've been there for -- for all those years, since 1982, '83, when I moved into the Little Nevada.

MEMBER COYNER: So that's a community well system --

THE WITNESS: Uh-huh. Yes, sir.

MEMBER COYNER: -- regulated by ND -- I'm not going to ask that. The state regulates that well system.

THE WITNESS: And don't ask me what it tests,

1 because they never give us one.

2 MEMBER COYNER: I know that. I understand.  
3 where do you work? what's your job?

4 THE WITNESS: I used to work for American  
5 Borax Company, on the mining industry.

6

MEMBER COYNER: Uh-huh.

7

THE WITNESS: I quit working for them in 1995.

8

After that I worked on my own, like a handyman and an

9

upholsterer. And I love my community. That's why I'm

10

still there.

11

MEMBER COYNER: That's all I have.

12

CHAIRMAN DODGION: Anything else?

13

MEMBER ZIMMERMAN: No, thank you.

14

CHAIRMAN DODGION: Thank you. I have no

15

further questions.

16

MR. MARSHALL: We'd like to now call Bill

17

Barrackman.

18

CHARLES WILLIAM "BILL" BARRACKMAN,

19

having been previously duly sworn,

20

was examined and testified as follows:

21

DIRECT EXAMINATION

22

BY MR. MARSHALL:

23

Q Okay. I'll go through this exercise once

24

more. First, can you just state your full name for the

25

record, please?

77

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A Sure. Bill Barrackman, Charles William

2

Barrackman.

3

Q And where in Amargosa is your house and --

4

A Let me get my glasses. Okay. It's right up

5

here in this corner, (witness indicating) right up here,

6

and --

7

Q What interests do you have in that area?

8

A Oh, I have my home, and then I grow organic

9 pistachios there, and I have a pistachio processing plant  
10 right back here, on this little parcel back here (witness  
11 indicating.

12 Q Thank you. You can sit down.

13 A Okay.

14 Q Mr. Barrackman, has manure from the Ponderosa  
15 Dairy been spread close to your home and operations?

16 A Yes, sir, within about -- I'd say within a  
17 mile. There's the property that's -- it's hard to know  
18 who owns it. They're calling it Beverly Hills Dairy, but  
19 as I understand it's owned by some of the same owners as  
20 the Ponderosa Dairy. And about a year or so ago they  
21 piled several tons of manure on BLM land and eventually --

22 MS. TANNER: Excuse me.

23 THE WITNESS: -- spread it --

24 MS. TANNER: I'm -- I just need a point of  
25 clarification. Are we are talking about Ponderosa Dairy

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1 or are we talking about Beverly Hills Dairy?

2 MR. MARSHALL: We're talking about where  
3 Ponderosa Dairy spreads their manure.

4 MS. TANNER: I believe the statement said --  
5 though, he said it came from Beverly Hills Dairy.

6 MR. MARSHALL: There's no --

7 THE WITNESS: They piled it on the property  
8 that has been designated -- they applied for a permit --

9 MS. TANNER: Who is "they"?

10 THE WITNESS: Ponderosa Dairy -- piled on it  
11 property.

12 CHAIRMAN DODGION: You'll have your chance to  
13 cross-examine him.

14 MS. TANNER: Thank you.

15 THE WITNESS: They piled it on that  
16 property -- well, actually, they didn't pile it on  
17 property. They piled on it BLM land.

18 CHAIRMAN DODGION: If I could stop you for  
19 just a second?

20 THE WITNESS: Yes, sir.

21 CHAIRMAN DODGION: Get my own mind clear on  
22 this.

23 THE WITNESS: Yes, sir.

24 CHAIRMAN DODGION: If I understood your  
25 testimony, was that that manure was piled on -- was put on

79  
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1 property that was apparently owned by Beverly Hills Dairy.

2 THE WITNESS: They said Beverly Hills Dairy,  
3 but it shares the same ownership, as I understand, with  
4 Ponderosa Dairy.

5 CHAIRMAN DODGION: That's what I understood  
6 you to say.

7 THE WITNESS: Yes.

8 BY MR. MARSHALL:

9 Q And have you ever had any issues with flies in  
10 your property?

11 A Yes, sir, I have. We had a lot of flies a  
12 year or so ago. And they piled that manure on there, and  
13 then -- I hope I found the only one that appeared in a  
14 package of pistachio nuts. We did -- we did find a fly in

15 a -- we do our own roasting, and salting, and packaging of  
16 pistachios there, and we happened to catch a bag that had  
17 a fly in it.

18 And so we don't open any of the doors any  
19 more, when we're -- before we start to do our packaging.  
20 we don't always do our packaging every day. We bring the  
21 product out of cold storage. Then we package it. And  
22 what we normally do now is I have two electronic bug  
23 machines in the plant, and I leave those on for three, or  
24 four, five days, keep all the doors closed, clean up the  
25 dead flies on the floor every day. And then when I don't

80

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1 see any flies appearing there in the morning I say, okay,  
2 now we can package some pistachio nuts, and we'll process  
3 maybe a thousand or 2,000 packages of nuts.

4 Q Okay. I'll beat out Mr. Coyner. Have you  
5 ever had your water tested in your well?

6 A Yes, sir, I have.

7 Q Can you tell the Commission about the results  
8 of that testing --

9 A Yes.

10 Q -- and when was it?

11 A Excuse me?

12 Q And when was it and the results.

13 A The last time I had it tested was in December,  
14 and the first test came back what coliform in it. And I  
15 thought, well, there's -- the little bottle that they test  
16 for the coliform has a seal around it. And what happened,  
17 when I opened the bottle, I then removed the seal, and I

18 thought, well, maybe I touched the underside of the lid  
19 after she pulled -- the lady at Apex Lab told me there was  
20 coliform in it.

21 So I got another bottle to retest it, and I  
22 was very careful to remove the seal first, and then  
23 carefully run the water into the bottle, and then put the  
24 lid back on it. well, that sample also came back with  
25 coliform in it.

81

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1 Q And did you submit comments on the draft  
2 permit for the Ponderosa CAFO?

3 A Yes, sir, I did.

4 Q And you submitted those comments before the  
5 hearing on June 12th; isn't that correct?

6 A Yes, sir, I did.

7 Q Okay. And how did you learn of the June 12th,  
8 2007 hearing?

9 A I believe it was -- somebody at the Senior  
10 Center. I think it was Kirt Stingler (phonetic) mentioned  
11 it to me.

12 Q And when did he mention to it?

13 A Only a couple of days -- two or three days  
14 before the actual hearing.

15 Q So around the 10th of June?

16 A Somewhere in there, yeah.

17 Q And in your comments, did you not ask for a  
18 public hearing on the Ponderosa Dairy permit from -- to  
19 NDEP? You asked --

20 A Yes, that's what I put in my comments to have

21

a hearing.

22

Q Did you ever receive notice from NDEP that they were going to have a hearing on -- they were going to grant your request and have a hearing?

23  
24  
25

A No, I never did receive any notice from NDEP.

82

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1

Q Okay. And what did you -- once you learned of the hearing, two days prior to the June 12th hearing date, what did you do?

2  
3  
4

A I called Bruce Crater (phonetic), who's a member of ACE, and I asked him if he knew about this hearing, and he said no. And I said, well, you know, I don't think anybody else in the community does either.

5  
6  
7  
8

So I wrote a letter, and Bruce and his wife came down, printed off -- first of all, I had to get a permit at the post office to do a bulk mailing, which I did.

9  
10  
11  
12

And I printed a letter and had Bruce and his wife, Marty, come over and help me fold them. And we got them to the post office in time, so they'd be delivered into the mail boxes in the community on the day of the hearing.

13  
14  
15  
16  
17

Q And you went to the hearing; did you not?

18

A Yes, sir.

19

Q And did you make comments at the hearing?

20

A Yes, sir.

21

Q And was it your understanding that -- how many people were there, about?

22  
23

A We had a show of hands, and -- or just

24 counted. We counted people, and there was about 90 people  
25 there.

83

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1 Q And do you have an understanding, of the  
2 people that showed up, how many showed up as a result of  
3 your notice?

4 MS. TANNER: Objection. I don't believe that  
5 this witness would ever be able to testify to that.

6 MR. MARSHALL: He can testify as to his  
7 understanding, particularly since there's testimony in the  
8 record about how they learned of the hearing.

9 MS. TANNER: Well, that would be hearsay.

10 MR. MARSHALL: And this is an administrative  
11 hearing.

12 CHAIRMAN DODGION: We will allow the question  
13 to be answered.

14 THE WITNESS: You know, I do remember a man  
15 getting up in the hearing, and he was mad at hell at NDEP  
16 for not letting him know about the hearing until that day.  
17 He didn't realize that it was sent out by -- by ACE. I  
18 have -- I agree with Counsel, that I have no way of  
19 knowing the specific number of people that were there as a  
20 result of the letter that I sent out.

21 However, just as a general comment, most of  
22 the people that I talked to did say, in fact, that they  
23 were there that night because they got something in the  
24 mail that day.

25 MR. MARSHALL: Then that's all the questions I

84

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1 have.

2 Oh, did you -- nope. Thank you. That's it.

3 Thank you very much.

4 CHAIRMAN DODGION: Mr. Butler?

5 CROSS EXAMINATION

6 BY MR. BUTLER:

7 Q Mr. Barrackman?

8 A Yes, sir.

9 Q I'm Jim Butler.

10 A Yes.

11 Q Pleased to meet you. A few questions about  
12 the water sample.

13 A Yes, sir.

14 Q Where did you get the sample bottles?

15 A I got them from Apex Lab.

16 Q In --

17 A Las Vegas.

18 Q And do you know how long they had been stored  
19 or how they had been preserved?

20 A Before she gave them to me?

21 Q Yes.

22 A No, I have no way of knowing that.

23 Q How long did you have them before you took the  
24 sample?

25 A Oh, I only had them a couple days.

85

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1 Q The -- and what did the sample test positive  
Page 77

2 for?

3 A Coliform. She just said coliform.

4 Q So she didn't say fecal coliform?

5 A Not that I remember. Did she -- I was going  
6 to ask John. But I don't remember her saying fecal  
7 coliform. I think she just said coliform.

8 Q Do you recall what the number was, or did she  
9 just say that there was some --

10 A No, sir, but I could make that information  
11 available to the Commission.

12 MR. BUTLER: Okay. Thank you very much.

13 THE WITNESS: Yes, sir.

14 MS. TANNER: Me?

15 CHAIRMAN DODGION: Ms. Tanner?

16 CROSS EXAMINATION

17 BY MS. TANNER:

18 Q Do you also have a septic tank?

19 A Yes, ma'am.

20 Q Do you know where that is in relation to  
21 your -- or I'm sorry. Do you know if your -- where your  
22 leach field for your septic tank is in relation to your  
23 drinking well? I guess, specifically, is it up-gradient?

24 A Yes, I understand what you mean. I don't  
25 know, well, whether it's up-gradient or not, but --

86

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1 Q You don't know?

2 A I know where it is, because we replaced it  
3 probably five or six years ago.

4 Q Okay.

5           A     I didn't replace it. I had a man come and do  
6 it, who does that.

7           Q     Now, do you have a consultant who has worked  
8 with you on some of these issues with the Division?

9           A     Are you meaning Mr. Sagady? Are you talking  
10 about Mr. Sagady?

11          Q     Do you personally have a consultant that  
12 you've worked with on some of these issues with the  
13 Division?

14               MR. MARSHALL: I object. I'm uncertain about  
15 the --

16               THE WITNESS: I don't know.

17               MS. TANNER: Okay. I'll clarify.

18          Q     You indicated that you, personally, issued  
19 some comments -- written comments on the permit?

20          A     Oh, yes, I did. I know what you meant. Also  
21 Bill Eddie did. He was my attorney at that time.

22          Q     Your attorney. I'm sorry.

23          A     He's no longer doing this kind of work. He's  
24 doing some kind of solar work.

25          Q     So Mr. Eddie issued comments on your behalf?

1           A     He did submit a written comment on my behalf,  
2 and I think I also submitted a written comment, if I  
3 remember right.

4           Q     But you're not positive?

5           A     I -- I don't remember if it was on this permit  
6 or if it was on the Beverly Hills permit. It might have  
7 been on the Beverly Hills permit that I made a written

8 permit.

9 Q Did you ever ask Mr. Eddie if he received  
10 written notice from the Division?

11 A No, I never did ask him that.

12 Q And you said you actually did hear from  
13 somebody who did get notice about the hearing. That's how  
14 you found out about it?

15 A No, ma'am. The man that told me is Kirt  
16 Stingler. He's a retired police officer, and he lives in  
17 Amargosa Valley, and he was at the Senior Center. And he  
18 looks at the legal sections of the paper.

19 Q Okay. So he -- he read the paper; he saw the  
20 notice?

21 A Yes, ma'am, he did.

22 Q And he told you?

23 A Yes, ma'am.

24 Q Do you read the paper?

25 A No, very seldom.

88

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1 MS. TANNER: Okay. I have no further  
2 questions.

3 CHAIRMAN DODGION: Okay. Questions from the  
4 panel?

5 MEMBER ZIMMERMAN: No. I have no questions.

6 CHAIRMAN DODGION: Okay.

7 COMMISSIONERS' EXAMINATION

8 MEMBER COYNER: Hi, Bill.

9 THE WITNESS: Yes.

10 MEMBER COYNER: Alan.

11 THE WITNESS: Yes, sir.

12 MEMBER COYNER: When did you move to Amargosa  
13 Valley?

14 THE WITNESS: Oh, it was in the late '80's. I  
15 think about '88, '89, somewheres in there.

16 MEMBER COYNER: And --

17 THE WITNESS: But I didn't move to that  
18 particular location.

19 MEMBER COYNER: Okay. That was my next  
20 question. You were at some other location?

21 THE WITNESS: Yes, sir.

22 MEMBER COYNER: So when did you move to your  
23 current location?

24 THE WITNESS: It was in -- let's see. It was  
25 in 1990 -- 1990.

89  
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1 MEMBER COYNER: And I believe I heard that the  
2 dairy -- what's your understanding of when the dairy  
3 started operations? What year?

4 THE WITNESS: I thought it was '93. Wasn't  
5 it?

6 MEMBER COYNER: Well, that's at least your  
7 understanding of when you think it started.

8 THE WITNESS: Well, maybe -- it was somewhere  
9 in there.

10 MEMBER COYNER: And --

11 THE WITNESS: It was after I was there. I  
12 know that.

13 MEMBER COYNER: And in your present home you  
Page 81

14 have a well?

15 THE WITNESS: Yes, sir.

16 CHAIRMAN DODGION: And how deep is it?

17 THE WITNESS: It was originally drilled -- it  
18 was one of those wells -- it was originally drilled to  
19 300 feet. It was one of those wells that was drilled and  
20 was used as the basis for the land entry in the early  
21 '60's, I believe.

22 But I think that the depth it was measured  
23 on -- it was around a hundred and eighty-seven or  
24 eighty-five, something like that. So there's been some  
25 fill-in on it.

90  
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1 MEMBER COYNER: Okay. So -- and then what  
2 level is the standing water at?

3 THE WITNESS: I believe the standing water,  
4 now, is about 127, 128 feet. When we first started there,  
5 it was about 125 or --

6 MEMBER COYNER: So it's been pretty steady for  
7 20 -- 20 years at about 125. You haven't seen much  
8 fluctuations?

9 THE WITNESS: We've seen it drop about five to  
10 six feet in the last, probably seven years -- six or seven  
11 years.

12 MEMBER COYNER: Sort of steady, no sudden  
13 drop?

14 THE WITNESS: I wouldn't know. I don't  
15 measure it every day, sir.

16 MEMBER COYNER: Yeah, sure. And then you had

17 this positive test in December of 2009 for coliform?

18 THE WITNESS: Yes, sir.

19 MEMBER COYNER: Had you tested your well  
20 previous to that?

21 THE WITNESS: There were some tests that were  
22 done on it by the USGS, and I don't remember what year it  
23 was. It seems like it's probably been at least 10 years  
24 ago.

25 And then I believe we tested it right after we

91  
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1 moved in there, probably in '91 or '92, and I don't  
2 remember any -- we've always had high arsenic, but I don't  
3 remember any -- any coliform in that water.

4 MEMBER COYNER: Okay. So that's two tests in  
5 20 years. So you've got faith that your well water is  
6 pretty good, I guess, is --

7 THE WITNESS: Yes, sir. I've been drinking  
8 it. So --

9 MEMBER COYNER: And the house was constructed  
10 when?

11 THE WITNESS: Oh, it's --

12 MEMBER COYNER: I want to know when the septic  
13 tank was constructed. So --

14 THE WITNESS: well, it's not a home. It's a  
15 mobile home.

16 MEMBER COYNER: Oh.

17 THE WITNESS: And it's still the original  
18 mobile home that was there when we bought the -- the  
19 property. And then we brought another mobile home in with

20 us that we had remodeled.

21 MEMBER COYNER: Uh-huh.

22 THE WITNESS: And we'll probably do away with  
23 those and build a home or put in a new --

24 MEMBER COYNER: So the septic tank was built  
25 in 1990 or --

92  
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1 THE WITNESS: Oh, probably earlier than that,  
2 I would say.

3 MEMBER COYNER: So it's in excess of --

4 THE WITNESS: It's been there a long time.

5 MEMBER COYNER: -- of 25 years old. And you  
6 mentioned you had somebody come in and work on it  
7 recently?

8 THE WITNESS: Not recently. It was probably  
9 seven or eight years ago. It was one of the local men  
10 that does -- he used to drill -- in fact, he's a licensed  
11 well driller. Dave Rou (phonetic) is his name, and he  
12 also drills septic systems. And I had him come over and  
13 check it, and he said it looks like it needs a new sep --  
14 a new leach line.

15 MEMBER COYNER: Uh-huh.

16 THE WITNESS: So he put in new leach lines for  
17 us.

18 MEMBER COYNER: And what have you done since  
19 December to follow up on this positive coliform test?  
20 Have you -- I mean, I realize that was just less than a  
21 month ago, but are you --

22 THE WITNESS: Yeah, we had a second -- a

23 second positive, and so what I did -- we removed the top  
24 of the -- what happens is the well comes from the -- the  
25 well, the big pump in the well. It goes into about a

93

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1 2,000-gallon tank. And I had the lid taken off of that  
2 tank, and we had the tank cleaned out, and bleached,  
3 and -- put a gallon of bleach water in it, and then filled  
4 it back up, and let it sit, and then pumped that out into  
5 the yard, and -- two or three times, and then -- and let  
6 it circulate through the lines in the house, and I have  
7 not tested it since then.

8 MEMBER COYNER: But you're going to?

9 THE WITNESS: Yes, sir. Yes, sir.

10 MEMBER COYNER: Yes, because -- well, yeah, I  
11 mean, the issue is, potentially, the septic tank has an  
12 issue with the result and the testing -- assuming that  
13 test was taken in a good a proper way and so forth.

14 Let's see. Do you use it for your drinking  
15 water?

16 THE WITNESS: Yes.

17 MEMBER COYNER: I think that's it.

18 CHAIRMAN DODGION: When you disinfected your  
19 tank, did you also disinfect your well?

20 THE WITNESS: No, sir, I did not.

21 CHAIRMAN DODGION: I would suggest that you do  
22 that.

23 THE WITNESS: I don't -- well, maybe there's a  
24 way I can get some water in there without pulling it --  
25 there was a -- I think, a hole --

1 CHAIRMAN DODGION: Get something in there.  
2 THE WITNESS: Yeah, all right.  
3 CHAIRMAN DODGION: I know on own domestic well  
4 what we do is probably --  
5 THE WITNESS: What do you do, just pour on  
6 gallon of bleach down there?  
7 CHAIRMAN DODGION: You can find a practice  
8 from somebody -- but basically you take a gallon of  
9 bleach, mix it with five, ten gallons of water, and then  
10 if you can cap off your well, pour it down the sides of  
11 the well, and then let it sit in the well for a while, and  
12 surge the well a couple of times.  
13 THE WITNESS: When you say surge the well --  
14 CHAIRMAN DODGION: Start, stop your pumping.  
15 THE WITNESS: Oh, okay. So you like --  
16 CHAIRMAN DODGION: It's totally unrelated to  
17 this hearing.  
18 THE WITNESS: I know, but I learned something.  
19 So you like to take the bleach and kind of let it drizzle  
20 down the casing? Is that the idea?  
21 CHAIRMAN DODGION: On the sides of the casing,  
22 yeah.  
23 THE WITNESS: Oh, okay.  
24 CHAIRMAN DODGION: And then pour some down  
25 over the top of it that -- the conduit or the pipe coming

1 up.

2 THE WITNESS: I see. Yeah.

3 CHAIRMAN DODGION: It's a good practice for us  
4 to do that.

5 Another question I have for you, though, is:  
6 The three of you have mentioned odors and flies.

7 THE WITNESS: Yes, sir.

8 CHAIRMAN DODGION: And I'd like to ask you if  
9 you have filed complaints about odors and flies with the  
10 Nye County Board of Commissioners and the County -- Nye  
11 County Health Officer.

12 THE WITNESS: well, when we first started  
13 objecting to this dairy, we did go before the Nye County  
14 Commissioners, and they didn't respond in a positive way.  
15 They didn't seem to think there was much they could do  
16 about it.

17 CHAIRMAN DODGION: Thank you. I have no  
18 further questions.

19 MR. MARSHALL: I just had one on Redirect  
20 Examination.

21 CHAIRMAN DODGION: Okay.

22 REDIRECT EXAMINATION

23 BY MR. MARSHALL:

24 Q You use your well to irrigate your pistachio  
25 orchard; is that correct?

CAPITOL REPORTERS <sup>96</sup> (775) 882-5322

□

1 A Yes, sir.

2 Q Okay. And how much -- how many gallons per

01-19-10 SEC Ponderosa Hearing Volume I.txt  
3 minute do you pump out of that when you're irrigating?

4 A About 300.

5 MR. MARSHALL: Okay. Thank you.

6 CHAIRMAN DODGION: Do you have any other  
7 redirect of your witnesses?

8 MR. MARSHALL: No.

9 CHAIRMAN DODGION: Okay.

10 MR. MARSHALL: Actually, I do have one  
11 question for Antonio Guerra, please.

12 ANTONIO GUERRA MARTINEZ,  
13 having been previously duly sworn,  
14 was recall, examined, and testified as follows:

15 REDIRECT EXAMINATION

16 BY MR. MARSHALL:

17 Q I believe there was a spill from the dairy at  
18 some point in the past that came close to your house; is  
19 that correct?

20 A That's correct.

21 Q Can you please tell the Commissioners about  
22 that?

23 MR. BUTLER: Objection. I'm not sure this has  
24 anything to do with permit. We haven't established a  
25 timeframe. We don't know anything about it.

97  
CAPITOL REPORTERS (775) 882-5322

1 MS. TANNER: I would join in that.

2 MR. MARSHALL: That's what we're trying to do  
3 is establish a timeframe and have him testify as to the  
4 potential impact to him, since he's immediately  
5 downstream, as you guys -- was he demonstrated.

6 CHAIRMAN DODGION: I think that testimony  
7 would go towards him having standing in this hearing,  
8 which we've already granted. So, with that, I'm going to  
9 sustain the objection, because that spill is not  
10 relevant --

11 MR. MARSHALL: Okay.

12 CHAIRMAN DODGION: -- to this permit.

13 MR. MARSHALL: I don't necessarily agree,  
14 but --

15 CHAIRMAN DODGION: Okay.

16 MR. MARSHALL: That's all that we have at this  
17 time. We have a series --

18 CHAIRMAN DODGION: Did we --

19 MR. MARSHALL: I'm sorry?

20 CHAIRMAN DODGION: Did we not allow you to  
21 cross-examine, Mr. Butler? I believe we did.

22 MS. TANNER: No, you did.

23 MEMBER COYNER: Keeping check.

24 CHAIRMAN DODGION: I need that help.

25 All right. Proceed, Mr. Marshall.

CAPITOL REPORTERS <sup>98</sup> (775) 882-5322

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1 MR. MARSHALL: We -- that's all the direct  
2 testimony that we have.

3 We have some additional exhibits that I can  
4 either present now or I can present to you while we're  
5 doing our argument.

6 And so we can submit our case on the briefs  
7 that we submitted, the reports and other testimony that  
8 you've heard today.

9 CHAIRMAN DODGION: I guess that brings up a  
10 whole legal issue here of the exhibits being accepted  
11 without being introduced through the witnesses' testimony,  
12 so that they have the opportunity to cross-examine.

13 MS. REYNOLDS: Right. You can -- they need  
14 the opportunity to make their objections for the record.

15 CHAIRMAN DODGION: Okay. So you wish to --

16 MR. MARSHALL: We would -- we'll move into  
17 evidence all the exhibits that we have submitted to date,  
18 including all the attachments and reports that we have  
19 on -- that we filed as -- with our briefs.

20 CHAIRMAN DODGION: Do you have a list of  
21 those?

22 MR. MARSHALL: I don't have a list. I do  
23 believe that they're all listed on the NDEP's website  
24 and --

25 CHAIRMAN DODGION: The one we have --

CAPITOL REPORTERS 99 (775) 882-5322

1 MR. MARSHALL: -- all attached to our opening  
2 brief, our reply brief, and with the documents we have  
3 submitted today, and there's two more that I'd like to  
4 submit. And I'm sorry. I neglected to do this through  
5 Mr. Barrackman, which I can do if we want to.

6 (Discussion off the record)

7 MR. MARSHALL: This is the notice that he  
8 prepared, that he testified to.

9 MR. BARRACKMAN: Can I see that?

10 (Discussion off the record)

11 MR. MARSHALL: And --

12 CHAIRMAN DODGION: Mr. Barrackman did testify  
13 to this.

14 MR. MARSHALL: Yes.

15 CHAIRMAN DODGION: And that is essentially  
16 what he testified to. So do you have any objections to  
17 this particular document?

18 MR. BUTLER: To that particular exhibit, no,  
19 we do not.

20 MR. MARSHALL: You guys have copy of that one.  
21 I have limited numbers. This is a little bit more of a  
22 demonstrative exhibit.

23 MR. BUTLER: We object to that.

24 MS. TANNER: I would object to that, as well.

25 MR. MARSHALL: That basically takes

CAPITOL REPORTERS <sup>100</sup> (775) 882-5322

1 information, from the record, by Mr. Sagady, and just sets  
2 out, generally, the flow of nutrients or pollutants,  
3 depending on how you want to call them, and that is  
4 relevant. It's all outlined in our reply brief and his  
5 comments filed with our opening brief.

6 CHAIRMAN DODGION: Well, we have an objection  
7 to the -- two objections to the acceptance of this and the  
8 introduction of it.

9 And state the basis for your objections,  
10 please.

11 MR. BUTLER: It is not relevant. We don't  
12 know who prepared it. We are not able to examine  
13 Mr. Sagady on some of the numbers that have been put in  
14 the boxes. We have objections to Mr. Sagady's work.

15 In fact, we feel that he made some  
16 mathematical errors, but he's not here. We can't ask him  
17 about that. So we object based on admissibility and  
18 relevance.

19 MS. TANNER: The State would join in that  
20 objection. I do believe that we are entitled to  
21 cross-examine expert witnesses and to explore their  
22 conclusions, and we're not able to do this in this case.  
23 And whether or not that's a synopsis of the full report,  
24 our objection remains that.

25 MR. MARSHALL: May I be heard?

CAPITOL REPORTERS <sup>101</sup> (775) 882-5322

1 CHAIRMAN DODGION: Yes, you can.

2 MR. MARSHALL: This particular exhibit, by the  
3 way, I said, is demonstrative. The actual numbers are  
4 just illustrative. I mean -- but I think no one disagrees  
5 that, in general, this is how nutrients are processed  
6 through the plants. And the -- definitely the Interveners  
7 and the State have their own consultants and experts here  
8 to testify that somehow, in general, these numbers are  
9 approximate.

10 So I don't think -- these numbers are nothing  
11 different than, essentially, what would have been in the  
12 report for a long time and have been available to  
13 everybody.

14 CHAIRMAN DODGION: well, I think that the fact  
15 that can't introduce it through your witness and they're  
16 not able to cross-examine, and we're not able to  
17 cross-examine the witness, that I'm going to have to

01-19-10 SEC Ponderosa Hearing Volume I.txt  
18 sustain the objection.

19 And I think that you're right, that the  
20 Intervener dairy has their witness to go through this  
21 process, which will give you the opportunity to  
22 cross-examine if you think that their information is not  
23 appropriate.

24 So the objection is sustained. What other  
25 exhibits do you have?

102  
CAPITOL REPORTERS (775) 882-5322

1 MR. MARSHALL: We have the -- the large map  
2 that you guys have individual copies for.

3 CHAIRMAN DODGION: Yes.

4 MR. MARSHALL: This is a smaller map of -- I  
5 think I handed out -- do you have copies of this one?

6 MEMBER ZIMMERMAN: No.

7 (Discussion off the record)

8 MR. MARSHALL: We may be limited in our  
9 numbers that we have today. This is a map prepared by --  
10 I guess by Mr. Lazarus' company for the dairies and is  
11 part of the record, taking this out of the NDEP files.

12 MR. MARTINEZ: Do you need this one, too?

13 MR. MARSHALL: Oh, I'm sorry.

14 MS. REBERT: Thank you.

15 MR. BUTLER: We don't object to that.

16 MS. TANNER: No objection.

17 CHAIRMAN DODGION: All right. Then do we had  
18 a number or something for this one?

19 MR. MARSHALL: Yes. A-3.

20 MR. BARRACKMAN: A-3.

21  
22  
23  
24  
25

MR. MARSHALL: Yes, A-3.  
CHAIRMAN DODGION: We'll accept Exhibit A-3.  
(Appellants' Exhibit No. A-3 marked  
for Identification and received into  
Evidence)

CAPITOL REPORTERS <sup>103</sup> (775) 882-5322

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MR. MARSHALL: And this is just an expanded  
aerial view of the Google map that Mr. Walker posted, just  
this area, and we blew it up to include the other  
associated fields.  
MR. BUTLER: We have no objection.  
MS. TANNER: No objection.  
CHAIRMAN DODGION: And the identification for  
this one?  
MR. MARSHALL: I think I handed out my copies.  
MR. BARRACKMAN: He asked you a question.  
MR. MARSHALL: Yes, I'm trying to figure out  
which one we labeled this.  
MR. BARRACKMAN: We labeled it A-2.  
MR. MARSHALL: This is A-2.  
(Appellants' Exhibit No. A-2 marked  
for Identification and received into  
Evidence)  
MR. MARSHALL: And that's it for now. And we  
issued the -- previously introduced or -- this groundwater  
map that we gave to you in the initial argument in our  
standing.  
CHAIRMAN DODGION: Any objection to that?  
MS. TANNER: No objection.

24

MR. BUTLER: No objection.

25

CHAIRMAN DODGION: And it is A-9.

104

CAPITOL REPORTERS (775) 882-5322

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(Appellants' Exhibit No. A-9 received

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into Evidence)

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MEMBER COYNER: That was my understanding.

4

MR. BARRACKMAN: A-9.

5

(Discussion off the record)

6

MR. MARSHALL: We talked about that one, A-1.

7

CHAIRMAN DODGION: That --

8

MR. MARSHALL: The small copy of the big map

9

that we were using.

10

CHAIRMAN DODGION: Right. All right, then.

11

(Appellants' Exhibit No. A-1 received

12

into Evidence)

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CHAIRMAN DODGION: Those are all of the

14

additional --

15

MR. MARSHALL: That's it.

16

CHAIRMAN DODGION: -- exhibits that you wish

17

to put into the record?

18

MR. MARSHALL: Yes.

19

CHAIRMAN DODGION: All right. It looks like

20

you'd like to say something.

21

MR. BUTLER: I'm not sure where we are.

22

Mr. Marshall said he wanted to move admission of all of

23

the attachments to everything he's filed. He hasn't done

24

that.

25

we have objections to selected ones of those.

105

CAPITOL REPORTERS (775) 882-5322

1 I'm not sure how you want to deal with that.

2 MR. MARSHALL: I believe you ruled on the  
3 demonstrative exhibit that we had, but I think what's  
4 outstanding -- I don't know, specifically -- are we  
5 talking about -- were there any other objections to  
6 other --

7 MR. BUTLER: well, you have -- we object to  
8 Exhibit A, to the opening statement, which is a report  
9 from Mr. Charles Tebbutt, which goes to -- which is -- you  
10 know, we object on relevance, and we object on the fact  
11 that he's not here.

12 MS. TANNER: The State would join in that  
13 objection.

14 CHAIRMAN DODGION: So we're talking about --

15 MS. TANNER: It's the --

16 CHAIRMAN DODGION: Okay. "For consideration  
17 and support of Amargosa Citizens for Environmental  
18 Commission Declaratory Order --

19 MS. TANNER: That's correct.

20 MR. BUTLER: This was for the other  
21 proceeding --

22 CHAIRMAN DODGION: Yes, it was.

23 MR. BUTLER: -- their petition.

24 CHAIRMAN DODGION: And it was at least  
25 attached here. Do you have a list of the attachments?

CAPITOL REPORTERS <sup>106</sup> (775) 882-5322

1 MR. BUTLER: well, I have all the attachments  
Page 96

2 here, and I can --

3 CHAIRMAN DODGION: I guess I should come back  
4 to Mr. Marshall. And do you have a list of the  
5 attachments in the exhibits that you want us to accept  
6 into the record?

7 MR. MARSHALL: I can generate one. I do not  
8 have one presently, but it's -- I don't know if we want to  
9 continue at this point, or I can generate one just using  
10 our exhibit list that we have, but I don't have a  
11 complete --

12 MEMBER COYNER: I understand.

13 CHAIRMAN DODGION: I'm asking to make sure  
14 that we have everything that he wants to.

15 MEMBER COYNER: Is the sum total of this, plus  
16 what we can see, the total of these?

17 CHAIRMAN DODGION: Yes. If it would -- then  
18 you intend at this point to rest your case in chief?

19 MR. MARSHALL: Yes.

20 CHAIRMAN DODGION: I think what we'll do then  
21 is we'll take a -- we'll break for lunch and reconvene  
22 here at 12:45, at which time we will reconvene, and you  
23 can introduce your list, and we can go through the  
24 objections to the list various exhibits.

25 MR. MARSHALL: Okay.

107  
CAPITOL REPORTERS (775) 882-5322

1 CHAIRMAN DODGION: Is that satisfactory with  
2 the panel.

3 MEMBER ZIMMERMAN: Yes.

4 MEMBER COYNER: Yes.

5 CHAIRMAN DODGION: All right. We'll be in  
6 recess until 12:45.

7 (Proceedings recessed from 11:41 a.m. until 12:47 p.m.)

8 CHAIRMAN DODGION: It appears that everyone we  
9 need is here, so we can reconvene.

10 Mr. Marshall, back to your list of exhibits.

11 MR. MARSHALL: All right. I have a list of  
12 exhibits. I added one to the bottom, which is Exhibit  
13 A-10, which is again a document out of files, and it's  
14 entitled, "Comprehensive Nutrient Management Plan,  
15 Summary" --

16 THE REPORTER: I'm sorry, "Comprehensive" --

17 MR. MARSHALL: "Comprehensive Nutrient  
18 Management Plan, Summary of Plan, Ponderosa Dairy," dated  
19 December 5, 2005, and we put A-10 as that exhibit.

20 CHAIRMAN DODGION: And you're introducing this  
21 because it was not part of the NDEP record or --

22 MR. MARSHALL: Well, I think, when we talk  
23 about objections, it's interesting it's not part of --  
24 when you say, "NDEP record," it's not part of their  
25 exhibits.

108  
CAPITOL REPORTERS (775) 882-5322

1 CHAIRMAN DODGION: Okay.

2 MR. MARSHALL: But if it's --

3 MS. TANNER: Which are we talking about?

4 MR. MARSHALL: That's this one.

5 And that's, then, the list of our exhibits,  
6 excluding Exhibit A-8, was the demonstrative exhibit you  
7 have already ruled on?

8 CHAIRMAN DODGION: All right. Mr. Butler, on  
9 the exhibits?

10 MR. BUTLER: No objection to what he's marked  
11 as A-10, which is the summary document from the Division's  
12 files.

13 (Appellants' Exhibit No. A-10 marked  
14 for Identification and received into  
15 Evidence)

16 MR. BUTLER: In terms of those exhibits to the  
17 briefs, Exhibit A, Mr. Tebbutt's report, we object to that  
18 as irrelevant and not having a witness here.

19 Exhibit B, the Ponderosa chronology, we have  
20 no objection.

21 Exhibit C, the State of Nevada Compliant, we  
22 objected that it's irrelevant to the permit proceeding.

23 Exhibit D, which is a letter from the Division  
24 of Water Resources regarding water rights, we believe  
25 that's irrelevant, and we object that that is irrelevant.

109  
CAPITOL REPORTERS (775) 882-5322

1 Exhibits E-1, E-2, and E-3 all relate to  
2 Mr. Sagady's testimony. We object to that because he is  
3 unavailable to be called as a witness, and we can't ask  
4 him questions about his report.

5 There are four exhibits appended to the reply  
6 brief, Exhibits F, G, H, and I. We do not object to any  
7 of those.

8 CHAIRMAN DODGION: And these A-1 through  
9 A-10 --

10 MR. BUTLER: We have those --  
Page 99

11 CHAIRMAN DODGION: -- we've already gotten  
12 through those.

13 MR. BUTLER: We've already done all those, and  
14 I don't believe we had any objections to any of those.

15 CHAIRMAN DODGION: The State?

16 MS. TANNER: Thank you. I have similar  
17 objections. I would actually -- I would have no objection  
18 to A-10, so all the exhibits that start with A, A-1  
19 through A-10, I think we're clear on.

20 I also have no objections to those documents  
21 that were attached to Appellants' reply brief. So that  
22 would be F, G, H, and I. I would object to each one of  
23 the exhibits that are attached to Appellants' opening  
24 brief.

25 The Sagady document, E-1, E-2, and E-3, and

CAPITOL REPORTERS <sup>110</sup> (775) 882-5322

□

1 Exhibit A, the Tebbutt Report, basically are attempts to  
2 present expert testimony, without having a witness  
3 present, without our ability to cross-examine that  
4 witness.

5 And I believe Exhibit A, on top of that, is  
6 also irrelevant.

7 Exhibit B and C, I would also agree that they  
8 are irrelevant to this proceeding. The Ponderosa  
9 chronology covers, I believe, from '98 to 2004 and  
10 wouldn't have anything to do with NDEP's decision to  
11 permit, so long as the dairy was in compliance in 2007.

12 And the same for Exhibit C, it's irrelevant to  
13 this proceeding.

14 CHAIRMAN DODGION: I want to deal with  
15 Exhibits E-1, E-2, and E-3 first -- or rather F, G, H, and  
16 I are accepted.

17 (Appellants' Exhibit Nos. F, G, H,  
18 and I marked for Identification and  
19 received into Evidence)

20 CHAIRMAN DODGION: The Hearing Exhibits A-1,  
21 2, 7, 3, 9, and 10 are accepted.

22 (Appellants' Exhibit No. A-7 received  
23 into Evidence)

24 CHAIRMAN DODGION: Exhibits E-1, E-2, E-3, I'm  
25 going to sustain the objection to those. My basis for

CAPITOL REPORTERS <sup>111</sup> (775) 882-5322

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1 that is: Mr. Sagady is not here. Mr. Sagady was listed  
2 on your list of witnesses, and the State and the  
3 Intervener had an expectation of being able to  
4 cross-examine him on those documents. So I'm going to  
5 sustain the objection to E-1, E-2, and E-3.

6 With respect to Exhibit A, I'm going to allow  
7 that or overrule the objections to that. Groundwater  
8 monitoring is very important to this proceeding. The  
9 dairy -- the Intervener has their groundwater expert here,  
10 whose testimony will be able to be presented on the record  
11 and will be available for cross-examination, and also to  
12 refute anything that he wants to in that report.

13 So on that basis I'm going to overrule that  
14 objection and accept that report into the record.

15 (Appellants' Exhibit No. A marked for  
16 Identification and received into  
Page 101

17 Evidence)

18 CHAIRMAN DODGION: Exhibit B, the Ponderosa  
19 chronology, you did not object to even, though you did.

20 MS. TANNER: Yes.

21 CHAIRMAN DODGION: It's the Intervener Dairy,  
22 and it's their chronology, and I'm accept that.

23 (Appellants' Exhibit No. B marked for  
24 Identification and received into  
25 Evidence)

CAPITOL REPORTERS <sup>112</sup> (775) 882-5322

1 CHAIRMAN DODGION: The 1998 State Complaint, I  
2 think it is irrelevant, and I will sustain that objection.

3 The Nevada Division of Water Resources letter,  
4 Water Resources is well beyond the purview of NDEP, the  
5 Division of Water Resources, and again I find that is  
6 irrelevant, not appropriate.

7 MR. MARSHALL: If I could -- could I be heard  
8 on some of these objections?

9 CHAIRMAN DODGION: Yes, you may.

10 MR. MARSHALL: Particularly the -- first off,  
11 the relevance objections.

12 The one of the fundamental issues that we have  
13 in this -- for ACE and the gentlemen here is the --  
14 whether or not monitoring needs to be done for a number of  
15 reasons, whether or not the actual conditions in the  
16 permit are protective, but also because this applicant has  
17 an extensive history of compliance issues.

18 And that these exhibits, D, and particularly  
19 C, are directly relevant to whether or not these -- this

20 entity -- there should be monitoring imposed because of  
21 the past history of this entity. So that's the reason  
22 that those documents are there.

23 If I could also -- know you, kind of  
24 already --

25 CHAIRMAN DODGION: which particular documents

CAPITOL REPORTERS <sup>113</sup> (775) 882-5322

1 exactly?

2 MR. MARSHALL: That would be B, C, and D, the  
3 chronology, the 1998 Complaint, and the letter from the  
4 Division of Water Resources was offered for a number of  
5 purposes, but also the fact that the history of Ponderosa  
6 and its, basically, activities, that the State needs to  
7 constantly be on top of this operation in order to comply  
8 with the law. So that's what that -- that's why that  
9 exhibit was offered.

10 Then I'd like to touch on Exhibits E-1 through  
11 E-3.

12 CHAIRMAN DODGION: Let me --

13 MR. MARSHALL: Okay.

14 CHAIRMAN DODGION: -- deal with C and D, the  
15 top items there. I've accepted Exhibit A and B.

16 The 1998 State of Nevada Complaint is 12 years  
17 old, and I don't believe it's relevant, and I'm going to  
18 sustain the objection to that.

19 And again, Water Resources deals with water  
20 quantity, water rights, and has nothing to do with the  
21 permit that we're talking about here, and so I am going to  
22 continue to sustain the objection to that.

23 MR. MARSHALL: May be heard on Exhibits E-1,  
24 through 3?

25 CHAIRMAN DODGION: Yes.

CAPITOL REPORTERS <sup>114</sup> (775) 882-5322

1 MR. MARSHALL: In some ways I think this goes  
2 to what is the role of the Commission in reviewing the  
3 Department's permit.

4 AS I understand this proceeding -- and  
5 apparently as both the State and the Interveners, is that  
6 this is -- this body is reviewing the Department's permit  
7 under a standard of deference, and so the -- and, you  
8 know, for example, in the Intervener's responsive brief,  
9 they essentially say that factual determinations of an  
10 agency should be entitled to deference as based on  
11 substantial evidence. Substantial evidence is that  
12 which -- what a reasonable mind accept as adequate support  
13 for conclusion.

14 And our understanding of this process was that  
15 there was a record that was established with NDEP, and  
16 that we are basically presenting to you arguments  
17 fundamentally based on that record and analysis of those  
18 documents in that record, as to why or why not the  
19 conclusions of NDEP were legitimate.

20 And then you then apply this deferential  
21 standard of view to the permit. This was not a de novo  
22 hearing on the merits of the appeal. And if I have this  
23 incorrect, then I apologize, but they essentially -- what  
24 the Sagady report does, is it goes through record  
25 materials, and to articulate why it is that those elements

1 don't match up with requirements of law. Essentially what  
2 I view that as is an argument for why those elements were  
3 not supported -- the conclusions reached by NDEP were not  
4 supported by the facts in the record.

5 And so it's not a really a dispute over  
6 experts' testimony to you in the first instance, as to why  
7 in permit is -- is -- should be granted, for you to grant  
8 this permit, but whether or not -- did NDEP make the right  
9 decision based on the record before it?

10 And to that extent, you know, this concern  
11 about the presence of the person giving testimony, the  
12 utility of -- for example, the sagady report is to explain  
13 why it is that the documents in the record do not support  
14 the conclusions reached. I can make those arguments as  
15 well as Mr. Sagady can, because it's basically premised on  
16 what's in the record and then the legal standard applied  
17 to that.

18 So I guess I disagree, and respectfully, with  
19 your concern that the Appellants -- or excuse me -- the  
20 Intervenors and the State do not have an opportunity to  
21 cross-examine Mr. Sagady based on what he articulates in  
22 his report. They have the same opportunity to present  
23 their arguments as to why the NDEP made the right  
24 decision.

25 And so the concern in this proceeding, I

1 think, is not that they -- you have a right to  
2 cross-examine witnesses against you, but rather whether or  
3 not you have an opportunity to present argument to the  
4 Commission as to why the action taken was appropriate.

5 And so, with that, I guess I disagree that the  
6 basis for bringing in a document should be whether or not  
7 its -- on review of the substantive merits of the permit  
8 issued, is contingent on whether or not the witness is  
9 present or not.

10 CHAIRMAN DODGION: I appreciate your comments  
11 and your concern. I'm still going to sustain that  
12 objection.

13 And you do have -- and you already have to a  
14 certain extent, summarized Mr. Sagady's findings and  
15 recommendations, and I'm sure that you will find an  
16 opportunity to do that again.

17 All right. Do we have anything else on these?

18 All right. Then let's move forward. Now,  
19 Mr. Marshall, you have rested your case in chief, with  
20 this?

21 MR. MARSHALL: That's correct.

22 CHAIRMAN DODGION: Mr. Butler?

23 MR. BUTLER: Mr. Chairman, I know that the  
24 Commission has frowned on motions today, but as  
25 Mr. Marshall has rested his case, if you measure now the

CAPITOL REPORTERS <sup>117</sup> (775) 882-5322

□

1 evidence that he has placed before the Commission on the  
2 claims that he has raised with respect to the permit, both

3 procedurally and substantively, he has not met his burden  
4 of proof of showing that the -- there is any error in the  
5 permit or any error in the permitting process.

6 At this time we'd like to move to dismiss  
7 his -- the appeal, and alternatively -- or alternatively  
8 for summary judgment, however you want to deal with that,  
9 but we think at this point that there is -- if nobody said  
10 another word, there is not evidence in the record by which  
11 the Commission could overturn the agency's decision.

12 CHAIRMAN DODGION: I indicated that I was  
13 expecting to deal with motions and objections.

14 Very briefly, Ms. Tanner, you may speak to  
15 that motion.

16 MS. TANNER: I would also agree with that  
17 motion. I believe that the Appellants had the burden, and  
18 they failed to meet that burden to present to you claims  
19 for relief that are -- that you can grant. And they have  
20 been unable to do that.

21 You haven't heard very much from them. You've  
22 heard about some tests for coliform in wells. You've  
23 heard no link to the dairy. You've heard no testimony in  
24 regards to how the Division actually handled the  
25 permitting process, that they did anything wrong. And it

118

CAPITOL REPORTERS (775) 882-5322

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1 is not -- it is certainly not fair to the parties to  
2 require us to put on an affirmative case simply to allow  
3 them to pick it apart.

4 They needed to come here before you today and  
5 present evidence as to why they believe the Division did

6 not follow State law or the Clean Water Act in issuing the  
7 NPDS permit, and they have presented no evidence.

8 Even the document from Western Watersheds --  
9 I'm sorry -- not Western Watersheds -- the Tebbutt -- I  
10 forget -- I'm sorry. I don't -- Western Environmental Law  
11 Central. Is that right? Even that document -- even if  
12 you were to just take that on its face, basically what that  
13 document says that CAFOS are bad, and that's not what  
14 we're here to discuss. We're here to discuss whether or  
15 not the Division complied with regulations in entering the  
16 permit, and I don't believe they put on anything in that  
17 regard, and I believe that you are well within your  
18 ability to dismiss their appeal on its face right now.

19 CHAIRMAN DODGION: Okay. Mr. Marshall?

20 MR. MARSHALL: Thank you. I think -- you  
21 know, this again gets to probably a fundamental issue of  
22 what -- why you are here. And it is our contention that  
23 both procedurally and substantively the permit issued by  
24 NDEP was flawed, and we -- I can give you my closing  
25 argument right now that connects all the dots between the

119  
CAPITOL REPORTERS (775) 882-5322

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1 facts and the law, the facts that we have issued -- we  
2 have put forward, and the applicable law that basically  
3 establishes our contentions. I can -- or let me just give  
4 you an example of this.

5 I thought I had it -- I had it right in front  
6 of me, but -- well, here we go.

7 Under NAC 445A.234, which has to do with  
8 notice, NDEP must prepare a program for public notice in a

01-19-10 SEC Ponderosa Hearing Volume I.txt  
manner designed to inform interested and potentially

9  
10 interested persons of the proposed discharge. That's the  
11 standard that NDEP has to meet.

12 Now, it's a question for you as to whether or  
13 not they've met that standard, given the facts before you.  
14 Now, what the facts before you? The facts before you are:  
15 we have an array of residents here who did not receive the  
16 required 30 days' notice for the hearing on this, despite  
17 the fact that one of the individuals commented -- provided  
18 comment and requested a hearing, and the fact that, if you  
19 read the statute, what NDEP says is permissible by law,  
20 says that the elements of the program that NDEP must --  
21 must prepare, at a minimum, must include these newspaper  
22 notices, depending on if its general circulation or not.

23 So the question that is placed before you on  
24 this particular issue is a notice in a town hall, and, you  
25 know, a little super-small print notice in a legal section

CAPITOL REPORTERS <sup>120</sup> (775) 882-5322

□  
1 of the newspaper, is that designed to notify interested  
2 people and potentially interested people when, in fact,  
3 the Department had comments from people, had a sign-up  
4 sheet for people as to whether or not they were  
5 interested, yet didn't notify them. Right?

6 Now, we can go on each claim like this.

7 CHAIRMAN DODGION: No, I don't want you to do  
8 closing argument.

9 MR. MARSHALL: That, to me, is indicative of  
10 the fact that what we are here to do is apply the law to  
11 what essentially are pretty much undisputed facts, and

12 that that is -- I mean, we can have that argument now or  
13 we can have it after they put on their case.

14 CHAIRMAN DODGION: Thank you. And I disagree  
15 with you. I think that they have -- the Appellants have  
16 raised issues that are within the purview of the  
17 Commission to look into and make a decision based on your  
18 refutation of -- or rebuttal, or whatever you want to  
19 characterize it, of the testimony that they put on and is  
20 contained in the documents.

21 That's my position. Do you have something?  
22 Panel members?

23 MEMBER ZIMMERMAN: I agree.

24 MEMBER COYNER: Well, I turn to the appeal  
25 hearing form, which was filed timely, I'm sure, where it

CAPITOL REPORTERS <sup>121</sup> (775) 882-5322

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1 says the assurance of the bureau that the waters of the  
2 state will not be degraded by this operation and the  
3 public safety and health will be protected cannot be  
4 documented because no monitoring wells are required on the  
5 eight lagoons, twelve fields, and three containment areas.  
6 That's one of the primary -- if that's the only thing  
7 that's valid in the appeal, I still have no answer for  
8 that appeal.

9 I can't -- I don't know what the document says  
10 with regards to monitoring wells. I haven't heard from  
11 the State how they weighed that issue, to decide not to  
12 have any, to decide to have three? That, for me, is the  
13 limited argument and that, alone, qualifies it for the  
14 appeal hearing.

15 CHAIRMAN DODGION: Very good. I'd like a  
16 motion to dismiss the motion.

17 MEMBER COYNER: Do we have to?

18 CHAIRMAN DODGION: well, let's do.

19 MS. REYNOLDS: Yes.

20 MEMBER COYNER: Okay. So I would move to  
21 dismiss the motion.

22 MS. REYNOLDS: Not --

23 MEMBER COYNER: Dismiss currently --

24 MS. REYNOLDS: Deny the motion.

25 MEMBER COYNER: I move to deny the motion to

CAPITOL REPORTERS <sup>122</sup> (775) 882-5322

□

1 dismiss. Thank you.

2 MEMBER ZIMMERMAN: I second.

3 CHAIRMAN DODGION: All in favor?

4 ("Aye" responses)

5 CHAIRMAN DODGION: All right. Motion denied.

6 (The vote was unanimously in favor of motion.)

7 CHAIRMAN DODGION: Mr. Butler, please proceed  
8 with your --

9 MR. BUTLER: I think the State's going to go  
10 next, sir.

11 MS. TANNER: If that is --

12 CHAIRMAN DODGION: That's fine with me.

13 MS. TANNER: Okay. Thank you. If I could  
14 have just one moment, please.

15 (Proceedings paused briefly)

16 MS. TANNER: I would -- the State would first  
17 call Alan Tinney.

18 I'll hand you these. I don't believe there's  
19 any objections to these, and I'm going to be starting with  
20 Number 3.

21 (Discussion off the record)

22 MS. TANNER: I made it available, and I don't  
23 believe there's any objections on either side to any of my  
24 exhibits, with the possible exception of 1 and 2, but I'm  
25 not sure I'm going to use that yet.

CAPITOL REPORTERS <sup>123</sup> (775) 882-5322

1 CHAIRMAN DODGION: Okay. would you --

2 ALAN TINNEY,  
3 having been previously duly sworn,  
4 was examined and testified as follows:

5 DIRECT EXAMINATION

6 BY MS. TANNER:

7 Q Good afternoon. Can you please state your  
8 name and spell last name?

9 A Alan Tinney, T-i-n-n-e-y.

10 Q Where are you employed, Mr. Tinney?

11 A Nevada Division of Environmental Protection.

12 Q And what is your title there?

13 A I'm the Supervisor of the Permitting Branch.

14 Q And how long have you been employed with the  
15 Division?

16 A About seven years.

17 Q How long in your current position?

18 A Six years.

19 (State's Exhibit No. 3 marked for  
20 Identification)

21

BY MS. TANNER:

22

Q Okay. I'm handing you what I have as State's

23

Exhibit 3. Do you recognize that?

24

A Yes.

25

Q And what is that document?

124

CAPITOL REPORTERS

(775) 882-5322

□

1

A It's my resume.

2

Q Can you just briefly highlight your background

3

on especially on the issue of permitting and water

4

pollution control?

5

A From '03 to present I've been the Supervisor

6

of the Permitting Branch. Prior to that, from '02 to '03

7

I was a permit writer for the Division of Environmental

8

Protection. From '97 to '02, prior to that, I was a

9

Bureau Chief for the Division of Health. And from '96 to

10

'97, before that, I was Acting Bureau Chief for the

11

Division of Health.

12

And from '95 to '96 I was the Manager of the

13

Public Health Engineering Supervisor, and prior to that I

14

was the Public Health Engineer for the Division of Health.

15

And that goes back far enough.

16

MS. TANNER: I think so. I wanted some

17

highlights. And I apologize. I'm one copy binder short.

18

So I'm going to hand out my documents as we go. And if

19

there's no objection, I move to have that admitted.

20

MR. MARSHALL: No objection.

21

MR. BUTLER: No objection.

22

MS. REBERT: Excuse me. Did you have a number

23

for this?

24 MS. TANNER: That's 1. If they're down at the  
25 bottom there --

CAPITOL REPORTERS 125 (775) 882-5322

1 MR. MARSHALL: 3?

2 MS. TANNER: I'm sorry. 3. I skipped 1 and  
3 2. Sorry about that.

4 (State's Exhibit No. 3 received into  
5 Evidence)

6 BY MS. TANNER:

7 Q Are you aware of the facility that we've been  
8 discussing here today, Ponderosa Dairy in Amargosa Valley,  
9 Nevada?

10 A Yes.

11 Q And that's Permit NV 0023027; is that correct?

12 A Umm --

13 Q You going to take my word on it?

14 A I'm going to take your word on it.

15 Q Okay. Have you done any work in relation to  
16 this permit?

17 A When it was issued, yes, in preparing for  
18 today.

19 Q And what was your role?

20 A I was supervising the permit writer at the  
21 time.

22 Q Are you familiar with regulations that were  
23 applicable at the time that this permit was issued?

24 A Yes.

25 Q And are you familiar with the official NDEP

CAPITOL REPORTERS 126 (775) 882-5322  
Page 114

1 file in regards to this permit and this facility?

2 A Yes.

3 Q Are you familiar with the briefs that have  
4 been filed in this appeal?

5 A Yes. I read them.

6 Q In your review of the file and the briefs on  
7 appeal, have you discovered anything that, in your  
8 professional opinion, would be grounds for the Division to  
9 reassess the issuance of this permit?

10 A No, I have not.

11 Q I want to talk you to about some of the  
12 application process allegations. And first let's start  
13 with the Notice of the Permit Application, itself. I'm  
14 going to hand you a copy of Nevada Administrative Code  
15 445A.234. Do you recognize that?

16 A Yes.

17 Q Are you familiar with it?

18 A Yes.

19 Q Okay. Can you talk to us briefly about the  
20 requirements for the Division regarding the dissemination  
21 of public notice of a complete application for a discharge  
22 permit?

23 A The director shall provide a period of not  
24 less than 30 days to all -- to -- sorry. I'm going to  
25 start over again, because I'm down in the middle here.

2 those of the -- circulated within the geographic area of  
3 the proposed discharge by publishing in a local newspaper  
4 or periodical, or if not a daily newspaper, and then also  
5 notice to be mailed to any person or persons in a mailing  
6 list maintained by the department.

7 Q Okay. So we have a daily newspaper of general  
8 circulation if the local newspaper is not daily. Is that  
9 how you read that?

10 A That's correct.

11 MS. TANNER: Okay. I'm going to just move to  
12 admit Exhibit 4.

13 MR. BUTLER: No objection.

14 MS. TANNER: And I don't know if there's a way  
15 to streamline that. I don't think I have any objections  
16 to these. So maybe I should just do it at the end, so  
17 long as I don't forget.

18 CHAIRMAN DODGION: Did you have an objection  
19 to this one, Mr. Marshall?

20 MR. MARSHALL: Yes. It's not -- I mean, it's  
21 just the law. It's not evidence. It's -- but --

22 CHAIRMAN DODGION: It's just an exhibit.

23 MR. MARSHALL: It's fine as an exhibit.

24 MS. TANNER: It's just a -- okay.

25 / /

1 (State's Exhibit No. 4 marked for  
2 Identification and received into  
3 Evidence)

4 BY MS. TANNER:

5 Q Are you familiar with how NDEP addressed  
6 public notice for the discharge permit application of the  
7 Ponderosa Dairy?

8 A Yes.

9 (State's Exhibit No. 5 marked for  
10 Identification)

11 BY MS. TANNER:

12 Q I'm going to look at some of those documents.  
13 I'm handing you Exhibit 5. Do you recognize that  
14 documents?

15 A That's the notice of proposed action.

16 Q And what is that, specifically?

17 A It's the notice of proposed action to -- where  
18 the Division has made a tentative action to issue the  
19 permits, and this was the notice we placed in the  
20 newspaper.

21 MS. TANNER: Okay. Great. I would move to  
22 admit Exhibit 5.

23 CHAIRMAN DODGION: Any objections?

24 MR. MARSHALL: No objection.

25 / /

129  
CAPITOL REPORTERS (775) 882-5322

1 (State's Exhibit No. 5 received into  
2 Evidence)

3 (State's Exhibit No. 6 marked for  
4 Identification)

5 BY MS. TANNER:

6 Q Now, I'm handing you what's been marked as  
7 Exhibit 6. Do you recognize that document

8           A     That's the affidavit of publication from --  
9     let me look here.  
10          Q     Here.  
11          A     The Pahrump Valley Times.  
12          Q     Okay. So that was what was published?  
13          A     Yes.  
14          Q     Okay. And do you see a date on -- dates of  
15     publication on that document?  
16          A     February 9th, 2007.  
17                 MS. TANNER: I would move to admit that,  
18     Exhibit 6.  
19                 MR. MARSHALL: No objection. It's part of the  
20     record.  
21                 CHAIRMAN DODGION: Yes, it is.  
22                         (State's Exhibit No. 6 received into  
23                         Evidence)  
24                         (State's Exhibit No. 7 marked for  
25                         Identification)

  130  
CAPITOL REPORTERS                   (775) 882-5322

1     BY MS. TANNER:  
2           Q     And I'm handing you Exhibit 7. What is that  
3     document?  
4           A     This is affidavit of publication by -- make  
5     sure who this is -- Las Vegas Review Journal.  
6           Q     Okay. And that was what was published on  
7     February 9th of 2007?  
8           A     Let me also look at that and make sure who is  
9     that -- February 9th, 2007, yes.  
10          Q     Okay. Did NDEP also -- I'd move to admit that

11 one, as well.

12 (State's Exhibit No. 7 received into  
13 Evidence)

14 BY MS. TANNER:

15 Q Did NDEP post notice anywhere else?

16 A Yes.

17 Q Where?

18 A We also placed the Notice of Proposed Action  
19 and Fact Sheet on the -- on our Internet --

20 Q Uh-huh.

21 A -- website. We've also placed the Notice of  
22 Proposed Action, a copy of that, in the local town hall.

23 Q So in your role as supervisor of -- in this  
24 case, did you find that publishing in an available daily  
25 newspaper to be -- to meet the requirement -- the first

CAPITOL REPORTERS <sup>131</sup> (775) 882-5322

1 requirement of 445A.234?

2 A Yes.

3 Q And how about -- so publishing in the local  
4 bi-weekly newspaper would exceed that requirement; is that  
5 correct?

6 A That's correct.

7 Q And posting in the town offices would exceed  
8 that requirement?

9 A That's correct.

10 Q The posting on the Internet exceeded that  
11 requirement?

12 A That's correct.

13 Q Okay. The second requirement of 445A.234

14 requires mailing to the Division's mailing list. Are you  
15 aware of an official mailing list for the Division?

16 A Yes.

17 (State's Exhibit No. 8 marked for  
18 Identification)

19 BY MS. TANNER:

20 Q I'm handing you Exhibit 8. Do you recognize  
21 that?

22 A This is a printout of a portion of our mailing  
23 list, yes.

24 Q Okay. And was that the mailing list that was  
25 in effect at the time of the Notice of Application, to

CAPITOL REPORTERS <sup>132</sup> (775) 882-5322

1 your knowledge?

2 A Oh, boy. I'm going to have to say I don't  
3 know that answer.

4 Q Okay. That's fair enough. Can you -- do you  
5 have any indication of how that list was maintained at the  
6 time?

7 A Yes. We had a database that maintained a  
8 mailing list for multiple different ways that we could  
9 pull it out of there, for different locations, counties,  
10 cities, people who had asked us to notify them on  
11 different types of projects, and so on and so forth.

12 Q Okay. And what must someone do to be placed  
13 on that mailing list?

14 A They have to officially ask us to be placed on  
15 our official mailing list.

16 Q Okay. And was the Notice of Proposed Action  
Page 120

17 mailed to the mailing list that you had in effect at the  
18 time?

19 A We mailed it to a mailing list, yes.

20 Q But you can't say --

21 A I can't say this one, no.

22 MS. TANNER: Okay.

23 MR. MARSHALL: I'm going to object and ask his  
24 answer be stricken, because I don't think the witness has  
25 foundation as to establish the foundation he knows what --

133  
CAPITOL REPORTERS (775) 882-5322

1 what staff did to mail -- to mail it. I mean, he may be  
2 able to establish a foundation, but --

3 BY MS. TANNER:

4 Q Are you a supervisor in this case?

5 CHAIRMAN DODGION: Are you objecting to this  
6 purported mailing list?

7 MR. MARSHALL: I'm objecting to Mr. Tinney's  
8 testimony that NDEP mailed the notice to this list as a  
9 lack -- as lacking any personal knowledge and any  
10 foundation.

11 CHAIRMAN DODGION: I have to agree with you.  
12 He's already indicated that he couldn't testify that this  
13 mailing list was the list.

14 MS. TANNER: I took -- and that's why I took  
15 it back, but the question -- my question to him was  
16 whether --

17 CHAIRMAN DODGION: So you're retracing your  
18 original question, and you're starting over?

19 MS. TANNER: Well, I -- I took the list back.

20 My question to him was: To -- is it your understanding  
21 that the Division mailed to the mailing list that was in  
22 effect at the time? He can't identify this particular  
23 list.

24 MR. MARSHALL: I object, because the question  
25 is: Is it your understanding that NDEP sent out a mailing

CAPITOL REPORTERS <sup>134</sup> (775) 882-5322

1 for a particular list, which he can't testify as to what  
2 the particular list was.

3 I'm not sure what the relevance of that -- of  
4 him answering, or if he could -- if he has a basis on  
5 which to answer that question. I think that needs to be  
6 established first, rather than ask the ultimate question  
7 of whether or not the NDEP actually mailed notices.

8 MS. TANNER: Well, first of all, he's -- he's  
9 the supervisor of this case, but I can -- I can certainly  
10 follow up these questions with the actual project --  
11 project manager -- is that correct term?

12 THE WITNESS: Permit writer.

13 MS. TANNER: Permit writer.

14 CHAIRMAN DODGION: The permit writer who  
15 actually did the mailing?

16 MS. TANNER: Who actually did the mailing. So  
17 we can put this on.

18 CHAIRMAN DODGION: That's what you best do.

19 MS. TANNER: Okay.

20 CHAIRMAN DODGION: Your objection is  
21 sustained.

22 BY MS. TANNER:

23 Q In regards to providing -- in your review of  
24 the file, in regards to providing notice of Ponderosa  
25 Dairy's application for the NPDS permit, did you find

CAPITOL REPORTERS <sup>135</sup> (775) 882-5322

1 anything to indicate that the laws and regulations of the  
2 State of Nevada were not complied with?

3 A Not that I found.

4 MS. TANNER: Okay. I want to move on to the  
5 Notice of Public Hearing on the permit.

6 (State's Exhibit No. 9 marked for  
7 Identification)

8 BY MS. TANNER:

9 Q I'm handing you the regulation, NAC 445A.238.  
10 Are you familiar with that regulation?

11 A Yes.

12 Q And, now, in that regulation, it requires that  
13 a public hearing be made within 30 days for -- for a  
14 public comment period of at least 30 days; is that  
15 correct?

16 A For a public hearing, yes.

17 Q Uh-huh. Did you receive any requests for a  
18 public hearing?

19 A Yes.

20 Q Okay.

21 A Do you want that in?

22 MS. TANNER: Yes, I would move to admit the  
23 copy of the regulation, Exhibit 9.

24 MR. MARSHALL: No objection.

25 / /

1 (State's Exhibit No. 9 received into  
2 Evidence)

3 (State's Exhibit No. 10 marked for  
4 Identification)

5 BY MS. TANNER:

6 Q I'm handing you what's been marked as Exhibit  
7 10. Do you recognize those papers?

8 A These are letters we received, yes.

9 Q Okay. These are letters -- and specifically  
10 these are letters that were requesting the Division, that  
11 you hold a public hearing on the permit application.

12 A These are the letters that we received for  
13 public comment under the public notice.

14 Q I see.

15 A I'd have to read each one to see if they  
16 actually asked for a public hearing.

17 MS. TANNER: Okay. I would move to admit  
18 Exhibit 10.

19 Q What was --

20 CHAIRMAN DODGION: Hold on just a second.  
21 Mr. Marshall is still looking.

22 (Discussion off the record)

23 MR. MARSHALL: Yes. We don't -- we do not  
24 object.

25 CHAIRMAN DODGION: Okay.

1 MR. BUTLER: No objection.  
2 (State's Exhibit No. 10 received into  
3 Evidence)

4 BY MS. TANNER:

5 Q What was NDEP's response to the receipt of  
6 those letters?

7 A Because some of those letters -- I don't know  
8 which ones off the top of my head -- had a request for  
9 public hearings, we held a public hearing.

10 (State's Exhibit No. 11 marked for  
11 Identification)

12 BY MS. TANNER:

13 Q Okay. I'm handing you NAC 445A.239. Are you  
14 familiar with that regulation?

15 A Yes.

16 Q Okay. And in that regulation it addresses  
17 public notice requirements for any public hearing?

18 A Yes.

19 Q And can you explain that portion of it, what  
20 the Division -- what you view the Division was required to  
21 do?

22 A It must circulate the notice of a public  
23 hearing at least as widely as was the notice of public  
24 application.

25 Q Okay. And is there also at least a 30 days'

□

1 notice, as well?

2 A Must put it in at least one newspaper, send to

3 all persons or government agencies which received a copy  
4 of the notice or the fact sheet for the permit  
5 application, mail to any persons or group upon request,  
6 and given pursuant to at least 30 days in advance of the  
7 hearing.

8 MS. TANNER: I would move to admit Exhibit 11.

9 MR. MARSHALL: No objection.

10 (State's Exhibit No. 11 received into  
11 Evidence)

12 BY MS. TANNER:

13 Q Okay. So are you familiar with how the  
14 Division handled the public notice portion -- for the  
15 public hearing on this permit application?

16 A Yes.

17 (State's Exhibit No. 12 marked for  
18 Identification)

19 BY MS. TANNER:

20 Q Okay. I just handed you Exhibit 12. What is  
21 that document?

22 A This is the Notice of Public Hearing.

23 Q Okay. And what was the date proposed on  
24 there? Does it say the date proposed for the public  
25 hearing?

CAPITOL REPORTERS 139 (775) 882-5322

□

1 A It was given February 9th, 2007 -- June 12th,  
2 2007.

3 MS. TANNER: Okay. I would move to admit  
4 Exhibit 12.

5 MR. MARSHALL: No objection.

01-19-10 SEC Ponderosa Hearing Volume I.txt  
6 (State's Exhibit No. 12 received into  
7 Evidence)  
8 (State's Exhibit Nos. 13 and 14  
9 marked for Identification)

10 BY MS. TANNER:

11 Q Okay. Now, we've got -- I'm handing you  
12 Exhibit 13 and 14. Are those the Affidavits of  
13 Publication for Pahrump Valley Times and the Las Vegas  
14 Review Journal?

15 A 13 is the Affidavit of Publication by Pahrump  
16 Valley Times.

17 Q Uh-huh.

18 A And 14 is the Affidavit of Publication by the  
19 Las Vegas Review Journal.

20 Q Okay. Let's look at the -- well, first of  
21 all, on the Affidavit of Publication for Pahrump Valley  
22 Times, does it state the date that it was published in the  
23 paper?

24 A May 11th, 2007.

25 MS. TANNER: Okay. I would move to admit

CAPITOL REPORTERS <sup>140</sup> (775) 882-5322

□

1 Exhibit 13.

2 MR. MARSHALL: The only comment is that it's  
3 illegible, but I think generally these notices are  
4 illegible. So I have no -- at least my copy is. I  
5 can't -- I can't see the actual notice, but --

6 CHAIRMAN DODGION: Okay. On here --

7 MR. MARSHALL: I'm willing to accept that  
8 that's an accurate representation of the actual notice.

9 MS. TANNER: Thank. You, mine is also  
10 illegible, but we can fix that if need be.

11 CHAIRMAN DODGION: How did it appear in the  
12 papers?

13 MS. TANNER: I don't know.

14 MR. BARRACKMAN: At that point nobody showed  
15 up.

16 (State's Exhibit No. 13 received into  
17 Evidence)

18 BY MS. TANNER:

19 Q Exhibit 14, let's look at there one for a  
20 second, an Affidavit of Publication from the Las Vegas  
21 Review Journal. Does it state in the affidavit the date  
22 that it was published?

23 A Yeah, May 11th, 2007.

24 Q Okay. Now, I note that in the briefs there's  
25 been a little bit of an issue in this one, and I know that

CAPITOL REPORTERS <sup>141</sup> (775) 882-5322

1 this is also somewhat hard to read, but I believe at the  
2 very bottom there's a date that says the date it was  
3 published on the notice. What is that date?

4 A It looks like May 14th, 2007.

5 Q Okay. So the actual -- what was -- actually  
6 appeared in the paper at the bottom of the notice said  
7 May -- it said it was being published on May 14th, 2007?

8 A Yes.

9 Q Is that how you read that?

10 A Yes.

11 MS. TANNER: Okay. I would move to admit --

01-19-10 SEC Ponderosa Hearing Volume I.txt  
12 is that Exhibit 14?

13 (State's Exhibit No. 14 received into  
14 Evidence)

15 (State's Exhibit No. 15 marked for  
16 Identification)

17 BY MS. TANNER:

18 Q Okay. I'm handing you can Exhibit 15, which  
19 is three pages, a letter from Maggie Wimmer, of the Review  
20 Journal Classified Legal Advertising, and it looks like a  
21 second page of that letter as well as an attachment of the  
22 actual printed page in the newspaper.

23 A Yes.

24 Q And so what's your understanding of what  
25 happened in that case, that the --

CAPITOL REPORTERS <sup>142</sup> (775) 882-5322

1 A What I understand is the date at the bottom of  
2 the notice, that they put into the notice, was a different  
3 date than they actually published the notice.

4 Q Okay. And so according to this letter it  
5 looks like the notice actually did correctly run, May 11th  
6 of 2007; is that correct?

7 A Per her letters to us, yes.

8 MS. TANNER: Okay. I would move to admit  
9 Exhibit 15.

10 MR. MARSHALL: No objection.

11 MS. TANNER: Okay.

12 (State's Exhibit No. 15 received into  
13 Evidence)

14 (State's Exhibit No. 16 marked for

15

16 BY MS. TANNER:

17 Q I'm going to skip over Exhibit -- well, I  
18 guess I might as well just do it, since it's here. 16 is  
19 NRS 445A.595, and that statute also requires a 30-day  
20 notice --

21 A That's correct.

22 Q -- of publication of hearing?

23 A For the hearing, right.

24 Q Okay. So given the fact that those notices  
25 ran on May 11th, 2007, and the hearing -- to your

CAPITOL REPORTERS <sup>143</sup> (775) 882-5322

□

1 knowledge, did the hearing actually take place on  
2 June 12th --

3 A Yes.

4 Q -- of 2007.

5 A Yes.

6 Q So in your estimation, did NDEP meet the term  
7 of notice requirement?

8 A It did at least 30 days.

9 MS. TANNER: Okay. I would move to admit  
10 Exhibit 16.

11 (State's Exhibit No. 16 received into  
12 Evidence)

13 MS. TANNER: Okay. I think that's all the  
14 questions I have of this witness.

15 CHAIRMAN DODGION: Mr. Marshall, do you have  
16 anything in Cross-Examination?

17 MR. MARSHALL: Yes, I do.

18

19 BY MR. MARSHALL:

20 Q Mr. Tinney, I'm handing you Exhibit -- a copy  
21 of Exhibit 4, which you read from earlier. I'm wondering  
22 if you might -- do you need it that far away from you,  
23 because I don't.

24 A Yeah, I do, actually.

25 Q I wonder if you might -- I know that you

CAPITOL REPORTERS <sup>144</sup> (775) 882-5322

□

1 earlier read from paragraphs A and B of Section 445A.234,  
2 subparagraph 1; is that correct?

3 A That's correct.

4 Q And did you not read from the paragraph 1,  
5 itself; is that correct?

6 A That's correct.

7 Q Okay. would you mind reading, please, all of  
8 paragraph 1, which is the preamble to paragraphs A and B,  
9 please?

10 A Sure.

11 "Public notice of every complete application  
12 for a discharge permit, except for a temporary permit or a  
13 permit for pre-treatment discharge or the poisoning of the  
14 trash fish must be circulated in the manner designed to  
15 inform interested and potentially interested persons of  
16 the proposed discharge and of the proposed determination  
17 to issue or deny a permit for the discharge. Procedures  
18 for the circulation of public notice must include at least  
19 the following," and that was A and B.

20 Q And that was A and B. So if I'm correct, the

21 legal standard is that you have to create a program or  
22 a -- circulate notice in a manner to inform interested and  
23 potentially interested persons, and that the two items  
24 that you testified to, are that the items that must --  
25 that are the minimum, that it must include at least the

145

CAPITOL REPORTERS

(775) 882-5322

□

1 following. Is that correct?

2 MS. TANNER: I believe that actually -- I  
3 would object. I think that mischaracterizes his  
4 testimony. Did he testify that they, in fact, exceeded  
5 those requirements.

6 MR. MARSHALL: Well, I think what I'm allowing  
7 Mr. Tinney to state is that Items A and B are what the  
8 statute calls for as the minimum that must be included in  
9 the design of a manner to inform interested and  
10 potentially interested persons.

11 A I read it as the procedures for the  
12 circulation of public notice must include at least the  
13 following --

14 Q The following.

15 A -- A and B --

16 Q Okay. Thank you very much.

17 A -- for that.

18 Q Now, in your -- you said you reviewed NDEP's  
19 file for this matter. Is that -- is that accurate?

20 A Yes.

21 Q And did you notice, in there, any sort of  
22 affidavit of mailing from any NDEP staff regarding notices  
23 in this case?

24

A No.

25

Q And you also testified that, I think,

CAPITOL REPORTERS 146 (775) 882-5322

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1 subdivision A requires that notice must be circulated  
2 within the geographic area of the proposed discharge by  
3 publishing in a local newspaper, periodical, in a paper  
4 of -- if the local newspaper is not a daily newspaper, in  
5 a daily newspaper of general circulation, and that -- and  
6 you testified that was the -- what newspaper met that  
7 requirement?

8 A The Las Vegas Review Journal.

9 Q And do you know: Is the Las Vegas Review  
10 Journal circulated in Amargosa Valley?

11 A I don't know that.

12 Q You don't know that?

13 A I don't know that.

14 Q And -- all right. Now, you also testified  
15 that you reviewed the permit or legal compliance with all  
16 applicable regulations and laws; is that -- is that  
17 accurate?

18 A Did I say that?

19 Q Did I summarize your testimony?

20 MS. TANNER: Can you say that again?

21 MR. MARSHALL: That Mr. Tinney -- I think you  
22 asked him several times whether he has read all the  
23 briefs, and has reviewed the file, reviewed the permit,  
24 and you asked his opinion as to whether or not, in the  
25 first instance, would he -- would the Division have done

1 anything differently, and then, second, would the -- did  
2 the permit, in fact, comply with the various provisions of  
3 law that the NDEP was applying.

4 MS. TANNER: Based upon his review?

5 MR. MARSHALL: Based upon his review.

6 MS. TANNER: Yes.

7 BY MR. MARSHALL:

8 Q Was that your testimony?

9 A Ask me -- can I have you ask your question  
10 again, please, so I can try to answer it what you want?

11 Q Sure. Sure. My -- I believe you testified --  
12 and please correct me if I'm wrong -- that -- that your  
13 review of the permit in this case satisfies all applicable  
14 laws to issuance of the permits, or the permit, in other  
15 words, was legally issued? I'm trying to summarize your  
16 statements, since I don't have the benefits of the written  
17 record.

18 A Of the written record, yes. And I'm going to  
19 try to answer it to the best of my abilities here.

20 Q Sure.

21 A I believe what I answered was -- was there  
22 anything that I saw that would -- that I would change, and  
23 the answer of was "no" to that, but I also answered each  
24 of the questions of the different procedural activities  
25 for the public notice and the public hearing notice.

148  
CAPITOL REPORTERS (775) 882-5322

1 Q Uh-huh.

2           A     And I didn't see nothing -- I didn't see --  
3     that we issued everything correctly to those laws and regs  
4     that I just walked through.

5           Q     Okay. And who's the permit issued to?

6           A     Rockview -- I'd have to look at the public  
7     notice, but I think it's the Rockview Farms Dairy.  
8     Rockview Farms, Incorporated.

9           Q     I'm handing you Exhibit 5. It's the Notice of  
10    Proposed Action.

11          A     Right.

12          Q     And are you aware: Is that company licensed  
13    to do business in the State of Nevada?

14          A     I don't know.

15               MR. BUTLER: Objection. I'm not sure that's  
16    relevant.

17               MR. MARSHALL: It's relevant to whether or not  
18    the permit is issued to a company that's licensed to do  
19    business in the State of Nevada? That's -- you're  
20    objecting to that on relevance?

21               MR. BUTLER: Yes, I am. I don't -- you  
22    haven't cited to a provision in the regs that requires  
23    that.

24               MR. MARSHALL: There's an objection there.

25               CHAIRMAN DODGION: And I am contemplating that

1     objection.

2               I think you'll find that there are numerous  
3     places in Nevada where businesses are not required to be  
4     licensed, and Nye County may be one of them. I don't

5 know.

6 But I -- I have to agree. I don't see the  
7 relevance of whether that business, that Rockview Farms is  
8 licensed to do business in the State of Nevada --

9 MR. MARSHALL: Okay.

10 CHAIRMAN DODGION: -- with respect this  
11 permit.

12 MR. MARSHALL: So I take it you're sustaining  
13 the objection?

14 CHAIRMAN DODGION: I'm sustaining the  
15 objection.

16 MR. MARSHALL: Thank you. That's all the  
17 questions I have.

18 CHAIRMAN DODGION: Mr. Butler, do you have  
19 questions of Mr. Tinney?

20 MR. BUTLER: No, I do not.

21 CHAIRMAN DODGION: Does staff have any?

22 COMMISSIONERS' EXAMINATION

23 MEMBER ZIMMERMAN: I've got a couple of  
24 questions. Now can I go out of the scope of the questions  
25 asked, because I think he's a person that has the answers?

150  
CAPITOL REPORTERS (775) 882-5322

1 MS. REYNOLDS: No.

2 MEMBER ZIMMERMAN: No?

3 CHAIRMAN DODGION: You might try, though, and  
4 let's see if we can get it in.

5 MEMBER ZIMMERMAN: Okay. So does the  
6 permit -- this is the A-3. Does the permit cover all of  
7 these areas that are highlighted as part of the operations

8 or are there any that are excluded?

9 MS. TANNER: I -- and may I just have a  
10 moment?

11 (Discussion off the record)

12 THE WITNESS: I'm going to have to defer that,  
13 because I haven't seen -- I haven't looked at that, and I  
14 can't see it from over there, to literally go from that to  
15 the permit, and back and forth. So I can say the CAFO --  
16 that CAFO has been permitted.

17 MEMBER ZIMMERMAN: Now, we should be able to  
18 know --

19 CHAIRMAN DODGION: But you can't testify as  
20 to --

21 THE WITNESS: Each of the pivots.

22 CHAIRMAN DODGION: -- what the CAFO is and  
23 draw a circle around on it that map?

24 THE WITNESS: Not that -- not me, I cannot  
25 draw that.

151  
CAPITOL REPORTERS (775) 882-5322

1 CHAIRMAN DODGION: I hope --

2 MS. TANNER: I have a second witness.

3 CHAIRMAN DODGION: -- Ms. Tanner, that you  
4 will put a witness up here who will do that.

5 MS. TANNER: I have a second witness. I have  
6 this witness for the limited issue of the procedural  
7 notice requirements.

8 CHAIRMAN DODGION: Okay. I'd ask you to defer  
9 that question to the appropriate witness.

10 MR. ZIMMERMAN: Okay. That information is in  
Page 137

11 the permit. It's Table 1.3 E.

12 CHAIRMAN DODGION: I'm sure that --

13 MR. ZIMMERMAN: Okay.

14 CHAIRMAN DODGION: -- it is in the permit,

15 and --

16 THE WITNESS: And that was what I was trying  
17 to answer.

18 CHAIRMAN DODGION: It need to be introduced  
19 properly, and over the objections, and et cetera, and so  
20 on.

21 So do you have any other questions?

22 MEMBER ZIMMERMAN: Okay. So let's see.

23 Now, are you aware of -- in the -- how --

24 let's see. In the permit it talks about if particular

25 lagoons are lined, that groundwater monitoring would not

CAPITOL REPORTERS <sup>152</sup> (775) 882-5322

1 be required.

2 Are you aware of all of the lagoons that are  
3 lined within the operations? It shows on the map that was  
4 put forth by the Intervener all of the lagoons.

5 THE WITNESS: I haven't had privy to that map,  
6 so I can't answer.

7 MEMBER ZIMMERMAN: It was an attachment to the  
8 Intervener's Answer --

9 THE WITNESS: I can't answer.

10 MEMBER ZIMMERMAN: -- and I'm just wondering  
11 if you know: Are all the lagoons lined or just some of  
12 the lagoons?

13 THE WITNESS: No, some of the lagoons are  
Page 138

14 lined, but I'm going to have to defer to --

15 CHAIRMAN DODGION: Again, this is material  
16 that you will cover with the permit writer?

17 MS. TANNER: Yes. That's my next witness.

18 MEMBER ZIMMERMAN: All right. The next  
19 question I had is -- okay. This permit was considered a  
20 minor modification.

21 THE WITNESS: It was considered a renewal.

22 MEMBER ZIMMERMAN: A renewal. Is that treated  
23 as a new permit or is -- or maybe the question is: would  
24 a new permit be treated differently than a renewal?

25 THE WITNESS: In the Clean Water Act, new

153  
CAPITOL REPORTERS (775) 882-5322

1 permits can be looked at differently than a renewal.

2 MEMBER ZIMMERMAN: And how --

3 THE WITNESS: But this was a renewal.

4 MEMBER ZIMMERMAN: Then how would you decide  
5 if it was a new permit?

6 THE WITNESS: If it was the first time we've  
7 ever permitted the location.

8 MEMBER ZIMMERMAN: well, when I look at the  
9 NAC here, it says something about, you know, if there are  
10 significant increases in discharges of pollutants, it  
11 would be considered a new permit. And I'm wondering if  
12 that -- it appears the basis of this revision was the  
13 increase in discharges. And I'm wondering --

14 THE WITNESS: Under a renewal, they can --  
15 they put a complete application, a new application in, and  
16 we go through the whole process, as looking at it as anew.

17 But when you ask if it's a new permit, under the Clean  
18 Water Act, that sometimes have different meanings than  
19 renewal. A renewal, we look at the whole thing. We look  
20 at the whole process, the whole application, as  
21 submitted --

22 MEMBER ZIMMERMAN: Uh-huh.

23 THE WITNESS: -- any changes that happened  
24 from the last permit to this permit.

25 MEMBER ZIMMERMAN: Okay. So I guess, I'm

154  
CAPITOL REPORTERS (775) 882-5322

1 just -- so would you treat -- so you treat it as if it was  
2 a new permit, even though it was a renewal, because the  
3 significant change?

4 THE WITNESS: We treat it as a renewal, but we  
5 look at the whole part -- we look at the whole permit and  
6 any changes that might happen to the permit. That's why  
7 the permit revolves every five years is that it allows us  
8 to completely review the permit, but it also allows  
9 somebody to -- in their application, put in something new  
10 on their application. So it can be new parts to the  
11 renewal of the application.

12 MEMBER ZIMMERMAN: And would you have treated  
13 anything differently if it was a new permit? Would you  
14 have noticed it differently?

15 THE WITNESS: No.

16 MEMBER ZIMMERMAN: Circulated it differently?

17 THE WITNESS: No. A new permit would be a  
18 dairy that's building at the moment in time, as dairies  
19 build. So there's two different things that goes on

20 there.

21 MEMBER ZIMMERMAN: Okay. Let's see. I think  
22 that's it for me.

23 CHAIRMAN DODGION: I don't have any questions.  
24 Alan?

25 MEMBER COYNER: Other than the one that you

CAPITOL REPORTERS <sup>155</sup> (775) 882-5322

1 raised in mine, I'm going to ask Alan that question. Do  
2 you know if a business that is not holding a Secretary of  
3 State's business license can hold a permit in Nevada?

4 THE WITNESS: Per our regulations, I don't  
5 believe that that's in our regulations. If you look at  
6 445-A.231, it actually specifically tells us who can apply  
7 for a permit, and it does not say.

8 MEMBER COYNER: That you have to have a  
9 business license?

10 THE WITNESS: That's correct.

11 MEMBER COYNER: All right. Thanks.

12 MR. MARSHALL: Could you repeat that number?

13 THE WITNESS: 445A.231 -- 231 or 232. I have  
14 to go back and look at the regs. One of those tells you  
15 how you can apply for a permit.

16 MR. MARSHALL: Thank you.

17 MS. TANNER: May I ask just a brief question  
18 on followup on redirect or --

19 CHAIRMAN DODGION: Let's give Mr. Butler a  
20 chance.

21 MS. TANNER: My apologies.

22 MR. BUTLER: I don't have any questions.

23 Thank you.

24 CHAIRMAN DODGION: Okay.

25 MS. TANNER: Just --

CAPITOL REPORTERS <sup>156</sup> (775) 882-5322

1 CHAIRMAN DODGION: And I don't have any  
2 questions, either. So I'll let you go ahead with the  
3 redirect.

4 MS. TANNER: Since I keep interrupting you.

5 REDIRECT EXAMINATION

6 BY MS. TANNER:

7 Q You were asked a question on Cross-Examination  
8 in regards to whether or not the Division kept an  
9 affidavit of mailing for mailings to the official mailing  
10 list, and I believe your answer was no. Is that correct?

11 A That's correct.

12 Q Okay. Is it the business practice -- or was  
13 it -- or let me back up.

14 was it the business practice at the time for  
15 the Division to send out notice via certified mail?

16 A No.

17 Q Okay. It was just straight mail?

18 A Just straight mail.

19 Q At the time was it the practice or procedure  
20 of the Division to keep a record of everyone who -- of  
21 that mailing?

22 A There was a practice -- a policy and practice  
23 to print the database at the time of when we draft the  
24 permit, and so that's what is attached to our draft permit  
25 inside the -- inside the file.

1 Q And -- okay.

2 A It has a list of the people, but that's a  
3 revolving database. So that changes.

4 MS. TANNER: Okay. Can you explain that --  
5 well, actually, I'll save that. I'll save that for the  
6 next witness.

7 I don't have any other questions.

8 CHAIRMAN DODGION: You going back at him on  
9 that?

10 MR. MARSHALL: No, I'm fine.

11 CHAIRMAN DODGION: All right, Mr. Tinney,  
12 you're excused.

13 MS. TANNER: Thank you.

14 CHAIRMAN DODGION: Don't leave the building.

15 MS. TANNER: The State's next witness, if  
16 we're ready, would be Mr. Bruce Holmgren.

17 BRUCE HOLMGREN,  
18 having been previously duly sworn,  
19 was examined and testified as follows:

20 DIRECT EXAMINATION

21 BY MS. TANNER:

22 Q Can you please state your name and spell your  
23 last name?

24 A My name is Bruce Holmgren. The last name is  
25 H-o-l-m-g-r-e-n.

1 Q What is your employment?

2 A I'm the Regulation Branch Supervisor with the  
3 Bureau of Mining Regulation and Reclamation.

4 Q And how long have you been in that current  
5 position?

6 A The current position two years, all those two  
7 years.

8 Q Can you explain what your position was  
9 immediately prior to that?

10 A I was a permit writer with the Bureau of Water  
11 Pollution Control.

12 Q Okay. And how long were you employed in that  
13 position?

14 A Oh, approximately eight years.

15 MS. TANNER: Okay. I -- this is -- I do not  
16 have this document marked. My apologies. I just got it  
17 this morning, and so I would mark out of order as Number  
18 26.

19 (State's Exhibit No. 26 marked for  
20 Identification)

21 MS. TANNER: It is Mr. Holmgren's resume, and  
22 I'm handing this to you for your review.

23 Can you brief my describe --

24 CHAIRMAN DODGION: Do you have copies of that?

25 MS. TANNER: I don't have copies of it,

159  
CAPITOL REPORTERS (775) 882-5322

□

1 either. So I'm going to hand it around if that's okay.

2 He -- he knows --

3 MR. MARSHALL: That's fine. I can look over  
4 his shoulder. Before we proceed, may I just ask a voir  
5 dire question?

6 CHAIRMAN DODGION: Certainly.

7 MR. MARSHALL: Only because of Mr. Holmgren's  
8 current employment.

9 VOIR DIRE EXAMINATION

10 BY MR. MARSHALL:

11 Q You said you were with the --

12 A The Bureau of Mining.

13 Q The Bureau of Mining?

14 A Yes.

15 MR. MARSHALL: Forgive me. Is he an employee  
16 of yours?

17 CHAIRMAN DODGION: No, he is an employee --

18 THE WITNESS: No, I'm with the --

19 CHAIRMAN DODGION: And --

20 THE REPORTER: I'm sorry. Who's talking?

21 THE WITNESS: I'm sorry.

22 CHAIRMAN DODGION: Thank you for that.

23 MEMBER COYNER: The answer to these questions  
24 is, no, he is not an employee under my supervision.

25 THE REPORTER: Thank you.

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1 MS. TANNER: Why don't I do this? If you're  
2 familiar with your resume, I'm going to pass it around to  
3 make sure that everybody has --

4 MR. LANZA: Do you want me to make copies?

5 MS. TANNER: Thank you. That would be great.

01-19-10 SEC Ponderosa Hearing Volume I.txt  
6 Thank you.

7 DIRECT EXAMINATION RESUMES

8 BY MS. TANNER:

9 Q Can you briefly describe your experience? And  
10 I would ask you just to focus on the -- on your experience  
11 in permitting and water pollution control.

12 A Well, I spent eight years writing permits in  
13 the Bureau of Water Pollution Control, NPDS, and  
14 groundwater discharge permits.

15 Q So what's your education?

16 A I have a BS in agricultural engineering from  
17 the University of Maryland.

18 Q Okay. Are you aware of the Ponderosa Dairy  
19 facility in Amargosa Valley?

20 A Yes, I am.

21 Q And did you -- what was your work in relation  
22 to this permit?

23 A I wrote the permit that's been appealed.

24 Q Okay. And so you've had a working  
25 relationship with the dairy in processing this permit?

CAPITOL REPORTERS <sup>161</sup> (775) 882-5322

1 A Yes.

2 Q Okay. How does -- can you explain how  
3 Ponderosa Dairy manages their waste, and their nutrients,  
4 and their beneficial waste, their agricultural waste?

5 A Well, they collect their processed waste water  
6 in ponds. First the water goes through separators, to  
7 remove the solids. The solids -- the manure and whatever  
8 else is removed from the water is taken to a compost

9 facility. So the processed waste water is collected in a  
10 series of ponds and used for irrigation.

11 Q Okay. What type of permit did you work on in  
12 regards to Ponderosa Dairy?

13 A An NPDS permit, National Pollution Discharge  
14 Elimination System.

15 Q Okay. Can you describe, briefly, the  
16 regulatory framework of -- of issuing that permit, how  
17 you, understand it?

18 A Well, the Clean water Act interprets CAFOs as  
19 being point sources. So they have to get a permit, an  
20 NPDS permit for an authorization to discharge.

21 Q And the State of Nevada is --

22 A The State of Nevada has been delegated the  
23 authorization to issue NPDS permits.

24 Q Okay. So -- but essentially you are tracking  
25 the regulations of the Clean water Act in -- in the --

CAPITOL REPORTERS <sup>162</sup> (775) 882-5322

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1 A The Clean water Act regulations are adopted by  
2 reference.

3 Q Okay. And were you -- are you familiar with  
4 the regulations that were in place at the time this permit  
5 was issued?

6 A Yes.

7 Q Are you familiar with the official Division's  
8 file in regards to this permit and this facility?

9 A Yes, even though I have not -- I have not had  
10 too much involvement the last two years, but at the time  
11 the permit was issued, yes.

12

Q Okay. Fair enough.

13

Are you familiar with the briefs that have been filed regarding this appeal?

14

A Yes.

15

16

Q Okay. In your review of the file and your

17

experience in working on this permit, have you discovered

18

anything that would be grounds for the Division to

19

reassess the issuance of this permit?

20

A No.

21

Q Okay. I want to ask you a couple of questions

22

about the notice issues that we discussed with Mr. Tinney.

23

Let me make sure I cover what he did not.

24

If I can have your indulgence for just one

25

moment, I need to go back to that exhibit.

163

CAPITOL REPORTERS

(775) 882-5322

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1

(Proceedings paused briefly)

2

BY MS. TANNER:

3

Q Okay. I'm handing you what's been marked as

4

Exhibit 8. Do you recognize that?

5

A Yes, I do.

6

Q Okay. Was that the official mailing list in

7

place at the time of the notice of the permit application?

8

A Yes. This is the valid list that was used for

9

the Notice of Proposed Action.

10

Q Okay. And were you in charge of actually

11

doing the mailings in this case?

12

A I -- well, in this case, I printed the

13

envelopes from the database and gave them to our

14

administrative staff to mail, along with the notice.

15 MS. TANNER: Okay. Fair enough. I would move  
16 to admit Exhibit 8.

17 MR. MARSHALL: No objection.

18 MS. TANNER: Thank you.

19 (State's Exhibit No. 8 received into  
20 Evidence)

21 MS. TANNER: Oh, and, here, I now have copies  
22 of Mr. Holmgren's resume, and this would be Exhibit 26,  
23 and I would move to admit the Exhibit 26.

24 (State's Exhibit No. 26 received into  
25 Evidence)

CAPITOL REPORTERS <sup>164</sup> (775) 882-5322

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1 BY MS. TANNER:

2 Q Okay. In regards to the filing of -- well,  
3 first, let's just recap for a second. There was the  
4 notice of the permit application?

5 A Right, which we call the Notice of Proposed  
6 Action.

7 Q Noticed of Proposed Action. Thank you.  
8 And then the Notice of Proposed Hearing?

9 A Public Hearing.

10 Q Public Hearing. I'll get this down.

11 As far as additional notice to the mailing  
12 list, what is -- what was the process to provide notice to  
13 interested people between those two notices?

14 A Well, after we published the Notice of  
15 Proposed Action, we received five requests for public  
16 hearing -- for a public hearing.

17 So we took some time in determining whether

18 the public hearing was necessary, and decided that it was  
19 appropriate. So the -- we used same mailing list, as the  
20 Notice of Proposed Action, plus the five people that had  
21 commented.

22 Q And those comments that were in writing --

23 A Yes.

24 Q -- that was your practice, was to file -- was  
25 to send those?

CAPITOL REPORTERS <sup>165</sup> (775) 882-5322

1 A That's correct.

2 Q Okay. And did you -- were you in charge of  
3 that?

4 A Yes.

5 Q And did you do that?

6 A Yes.

7 Q Are you aware of whether anyone interested in  
8 this proceedings requested to officially be placed on  
9 NDEP's mailing list prior to the Notice of Public Hearing  
10 being sent out?

11 A No.

12 Q And, now, the notice was in addition -- was  
13 also posted on the town office; is that correct?

14 A Yes.

15 Q And on the Internet?

16 A Yes.

17 Q As the employee in charge of providing the  
18 notice, do you believe that the Division complied with NRS  
19 445A.595 and NAC 445A.239 by circulating notice at least  
20 as widely as it did the Notice of Permit Application?

21

A Yes, I do.

22

Q And did you do that at least 30 days prior to  
23 the hearing?

24

A Yes.

25

Q You heard the -- were you present earlier this

166

CAPITOL REPORTERS

(775) 882-5322

□

1 morning and heard the testimony of the Appellants?

2

A Yes.

3

Q Okay. Mr. Barrackman said they did not  
4 receive individual notice of the Notice of Public Hearing.  
5 Did you recall that testimony?

6

A Yes, I do.

7

Q And why that was?

8

A We did not receive comments from

9

Mr. Barrackman. We received them from his attorney.

10

Q Okay.

11

A And his attorney was copied on the Notice of

12

Public Hearing.

13

Q Do you remember the name of that person?

14

A William Eddie.

15

Q So you provided written notification to

16

Mr. Eddie because he had provided you with a --

17

A Right. His -- it did say on his letter that

18

the comments were on behalf of Mr. Barrackman, but the

19

comments actually came from Mr. Eddie.

20

Q Okay. Now -- and you heard Mr. Bosta indicate

21

that he specifically requested that he be placed on

22

official mailing list?

23

A That was at the hearing.

24

Q Okay.

25

A So he could not have received -- would not

CAPITOL REPORTERS 167 (775) 882-5322

□

1 have been on our list for the Notice of Public Hearing.

2 Q Okay. And once he requested to be placed on  
3 mailing list, did you do so?

4 A Yes. He should be on the list now. I have  
5 not verified that.

6 Q Okay. Since we're -- you know what? I'll get  
7 back to that.

8 (Proceedings paused briefly)

9 BY MS. TANNER:

10 Q I want to talk to you for a few minutes about  
11 the issue of whether or not critical documents were  
12 readily available to the public, and I want to hand you  
13 Nevada Administrative code 445A.237, which I've marked as  
14 Exhibit 17.

15 (State's Exhibit No. 17 marked for  
16 Identification)

17 BY MS. TANNER:

18 Q Are you familiar with that regulation?

19 A Yes, I am.

20 Q Okay. And that regulation requires that  
21 applications, related forms, including draft permits are  
22 made available to the public for inspection and copying;  
23 is that correct?

24 A Yes.

25 MS. TANNER: I would move to admit that

CAPITOL REPORTERS 168 (775) 882-5322  
Page 152

1 document.

2 MR. MARSHALL: No objection.

3 CHAIRMAN DODGION: And which exhibit is that  
4 again?

5 MS. TANNER: That would be Exhibit 17.

6 (State's Exhibit No. 17 received into  
7 Evidence)

8 BY MS. TANNER:

9 Q What was your involvement specifically in  
10 insuring that the Division complied with -- with that  
11 regulation to a -- to provide access to documents?

12 A Well, the Notice of Proposed Action and Notice  
13 of Public Hearing, in fact, were all posted on our  
14 website, and the other information was available at the  
15 Division's office in Carson City. The -- both the Notice  
16 of Proposed Action and Notice of Public Hearing did  
17 reference me as a contact for more information.

18 Q Okay.

19 A And it gave phone number, address, and email  
20 addresses.

21 Q Okay. And, specifically, was the draft permit  
22 and the Nutrient Management Plan available for public  
23 inspection and copying?

24 A In Carson City, yes.

25 Q In Carson City? And that was prior to the

1 issuance of the permit?

2 A Yes.

3 (State's Exhibit No. 18 marked for  
4 Identification)

5 BY MS. TANNER:

6 Q I'm handing you Exhibit 18. Do you recognize  
7 that?

8 A It's the Ponderosa Dairy Fact Sheet.

9 (State's Exhibit No. 19 marked for  
10 Identification)

11 BY MS. TANNER:

12 Q And Exhibit 19?

13 A It's a draft, a Ponderosa permit, NPDS permit.

14 Q A proposed permit, and draft permit?

15 A (No audible response).

16 Q Okay. And those are the two documents that  
17 you said were available online?

18 A No. We do not put the permits online.

19 Q Oh, okay. I'm sorry.

20 A The Fact Sheet was available at our website.

21 The draft permit is only available upon request.

22 Q Okay. I'm going to hold on to these for just  
23 a few minutes.

24 Now, you indicated that the documents were  
25 located for public inspection and copying in the Carson

1 City office, correct?

2 A That's correct.

3 Q Did you receive any requests for documentation  
4 from interested persons in regards to the dairy?

5 A At various times, yes.

6 Q In the briefs filed by the Appellant, I noted  
7 that it's alluded to that the Division would only allow  
8 the copying of the entire file. Is that true?

9 A No.

10 Q Can you explain that? Do you know where that  
11 comes from?

12 A It comes from when people want to get the  
13 important documents. We don't want to make that  
14 determination. We tell them they either copy the whole  
15 file or to come to Carson City, review the file, and  
16 select what they feel is appropriate for copying, or if  
17 they ask for specific documents, we copy those.

18 Q Okay. So -- well, let me break that down a  
19 little bit. Did you get a specific request from one of  
20 the Appellants to have you determine what he -- what you  
21 would find to be relevant for this case?

22 A There -- yes, there was a question of that  
23 type.

24 Q And -- but you wouldn't entertain that,  
25 correct?

CAPITOL REPORTERS <sup>171</sup> (775) 882-5322

1 A Correct.

2 Q But if -- if the --

3 A I may have overlooked something that would be  
4 important to him. That's kind of a judgment call, and we  
5 try to avoid.

6 Q You don't want to make the decision as to  
7 whether or not he found something relevant?

8 A That's correct.

9 Q If he asked you for a specific document, over  
10 the phone, for copying, did you provide it?

11 A Other than --

12 Q Or if anyone did?

13 A Well, that would not be the case with a  
14 Nutrient Management Plan due to its size, but other  
15 documents, yes, like the draft permit.

16 Q Does the agency charge a fee for copying  
17 public records?

18 A Yes, we do.

19 Q Do you know what that is?

20 A I think it's 10 cents a page, and you're no  
21 charged until it's over 20 pages.

22 Q So there would be -- with an exceptionally  
23 large document, there would certainly be potential fees  
24 involved?

25 A Yes.

172  
CAPITOL REPORTERS (775) 882-5322

1 Q Okay. I want to talk a little bit just -- I  
2 want to address a few things that were brought up in the  
3 Appellants' case in chief before we get into any further  
4 issues.

5 AS -- did you hear testimony this morning in  
6 regards to the Appellants discussing tests of their wells?

7 A Yes, I heard.

8 Q Okay. I believe that it was Mr. Barrackman  
9 who indicated that he had a coliform result in a test of  
10 his well recently.

11 A Yes.

12 Q Okay. And I believe also that Mr. Bosta  
13 testified that he had a coliform result in a test of his  
14 well, also relatively recently; is that correct?

15 A I think he had a positive and then a negative.

16 Q A positive and then a negative. Okay.  
17 what does a -- what does a coliform result  
18 tell you?

19 A It's -- it's somewhat meaningless.

20 Q why?

21 A Coliform is everywhere. what they should be  
22 looking for is fecal coliform.

23 Q Okay. In regards to Mr. Barrackman's well,  
24 are you familiar with the area, as far as Mr. Barrackman's  
25 farm is versus where the dairy's at?

173  
CAPITOL REPORTERS (775) 882-5322

1 A I know that Mr. Barrackman's place is  
2 northwest of Ponderosa Dairy, yes.

3 Q Do you know the -- do you know -- are you  
4 familiar with the up-gradient and down-gradient pattern of  
5 the groundwater in that area?

6 A I would say it's up-gradient of the Ponderosa  
7 Dairy.

8 Q Mr. Barrackman's farm is up-gradient of the  
9 Ponderosa Dairy?

10 A Yes.

11 Q Okay. And presumably his well is up-gradient  
12 of the Ponderosa Dairy?

13 A I believe his well is at his ranch, yes.

14 Q All right. Let's talk about the issue of  
15 groundwater monitoring.

16 First of all, I think I can go ahead and  
17 admit -- move to admit Exhibits 18 and 19.

18 MR. MARSHALL: No objection.

19 (State's Exhibit Nos. 18 and 19  
20 received into Evidence)

21 MS. TANNER: Thank you.

22 Q Are you aware of what Ponderosa Dairy's  
23 permitted groundwater monitoring plan is?

24 A Yes.

25 Q Can you explain it?

CAPITOL REPORTERS <sup>174</sup> (775) 882-5322

1 A They're required to have monitoring wells at  
2 the -- at the pond systems that we're not confident are  
3 lined. So there is one monitoring well that's  
4 down-gradient of the Dairy 1 pond system.

5 (State's Exhibit No. 20 marked for  
6 Identification)

7 BY MS. TANNER:

8 Q And is that -- is that outlined in the actual  
9 permit?

10 A Yes, it is.

11 Q Okay. I just handed you Exhibit 21 (sic),  
12 which is the actual permit. And maybe you might want to  
13 hold on to that for me.

14 A That would be Table 1.2.

15 MR. MARSHALL: Okay. Table 1.2 --

16 THE WITNESS: That's 20?

17 MS. TANNER: Sorry. Exhibit 20, yes. Did I  
18 say 21?

19 MR. MARSHALL: Yes.

20 MS. TANNER: My apologies. It's Exhibit 20.  
21 (State's Exhibit No. 21 marked for  
22 Identification)

23 BY MS. TANNER:

24 Q I'm also handing you what I have marked as  
25 Exhibit 21, which is regulation 445A.250. Are you

CAPITOL REPORTERS <sup>175</sup> (775) 882-5322

1 familiar with that?

2 A Yes, I am.

3 Q Okay. Is -- is ground -- based upon that  
4 regulation is groundwater monitoring -- actually, in your  
5 experience, is groundwater monitoring required in an NPDS  
6 permit?

7 A No.

8 Q But yet it is in this permit?

9 A That's correct.

10 Q And why is that? Can you explain that?

11 A Because the permits that the Bureau of Water  
12 Pollution Control issues are protective of the waters of  
13 the state, not just waters of the U.S.

14 Q So the NPDS requirements only require that it  
15 be protective of the waters of the U.S., but the Division  
16 requires that it be protective of the waters of the state  
17 in addition?

18 A That's correct.

19 Q Is there a soil monitoring plan in the -- for  
Page 159

20 Ponderosa Dairy, that you're aware?

21 A Yes, is there.

22 Q Can you briefly describe that?

23 A They're required to analyze for nutrients  
24 on -- the frequency is determined by the -- somewhat by  
25 the crop rotation.

CAPITOL REPORTERS <sup>176</sup> (775) 882-5322

1 Q Okay. At the time of the issuance of the  
2 permit, were there any problems with Ponderosa's  
3 groundwater monitoring wells?

4 A No.

5 Q Are you aware of the dairy's additional  
6 groundwater monitoring plan?

7 A Yes, I am.

8 Q Can you describe that?

9 A They have -- they proposed, and NDEP has  
10 approved, putting down-gradient monitoring wells from each  
11 of the three pond systems and one up-gradient well.

12 (State's Exhibit No. 22 marked for  
13 Identification)

14 BY MS. TANNER:

15 Q Okay. And I'm handing you Exhibit 22. Is  
16 that their proposed groundwater monitoring plan?

17 A Yes, it is.

18 MS. TANNER: I would move to admit -- do you  
19 want to hold on to the permit, just in case?

20 I would move to admit Exhibits 21 and 22.

21 MR. MARSHALL: No objection.

22 (State's Exhibit Nos. 21 and 22  
Page 160)

23 received into Evidence)

24 MS. TANNER: Pardon me just a moment.

25 (Proceedings paused briefly)

CAPITOL REPORTERS <sup>177</sup> (775) 882-5322

1 BY MS. TANNER:

2 Q And I believe you said that the Division has  
3 actually approved of that plan.

4 A Yes, it has.

5 Q Is there a reason -- has it been implemented  
6 yet?

7 A No. I think they were waiting for the -- this  
8 case to be resolved.

9 Q Okay. And these -- so just to be clear, these  
10 groundwater monitoring wells were not required by NDEP in  
11 the permit, but they are voluntary by the dairy?

12 A Yes. The dairy has volunteered to expand the  
13 groundwater monitoring system.

14 Q Okay. Are you aware of whether or not the  
15 permit covers issues of odors?

16 A No, it does not.

17 Q Okay. And --

18 CHAIRMAN DODGION: Would you repeat that  
19 question, please?

20 MS. TANNER: I asked him if the permit covers  
21 issues of odors.

22 CHAIRMAN DODGION: Yes. Thank you.

23 THE WITNESS: The answer was no.

24 BY MS. TANNER:

25 Q Is it required to under the NPDS regulatory  
Page 161

1 framework?

2 A No.

3 Q How about the issue of flies, is that covered  
4 by the permit?

5 A No.

6 Q Is it required to under the NPDS regulatory  
7 framework?

8 A No.

9 Q There's been some -- some issues surrounding  
10 the Nutrient Management Plan raised. What is a Nutrient  
11 Management Plan?

12 A The Nutrient Management Plan is a regulatory  
13 required plan where they're balancing the nutrients  
14 applied to the soil with the agronomic rates of the crop  
15 that's being grown.

16 Q And when you say, "regulatory framework,"  
17 or -- I just -- I'm sorry. What was the word you said?

18 A I'm not sure what the word was, but -- it is  
19 required by regulation.

20 Q Okay. And do you know which regulation this  
21 would be?

22 A It's required by the NAC and the Clean Water  
23 Act regulations.

24 Q Okay. Specifically addressing the NPDS  
25 permit?

1 A Yes.

2 Q And so the Division also requires the NMP?

3 A Right. We -- we have been delegated  
4 authority. So we have to be at least as stringent as the  
5 federal regulations.

6 Q Okay. And did the dairy submit an NMP in this  
7 case?

8 A Yes, they did.

9 Q To your knowledge, did the Division approve  
10 that document?

11 A Yes.

12 Q Let's talk about that document for a second,  
13 as far as public review. Were the terms of the Nutrient  
14 Management Plan available for public review before you  
15 issued the permit -- or before the Division issued the  
16 permit?

17 A Yes, those are the requirements the Clean  
18 Water Act regulations. The terms of the Nutrient  
19 Management Plan were incorporated into the draft permit  
20 and the Fact Sheet.

21 Q Okay. And -- let's -- you were -- were you in  
22 consultation with the EPA in issuing this permit?

23 A Yes. All of our NPDS permits are submitted to  
24 Region 9 in draft form before they go out to public  
25 notice.

□

1 (State's Exhibit No. 24 marked for  
2 Identification)

01-19-10 SEC Ponderosa Hearing Volume I.txt  
BY MS. TANNER:

Q Okay. So I'm handing you what's been marked  
as Exhibit 24. Do you recognize that document?

A Yes. This is the letter regarding Region 9's  
review of the draft permit.

Q And did they have input into how the Division  
should handle public review in that letter? Did they  
indicate -- here.

A They had previously approved the NPDS CAFO  
boilerplate, but due to some court decisions they decided  
that they wanted us to go a little further than the  
approved permit. So, yes, we incorporated a little bit  
more of the terms of the NMP into the permit.

Q So they provided you this letter with that  
additional guidance, and did you then follow this  
directive?

A Yes.

MS. TANNER: I would move to admit Exhibit 24.

MR. MARSHALL: No objection.

MS. TANNER: Thank you.

(State's Exhibit No. 24 received into  
Evidence)

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CAPITOL REPORTERS 181 (775) 882-5322

BY MS. TANNER:

Q I want to go back and ask one more question in  
regards to Mr. Barrackman's well.

Just for clarification, if Mr. Barrackman's  
well is up-gradient of the Ponderosa Dairy, in your

6 professional opinion is it possible for the groundwater to  
7 migrate from the Ponderosa Dairy back up to  
8 Mr. Barrackman's property and impact his well?

9 A No.

10 Q In your professional opinion, in working on  
11 this permit, do you believe that this permit is protective  
12 of groundwater in the State of Nevada?

13 A Yes.

14 Q Did you get final approval from the EPA?

15 A Yes. There were a couple emails that came  
16 afterwards, after the -- some of the tables were  
17 incorporated into the permits about the crop rotation and  
18 nutrient application rates.

19 (State's Exhibit No. 25 marked for  
20 Identification)

21 BY MS. TANNER:

22 Q I'm handing you Exhibit 25. Is that one of  
23 those emails?

24 A Yes, it is.

25 MS. TANNER: I would move to admit Exhibit 25.

CAPITOL REPORTERS <sup>182</sup> (775) 882-5322

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1 So --

2 MR. MARSHALL: No objection.

3 MS. TANNER: And I'm talking right over him.

4 (State's Exhibit No. 25 received into  
5 Evidence)

6 BY MS. TANNER:

7 Q Your correspondence with the EPA, do you have  
8 knowledge of which -- which offices of the EPA had the

01-19-10 SEC Ponderosa Hearing Volume I.txt  
9 opportunity to review the permit?

10 A Yes. We -- it's a standard practice. We  
11 submit them to Region 9, but because the regulation -- the  
12 federal regulations were new, they decided that the  
13 Washington office had to review it, as well. So, yes,  
14 both Region 9 and the national office reviewed our CAFO  
15 program.

16 Q Reviewed and approved?

17 A Reviewed and approved. We don't have any  
18 documentation of approval, but we would have heard from  
19 the headquarters if there were any issues.

20 Q Okay. One final set of questions. In regards  
21 to the Nutrient Management Plan, to your knowledge, does  
22 that -- did that particular portion have elements in it  
23 that are specifically protective of groundwater?

24 A Yes.

25 Q Okay. Can you -- as far as those elements,

183  
CAPITOL REPORTERS (775) 882-5322

1 what did you do with those in relation to the permit? Did  
2 you incorporate those into the permit?

3 A Yes. I mean, that's what the Nutrient  
4 Management Plan is based on is balancing the nutrients  
5 applied with the agronomic rate of the crop grown.

6 Q Okay. So it's both in the NMP, and it's also  
7 listed in the permit?

8 A Yes.

9 MS. TANNER: Okay. I don't think I have any  
10 further questions of my witness, and I would move to admit  
11 Exhibit 20, which is the permit, itself.

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MR. MARSHALL: No objection.

(State's Exhibit No. 20 received into  
Evidence)

CHAIRMAN DODGION: All right. Mr. Marshall?

MR. MARSHALL: Would you mind if we take a  
short break?

CHAIRMAN DODGION: I think that would be a  
good idea.

MR. MARSHALL: Thank you very much.

CHAIRMAN DODGION: How short a break do you  
want?

MR. MARSHALL: Ten minutes is fine.

CHAIRMAN DODGION: Ten minutes? All right.  
we'll reconvene at 2:25, by my watch.

CAPITOL REPORTERS <sup>184</sup> (775) 882-5322

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(Proceedings recessed from 2:14 p.m. until 2:25 p.m.)

CHAIRMAN DODGION: All right. It is now 2:25,  
and we'll reconvene.

Mr. Marshall, you're up.

MR. MARSHALL: I am ignoring you to buy a  
little more time.

CHAIRMAN DODGION: I'll give you a little more  
time.

MR. MARSHALL: That's all right. I'm almost  
done. Okay.

CROSS EXAMINATION

BY MR. MARSHALL:

Q Mr. Holmgren, you earlier testified that the  
dairy processed their waste water. Can you describe a

15 little bit about what that kind of entailed?

16 A well, "processed" is probably a -- it's a  
17 pretty strong term for what they do. Processing -- what I  
18 would refer to it earlier, was more screening to remove  
19 the solids.

20 Q Do they add anything to the waste stream to,  
21 in essence, treat it before they apply it?

22 A There's -- it goes through -- after the  
23 screening, it does go through a settling process. And  
24 they -- the permit would allow them to use their microbes,  
25 which I think they only use if there's odor complaints.

CAPITOL REPORTERS <sup>185</sup> (775) 882-5322

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1 Q And is it also -- is not also an aeration  
2 that's involved?

3 A Aeration is a possibility, but it's not  
4 required by the permit.

5 Q But in the Fact Sheet it describes the  
6 addition of microbes and aeration; does it not?

7 A Those are both options for odor control.

8 Q Okay. So --

9 A But it's not part -- it's really not part of  
10 the permit.

11 Q Okay. And --

12 A It's just describing what their facility.

13 Q And you understand is that they -- they  
14 undertake those efforts?

15 A I've been told they do. I've seen the  
16 aeration. I have not observed microbial addition.

17 Q Okay.

18 A And we don't require that in the permit  
19 reporting, either. So --

20 Q When you were reviewing the permit  
21 application, did you -- do you use the Nation Resource  
22 Conservation Service, conservation practice standards?

23 A Yes.

24 Q And specifically do you use Code 590, Nutrient  
25 Management, and Code 633, Waste Utilization?

186  
CAPITOL REPORTERS (775) 882-5322

1 A Those are the two guidance documents that are  
2 called out in the permit, yes.

3 MR. MARSHALL: Okay. For the everyone, those  
4 are Exhibits H and I to Appellants' reply brief.

5 Q And could you just generally describe -- I'm  
6 going to hand a copy of Nutrients Management 590 -- or  
7 Code 590, and can you generally describe what that  
8 guidance does?

9 A Well, it's generally looking at nutrient  
10 balances. It's telling them when they should be looking  
11 at the phosphorous index. If the numbers are high with  
12 the phosphorous index, they're required to apply the  
13 nutrients, based on the phosphorous application rates, but  
14 that's not the case at Ponderosa. So they're applying  
15 according to the nitrogen application rates.

16 Q Okay. Can I direct your attention to --  
17 thinks page 590-8 -- the page numbers are in the upper  
18 left-hand corner. And this is under "Considerations to  
19 Protect Air Quality by Reducing Nitrogen and/or  
20 Particulate Emissions to the Atmosphere." Can you read

01-19-10 SEC Ponderosa Hearing Volume I.txt  
21 that first paragraph under there?

22 A (Reading)

23 "Consider measures for minimizing potential  
24 problems from odors associated with the land application  
25 of animal manure, especially when applied near or upwind

CAPITOL REPORTERS 187 (775) 882-5322

1 of residences. Avoid flying these materials upwind of  
2 occupied structures when residents are us" -- excuse me --  
3 "when the residents are likely to be home, evenings,  
4 weekends, holidays."

5 Q Thank you. I'm now going to hand you waste  
6 Utilization Code 633, Exhibit I. Why don't you take a  
7 look at that. Is that -- it looks like --

8 A That's --

9 Q -- it's the document that it's claimed to be.

10 A Yes. It is an NRS guidance document.

11 Q Can you turn to page 633-2, dash 2?

12 A (Witness complying).

13 Q And this is under "Additional Criteria to  
14 Protect Air Quality." Can you look at the highlighted  
15 area there?

16 MS. TANNER: You know, I do have an objection  
17 on this line of Cross-Examination. The NRCS code  
18 standards are not regulation.

19 CHAIRMAN DODGION: They are used, however, by  
20 the permit writer in developing the criteria for the  
21 permit.

22 MS. TANNER: But not in regards to air  
23 quality. Only in regards to water quality.

24 CHAIRMAN DODGION: I think that's an issue  
25 that's trying to be explored right here, and I'm going to

CAPITOL REPORTERS 188 (775) 882-5322

1 overrule the objection.

2 BY MR. MARSHALL:

3 Q Can you read that the highlighted or the  
4 marked material? This is on the first column at the  
5 bottom of the "Additional Criteria" section, please?

6 A (Reading)

7 "All materials shall be handled in a manner to  
8 minimize the generation of particulate matter, odors, and  
9 greenhouse gasses."

10 Q Thank you. Do you know if the dairy has a  
11 secondary discharge permit for the amount of water -- that  
12 amount of effluent that is permitted by the NDEP's permit  
13 for this?

14 A I think you're talking about secondary water  
15 right; is that correct?

16 Q Secondary use of their water rights to dispose  
17 of the --

18 A That's a Division of Water Resources matter.  
19 It -- no, I do not know.

20 Q So you don't know? So --

21 A And it's not part of our permit, either.

22 Q But you understand that it's -- it is required  
23 that they have it; is that correct?

24 A And --

25 MS. TANNER: Objection. I believe that the

CAPITOL REPORTERS 189 (775) 882-5322  
Page 171

1 Commission has already ruled that these matters are  
2 irrelevant to this proceeding.

3 MR. MARSHALL: I disagree that.

4 CHAIRMAN DODGION: Now, again, the witness has  
5 testified that you're getting into water quantity issues  
6 that are regulated by the State Engineer.

7 MR. MARSHALL: The issue that --

8 CHAIRMAN DODGION: Not -- not subject to this  
9 permit.

10 MR. MARSHALL: Well, they do -- in fact, are  
11 directly tied to the permit, and that's because the dairy,  
12 prior to -- it's our contention that prior to the issuance  
13 of this permit, the NDEP must assure that the -- that the  
14 dairy has the ability to operate as permitted.

15 And if they don't have the necessary rights to  
16 do that, then why are they issuing them a permit to  
17 undertake that operation? So just --

18 CHAIRMAN DODGION: It's not -- it's not the  
19 Division of Environmental Protection's responsibility, or  
20 this Commission's responsibility to oversee the permits  
21 issued by the State Engineer's Office.

22 MR. MARSHALL: I agree with that.

23 CHAIRMAN DODGION: And in essence --

24 MR. MARSHALL: But I do think that it is an  
25 obligation or the -- the -- in fact, the Department takes

2 have the applicable rights, and I can ask the witness if  
3 that is, in fact, the case.

4 CHAIRMAN DODGION: I'll allow that. Go ahead.

5 BY MR. MARSHALL:

6 Q If they have inquired -- have you inquired  
7 Mr. Holmgren --

8 A Yes.

9 Q -- of the applicants, of whether they have the  
10 necessary rights to undertake these?

11 A No. We have not asked that question, but the  
12 mailing list that was already entered into -- I don't know  
13 exhibit -- an earlier exhibit, included Rob Martinez, who  
14 was with the Division of Water Resources, and that's why  
15 we give them copies of our draft permits and fact sheets.

16 Q And if there's a ruling that -- from the State  
17 Engineer, that they cannot use this additional water to  
18 irrigate their crops, as you project, that you allow under  
19 this permit, would that be relevant to your consideration?

20 A Excuse me. Would you ask that again?

21 Q If there's a ruling from the State Engineer  
22 that says they cannot use this additional increment of  
23 water from the -- under the expansion of this permit, for  
24 irrigation, would that be relevant to your consideration  
25 of the permit?

□

1 A Yes.

2 Q Okay. Thank you.

3 I'd like to go back to Code 633, and I'll have  
4 you look at page 663-3 under "Plans and Specifications."

5 Can you look at this -- I believe it's the  
6 second sentence under "Plans and Specification," and read  
7 that out loud slowly and articulately, please.

8 A I do have a cough lozenge in my mouth, but --  
9 "The waste management plan is to account for the  
10 utilization or other disposal of all animal waste  
11 produced, and all waste application areas shall be clearly  
12 indicated on plan map."

13 Q Okay. And did you, in fact, look at the --  
14 was there ever a Waste Management Plan submitted as part  
15 of the Comprehensive -- or excuse me -- the Nutrient  
16 Management Plan for the Ponderosa Dairy?

17 A It may not have been called a Waste Management  
18 Plan, but the plan does call for all of the manure to be  
19 composted.

20 Q And is that -- and then how was that manure to  
21 be utilized?

22 A The composted manure from the commercial  
23 facility is generally sold.

24 Q And utilized where?

25 A It is not really a concern of ours where it is

1 used. This is compost that's been permitted through the  
2 Bureau of Waste Management, as well, and once it's been  
3 gone through the -- once the composting is documented, it  
4 can be distributed commercially.

5 Q And so, in other words -- and do you know what  
6 percentage of the waste stream is manure from the dairy?

7 A No, I don't have those numbers. It may be in  
Page 174

8 the Fact Sheet.

9 Q And is it -- is it a substantial percentage of  
10 the --

11 A Oh, it's a very large composting facility,  
12 yes.

13 Q Right.

14 A It's probably the largest in the state.

15 Q And under the Clean water Act regulations, are  
16 any -- isn't it an obligation that the dairy include  
17 within its Comprehensive Nutrient Management Plan, any  
18 fields that it has control, or leases, or any sort of  
19 long-term relationship with?

20 MR. BUTLER: You know, I object to that. He's  
21 characterizing --

22 MR. MARSHALL: Can I finish the question?

23 MR. BUTLER: I object to the part you've  
24 already done.

25 CHAIRMAN DODGION: well, let him finish, and

193  
CAPITOL REPORTERS (775) 882-5322

□

1 then we'll --

2 MR. BUTLER: I mean, he's giving this long  
3 rambling characterization of a regulation that he hasn't  
4 cited to, that he hasn't put in front of the witness. I  
5 mean, he's just -- you know, if he's got a specific  
6 regulation he wants to ask about, I think he should give  
7 the witness the benefit of having that regulation in front  
8 of him.

9 CHAIRMAN DODGION: Put the regulation in front  
10 of the witness.

11 BY MR. MARSHALL:

12 Q Okay. So your understanding on the permit  
13 is -- and maybe we can use the -- forgive the mess that  
14 we've got going.

15 I believe this is A-3, this map, A-3. Can you  
16 look at map A-3. Is that document familiar to you?

17 A I have seen it before, yes.

18 Q Is that part of the NDEP's file?

19 A I believe so.

20 Q Okay. And can you generally describe for the  
21 Commission what it depict on the map?

22 A It shows Ponderosa Dairy, Beverly Hills Dairy,  
23 and then some irrigation fields in between.

24 Q And those -- all those fields are numbered and  
25 named; is that correct?

194  
CAPITOL REPORTERS (775) 882-5322

1 A Yes, and it also have the acreage.

2 Q Okay. And is there -- is there -- or why do  
3 you think this map was created by Glorieta Consultants and  
4 submitted to you?

5 A (No audible response).

6 Q What purpose did it serve?

7 A Probably showing the relationship between  
8 Ponderosa and Beverly Hills Dairies.

9 Q What was that relationship?

10 A Well, the permits allow the manure to be  
11 brought from Beverly Hills Dairy, which has not been  
12 constructed, for composting at Ponderosa, and that it  
13 would also allow material to be transferred back to

14 Beverly Hills as a soil amendment.

15 Q So, in other words, Ponderosa Dairy can  
16 dispose of --

17 A I wouldn't call it disposing.

18 Q Excuse me. Well, how about manure from the  
19 Ponderosa Dairy?

20 A No. It's compost once it's --

21 Q Okay.

22 A The permit does not allow --

23 Q Describe pollution control permit --

24 A The permit does not allow the transfer of  
25 com --

CAPITOL REPORTERS <sup>195</sup> (775) 882-5322

1 Q Describe what's the differences between the  
2 two.

3 A Compost has gone through a bacteriological  
4 breakdown. The manure is then placed in piles and  
5 maintained at certain temperatures, and turned, so it --  
6 it kills the pathogens, reduces the nitrogen in it.

7 Q But it doesn't delete the nitrogen from it,  
8 otherwise -- that's what you need as a soil amendment,  
9 right?

10 A No. Compost is usually -- is used more for a  
11 soil amendment, for improving the soil properties. It  
12 doesn't -- it can be pretty low in nitrogen.

13 Q It can be, but do you --

14 A It would require characterization, and  
15 characterization has to be provided to anybody that is  
16 receiving the compost.

17 Q Okay.  
18 A which would be Beverly Hills or whoever else.  
19 Q who they transfer the compost to or --  
20 A Right.  
21 Q Or whatever?  
22 A Right. The idea is they want to know what the  
23 nutrient analysis is so it's not over-applied in other  
24 areas.  
25 MR. MARSHALL: Okay. That's all the questions

196  
CAPITOL REPORTERS (775) 882-5322

1 I have right now.  
2 CHAIRMAN DODGION: Ms. Tanner, your witness.  
3 MS. TANNER: Did you --  
4 CHAIRMAN DODGION: Mr. Butler?  
5 MR. BUTLER: Yes, I have a few questions.  
6 CROSS EXAMINATION  
7 BY MR. BUTLER:  
8 Q Mr. Holmgren, if you could look at the map  
9 that Mr. Marshall had just given you, and then if we can  
10 find the permit somewhere, which I think is Exhibit --  
11 MS. TANNER: I think it's 20.  
12 BY MR. BUTLER:  
13 Q -- 20, and if you could look at Table 1.3-E.  
14 A we're still tracking the permit down.  
15 MS. TANNER: You've got it.  
16 MR. BUTLER: I've got it.  
17 MS. TANNER: Here we go.  
18 THE WITNESS: I've got it now.  
19 BY MR. BUTLER:

20 Q Okay. And so can you tell me what Table 1.3-E  
21 is, and it's -- this is out of permit, correct?

22 A Yes. It is the nitrogen allocation table that  
23 was required to be put into the NDPS program to  
24 incorporate all of the terms of the NMP into the permit.

25 Q Okay. On the -- there's a column marked

197  
CAPITOL REPORTERS (775) 882-5322

1 "Field," that -- it's the far left-hand column. Do you  
2 see that?

3 A Yes.

4 Q Now, I don't want to -- what I want to get at  
5 is: There are one, two, three, four, five, six, seven,  
6 eight, nine, ten -- eleven fields listed there on the map.  
7 Can you tell us where those eleven fields are?

8 A Those eleven fields are in the lower  
9 right-hand corner.

10 Q Okay.

11 A They're adjacent to the corrals. Some of  
12 those are circles, three-quarter circle. Some are  
13 rectangular.

14 Q So those are the areas where the permit  
15 authorizes Ponderosa to apply -- make sure I use the right  
16 word -- but green water, or water from the lagoons -- and  
17 you correct me if I don't get it quite right -- as  
18 specified in the permit at those limits?

19 A That's correct. Those are the eleven fields  
20 that are permitted to receive what we call processed waste  
21 water.

22 Q Now, if I were a farmer in the Amargosa  
Page 179

23 valley, or if I had some land in the Amargosa Valley, and  
24 I wanted to fertilize that, could I go to the Ponderosa  
25 Dairy and buy a truck load of compost?

198  
CAPITOL REPORTERS (775) 882-5322

1 A Yes.

2 Q And I would pay them for that?

3 A If the dairy has it available, yes.

4 Q And I could haul that to my property and  
5 distribute it?

6 A That's correct. The requirement would be that  
7 you get a nutrient analysis of the material you're taking.

8 Q But I don't need to come to you for a permit?

9 A No.

10 Q And that activity is not covered, apart from  
11 the -- the data collection in the water pollution control  
12 permit.

13 A That's correct.

14 Q Thank you very much.

15 I want to -- do you know the difference  
16 between a Nutrient Management Plan and a Comprehensive  
17 Nutrients Management Plan?

18 A There are some differences. In Nevada, now,  
19 they are everything from the comprehensive nutrient  
20 Management -- Nutrient Management Plan has been  
21 incorporated into the Nutrient Management Plan -- let me  
22 start over.

23 Yes. A Nutrient Management Plan is a document  
24 that's required by the regulations. There's --

25 Q By the Clean Water Act regulations?

1 A And the state regulations. That primarily  
2 regulates how CAFOs are operated.

3 Q Do those regulations require a Comprehensive  
4 Nutrient Management Plan?

5 A No, they do not.

6 Q why would a dairy prepare a Comprehensive  
7 Nutrient Management Plan?

8 A It's an NRCS document. If NRCS was involved  
9 in assisting in the preparation, they probably would  
10 insist on a CNMP, or if the permittee was planning to  
11 apply for some type of U.S. Department of Agricultural  
12 cost share.

13 Q So in order to get funding or support from  
14 NRCS, an applicant must submit a Comprehensive Nutrient  
15 Management Plan?

16 A They must have a CNMP.

17 Q They must have it approved?

18 A Right. It doesn't have to be submitted to us,  
19 but --

20 Q So does a CNMP, a Comprehensive Nutrient  
21 Management Plan, include more than a Nutrient Management  
22 Plan?

23 A Yes.

24 Q Are you familiar with any specific examples of  
25 what's in one but not in the other?

1           A     I think there were -- the CNMP included things  
2     like feed rates and some items like that. I guess my  
3     focus has been more on the NMP's, since that's the  
4     document that we require.

5           Q     Did the Ponderosa Dairy require a  
6     Comprehensive Nutrient Management Plan?

7           A     Yes, they did.

8           Q     And did they submit that document to you?

9           A     Yes.

10          Q     And is that the document that is in the  
11     permitting record?

12          A     Yes.

13          Q     I want to ask you about Exhibit H, which is  
14     NRCS Code 590, and I want to ask you to look at some stuff  
15     that Mr. Marshall didn't ask. I want to you look at page  
16     590-7 and read the -- just read the part that I've got the  
17     block around.

18          A     Okay.

19                 "Additional criteria to protect air quality by  
20     reducing nitrogen and/or particulate emissions to the  
21     atmosphere." That's the title of the section.

22                 "In areas that" -- "with an identified or  
23     designated nutrient management related air quality  
24     concern, any components of a nutrient management, i.e.,  
25     amount, source, placement, form, timing of application,

□

1     identified by risk assessment tools as a potential source  
2     of atmospheric pollutants, shall be adjusted as necessary

01-19-10 SEC Ponderosa Hearing Volume I.txt  
3 to minimize the losses."

4 Q Do you know -- I want to ask you a question  
5 about the Nutrient Management Plan, and this is marked as  
6 Exhibit 5 of our exhibits, but we did not put it in your  
7 small binders.

8 Do you recognize that?

9 A Yes, I do.

10 Q Are you familiar with Section C, which is  
11 called "Objectives and Resource Concerns"?

12 A Yes.

13 Q All right. Is there a worksheet included in  
14 the NMP that's called "Resource Inventory Checklist"?

15 A Yes.

16 Q Now, these pages aren't numbered. This is  
17 Section C of the NMP. This is -- this is on an NRCS form?

18 A (No audible response).

19 Q Is this on an NRCS form?

20 A Yes, it is.

21 Q And there are instructions on filling out the  
22 form. Can you read those?

23 A (Reading)

24 "Identify the quality criteria for each and  
25 every resource" -- "each and every resource concern or

202  
CAPITOL REPORTERS (775) 882-5322

□

1 benchmark conditions by placing a mark in the appropriate  
2 block. Resource concerns that do not meet quality  
3 criteria must be included in plans for treatment. Use NA  
4 only if the resource condition does not exist on the  
5 property. Following the selection of the preferred

6 alternative, place a mark in the appropriate block in the  
7 planned column that quality criteria are met when the plan  
8 is implemented. Alternatives of value" --

9 Q Are there -- in following that, are there some  
10 worksheets --

11 A Yes.

12 Q -- with checks?

13 A Yes, there are.

14 Q And at the top, in the top right-hand corner,  
15 there's a column that says, "Meets quality criteria"; is  
16 that correct?

17 A Yes.

18 Q Then there are two -- that's separated into  
19 two further columns, "Benchmark and Planned."

20 A Yes.

21 Q And then in "Benchmark" there's a "not  
22 applicable," a "no," and a "yes," and in "Plan," there's a  
23 "no" and a "yes."

24 A Yes.

25 Q Now, my reading of that, if we go back to the

203  
CAPITOL REPORTERS (775) 882-5322

□

1 instruction, is that if it meets the benchmark, you mark  
2 "yes." Is that the way you read it?

3 A Yes.

4 Q Let's go down the columns on the left -- it's  
5 not on the first page. Look at the second page. Is there  
6 an "Air Quality" section?

7 A Yes, there is.

8 Q Now, looking over at the -- where the checks

9 are placed on the bench -- in the benchmark, there are  
10 one, two, three, four -- five air quality lines; is that  
11 correct?

12 A Yes.

13 Q Where's the check placed for -- the first one,  
14 which is "Airborne Sediment, (sic) Safety, Smoke Safety."

15 A It's checked, "yes," as a benchmark, and "yes"  
16 in "Planned."

17 Q So presumably that meets the benchmark at the  
18 time the assessment was done, and as the facility is  
19 planned it meets the benchmark?

20 A Yes.

21 Q Now, there's a second entry for air, and it's  
22 titled, "Airborne Sediment, Smoke, Property Damage, and  
23 Health." Now, are there -- is there a check for that  
24 column?

25 A "Not applicable."

CAPITOL REPORTERS 204 (775) 882-5322

1 Q There's a fourth one, "Airborne Particulates  
2 Conveyance." Is there a check for that one?

3 A "Not applicable."

4 Q And "Airborne Chemical Drift," is there a  
5 check for that one?

6 A "Not applicable."

7 Q And the last one is "Odors." Is there a check  
8 for that one?

9 A Under "yes" for a benchmark and "yes" under  
10 "Planned."

11 Q And then there's a column for notes. Does it

12

say anything in the notes?

13

A "Using microbes in the lagoon system."

14

Q All right. Thank you very much.

15

16

Oh, I want -- I have another question on the permit. And this is on the monitoring table, Table 1.2, which is back a page. And you talked about -- maybe it's back two pages. This is the table that describes the monitoring locations.

20

21

There's some footnotes to the table. What does Footnote 1 say? It's on page 4 of 21 of the permit.

22

A (Reading)

23

24

"Additional monitoring wells may be added as a" -- "to permit as minor modification."

25

MR. BUTLER: Okay. I think that's all the

205

CAPITOL REPORTERS

(775) 882-5322

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1

questions that I have. Thank you very much.

2

MS. TANNER: Can I redirect?

3

CHAIRMAN DODGION: Yes.

4

5

MS. TANNER: Just briefly. I'm sorry that my poor witness has a cold.

6

7

CHAIRMAN DODGION: I also have a cough drop here.

8

THE WITNESS: I've got some, thank you.

9

REDIRECT EXAMINATION

10

BY MS. TANNER:

11

12

13

14

Q I just wanted to clarify, at the beginning of Cross-Examination there was some questions raised in regards to what I believe Mr. Marshall characterized as processing the waste in the lagoons.

15 And I believe you indicated that it was your  
16 understanding that microbes were added, which I believe it  
17 was just noted, in --

18 A Yes.

19 Q -- an NRCS document, and that aeration is --

20 A Is an option.

21 Q Is an option. I wanted to be make sure that  
22 we're clear on this.

23 These are not requirements for treatment of  
24 raw agricultural waste; is that correct?

25 A That's correct.

CAPITOL REPORTERS <sup>206</sup> (775) 882-5322

1 Q Under NDPS permitting or under the Nevada  
2 regulations?

3 A That's correct. They're both done for odor  
4 control.

5 Q Okay. Presumably for the benefit of the  
6 residents of Amargosa Valley or the workers. I think --  
7 oh, I'm sorry. I do have just a couple more.

8 In the permit, I believe at Section 1.3 -- you  
9 have the copy. I don't know what page that's at.

10 A 1-A-3 is on page 5.

11 Q Okay. Page 5. This particular section talks  
12 about the requirements of the NMP; is that correct?

13 A Yes.

14 Q Can you states -- tell us where those  
15 requirements come from?

16 A Those are from the Clean Water Act  
17 regulations.

18 Q I do have -- let me hand you -- I have an  
19 exhibit I've not yet handed out, which I'll mark as 27.  
20 (State's Exhibit No. 27 marked for  
21 Identification)

22 BY MS. TANNER:

23 Q Do you recognize that document?

24 A Yes, I do.

25 Q And what is that document?

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1 A It's page from the Federal Register with  
2 the -- the CAFO Clean Water Act regulations.

3 Q And do those mirror what is placed into the  
4 permit?

5 A Yes.

6 MS. TANNER: Okay. Let me mark that. I  
7 believe we're at 27; is that correct?

8 MR. WALKER: Yes.

9 MS. TANNER: I would ask for Exhibit 27 be  
10 admitted.

11 Q Now, these also --

12 CHAIRMAN DODGION: Before you proceed there,  
13 do you have an objection?

14 MR. MARSHALL: I have no objection.

15 CHAIRMAN DODGION: Proceed.

16 (State's Exhibit No. 27 received into  
17 Evidence)

18 MS. TANNER: I'm sorry. I'm talking over  
19 again. Sorry.

20 Q Also in this particular section, an NM -- the

01-19-10 SEC Ponderosa Hearing Volume I.txt  
21 permit requires that the NMP be prepared in accordance  
22 with -- and I believe I'm quoting -- in accordance with  
23 NRCS Standard Code 590 and NRCS conservation practice  
24 Standards Code 633, which Mr. Marshall had reviewed with  
25 you. Is that correct?

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1 A Yes.

2 Q Does NDEP utilize these standards in reviewing  
3 and approving NMP's for NDPS permits?

4 A Yes, we do.

5 Q Now, I note that both of these codes, Exhibits  
6 H and I -- I believe these standards of practice, they do  
7 address water quality, but they also appear to address  
8 other issues.

9 If you look here, I'm handing you Appellants'  
10 Exhibit H. On that first page, under "Purposes," can you  
11 highlight what the purposes are of that standard?

12 A Budget and supply nutrients for plant  
13 production, properly utilize manure for organic  
14 by-products as a plant nutrient source, minimize  
15 agricultural non-point source pollution of surface and  
16 groundwater resources.

17 The last word was "resources."

18 Protect air quality by reducing nitrogen  
19 emissions, ammonium, and NOX compounds, and the formation  
20 of atmospheric particulates, maintain or improve the  
21 physical chemical or biological condition of the soil.

22 Q Okay. Now, for -- is -- in your professional  
23 opinion and in your experience, is the Division's Bureau

01-19-10 SEC Ponderosa Hearing Volume I.txt  
24 of water Pollution Control concerned about each and every  
25 one of those purposes or -- or a limited number?

209  
CAPITOL REPORTERS (775) 882-5322

1 A A limited number.

2 Q which ones?

3 A well, I guess I would say the air quality  
4 portion is regulated under another bureau within the  
5 Division of Environmental Protection.

6 Q So you would be -- would you be primarily  
7 concerned with the minimized agricultural non-point source  
8 pollution of surface and on groundwater resources?

9 A well, the budget and supply of nutrients is  
10 where we're --

11 Q You'd also be concerned about nutrient uptake?

12 A Yes.

13 Q Okay.

14 A Yes, because that's what the permit is based  
15 on.

16 Q Okay. Similarly, we have Appellants' Exhibit  
17 I, and there are several purposes listed there on the  
18 first page.

19 A Purpose: Protect water quality, protect air  
20 quality, provide fertility for crop forage, fiber  
21 production, and forest products, improve or maintain soil  
22 structure, provide feed stock for livestock, provide a  
23 source of energy.

24 Q Okay. And out of those purposes, what would  
25 be the primary concern for the Bureau of Water Pollution

210  
CAPITOL REPORTERS (775) 882-5322  
Page 190

1 Control?

2 A Protect water quality.

3 Q Okay. And so in the permit, when it asks that  
4 the NMP be prepared in accordance with these standards,  
5 is -- is it thus limited to those purposes that --

6 A The focus --

7 Q -- apply to the NPDS permit?

8 A The focus is on water quality, yes.

9 Q Do you know, to your knowledge, have these  
10 NRCS standards ever been adopted as regulation or law in  
11 the State of Nevada?

12 A No, they have not.

13 Q Why -- do you know why the Division uses these  
14 standards as guidance?

15 A The NRCS had developed a guidance that seemed  
16 applicable to the direction that the permitting program  
17 was headed. Rather than develop our own guidance  
18 documents, we just adopted the NRCS standards.

19 Also, the agricultural community was familiar  
20 with NRCS, was more accepting, I feel, of those guidance  
21 documents than they would have been from new -- new  
22 documents, even if they were similar, coming out of the  
23 Division of Environmental Protection.

24 Q And do you know if, say, for instance, an  
25 unrelated portion of the CNMP unrelated to Bureau of Water

2 Bureau of Water Pollution Control have any authority to  
3 enforce NRCS's guidance?

4 A No.

5 MS. TANNER: I have no further questions.

6 CHAIRMAN DODGION: Mr. Marshall, you get  
7 another shot at it.

8 MR. MARSHALL: Yeah. Can I use your Exhibit  
9 5, I believe it was?

10 RE-CROSS-EXAMINATION.

11 BY MR. MARSHALL:

12 Q I would pass off this major document to you.

13 You testified this was the -- both in this  
14 case -- both the Comprehensive Nutrient Management Plan  
15 and, for all intents and purposes, the Nutrient Management  
16 Plan prepared by the Ponderosa Dairy, the Division --  
17 excuse me -- the Division approved; is that correct?

18 A Yes.

19 Q And so this was -- this document was the  
20 central document in the file for consistency with the NPDS  
21 permit, is that -- or NPDS regulations in the development  
22 the CAFO regulations?

23 A It was used to develop the CAFO -- the NPDS  
24 permit that was issued to Ponderosa, yes.

25 Q Okay. And so this -- just the -- could you

212  
CAPITOL REPORTERS (775) 882-5322

1 just estimate the number of pages in that document?

2 A (No audible response).

3 Q We're in the hundreds and hundreds; is that a  
4 fair --

5 A I would say we're 500 or so, yes.

6 Q Okay.

7 A Some of those are going to be fold-out sheets  
8 and colored sheets.

9 Q And you said -- and as you said, this document  
10 was only available in Carson City for review?

11 A That's correct.

12 Q That's correct?

13 A Yes.

14 Q Okay.

15 A At the time. Later on --

16 Q Go ahead. Later on --

17 A Later on it was available on the Internet, but  
18 that was after the public hearing.

19 Q So it was available on the Internet, but only  
20 after the public hearing?

21 A That's when we had the request for it. That's  
22 when we were able to negotiate that arrangement, yes.

23 Q Now, is that how the document appears in the  
24 state's files?

25 A (No audible response).

□

1 Q Are you familiar with that?

2 A I'm not sure what's in the file right now.  
3 These documents are frequently updated.

4 Q And I guess, when you were working with the  
5 file, was it organized like this?

6 A (No audible response).

7 Q I mean all in one place?

8 A Yes, sir.

9 Q So there was a binder you could point to  
10 somebody, to say this was the --

11 A The --

12 Q -- the Nutrient Management Plan that --

13 A That the public could come in and review, yes.

14 Q Okay. Now, could we -- you were asked to look  
15 at, I believe, some NRCS forms in this document, and these  
16 were submitted by -- can you tell who submitted this?

17 A I would say Glorieta Geoscience, and they did  
18 it for Ponderosa.

19 Q Okay. So, and then --

20 A But it probably came from Ponderosa.

21 Q Right, but this was submitted by the Applicant  
22 Ponderosa.

23 A Yes.

24 Q And these forms were filled out, your  
25 understanding is, by the Applicant?

214  
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1 A Yes.

2 Q Right. And so it represents what they  
3 believed these -- is the condition?

4 A That's correct.

5 Q Okay. Thank you.

6 I'll unweight that from you and put it back  
7 here for a second.

8 A Okay.

9 Q Now, in response to some questions from  
10 Ms. Tanner on redirect, you essentially said that when you

11 reviewed the Nutrient Management Plan and the permit, you  
12 were not -- your concern was focused on water quality; is  
13 that correct?

14 A That's correct.

15 Q And so would it be fair to say that you did  
16 not take into account considerations for air quality?

17 A That's correct.

18 Q Okay. I'm going to hand you 590 again. This  
19 is Exhibit H. Can you -- I'll direct you to "Criteria  
20 Applicable to All Purposes," and can you read that first  
21 sentence under -- there on the first page?

22 A (Reading)

23 "A nutrient budget for nitrogen, phosphorus,  
24 and potassium shall be developed that considers all  
25 potential sources of nutrients including but not limited

215  
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□

1 to animal manure and organic by-products, waste water,  
2 commercial fertilizer, crop residues, lagoon credits, and  
3 irrigation water."

4 Q And was a nutrient budget -- now, when you  
5 hear the term, "nutrients budget," can you describe in  
6 your mind what that means?

7 A It's balancing the nutrients that are applied  
8 to the fields versus the amount that the crops are up-  
9 taking.

10 Q So in your understanding -- so do you have any  
11 idea of how many -- how much nutrients the dairy's  
12 actually producing?

13 A No. They're regulated based on their  
Page 195

14 application.

15 Q So --

16 A So -- I mean, it could be calculated, yes.

17 Q And how would you calculate that?

18 A Well, there are other losses, but the amount  
19 that's being applied there, they're required to monitor  
20 and report all nutrient sources, and then there's book  
21 values for the up-take rate of the crops that are being  
22 grown.

23 Q But that's -- that's -- what you're talking  
24 about is the amount of processed waste water and manure  
25 that's applied to the fields?

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1 A That's correct.

2 Q Right? And whether or not, then, the amount  
3 of nitrogen that's in there is taken up by the plant  
4 matter, right --

5 A Right.

6 Q -- rather than infiltrated into the  
7 groundwater, in essence.

8 A Well, if there -- there's a limit on how much  
9 they can apply. So there should be minimal infiltration  
10 into the groundwater.

11 Q I guess my question is: Do you know how  
12 much -- does the operation of the dairy, the -- how much  
13 gray water -- excuse me -- processed waste water, manure,  
14 that the dairy actually produces?

15 A Well, the amount that they produce -- the  
16 processed waste water could not exceed the one MGD over a  
Page 196

17 year.

18 Q That they apply to the fields?

19 A Right. well, there would be some evaporation  
20 on there, yes.

21 Q Right, but that -- so that the productive  
22 condition that you wrote regulates how much water they can  
23 apply to the fields, not how much they actually generate?

24 A Correct. That's -- that's what the permit is  
25 based on, is the application.

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1 Q So it's not based on the amount of nutrients  
2 that are actually created by the operation?

3 A Some of the -- correct.

4 Q Okay.

5 A Some of the nutrients are transported off in  
6 the compost.

7 Q Right. So -- but so there's different fates  
8 for the nutrients that are --

9 A Correct.

10 Q -- that are created, right?

11 A Correct.

12 Q So that there is -- there's a certain amount  
13 of animal waste that are produced by the 9,000-odd cows  
14 that are on site?

15 A Uh-huh.

16 Q And then -- but you don't know -- or you  
17 didn't feel it was important to know actually how much  
18 waste was generated?

19 A There's a number in the Nutrient Management  
Page 197

20 Plan. I just don't have that number.

21 Q So it is in the Nutrient Management Plan how  
22 much they actually produce?

23 A There's -- there's calculations on that, yes.

24 Q And I hate to do this to you, but do you think  
25 you could find that in here?

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1 A It could take a while.

2 Q Do you know what section it would be in?

3 A I'd have the look at the Table of Contents.

4 Q Let me ask you this way instead of -- because  
5 I think we can look for it if it's actually there, but did  
6 you ever review a document that said: Here is the amount  
7 of nitrogen that we're producing, and here's the fate of  
8 that nitrogen. This amount is going to be processed as  
9 waste water, and then applied to the fields. This amount  
10 will be from manure, then applied to the fields. This  
11 amount will be composted and then sent off-site --

12 A It should --

13 Q -- and whether that balanced?

14 A (No audible response).

15 Q Did you ever see anything like that?

16 A I can't say that it's in here.

17 MR. MARSHALL: Okay. No further questions.

18 CHAIRMAN DODGION: All right. The question --  
19 don't get up.

20 THE WITNESS: I tried.

21 CHAIRMAN DODGION: Questions from the panel?

22 Stephanie? This is the guy that can answer all those that

23 you had before.

24 COMMISSIONERS' EXAMINATION

25 MEMBER ZIMMERMAN: Yes, yes. I have the area

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1 defined now, which is that picture up there. I was  
2 confused when I saw the other areas on this map.

3 I'd like to understand how the ponds work, and  
4 what's lined, and what's not, and what monitoring wells  
5 are out there. I read it. I heard different things here.  
6 So I'm just curious if you can help with that.

7 THE WITNESS: It's -- that facility is  
8 operated as three dairies.

9 MEMBER ZIMMERMAN: Okay.

10 THE WITNESS: So there are three pond systems:  
11 Dairy 1, Dairy 2, and Dairy 3.

12 MEMBER ZIMMERMAN: Okay.

13 THE WITNESS: Dairy 1 is the one -- I don't  
14 know if it shows up on there -- that has a lot of ponds.  
15 It has probably eight ponds or so.

16 MEMBER ZIMMERMAN: Right. The storage ponds.

17 THE WITNESS: Right. Those are not lined.

18 MEMBER ZIMMERMAN: Okay.

19 THE WITNESS: Those are the ones that have the  
20 monitoring well in place.

21 MEMBER ZIMMERMAN: And that is MW-1?

22 THE WITNESS: That's correct.

23 MEMBER ZIMMERMAN: And has been replaced.

24 There was an old --

25 THE WITNESS: No. MW-1 has not when replaced.  
Page 199

1 MEMBER ZIMMERMAN: Okay. So MW-1. Okay.  
2 THE WITNESS: That's still in permit.  
3 Okay. Dairy 2 had a soil pond system, and the  
4 monitoring well there detected increases in nitrate, as  
5 well as chlorides and TDS. Based on that we required them  
6 to line the pond -- put in a lined pond system.  
7 MEMBER ZIMMERMAN: Okay. So on this map here,  
8 that's a little bit bigger, one of -- this, the one I can  
9 read -- now you're talking about the lagoons --  
10 THE WITNESS: Right.  
11 MEMBER ZIMMERMAN: -- just south of the barn?  
12 THE WITNESS: Right.  
13 MEMBER ZIMMERMAN: Okay. And it looks like  
14 there's three lagoons there -- oh, four lagoons.  
15 THE WITNESS: I don't know that there's that  
16 many. I think that maybe an out-of-date map.  
17 MEMBER ZIMMERMAN: Okay. So how many lagoons  
18 would be at the Barn 2?  
19 THE WITNESS: It's in the Fact Sheet.  
20 MEMBER ZIMMERMAN: This is on the Intervener's  
21 Answer.  
22 THE WITNESS: They're only authorized, I  
23 think, to use the lined ponds that -- where they've all  
24 been reclaimed, but not --  
25 MEMBER ZIMMERMAN: I didn't see much

1 discussion on those.

2 THE WITNESS: Okay. There should be one on  
3 there. It says that the original 3 ponds were abandoned.

4 MEMBER ZIMMERMAN: Okay. Three are abandoned.  
5 So based on permit they cannot use them, because they're  
6 saying they're abandoned.

7 THE WITNESS: They can only use the lined  
8 ponds at Dairy 2.

9 MEMBER ZIMMERMAN: Okay. And there's one  
10 lined pond.

11 THE WITNESS: Right.

12 MR. MARSHALL: Is this a better --

13 THE WITNESS: I think this is the same one  
14 that Ms. Zimmerman has. But these -- the three ponds  
15 there were abandoned. There's just the one lined pond.

16 MEMBER ZIMMERMAN: Okay. And then -- and  
17 south of Barn 2 there is a proposed well, MW-2?

18 THE WITNESS: That is proposed -- that is part  
19 of the monitoring plan that Glorieta and Ponderosa have  
20 proposed to us, and we've accepted, but has not been  
21 implemented.

22 MEMBER ZIMMERMAN: Okay. So let's not talk  
23 about that yet. So there is not a well in that area --

24 THE WITNESS: That's correct.

25 MEMBER ZIMMERMAN: -- a monitoring well?

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□

1 Okay.

2 THE WITNESS: The well that was there has been

01-19-10 SEC Ponderosa Hearing Volume I.txt  
3 abandoned.

4 MEMBER ZIMMERMAN: Okay.

5 THE WITNESS: And at Dairy 3 there are  
6 multiple lined ponds, and because those ponds were  
7 constructed according to the current liner requirements,  
8 there's no monitoring well currently at Dairy 3.

9 MEMBER ZIMMERMAN: Okay. And in the documents  
10 I looked through, it appeared the west lagoon and south  
11 lagoon were unlined, and that is not the case any more?

12 THE WITNESS: They're -- they're not being  
13 used.

14 MEMBER ZIMMERMAN: So those are abandoned?

15 THE WITNESS: They're -- no.

16 MEMBER ZIMMERMAN: No?

17 THE WITNESS: They're in the schedule of  
18 compliance that if they get used twice, then they have to  
19 be lined.

20 MEMBER ZIMMERMAN: Okay. So they're not used?

21 THE WITNESS: Right.

22 MEMBER ZIMMERMAN: They could be?

23 THE WITNESS: They're there for emergency  
24 storm water containment, but if that happens a second  
25 time, the permit requires them to be lined.

223  
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1 MEMBER ZIMMERMAN: It must be lined. Okay.  
2 So the other lagoons are lined?

3 THE WITNESS: That's correct.

4 MEMBER ZIMMERMAN: Okay. And there are no  
5 monitoring wells around that --

6

THE WITNESS: That's correct.

7

MEMBER ZIMMERMAN: -- in service because of

8

the lining?

9

THE WITNESS: Because they're lined.

10

MEMBER ZIMMERMAN: Okay. And at Barn Number

11

1, the lagoons just south of the corrals and north of the

12

storage ponds, are those in use?

13

THE WITNESS: The ones that are listed lagoon

14

1, 2?

15

MEMBER ZIMMERMAN: Yes.

16

THE WITNESS: Yes, I think those are used for

17

their solid separation.

18

MEMBER ZIMMERMAN: And are those lined or

19

required to be monitored?

20

THE WITNESS: Those are monitored -- those

21

were to be monitored under the MW-1.

22

MEMBER ZIMMERMAN: Okay.

23

THE WITNESS: There's only one well put in for

24

each of the two unlined systems. When a problem was

25

detected at Dairy 2, the unlined ponds were replaced with

224

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(775) 882-5322

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1

a lined pond, and the well was abandoned.

2

MEMBER ZIMMERMAN: Okay. So at this point we

3

have one monitoring well?

4

THE WITNESS: That's correct.

5

MEMBER ZIMMERMAN: And that is around Barn 1?

6

THE WITNESS: Yes.

7

MEMBER ZIMMERMAN: Storage ponds. Okay. And

8

then these other fields are available for land

01-19-10 SEC Ponderosa Hearing Volume I.txt  
9 application, Field 1, all the pivots --

10 THE WITNESS: Those 11 fields are listed in  
11 the permit, yes.

12 MEMBER ZIMMERMAN: Okay. And how often would  
13 they get used? would -- and I don't know if you know the  
14 answer to that, but --

15 THE WITNESS: They're pretty much used  
16 continuously.

17 MEMBER ZIMMERMAN: Continuously, up --

18 THE WITNESS: Right.

19 MEMBER ZIMMERMAN: water is applied --

20 THE WITNESS: There's lot of cows there.

21 MEMBER ZIMMERMAN: Right. I have understand.

22 THE WITNESS: So they're raising feed for  
23 them. There's some that they -- some of the fields they  
24 put the cows out on, and there's a lot of processed waste  
25 water to be used.

CAPITOL REPORTERS 225 (775) 882-5322

1 So, I mean, it -- the permit does include a --  
2 seasons when the fields are used, but I don't think any of  
3 them go, like, a year without being used.

4 MEMBER ZIMMERMAN: Okay. Now -- now, in some  
5 of the documentation it appears that you would want to  
6 test the soil before applying, to understand all of the  
7 nutrients in there. Does that occur on a regular basis?  
8 You know, on the documents I see testing, say, you know,  
9 three to five years.

10 THE WITNESS: Right. That's based on the  
11 cropping patterns.

12

MEMBER ZIMMERMAN: Okay.

13

THE WITNESS: If -- if it's an annual crop, I think they're required to be tested every three years.

15

MEMBER ZIMMERMAN: Right.

16

THE WITNESS: It's a perennial, every five years.

18

MEMBER ZIMMERMAN: And how does this testing of the soil before applying come into play?

20

THE WITNESS: They -- well, all of these fields have been used before the current regulations were in place, before the NMP requirements were as strict as they are now. So, I mean, it's -- they are -- they were sampled to prepare the NMP. That data was used to prepare that large document sitting on the floor here. So they

226

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(775) 882-5322

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1

had to do a soil analysis to prepare this document.

2

MEMBER ZIMMERMAN: And would they have done that on all of the fields and pivots?

4

THE WITNESS: Yes.

5

MEMBER ZIMMERMAN: So there could not be an opportunity to let it sit for a while, based on their operations, to have the numbers -- you know, the results -- I mean, would there -- would there be a way to --

10

THE WITNESS: You would -- I think that would have to be more of an operational decision that you'd have to ask the dairy.

13

MEMBER ZIMMERMAN: Okay.

14

THE WITNESS: You know, there's a potential

15 for modifying, which is in the Nutrient Management Plan.  
16 If they say we're putting in a crop that required a lot  
17 more water and more nitrogen, then they might be able to  
18 do something like that.

19 MEMBER ZIMMERMAN: Okay.

20 THE WITNESS: But right now the way they --  
21 the Nutrient Management Plan is written, is they don't  
22 have enough area to let something sit fallow for a year.

23 MEMBER ZIMMERMAN: Okay.

24 THE WITNESS: If that's what your question  
25 was.

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□

1 MEMBER ZIMMERMAN: Yes. And in your opinion  
2 could the -- based on the applications, could the nitrogen  
3 actually -- the nitrates actually reach the groundwater at  
4 some point, assuming -- presuming they weren't following  
5 the permit, and they were just applying to the land, could  
6 those nitrates ultimately reach groundwater, which is,  
7 what, 85, 90 feet deep?

8 THE WITNESS: They're -- there's a permit in  
9 place.

10 MEMBER ZIMMERMAN: Uh-huh.

11 THE WITNESS: They're required to monitor and  
12 report to us quarterly. So --

13 MEMBER ZIMMERMAN: what do they report  
14 quarterly?

15 THE WITNESS: There was a quarterly report  
16 that's required. Most of these -- the -- some of the  
17 analyses -- there's something that's done monthly. I know

01-19-10 SEC Ponderosa Hearing Volume I.txt  
18 the monitoring wells are monitored quarterly.

19 MEMBER ZIMMERMAN: Uh-huh.

20 THE WITNESS: Most of it is more annual and  
21 bi-annual.

22 MEMBER ZIMMERMAN: Uh-huh.

23 THE WITNESS: And then if there is a release,  
24 that has to be reported, you know, within 24 hours.

25 MEMBER ZIMMERMAN: Uh-huh. Okay. Now, do you

228  
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1 know if this letter, this June 19th letter proposing the  
2 additional wells -- have those been installed or are  
3 they --

4 THE WITNESS: No.

5 MEMBER ZIMMERMAN: -- waiting for this?

6 THE WITNESS: They're waiting for this matter  
7 to be resolved before the SEC.

8 MEMBER ZIMMERMAN: Okay. If -- if -- you said  
9 the State approved this plan, would this become part of  
10 the permit?

11 THE WITNESS: It was not -- I don't think that  
12 was the plan.

13 MEMBER ZIMMERMAN: Okay.

14 THE WITNESS: I think the plan was to evaluate  
15 it at the next permit renewal and determine whether it's  
16 appropriate to put it in at that time.

17 MEMBER ZIMMERMAN: Okay. And there are about  
18 two years left on this existing permit, the current  
19 permit?

20 THE WITNESS: It's probably a little -- well,

21

it's less than three.

22

MEMBER ZIMMERMAN: Okay.

23

THE WITNESS: I think it was issued in late

24

October.

25

MEMBER ZIMMERMAN: Okay. So have you -- so

229

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(775) 882-5322

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1

you have had some testing on the fields submitted?

2

THE WITNESS: In the Nutrient Management Plan,

3

yes, but they're not up on three years yet from when the

4

permit was issued.

5

MEMBER ZIMMERMAN: Right. But previous ones

6

you had --

7

THE WITNESS: Yes, there's older data.

8

MEMBER ZIMMERMAN: And have those ever

9

exceeded the limitations?

10

THE WITNESS: There are -- there are not

11

really limitations on the soil. The soil's analyses are

12

used to the determine what the application rate is,

13

because there is going to be residual nitrogen in the soil

14

that's available.

15

MEMBER ZIMMERMAN: Uh-huh.

16

THE WITNESS: So if there's a lot of nitrogen

17

available in the soil, then your application rate will be

18

reduced, but there's no limit on what's in the soil.

19

MEMBER ZIMMERMAN: And so the State does not

20

have concerns of those nutrients, or excess nitrates, or

21

nitrogen getting into the groundwater?

22

THE WITNESS: It's used to balance the amount

23

that's applied. I mean, that's --

24 MEMBER ZIMMERMAN: And that's why, right, to  
25 keep it from -- from excess amounts getting into the

230  
CAPITOL REPORTERS (775) 882-5322

1 groundwater?

2 THE WITNESS: That's correct.

3 MEMBER ZIMMERMAN: Okay. That's it for me  
4 now. I may have more.

5 CHAIRMAN DODGION: Alan?

6 MEMBER COYNER: Do you want me to go before  
7 you?

8 CHAIRMAN DODGION: Sure.

9 MEMBER COYNER: Oh, you must be saving it all  
10 up. Sorry, Bruce, I have to walk you through the  
11 groundwater monitoring again.

12 with regards to the permit -- big permit?  
13 Small permit? One of a kind in Nevada?

14 THE WITNESS: This was -- well, it's the  
15 largest area in the state, if that's what you're asking.

16 MEMBER COYNER: Anything close to it?  
17 Anything half its size?

18 THE WITNESS: In size? No.

19 MEMBER COYNER: So this is way out there?

20 THE WITNESS: It doesn't mean there couldn't  
21 be something coming along.

22 MEMBER COYNER: But right now, currently  
23 issued permits, the ones that you've reviewed in your time  
24 at the Division.

25 THE WITNESS: There was a dairy that was close

231  
CAPITOL REPORTERS (775) 882-5322  
Page 209

1 to this size. I don't know if it's still in operation, in  
2 wabuska. They were permitted separately, but they were a  
3 family operation, you know, separated because one brother  
4 owned one facility. Another brother owns the other two,  
5 but it would be more than half this size, but --

6 MEMBER COYNER: Okay. Did you draw any  
7 experience from that operation and funnel it into this  
8 permit?

9 THE WITNESS: No, that was not an NPDS permit.  
10 That permit is a State groundwater permit. That is our --  
11 you know, a lot of the CAFOS may end up being that way.

12 MEMBER COYNER: Sure. So kind of cutting new  
13 ground here in terms of what you're requiring in the  
14 permit?

15 THE WITNESS: Yes.

16 MEMBER COYNER: Okay. I kind of tracked  
17 the -- from 8, 19 to 20, or 20 -- of the draft, the Fact  
18 Sheet, you know, and so forth through here. And, you  
19 know, that initial Fact Sheet, which if you can help Bruce  
20 look at that. You got it?

21 MS. TANNER: Uh-huh.

22 MEMBER COYNER: Exhibit 18, I notice there was  
23 a paragraph, and some of this is a little repetitive, but  
24 bear with me. Discrete groundwater sample should be  
25 collected to confirm -- I'm sorry --

232  
CAPITOL REPORTERS (775) 882-5322

1 THE REPORTER: Thank you.  
Page 210

2 MEMBER COYNER: -- to confirm the effective  
3 protection of groundwater on the re-established discharge  
4 conditions of this permit. If the permittee constructs  
5 liners meeting the division's minimum specifications in  
6 all ponds and lagoons, monitoring wells shall not can be  
7 required by this permit.

8 Realizing that was at the front end, before  
9 you thought everything through, but I guess knowing that  
10 you had unlined ponds -- and I think there's another sort  
11 of section in here that talks about numerous violations --  
12 "Compliance History," it's called.

13 Between those two items, how would you imagine  
14 that you wouldn't need monitoring wells? And I'm just  
15 trying to get your thinking as we step through the permit.  
16 To me it was like a no-brainer that you had to have  
17 monitoring wells.

18 THE WITNESS: Yes.

19 MEMBER COYNER: But yet in the beginning they  
20 were not.

21 THE WITNESS: They were really two issues in  
22 there under the compliance. One of them was the Dairy 2  
23 pond system, and that identified a problem. I mean, that  
24 was -- that was in the list of non-compliance items.

25 And the other -- you know, we depicted a

1 problem, so we eliminated the source. And once the source  
2 was eliminated, we didn't feel that groundwater monitoring  
3 was necessary any more.

4 The -- a large number of the other  
Page 211

5 non-compliance items had to do with them meeting the flow  
6 limits. When the earlier permit was issued, they did not  
7 have any way to adequately monitor the processed waste  
8 water.

9 We required them to put in a lot of flow  
10 measuring devices. One that was done, they realized that  
11 their estimates were off, and they were struggling to get  
12 into compliance, because the permit had a flow limitation  
13 that they had based on an estimate, but the meters were  
14 showing that they had estimated too low.

15 So they had to take several measures to  
16 conserve water, and they got lucky with some of that, that  
17 there were dry years, that there was not lot of water  
18 necessary for washing the cows and things like that. But  
19 that -- they still were able to apply at the agronomic  
20 rates, even though there -- they were exceeding the flow  
21 limits.

22 MEMBER COYNER: Okay. Given that, wouldn't  
23 the groundwater monitoring wells be the gold standard?  
24 Isn't that what you're going to stand on for protecting  
25 the waters of the states?

234  
CAPITOL REPORTERS (775) 882-5322

1 THE WITNESS: We determined it was not  
2 necessary if they're applying the nutrients according to  
3 an approved Nutrient Management Plan and the ponds were  
4 lined. When the ponds were not lined, we did require  
5 monitoring wells.

6 MEMBER COYNER: I understand, but just, in  
7 general, wouldn't you agree with the statement that

8 groundwater monitoring is still the best way to determine  
9 whether there's impact to the waters of the state, rather  
10 than calculations, rather than Nutrient Management Plans,  
11 that try to do balancing and calculations, and, you know,  
12 smoke and mirrors, and all that stuff.

13 But isn't it the groundwater monitoring wells  
14 the gold standard? If you were going to go to court on  
15 whether the dairy was polluting the waters of this state,  
16 wouldn't you want to be able to prove it by groundwater  
17 monitoring sampling? Is that a fair question?

18 THE WITNESS: That would give you additional  
19 data.

20 MEMBER COYNER: Additional data. wouldn't you  
21 rather stand on that as your primary data? I would.

22 Okay. Let's talk a little bit about -- in the  
23 final permit, then. The two tables -- and a lot these say  
24 monitor and report --

25 THE WITNESS: Yes.

235  
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1 MEMBER COYNER: -- effluent. In the effluent  
2 discharge limitations we have monitor and report for most  
3 all of these, and there's a big long list, or a longer  
4 list. And I'm referring to Exhibit 20, which -- is that  
5 the actual permit? Yes, it is.

6 Table 1.1, page 2, and then Table 1-2, page 4.  
7 The surface discharge has a long list of things that we  
8 need to be looked at or analyzed for. And the groundwater  
9 has a rather short list. why is that, in general?

10 THE WITNESS: Okay. In general --  
Page 213

11 MEMBER COYNER: Are there things that don't  
12 happen in one that --

13 THE WITNESS: The groundwater is looking --  
14 the groundwater monitoring was looking at parameters that  
15 would be identified as leakage from processed waste water.  
16 Chlorides, nitrate, TDS move through the soil rapidly. So  
17 those would be showing up sooner than some of the other  
18 things that we could have been monitoring for. You know,  
19 we were looking -- we require them to graph those  
20 parameters so we can see if there's increasing trends.

21 A lot of the data in the first table is  
22 collected to -- for compliance with the Nutrient  
23 Management Plan. It's gathering data that is inputted  
24 into the equation to determine what the application rates  
25 are. Like I said earlier, we don't limit the nitrogen

CAPITOL REPORTERS <sup>236</sup> (775) 882-5322

1 that's in the soil, but that can affect the amount of the  
2 nitrogen that can be applied.

3 MEMBER COYNER: Why isn't fecal coliform on  
4 the groundwater list?

5 MEMBER ZIMMERMAN: What was the question?

6 MEMBER COYNER: Why isn't fecal coliform on  
7 the groundwater list?

8 THE WITNESS: Because if there's leakage from  
9 the pond system, the chlorides and nitrate would show up  
10 much sooner than fecal coliform. It's larger.

11 MEMBER COYNER: So it's proxy.

12 THE WITNESS: Yes.

13 MEMBER COYNER: By proxy?

14 THE WITNESS: Yes.

15 MEMBER COYNER: You would use that?

16 THE WITNESS: Right.

17 MEMBER COYNER: And explain to me what monitor  
18 and report -- well, there's a requirement, and it says  
19 monitor and report. Where does that leave you with  
20 regards to exceedances or out of compliance?

21 THE WITNESS: They're still required to comply  
22 with the Nutrient Management Plan.

23 MEMBER COYNER: So the --

24 THE WITNESS: That's why the terms of the  
25 Nutrient Management Plan were incorporated into the

237  
CAPITOL REPORTERS (775) 882-5322

1 permit.

2 MEMBER COYNER: So the chlorides -- the amount  
3 of chlorides in milligram per liter is set in the  
4 Nutrients Management Plan?

5 THE WITNESS: The -- no. The chlorides are  
6 just done more as an indicator of potential problems.

7 The chlorides were -- are, for the various  
8 water sources, to see if there -- you know, if there's a  
9 release or something, to kind of identify what chloride  
10 levels we'd be looking at, to see whether the -- you know,  
11 whether there -- say if there had been a release, if it  
12 had impacted a surface water.

13 MEMBER COYNER: So nitrogen is the only one  
14 that you're going to look at separately for a quantitative  
15 exceedance? We've got 10 on milligrams per liter. Again,  
16 groundwater monitoring. That's the -- really the only one

17 that -- you know, if they were outside of their permit --  
18 if they're going to be in non-compliance, it would be  
19 because it would be more than 10?

20 THE WITNESS: The total nitrogen of 10, yes.  
21 The chloride standards -- when you start looking at  
22 chloride you have to compare it to background and things  
23 like that. The nitrate, we know what the background  
24 level -- the -- we know what the nitrate level is in the  
25 background in that area. So if it approaches 10, we know

238  
CAPITOL REPORTERS (775) 882-5322

1 that there's a problem. And the way the permit is  
2 written, it does have a 7, 9, 10. It doesn't wait until  
3 it gets to 10.

4 MEMBER COYNER: Are most of the groundwater  
5 monitoring permits that we write like this, or do they  
6 have more numerical limits? And let's say for mining.

7 THE WITNESS: For mining?

8 MEMBER COYNER: Uh-huh.

9 THE WITNESS: There are no limits in the  
10 mining permits.

11 MEMBER COYNER: All at for groundwater?

12 THE WITNESS: Not for a mining permit. There  
13 are for RIB permits, but the mining permits do not include  
14 any standards.

15 MEMBER COYNER: Okay. So we move -- we've got  
16 our final permit that was issued. How many groundwater  
17 monitoring wells -- I'm sorry, Stephanie. I think you  
18 said two -- are there in this permit, called for in this  
19 permit?

20 THE WITNESS: There is one groundwater  
21 monitoring well in that permit, and that could go away if  
22 the permittee lined the Dairy 1 pond system.

23 MEMBER COYNER: I hope not. MW-1 is the one  
24 that's still basically the one that's in the place.

25 THE WITNESS: The one that's there, yes.

239  
CAPITOL REPORTERS (775) 882-5322

1 MEMBER COYNER: Okay. Now, in the permit that  
2 says -- right about minor modification. So Table 1.2,  
3 page 4, end of footnotes. Additional monitoring wells may  
4 be added to the permit as a minor modification.

5 THE WITNESS: Correct.

6 MEMBER COYNER: Am I to understand that the  
7 proposal from the dairy, through Glorieta, which is your  
8 picture, which is Exhibit -- I don't know where it was --  
9 back here -- 22 -- Exhibit 22, has the Ponderosa Dairy  
10 site map with propose the monitoring wells. Is this going  
11 to -- is this proposed to come in as a minor modification?

12 THE WITNESS: No. That was proposed as  
13 voluntary additional monitoring, and that was going to be  
14 re-evaluated during the next permit renewal to determine  
15 whether it was appropriate to bring it in or not.

16 MEMBER COYNER: Why does it say additional  
17 monitoring wells may be added to the permit as a minor  
18 modification?

19 THE WITNESS: Because if we determined there  
20 were other problems here, we wanted to have the  
21 flexibility of adding more wells.

22 MEMBER COYNER: Okay. So, again, you're not  
Page 217

23 requiring more wells. They're voluntarily adding them?

24 THE WITNESS: That -- that was the additional  
25 monitoring plan that was submitted, yes.

240  
CAPITOL REPORTERS (775) 882-5322

1 MEMBER COYNER: Okay. And you can say --

2 THE WITNESS: But -- but if we identified a  
3 problem, we may -- we may be telling them to put in other  
4 wells.

5 MEMBER COYNER: Understand.

6 THE WITNESS: We just wanted to make it clear  
7 that we had that option.

8 MEMBER COYNER: If this comes in, does it  
9 become part of the permits? If, in the future, you accept  
10 this voluntary monitoring, does it become part of the  
11 permit?

12 THE WITNESS: The plan was to evaluate that at  
13 the next permit renewal. So I don't think we're ready to  
14 say whether it would or not.

15 MEMBER COYNER: So that would be subject to  
16 public notice --

17 THE WITNESS: Right.

18 MEMBER COYNER: -- public discussion, are the  
19 wells in the right place, is there enough wells, so forth,  
20 and so on?

21 THE WITNESS: Yes. The monitoring plan's  
22 already been submitted. So it is part of the public  
23 report now. So --

24 MEMBER COYNER: Oh, well, in that -- in that  
25 vein, then, has MW-1 showed anything with regards to

1 monitoring reports, to date, that would lead you to have  
2 any concerns?

3 THE WITNESS: MW-1 needs to be replaced.

4 MEMBER COYNER: That's not the answer to the  
5 question.

6 THE WITNESS: I have no data. The groundwater  
7 in that area has been drawdown below the bottom of the  
8 well. So we don't have any current data.

9 MEMBER COYNER: When was the last time we had  
10 data?

11 (Discussion off the record)

12 THE WITNESS: Uh, it's probably been a couple  
13 years.

14 MEMBER COYNER: A couple years. When was this  
15 permit issued?

16 THE WITNESS: The permit was issued just  
17 before the well went permanently dry.

18 MEMBER COYNER: So was there data from that  
19 well that was considered when this permit was being --

20 THE WITNESS: Yes, right.

21 MEMBER COYNER: And did that data show  
22 anything of concern?

23 THE WITNESS: No.

24 MEMBER COYNER: Okay. That's it.

25 CHAIRMAN DODGION: Back to the minor

1 modification.

2 THE WITNESS: Yes.

3 CHAIRMAN DODGION: I understand that when you  
4 to go renew the permit, in two and a half years, and want  
5 to incorporate that monitoring plan, it would be subject  
6 to public notice, and public hearing, and public input.

7 However, as a general condition of the permit,  
8 during the life of the permit, would you have to have a  
9 public hearing, public input, and so on, to incorporate  
10 that monitoring plan?

11 THE WITNESS: No. That was the purpose of  
12 putting that line in there, that additional wells could be  
13 added as a minor modification. We -- if we identified a  
14 problem, we wanted to be able to put wells in right away,  
15 rather than going through the -- taking the time to go  
16 through a public review process. We were getting data.  
17 We know the condition of the ponds. If we felt new wells  
18 were necessary --

19 CHAIRMAN DODGION: I do understand that. And  
20 this voluntary groundwater monitoring plan is a little bit  
21 different.

22 THE WITNESS: Right.

23 CHAIRMAN DODGION: If you -- say if this panel  
24 decided that we wanted to see that incorporated in the  
25 permit, would you have to go to public hearing -- public

CAPITOL REPORTERS <sup>243</sup> (775) 882-5322

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1 notice, public hearing, so it's public participation?

2 THE WITNESS: No, no. I think we could

01-19-10 SEC Ponderosa Hearing Volume I.txt  
3 utilize that footnote and put it in as a minor  
4 modification.

5 CHAIRMAN DODGION: The only other question I  
6 have is I believe you stated that the land application  
7 areas are used to the max. And that there is no reserve  
8 area in case soil sampling or something else were to show  
9 that the land application of a particular field was  
10 causing groundwater contamination, they would not have any  
11 place to being with that processed water?

12 THE WITNESS: I don't know whether the dairy  
13 owns additional land in the area, but if they were to  
14 propose fields other than these eleven, they would be  
15 major modification of the permit. So we would have to go  
16 through the public process.

17 CHAIRMAN DODGION: That was necessary, in your  
18 view, to have an emergency area or a reserve area?

19 THE WITNESS: That would probably be a better  
20 situation, but that was not what was proposed, and we felt  
21 that we could make this work.

22 CHAIRMAN DODGION: Okay. Any other questions?

23 MEMBER ZIMMERMAN: No.

24 CHAIRMAN DODGION: Bruce, thank you.

25 THE WITNESS: Yes.

CAPITOL REPORTERS <sup>244</sup> (775) 882-5322

1 MS. TANNER: Are we allowed to redirect?

2 CHAIRMAN DODGION: I gave you the redirect  
3 shot once before. So -- then I've got to go here, and  
4 there. So I'm going to send you home. You had your  
5 opportunity.

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25

MS. TANNER: Okay. Thank you.

CHAIRMAN DODGION: You can cover it in your --  
with another witness, however you want to do it.

(Discussion off the record)

CHAIRMAN DODGION: So, Ms. Tanner, you're back  
up.

MS. TANNER: That would be the end of my case.  
I would rest.

CHAIRMAN DODGION: So at this point you rest  
your case in chief?

MS. TANNER: Uh-huh.

CHAIRMAN DODGION: All right. At this point  
I'd like to take another -- let's -- until 10 minutes to  
4:00, a break, and then we'll be ready for the  
Intervener's case.

(Proceedings recessed from 3:40 p.m. until 3:50 p.m.)

CHAIRMAN DODGION: All right.

MR. BUTLER: Mr. Chairman, our first witness  
will be Mr. Jay Lazarus.

THE REPORTER: Raise your right hand.

CAPITOL REPORTERS <sup>245</sup> (775) 882-5322

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7  
8

JAY LAZARUS,  
having been previously duly sworn,  
was examined and testified as follows:

MR. BUTLER: We have some slides that I have  
copies of. Oh, I'm not sure if we will move to admit  
these are not. Most of them are from public sources or  
are documents that are otherwise already in the record,  
but we can ask that question when we get to the end.

9

10 BY MR. BUTLER:

11 Q Mr. Lazarus, can you state your name for the  
12 record?

13 A Jay Lawrence Lazarus.

14 Q And tell us where you work.

15 A I'm President and Senior Geohydrologist of  
16 Glorieta Geoscience, Inc., 1723 Second Street, Santa Fe,  
17 New Mexico.

18 Q Can you tell me what Glorieta Geoscience is?

19 A Glorieta Geoscience has been in business -- we  
20 happily celebrated our 30th anniversary this last  
21 Thanksgiving. We provide consulting services in  
22 hydrology, geology, water rights, agronomy, irrigation,  
23 CAFO permitting, CAFO development, geomorphology, and  
24 other environmental studies.

25 Q Were you retained by the Ponderosa Dairy?

CAPITOL REPORTERS <sup>246</sup> (775) 882-5322

□

1 A Yes, sir.

2 Q When?

3 A In 1998.

4 Q Can you describe the work that you've done for  
5 the dairy?

6 A Since 1998 we have been providing  
7 environmental compliance related services, agronomy  
8 services, some water supply services, and overall  
9 compliance assistance through the dairy for their nutrient  
10 management and overall environmental permitting.

11 Q And so have you visited the dairy?

12

A Many times.

13

Q How many times?

14

A I don't know.

15

Q More than 12?

16

A Oh, yeah.

17

Q Okay. Do you do similar work for other

18

dairies?

19

A I believe right now that actually I'm

20

principal in charge of groundwater discharge permitting

21

for probably about 25 dairies in New Mexico. I'm the

22

hydrology and environmental consultant to Dairy Producers

23

of New Mexico, which is a trade organization of over a

24

hundred dairies in New Mexico.

25

I -- since 1998 until about a year ago I was

247

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1

responsible for negotiating the Federal CAFO Rule on

2

behalf of the State of New Mexico, and I am currently the

3

chief technical representative for the dairy industry on

4

drafting of dairy-specific rules for New Mexico.

5

Q And so the 25 dairies you work for, those are

6

exclusively or mostly permitted under the CAFO

7

regulations?

8

A They're generally permitted under the New

9

Mexico Environment Department of Groundwater Discharge

10

Permit Regulations, the Texas Council on Environmental

11

Quality Regulations, and these regulations here in Nevada.

12

Q Do you -- what's your experience with Nutrient

13

Management Plans?

14

A well, I helped develop the nutrient management

01-19-10 SEC Ponderosa Hearing Volume I.txt  
15 template for the Region 6 CAFO permit, in terms of  
16 Comprehensive Nutrient Management Plans last -- it would  
17 be October of 2008. I taught the hydrology and permitting  
18 module for the CNMP training workshop for all of New  
19 Mexico.

20 Q So you teach classes in preparing  
21 Comprehensive Nutrient Management Plans?

22 A Yes, sir.

23 Q And you also, in your consulting business,  
24 prepare those for permit applicants?

25 A My company does that. That's correct.

CAPITOL REPORTERS <sup>248</sup> (775) 882-5322

1 Q What was your role in the Ponderosa Dairy  
2 Nutrient Management Plan?

3 A I was basically the principal in charge.  
4 Mr. Ganta, our Senior Agronomist, worked on the data  
5 compilation and data analysis. And I worked with  
6 Mr. Ganta on all the quality assurance, quality control  
7 portions of it, and the conceptualization of the overall  
8 nutrient management for the facility.

9 Q You have Exhibit -- I think we called it  
10 Number 6 (sic).

11 (Intervener's Exhibit No. 8 marked  
12 for Identification)

13 BY MR. BUTLER:

14 Q Let me double-check the number. No, I'm  
15 sorry. It's Number 8, which is your resume.

16 A Yes, I do.

17 MR. BUTLER: I'd like to move admission of

01-19-10 SEC Ponderosa Hearing Volume I.txt  
Intervener Exhibit 8, please.

18

19 MS. TANNER: No objection.

20 CHAIRMAN DODGION: 8. Let me see if I can  
21 find it.

22 MR. BUTLER: It's -- there's a small binder  
23 that has all of our exhibits in it.

24 CHAIRMAN DODGION: I do not believe I have it.

25 (Discussion off the record)

CAPITOL REPORTERS <sup>249</sup> (775) 882-5322

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1 MR. BUTLER: Move admission of Intervener  
2 Exhibit Number 8.

3 MR. MARSHALL: No objection.

4 MS. TANNER: No objection.

5 (Intervener's Exhibit No. 8 received  
6 into Evidence)

7 MR. BUTLER: Mr. Chairman, it's our intent to  
8 offer Mr. Lazarus as an expert witness in hydrology,  
9 geology, permitting under the CAFO rules, and preparation  
10 and implementation of Nutrient Management Plans and  
11 Comprehensive Nutrient Management Plans.

12 I've asked him questions about his specific  
13 experience in this case and dealing with those last two  
14 subjects. I'm prepared to go into that in great detail,  
15 but I don't think we need to. I would offer him as an  
16 expert. If Mr. Marshall has objections or if the panel  
17 has questions, Mr. Lazarus will answer those.

18 CHAIRMAN DODGION: Do you have any objections  
19 to his expert status?

20 MR. MARSHALL: I -- I agree that he is very

01-19-10 SEC Ponderosa Hearing Volume I.txt  
21 well versed in these applicable regulations and the  
22 production of Nutrient Management Plans. I think, as we  
23 discussed earlier, whether or not he's an expert is  
24 irrelevant in some ways to this proceeding, but  
25 notwithstanding those general objections, if would you

250  
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1 like him to be qualified as an expert, I do not object to  
2 that?

3 CHAIRMAN DODGION: We accepted his resume, and  
4 we'll go forward from there then.

5 BY MR. BUTLER:

6 Q Mr. Lazarus, did you prepare a voluntary  
7 Groundwater Monitoring Plan for the Ponderosa Dairy?

8 A Yes, sir.

9 Q And this is a map we were referring to when  
10 Mr. Holmgren was testifying. Could you, very quickly,  
11 sort of walk through the current status of some of the  
12 facilities there, particularly the lagoons and the  
13 monitoring wells, just so we're up-to-date?

14 A Sure.

15 Q There is -- there's a pointer on there.

16 A Okay. Thank you.

17 Q It's right there.

18 A Got it. Okay.

19 Ponderosa Dairy is composed of three milking  
20 barns: Milking Barn 1, Milking Barn 2, and the most  
21 recently constructed, Milking Barn Number 3.

22 All three of these barns are surrounded by  
23 corral systems, where the cows walk into the barns, get

24 milked. They're washed down for cow herd health and also  
25 for milk quality. We have very stringent milk quality

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1 regulations.

2 water generated in these individual milking  
3 parlors, as we refer to them, flows to sumps behind the  
4 barn, and then is pumped through separators to lined  
5 lagoon system at Barn 3, a lined lagoon over here -- I'm  
6 sorry -- at Barn 1, and another lined lagoon at Barn 2.  
7 And when I -- I'll rephrase this. These are synthetically  
8 lined lagoons.

9 we have clay lined settling basins, here  
10 behind Barn 1, that have been functioning as settling  
11 basins to settle out the solids before they go in to land  
12 application or into the different specific lagoons. All  
13 of the lagoons are plumbed such that we can transfer water  
14 this way, back and forth between them, depending on which  
15 fields need the green water and which fields wouldn't need  
16 the green water.

17 The water is generated, as I said, in the  
18 milking parlors. Previously, we had different setups at  
19 Barn 1 and Barn 2. And if the panel will bear with me,  
20 it's my understanding -- if I'm wrong, correct me -- that  
21 this is your first dairy hearing, so I want to give a  
22 little history of the dairy and give some background in  
23 terms of how dairies operate.

24 MR. BUTLER: Keep it brief.

25 THE WITNESS: Yes, sir.

CAPITOL REPORTERS 252 (775) 882-5322  
Page 228

1 MR. BUTLER: Okay.

2 CHAIRMAN DODGION: Thank you.

3 THE WITNESS: Okay. Originally, Barn 1 and  
4 Barn 2 were constructed as flush dairies. Barn 3 was  
5 constructed as a scrape dairy. Now, I'll explain the  
6 difference.

7 Flush dairies is -- with all due respect to  
8 anybody here in the room -- is an old California design to  
9 take care of the manure in the corrals. I'll try not to  
10 drop into the dairy vernacular, but the cows excrete out  
11 most of the manure while they're eating. And they're  
12 generally eating, you know, on the field lines, in the  
13 head locks, and most of the manure is generated there.

14 In the older flush systems that we had at  
15 Milking Barn 1 and Milking Barn 2, the water was recycled  
16 from the milking parlor. The milk comes out of the cow at  
17 pretty much the body temperature of the cow. It's  
18 instantly chilled down to about 35, 36 degrees, prior to  
19 transport.

20 Historically the milk has been chilled using  
21 water-cooled chillers. Groundwater is coming out about  
22 54, 55 degrees. We can use the coolness in that  
23 groundwater to help us chill the milk down, and then the  
24 rest is done mechanically.

25 So that water, in Barn 1 and Barn 2, from the

2 does, what a flush system does is it puts the manure in  
3 the water, and then you've got to take it out again. So  
4 you're increasing the nitrogen concentration in that green  
5 water going to your lagoons, compared to a scrape dairy.

6 When we built Barn 3, there was a lot of  
7 discussion, and Mr. Goedhart and I fortunately prevailed a  
8 Barn 3, and we detained that as a scrape dairy to limit  
9 the amount of manure solids and associated nitrogen  
10 compounds going into the green water. In the past two  
11 years we have retrofitted to change Barn 1 and Barn 2 from  
12 flush to scrape at the cost before \$100,000 per milking  
13 parlor.

14 BY MR. BUTLER:

15 Q Now, Jay, can you jump to: why is that  
16 relevant to the NMP and the permit?

17 A The NMP is written to balance the nutrients  
18 generated from the green water with the nutrients applied  
19 to the field. The relevance is since we have converted  
20 Barn 1 and Barn 2 to scrape from flush, our concentration  
21 of what we -- TKN, Total Kjeldahl Nitrogen, which is  
22 ammonia and organic nitrogen -- carbon-bound nitrogen is  
23 what we have in our lagoons. That concentration is  
24 decreased by about 40 percent.

25 So we were looking at concentrations in the

1 ballpark of about 250 or greater parts per million,  
2 average, Total Kjeldahl Nitrogen in the lagoons. Now  
3 we're seeing concentrations running between 140 and 160  
4 parts per million. So there's significantly less nitrogen

5 going into the lagoons and out on the fields.

6 So the balancing that we calculated for our  
7 available nutrients and our crop update was based on TKN  
8 concentrations in the ballpark 250, and we are right now  
9 putting out between about 140 to 160, based on the most  
10 recent analyses.

11 This gets back to the question, I believe,  
12 that the Chairman had about: Do we have any extra land in  
13 case of an upset or excess nitrogen being applied? well,  
14 what we've done is we've decreased the total amount of  
15 nitrogen going on to the fields. It had balanced it  
16 around 250. Now we're about 40 percent or so lower than  
17 that.

18 Q So you had more flexibility, more room in the  
19 balancing system?

20 A Absolutely.

21 Q Okay. Can we go back to the first slide, and  
22 I want to talk about how you prepared the groundwater  
23 monitoring plan.

24 A Okay.

25 Q What information did you consider?

255  
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1 A Well, the first thing we do when we want to  
2 look at a groundwater monitoring plan is try and determine  
3 what the regional groundwater flow direction is, and then  
4 reduce it down to the on-site groundwater flow direction.

5 So the first thing we did was look at the U.S.  
6 Geological Survey, Death Valley Ground Flow Water Model.  
7 And as you can see, on here, these blue arrows are

8 direction of groundwater flow.

9 And I believe this reflects accurately what I  
10 believe Mr. Marshall spoke to earlier about groundwater  
11 flowing in a lot of different directions in this area, and  
12 that can have to do with both pumping stresses and any  
13 kind of discontinuities that might exist more in the  
14 bedrock portions of the water table.

15 So the first thing we did was look at the USGS  
16 map, and we're looking at a general northeast to southwest  
17 flow direction and northwest to southeast, but we have  
18 localized areas of different groundwater flow direction.

19 Then what we did, we took post-1990 water  
20 level data, reported from nearby wells, to look at what we  
21 would call a more sub-regional type view of this. So we  
22 looked at the regional with the USGS. Then we took  
23 reported water levels from various wells around here, and  
24 you can see the different wells identified.

25 And this approximately is two miles from the

256  
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1 dairy barn boundary. So when we say a sub-regional sense  
2 here, the groundwater is flowing generally to the  
3 southeast with maybe more -- a little bit more southerly  
4 component.

5 Then we took that information and said:  
6 what's happening on the dairy proper? So based on water  
7 level measurements in -- I'm sorry -- in 2009, okay, the  
8 general groundwater flow direction here at the dairy is  
9 generally to the east with a very flat gradient of about  
10 six -- .006 feet per foot. And that's basically the slope

11 of the water table.

12 Q Now, based on that did you place the  
13 monitoring wells?

14 A Yes, sir.

15 Q Now, can you explain, in your view, in  
16 preparing this plan, what was the purpose of the  
17 groundwater monitoring plan?

18 A The purpose of any groundwater monitoring plan  
19 is to make sure that the water quality and water resources  
20 of the state are being protected from any potential  
21 contamination. So when we look at contaminant sources,  
22 we're looking for locations, such as these lagoons, the  
23 green water lagoons that have a constant head in them.

24 So there's always water in them. There's  
25 always the potential. There's pressure pushing down

257  
CAPITOL REPORTERS (775) 882-5322

1 (witness indicating). So if there's going to be any  
2 potential seepage to groundwater, we're looking at these  
3 lagoon systems, because there's always a constant supply  
4 of water and a constant head, and it would be no different  
5 than looking at a synthetically lined lagoon at a mining  
6 facility or a waste water treatment plant.

7 So what we did is we looked at our groundwater  
8 flow direction, and, you know, we made a determination.  
9 Locally, it's going west to east. Sub-regionally, it has  
10 more of a southeasterly component to it.

11 So what we did was propose monitoring well  
12 locations to the -- generally the south and/or east of  
13 these three lagoon systems that would have what I refer to  
Page 233

14 as a constant head of water.

15 The other thing I want to refer to are these  
16 lagoons, here, these settling basins, that have been  
17 referred to as unlined lagoons. These are clay-lined  
18 lagoons that have been in existence since the dairy was  
19 built. These other ones are synthetically lined.

20 So we located our monitoring wells down  
21 gradient of each one of these constant heads, constant  
22 sources of water, and we have a proposed up-gradient  
23 monitoring well to be able to identify background water  
24 quality coming onto the dairy.

25 Q Where are the monitoring wells screened?

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1 A The monitoring wells will be screened -- this  
2 is a schematic of our monitoring well construction. And,  
3 you know, our approximate water static water level is 95  
4 to a hundred feet, depending where we are topographically  
5 on the dairy.

6 The screen will generally be placed five feet  
7 below the top of the water table, where it's encountered.  
8 We don't know exactly where it's going to be until we  
9 drill it. So if there's any seasonal fluctuations in the  
10 water table, if it rises, we're still within the screened  
11 interval, and then NDEP has allowed us up to -- close to  
12 40 feet of screen in this -- in these monitoring wells to  
13 accommodate water level declines that are occurring in the  
14 Amargosa Valley, so we can get as long as a life out of  
15 possible -- as long a life as possible out of these  
16 monitoring wells.

17 Q Based on where the wells are located, and  
18 where the water will be sampled, do they function as an  
19 early warning system of any leakage from the lagoons?

20 A Absolutely.

21 Q What's the schedule for monitoring and  
22 reporting the data?

23 A I think our schedule is that we will solicit  
24 bids from drillers for drilling the wells within 60 days  
25 of an State Environmental Commission decision in this

259  
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1 matter that we're addressing today.

2 Q I phrased the question badly. What's the  
3 sampling frequency?

4 A Okay. Quarterly.

5 Q And what are you sampling for?

6 A What we refer to as the dairy suite that  
7 Mr. Holmgren discussed earlier. It's nitrate, TKN,  
8 chloride, and total dissolved solids.

9 Q Now, Mr. Coyner asked Mr. Holmgren why the  
10 permit doesn't include sampling for fecal coliform. Did  
11 you consider that?

12 A You know, we've talked about fecal coliform a  
13 lot, and, you know, what we see is that -- to use, I  
14 believe, Mr. Coyner's language -- the chlorides are proxy  
15 for any of these other contaminants, but they're more  
16 highly mobile and highly soluble in an aqueous  
17 environment, and if we see chloride concentrations  
18 increasing in the shallow groundwater, then we'll be  
19 looking to go see if the nitrates are increasing after

20 that.

21 Q So in your opinion these are the suite of  
22 constituents that you need to sample for in order to  
23 effectively test for potential -- for leakage in the  
24 lagoons?

25 A My company samples over a hundred monitoring

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1 wells every quarter throughout the State of New Mexico for  
2 that specific suite of constituents. So the answer is  
3 yes.

4 Q Let's -- while we have that up there, let's  
5 talk about soil testing under the permits requirements.  
6 Tell me how the dairy tests the soil in the fields.

7 A The soil testing that Mr. Holmgren described  
8 earlier was broken down into both perennial and annual  
9 crops, where there's a five-year sampling or a three-year  
10 sampling frequency.

11 The dairy has recently started on an annual  
12 soil sampling frequency, just to insure that they're land  
13 applying at what we refer to as agronomic rates.

14 So what we're -- what we're looking at in  
15 these fields, here (witness indicating) and over here, is  
16 soil sampling for nitrogen and phosphorus to a depth of  
17 three feet. In these fields we generally take 15 soil  
18 samples per each foot, down to three-foot, which is the  
19 bottom of the root zone, and composite those for each  
20 one-foot increment within the field and have those  
21 analyzed.

22 And what we're -- what we look at the soils as  
Page 236

23 is a combination of looking at it for agronomic and farm  
24 field management, and it's also an early warning system,  
25 in case there would be any nitrogen that would be over-

261  
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1 applied, and how -- and then we would look at how we would  
2 manage those fields.

3 Q Now, has the dairy taken or changed its  
4 practices in the past or its land application practices or  
5 operations based on the results of some of the soil  
6 sampling?

7 A Yes, sir.

8 Q Can you tell us where that happened?

9 A Right now -- and the soil samples will be  
10 submitted to NDEP with the annual report that's due on the  
11 28th of this month, but we encountered some soils that  
12 have nitrogen concentrations that were higher than we'd  
13 like to see them, in what we call Field 4, Flood Field 1,  
14 and also here in the Gilligan North Pivot.

15 So what we've done with this field is we're  
16 only irrigating this flood field with fresh water.  
17 There's no green water or manure solids applied to it.  
18 And we're increasing the amount of fresh water going on  
19 this field, and reducing the amount of green water until  
20 we can mine out any of that excess nitrogen.

21 And I think this is reflective of what the  
22 intent of both the CNMP and NMP's are. And sometimes  
23 they're used interchangeably in these discussions, because  
24 it's not very straightforward, but these are dynamic  
25 living documents.

1 And we will adjust the plans based on the  
2 results that we're getting from our green water lagoons,  
3 which we've already dropped the concentration of TKN by  
4 40 percent based on management practices, that the dairy's  
5 installed, and also looking at -- oops -- you know,  
6 changing the irrigation practices here and here.

7 Now, I think the interesting thing about this  
8 permit is that, you know, the modification was for an  
9 increase -- this permit increased the discharge -- the  
10 permitted discharge from about 650,000 gallons a day to a  
11 million gallons a day.

12 well, if you have the same hundred -- or  
13 hundred grams of nitrogen to put out in a thousand gallons  
14 of water, and we've got that same hundred grams of  
15 nitrogen we're putting out in a thousand gallons of water,  
16 our concentrations going onto the fields have decreased  
17 significantly because it's been diluted. And --

18 Q So finish that, and then I have a question.

19 A Okay. And so what we do, we have developed a  
20 software program that by June 8 will be a web-based  
21 software program for all concentrated animal feeding  
22 operations. They're not confined to animal feedings  
23 operations. They're concentrated animal feeding  
24 operations. That's the CAFO acronym. Anyone will be able  
25 to use it, and -- and I thank Mr. Goedhart for his

1 support, because we tested it out on this facility. After  
2 every green water irrigation or application of manure  
3 solids, the dairy sends us that information of how many  
4 gallons went out, at such and such concentration, and we  
5 work the formulas to tell them how much more they can put  
6 on to each field.

7 So we're very aggressively managing these  
8 fields in a forecasting methodology rather than  
9 calculating it at the end of the year when the Holstein's  
10 out of the barn.

11 Q And the purpose of that is to achieve the  
12 limits in the permit?

13 A To make -- yes, sir.

14 Q Now, did you -- when you prepared the  
15 monitoring plan, did you consider monitoring wells  
16 down-gradient from the fields?

17 A It was discussed.

18 Q Why did you not propose to put monitoring  
19 wells down-gradient from the fields?

20 A As I said earlier, our monitoring wells are  
21 located down-gradient of what we refer to as a constant  
22 head or constant source, where there's pressure pushing  
23 down. In the land application fields we're managing them  
24 to achieve balance -- applying at agronomic rates, and the  
25 dairy is sampling the soils on yearly basis.

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1 So it's my professional opinion that  
2 conducting the soil sampling in these fields is much more

3 appropriate than drilling monitoring wells, because by the  
4 time any -- and I'm not saying that not a single molecule  
5 is going to migrate from the first -- not going to migrate  
6 from the first foot to the second foot, but what we're  
7 looking at here, by sampling the soils, we have a top-down  
8 approach rather than a bottoms-up.

9 we're looking right at the potential sources  
10 in the first three feet, and we're not waiting for any  
11 potential contamination to get down a hundred feet. And  
12 based on the actions that the dairy's taken, that were the  
13 result of the soil sampling, we've modified our irrigation  
14 programs here and modified irrigation practices on the  
15 Gilligan North Pivot.

16 Q Now, there's one issue we haven't talked  
17 about. Where does the water -- the irrigation water come  
18 from?

19 A A series of irrigation wells on the property  
20 and --

21 Q Can you identify those on the map?

22 A We've got these -- this irrigation well  
23 (witness indicating) feeds this pivot. This one feeds  
24 this pivot. This I think there's two irrigation wells for  
25 this pivot. There's another irrigation well for this

265

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1 field. And we have another irrigation well over here  
2 (witness indicating), another irrigation over here.  
3 They're plumbed together so they can irrigate the various  
4 different fields as the dairy needs it and as production  
5 is available.

6 Q Do those wells affect the groundwater flow at  
7 the site?

8 A Yes, sir.

9 Q And did you take that into account?

10 A Yes, sir.

11 Q Is there -- I think there's a slide in there  
12 that you prepared --

13 A Is it this one you want or --

14 Q The model.

15 A Okay.

16 Q Can you tell us about the groundwater flow,  
17 how it's affected by the pumping wells?

18 A Yes, sir.

19 Throughout this process we paid very close  
20 attention to what the Appellants -- what the concerns that  
21 the Appellants have raised about water quality impacts in  
22 the Amargosa Valley.

23 So what we did was we generated a one-layer  
24 mod flow model pumping approximately 4700-acre feet, which  
25 is the approximate water right that the dairy has, for a

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1 period of 40 years. And this was a super position model,  
2 one-layer model, and what we did was --

3 Q So that doesn't describe conditions today,  
4 right?

5 A This -- that's correct.

6 Q What does it describe?

7 A This describes the directions that groundwater  
8 would be flowing after pumping the dairy's full water

01-19-10 SEC Ponderosa Hearing Volume I.txt  
9 right for a period of 40 years.

10 Q And why did you select 40 years?

11 A We think that's a reasonable planning horizon  
12 for a facility like this. And so what we're looking at  
13 here is -- you can see all these blue arrows, until we get  
14 way down over here, are all pointing back towards the  
15 dairy.

16 So if there was any type of seepage at the  
17 dairy, the cone of depression that's created by the  
18 dairy's permitted pumping, will pull any potential  
19 contaminants or keep any potential contaminants back  
20 within the dairy property.

21 Q I think that's it for the groundwater  
22 monitoring plan.

23 A Okay.

24 Q You were hearing during the hearing today.  
25 You've heard some discussion about flies and odors. Can

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1 you tell the Commission -- based on your experience at  
2 other dairies in other locations, can you characterize  
3 what you view the conditions at the Ponderosa Dairy as,  
4 for flies and odor?

5 A Well, a lot of my other clients would be very  
6 unhappy with this, but they should all look like  
7 Ponderosa. Okay? These guys have a very aggressive  
8 maintenance program on site for both fly management and  
9 odor management by adding the microbes to the lagoon.

10 And by taking out the flush system and  
11 converting to scrape we decrease the amount of

12 volatilization and any odors going up into the air. So  
13 this is a facility that the owner should be proud of.

14 Q Now --

15 A And I've seen a lot of bad dairies.

16 Q There have been some discussions about air  
17 emissions. Are you aware of any regulatory initiatives on  
18 air emissions at dairies?

19 A Yes, sir.

20 Q Can you tell me what that is?

21 A That's the National Air Emissions Study being  
22 conducted by Purdue University under contract to U.S. EPA.

23 Q And what is your role in that?

24 A My role in that was to work with our  
25 constituent there -- the National Air Emissions Study --

268

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1 and I don't know if we have any slides following this --  
2 on this --

3 Q No.

4 A Okay. The National Air Emissions Study is an  
5 industrial-funded study nationwide, to determine what the  
6 potential air quality impacts may be from all sorts of  
7 different kinds of CAFOs. There are -- and CAFOs include  
8 milk CAFOs, chickens, ducks, turkeys, horses, swine.

9 And this is an industry-funded study, where  
10 the dairy industry put up five million dollars of the  
11 industrial's own money. I'm sorry. It was three million  
12 dollars from dairy, I believe, for six dairy sites around  
13 the country to be monitored, and each -- and the  
14 monitoring equipment at each one of those sites was half a

01-19-10 SEC Ponderosa Hearing Volume I.txt  
15 million dollars.

16 Data is being -- has been collected for two  
17 years. The data collection period, nationwide, by Purdue  
18 finished, I believe, in November of 2009, and they're  
19 taking these next two years to analyze the data and make  
20 recommendations to U.S. EPA on controlling or regulatory  
21 recommendations for air emissions at CAFOs nationwide.

22 Q Now, under the current EPA CAFO regulations,  
23 adopted by reference in Nevada, are there any restrictions  
24 or limitations related to air quality?

25 A To the best of my knowledge, no.

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1 Q The -- Mr. Marshall talked about the NCRS  
2 guidance documents. From your perspective, do those  
3 impose substantive limitations either on the permit or the  
4 NMP, related to air quality?

5 A No, because if you look at Nevada 590, the  
6 intention is to maintain or improve the air quality.  
7 Okay? And so right now the dairy has been at least  
8 maintaining, and by adding the microbes and decreasing or  
9 getting rid of the flush, we're improving the air quality  
10 to the degree that that does, and realistically, from a  
11 scientist's point of view, you know, we're looking to see  
12 what that national -- what the results are from the  
13 National Air Emissions Study, funded by the industry, and  
14 we're going to have to live with whatever they come up  
15 with.

16 Q Now, notwithstanding that, I want to ask you a  
17 couple of questions about the dairy practices, and these

18 relate to some of the recommendations in the guidance  
19 document.

20 what kind of nozzles does the dairy use on  
21 their irrigation pivots?

22 A They use LEPA nozzles, and to expand on that,  
23 LEPA is another one of those god-awful acronyms, but it is  
24 Low Energy Pressure Application, and quite a long time  
25 ago, I was actually fortunate enough to critique the first

270

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1 technical presentation made on the LEPA process.

2 And what that is, is that instead of having  
3 your hoses on your center pivots spraying up high, where  
4 it would be above the height of the corn, say, at a  
5 certain point, and having all this drift loss under high  
6 pressure, the hoses are lowered, and within the emitters  
7 or the nozzles, themselves, is either a wobbling plate or  
8 another device that you can put the water on, under low  
9 pressure, and very close to the top of where the crop is,  
10 and apply it under low pressure and really minimize your  
11 drift losses.

12 Q So that reduces the volatilization of the  
13 nitrogens?

14 A Absolutely.

15 Q Now, there's another recommendation there that  
16 I want to ask you if it's applicable in the Amargosa  
17 Valley. It says don't spread the green water and manure  
18 solids in times of high humidity.

19 A Well, then I think we can probably spread it  
20 all year.

21 Q Where's the nearest residence to the dairy?

22 A I think it's about a mile or mile and a  
23 quarter off to the north or west, and -- yeah.

24 MR. BUTLER: Could I have just a minute to  
25 make sure we've done what we wanted to do?

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1 CHAIRMAN DODGION: Surely.

2 (Proceedings paused briefly)

3 MR. BUTLER: Those are my questions for  
4 Mr. Lazarus at this point. Thank you.

5 CHAIRMAN DODGION: Mr. Marshall, are you ready  
6 for cross-examination?

7 MR. MARSHALL: Could I just ask what you think  
8 our schedule is for the remainder of the day? It doesn't  
9 seem like we're going to finish up.

10 CHAIRMAN DODGION: I've given up on finishing  
11 up today, frankly.

12 So -- and I don't know where we're going to  
13 get with the dairy's case in chief, but we are probably  
14 going to have to be moving out of this room by 5:30.

15 MR. BUTLER: Mr. Lazarus is our only witness.

16 CHAIRMAN DODGION: Did you mislead us?

17 MR. BUTLER: No. No, he is our only witness.  
18 Mr. Ganta was listed, but he was his purpose was only to  
19 be a rebuttal witness to Mr. Sagady, who did not appear.

20 CHAIRMAN DODGION: well, whatever that leaves  
21 us with, 5:30 we have to be out of the building or headed  
22 out of the building.

23 (Discussion off the record)

24 MR. MARSHALL: Let me see if I can collect my  
25 thoughts.

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1 CROSS EXAMINATION

2 BY MR. MARSHALL:

3 Q So, Mr. Lazarus, you spent a lot of time  
4 testifying as to the development of the monitoring plan;  
5 is this accurate?

6 A I testified to it, yes, sir.

7 Q And would you mind --

8 A Sure. Which one do you want?

9 Q Well, we've got a bunch of them, right? You  
10 developed a number of -- let's go back to the first slide.  
11 You developed the slide in preparation of the monitoring  
12 plan, right, or looked at this information in preparation  
13 of the monitoring plan --

14 A Yes, sir.

15 Q -- right?

16 A Yes.

17 Q Let's go to the next one. And this one, as  
18 well, was derived to generate information for a  
19 development of the monitoring plan, right?

20 A Yes, sir.

21 Q And then let's go to the next one. And the  
22 same with this one. This one, I think, was attached --  
23 maybe was this one of the exhibits or -- to the monitoring  
24 plan, itself, something like this?

25 A Yes, sir.

CAPITOL REPORTERS 273 (775) 882-5322  
Page 247

1 Q Okay. Showing the direction of the  
2 groundwater flow.

3 In general, getting the groundwater flow and  
4 direction right is critical for a monitoring plan. Would  
5 you agree with that?

6 A Yes, sir.

7 Q And is that why you spent so much time trying  
8 to get the right information to base the monitoring plan  
9 on?

10 A Yes, sir. These wells are expensive.

11 Q Okay. Let's to go the next one. On this map,  
12 here, isn't there a dead animal composting component of  
13 the dairy?

14 A Yeah, there's a dead animal compost component  
15 of the dairy, I believe, right along here (witness  
16 indicating), adjacent to the road, here that's blocked by  
17 this red line.

18 Q And can you describe that facility, just for  
19 the members of the Commission?

20 A It is --

21 Q Watch your head, Mr. Barrackman. You're going  
22 to be a dead animal.

23 A We're going to have to compost you.

24 MR. BARRACKMAN: That's what I have to look  
25 forward to, huh?

274  
CAPITOL REPORTERS (775) 882-5322

1 THE WITNESS: It's a very long skinny type of  
Page 248

2 structure in this area here (witness indicating), that was  
3 built and constructed -- designed and constructed in  
4 accordance with specifications of a Nevada professional  
5 engineer.

6 BY MR. MARSHALL:

7 Q And what happens in that facility?

8 A We take the dead animals, and -- dead cows,  
9 and mix them with manure, maybe a little bit more organic  
10 matter, but we really don't need it, and compost the cows,  
11 probably on the order -- and at least 90 days, maybe  
12 longer. And then that material is then spread out on the  
13 fields. The composted materials is spread out on the  
14 fields, and the NRCS, right now, has specific guidelines  
15 and gives dairy men methodologies to compost their  
16 animals.

17 Q And how many animals, annually, are -- is  
18 there an estimate for how many animals, annually, are  
19 composted through this facility?

20 A I don't know that number.

21 Q So you don't know how many animals have died  
22 and are replaced on the dairy annually?

23 A That's correct. See, we have two different  
24 kinds of replacements. We replace the milking cows once  
25 they stop producing a certain amount, and then you have a

275  
CAPITOL REPORTERS (775) 882-5322

1 few dead cows, whatever frequency it is, and I don't know  
2 with that number is.

3 Q Okay. Can we go on to the next slide?

4 A Sure.

5 Q That's the next one or the -- the next one.  
6 A Is that it?  
7 Q That one.  
8 A I'm sorry.  
9 Q That one.  
10 A Yes.  
11 Q And under examination of Mr. Butler you  
12 said -- I'm sorry to be confused about in, but --  
13 A Go ahead.  
14 Q This is not a picture of what's going on  
15 today, but what might happen after 40 years or what -- I  
16 didn't quite understand what that point was.  
17 A Okay. We constructed a one-layer groundwater  
18 model using Groundwater Vista software. As we say in the  
19 explanation below, it's not -- well, it's a very commonly  
20 used code throughout the county, developed by the U.S.  
21 Geological Survey.  
22 And what we do is have a certain -- you input  
23 your can aquifer parameters, transmissivity, storage  
24 coefficient. And transmissivity is made up of hydraulic  
25 conductivity and aqui -- it's the hydraulic conductivity

276  
CAPITOL REPORTERS (775) 882-5322

1 multiplied times the aquifer thickness.

2 So we take those aquifer parameters, which are  
3 commonly accepted parameters within the Death Valley Flow  
4 System that the USGS has developed. So we took the  
5 transmissivity, and the storage coefficient, plugged that  
6 into the model, uniformly, and then we turned a well on,  
7 pumped that well at 4700-acre-feet for a period of 40

8 years. At the end of 40 years, this is what the flow  
9 vectors look like.

10 Q Okay. So in other words, this is what your  
11 projection the groundwater flow under the dairy will be in  
12 40 years?

13 A Based on pumping the dairy's permitted water  
14 rights.

15 Q Right. So -- but, again, it's not an accurate  
16 representation of what's happening now or in the next --  
17 the near term? Is that accurate?

18 A Well, actually, it is. And if I can please  
19 have your exhibit, sir, the -- no, no, no. It was the  
20 Appellants' exhibit. It was Mr. Bu1o's, I think, 2004  
21 potential -- thank you. We've got it right here.

22 Q This is A-9, A-9.

23 A This is -- I'm really glad you guys brought  
24 this up.

25 Q Let me get it.

277  
CAPITOL REPORTERS (775) 882-5322

1 A Okay. If everybody can see what I'm pointing  
2 at, you know, we didn't run the model for one year to five  
3 years. We ran it for 40 years. And based what the well  
4 Head Protection Plan did, these are looking at the  
5 elevation of the water table in the spring of 2004.

6 And what this is showing -- if you look here,  
7 these tight contours here (witness indicating), are right  
8 on the dairy. So we have an existing cone of depression  
9 on the dairy, in 2004, based on the work that Nye County  
10 did. And if you -- these are different scales and done

11 for different purposes, but we're both showing -- both our  
12 model output and Nye County's well Head Protection Map are  
13 both showing pretty close contours around the dairy. So  
14 there's a cone of depression under the dairy, and we're  
15 pulling that water back on itself.

16 BY MR. MARSHALL:

17 Q That generally happens when you have a well  
18 that's pumping a significant amount of water, right? You  
19 have a cone of depression associated with it?

20 A well, you could have on it a well with pumping  
21 a very small amount of water if has very low  
22 transmissivity also.

23 Q Okay. And so you went into a fair amount of  
24 detail of all the details that went into the modeling for  
25 this particular graph. And, again, this one, I understand

278  
CAPITOL REPORTERS (775) 882-5322

1 your testimony, was critical to your determinations of  
2 where monitoring wells are being placed and the  
3 construction and operation of the ground monitoring plan.  
4 Is that accurate, as well?

5 A No.

6 MR. BUTLER: Objection. I'm not sure that's  
7 accurate.

8 THE WITNESS: That's not accurate at all.

9 BY MR. MARSHALL:

10 Q Then forgive me. What was the purpose of this  
11 map, then, to show -- to show what?

12 A Okay. The purpose of running the model and  
13 generating this model output is to show the flow

14 directions in the aquifer, beneath the dairy, and in the  
15 vicinity of the dairy after pumping the dairy's water  
16 right for 40 years.

17 Q For forty years. Okay. And so let's --  
18 let's -- I think we have a package of these -- did you all  
19 receive this same package?

20 CHAIRMAN DODGION: Yes.

21 BY MR. MARSHALL:

22 Q So we have a package of these maps, and let me  
23 just -- I'm sorry. I forgot to ask one thing. Your  
24 understanding, this is a voluntary program that the dairy  
25 is proposing?

279  
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1 A Absolutely.

2 Q Okay. When you -- when say, "voluntary,"  
3 what -- describe to me a little bit what you mean (sic)  
4 "voluntary."

5 A It wasn't required in the permit, and the  
6 dairy volunteered --

7 Q So it's --

8 A -- to put --

9 Q -- at its own discretion?

10 A Let me finish. The dairy volunteered to  
11 install these properly located and constructed monitoring  
12 wells, even though it wasn't required by the permit, and  
13 we worked with NDEP staff, both on the location and  
14 construction of these wells.

15 Q So since it's discretionary and voluntary, the  
16 dairy can decide not to install the wells or monitor them?

17 Is that -- if it's voluntary; is that --

18 A Well, you know, I don't think it works that  
19 way.

20 Q And --

21 A If they're volunteering -- they're voluntarily  
22 putting in the wells --

23 Q Uh-huh.

24 A -- NDEP said, "We accept your plan, and we  
25 accept your quarterly monitoring." So I -- you know, once

280  
CAPITOL REPORTERS (775) 882-5322

1 you volunteer to monitor yourself, I think it's hard to  
2 get out of it, sir.

3 Q But I think the fundamental point is if it's  
4 voluntary it means you can cease if you want to.

5 A I don't interpret it that way.

6 Q Okay. So let me just ask you a hypothetical.  
7 Let's say NDEP came at you and said, "We want to impose  
8 monitoring on your wells -- on your operation," okay? Not  
9 on the -- on the Ponderosa Dairy, and you, as the  
10 consultant -- basically it was done as: We're going to  
11 impose monitoring. We want them here, here, here, and  
12 here. Let's see it was more extensive than what you  
13 believed. And we're going to -- here's all the  
14 information that we have developed to justify where we're  
15 going to place them, et cetera. And we're not going to  
16 let you critique this, and just -- you just have to accept  
17 it.

18 would you think that would be right to do that  
19 as a regulatory matter?

20 MR. BUTLER: Objection.

21 THE WITNESS: well --

22 MR. BUTLER: Objection.

23 BY MR. MARSHALL:

24 Q Would you want the opportunity to review the  
25 basis for such a conclusion?

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1 MR. BUTLER: I still object to that.

2 CHAIRMAN DODGION: I think it's an appropriate  
3 question. I'm going to overrule your objection.  
4 Please answer.

5 THE WITNESS: All right. So there were two  
6 questions. Can you please repeat the question?

7 BY MR. MARSHALL:

8 Q Sure. Let's say you didn't volunteer --

9 A Okay.

10 Q -- for this program. And let's see NDEP came  
11 up with it on their own, okay, and except it was a little  
12 different from what you came up with. It was much more  
13 extensive, and had 10 wells, and required you to test for  
14 coliform, and had -- you know, was more onerous, all  
15 right?

16 And they said, "We're just going to impose it.  
17 We're not going to let you comment on the basis for our  
18 determination of where those wells are going to be."

19 would you accept that or with you want to look  
20 at the factual basis for their determination?

21 A In all of our experience, putting in  
22 monitoring wells at dairies, mines, trailer parks, septic

23 facilities, sewage treatment plants, we developed the same  
24 kind of background information for all of our facilities,  
25 and then present our professional opinion as to where

CAPITOL REPORTERS <sup>282</sup> (775) 882-5322

1 properly located and constructed monitoring wells would  
2 go?

3 Q You didn't quite answer my question, which  
4 was: would you want to look at all this information  
5 before your client accepted the permit conditions?

6 A Yes.

7 Q Okay. Thank you.  
8 Unfortunately, I'm in a state of disarray  
9 here.

10 I'm going to actually mark this as a -- are we  
11 up to 10? So this would be 11?

12 MS. REBERT: Yes.

13 (Appellants' Exhibit No. A-11 marked  
14 for Identification)

15 BY MR. MARSHALL:

16 Q A-11. Can you particular a look at this  
17 document and --

18 CHAIRMAN DODGION: Which document is it?

19 MR. MARSHALL: I'm sorry. We only have one  
20 copy of it, but I'll provide it to you.

21 (Proceedings paused briefly)

22 BY MR. MARSHALL:

23 Q Can you describe what that is?

24 A It's basically a letter to from Cathy  
25 Ratcliff, who was our Project Manager for the dairy at the

1 time, to NDEP about the waste water pond design for Dairy  
2 Number 3.

3 Q So this was a letter from Glorieta, your  
4 company, to NDEP regarding the construction standards for  
5 lining -- the lined pond, Number 3, right? Dairy Number 3  
6 or did I --

7 A I mean, I don't know if you -- I don't know  
8 how broad -- that came across to me as --

9 Q It's a letter from Glorieta to NDEP --

10 A About the design of and construction of the  
11 pond, the lagoons at Barn 3.

12 Q Thank you.

13 And on the second page of this letter  
14 there's -- under Roman Numeral II there's a heading of  
15 "General Detention Basin Construction Details." Can you  
16 read number B please?

17 A (Reading)

18 "Liner leakage shall be equivalent to  
19 12 inches of material with a permeability coefficient of  
20 10 to the minus centimeters per second. See liner  
21 specifications."

22 Q So what that is, is that's a liner that  
23 basically says: Here's the leakage for the liner, which  
24 would be equivalent to a certain standard, and it's one  
25 times ten to the second centimeters per second?

1 A Ten to the minus -- do you want my glasses?

2 Q Is there a minus there? Yeah, I think I need  
3 them. They're really cool, too. I like those.

4 So that's essentially what that standard is?

5 A For clay-lined lagoons. Not for  
6 synthetically-lined lagoons, because synthetically-lined  
7 lagoons effectively have a permeability of zero, whereas a  
8 clay -- did I say a -- synthetically-lined lagoons have a  
9 permeability of effectively zero. Clay-lined lagoons,  
10 across the nation, have a construction standard of a  
11 hydraulic conductivity -- vertical hydraulic conductivity  
12 of 10 to the minus 7 centimeters per second. So the  
13 synthetically-lined lagoons are -- have zero permeability,  
14 and this describes a permeability.

15 Q For a clay-lined --

16 A Yes.

17 Q -- facility?

18 A For a clay-lined lagoon system.

19 Q Thank you. Okay.

20 CHAIRMAN DODGION: Did you intend to submit  
21 that --

22 MR. MARSHALL: Oh, I'm sorry.

23 CHAIRMAN DODGION: -- as an exhibit?

24 MR. MARSHALL: Yes, I did.

25 MEMBER COYNER: Any objection?

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1 CHAIRMAN DODGION: Objections or --

2 MR. BUTLER: No. I'd only note that the date

3 on it is 2002. Not I'm not sure of the relevance, but I  
4 don't object to it.

5 (Appellants' Exhibit No. A-11  
6 received into Evidence)

7 BY MR. MARSHALL:

8 Q Now, during your testimony -- and bear with  
9 me, because I'm probably not going to get it exactly  
10 right. Maybe we can work through to make sure I  
11 characterize it correctly.

12 But you talked about that when you have a  
13 lined facility, it's essentially no different than -- I  
14 think one of the examples you used was a waste water  
15 treatment plant.

16 A A lined lagoon and a waste water treatment  
17 plant or a facility that receives waste water from a  
18 treatment plant, like a golf course, where it's reused or  
19 something like that.

20 Q And are you aware that there were, in fact,  
21 monitoring requirements for waste -- lined waste water  
22 treatment plants?

23 MS. TANNER: Objection. Relevance. We're not  
24 here to talk about waste water treatment plants.

25 MR. MARSHALL: Well, I think we're --

286  
CAPITOL REPORTERS (775) 882-5322

□

1 CHAIRMAN DODGION: We're here to talk about  
2 protection of groundwater, and I think that goes to the  
3 heart of the matter. I'm going to allow it.

4 THE WITNESS: Yes, sir, and the dairy has  
5 voluntarily proposed the monitoring -- groundwater

01-19-10 SEC Ponderosa Hearing Volume I.txt  
6 monitoring plan that is the topic of discussion now.

7 BY MR. MARSHALL:

8 Q Okay. Now, you mentioned your decision  
9 about -- I'm sorry. Could you go back to the map -- that  
10 one.

11 A Sure.

12 Q And I want to talk to you a bit about the fact  
13 that there's no monitoring wells down-gradient from the  
14 fields and the dead animal composting facility. And  
15 that's correct, there are no -- the monitoring wells --  
16 your positions of the monitoring wells was based on the  
17 location of the lagoons, not the fields; is that correct?

18 A That's correct.

19 Q Okay. And you based the -- your decision  
20 on -- I assume your recommendation to the dairy, which  
21 they then based their decision on, about locating a  
22 monitoring well south of where -- excuse me --  
23 down-gradient of the fields, has to do with -- really with  
24 a risk assessment, that you felt that the risk associated  
25 with the nutrients and green water applied to the fields

287  
CAPITOL REPORTERS (775) 882-5322

1 did not justify the expense of the monitoring well  
2 down-gradient?

3 MR. BUTLER: Objection. He didn't say that.

4 CHAIRMAN DODGION: He's asking you if you did  
5 say that. I think you can answer it.

6 THE WITNESS: I didn't say that.

7 BY MR. MARSHALL:

8 Q Okay. It would be accurate that is, in fact,

9 what happened? It was kind of a risk assessment, that you  
10 determined that -- for your recommendations, at least,  
11 that because of the monitoring that you described in the  
12 fields. the actual soil monitoring, that you did not feel  
13 that the risk was high enough to justify a monitoring well  
14 down-gradient of the irrigation fields?

15 A That's a reasonable opinion.

16 Q Okay. I mean --

17 A That's reasonable.

18 Q All right. But for a variety of reasons, you  
19 all concluded that the risk was high enough that, as a  
20 voluntary matter, you wanted to monitor down-gradient of  
21 the lagoons?

22 A well, if you remember what I said before, what  
23 we're looking at is where we have constant heads and  
24 constant pressure (witness indicating) pushing down, and a  
25 constant addition of water, and keeping that constant head

288

CAPITOL REPORTERS (775) 882-5322

□

1 on it. That can drive water down. We don't have that  
2 situation on these land applications.

3 Q All right. I think you were here when -- for  
4 the testimony of Mr. Holmgren, when he testified that --  
5 as to the usage of the fields. And they're basically used  
6 year-round. Would you say that that's -- was that an  
7 accurate -- was his testimony accurate?

8 A We have different crops in different fields  
9 that are grown throughout the year. So, yes, but I think  
10 that the -- the important thing on that is that, you know,  
11 looking at our lagoon systems, and looking at how we

12 increased our request in this most recent granted permit  
13 by NDEP from either six-hundred and twenty-five to  
14 650,000 gallons a day discharge to a million gallons a  
15 day, allows us the flexibility on land applying the green  
16 water, because we could have a situation -- you know, we  
17 could have a situation -- we went up to -- right now we're  
18 discharging probably around 640,000 gallons a day or maybe  
19 65 percent of our permitted discharge, based on how the  
20 dairy's being managed through their best management  
21 practices and reducing the water use and green water  
22 generation. So this is --

23 Q Hang on a second. Is that based at all on the  
24 fact that the market for milk has slowed?

25 A No.

CAPITOL REPORTERS <sup>289</sup> (775) 882-5322

□

1 Q And so still the same number of cows are being  
2 milked and the same amount of milk is being produced? Do  
3 you know?

4 A Well, the same amount of -- yes. The same  
5 amount of cows, and the same amount of milk is being  
6 produced. Now, if I can get back to what I was saying --  
7 you know, the way the permits are written -- you know, if  
8 we have a lot of rain in December and January, and we  
9 either don't need to put the water on, or we can't run our  
10 pivots through the fields, because it's too muddy.

11 You know, we need to have a certain amount of  
12 storage there so we're not going to exceed that  
13 one-million-gallon-a-day discharge. So we may have, you  
14 know, a month and a half where we're just storing that

15 water. Then it dries up. We've got a crop in the ground,  
16 and we can put that water out on the crop in such a volume  
17 that the crop needs and without exceeding that  
18 one-million-gallon-a-day discharge.

19 Q And I think you testified earlier that for the  
20 flood field and maybe BLM west pivot --

21 A No. That one and Gilligan North.

22 Q Gilligan North, showed levels of nitrogen that  
23 caused concern for you; is that correct?

24 A That's correct.

25 Q Okay.

CAPITOL REPORTERS 290 (775) 882-5322

1 A And so, because of that, the dairy has stopped  
2 applying --

3 Q Right.

4 A -- green water here on the flood field --

5 Q I think.

6 A -- and is re-addressing how we're managing the  
7 land application on the Gilligan North.

8 Q All right. But I think, again, the -- what  
9 prompted you to do that was levels of nitrogen that were  
10 of concern. Is that accurate?

11 A I don't know if "concern" is the right word,  
12 but there were -- water has a level. Chemicals have a  
13 concentration. So we're concerned about the concentration  
14 of nitrogen in these fields and the making sure that we've  
15 got the right crops in there to mine it out.

16 Q So -- and that's kind of leads -- thank you  
17 very much. It leads -- transitions right into my next

18 point, which is essentially what you're trying to do here  
19 is apply nitrogen to these fields -- I mean, you have a  
20 nitrogen lump that you need to address, and so the way to  
21 recycle or use it is essentially to put it on these  
22 fields, and for a crop to take it up, and then you  
23 essentially use it for field, or for other purposes, and  
24 that's the way that you -- I can use the word "dispose" --  
25 there may be another --

291

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(775) 882-5322

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1 A Well, use the word "recycle," which is  
2 absolutely right, because we're not disposing of anything.  
3 And it's really an incorrect assumption and assertion that  
4 we have waste other than what goes to landfill, because  
5 the water at the dairy is used at least two or three  
6 times, recycled to use your words, and we do not have  
7 wastes.

8 Q All right.

9 A Wastes, you pay somebody to haul off. People  
10 come to us and buy our nutrients. So we don't consider  
11 them a waste at all, sir.

12 Q But essentially what the -- I think you  
13 described the permit, was -- operates to essentially give  
14 you an agronomic rate that applies to these fields, that  
15 essentially will hopefully utilize the nitrogen that's  
16 applied to it, and therefore you won't have -- your  
17 conclusion, you won't have a significant risk to the  
18 groundwater. Is that, in essence, what the permits --

19 A Right. Yeah, and what we've done --

20 Q That's fine. That's fine. You answered the

21

question.

22

How can you be sure that that works?

23

A By carefully designing, sampling, and

24

analyzing these constituents in the soil profile.

25

Q And this is the --

292

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□

1

A And also by using our nutrient application

2

forecasting software, where after every green water or

3

manure application, the dairy faxes that information to

4

Mr. Ganta, and he plugs that into the software. And then

5

we tell the dairy how much more they can apply. And a lot

6

of the calculation is based on the antecedent nitrogen

7

concentration in the soil in the field.

8

Q Right. So you're basically trusting that your

9

formulas and calculations work?

10

A I'm not trusting that the formulas and

11

applications work. If I were trusting that the formulas

12

and applications work, I would do it at the end of the

13

year, and I wouldn't be forecasting, which goes beyond the

14

requirements of the permit. So we're actively forecasting

15

what we can put out there, and actively managing each one

16

of these fields.

17

Q How much nitrogen is produced by the dairy

18

annually?

19

A I have no idea.

20

Q I mean, is it pounds, tons?

21

A I don't remember.

22

Q So you have no idea of how much nitrogen --

23

let me back up.

24 You testified that you were -- you've been  
25 intimately involved with this dairy for since 1998?

CAPITOL REPORTERS 293 (775) 882-5322

1 A Correct.

2 Q And you have -- or are intimately involved in  
3 the preparation of the Comprehensive Nutrient Management  
4 Plan; is that correct?

5 A Correct.

6 Q And so you have -- and your testimony right  
7 now is that you have no idea how much nitrogen is produced  
8 by the dairy annually?

9 A That's correct, because we converted Barn 1  
10 and Barn 2 from flush to scrape, and I've got to look at  
11 those numbers that are in the annual reports to get that  
12 determination.

13 Q Okay. So do you know how much was produced at  
14 the time that the dairy -- that the NDEP permitted this?

15 A I don't remember, and I don't work in that  
16 currency. The currency that we work in is how much TKN is  
17 in the lagoon? And then how much of that is going out on  
18 to the individual fields? So those are the currencies we  
19 work in on a daily basis.

20 To be perfectly frank, it's only the  
21 regulatory agencies that want to know how many pounds per  
22 year are going into it, and that's just a big gross fat  
23 EPA number. Okay?

24 we're interested in what's going on a daily,  
25 and that's how we're managing our fields, and we've

CAPITOL REPORTERS 294 (775) 882-5322  
Page 266

1 reduced that amount of TKN going out to the fields by  
2 about 40 percent in the last year or so.

3 Q But you still are producing -- well, how  
4 much -- well you're still producing -- well, let me put it  
5 this way.

6 would you agree that the dairy produces  
7 hundreds of tons of nitrogen that you measured in TKN or  
8 however you want to measure it annually?

9 A You know, I'd have to go back and look at  
10 what's in the NMP.

11 Q Okay. But let me -- but I can characterize  
12 your testimony. Conk me on the head if I got it wrong,  
13 but you essentially say that that's not a relevant concern  
14 for you.

15 A The total pounds of nitrogen produced yearly  
16 on the dairy is not a relevant concern to us. It's how  
17 much TKN we are putting out to each individual field, and  
18 what the agronomic rate is, and the crop up-take is on  
19 that field.

20 Q Where does the nitrogen, that's produced by  
21 the dairy, go?

22 A There's a -- the nitrogen goes up -- the  
23 manure solids are composted, and that goes off-site or is  
24 used on the dairy.

25 Some manure solids go off the dairy. Some

2 generated in the lagoons has nitrogen in them also, and  
3 that nitrogen is land-applied, and some of it is  
4 volatilized.

5 Q Do you have any idea how much of the nitrogen,  
6 that's produced by the dairy, is volatilized?

7 MR. BUTLER: Objection. I'm not sure that's  
8 relevant.

9 MS. TANNER: I agree.

10 MR. MARSHALL: I think it goes directly to the  
11 point of -- if you look at -- we're going to have an  
12 argument over what the NDEP's obligation is under these  
13 guidance documents or these documents that they agree that  
14 they used to issue permits, and whether or not they  
15 accurately assessed the fate of this waste stream.

16 CHAIRMAN DODGION: I understand where you're  
17 going. I understand the question. And it is an issue  
18 that that panel is going to have to deal with, since you  
19 brought it up. As to whether it's totally relevant to the  
20 permit or not, we haven't ruled yet.

21 If you can answer the question, please answer  
22 it. If you can't --

23 THE WITNESS: I think I'll know that answer  
24 after the National Air Emissions Study is completed.

25

1 BY MR. MARSHALL:

2 Q So you don't know now; is that --

3 A That's correct.

4 Q -- accurate?

5 A Yes.

6 Q And let me ask you this: why -- why did the  
7 dairy -- the Dairy Association or the industry -- I think  
8 you said Dairy Industry or -- excuse me -- CAFO industry,  
9 fund this air study?

10 A It's because the swine people cut a deal with  
11 EPA.

12 Q I think you need to explain that a little bit.

13 A That's how I understand it, is that they were  
14 issues relative to hog farms, and EPA was going to go  
15 after the hog farms and the swine industry. The hog  
16 industry made a deal with EPA to do these studies, and the  
17 rest of the CAFO industry got pulled into the tent.

18 Q So the -- I guess what you're saying is that  
19 there was a concern, from at least the swine CAFO  
20 industry, that there were significant air quality issues  
21 associated with CAFOs?

22 A I don't know what happened or what the  
23 background was. I just know that's where this started,  
24 and our clients voluntarily funded the study.

25 Q Put up millions of the dollars to address this

1 issue?

2 A Because that was to give -- because by  
3 participating in the study, it gave the participating  
4 dairies -- I'm trying to remember incorrectly, Commission.  
5 Please bear with me. I haven't looked at this in a few  
6 years, but it was giving the dairies some exemption from  
7 CERCLA or RECLA enforcement, and that's as far as I can

8 go.

9 Q Okay. I'm going to ask you to take a look at  
10 what's been marked as Exhibit A-8 that was not admitted  
11 earlier.

12 A Okay.

13 Q And again take my representation that this was  
14 prepared by Mr. Sagady for this proposal.

15 MS. TANNER: I think I'm going to object.  
16 This document has been rejected by the Commission. If  
17 Counsel wants to ask questions on its own --

18 CHAIRMAN DODGION: The document was not  
19 admitted --

20 MS. TANNER: Not admitted.

21 CHAIRMAN DODGION: -- as an exhibit, because  
22 Mr. Sagady --

23 MR. MARSHALL: Sagady.

24 CHAIRMAN DODGION: -- was not here, and is not  
25 available for cross-examination. And when I made that

298  
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1 ruling, I indicated to Mr. Marshall that Mr. Lazarus would  
2 be here and he could ask him about it.

3 THE WITNESS: I don't know anything -- I can't  
4 respond to this because there's a lot of --

5 MR. MARSHALL: I haven't asked you a question  
6 yet. I haven't asked the question yet.

7 THE WITNESS: Oh, okay.

8 MR. MARSHALL: Before I do that, it's  
9 S-a-g-a-d-y.

10 CHAIRMAN DODGION: Sagady?  
Page 270

11 MR. MARSHALL: Sagady.

12 CHAIRMAN DODGION: All right.

13 BY MR. MARSHALL:

14 Q Now, without looking generally at the numbers,  
15 that Mr. Sagady calculated here, and are on the form, you  
16 know, but just as a processing of trying to look at  
17 tracking nitrogen through their system, would you say that  
18 this is a character -- at least a ballpark  
19 characterization of where nitrogen goes within the dairy?

20 A I have no idea. I need time to look at this.  
21 There's about 11 boxes on there.

22 Q Okay. Take your time.

23 A And there's --

24 Q Take your time.

25 (Proceedings paused briefly)

299  
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1 THE WITNESS: This is wrong.

2 BY MR. MARSHALL:

3 Q Your --

4 A This is wrong.

5 Q well, he testified it's wrong.

6 A This is wrong.

7 Q well, can you explain to me why it's wrong?

8 A well, the waste excretion doesn't come in to  
9 the milk house wash process. Okay? These arrows -- I  
10 mean, I can tell, right here, this first arrow's wrong. I  
11 don't --

12 Q Let me ask another question.

13 A well, if you -- please. Please. You know, if

14 you want me to think about this --

15 Q Yes.

16 A -- let me think about this.

17 (Proceedings paused briefly)

18 THE WITNESS: There's an awful lot in here  
19 that I don't agree with. There's an awful lot in here  
20 that's inaccurate and doesn't understand -- indicates a  
21 lack of understanding of what goes on inside of dairy and  
22 how the dairy's operated.

23 BY MR. MARSHALL:

24 Q Let me --

25 A And I -- you know, I -- I've got one, two,

300  
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1 three, four, five, six, seven, eight, nine, ten -- I've  
2 got 10 boxes and I don't know how many different arrows  
3 going different ways, that just isn't accurate on how  
4 nutrients and water flows at the dairy.

5 And, in addition, you know, looking at what  
6 Mr. Sagady has going out to the fields and to such, what I  
7 can say is that in our review of Mr. Sagady's work and his  
8 land application calculations, he neglected to convert  
9 acreages inches of water per field to acre inches of water  
10 per acre. If Mr. Sagady had correctly done this  
11 calculation, he would have shown that the nitrogen  
12 balances, but his mathematics were wrong.

13 Q Okay. Let me --

14 A And so I -- this is inaccurate, and a  
15 misrepresentation of what goes on in the dairy.

16 Q Okay. But you testified that you looked at  
Page 272

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17 what he did and concluded that -- that the nitrogen -- I  
18 think you said the nitrogen balanced. Is that what you  
19 said?

20 A The nitrogen -- we are permitted to put out so  
21 many pounds per acre per year of nitrogen onto each  
22 field --

23 Q Right.

24 A -- from our green water lagoons. The permit  
25 is at -- the permit volume is what's coming out of green

301  
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1 water lagoons, and that, based on our calculations, before  
2 we converted Barn 1 and 2 from slush to scrape, we  
3 balanced that at a higher TKN, and now we have a lower TKN  
4 going up. So we're even in better shape in terms of our  
5 agronomic rate application.

6 Q All right. So what you're talking about is  
7 that balance of the amount of material -- of green water  
8 and manure that is applied to the fields, and how much is  
9 taken up by the crop; is that --

10 A Yes, that's the balance.

11 Q Is that the balance?

12 A That's the purpose of the NMP, and that's how  
13 we operate the dairy.

14 Q Right. That's the basic presumption of the  
15 NMP, that those two things balance?

16 A Correct.

17 Q Right. But this is -- this is a little  
18 different. It's kind of looking at trying to get at this  
19 question of --

20 MR. BUTLER: Objection. He said it's  
21 inaccurate; it doesn't represent his understanding of the  
22 dairy. He's testified that Mr. Sagady made mathematical  
23 corrections. I don't think he should be asking any more  
24 about this document.

25 THE WITNESS: And Mr. Sagady's never been to

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1 the dairy.

2 MR. BUTLER: If he has questions, he can ask  
3 him about it, but I object to --

4 CHAIRMAN DODGION: I'm going to sustain your  
5 objection, but he has testified before the document.

6 MR. MARSHALL: Okay.

7 CHAIRMAN DODGION: And his opinion of the  
8 document is quite clear. You can certainly get to the  
9 questions that you want to ask him without referring to  
10 the document.

11 BY MR. MARSHALL:

12 Q Okay. So have you ever -- I think -- did you  
13 ever prepare or look at this question of the kind of fate  
14 of the nitrogen stream that the dairy produces?

15 A In the context of the regulatory requirements  
16 for land application and application at agronomic rates,  
17 yes.

18 Q So, in other words, that kind of -- that  
19 confined box, that we're talking about, which is the  
20 amount that's applied to the field and the amount that is  
21 taken up by the plants?

22 A Yes, sir.

23 Q Right. So -- but the amount that's applied to  
24 the field is not the amount that is produced by the amount  
25 of nitrogen that's produced by the dairy; is that not

303  
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1 correct?

2 A Well, as I said earlier, there's some  
3 volatilization.

4 Q And there's other -- there's -- you said that  
5 there's manure that's transferred off-site.

6 A Under the permit -- under the conditions of  
7 the approved permit, yes.

8 Q And then there's compost that's composted and  
9 sold?

10 A Yes, sir.

11 Q Right? And then there's volatilization, and I  
12 assume that's including some evaporation off the ponds.

13 A Correct.

14 Q Okay. So -- and I understand the only portion  
15 that you looked at, in terms of the nitrogen balance or  
16 budget, was that question of how much nitrogen is applied  
17 to the fields and how much is taken up by the plants.

18 A Well, we look at how much nitrogen is  
19 generated from the milking parlors to the green water  
20 lagoons, and then we go to the process that you just  
21 described.

22 Q Okay. And then help me with that connection,  
23 because that's -- that's from the green water, and -- but  
24 that's, in terms of your -- what you described as your  
25 scrape operations now, there's manure, and there's green

1 water, right?

2 A Yes.

3 Q Those are different and so --

4 A well, manure, think of it as the liquid versus  
5 the solid manure. The green water --

6 Q Right.

7 A -- is the liquid portion, and the manure is  
8 the manure solids.

9 Q And so you're focusing on the liquid portion?

10 A well, I'm focusing on the liquid portion and  
11 any of the manure solids or compost that would be land  
12 applied to these fields, because they have to be factored  
13 into our calculations for an agronomic update.

14 Q Right. So, again, it's -- you weren't really  
15 looking at the amount of nitrogen that was produced by  
16 these 9,000-plus cattle, or 8200, or whatever it is, but  
17 rather the amount that is generated to be applied with the  
18 green water that's to be applied to the fields and any  
19 additional manure that's spread on these particular  
20 fields?

21 A In general, yes.

22 MR. MARSHALL: Okay. That's all I have. Oh,  
23 wait a minute. Sorry.

24 (Discussion off the record)

25

1 BY MR. MARSHALL:

2 Q Now, are the lined ponds ever cleaned?

3 A The ponds are constructed so they're  
4 effectively self-cleaning through the irrigation process.

5 Q And can you -- I mean, I hate to ask this.  
6 Can you explain that a little bit? I'm sorry. I don't  
7 understand. Can you explain how they're self-cleaning?

8 MR. BUTLER: Excuse me. I'm sorry. I  
9 apologize. I -- I got distracted. I didn't hear the  
10 question.

11 MR. MARSHALL: That's okay.

12 CHAIRMAN DODGION: It was self-cleaning ponds.

13 MR. MARSHALL: He started talking about  
14 self-cleaning ponds. I was asking them to describe the --  
15 how self-cleaning ponds work.

16 A I'm giving away some trade secrets here.

17 Q Well, don't do that.

18 A But --

19 Q Just describe --

20 A We slope the floor of the lagoons. Okay? And  
21 you've heard of this stuff flowing downhill. Okay?

22 So we slope the floors of the lagoons, and  
23 near the -- down -- the downhill portion of this slope, we  
24 have a concrete pad built into the liner (witness  
25 indicating). Okay?

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1 Through -- with manufacturers specs, we have  
2 two posts cemented into that concrete pad. It comes up

3 near the surface. We have a floating pump with a floating  
4 intake at those locations. So as the manure solids roll  
5 downslope in the lagoon, they're taken up by the pumps,  
6 land applied to the field, and we sample the soils to make  
7 sure that everything is in balance.

8 CHAIRMAN DODGION: All right.

9 BY MR. MARSHALL:

10 Q Why does the scrape system reduce the nitrogen  
11 by 40 percent? Mr. Barrackman wants to know.

12 A Because we're not putting the manure in,  
13 letting it stew, and take -- having to take it out again.  
14 That manure solids concentration is removed from the green  
15 water stream.

16 So in a flush system, you're putting the  
17 manure in. You're letting it interact and dissolve out  
18 certain constituents from the solids in the water, and  
19 then you've got to take the manure out again. Meanwhile,  
20 you've put more dissolved constituents in your water.

21 Therefore, we're not putting that shit -- the  
22 manure -- I'm sorry -- we're not putting that manure --

23 Q I was waiting for that to happen.

24 A I'm sorry, Commissioner. We're not putting  
25 that manure into the water any more.

307  
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1 Q So, in other words, the nitrogen that would  
2 otherwise be going into the water, that would dissolve  
3 into -- excuse me -- I don't really use "processed" any  
4 more.

5 A Green water is fine.

6 Q Yes, the green water, is now being put some  
7 place else?

8 CHAIRMAN DODGION: Composting.

9 THE WITNESS: It's being composted.

10 BY MR. MARSHALL:

11 Q It's going some place else.

12 A So instead of having -- being part of the  
13 equation, going to the fields --

14 CHAIRMAN DODGION: I think that --

15 THE WITNESS: -- it's going to the compost.

16 CHAIRMAN DODGION: I think that this business  
17 has been flogged quite enough.

18 MR. MARSHALL: Flogged to death.

19 CHAIRMAN DODGION: Do you have any other --

20 MR. MARSHALL: Beating a dead cow.

21 No, I think that's it.

22 CHAIRMAN DODGION: All right. I think then at  
23 this time I'm going to take a five-minute break, and then  
24 we'll come back and talk about tomorrow.

25 (Proceedings recessed from 5:17 p.m. until 5:21 p.m.)

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1 CHAIRMAN DODGION: All right. we'll be back  
2 in session here.

3 It's my intention to stop the process at this  
4 point, start up again tomorrow with Ms. Tanner,  
5 Cross-Examination.

6 MS. TANNER: Thank you.

7 CHAIRMAN DODGION: Since everybody is here, we  
8 could probably start earlier tomorrow or do we -- we don't

01-19-10 SEC Ponderosa Hearing Volume I.txt  
9 have a --

10 MR. WALKER: We do not have a set time. So we  
11 can decide that now as we see fit.

12 MR. BARRACKMAN: Mr. Coyner is not here.

13 CHAIRMAN DODGION: Well, how could we forget  
14 Mr. Coyner?

15 MR. WALKER: Mr. Coyner and I will be  
16 commuting from Reno and maybe some others. So --

17 CHAIRMAN DODGION: I'm trying to determine the  
18 appropriate --

19 MR. WALKER: And the weather isn't exactly  
20 pleasant.

21 CHAIRMAN DODGION: Has anybody looked outside?  
22 What's it look like?

23 THE REPORTER: It's dark.

24 (Discussion off the record)

25 CHAIRMAN DODGION: We were talking off the

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1 record about stopping here and then starting tomorrow  
2 morning with Ms. Tanner's Cross-Examination of  
3 Mr. Lazarus.

4 And beyond that, I was trying to determine an  
5 appropriate start time. We seem to be honing in on 9:00  
6 o'clock.

7 MEMBER COYNER: Very good.

8 CHAIRMAN DODGION: Any objections to that from  
9 any of the parties? Does that sound reasonable?

10 well, in a case of that kind, we will adjourn  
11 for now, and we will reconvene at 9:00 o'clock tomorrow

12 01-19-10 SEC Ponderosa Hearing Volume I.txt  
morning. Same place, same witness.

13 (Proceedings recessed for the evening at 5:23 p.m.)

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I, CARRIE HEWERDINE, Court Reporter for the State of Nevada, State Environmental Commission Appeal Hearing, do hereby certify that the foregoing pages 1 through 311, inclusive, comprise a full, true and correct transcript of the proceedings held on Tuesday, the 19th day of January of 2010, in the matter of the above-entitled matter.

Dated this 22nd day of January, 2010.

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