

In The Matter Of:

*Department of Conservation & Natural Resources
State environmental Commission Open Meeting*

December 19, 2017

*Capitol Reporters
123 W. Nye Lane, Ste 107

Carson City, Nevada 89706*

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STATE OF NEVADA
DEPARTMENT OF CONSERVATION & NATURAL RESOURCES
STATE ENVIRONMENTAL COMMISSION
OPEN MEETING
TUESDAY, DECEMBER 19, 2017
CARSON CITY, NEVADA

The Panel: JIM GANS, Chairman
TOM PORTA, Vice Chair
RICH PERRY, Commissioner

For the Panel: HENNA RASUL, ESQ.
Deputy Attorney General

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TUESDAY, DECEMBER 19, 2017, 9:00 A.M.

---oOo---

CHAIRMAN GANS: It is a couple minutes after nine. I want to make sure we establish a quorum and make sure we're okay right here.

MS. KING: Yes, sir, we do have a quorum and we will now take roll.

CHAIRMAN GANS: Thank you. It's been properly noticed and posted?

MS. KING: Yes, sir.

CHAIRMAN GANS: Okay. I've got some comments this morning before we begin. I want to make sure --

MS. KING: Chairman Gans, we need to take roll.

CHAIRMAN GANS: What? Sorry. I read that too. I want to make sure we have some things on the record for this meeting this morning. So I'll start off this morning by saying good morning. My name is Jim Gans and I'm chairman of the State Environmental Commission. And joining me today are two of our members of the commission, Mr. Tom Porta on my right and Mr. Rich Perry on my left.

For the record, this is a prehearing conference that's being convened at 9:00 a.m. on Tuesday, December 19th, 2017 at the Legislative Building, Room 1214, located at 401 South Carson Street. This meeting is open to the public and written notice pursuant to NRS 233B and NRS 241 has

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1 provided -- was provided to the affected parties. And the
2 agenda for this prehearing conference was also posted and
3 made available to parties from the public.

4 Pursuant to 445B.879, we will be the SEC panel
5 that rules on the Nevada Division of Environmental
6 Protection's motion to dismiss the request for appeal hearing
7 which was filed by Tahoe Western Asphalt, LLC, or TWA. And
8 I'll refer to Tahoe Western Asphalt as TWA.

9 The motion to dismiss alleges that an appeal must
10 be based on a final decision of the department whereas the
11 September 13th 2017 penalty assessments are final decisions
12 of the SEC. The SEC's role today is to grant or not to grant
13 the motion to dismiss the request for an appeal being filed
14 by TWA. The SEC will consider the arguments heard today and
15 make its ruling today.

16 Please keep in mind that this prehearing
17 conference is not the vehicle to argue the truth or falsity
18 of the allegations asserted in the appeal hearing request.
19 This prehearing conference is only to determine whether the
20 plaintiff has properly alleged the appeal hearing request.
21 So please keep the discussion focused on a motion to dismiss
22 and a motion to dismiss only. I want to really emphasize
23 that.

24 Again, any discussion regarding the allegations
25 asserted at the appeal hearing will not be allowed. You
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1 probably think I'm a bad guy today because I'm going to be
2 really strict on that for everyone.

3 Today's agenda has two public comment periods,
4 one before the ruling on the motion to dismiss and one
5 following the ruling on the motion to dismiss. Please listen
6 carefully.

7 Comments associated with TWA in any capacity must
8 not be provided during the first public comment period to
9 ensure an unbiased proceeding. If you are here today to
10 comment on anything to do with TWA, you must save your
11 comment until the second public comment period. To ensure
12 due diligence with respect to this proceeding, I will be very
13 strict on this matter. Again, any comment associated with
14 TWA must be provided during the second comment period.

15 With that, I would like to advise everybody here
16 today that this proceeding is a prehearing conference
17 conducted pursuant to NRS Chapter 233B. This conference is a
18 quasi-judicial proceeding and we would ask everyone,
19 including members of the public, to conduct themselves
20 respectively as if they were in court.

21 And at this juncture I would like the parties in
22 this proceeding to please introduce themselves. We'll do the
23 public comment first before I proceed any further. So, what
24 I'm asking now is are there any comments from the public? I
25 would ask anyone who would like to provide a public comment
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1 that is not associated with TWA to do so now. Please note
2 that no action will be taken on any matter during public
3 comment until the matter itself has been concluded on the
4 agenda and is labeled as possible action. Also, at my
5 discretion, I may limit public comments to three minutes
6 period person. With that, are there any comments from the
7 public?

8 UNIDENTIFIED SPEAKER: So we can't discuss
9 anything about what TWA is doing?

10 CHAIRMAN GANS: That's correct. You cannot -- On
11 the first public comment you cannot.

12 UNIDENTIFIED SPEAKER: Okay. Well, then why are
13 you asking if there's any comments?

14 CHAIRMAN GANS: Because there may be comments on
15 something else. It's open to the public. Something else to
16 do with the commission, something else to do with NDEP,
17 something to do with anything.

18 UNIDENTIFIED SPEAKER: Oh, I see.

19 CHAIRMAN GANS: Okay. That is the law. We have
20 to have that open public comment period at any of our
21 meetings.

22 UNIDENTIFIED SPEAKER: Okay. Got you.

23 CHAIRMAN GANS: The second comment period will be
24 the comment period where you can comment on TWA.

25 UNIDENTIFIED SPEAKER: But you've already made
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1 your decision, according to what I'm listening to.

2 CHAIRMAN GANS: Oh, no. Oh, no. There's no
3 decision being made until we consider all of the comments
4 from the attorneys in this matter.

5 UNIDENTIFIED SPEAKER: We don't have an attorney.

6 CHAIRMAN GANS: No. And you'll be allowed to
7 comment on the second public hearing.

8 Okay. I see no one coming forward. There are no
9 comments at this time. So we will proceed now with the
10 introduction of all the parties on this matter.

11 MS. SUWE: Thank you, Chairman Gans,
12 Commissioners. Belinda Suwe, Deputy Attorney General on
13 behalf of the Nevada Division of Environmental Protection.

14 (The court reporter interrupts)

15 MS. SUWE: Belinda, B-e-l-i-n-d-a, Suwe, S-u-w-e.

16 CHAIRMAN GANS: Other parties.

17 MR. SIMONS: Oh, I'm sorry. Do you want me to do
18 it at this time?

19 CHAIRMAN GANS: Yes. I'd like you to introduce
20 yourself.

21 MR. SIMONS: Mark Simons, S-i-m-o-n-s,
22 representing the --

23 MS. KING: Sir, would you please speak in to the
24 microphone.

25 MR. SIMONS: I'll do it again. Mark Simons,
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1 S-i-m-o-n-s, representing TWA.

2 CHAIRMAN GANS: Okay. And we've already
3 introduced the panel. Also sitting next to me is a
4 representative of the attorney general's office, our
5 attorney, the commission's attorney. Okay. Anyone else?
6 Very good. Thank you.

7 Okay. With that, I would like to open with a
8 prehearing conference regarding NDEP's filed motion to
9 dismiss TWA's request for the appeal hearing. We will begin
10 by listening to NDEP's basis for its motion to dismiss.
11 Following NDEP, we will hear TWA's motion -- opposition to
12 the motion to dismiss. NDEP will then have the opportunity
13 to reply. Following each party's arguments, the SEC panel
14 will have the opportunity to ask questions. So we're going
15 to -- we're going to let the parties make their
16 presentations. We will not interrupt you. We'll probably
17 make notes. So at the end of your presentations we will have
18 questions, no doubt.

19 MS. SUWE: Okay. Thank you. And for the record
20 again Belinda Suwe, Deputy Attorney General, on behalf of the
21 Nevada Division of Environmental Protection.

22 Thank you, Chairman Gans and Commissioners, for
23 granting NDEP's commission to intervene and for hearing us
24 today on the NDEP's motion to address TWA's appeal. This
25 commission should address the appeal because the commission
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1 only has authority to hear appeals of the final decisions of
2 the NDEP. The NOAV, the notice of alleged violation, which
3 I'll use interchangeably, NOAV and violations, issued by the
4 NDEP are final and not appealable. And the appeal is not a
5 petition for reconsideration or rehearing. And even if it
6 were, the appeal does not meet the factors for petition of
7 reconsideration of a hearing.

8 So first, if we look to controlling statutes and
9 regulations, they do not allow TWA to appeal the penalties
10 levied by the SEC to the SEC. The statutes and regulations
11 made clear that only final decisions of the NDEP are
12 appealable to the commission. The statutes actually define
13 appealable matters before this commission and the appeal has
14 to be related either to a permit or order issued by the NDEP.
15 TWA's appeal does not fit in to either of these two
16 categories of appealable matters.

17 In addition, if you look to SEC form three for
18 appeals, which is required by regulation and was submitted by
19 TWA, item number two very clearly states that the appellant
20 is to attach a copy of NDEP's final decision such as permit
21 or notice of alleged violation being appealed. So even if
22 TWA didn't look to the controlling statutes and regulations,
23 they were put on notice that only the NDEP's decisions are
24 appealable to this commission.

25 It's also common practice that a body cannot
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1 review its own decisions on appeal. This is true if for no
2 other reason than there's no one to respond to the appeal.
3 As exemplified in this case, we have an appellant, TWA, an
4 intervener, NDEP, but there's no apparent respondent.

5 Because this commission does not have
6 jurisdiction to hear an appeal of its own decision, the
7 appeal should be dismissed.

8 Moving on to the second issue, the NOAVs, which
9 were the basis for the appeals, are final and cannot be
10 appealed. TWA argues that they are only appealing the SEC's
11 penalty, but much of their appeal attempts to attack the
12 validity of the violations themselves. If TWA felt the
13 violations were issued in error, they should have appealed
14 the violations within the regulatory deadline of ten days
15 after the NOAVs were issued.

16 TWA was given an opportunity to present all
17 mitigating factors and evidence to the contrary at an
18 enforcement conference with the NDEP before the violations
19 were issued. TWA was also given adequate notice of their
20 rights to appeal with the issued NOAV. TWA chose not to
21 appeal the NOAVs and now the NOAVs are final. TWA cannot now
22 appeal the penalties as an attempt to attack the underlying
23 violations.

24 To be clear, NDEP's decisions are fully supported
25 by the record and we would demonstrate this at an appeal.

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1 But for any regulatory agency to operate effectively and
2 efficiently, there has to be a point that its decision
3 becomes final. In this case that date was months ago.
4 Because TWA is time-barred from appealing the NOAVs, this
5 appeal should be dismissed.

6 Finally, I'd like to address the issue of TWA's
7 request and their opposition to reframe the appeal as a
8 petition for reconsideration or rehearing. It's important to
9 keep focus on what TWA actually filed. They filed an appeal.
10 Appeals not only have different requirements than a petition
11 for reconsideration or rehearing, but they also trigger
12 different statutes and regulations for the SEC's handling of
13 the matter.

14 For example, a petition for reconsideration or
15 rehearing has different deadlines than an appeal and this
16 commission has to comply with it. It can set a bad precedent
17 and may open the commission to unnecessary liability if the
18 commission chose to interpret this filing as something other
19 than an appeal.

20 But even if TWA had filed a petition for
21 reconsideration or rehearing, they have still failed to meet
22 the regulatory criteria. TWA never specifically asked
23 whether they want a reconsideration versus a rehearing, but
24 they failed to meet the factors for both.

25 TWA's appeal cannot be considered a petition for
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1 reconsideration because it attempts to introduce new
2 evidence, which is not allowed in a petition for
3 reconsideration. TWA's appeal also cannot be considered a
4 petition for rehearing because it never articulates why the
5 evidence is not cumulative to have been presented at the
6 September SEC meeting.

7 So even if this commission were to treat the
8 appeal as a petition for reconsideration or rehearing, the
9 petition would have to be denied because it fails to meet the
10 regulatory requirement.

11 So, in conclusion, again, because SEC does not
12 have jurisdiction to hear the appeal of its own decision, the
13 NOAVs issued by the NDEP are final and cannot be appealed and
14 it would be improper for SEC to grant a petition for
15 reconsideration or rehearing. The NDEP respectfully requests
16 that this commission dismiss TWA's appeal.

17 At this point I would be happy to answer any
18 questions of the commissioners now.

19 CHAIRMAN GANS: Questions from the panel?

20 MS. SUWE: All right. Thank you. And I would
21 respectfully like to request the opportunity for rebuttal.

22 CHAIRMAN GANS: Don't leave yet. We're thinking.
23 We may have questions for you. Ma'am, please come back.
24 We're not done. We're thinking. I'm sorry.

25 MS. SUWE: Absolutely. Sorry. You were thinking
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1 of questions.

2 MS. KING: Will you please turn on your
3 microphone.

4 CHAIRMAN GANS: I noticed in your brief you
5 mentioned the timely filing. I want to make up my own mind.
6 This is for me now. I think you said that the appeal -- you
7 have a distinction between appealing a violation of the
8 permit versus appeal for the penalty. You dichotomized that.
9 Can you explain that a little bit?

10 MS. SUWE: Well, the violations were issued back
11 in May long before -- some might have been later. But I know
12 most of them were shooting May. And so pursuant to the
13 regulations, you only have ten days from the issuance of the
14 violation to appeal the violation to this commission.

15 Now, the way the air penalties are set up, the
16 violation is issued by NDEP and the subject matter of the
17 violation can then be appealed to the SEC within the ten
18 days. But there's a reg that says if the violation is not
19 appealed within ten days, the violation becomes final. At
20 that point then, as you're well aware, would then present the
21 penalty matrix to this commission based on the underlying
22 violations and then it's the commission's opportunity to
23 issue the penalty. And then at that time you can file the
24 appeal based on the SEC's penalty. But that's not an
25 appropriate appeal. You can't appeal SEC's decision to the

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1 SEC.

2 CHAIRMAN GANS: So what are your -- So you're
3 saying that NOAVs were issued I think the date's from July if
4 I remember correctly.

5 MS. SUWE: It was well before the September SEC
6 meeting.

7 CHAIRMAN GANS: So you're saying the timeliness
8 of the appeals would have had to have -- on the basis of the
9 violation, the NOAVs --

10 MS. SUWE: Right.

11 CHAIRMAN GANS: -- would have to have occurred
12 back in July or August at the latest?

13 MS. SUWE: Correct, correct.

14 CHAIRMAN GANS: Ten days after the NOAVs were
15 issued.

16 MS. SUWE: Yes, that's correct.

17 CHAIRMAN GANS: Now, that's talking about appeals
18 of the violations. Now let's talk about the violations for
19 penalties.

20 MS. SUWE: Yes.

21 CHAIRMAN GANS: So you brought that distinction.
22 So now explain to me about penalty appeals.

23 MS. SUWE: The timeliness?

24 CHAIRMAN GANS: Yes.

25 MS. SUWE: So there may have been appeal rights
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1 open to TWA after the time that the SEC made its decision.
2 But the appropriate route to appeal the SEC's penalties is
3 not an appeal to the SEC. That is something that the SEC
4 doesn't have jurisdiction to hear. There are other avenues
5 available that could have been chosen by TWA, such as the
6 petition for judicial review.

7 CHAIRMAN GANS: Okay. I'm not done. Let me
8 think. I want you to, for me again, to reiterate, because I
9 read both briefs and I was a little confused because you're
10 both saying different things, which is probably not unusual.
11 But what I think I heard you say is that a decision of the
12 SEC cannot be appealed back to the SEC.

13 MS. SUWE: That's correct.

14 CHAIRMAN GANS: I want you to expand on that.
15 Why not?

16 MS. SUWE: Well, like I said in my opening
17 statements, if for no other reason, there's no one to defend
18 the appeal. The NDEP, you know, we made the recommendation
19 to the SEC, but at the end of the day, it wasn't our final
20 decision, the penalties. So we're happy to assist SEC in the
21 defending of the penalty because we made that recommendation
22 to the SEC. But it wasn't actually our decision now to
23 appeal or to defend.

24 CHAIRMAN GANS: So it's your opinion that once
25 the SEC acts on a penalty --

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MS. SUWE: Yes.

CHAIRMAN GANS: -- that is a final decision?

MS. SUWE: Of the SEC.

CHAIRMAN GANS: Of the SEC, okay.

MS. SUWE: Because NDEP doesn't have that authority. Only the commission has granted that authority.

CHAIRMAN GANS: So the authority NDEP has is to issue the NOAV?

MS. SUWE: Yes.

CHAIRMAN GANS: That's their -- And that's appealable?

MS. SUWE: Yes. But it had to have been done within the ten days after the violation was issued.

CHAIRMAN GANS: I'm also concerned, and you could address this, I'm also concerned what I read about the Department of Conservation and Natural Resources and the SEC's relationship to that department and how the NAC or the NRS's distinguish between what the department does and what the SEC does. Can you give us any light on that? I realize we're, from what I read, that maybe we are a part of that department or under that department or within that department or some way related to that department.

MS. SUWE: Right. There is an interesting regulation which TWA pointed out which does specifically state that the SEC is created within the department. I think

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1 when you look at the statutes and regulations as a whole
2 though, it becomes apparent that that's really only meant to
3 be administratively. For example, your executive director is
4 housed within the department.

5 Because if you look at that same exact statute
6 later on, it says that the department will provide
7 administrative assistance and other assistance to the
8 commission. So it wouldn't make sense to make the conclusion
9 that the SEC and the department are interchangeable but in
10 that same statute then spell out that the department is to
11 assist this commission.

12 When you look at the statutes as well, you know,
13 the powers of the commission and the powers of the
14 department -- of their department are clearly specified as
15 different powers. So, again, it wouldn't make sense to make
16 a determination based on the statutes, but the two terms can
17 be used interchangeably if they have distinct powers.

18 And that's my -- I also pointed to the actual
19 regulation, which defines the appealable subject matter
20 before this commission, because their it clearly states that
21 it has to be based on a permit or an order issued by NDEP. I
22 don't think that this commission issuance of the
23 administrative penalties could be considered an order by
24 NDEP. You know, no where else is that term used for
25 something like this.

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1 So while I do think, you know, that that first
2 sentence that says that the SEC is housed within the
3 department, you know, I just think it's clear when you look
4 at the statutes and regulations as a whole that it's meant to
5 just be administratively.

6 And, like I said too, the SEC's form three says
7 in plain language that the appeal is supposed to include the
8 permit or order issued by the NDEP. So even if the statutes
9 arguably were confusing, the SEC, who is charged with
10 interpreting these statutes and regulations, seem to already
11 make that conclusion that the appeal has to be a decision of
12 the NDEP and not of the commission.

13 CHAIRMAN GANS: So you distinguish between a
14 final decision of the department and a final decision of the
15 State Environmental Commission. Is that true?

16 MS. SUWE: Right. Right. And I think it has to
17 be that way. Because, otherwise, any appeal that comes to
18 this commission it wouldn't hold much weight if you were
19 really taking your directions from the director and the
20 department. You know, I think that this commission is well
21 aware that they don't take direction on their decisions from
22 the director and the department. So if you're not taking
23 direction from the department, how could your decisions be
24 that of the department?

25 CHAIRMAN GANS: If the plaintiff is correct in
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1 this or the -- it would seem to me that we have been
2 operating wrong for decades. I mean, I've been chairman for
3 a while. And, you know, we act -- I always have -- act as an
4 independent body where we don't want to be influenced by
5 anyone. We don't want to be influenced by you, even our own
6 attorney. We would like to think that we think these things
7 through. We read the NAC. We read the NRS. We listen. And
8 we make our best lay judgment -- I guess you could call us
9 lay people -- based on the information. So there's a
10 possibility that we've been operating wrong for decades?

11 MS. SUWE: No, I don't think that's true at all.
12 If you look at the statutes, they very clearly state -- Well,
13 they don't specifically state that this is an independent
14 quasi-judicial board. But when you look at the duties and
15 the powers of this commission, that's exactly what this
16 commission is. In order to fulfill your obligations as a
17 quasi-judicial board, you have to have some independent
18 decision making. And that's exactly how the statutes are
19 laid out is that this commission is distinct from the
20 department.

21 CHAIRMAN GANS: I hear things said a lot about
22 the letter of the law versus the intent of the law. I think
23 I understand the intent or what I'm lead to believe is the
24 intent. I guess what we must make very sure of is that the
25 letter of the law supports that intent that we're thinking
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1 about. So that's why I'm going to be very interested in the
2 presentation of TWA because I'm not assuming anything. I
3 think anything can always be corrected if necessary if there
4 is an error.

5 So what can you tell me about the intent versus
6 the letter of the law and how we have been --

7 MS. SUWE: Right. Well, the letter of the law
8 does say that this commission is created within the
9 department. But I think that that's open to interpretation
10 and that's where you get to the intent argument. What does
11 that mean that it's within the department? And I think when
12 you look at the fact that the statutes very clearly give
13 different powers to the commission and different powers to
14 the department, they speak directly to the department
15 providing assistance to the commission, which wouldn't make
16 sense if the commission and the department were the same
17 body. Sorry. I lost my train of thought.

18 But just -- Oh, you know, the board could -- this
19 commission, sorry -- couldn't operate as a quasi-judicial
20 board if the intent of that once -- And we're looking at one
21 sentence. If you look at any other reg or statute, no where
22 else does this confusion occur that, you know, could the
23 commission and the department be used interchangeably. They
24 are always treated differently in the statutes and
25 regulations.

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1 So to me the intent is clear and, you know, the
2 letter of the law they might be open to interpretation, which
3 at this point this commission gets discretion to interpret.
4 And when you look at the intent of the rest of the statutes,
5 how this commission has interpreted the statutes in the past,
6 it's clear that that one sentence is just meant to be for
7 administrative purposes.

8 CHAIRMAN GANS: Any other comments or questions?
9 Tom?

10 MS. SUWE: The administrator also pointed out
11 that it allows the NDEP to provide you with a budget.

12 CHAIRMAN GANS: As being part of the department?

13 MS. SUWE: Right.

14 CHAIRMAN GANS: Uh-huh. Thank you. Tom.

15 MEMBER PORTA: Could you walk us through the
16 division's process for NOAV, the action, the enforcement
17 conference, and how that process goes. Because I know we
18 changed -- it was changed a couple of years ago with the way
19 that it was held. Could you explain that to this commission
20 for us.

21 MS. SUWE: Sure. So the NDEP goes out, they
22 suspect a violation has occurred. They would issue a draft
23 NOAV to the alleged violator and invite them to come in for
24 an enforcement conference. At that point NDEP sits down with
25 the alleged violator and at that point it's the alleged

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1 violator's opportunity to provide any contrary evidence or
2 any mitigating factors that NDEP should consider.

3 After NDEP takes those factors in to
4 consideration, they issue a final notice of alleged violation
5 or in some cases they don't issue anything at all, if the
6 alleged violator has, you know, evidence to the contrary. In
7 addition, sometimes the violations are just issued as
8 warnings if, you know, we feel like the problem has been
9 corrected and it's not likely to happen again and it's not
10 severe.

11 So then once the violation is issued, attached to
12 the violation is the SEC's form three for appeals and there's
13 also a paragraph that explains the violator's rights to
14 appeals. And then once the -- If the violator does not
15 appeal that violation within ten days, then that violation
16 becomes final. And at that point we bring the violation to
17 this commission based on the penalty matrix with our
18 recommendation for the penalty.

19 MEMBER PORTA: Just one last question. Then in
20 that, before you make the final NOAV issuance with the form,
21 in that enforcement conference the parties are told
22 explicitly what information the division has and they're
23 provided an opportunity to provide counter-information to
24 contest the notice or, you know, have other evidence showing
25 they were in compliance versus in violation. If they don't

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1 do that, is the penalty discussed at that conference as well?

2 MS. SUWE: That is something that we changed on
3 recommendation of this commission. We do discuss what the
4 penalty will be recommended by the NDEP to the SEC.

5 MEMBER PORTA: Okay. So when they leave that
6 conference, they know what the violation is, what the penalty
7 is going to be recommended to the SEC, and then that's put
8 together in the formal NOAV, final action, by the division
9 with the form to appeal?

10 MS. SUWE: That's correct.

11 MEMBER PORTA: Okay. Thank you.

12 MS. SUWE: I would have to double-check. But I
13 think the recommended penalty might be included in the draft
14 letter that goes along with the -- Yes, it is. So in the
15 draft letter. Sorry. Not in the draft letter. But the
16 letter that goes out with the -- Oops, sorry -- the
17 violation, it specifically states which penalty the NDEP will
18 be recommending to the State Environmental Commission.

19 MEMBER PORTA: Thank you.

20 MEMBER PERRY: My turn. Belinda, I just have one
21 question. There we go. Where is it? I'm sitting here
22 looking at the statutes and the regulations of 445B, right.
23 Where is it in the statutes or regulations the procedure that
24 we use with the State Environmental Commission to set
25 penalties? Is it in -- Is it in NAC? I can't find it in

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1 NRS. Maybe I'm not looking in the right place. Or maybe
2 it's in some other part of 445.

3 MS. SUWE: So in NRS it states that the
4 commission has the authority. I'll have to get my reg book
5 to find you the exact citations. But the regulations state
6 that the commission has authority to levy penalties up to
7 \$10,000 per violation per day. But it's not spelled out
8 specifically for major violations. For minor violations
9 there is an administrative code that specifically spells out
10 if you do this it's this much money. And, you know, those
11 penalties increase for the number of times that you have the
12 same violation.

13 But for major violations, all you have is the
14 statutory maximum and that's why the NDEP and this commission
15 developed the penalty matrix so that we could be sure if we
16 were applying penalties consistently across the board.

17 MEMBER PERRY: Okay. Thank you.

18 CHAIRMAN GANS: So let me make -- This is kind of
19 a reiteration. Are there two bites of the apple? And what
20 I'm asking here is a permittee has the opportunity to appeal
21 the final decision of the department, which is the NOAV?

22 MS. SUWE: Right.

23 CHAIRMAN GANS: With a certain time period set.
24 I think it's ten days; is that correct?

25 MS. SUWE: That's correct.
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1 CHAIRMAN GANS: Is there another bite at that
2 apple? Is there another opportunity for the permittee to --

3 MS. SUWE: Well --

4 CHAIRMAN GANS: Go ahead.

5 MS. SUWE: -- that's exactly what TWA is trying
6 to do here. They didn't file the appeal the way they should
7 have. And now that they got penalties that they don't like,
8 now they're trying to appeal the penalties, which I would
9 concede that they probably do have a right to appeal the
10 penalties in a petition for judicial review, but the subject
11 matter has to be specific to a penalty. And in this case
12 when you read TWA's appeal, it goes well beyond that to the
13 violations themselves.

14 As I put in my brief in response to TWA's
15 argument, you know, if you look at their prayer for relief at
16 the end of their appeal, they ask that the violations be
17 withdrawn or overturned. It clearly that time has come and
18 passed. You know, those violations are final. They are
19 issued. They cannot be withdrawn at this point. So it does
20 appear that TWA is trying to get two bites at the same apple.

21 CHAIRMAN GANS: But if I recall what you said,
22 there's a possibility of a second bite which would be the
23 rehearing or the reconsideration. Is that correct or not?

24 MS. SUWE: That they can ask -- he could have
25 potentially asked this commission to do a petition for
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1 reconsideration or rehearing. But there are certain factors
2 that have to be met in order for this commission to grant a
3 petition for reconsideration or rehearing.

4 In addition, even if you had asked for a petition
5 for reconsideration or rehearing, it would still be limited
6 only to the issue of the penalty and not to the underlying
7 violations.

8 CHAIRMAN GANS: Okay.

9 MEMBER PORTA: I'm good.

10 CHAIRMAN GANS: Rich?

11 MEMBER PERRY: Nothing.

12 CHAIRMAN GANS: Okay. Thank you for your
13 patience with us.

14 MS. SUWE: No. Absolutely.

15 MR. SIMONS: Again, Mark Simons. Thank you.

16 MS. KING: Sir, will you please turn on your
17 microphone on.

18 MR. SIMONS: Mark Simons. Okay. I appreciate
19 your questions because your questions are giving me a
20 reflection of how you're looking at this. And so I'm going
21 to formulate my response to kind of the guidance that you've
22 been giving me as I've been listening.

23 The premise of this petition is that 233B.130
24 says before you can take the steps of taking this matter out
25 of the administrative process and taking it over to the
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1 judiciary and having the judicial branch oversee and review
2 and analyze what you did, you have to complete your
3 administrative steps to give this commission the opportunity
4 to review, do its own housekeeping, clean up the record and
5 see, look, did we make a proper decision or is the record
6 supportive of what we did. So that is why we've taken this
7 approach.

8 The two bites of the apple, that's an interesting
9 usage, because there's always two bites of the apple, always.
10 There's always a decision that will be made.

11 Let's go down to the page that you started with
12 the NOAVs. You started with that. The director takes that.
13 And that can be appealed to the commission. Then there can
14 also be and one of the review of that commission's decision
15 on the NOAVs.

16 But now we've gone past the NOAVs. We're at the
17 penalty phase. And I'm going to use the analogy to the
18 criminal law. Many times a criminal will be convicted but
19 the penalty phase is something different. The crime has been
20 committed. I'm not saying that this equates to a crime. But
21 I'm using this as analogy. And then there's the penalty
22 phase. And the penalty phase is another review of the
23 underlying activities to determine whether the penalty is
24 appropriate. So that's why we're now at this phase. Because
25 there was a -- an additional initial consideration of the

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1 penalty and the penalty was imposed. Now, does that
2 automatically stop the review process within the
3 administration? We don't believe so. Because you do get a
4 second bite. There can be a reconsideration. We know that.
5 We know that's under -- in the NACs and the NACs give us
6 guidance in how to apply statutes.

7 We also have, based upon our interpretation, I
8 think this was probably a very unusual situation because I'm
9 not familiar with anyone having taken steps -- Although you
10 said you've had decades of experience, I don't know if you've
11 had decades of experience with this kind of unique issue.
12 The statute says -- Excuse me. The NAC says any person
13 agreed by final decision of the department, this is under
14 445B.890. And then the department is later defined. And
15 within the department is the commission.

16 And you heard argument that we should carve out
17 the commission and treat it independently. Well, I agree
18 it's independent. It has to be independent. But the statute
19 also says, and I believe it's for funding purposes, that its
20 support and assistance comes within the greater overall
21 department. And that -- because you're not allowed for it.
22 You're not funded by a separate legislative grant.

23 But where do you work in the frame work? You
24 work within the department. So if you look at the plain
25 language of the statutes -- And that's another statutory

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1 construction requirement -- it says the final decision of the
2 department can be appealed. And you use form three, which we
3 did. Form three gives you the detail analysis how you
4 process. And that form three was not rejected. It was not
5 sent back saying you've done something improper. It was
6 not -- We were not notified that, excuse us, we don't
7 understand this process that you're trying to implement, we
8 think your process is wrong. No. It was accepted and
9 processed.

10 So we moved forward with that form three,
11 which -- And when you say the intent -- And I'm going to say
12 the process that was followed appeared to be proper under the
13 interpretation of the statutes and under the procedural
14 mechanisms as you've implemented as part of this commission
15 to process appeals. So now there's this upside with the
16 argument with the NDEP coming in and saying, well, nobody
17 would have been notified. Well, everybody was notified. And
18 under the rehearing, anybody who has I will say a dog in the
19 fight is one way to use, anybody who is interested in the
20 matter can appear, just like they did, intervene just like
21 they did, and move forward with it.

22 So the concept that you don't get to review a
23 decision that what you say on the penalty phase has no
24 oversight or no reconsideration aspect, I don't agree with.
25 I think there's always, always the ability for you to revisit
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1 whether your conduct was appropriate before it was taken out
2 of this arena and cast in to another arena for oversight.

3 When you requested is there an appeal, she was
4 very, very careful how she said it. Yes, you immediately go
5 to judicial review, you immediately take this out and you go
6 somewhere else and review it. I don't agree with that
7 process. I don't think the statutory framework or the NAC
8 attempts to impose that type of burden upon you. I think it
9 gives you the opportunity to review. And in this instance
10 the underlying factors will be important in the review of the
11 penalties. Because the underlying factors, you can always
12 take judicial notice and judicial notice is a mechanism
13 whereby you get to look at a public record or an activity
14 that's been taken in the course of the proceedings at any
15 point in time.

16 And at this point the underlying to the first
17 violations were based upon a failure to properly permit
18 within the time requirement even though there was an
19 extension granted until the next start-up season. So you
20 imposed -- And the penalties were imposed on activity that
21 was allowed under the NDEP's own correspondence. And so
22 should there be penalty imposed when the person, just any
23 business owner, who has been allowed the opportunity to have
24 a grace period until they start operations should get
25 penalized for that. No. That's where we get in to the is

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1 the penalty appropriate in this situation. If it's just
2 going to be rubber stamped that says NDEP says this, rubber
3 stamp it, we imposed our penalties, rubber stamp it, and go
4 take it up to the judiciary, that's fine.

5 If that's the message you want to send to anybody
6 in the community that we won't revisit whether the underlying
7 activity was appropriate, and that's a foundational basis.
8 It's the foundational basis of the entire statutory scheme of
9 the fairness. The opportunity to have review within the
10 administration before we jump it over to the court system.

11 Do we want to be in the court system? No. Do we
12 want this panel to review to say maybe the penalties weren't
13 appropriate given the underlying activity? So that's why
14 we've invoked the appellate process, which appeared to be the
15 proper way based upon our interpretation of the language,
16 based upon the procedures that the commission on the form
17 three and acceptance with the form three in light of the
18 opposition -- excuse me -- the motion, which says we should
19 reconsider or rehear.

20 So that's another bite at the apple. You
21 absolutely do have a second opportunity. It's not our bite.
22 It's your bite. We bring this issue to your attention. If
23 you say no, we're standing by our main decision, fine. If
24 you say no, no.

25 But then we get to the finality. And once you
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1 have rendered a decision on the appeal or rehearing then it's
2 final. Then we can jump in to the judicial review process,
3 which, again, we're trying to just achieve fairness on this
4 analysis. And if you think that there's something that was a
5 misinterpretation of the statute or the NAC on the process,
6 we think that you should under your inherent powers to review
7 and do what's right take a look at it under rehearing
8 scenario.

9 I think I've wrapped up with essentially what I
10 wanted to get out. And I'm ready to deal with any questions
11 you may have.

12 CHAIRMAN GANS: We certainly have questions.

13 MR. SIMONS: Sure.

14 CHAIRMAN GANS: So I'll give my patriots here the
15 first shot. Tom, do you have anything you want to ask?

16 MEMBER PORTA: Yes. Thank you.

17 Mr. Simons, is it?

18 MR. SIMONS: Simons.

19 MEMBER PORTA: Yes. So your contention is that
20 the SEC somehow reports to the director of the department?

21 MR. SIMONS: No, no, no.

22 MEMBER PORTA: Okay. Then your argument with
23 regard to the SEC being under the department is the way
24 you're moving forward for this appeal. If we weren't part of
25 it or independent then we wouldn't be subject to that. I

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1 mean that's kind of what I got from your argument and in your
2 brief. Because if we're not a part of the department other
3 than the department providing us administrative support, I
4 fail to see how your argument makes any sense. Maybe you
5 could explain.

6 MR. SIMONS: I will. It's very simple. The NAC
7 445B.890 says this, any person agreed by a final division --
8 decision of the department. NRS 445B.200 says the SEC is
9 part of the department. So using the language -- And this is
10 called out for these refined terms, department. SEC part of
11 the department. That could be interpreted to say the SEC, a
12 decision -- a final decision by the SEC has to be appealed to
13 the SEC. That's the -- And just straight statutory language
14 just taking the definition out of one statute and applying it
15 to the appeal statute. That's how we looked at it.

16 It wasn't -- And within that, I don't -- the
17 analysis of whether you're independent is irrelevant. The
18 analysis of whether you have separate funding is really
19 irrelevant. It's what does the language of the statute say.
20 And in this setting, in the setting of a decision made, how
21 do you review a decision. So it makes sense that if a
22 decision is made by the department, which includes the SEC,
23 what do you do?

24 And then it says this. You appeal the decision
25 by filing a request for a hearing before the commission on
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1 form three with the SEC. So we look at this language and say
2 the definition of the SEC fits within the department,
3 therefore it fits -- we have to follow this procedure based
4 upon the language of the statute. That's why the form three
5 was filed. Form three was accepted. Does that make sense?
6 Did I answer your approach?

7 MEMBER PORTA: Yes. Thank you. You are correct,
8 this is new ground for us. I don't think we've had this
9 particular type of appeal before, if you will. So I'm just
10 trying to wrap my head around it. I think the crux of this
11 argument is are we part of that department? Are we subject
12 to what -- You describe the appeal process under the
13 department. If we're not then I don't believe the appeal is
14 appropriate. But that's for later.

15 MR. SIMONS: I will agree with that. I think
16 that's one prong of it, of what we're saying. The second
17 prong is if you think that is the statutory interpretation
18 you're going to use is not going to be consistent with what
19 we're proposing, then I think the second prong is do we look
20 at it as a request for a rehearing. Because somehow the
21 proper forms weren't followed. Or are we going to penalize
22 the appellant for this confusion of this process? And I
23 think that's going to be the harder question for you. And I
24 think that's where we get to the intent. What's the intent?
25 The intent is to do right, to review, to see if you make a
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1 solid decision. And then the parties can take it up if they
2 don't feel comfortable with the process in to the judicial
3 arena.

4 CHAIRMAN GANS: Mr. Perry.

5 MEMBER PERRY: Thank you. Mr. Simons, I'm
6 actually right in the midst of working through some updates
7 in our own regulations right now in the department I'm in.
8 And I look at two of these documents here. First is the
9 statute right, which is the defining language that enables
10 the administrative code. So I'm going to read through this
11 very short section here and I want you to tell me under
12 what -- under what part of it you have filed the appeal,
13 okay.

14 MR. SIMONS: Can you tell me what statute so I
15 may grab it?

16 MEMBER PERRY: Absolutely. NRS 445B.360, appeals
17 to the commission, appealable matters, actions by the
18 commission and regulations. Because to me this is the
19 defining -- It's not -- The NAC, and I'll talk about that in
20 just a minute, because that's really what you're quoting
21 there in 890 and 899 are practices before the State
22 Environmental Commission, which is a requirement that there
23 is those regulations how those hearings and all work.

24 So any person aggrieved by, A, the issuance,
25 denial, renewal, modification, suspension, or revocation of
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1 an operating permit, or B, the issuance, modification, or
2 rescission of any other order. Is your appeal based on one of
3 those things?

4 MR. SIMONS: You didn't finish.

5 MEMBER PERRY: We'll finish. By the director may
6 appeal to the commission. Number two, the commission shall
7 affirm, modify, or reverse any action taken by the director
8 which is the subject of the appeal. And, three, the
9 commission shall provide by regulation for the time and
10 manner in which appeals are to be taken to the commission.

11 MR. SIMONS: Yes.

12 MEMBER PERRY: So this is an NOAV and a fine that
13 was set by the commission.

14 MR. SIMONS: No. This is where we disagree. The
15 statute that you just read says decisions by the director,
16 decisions by the director. We are not appealing the decision
17 by the director. We're appealing a decision made by the
18 commission. That's why I don't believe this statute applies.

19 And I do agree with counsel that was up here
20 before that says if you are going to appeal the NAV --
21 NAOV(sic), then that's a decision that would have been
22 brought to the commission. Then the commission takes the
23 further step of implementing the penalty, makes a decision on
24 the penalty. So I'm looking at it and I think this statute
25 calls out for distinction between a decision by the director,
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1 which may be appealed, and the decision made by the
2 commission. And we're at the commission aspect. How do we
3 review a decision by the commission? That's where we have to
4 jump back to the other statutes. And that's how I'm
5 approaching your question.

6 MEMBER PERRY: If you could tell me what other
7 statute are you saying.

8 MR. SIMONS: Oh, actually you're correct, it's
9 not a statute. It's the NAC that says how do you take the
10 steps of having reviewed, how does the administrative body
11 review a decision? We know how the director's decision is
12 appealed because that is the statute you just read. But how
13 is the decision of a commission reviewed. We know we have a
14 rehearing and we have language that gives rise to a potential
15 appeal, that you appeal the decision to the commission. So
16 we have statutes that have some direct appeal rights to this
17 commission. Excuse me. Not a statute. I misspoke. NAC.
18 So you do have automatic appellate -- something is going to
19 be automatically appealed to you under the NAC. So we look
20 at that.

21 So for my process in responding to your question,
22 I think that statute deals with the first layer of the
23 implementation of the NOAVs against the TWA, which then could
24 have been appealed to the commission. But we're now past
25 that. We're in the commission's decision.

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1 Does my response make sense? I hope it does.

2 MEMBER PERRY: You know, I guess my understanding
3 always has been that it's the statute that determines, you
4 know, what is appealable or what is allowable. And it's the
5 administrative code that decides how that is going to happen.
6 So I look at that practices before the State Environmental
7 Commission, all of those that you have referenced there at
8 890 and 899, here's the procedure by which to be used if,
9 indeed, 445B.360 appeals to the commission as viable.

10 So I go back to the appeals to the commission and
11 say it isn't here. So I don't see how it could be appealed
12 to this commission.

13 MR. SIMONS: Then --

14 MEMBER PERRY: But maybe I'm looking for a legal
15 opinion from the attorney general's office or something,
16 because it seems like we're mixing NAC and NRS up.

17 MR. SIMONS: Here's how I think I can rectify
18 this. Clearly there's a mechanism to appeal the decision by
19 the director of the NDEP.

20 MEMBER PERRY: In 360?

21 MR. SIMONS: Correct. But what is the process
22 for review? Because we don't have a callout in the statutes
23 of how does a commission rehear a matter before it. But we
24 do have a callout, a specific NAC provision, that says you
25 can rehear something. We're also saying -- And so there is a
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1 little bit of a possible breakdown in the statutory framework
2 that doesn't expand upon areas that the NAC does cover. And
3 I'm agreeing with you that I'm not familiar with anything in
4 the NRS that specifically addresses what is the mechanisms,
5 how do you approach an appeal to the commission. Although
6 the NAC specifically does. So you've had to have had appeals
7 from other matters where you are the appellate commission,
8 have you not?

9 MEMBER PERRY: Yes. Usually -- But it was
10 something that was on the list of 445B.360. It was the
11 denial of a permit or something like that. It was never, at
12 least in my time here. Perhaps my cohorts here can comment.
13 But I don't recall anything other than what was in 360.
14 Those are the appealable items to the commission.

15 MR. SIMONS: Okay.

16 CHAIRMAN GANS: Rich, I can't rule -- I'm not
17 ancient, but I think I agree with you. That would be my
18 understanding also.

19 MR. SIMONS: Have you ever received a request for
20 rehearing on one of your decisions?

21 CHAIRMAN GANS: Not since I've -- Not in the last
22 ten or 15 years.

23 MR. SIMONS: See, I think we're treading on new
24 ground is what I think. I took a -- Some others may have a
25 different opinion. But hopefully I'm answering your
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1 questions at least from my approach.

2 MEMBER PERRY: I guess my comment there is I can
3 see how it could be confusing. Because in -- when you're in
4 a state agency and you're having to -- you know, the
5 legislature decides what is going to be in the statute and
6 then you take that and you execute the regulations
7 accordingly, that obviously was done here. And the
8 assumption there, because almost every, you know,
9 environmental regulation or, you know, natural resource code
10 that there is has been developed, you know, that way. And
11 there is this standard group of things called practice before
12 the State Environmental Commission or in the case of the
13 agency I work for is practice before the commission on
14 mineral resources that that's -- these are the practices of
15 what the hearings are. This is how you do them. But what is
16 allowed to go to those are in the statute. That's my
17 interpretation of this. And maybe we have some legal counsel
18 here that could comment on that.

19 MS. RASUL: I would recommend deferring to the
20 arguments that are provided by Ms. Suwe. She could probably
21 address that for you.

22 CHAIRMAN GANS: Mr. Simons, I do have some
23 questions. When you asked the question about using the form
24 three, okay, as far as I'm concerned, my experience on this
25 SEC is that the statutes you read and the use of form three
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1 and the final decision of the department all make sense and
2 we've been doing that for years.

3 Certainly TWA knew what the NOAVs were, knew what
4 the penalties were. You didn't object, didn't appeal, didn't
5 do anything. Okay. So now you're coming -- Here's my
6 confusion -- Let me finish.

7 MR. SIMONS: Fair enough.

8 CHAIRMAN GANS: My confusion is now you're coming
9 forward and in my opinion after the fact. I take what you're
10 doing very seriously. First of all, my first reaction is
11 it's absurd. And then I thought, wow, I'm surprised. No. I
12 got to listen to this. I got to figure out what's going on
13 here. Because there may be a chink in the armor, so to
14 speak. It may be what we've been doing we haven't been doing
15 exactly proper. Maybe there's a different interpretation,
16 maybe the letter of the law. I don't know. I know what
17 we've been doing. And I know when you say the final decision
18 of the department form three is an appeal. Okay. It's not a
19 reconsideration. It's not a rehearing, okay. Are we
20 hearing -- I read the statute and I read the NAC and it looks
21 to me like you didn't provide us with what I would want from
22 you for a reconsideration or a rehearing. So here I sat
23 really confused about what in the world we're doing here when
24 I know in the first place the NOAV and the penalties were not
25 appealed, were not objected to. In fact, my understanding

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1 was they were accepted way back in July or August. And so
2 now later we come through here and it's months later and now
3 we're trying to do something else. I almost think that --
4 And, pardon me, and I don't mean any -- anything by this, but
5 it seemed like you were confused. Why would you use form
6 three? Why didn't you just come in for a reconsideration or
7 a rehearing? You didn't. This is not a petition. You used
8 form three. Form three is pretty knowledgeable to us. We
9 use them all of the time.

10 So I guess you're leaving me totally up in the
11 air. I'm not saying you're right or wrong. I'm just saying
12 I'm confused by what you've done.

13 MR. SIMONS: Okay. May I respond? Thank you.
14 You start out by saying the NOAVs and the penalties were
15 imposed. That's not true. The NOAV is implemented. And
16 then there's a separate proceeding to deal with the penalty
17 phase; correct? Because there was a hearing that was
18 conducted.

19 CHAIRMAN GANS: No. Well, here's what I'm
20 saying. No, I'm not saying that. You're putting words in my
21 mouth. The permittee knew the NOAV, knew the penalty. They
22 knew both. We just walked through that with Mr. Porta here.
23 They knew it. And there was no appeal. There was no
24 objection. Nothing was done last July. It almost seems
25 like -- And this is where I'm confused. We're coming in

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1 after the fact with an appeal of an SEC final decision and
2 you're asking the SEC to say that decision wasn't right. You
3 guys were wrong. You got to rethink this thing. But it
4 didn't come in here as a reconsideration or a rehearing. It
5 didn't come that way.

6 MR. SIMONS: I understand. The aspect of the
7 penalty phase, the penalty is not imposed until later. And I
8 think that occurred in September. There was a penalty. And
9 that became a ruling of the commission. The prior phase is a
10 ruling by the director. I agree that was not appealed. But
11 then when the commission made a decision, that then has
12 consequences. And based upon our review, and I walked you
13 through how it could be interpreted, whether you say that's
14 the right interpretation or not, that's a you decision, not a
15 me decision. I had to explain my position to you and
16 hopefully I did that.

17 And then I said because you make a decision
18 should you have the ability in the statutory scheme to
19 revisit a decision before it's taken up to judiciary. And I
20 take this very seriously. I don't come in here and do this
21 because I think it's fun or entertaining. I'm trying to do
22 the right thing. And the right thing in here is I think is
23 to give the opportunity to the commission to revisit based
24 upon some of the underlying information that was not
25 disclosed at the director level. The communications where
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1 they were given the extension was not brought to anybody's
2 attention at the lower level. And should you turn a blind
3 eye to that, I don't think so.

4 So we're trying to find a mechanism to get this
5 information to you for review. If you say procedurally
6 you're barred and we're not going to reconsider information
7 that I've asked you to take judicial notice of, that's your
8 decision as well. But I'm trying to do -- bring the issue to
9 your attention. If you say, Mr. Simons, you used the form
10 three absolutely incorrect, your use of the rehearing
11 procedure absolutely incorrect, and we're not going to review
12 or take judicial notice, the fact that we imposed a penalty,
13 some significant penalties, based upon this information,
14 we're not going to review that, I understand that as well.
15 Then we know we have to go to the next arena.

16 So I'm at a loss. I understand your frustration
17 because this is a very unique situation and maybe it wasn't
18 approached the proper way. But we approached it the way that
19 we thought it was required.

20 CHAIRMAN GANS: So what I'm hearing you say is --
21 or my question is where do we draw the line? I mean, if the
22 permittee has the opportunity to respond to a NOAV, which you
23 certainly did, respond to a recommended penalty knowing that
24 that penalty was going to go forward and be considered at
25 least by the SEC, so -- and that didn't go right, okay, or
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1 the permittee decided, wait a minute, I didn't like the NOAV
2 in the first place but I didn't -- I didn't object and I
3 didn't like the penalty and I didn't object, but -- I guess
4 what I'm asking is administrative remedies, where do we stop?
5 I mean, we could be here for the next two or three years
6 trying to figure out what we're supposed to do and not do
7 and give more bites of the apple is what I'm saying.

8 MR. SIMONS: I don't think so. I think this is
9 the end. I don't think under any interpretation that anybody
10 would agree that there would be anymore approaches. It
11 simply is does the commission have the ability to review a
12 decision it made. That's the foundational premise. And if
13 so, then what is the proper methodology to get there for the
14 commission to reconsider the decision, either by mechanism of
15 an appeal or mechanism of a rehearing. You would have to
16 think just instinctively, yes, we should have -- there should
17 be a mechanism, we have the ability to review a decision we
18 made by an aggrieved party before it all of a sudden jumps up
19 in to the court system. And that's what I'm looking at. And
20 I have explained both approaches and I don't think I need to
21 rehash that.

22 CHAIRMAN GANS: I've got one more question. I
23 have probably a final question. It may not be a fair
24 question, but I'm going to ask it, okay.

25 MR. SIMONS: I'm good.
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1 CHAIRMAN GANS: What really bothers me here on
2 all of this, after you caused me, okay, to go back and read
3 the NAC, read NRS's, I'm trying to figure it out myself,
4 okay, why didn't you petition a rehearing or a
5 reconsideration? Why did you go the appeal route?

6 MR. SIMONS: That's a fair question. I'm
7 responsible for all the decisions made out of my office. So
8 I'm standing by the decision that was made to go with the
9 appeal.

10 CHAIRMAN GANS: Okay. That's honest. That's all
11 I can ask.

12 Tom.

13 MEMBER PORTA: Yeah, Mr. Simons, so my question
14 is, you know, when I look at the NAC and the practices before
15 the commission, which are 445B.875 through 899, the
16 rehearing, when I look at this it shows a process had you --
17 And the way I interpret it, if you had filed the appeal and
18 it went before the commission, these regulations lay out the
19 process in which those appeals are heard before the
20 commission, including the rehearing.

21 And the way my thinking goes is if this had been
22 appealed within the ten days and we had gone to a hearing,
23 then if you followed the NAC, these practices, you could have
24 petitioned a decision by the commission for rehearing, but
25 that wasn't done here. You're asking us to basically, in my

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1 opinion, pluck out petition for rehearing, 899, and it just
2 in my way of thinking doesn't seem to fit the process which
3 practices before the commission lay out. And why -- why
4 should we take this piece out and apply it to your situation
5 when, in my opinion, again, these practices before the
6 commission are appeals to the commission through the NOAV
7 process and petition for rehearing. Why should we pluck out
8 899 in this particular case?

9 MR. SIMONS: Okay. I think I understand your
10 question. Going back to the basic concept, it is not a
11 decision of the director. It was a decision of the
12 commission that is being sought for redo, reconsideration,
13 however you want to phrase it. Why you call out 899 -- Well,
14 why I call out 899 is because it specifically says that
15 petition for rehearing has these requirements.

16 MEMBER PORTA: Right.

17 MR. SIMONS: And to the extent that it -- For
18 example, Subsection 7, if the commission grants a petition
19 for reconsideration, we will re-examine the records in regard
20 to the issues. So that is the mechanism if it was improperly
21 formulated as an appeal under 890 rather than should have
22 been properly cast as a reconsideration under 899 then we
23 would ask for that leniency I guess is the best way to phrase
24 that.

25 CHAIRMAN GANS: Mr. Perry.
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1 MEMBER PERRY: I don't think I have any questions
2 at this time. Actually, because I'm lacking NRS 233B.050, do
3 you have that one, Tom?

4 MEMBER PORTA: I might have it. The
5 Administrative Procedures Act?

6 MEMBER PERRY: Yeah. That's what a lot of this
7 899 and --

8 MEMBER PORTA: 050.

9 MEMBER PERRY: Yeah.

10 MEMBER PORTA: Yeah, I think so. Yeah. I have
11 633B. Do you want it?

12 MEMBER PERRY: Is it a short section by chance or
13 is it a long one?

14 MEMBER PORTA: Let me get to it first.

15 MEMBER PERRY: That's the Administrative
16 Procedures Act, right, that takes a lot of this?

17 MEMBER PORTA: Yeah.

18 MEMBER PERRY: If you have it or if it's short.

19 MEMBER PORTA: Yeah. I'll just give you the page
20 here when I get to it. 050?

21 MEMBER PERRY: Okay. So it's a good thing I'm
22 not a lawyer because I would be in trouble here. But I keep
23 reading these things because that was the intent of the
24 legislature when they passed this, right. And everything in
25 this section here that you've referenced is the basis of your
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1 appeal under the -- Let me go back to the term here --
2 practice before the State Environmental Commission. So it
3 references back to 233B.050, NRS, the rules and practices of
4 public inspection, non-validity of rules and practice and
5 regulations and final orders. So it says here, in addition
6 to other regulation-making requirements opposed by law, each
7 agency shall adopt rules of practice setting forth the nature
8 and requirements of all formal and informal procedures
9 available, including a description of all forms and
10 instructions by the agency, which fits what's here, right?
11 It says here are the procedures under which a hearing can be
12 held in front of the State Environmental Commission. Make
13 those available for public inspection, make available for
14 public inspection all final orders, review the rules of
15 practice every three years, regulations every ten years, and
16 so forth and so on.

17 But what it basically says is every agency has to
18 have -- adopt rules of practice for hearings. And that has
19 been done here.

20 But I get back to the statute which says here are
21 the appealable items under NRS 445B.360. And an issuance of
22 an NOAV defined by the State Environmental Commission is not
23 one of them. I get back to the intent of that. That was --
24 I mean, am I making sense here?

25 CHAIRMAN GANS: Oh, yeah.
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1 MEMBER PERRY: Or am I just getting myself in to
2 the dangerous legal world? Thank you very much. Any comment
3 on that?

4 MR. SIMONS: I think I addressed it earlier. I
5 don't think -- I think we're outside of that frame work.
6 We're not just limited by that.

7 MEMBER PERRY: Then under what statute is --
8 Because, I mean, when you say we're outside the framework, we
9 can't just make up framework. It has to be somewhere in the
10 statutes that allows for this appeal. And where I'm looking
11 at is I don't see that.

12 MR. SIMONS: Well, that statute that you just
13 read said that regulations in various rules of procedure will
14 be implemented. That's with the NACs. I interpreted that to
15 be the NAC enabling legislation. So now we look to the NAC.
16 And now if we're looking at the NAC, then we're in to the 890
17 and 899 that I've been talking about. So if that's the
18 enabling legislation, it doesn't have to fit in to the .360
19 framework that you're relying on because that's a decision by
20 the director.

21 If there are only those types of appeals that you
22 consider and there's nothing else that comes from any other
23 department or any other division or any other, I guess it
24 would be any other department or any other subdivision other
25 than the NDEP, then that's good language.

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1 But the way the NAC is written, it doesn't only
2 limit appeals to the commission to matters coming out or
3 deriving from .360 in my position.

4 MEMBER PERRY: I understand your position. I
5 don't know that I agree with it though.

6 MR. SIMONS: That's fair. I mean, you don't have
7 to agree.

8 MEMBER PERRY: I mean, otherwise, it has to be
9 pretty specific of what is an appealable item to any -- any
10 body; right? And I think clearly I go back to it's -- this
11 was set up -- this mechanism was set up and these procedures
12 under the practices before the State Environmental Commission
13 were the practices set up for appeals under 445B.360, which
14 are basically issuance, denials, renewals, modifications,
15 suspensions, or revocations of permits and so forth.

16 MR. SIMONS: Let me try something different on
17 you then. Where in that statute does it say how the
18 commission conducts a rehearing in 360?

19 MEMBER PERRY: It does. It addresses it here
20 under the practices. But what I'm saying is the rehearing
21 would have to be in regards to one of those things under
22 445B.360.

23 MR. SIMONS: Well, it doesn't call out -- If we
24 just look at the straight language of 360, it doesn't call
25 out for the ability to have a rehearing. It only calls out
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1 for the ability to have an appeal. So if you say there's
2 only an appeal, then by that strict interpretation you can
3 never conduct a rehearing. Yet, we know in the NACs you can
4 conduct a rehearing. So if you're going to stand on that
5 strict interpretation of NRS 445B.360, then you can never
6 conduct a rehearing, even though it's called out for in the
7 NAC.

8 MEMBER PERRY: Now you've gone beyond my legal
9 ability here. Because to me a rehearing -- I mean a
10 rehearing could be a rehearing of an appeal; right? That's
11 all a hearing -- A hearing is just a public hearing. We're
12 in a hearing right now.

13 MR. SIMONS: What 360 doesn't call out for is the
14 ability to have a rehearing. The language in this statute
15 that you read earlier does not say rehearing anywhere.

16 MEMBER PERRY: We're going to get in to a
17 circular argument here. I understand what you're saying. I
18 understand that, the rehearing is in the practices. My
19 contention is just that in order to have a hearing or a
20 rehearing it has to be one of these items here that are
21 listed in the statute. I'll just end it at that.

22 MR. SIMONS: Well, I agree with you, when we get
23 in to these very unique areas, there may be some gaps in the
24 statutory framework and in the regulations. And I think
25 we're in that position. Or at least it appears to me that we
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1 are.

2 CHAIRMAN GANS: Tom, do you have anymore?

3 Thank you very much for your patience with us,
4 your dealing with lay people.

5 MR. SIMONS: Thank you for the opportunity to be
6 here and have this dialogue. I appreciate it.

7 CHAIRMAN GANS: Thank you.

8 MS. SUWE: So, there was a lot that was
9 discussed. There's a few things I'd like to focus on for
10 rebuttal. I do think it's important to address TWA's remarks
11 that they're required to exhaust all of their administrative
12 remedies before they file a petition for judicial review.

13 I think it's important to look at the actual
14 language of 233B.130, which addresses petitions for judicial
15 review. And what it actually states is that you have to keep
16 reviewing within the agency until you get to the highest
17 level of review within that agency. This appeal here does
18 not get TWA to any higher level. They're staying at exactly
19 the same level. So this argument that it has to exhaust all
20 of his administrative remedies before he can file a PJR, the
21 statute doesn't actually require that he petition this same
22 commission for an appeal or a rehearing.

23 I am happy that TWA actually used the example
24 that they claim that they had an extension if granted by NDEP
25 for their failure to test. NDEP wants to issue, you know,
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1 fair violations. If TWA genuinely believed they had an
2 extension, that is something that should have presented at
3 the enforcement conference. And if not presented at the
4 enforcement conference at least then appealed to this
5 commission and presented to the commission at that time.

6 They didn't do that. Those violations are final.
7 This commission cannot now go back and look at those
8 violations and think, well, was this really a violation. TWA
9 had to make that appeal within the ten days after the
10 violation was issued.

11 I think it's easy for us to look at these
12 statutes and regulations and think it's clear that the
13 department and the commission are two separate bodies because
14 we actually do this work. We understand how it operates. We
15 understand that they're two different bodies. So I do
16 sympathize a little bit with TWA that that could have been
17 confusing.

18 That's why I think it's important that we look at
19 form three and what they actually filed and how this
20 commission has attempted to help these people that don't do
21 this practice every day. Form three, the second element,
22 requires that the appellant attach a copy of the order or
23 permit that was issued by NDEP that's the subject of the
24 appeal. This was, you know, meant to help these people be
25 able to tell the difference between the commission and the
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1 NDEP.

2 And as an attorney, when TWA was reading this
3 form three and filling it out, if nothing else, that should
4 have clicked a little something that maybe an appeal isn't
5 the right venue here.

6 I think, Mr. Perry, I don't know where you went
7 to law school, but you did a great job to me. So I think
8 that you're right on the money that the appealable subject
9 matter is defined. He doesn't meet the requirement for
10 either of those appealable subject matters, which are a
11 permit or an order issued by the director. TWA repeatedly
12 just said that he agrees that a decision of the commission is
13 not a decision of the director.

14 Now, as you said, even if you were doing a
15 rehearing or a reconsideration, the appealable subject matter
16 would still be one of those requirements of the NRS.

17 I think it's funny that, you know, he doesn't --
18 this appeal doesn't fit clearly within the statutes and
19 regulations for practice before the commission. So rather
20 than TWA admitting that potentially they filed the wrong
21 thing because it doesn't fit and their argument is, well,
22 there's gaps in the SEC, you should just fill in the gaps.
23 Their aren't gaps. It doesn't fit for a reason. It doesn't
24 fit because the appeal is improper. This commission doesn't
25 have jurisdiction to hear this appeal and the appeal has to

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1 be dismissed. Thank you.

2 CHAIRMAN GANS: I want to go back to one of the
3 questions that I think Rich brought up earlier. And maybe
4 you can enlighten us a little bit. Rich was talking about
5 the difference between NAC and NRS. And I probably have more
6 confusion there, Rich, than you do. I guess NRS has more
7 standing than NAC. I'm not really sure as a layperson. But
8 can you shed some light on how NAC and NRS kind of interact
9 or work or how they work together in this?

10 MS. SUWE: Sure. The regulation is always
11 controlling. And then the NAC can be an interpretation or
12 guidance for how to implement the NRS's. I think it's
13 important that the NRS that's cited in the reconsideration or
14 rehearing is a very broad Administrative Procedures Act
15 statute that just allows for this commission to set
16 procedures for how they conduct themselves, but that 233B
17 cannot be used to enlarge this commission's authority for
18 hearing matters on appeal. You are still bound by your
19 regulations, which that has been discussed many times, the
20 appealable subject matter is defined and has to be based on a
21 decision of the director.

22 CHAIRMAN GANS: Tom.

23 MEMBER PORTA: Belinda, would you agree that
24 practices before the commission, NAC, the regulations, those
25 regulations are laid out in my mind in a very systematic way
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1 when you appeal a notice of alleged violations. And to pick
2 out one certain part when you didn't follow that process to
3 me is not appropriate. Would you agree?

4 MS. SUWE: I would agree with that. I do think
5 arguably had they filed the petition for reconsideration or
6 rehearing and followed all the factors in, you know, that are
7 required for petitioner reconsideration, this commission
8 could have maybe used a little bit of leeway and considered
9 that petition. But that's not even what happened here. They
10 filed an appeal. Once they were made aware that an appeal
11 was probably not the right thing to do, they made no effort
12 to amend their filing, they made no effort to even go back
13 and try to explain how they met the factors. They never even
14 clarified that they were looking for a rehearing or
15 reconsideration. And so I do think it's cherry picking, but
16 I would not have been surprised if this commission had used a
17 little bit of discretion and still allowed a petition for
18 reconsideration or rehearing to go forward. But that's not
19 what this commission has before it.

20 And, like I mentioned earlier, there are definite
21 liability considerations that this commission should be
22 looking at if they chose to interpret an appeal something
23 other than what it is. If you took on that liability for a
24 filer, you took on that risk, because had they actually filed
25 a petition for reconsideration and rehearing, certain

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1 deadlines would have had to have been met that this
2 commission is not allowed to weigh.

3 So I don't know why this commission would take on
4 that kind of liability of trying to guess what a filer
5 actually intended to file. You have to accept what was
6 filed, treat it like what was filed. And in this case it was
7 an appeal of the SEC's decision to the SEC, which is not
8 appropriate, appealable subject matter pursuant to the
9 regulation and it has to be dismissed.

10 MEMBER PORTA: Okay.

11 CHAIRMAN GANS: Rich.

12 MEMBER PERRY: No comments. Thank you.

13 CHAIRMAN GANS: Okay. I have no further
14 questions either.

15 MS. SUWE: Thank you.

16 MR. SIMONS: Can I clarify one matter?

17 CHAIRMAN GANS: Is that okay with you?

18 MEMBER PORTA: I think so.

19 MEMBER PERRY: Sure.

20 CHAIRMAN GANS: Okay. The panel says yes.

21 MR. SIMONS: The sphere card is attempting to be
22 played that you have liability. There is no liability.
23 You're judicially immune. You're immune by statute. You
24 have no liability, period. So I do take exception that she's
25 trying to say you or the commission would have some

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1 liability. That's not true. That's the only correction I
2 wanted to make.

3 CHAIRMAN GANS: Thank you. Okay. We have come
4 to the time where the commission deliberates and votes. The
5 members of this panel will openly discuss the matters of the
6 motion to dismiss. And after such deliberation, I will
7 entertain motions from members of the panel and we'll call a
8 vote in such motions. Please note that a simple majority
9 vote prevails in all matters considered by the commission.
10 After the panel concludes its deliberation and issues its
11 decision, the matter will be concluded.

12 So, with that, I would ask the panel members for
13 any comments or discussion on the motion to dismiss.

14 MEMBER PERRY: Maybe we have some discussion
15 first? I mean, I -- I'm -- I don't think I'm going outside
16 of the bounds, but I, you know, I believe clearly that this
17 is not an appealable issue based on statute, from what I
18 could read there. And I understand how that sometimes gets
19 confused because I have been there in that world too. Those
20 of us who work at state agencies, who also -- the key to the
21 NAC that unlocks it and makes it valid is the NRS and you
22 have to go back to the NRS to interpret what is valid in the
23 NAC. So --

24 And then I'll go further. I don't think there's
25 a really -- even if there was a reason as you stated had this
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1 been done earlier that there would be any different outcome
2 in setting a violation -- setting the fee for the violation.
3 I think that the plaintiff is better off moving forward if
4 they chose -- choose to do so to go to district court to try
5 to resolve this. I think it's just going to be, you know,
6 burning time. Does that make sense?

7 CHAIRMAN GANS: Uh-huh. I understand.

8 MEMBER PERRY: In reality.

9 CHAIRMAN GANS: Tom, would you like me to go
10 first?

11 MEMBER PORTA: Go ahead.

12 CHAIRMAN GANS: Where I'm coming from, and I want
13 the plaintiffs to know that I took this very seriously coming
14 in. I learned a lot, forcibly, with what you've done here.
15 I -- I just don't -- You know, I'm a member of the SEC. I
16 just don't see -- We made a decision. To me that was a final
17 decision and it's done. Now to appeal our decision back to
18 us, appeal it, doesn't make a lot of sense to me.

19 So I just don't see any room for us in this
20 situation to be able to turn around and say, oh, now we
21 better do something else. So that's what I came through with
22 with everything that we've gone through.

23 MEMBER PORTA: Well, unfortunately, I didn't do
24 any Christmas shopping this weekend because of this appeal.
25 I spent some time reading the statute. For me it comes down

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1 to the fact, you know, that based on the argument that
2 Mr. Simons is making is are we under the department, per se.
3 And everything I read, including other board and commissions
4 that are housed under other agencies, they're not -- they're
5 independent bodies, from what I see. And I think that's the
6 case with our body here.

7 The department provides us, per the regulations,
8 assistance, technical assistance, staffing, so forth, to run
9 this organization, if you want to call it that. And I could
10 find no other information, per se, that shows our body having
11 to rely on the director or going to the director for any
12 types of approvals or denials or anything like that. So that
13 kind of in my mind backs our sense that this is an
14 independent body. And so that was one critical factor for
15 me.

16 And, having said that, if we are the independent
17 body, which I think we are, then the grounds to, you know,
18 hear this or rehear it to me fall short because he's arguing
19 that the director can appeal the decision to us. And I don't
20 believe that.

21 The second thing is, like I keep going back to
22 the practices before the commission. This follows a logical
23 step-by-step process, had you filed an appeal based on the
24 notice of alleged violation. I mean, I walked through all of
25 those regulations. It's very clear, very concise. If TWA

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1 had done that and we had made a decision, they could have
2 petitioned us for a rehearing or reconsideration. And I just
3 have real trouble since they didn't do that now going back to
4 these procedures and in my opinion cherry picking this one
5 reg and saying, you know, we would like a rehearing. I don't
6 think that fits. It doesn't fit the logic of these
7 regulations and the way they're laid out and the fact Rich
8 has gone through the fact that it's not an appealable matter
9 before us. And so, anyway, that's where I stand.

10 CHAIRMAN GANS: Any other discussion or comments
11 by the panel members? Rich.

12 MEMBER PERRY: I'm ready to make a motion. I'm
13 trying to come up with a form of the motion. So if you're
14 ready for one, I'll try, Mr. Chairman.

15 CHAIRMAN GANS: Absolutely.

16 MEMBER PERRY: Okay. So, Mr. Chairman, I'll make
17 a motion to dismiss the appeal hearing request submitted by
18 Tahoe Western Asphalt.

19 MEMBER PORTA: I will second.

20 CHAIRMAN GANS: Okay. It's been moved and
21 seconded to uphold the dismissal request by NDEP. Are there
22 any other discussion or comments on the motion? Okay.
23 Hearing none, then I would ask for a vote. All of those in
24 favor signify by aye.

25 (The vote was unanimously in favor of the motion)
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CHAIRMAN GANS: Opposed? Hearing none, the motion carries.

Now, that brings us now to the final public comment period, which I'm very pleased with the audience. You didn't disrupt us. You were very respectful of our procedure and process. And to that I say thank you.

So now it is your forum to come forth. Again, I will ask you, as I did last time, if I think you're wandering or -- I will hold you to three minutes. I would also ask that please don't reiterate and say the same thing another person said. But we would be very happy for the public to come forward with any comments or -- they would like to make at this point.

MS. KING: Mr. Chairman, may we take a ten-minute break before we get in to the public comment?

CHAIRMAN GANS: Is that okay with the panel members? Okay. We will be adjourned for just ten minutes. Thank you for your patience.

(Recess was taken)

CHAIRMAN GANS: We're reconvened in this prehearing. And we are at Item Number 8, final public comment. So I would invite the members of the public to come on up here to provide comments.

MS. LUCAS: I have some paperwork if you -- I
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1 have some paperwork here.

2 CHAIRMAN GANS: Can you push that microphone.

3 MS. LUCAS: Oh, okay.

4 (The court reporter interrupts)

5 MS. LUCAS: My name is Judy Lucas. And I live on
6 Miriam Way, right up against the hill that we get all the
7 smell. I need to understand what this meeting was about.
8 The fines that were levied on him, he has to pay; is that
9 correct?

10 CHAIRMAN GANS: That's correct. They stand.

11 MS. LUCAS: And he can't get out of it. How much
12 are they? Are they the \$10,000 a fine?

13 CHAIRMAN GANS: Well, I don't recall. Val, I
14 don't recall the actual. There were four violations that we
15 approved the penalties on. I don't know the exact amounts.

16 MS. KING: We don't have that information on us
17 right now.

18 MS. LUCAS: All right. He still is doing what he
19 was --

20 CHAIRMAN GANS: Excuse me. Hold on. Tom.

21 MEMBER PORTA: He has, this body has assessed a
22 penalty and this hearing today was an appeal of that penalty.
23 And we denied that attempt to overturn our decision. His
24 next appeal process per the laws of Nevada are for judicial
25 review. And correct me if I'm wrong, but under that process,
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1 a court if they do file it will review our decision making
2 that we made during that hearing to see that we followed all
3 of the regulations and requirements. And if we did, then the
4 Court should uphold our decision for that penalty.

5 MS. LUCAS: Okay.

6 CHAIRMAN GANS: The point is we're final, we're
7 done. What Mr. Porta is explaining to you is they have
8 another opportunity to go in to the court, just the court
9 system and question what we did, if we did it right or wrong
10 or whether it's going to hold or not. So we're done. But
11 the Court may not be done.

12 MS. LUCAS: Okay. What if he -- He is continuing
13 to do what he was fined for. He waits until the inspectors
14 leave and then he ups the heat, okay. And we're getting this
15 toxic, toxic smell and taste. We lost three dogs this year
16 because of lung cancer. We had to put them down. Plants all
17 died. Trees have died. Vegetable plants have all died. Why
18 do you think that's happening? It's coming from this toxic,
19 horrible smell we're all getting.

20 Now, I'm very, very concerned about children. I
21 mean, they go out and play. There's a park there. Well,
22 what's going to happen to them? They're going to get this
23 stuff in their lungs. I can taste it when it's really bad.
24 So what happens? We all have to stay in our houses and we
25 have to shut windows and we have to shut -- And it's coming

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1 through some of the air conditioning.

2 The other thing that I'm very terrified over,
3 he's had one fire. He's going to have another, because he a
4 not doing what he's supposed to do. And his machines -- I
5 was up there yesterday and he was being checked yesterday.
6 As soon as those people left, up it went. You can smell it.
7 You can see it. Now, from our house we can't see the smoke
8 because we're right up against the hill. But you get down to
9 some of these other places and you can see the smoke coming.
10 I came in from Smith's when he was doing it again and I
11 thought there was a fire. No. It was him.

12 So I don't know. We don't know what to do. We
13 don't know how -- He won't comply with what he's supposed to
14 comply with. He won't do it. His machines are horrible.
15 They're old. They're beat up. And he lies and he doesn't
16 care about any of us.

17 The other thing is this fire. He's had that one
18 fire. Thank God for the fire chief that they got it out.
19 He's got a 10,000-pound propane tank. What if the fire got
20 to that? What do you think would happen to all the pick and
21 pull, all of those businesses, and all of us? We would all
22 lose our homes. The fire that would start would go down in
23 to Deer Run Road. Now you're talking a \$500,000 home. We
24 know we're not rich. We don't have exclusive homes. But
25 they're our homes.

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1 My husband and I have been there for 27 years and
2 enjoyed the horses coming up in to our yard. We can't even
3 go outside during the summer anymore.

4 So he is not complying. He needs to be fined
5 \$10,000 a day and make him pay it and maybe he'll stop.

6 We are thinking of doing a class action suit, a
7 lot of us getting together and trying to find a lawyer that
8 will help us do it. We are also thinking of calling --
9 contacting the EPA in Washington D.C. to come out here and
10 put a stop to this because he's poisoning us all.

11 I have a lung problem. I only have half of a
12 lung on one side. And I think that's why I can pick up so
13 fast on everything. And I have to be careful.

14 I mean, I don't understand why nobody does
15 anything to stop him. Somebody is being paid off to let this
16 man keep doing this. It has to be. Because all of the
17 complaints that have come in, we call Chad, call Ann and then
18 Chad, who is so good about calling back, and he calls back
19 and we talk to him. He's been out there when the smell was
20 going on, so he knows what the smell is like. So we're
21 trying to get help. And we don't know who to go to to put a
22 stop to this.

23 He either needs to fix those machines like
24 they're supposed to be fixed or move. He needs to be out,
25 like, out where there's no houses.

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1 We weren't even considered. Now, yes, we are in
2 Mound House now, but we were Carson City, considered part of
3 Carson City up until just a couple of years ago and then we
4 went in to Mound House.

5 Now, we don't know what to do. All we know is
6 we've got to stop it. And he's had this one fire. It's
7 going to happen again, because he's not complying.

8 So we're coming to you people or who ever we have
9 to go to, the ones of us that are here, to help us before
10 we -- everybody loses everything or they die, you know. It's
11 just so hard to understand.

12 I'm hoping he does go to the judicial because I
13 retired from the Nevada State Supreme Court and I know a lot
14 of those judges. And I hope -- Where's the lawyer? Was he
15 afraid to come back here and listen to this? Where is he at?
16 He's not even here. He's not even here. He left. He didn't
17 want to hear this.

18 Now, thank you. Thank you guys for what you
19 decided today. Maybe that will help. But it's got to be
20 every day this man is fined until he -- Something has got to
21 change before there is serious, serious problems. So thank
22 you. I do thank you.

23 CHAIRMAN GANS: Thank you for your comments.
24 Thank you very much.

25 MS. LUCAS: Okay. Did you want these that -- One
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1 letter is to Ask Joe, the gentleman on channel four. We're
2 hoping he investigate all of this. The other one is to the
3 fire chief where we had the fire, thanking him. If you want
4 copies, I have them here for you if you want them.

5 MS. RASUL: What I would recommend is to hand
6 them to Val and she can attach it to the proceedings that was
7 put on today, the minutes.

8 MS. KING: Ms. Lucas, I have copies of those
9 letters, and I'll hand them out to the commissioners right
10 now.

11 MS. HARRIS: Okay. Thank you. And I have one
12 more for the people that couldn't be here in the
13 neighborhood.

14 (The court reporter interrupts)

15 CHAIRMAN GANS: You got to state your name.

16 MS. HARRIS: Oh, I did. Melanie Harris.

17 CHAIRMAN GANS: Do you need the address also or
18 not?

19 MS. HARRIS: I'm on Miriam at the top of the hill
20 too. But I just have one question as to why does he get to
21 keep operating when he does have all of these fines? He
22 doesn't comply. That's my only question. Why can't we take
23 his permit away? Why do we have to endure this and go to
24 hearings? He's going to start up again like he's doing now.
25 And in the summer it's so bad. We need him to go away. The

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1 fire was very nice. We all opened our windows. We all
2 celebrated. We were happy it burned down.

3 CHAIRMAN GANS: Thank you for your comment.

4 MS. FRAKER: Hello. My name is Melissa Fraker.
5 I live on 770 Shari Drive.

6 (The court reporter interrupts)

7 MS. FRAKER: F-r-a-k-e-r. I'm wondering why this
8 man hasn't been shut down. He's been fined. He's been
9 fined. He's had fires. And there is also diesel that is up
10 there, okay. When diesel gets fire, that is one of the worst
11 fires that you could possibly get. We have so many fires
12 right now in California, okay. With the propane and the
13 diesel, this man can blow up our community, period. Period.
14 And then that fire would be hard, so hard to put out. And
15 I'm asking why is this man not shut down until this is
16 resolved?

17 CHAIRMAN GANS: We have no comments on this. We
18 have to work within our laws. We are doing what we need to
19 do. And that's as much as we can go. Understand something,
20 and this is for all the public, any body like this, like us,
21 work within a framework of Nevada Revised Statutes. And what
22 we do has to be in accord with that. We can't step outside
23 those boundaries. And I think most of you are pretty well
24 aware of what we're doing and what we can do and what we are
25 pursuing. So I can't answer your question other than what
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1 we're doing. And you know that.

2 MS. FRAKER: Yes, I do. And I really, really
3 appreciate you guys for hearing us out and understanding.
4 But I know everybody has guidelines. But how can we get this
5 man -- How am I supposed to say this -- to shut down until
6 all of these criterias are made? There's nothing that you
7 can do here to shut him down? We're not at that level yet
8 or what? I'm not really understanding.

9 CHAIRMAN GANS: Again, I got to reiterate, we're
10 doing what we can do within the confines of the law. And I
11 would say, my only advice would be continue to work with
12 Nevada Department of Environmental Protection.

13 MS. FRAKER: Okay. Okay. So we're not there
14 pretty much then; right? Okay. Okay. This man is a liar.
15 This man is -- Just like Judy said, our animals, our
16 children, our plants, our health. You cannot open your
17 windows. I have videos that I gave to Chad showing the oils
18 blowing through the air. I have letters from people that
19 cannot be here. Our neighborhood has gone downhill. And
20 nobody -- nobody would want to live as we are now.

21 And I appreciate each and every one of you guys
22 because I -- you guys know how to read all of these --

23 MEMBER PERRY: Regulations.

24 MS. FRAKER: Thank you. Regulations. And we
25 don't. And so our next step is getting together and possibly
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1 getting a lawyer ourselves so everybody knows, you know,
2 their mumbo jumbo, you know. Because the lawyer should have
3 been here, you know, because our lives are at stake. Our
4 children -- I've lived here 30 years. I love asphalt, set my
5 hard hat. But, boy, I surely don't like to live in it
6 because it is sickening, sickening smell.

7 Anyway, I've got to get going. I'm in a lot of
8 pain right now. And I appreciate you guys for everything
9 that you are helping us do. Thank you very much.

10 CHAIRMAN GANS: Thank you for your comment and
11 coming down. Thank you very much.

12 MS. FRAKER: And have a great day. Merry
13 Christmas, you guys.

14 MS. WILEY: My name is Janice Wiley, W-i-l-e-y.
15 And I live on Tracy Lane in the same area. I know you're
16 constrained by your parameters. I'm not a lawyer. But I
17 want to thank you for denying his appeal. Nice Christmas
18 present for us. We were never given a chance to appeal
19 anything neither through Lyon County or Carson County. And
20 if we had been able to, we wouldn't be here today. We would
21 have been able to shut that man down. So thank you very
22 much. And have a Merry Christmas.

23 CHAIRMAN GANS: Thank you for your comments.

24 MR. LUCAS: I'm Bob Lucas. I live in Mound
25 House. I wish that his attorney had not left, because this
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1 guy apparently is not telling his attorney the truth.
2 Because every time he fires this plant up, he's violating --
3 he's not in compliance. Instead of going through all of this
4 at least twice, we've been here, this is our second time
5 here, why doesn't he just comply? Because apparently when
6 the inspectors from Nevada, these people are up there, he
7 seems to be in compliance. As soon as they leave, he's not.
8 So maybe -- maybe the fix is more than what the fines are.

9 But, you know, we lost three dogs this year. We
10 train guide dogs. We lost two dogs -- all three dogs from
11 lung cancer. Is that a coincidence? But how do you prove
12 that?

13 And you go up there and talk to him and he
14 doesn't care about human life. That's obvious because his
15 family is not breathing this garbage in. And I can guarantee
16 you because I was in real estate a little while. We've been
17 here 27 years. If that crap was going over there on the west
18 side of Carson where all the power and all the money is, this
19 guy would have been in compliance a long time ago. Thanks
20 very much for what you guys have done. I know you can only
21 do so much.

22 CHAIRMAN GANS: Thank you for your comments.

23 MS. PALANY: Hello. My name is Elaina Palany.

24 (The court reporter interrupts)

25 MS. PALANY: P-a-l-a-n-y. And I do live in Mound
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1 House, 281 Mound House. Anyway, I work for the State for 27
2 years. And I was very involved with the NRS, NAC. And one
3 of the things about Nevada is that we have some excellent
4 people like you guys. And I appreciate and really enjoy the
5 fact that you guys do a really good job in explaining the
6 NRA, NAC -- NRS, anyway. It's been a long time since I've
7 legally been involved in understanding the law and policies.

8 One of the things about Nevada that impresses me
9 the most is that we're very open to allow all of these
10 companies to come in to our area and because we have very low
11 taxes. And throughout the years we have made provisions or
12 allowed these companies to come in and change us. It's hard
13 for us to change them. Because all of our laws, the way they
14 are.

15 And one of the reasons why I was forced to retire
16 is because our agency was forced to allow outsiders to come
17 in and change us. They changed our policies. They changed
18 our laws. I remember going to the meetings every two weeks
19 so that we can open up and let these new companies come in
20 and change every one of our laws to the point where we -- to
21 the point where we couldn't even use our local laws anymore
22 or policies because we needed to comply with California laws,
23 Oregon laws, Idaho laws.

24 But I was very impressed the way you guys handled
25 it today. And I just want to tell you that I know you hear
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1 the same thing over and over and I don't want to complain
2 about it because you say the same thing.

3 Same thing is I can get used to tobacco smell. I
4 don't smoke. But it took me a while to get used to the
5 tobacco smell because I've been around a lot of smokers and I
6 never smoked. But this smell, there is just no way I can get
7 used to it.

8 And I hope that we can continue to do -- We have
9 followed -- I mean, you guys have followed the procedures the
10 way you're supposed to be. I guess the next level is go to
11 the higher court. And hopefully we have the strength and
12 they have to follow through this.

13 Anyway, thank you.

14 CHAIRMAN GANS: Thank you for your comments too.

15 MR. BISHOP: My name is Emmitt Bishop. First of
16 all, I appreciate and thank the commission for doing their
17 job. I'm glad today that you guys didn't reinvent the wheel.
18 Because at first it was like why are we here. So you don't
19 get to reinvent the wheel. And rest assured, the last decade
20 and a half, you guys have been doing your job correctly. You
21 haven't been doing it wrong. And I'm sure this will be --
22 I'm sure we'll be coming back here again because it seems
23 like it never ends. Have a good holiday.

24 CHAIRMAN GANS: Thank you, sir.

25 MR. WAWRYTAO: Hello. I'm Ed Wawrytao,
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1 W-a-w-r-y-t-a-o. Okay. I just brought this device. It's an
2 air respirator. It's good for, you know, organic vapors and
3 acid gas. The reason why I brought this is because this is
4 something I got to hike with. If I hike up on top of the
5 water tower, I do that because the scene -- the scenery is
6 kind of nice. And plus I check up on TWA.

7 And the last time I went up there, it was months
8 ago. Mr. Myers was up there from D -- from NDEP. And I
9 wanted to see him, talk to him, speak with him. And as I was
10 walking up the hill, I was exposed to something coming out of
11 TWA's exhaust. It was very, very harsh. It was a chemical.
12 It was kind of like an acid-y taste to it. And as I
13 continued up the hill, you know, I'm getting older and it
14 takes a lot of air and oxygen to climb up that hill. I
15 finally got up there and I was excited and I talked to them.
16 They were in their cars. And, hey, come on, just check on
17 these guys. It's your job. You know, we're suffering down
18 here with these odors and all this accumulation of dust and
19 it just -- you cannot believe what these people are living
20 through.

21 But anyways, I was exposed to those chemicals.
22 And I didn't realize it until, like, 12 hours later. I went
23 to bed. I woke up in the middle of the night and I was in
24 deep pain. My respiratory systems were just burning, a
25 burning sensation that was tremendous. I had to get up and

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1 lay on my side and toss and turn and try to get up again and
2 I just kept on doing it all night long because I was in so
3 much pain because of this air I was breathing and air that I
4 did breathe.

5 The next day I called up Travis from NDEP and I
6 asked him, I said, did Chad or anybody else up there on the
7 hill that I was up there, did they get sick. And Travis said
8 no. I said, you know, I'm really sick and I don't know why,
9 you know. I don't know if I got some kind of toxic chemical
10 reaction from that exhaust or what. I don't know what I
11 should do. And he said, I'm very sorry that you're sick.
12 And I just said I got to go. And I just rushed to the
13 bathroom. Thought I was going to pass out. Thought I was
14 going to throw up and pass out at the same time. I didn't
15 know if I was going to survive. I was scared.

16 So I just turned on the water and kind of
17 recovered slowly and started taking aspirins one at a time,
18 you know. And I eventually felt a little better. I'm kind
19 of a workaholic. I've always got work to keep me occupied.
20 I tried to work. And I would get back and lay down and rest.

21 I get emotional about this because these people
22 are suffering. This is not BS. This is the real thing. I
23 got sick and I'm pretty darn healthy for my age. These
24 people are suffering. They live there every single day. I
25 cannot -- I will not live there. I live out of my shop. I'd

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1 rather live in my shop than live in my home. That's how bad
2 it is. And it's not going to get any better. Next year it
3 might get worse.

4 What are we going to do? You know, I know what
5 I'm going to do. I'm going to try to raise some money and
6 move the heck out of here, out of Mound House. I've been
7 there for 19 and a half years. That's what I'm probably
8 going to have to do.

9 My dogs are sick. I walk them. They sniff the
10 ground. They hunt and everything. They have a chronic
11 cough. I've never had a dog that had a chronic cough.

12 I just, you know, you know, we are flabbergasted.
13 We don't know what to do, you know. So I just want to take
14 it in our own hands. We need help. We need something to be
15 done with this conflict. Either they comply or they move out
16 or maybe they're shut down for a while. Maybe some of the
17 big guys, you know, up there on the asphalt, they deserve
18 their asphalt, you know, maybe they open for a short period
19 of time and then they shut down again until they start
20 complying.

21 Because I don't see how this manager is going to
22 change his ways. The only thing he's concerned about is his
23 profits. I don't even think he realizes the pain and
24 suffering that our community is going through. I look at him
25 and he's like a blank slate. I get emotional because these

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1 people are suffering and they need help. And that's what
2 we're asking. Can you please help us? Thank you.

3 CHAIRMAN GANS: Thank you for your comments.

4 MS. HARRIS: Melanie Harris. I just have one
5 more thing to add about our homes. We can't sell our houses.
6 We would have to put that in a disclosure. So we're stuck
7 there. We have no where to go. Thank you.

8 CHAIRMAN GANS: Thank you. Okay. Seeing no one
9 else, we'll conclude the item on public comment. And I think
10 it's time for adjournment. So we'll adjourn this prehearing
11 and thank you all.

12 (Hearing concluded at 11:16 p.m.)

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1 STATE OF NEVADA)
)ss.
2 COUNTY OF WASHOE)
3

4 I, CHRISTY Y. JOYCE, Official Court Reporter for
5 the State of Nevada, Department of Conservation and Natural
6 Resources, do hereby certify:

7 That on Tuesday, the 19th day of December, 2017, I
8 was present at the offices of The Legislative Building, 401
9 South Carson Street, Carson City, Nevada, for the purpose of
10 reporting in verbatim stenotype notes the within-entitled
11 public meeting;

12 That the foregoing transcript, consisting of pages
13 1 through 79, inclusive, includes a full, true and correct
14 transcription of my stenotype notes of said public meeting.
15

16 Dated at Reno, Nevada, this 16th day of January,
17 2018.
18
19

20 _____
21 CHRISTY Y. JOYCE, CCR
22 Nevada CCR #625
23
24
25

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