





**Appeal Prehearing Conference**  
**Eureka Moly, LLC - Mount Hope Project**  
**Water Pollution Control Permit NEV2008106**

 <b>TIME</b>	 <b>LOCATION</b>
<p><i>May 1, 2019</i>  <i>9:00 a.m.</i></p>	<p><i>Richard H. Bryan Building</i>  <i>Tahoe Conference Room, 2nd Floor</i>  <i>901 S. Stewart Street</i>  <i>Carson City, NV 89701</i></p>

**SEC members present:**

E. Jim Gans, chair  
 Tom Porta, vice chair  
 Kathryn Landreth

**SEC staff present:**

Henna Rasul, SEC/DAG  
 Valerie King, executive secretary  
 Shanon Pascual, recording secretary

**Defendant — NV Division of  
 Environmental Protection:**

Daniel P. Nubel, deputy attorney general  
 Frederick "Rick" Perdomo, deputy  
 administrator/NDEP

**Appellant — Great Basin Resource  
 Watch:**

Julie Cavanaugh-Bill, attorney  
 John Hadder, Great Basin Resource Watch

**NDEP staff present:**

Christine Olson  
 Matthew Schulberg  
 Joe Sawyer  
 Rob Kuczynski  
 Tom Gray  
 Katie Armstrong

**Public present:**

Patrick Rogers, Eureka Moly, LLC

# Begin summary minutes<sup>1</sup>

## 1) Call to order, roll call, establish quorum (Discussion)

The meeting was called to order at 9:30 a.m. by Chair Jim Gans, who stated that a three-member committee would make a determination on the appeal hearing filed by Great Basin Resource Watch (GBRW). Executive Secretary Valerie King confirmed that the hearing was properly noticed and that a quorum was present.

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## 2) Public comments (Discussion)

Chair Gans stated that public comments on the appeal would have to wait until after the hearing is held and that no action could be taken on a matter during the public comment period. He added that the chair could limit public comment to two minutes per person.

There were no public comments.

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## 3) Pre-hearing conference for appeal filed by Great Basin Resource Watch (Action Item)

Chair Gans stated that on April 11, 2019, the Nevada Division of Environmental Protection (NDEP) made an unopposed motion to vacate the appeal hearing date in lieu of a pre-hearing conference. On the same date, NDEP also made a motion to dismiss GBRW's request for an appeal hearing without prejudice and proposed to modify the schedule of compliance in Eureka Moly, LLC's permit No. NEV2008-8106. The pre-hearing conference is in response to a November 6, 2018, decision by NDEP to issue a water pollution control permit to Eureka Moly, LLC for its Mt. Hope project.

GBRW's complaints in the request for the appeal hearing are that:

- NDEP incorrectly determined that the Mt. Hope mine will not degrade water.
- NDEP cannot ensure closure due to an inadequate mine plan.
- There has been no exemption to Eureka Moly, LLC.
- NDEP arbitrarily determined that the pit lake will cause no harm.

Chair Gans stated that the role of the State Environmental Commission (SEC) is to rule on a pre-hearing motion made to dismiss GBRW's request for an appeal hearing and to address other issues associated with the case pursuant to NAC 445B.8913. He advised everyone present that the proceedings are a pre-hearing conference regarding a contested case, which is conducted pursuant to NRS Chapter 233P. Chair Gans said that the pre-hearing conference is a quasi-judicial proceeding and asked everyone to conduct themselves as if they were in court. He suggested that, while the case is contested, the parties are still "friends" and are not contesting each other personally; they are contesting the case itself. Chair Gans added that he has utmost respect for the attorneys on both sides of the issue.

Chair Gans stated that, after the panel concludes deliberation, a decision would be made. He verified that all parties had been notified appropriately of the pre-hearing conference or waived their right to notification. Ms. King confirmed that all notices had been properly posted.

### Defendant presentation:

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<sup>1</sup> **Editorial Note:** The expressions in these minutes are largely direct transcriptions of the audio file, but some content has been edited and paraphrased for clarity and textual consistency. Bracketed content indicates places in the audio that we're impossible to decipher.

Mr. Daniel Nubel, representing NDEP, stated that the case related to a molybdenum mine in Eureka, Nevada. He stated that Eureka Moly, the company that plans to own and operate the mine, began planning in 2006. NDEP first issued a permit for the mine operation in 2012 although construction was delayed, with no funding secured and no estimated date to begin construction. He added that during the initial and current permit cycle, GBRW submitted comments with concern about the mine, which NDEP took very seriously, prompting substantial changes to the permit in both 2012 and in the recent 2018 permit cycle. He added that GBRW filed an appeal mostly related to the expected Mt. Hope pit lake, which it suggested could possibly degrade the groundwater against regulation.<sup>2</sup>

Mr. Nubel stated that NDEP evaluated many studies and a significant amount of data regarding the expected water quality of the future Mt. Hope pit lake; the studies show that the pit lake will not violate the standards of NAC 445A.429. He said the groundwater flow model shows the pit lake as a terminal sink, with the volume of water flowing into the pit lake equaling the evaporation at the surface. As a result, the water in the lake will not mix with the surrounding groundwater. Mr. Nubel said that an ecological risk assessment was conducted and showed that no adverse effects are expected to humans or animals. Although all studies show that the pit lake would not violate NAC 445A.429, NDEP acknowledges that the projections will only become more certain with additional data, data that can only be obtained through Eureka Moly commencing mining until it reaches the groundwater table. If construction does begin at the Mt. Hope mine at that point, it will be several years before mining penetrates the water table, giving Eureka Moly more time to gain new rock characterization data that will assist in modeling the pit lake's expected water quality.

Mr. Nubel continued that the doctrine of ripeness supports dismissing GBRW's appeal for further factual development. NDEP could then revise its plan, or review may ultimately become unnecessary. He added that in deciding whether an agency's decision is ripe for a review, judicial bodies must consider:

1. Whether delaying review would cause hardship to the petitioner, in this case GBRW.
2. Whether judicial intervention would inappropriately interfere with further administrative action.
3. Whether the judicial body would benefit from further factual development.

Mr. Nubel argued that the GBRW appeal case is a prime example of a case that would benefit from further factual development without risking any prejudice to the petitioner. Mr. Nubel added that while NDEP is confident that the future Mt. Hope pit lake will not degrade groundwater or adversely affect humans and animals, the agency agrees that additional data will help confirm NDEP's analysis. Allowing Eureka Moly to commence mining until it reaches the groundwater table would provide additional data to assess the expected water quality of the pit lake. NDEP fully expects that this additional data will confirm the conclusions set forth in the comprehensive assessments that have already been completed. Additionally, allowing Eureka Moly to mine until it reaches the groundwater table will not pose any prejudice to GBRW. Under Nevada regulation, a pit lake is only formed when mining penetrates the groundwater table. NDEP will stipulate an additional permit term mandating that Eureka Moly conduct a revised groundwater flow model, a predictive pit lake model, and another ecological risk assessment before mining below the groundwater table. Additionally, NDEP will provide another comment period and opportunity to appeal once Eureka Moly provides those updated assessments. Mr. Nubel maintained that NDEP's proposal will allow more facts of the case to develop without risk of prejudice to GBRW.

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<sup>2</sup> NAC 445A.429 states that the pit lake may not 1) degrade the groundwater of the state and 2) adversely affect human or animal health.

Mr. Nubel said that NDEP requests that the SEC grant the motion to dismiss without prejudice and direct NDEP to revise its permit to include additional pit lake assessments and an opportunity to appeal prior to Eureka Moly mining below the groundwater table. Since the dismissal would be without prejudice, GBRW would be free to restart its appeal in the future if it disagrees with the updated pit lake assessments.

### **Appellant presentation:**

Ms. Julie Cavanaugh-Bill, representing GBRW, stated that the whole issue of ripeness on the case was decided based upon a forestry plan that had set out different logging amounts but was not comprehensive. The state in that case determined that it was not yet ripe to appeal since there was not a specific project in front of the court to adjudicate. She added that for the case at hand, there was a notice of decision, a deadline for appeal, and a final decision by NDEP. Ms. Cavanaugh-Bill said that NDEP's entire argument about ripeness and the need for more factual analysis underscores GBRW's argument that the decision is arbitrary. She added that the core samples used for analysis are dated, some from before 2008 when Eureka Moly was just starting to explore the site. She stated that GBRW had requested that Eureka Moly do new core sampling as cited in its briefs and comment letters, which was not done.

Ms. Cavanaugh-Bill said that GBRW is relying on the original permit process to question the pit lake model, not what is being discussed before the SEC. She noted that several other molybdenum mines now in operation in the United States are problematic, adding that NDEP has refused to look at the problems that have resulted from this type of mining in other areas around the country. GBRW is making simple requests to ensure that NDEP is doing its best to protect Nevada's waters. She noted that there was an appeal in the underlying water rights by a local ranch and said she expected a lot of activity around this because the mine will be one of the largest open pit molybdenum mines in the country, with 168.8 billion gallons of water being pumped out over the life of the mine.

Ms. Cavanaugh-Bill said that the U.S. Environmental Protection Agency agrees that groundwater in the vicinity is of drinking water quality. Once the water moves into the pit lake the results are unknown. If NDEP were granted its motion to dismiss, GBRW is concerned that the mine operation would be harder to stop once construction begins; the mine company would be resistant to stop operations. She said that it is GBRW's right to appeal NDEP's final decision under the statute. GBRW would like the SEC to review all the technical analysis and data to determine:

1. Whether NDEP performed its job under the law.
2. Whether the permit was issued in accordance with law and regulation.

She added that GBRW believes the permit was issued in an improper manner, especially the core sample. It should be done in an updated fashion, especially since two particular springs will be directly impacted once construction starts, along with three watersheds.

Ms. Cavanaugh-Bill concluded that the right to appeal is almost meaningless if an agency is able to cite the ripeness doctrine for a decision that is supposed to be final. She said that if NDEP thinks additional data is needed, then it should be provided before the ground is broken. She reiterated that GBRW recommends that the SEC deny the motion and allow the full appeal to proceed.

## Panel comments and discussion:

Commissioner Landreth stated that legally... *[audio is unclear]*.

Mr. Nubel agreed, noting that further information could not be gathered until the groundwater table is penetrated; specific information from later in the process will cause further input and studies to better assess impacts on water quality, if any. Speaking to GBRW's comment about looking at other mines, he added that finding out what will actually happen with water quality depends on an individual mine site. According to regulations, NDEP needs to look at the actual characterization of the wall within the mine pit. He added that with the proposed amendment to the permit, there would be no risk of a pit lake being formed until after another renewal cycle when more information is available to inform the appeal. He reiterated the reason for the ripeness doctrine in the first place: to allow the facts to develop based on additional rock characterization studies. Mr. Nubel maintained that NDEP's request will allow for another chance to appeal, when much more scientific evidence available.

Commissioner Landreth asked for clarification that the permit could be withdrawn if new data reveals implications for groundwater quality and that there would be a period of mining before groundwater could be impacted. Mr. Nubel replied that the current permit would put a hold on mining until additional studies and an additional comment period is held; at that point, there would be another opportunity to appeal the decision with more facts at hand. Mr. Nubel said that NDEP believes those facts will show no risk to groundwater, humans, or animals. He summarized the crux of GBRW's argument: that NDEP did not do enough research and did not get enough data. He said GBRW's argument prompts NDEP's position that mining needs to commence to look at the rocks to determine what the water quality is going to be. Mr. Nubel further stated that NDEP sees the proposed solution as a benefit to all parties: it would give GBRW another opportunity to appeal the permit before damage could possibly occur, and it would benefit the SEC by providing additional data to assess when the topic is most ripe.

Commissioner Landreth commended GBRW for its substantive recommendation and asked Mr. Nubel for a response to GBRW's claim that NDEP made an arbitrary decision. Mr. Nubel replied that NDEP is very confident in the information it has on the mine site. He added that just like NDEP's revisions to the permit during the first comment period, another attempt was made for fairness by including GBRW in the second permit cycle and offering another opportunity to appeal in the next comment round. Mr. Nubel stated that NDEP is not admitting that it doesn't have enough information; instead it is attempting to both resolve the issue right now and give GBRW the data that it requests.

Vice Chair Porta stated that the case could be an issue of "the chicken or the egg" and noted that NDEP has issued countless permits with the best data it has available. He added that NDEP permits are also changeable at any time during the process should additional information surface. He said his question is whether anything was done differently with the permit process at hand compared to those in the past, including modeling and assessing the regulations that apply. Mr. Nubel stated that the permit process was no different from past permits.

Vice Chair Porta asked whether NDEP could modify permits. Mr. Nubel said that NDEP could modify permits; if it were found that the water table could be affected, a remediation plan would be placed immediately in order so the water would stay up to standard. Mr. Nubel also said that if water were shown to be under standard once mining commenced, the bond would be assessed and revised to account for the costs to meet the standard.

Vice Chair Porta restated that any changes would be subject to review by the SEC also. Mr. Nubel agreed.

Chair Gans asked for a response from GBRW. Ms. Cavanaugh-Bill stated that GBRW believes that some of NDEP's data is outdated; it also believes the analysis is incorrect because other samples should have been reviewed. She added that if the same process was used in other permits, perhaps there is a problem. She pointed to one mine site referenced in GBRW's comments — Liberty — that has been a problem area. Ms. Cavanaugh-Bill suggested that if Liberty had been reviewed and analyzed more properly at the permitting stage, some of the problems now apparent at Liberty would not have occurred.

Ms. Cavanaugh-Bill argued that to grant NDEP's motion to dismiss the appeal would effectively deny GBRW the opportunity to appeal the final decision. She added that the ripeness doctrine is clear, as in one Supreme Court case: "The agency action is considered final if it marks the consummation of the agency's decision making process." She said that the case of Mt. Hope is the first she has heard of issuing an amended permit, and she commented that she is not sure how it would work procedurally. She said that the Supreme Court's ruling continued: "A final decision defines parties' rights and obligations or carries other legal consequences." She stated that the case involves a final NDEP decision, so GBRW has the right for the appeal to be heard. Ms. Cavanaugh-Bill expressed concern that if NDEP is allowed to dismiss the appeal at this stage, the appeal process becomes meaningless; it could occur every time someone attempts to appeal an agency's decision. She cited a case in Montana where the district court denied the appeal based upon the agency having already issued a final decision; adaptive management as invoked in the case was not accepted by the district court. Ms. Cavanaugh-Bill argued that based upon the substantive issues, GBRW does not believe that the data is relevant without more core samples. She added that NDEP relied on the company's review of the data, which GBRW does not find correct. GBRW also believes the bond is too low. She noted that the original permit was issued in 2012. While GBRW submitted comments that were later incorporated, she continued, GBRW does not feel the changes are sufficient. An appeal wasn't taken at that time because of a lack of resources. She added that the mine is a very significant project, resulting in increasing concern by several ranches that had stepped out and commented. She said parts of the mine were also appealed in district court. Ms. Cavanaugh-Bill said that now is the time to ensure the analysis is completed and not dismissed at the early stages.

Vice Chair Porta said that GBRW brought some compelling arguments, so he questioned when the tipping point would be for issuing a permit. He added that the final action is not the permit since it could be amended.

Commissioner Landreth and Chair Gans agreed that GBRW raised important arguments. Chair Gans also noted that he has great confidence in NDEP. Adding that he is glad NDEP had made some stipulations, he asked what stipulations NDEP would have to make to satisfy GBRW. Chair Gans noted that it appeared that GBRW is saying that, short of an appeal, there are no stipulations NDEP can make to satisfy GBRW.

Ms. Cavanaugh-Bill said that she feels that all parties have worked in good faith and in a civil and respectful manner, resolving the issues as best as possible. She added that an independent assessment is needed to ensure that the best data is used to address GBRW's concerns; as of yet, however, no agreements have been reached. Ms. Cavanaugh-Bill stated that there is no rush on the matter, and it is not known when the appeal hearing would be set. She added that GBRW wants to discuss the matter and is interested in resolving the issues. She added that GBRW staff have definite expertise in some of the pertinent areas, so a collaborative approach would be great.

Chair Gans added that the SEC could make a decision but wonders what could be done at the pre-hearing stage, as it would be in the same position. He said he did not imagine GBRW would come back

and make another appeal request. He said that he hopes to nip the issues in the bud early instead of continuing the case.

Chair Gans then asked if NDEP went far enough with its stipulations to work with GBRW. Mr. Nubel replied that he disputed Ms. Cavanaugh-Bill's statement that GBRW had not received the draft revised permit; GBRW was provided with a draft revised permit months previously, and two different meetings had been held with Ms. Cavanaugh-Bill and with GBRW after their appeal was filed to discuss the terms of the revised permit. Mr. Nubel said that he has a copy of the draft revised permit. He reiterated that not only did NDEP incorporate many of GBRW's comments in the permit, but after the appeal was filed NDEP tried to make it so there was no prejudice to GBRW. He added that as Chair Gans had mentioned, the case would take a lot of attorney and resource time as well as outside costs. He said that it is better to hear the case once samples are available, noting that most of GBRW's appeal revolves around the water quality of the pit lake.

Chair Gans asked why the samples had not already been taken. Mr. Nubel replied that it is not possible without mining occurring. He explained that the only samples that could be gathered would be through boreholes where the wall would most likely be; other than that there is no real way to get accurate samples until mining commences.

Chair Gans asked if the operation is on level ground. Mr. Nubel stated that it is not level, that the area is mountainous.

Chair Gans stated that he had read that the walls have dissimilar strata on different sides of the pit. Mr. Nubel stated that because of the stratification, it would be difficult to get samples until mining operations are underway. He added that NDEP proposes that mining start in order to get more accurate samples. He reiterated that no pit lake would be formed. Mr. Nubel said he recognizes that the commissioners have questions about the final order issue and reminded them that the process is intended to be a tiered process. Based upon NDEP's proposal, he continued, issues that are currently ripe to appeal would be related to the construction portion of the mine. He argued that it is not ripe to go into what will happen after the next cycle, which, if the SEC were to adopt NDEP's proposal, would be before the groundwater table is breached.

Chair Gans summarized NDEP's position: the current permit is supported by appropriate studies, and there is little sense in gathering extra samples until mining reaches a point where it will make more sense. Mr. Nubel agreed with Chair Gans' assessment.

Vice Chair Porta asked for GBRW's response to the assessment. Ms. Cavanaugh-Bill stated that she understands that there is another step before going beneath the groundwater table but argued that the current information is a part of NDEP's decision to issue the permit. She added that the best data currently available is not ultimately the best data that can be achieved. She said that molybdenum mining has historically been a problem, so the best evidence should be used in terms of issuing permits.

Chair Gans asked for specific examples of Nevada pit lakes that are a problem right now.

Ms. Cavanaugh-Bill cited the example of the Liberty site near Tonopah. Mr. Hadder added that the problem at Tonopah is enormous, with the pit lake being toxic, green, and with very high levels of total dissolved solids. He said that the Liberty pit lake is not the only one, although it is the only example in Nevada.

Mr. Nubel argued that the Liberty mine was licensed before NDEP had a mining program and was probably an impetus for the program to be established in the first place. He said that GBRW and NDEP have the same goal of using the best evidence to indicate the chemistry of the pit lake; however, in order to get that best evidence, NDEP believes mining has to start.

Commissioner Landreth stated that it seems to her that there could be a permit in place that would stop short of having a pit lake while collecting more evidence. She asked if it is NDEP's proposal to authorize mining up to the point of the groundwater, followed by another permitting process. Mr. Nubel agreed.

Commissioner Landreth asked Ms. Cavanaugh-Bill if that was GBRW's understanding. Ms. Cavanaugh-Bill replied that that is not her understanding. She clarified that she has not seen the extended permit. She noted that GBRW had seen a proposal but she understood that NDEP is proposing something different. She said her understanding is that NDEP is in the midst of the current permit, with that procedure being part of the whole permit.

Mr. Nubel said that NDEP's proposal for a revised permit would start the permit renewal cycle in five years; if Eureka Moly does not start mining in that timeframe, the five-year renewal would be under the same conditions. He added that if Eureka Moly did get funding to start mining, it would have to renew its permit before the groundwater table is breached; Eureka Moly would start mining, establishing a pit wall. He added that there is a rock characterization plan in the proposed revised permit that would be input into the water quality studies; before construction, another renewal cycle would occur.

Chair Gans asked how NDEP's proposal would address the "horse being out of the gate." Mr. Nubel stated that the issue would be addressed because the SEC would approve the final process; the permit could be halted if the SEC did not agree with it. Mr. Nubel reiterated that NDEP is currently asking that a reclamation bond and plan be put in place to protect water quality. He said that NDEP's proposal does not give or take away the permission to mine; it makes sure an adequate plan is in place so the pit lake does not degrade the groundwater.

Vice Chair Porta said that explanation helped him feel more comfortable with the process, especially how the process might affect permitting in the future. He added that ensuring the permitting process is properly followed is important; even GBRW's brief is about ripeness — some parts of the issue are ripe for adjudication while other parts are not. In this particular case, he continued, it would be appropriate considering the ripeness of getting proper rock samples.

Mr. Hadder stated that he appreciates the position that GBRW has placed everyone in but reiterated that the reason the permit had been appealed is to ensure the public has the right to present alternatives. He added that GBRW believes the data is insufficient and did agree that better data will come later on. He asserted that the analysis itself is not valid; GBRW's geology expert can testify on the information. Mr. Hadder stated that there was no reason to perform the first analysis if it is not part of the permit. He said that it would be difficult to reverse course after mining started; it would be difficult to revise the mine plan if samples find a specific problem with the pit lake. Mr. Hadder said that GBRW believes it has a good reason to appeal at this point since its role is to look after the environment and the community.

Mr. Hadder continued that perhaps what might result is a more collaborative way of permitting. He suggested that the appeal might be withdrawn if an agreement is reached with NDEP for an independent assessment of the pit lake by an accepted expert, financed by the mining company. He added that neither GBRW nor the public have the money to pay for an independent assessment; GBRW does not want the State of Nevada to foot the bill, but the protagonists should support such a request when there is public concern. He noted that GBRW does not believe an independent assessment should be done in every case; in this instance, however, it makes sense to perform an independent study now (by someone agreed upon by both GBRW and NDEP) as there is an opportunity to make sure that the process moves forward in the best way possible.

Mr. Nubel stated that he has a lot of respect for Mr. Hadder but added that NDEP is the independent expert since the agency is neither the mining company nor GBRW. He added that NDEP has scientists



and other experts on staff to review mine plans and is not in the pockets of mining interests. He argued that NDEP's review is an independent review; another independent technical review would simply add expense. Mr. Nubel said that there is no regulation for another independent study. Chair Gans responded that the AG's office has sensitized him to issues regarding deference to the State.

Ms. Cavanaugh-Bill stated that deference is normally given to the state; however, some of the samples were taken 30 or 40 years ago when original exploration was occurring. She said that it is now possible to take samples from the original core body, arguing that current data and analysis is insufficient, making NDEP's decision arbitrary. She said that she believed the issue of deference would come out in the hearing, noting that GBRW held a lot of respect for NDEP and its staff. She maintained, however, that NDEP had gotten it wrong in this particular case, which is why the public has a right to appeal final decision.

Mr. Nubel said that he is not following the line of logic on inappropriate core samples. Mr. Hadder responded that it is a matter of the samples being incomplete, with the analysis being more of the problem than anything else. He noted that the samples mainly focus on the ore bodies rather than the peripheral area; even the final environmental impact statement (EIS) indicates limitations in terms of the number of samples needed to actually represent the location of the pit wall. He added that GBRW agrees that better samples will become available as time goes by; by that time, however, the project will have started. He said he wonders why the analysis was done up front if it was just going to be evaluated later. Acknowledging that NDEP does good work, Mr. Hadder said the two parties just do not agree on the issue; there are a lot of cases where pit lakes were not well-modeled, and GBRW could present its expertise on that. He reiterated that GBRW believes the public should have the opportunity to hear the issue.

Mr. Nubel responded that he does not disagree with Mr. Hadder that the public should have input into the permit. He maintained, however, that the right time for public input is when the pit wall has actually been analyzed but before the groundwater table is breached; the environmental harm that concerns GBRW is not possible until the groundwater table is breached. He stated that, at that point, the best data would be available and all parties would be heard again.

Commissioner Landreth said she still does not understand why the permit had to be issued at this point for mining below the groundwater level. She asked about the possibility of setting a date to reevaluate the pit lake; in this way, the "horse" issue would be addressed. She expressed concern about the mining job starting and an entitlement from Eureka Moly. Mr. Nubel stated that he understands GBRW as arguing that once rock is moved for the first time, the mining company will inevitably go below the groundwater table.

Ms. Cavanaugh-Bill said that she does not know if it would be financially feasible for Eureka Moly to agree to mine only above the groundwater table when the main ore body is below it. She posited that this is why the original plan includes the analysis of the pit lake in the overall permitting process.

Vice Chair Porta asked if NDEP has permitted other mines in mountainous terrain across Nevada. Mr. Nubel said that NDEP has, noting that experts from NDEP could present information today or at a possible later hearing.

Chair Gans remarked that he was on the other side of the table for about two decades when performing EIS for projects. He said that comments by the U.S. Environmental Protection Agency (EPA) had bothered him and asked for NDEP's response. Mr. Perdomo responded that there is a separate permitting process on the federal side; since the project would be largely located on public land, EPA's comments address the federal permitting side, and the hearing at hand strictly pertains to the state side. Mr. Perdomo stated that EPA's comments would be addressed through collaboration between

NDEP and the Bureau of Land Management (BLM). He added that a memorandum of understanding is in place between BLM and NDEP for managing mines. Mr. Nubel interjected that EPA's comments could again be addressed before the groundwater table is breached. He added that it is not the first time NDEP has coordinated with federal agencies on a mine.

Chair Gans stated that it appears that the majority of the project is on federal land and that BLM is okay with it. He asked for comments on the EIS in general. Mr. Nubel stated that the purpose of an EIS is to provide information, not necessarily to dictate policy. He added that NDEP takes every EIS very seriously, reviewing them and gaining information from them; in this case, NDEP took BLM's input as a positive because a review of the environmental ramifications of the mine showed the water quality of the pit lake to be fairly good.

Mr. Hadder stated that GBRW had contested the EIS and won in the Ninth Circuit Court, primarily on air quality issues. He argued that BLM does its best, but GBRW believes the BLM was inadequate in this case. He noted that GBRW also disagrees on the pit lake assessment. He said that projections are often incorrect, with both inaccurate data and analysis. Mr. Hadder suggested a better approach: "let's assume we're going to have problems with the pit lake, and let's plan for it." He added that the EPA's comments are pretty interesting as well; it is apparent that it would be a long horizon for treatment and reclamation, with the possibility of the site becoming a perpetuity treatment site. He said that many things are covered in the EIS process, which is a good opportunity for transparency and discussion; however, GBRW feels there are failings in it, especially with air quality, which prompted the Ninth Circuit to vacate the EIS. He argued that the geochemistry characterization is incorrect; additional analysis on the geochemistry by a GBRW expert had made GBRW believe that even more. He added that other mines have the same issue. He stated that the Ninth Circuit had agreed that using a zero baseline on the air quality was not procedurally correct; in addition, the court believed that the mitigation analysis around the pit lake was probably inadequate, but it had already vacated the EIS based on air quality. Mr. Hadder argued that the EIS provides information but said that GBRW disagrees with many of its aspects, which prompted the organization to take it to court.

At Chair Gans's request, Mr. Nubel listed Eureka Moly's permitting process: planning began in 2006, and a permit was issued in 2012, with no action taken until 2018 when a permit was issued. Chair Gans said that he sympathizes with Eureka Moly for the extended timeline. He asked how it might impact Eureka Moly if further analysis later in the permit process indicated a need for water treatment. Mr. Nubel said that NDEP would do what is required by regulation even if a reclamation plan is necessary; NDEP would evaluate whether groundwater could be degraded and whether pit lake water could adversely affect the health of people or animals. He said that if NDEP found that it could, a plan to address the problem would be put in place. Mr. Nubel added that it is a risk that Eureka Moly takes by going into its line of business, which is why such studies are done before the pit wall sample is available. He again noted that such questions will be reassessed as mining goes on.

Chair Gans said that the risk then is to Eureka Moly. Mr. Nubel responded that Eureka Moly has provided the required information that projects what the pit wall would look like; if samples taken during mining indicate any problems, NDEP would require a reclamation plan without concern for Eureka Moly's investment. He said that does not necessarily mean the mine could not be in place, but it does trigger a requirement for a bond and a plan for getting the mine where it needs to be. He added that the plan would then be presented to the SEC and the public.

Chair Gans asked about the 1,600-year plan, which was in a brief to the SEC. Mr. Hadder replied that the long timeframe is part of the nature of dealing with geology; when it comes to the health of the planet, the timeline can be quite long. He added that funding mechanisms and bonds are in place to address the issue.

Mr. Nubel stated that NDEP's recommendation to the SEC is to issue an order dismissing GBRW's appeal without prejudice and to direct NDEP to modify the permit to include additional pit lake assessments and an opportunity to appeal prior to Eureka Moly mining below the groundwater table; NDEP would provide exact language to that effect to Ms. Cavanaugh-Bill and then to the SEC.

Chair Gans provided a hypothetical in which the SEC approves NDEP's motion to dismiss and Eureka Moly moves forward with mining. He asked what GBRW would then do. Ms. Cavanaugh-Bill said that GBRW would most likely appeal once the anticipated issues began to surface. Mr. Hadder added that GBRW would continue to look at information as it surfaced, conferring with NDEP and discussing issues that crop up. He reiterated that it would be best to gain solid information before the process started. He said that the mining process is inadequate for the area and mentioned the vital watershed and people that lived in the area; if the site generates acid mine drainage, then the community would unfairly have to deal with it long-term. He added that GBRW believes the analysis was done incorrectly and would like another set of eyes on it. Mr. Hadder maintained that GBRW's request does not disrespect NDEP.

Ms. Cavanaugh-Bill added that GBRW strongly disagrees with the dismissal on ripeness issue as it would constitute a denial of its right to appeal; to start phasing permitting concerns as proposed would set a precedent in Nevada. She added that the first tour of the site was in 2007, with several representatives from Shoshone communities, and it had been a long process for all involved.

Mr. Nubel said that NDEP is not attempting to make GBRW go away, reiterating that NDEP respects the organization. He said that NDEP has met with GBRW several times to discuss the mine pit and appreciates GBRW's comments during the permit process. He stated that NDEP is not asking for GBRW to go away, but to have the issue heard at a more appropriate time when the best evidence is available and before any harm can occur.

Mr. Nubel mentioned a mine that had been deemed "The Chernobyl of Nevada" about 20 years ago but is now reclaimed and used as a fish hatchery. He stated that he is comfortable with certain parts of the data and the permit being ripe; other parts are not there yet.

Commissioner Landreth said that she knows the administrative law and is not sure there is a double-edged sword; NDEP has been responsive to GBRW, but there is some doubt about the "horse" issue still. She added that nobody is perfect.

Chair Gans called for further questions.

Ms. Cavanaugh-Bill stated that GBRW had received both NDEP's ripeness response in its opening brief and the motion to dismiss, but she said that GBRW had no direct opportunity to respond to the motion to dismiss. She asserted that it is important to respond to the case laws set forth in the actual motion for the SEC to use during deliberation. She noted a case involving a group of minors wanting to use a pathway trail; NDEP said that information wasn't yet fully available. At that time, the court informed the youth that they had not yet filed a permit, so information gathering was not ripe. But the court acknowledged that the information was ripe for review by NDEP. She added that NDEP had put forth its plans in that case. Ms. Cavanaugh-Bill said that she would be willing to respond to NDEP's motion and cite some pertinent cases, but that would be moot if the SEC denied NDEP's motion. She added that if the SEC granted NDEP's motion, GBRW would request those citations. Chair Gans responded that he had asked for the information two weeks previously when he asked if GBRW had filed a brief on the motion. He said he was told that GBRW had no response.

Ms. Henna Rasul, deputy attorney general, stated that there is nothing in the regulations about the procedures. She added that since the case is likely precedential, it is prudent to allow Ms. Cavanaugh-Bill to provide a response, especially since the SEC's decision would need to be made public.

Mr. Nubel stated that Ms. Cavanaugh-Bill had submitted a response to the reply brief, devoting at least three or four pages to the ripeness argument, so she had already briefed the issue; any case law could be provided at the current meeting. He said that he does not see the utility in giving another chance to brief the ripeness issue.

Ms. Cavanaugh-Bill maintained that NDEP's motion to dismiss made different arguments as well. She stated that the notice requirement for the pre-hearing conference only regarded the issues waived in response, so she immediately stated that she would not waive the possibility to respond to the motion when the motion was first received. She added that she had been told that she would receive a briefing schedule at that time; analysis of the case law would assist the SEC in making the best decision since that same case law would be used if the matter ended up in district court. Ms. Cavanaugh-Bill stated that it would assist the SEC to be fully informed, adding that NDEP's motion to dismiss the appeal was separate and distinct from the factors to which GBRW had already responded.

Ms. Cavanaugh-Bill stated that the April 11 response brief addressed the original information in the permit and GBRW received the motion to dismiss on the same date. She stated that she immediately tried to ascertain when the response to the motion was due but received no response. She then checked about a new briefing schedule and was informed about the pre-hearing conference date. She said that NDEP's engagement on the issue of ripeness has been looked at by many courts and maintained that the case would set precedent. She said that she had prepared to address the issue prior to the hearing since she was told that it would include a briefing session.

Mr. Nubel acknowledged that there is possibly one additional case not in the response brief. Ms. Cavanaugh-Bill stated that her response to the motion would have included more material. She noted that NDEP referenced one case in its response brief, but she said she believed she had referenced four separate cases in her response, some of them being U.S. Supreme Court decisions.

Mr. Nubel said that he would defer to the attorney general's opinion.

**Motion:** Vice Chair Porta moved to continue the hearing and direct the executive secretary of the SEC to prepare another briefing schedule for both parties to discuss the issue of ripeness. Commissioner Landreth seconded the motion. All voted in favor of the motion.

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#### **4) Public comments**

There were no comments.

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#### **5) Adjournment (Discussion)**

The meeting was adjourned at 11:24 a.m.