





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

 TIME	 LOCATION
<i>June 20, 2019 9:30 AM</i>	<i>Richard H. Bryan Building Tahoe Conference Room, 2nd Floor 901 S. Stewart Street Carson City, NV 89701</i>

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

**Appellant — Great Basin Resource
 Watch:**

Julie Cavanaugh-Bill, attorney
 John Hadder
 Clay Millets (phonetic)

NDEP Staff Present:

Mathew Schulerberg, NDEP-BMRR
 Joe Sawyer, NDEP-BMRR
 Rob Kuczynski, NDEP-BMRR
 Erik Ringle, NDEP
 Natasha Zittel, NDEP
 Michelle Griffin, NDEP
 Todd Process, NDEP
 Matt Donaldson, NDEP

Public Present:

David Von Seggera, Sierra Club
 Ian Bigley, PLAN
 Glenn Miller, GBRW
 Colette Kalaza, Whitehorse Education
 Susan Juetten, rep. Carolyn Bailey

Begin summary minutes

1) Call to order and establishment of three member panel (Discussion)

Chair Jim Gans called the meeting to order at 9:30 a.m. Executive Secretary Valerie King confirmed that the hearing was properly noticed and that a three-member panel was present.

2) Public comments (Discussion)

Chair Gans noted that the panel had reviewed written public comments that were submitted in advance of the hearing. He said that comments specifically regarding the appeal would be accepted during the second public comment period.

There were no public comments.

3) Continued prehearing conference regarding Water Pollution Control Permit No. NEV2008106, Eureka Moly, LLC - Mount Hope Project. Ruling on NDEP motion to dismiss (Action item)

Chair Gans began by explaining the purpose of the prehearing conference: to hear and rule on the Nevada Division of Environmental Protection's (NDEP) amended motion to dismiss without prejudice Great Basin Resources Watch's (GBRW) request for an appeal. The motion also included a proposal to modify the schedule of compliance in Eureka Moly, LLC., permit NDEV2008106.

Defendant presentation:

Daniel Nubel, representing NDEP, said the factual elements of the case have not changed; only the legal arguments presented in the briefs have changed. He asked the State Environmental Commission (SEC) panel to grant the motion as the proposal would further factual development in the case and would not result in any practical harm to GBRW.

Mr. Nubel explained that NDEP is asking the SEC to modify item 6 of Eureka Moly's schedule of compliance in its 2018 permit. The modification would require Eureka Moly to get NDEP's written approval of a revised groundwater flow model, predictive pit lake model, and ecological risk assessment before mining below the groundwater table. The modification would include an additional public comment period and possible appeal of any NDEP decision. If the SEC agrees to modify the permit, the permit would not represent NDEP's final decision on expected water quality in the future pit lake.

Mr. Nubel said the core legal question was whether an agency — in this case NDEP — has completed its decision-making process and whether the result of that process is one that will directly affect the parties — GBRW. The courts have laid out three elements for judicial bodies to examine when deciding such an inquiry:

1. Whether a delayed review would cause hardship to the plaintiffs, in this case GBRW
2. Whether judicial intervention would inappropriately interfere with further administrative action
3. Whether the courts, in this case the SEC, would benefit from further factual development of the issues presented

As an example, Mr. Nubel described a U.S. Supreme Court case involving a Sierra Club challenge to an Ohio Forestry Association plan. The court found that the plan did not inflict significant harm on the

interests of the environmental group at that time, determining that the Sierra Club could bring an appeal at a time when harm is imminent. The court also found a real possibility that the agency would scrutinize the plan more closely before its implementation and that more facts would emerge. This would facilitate the ability to deal with the legal issues presented and aid the court with its resolution. Given these findings, the court ruled the suit unripe for review.

Mr. Nubel maintained that NDEP's proposed permit revisions would allow GBRW ample time to bring a legal challenge to prevent its alleged harm, much like the Ohio forestry case. He claimed NDEP's proposed revisions would allow more facts to develop, which might affect what requirements NDEP includes in future permits to ensure protection of groundwater and surface water.

Mr. Nubel then asserted that NDEP's motion is beneficial to all parties. It benefits NDEP by allowing more information to emerge to help determine whether it's necessary to modify the operating plans or put a remediation plan in place to protect waters of the state. GBRW benefits by having the additional information that it seeks in its appeal. SEC benefits by delaying its decision until more information is available to assess reclamation and remediation plans for compliance with applicable standards and regulations.

Panel questions:

Chair Gans asked whether the type of permit that NDEP issues is different from the type of permit issued in the Ohio forestry example. Mr. Nubel replied that the permit itself is a final decision but only certain issues related to the mine are currently ripe to be adjudicated. In its current form, the permit is tiered and will need to be renewed in five years. If the SEC adopts the proposed revision, the permit would need to be renewed at the time that the groundwater table is reached.

Chair Gans noted that the pit lake would be on the side of a hill. He asked how the groundwater level is defined. Rick Perdomo, also representing NDEP, affirmed that the sloped groundwater table is on the side of a hill because that is where the recharge zone is. The stage being discussed is the dewatering zone, where wells around the mine are located to pump water out of the ground to lower the groundwater table. NDEP is referring to the time when the mining company reaches this dewatering zone.

Chair Gans expressed concern about the groundwater level being the element that triggers any action. Mr. Nubel said that a major permit modification would be triggered in the first instance in which Eureka Moly reaches a dewatering zone, which initiates an additional public comment and appeal period.

Mr. Perdomo clarified that Eureka Moly will mine down to a point where the bottom of the pit intersects the existing groundwater table. The current plan is to have pumps in that area to remove the water, treat it, and discharge it.

Vice-Chair Porta interjected that the purpose of the SEC hearing is to determine whether the public has a right to appeal a final decision of the division, whether the decision is final, and whether the permitting process can be divided into phases.

Commissioner Landreth suggested that the Ohio forestry example was not applicable because, in that case, permits are issued once the plan is in place. She noted that during the last hearing — when she asked if it is possible to issue one permit for mining above groundwater and a separate one for mining below the water table — she was told that the process would be cost prohibitive. She said that a NDEP determination to issue a permit is a final decision. The idea that it might not be final brings the issue back to ripeness.

Mr. Nubel said that the permit itself does not go on in perpetuity. It requires renewal every five years or at points of major modifications. To the question of why a permit cannot be issued for stage one and a second for after the dewatering stage, he explained that NDEP is asking for there to be a requirement for a major modification and a revised permit to be issued once they reach the dewatering stage. At that point, GBRW can issue further comments about the water quality of the pit lake or other issues that are ripe for adjudication.

Mr. Nubel then argued that the Ohio forestry case is relevant because the court was considering alleged legal harm by the cutting of trees. In the Eureka Moly case, the legal harm is mining below the dewatering zone, the boundary below which a pit lake would be created.

Chair Gans asked for clarification of NDEP's proposal. Mr. Nubel reiterated that NDEP is requesting to modify Eureka Moly's permit, which would require the company to apply for a major permit modification once it reaches the groundwater table. By that point, additional data will be available. NDEP already believes that enough data has been analyzed for the project to begin. However, the motion was put forward because GBRW had concerns about the quantity of data that needs to be analyzed. NDEP believes a good method of collecting data for analyzing future water quality is to start mining and collect data from the final pit wall.

Commissioner Landreth asked whether NDEP disagrees with GBRW's criticisms of the quality of information that has been obtained, including the independent technical analysis and additional monitoring. Mr. Nubel replied that he disagrees that the permit was not supported by substantial evidence. NDEP finds that many of GBRW's suggestions would ultimately not be feasible and would not make a difference in the characterization of the pit lake. He noted that although the permit itself is final, it does not mean that everything about the mine is final going forward, including pit lake water quality.

Mr. Nubel then clarified that NDEP is asking for a modification in response to GBRW's concerns. As part of the proposed revision, more facts will be established to help predict the water quality of the pit lake. If the motion is denied and the case goes forward, NDEP is comfortable that the permit is supported by substantial evidence.

Vice-Chair Porta said he is not in favor of denying the public's right to appeal a decision within ten days, a right exercised by GBRW in this case.

Mr. Nubel argued that GBRW would still have the ability to appeal issues related to the permit. Any decision subject to further review by NDEP, such as pit lake water quality, would not yet be a final agency decision.

Mr. Perdomo addressed the question about the potential for two permits, arguing that multiple permits could create confusion about which permit controls mine operations. Current regulations allow for both minor and major modifications to a NDEP permit, and specific processes are required for both. With a major modification, regulations guarantee another public review process. NDEP's suggestion to require a major modification to the single, existing permit would provide that public process.

Appellant presentation:

Julie Cavanaugh-Bill, representing Great Basin Resource Watch (GBRW), began by pointing out that NDEP's notice of decision about the mine permit stated the deadline for appeal. It also stated the Nevada Revised Statute and Nevada Administrative Code that gives the public the right to appeal that decision. She said that GBRW has great concerns of the precedent that could be set if the permitting process is bifurcated, something NDEP's motion to dismiss effectively does. The legislative intent was that a notice of decision goes out when a permit is issued, initiating an opportunity for the public to

appeal that decision. She asserted that GBRW wanted to exercise its right to appeal the permit, asking that the motion be denied and an appeal hearing be scheduled

Ms. Cavanaugh-Bill stressed the importance of holding an evidentiary hearing so that complete, technical arguments can be heard and that the operation can move forward based on sufficient evidence. She argued that NDEP's request is an indication that they do not have sufficient evidence, that there are better options for collecting data. Current data on the mine site includes samples from 30 to 40 years ago, and many of those samples were taken during the exploration state. GBRW is not only concerned about the pit lake but also about how the location of disposal areas will affect nearby springs. Once operations begin, it is expected that approximately 11,300 acre-feet of water will be pumped each year.

Ms. Cavanaugh-Bill maintained that the evidence should be reviewed before the start of construction. She said that there would be an outcry by the company and affected employees, who could be laid off if operations are forced to cease after mining has begun. She noted that the cases cited by GBRW do not mention ripeness but do suggest that phased planning and adaptive management is unacceptable.

In response, Mr. Nubel argued that Ms. Cavanaugh-Bill's arguments unfairly assume that NDEP would later be biased for economic reasons rather than following statutes and regulations. Pointing to examples of adaptive phasing across the country at both state and federal levels, he also argued that the cases cited by GBRW are inapplicable, as they do not prohibit adaptive management. One of the cases cited by GBRW only found an aspect of an adaptive management plan to violate the law because the initial data that had been collected pointed to violations. The second case, relating to grizzly bear populations, found that harm would have already occurred by the time the damage is corrected. Mr. Nubel said that data supporting the Eureka Moly permit complies with Nevada statutes and regulations, preventing harm from occurring.

Panel comments:

Vice-Chair Porta expressed concern that there is no definition of a final decision. He argued that a permit is a final decision; it would be bad to start splitting up permits. He supports the public's right to appeal.

Chair Gans agreed that permits are a final decision.

Motion: Commissioner Landreth moved to dismiss the motion. Vice-Chair Porta seconded the motion, and it passed 3-0.

The appeal hearing will be scheduled for the morning of Wednesday, September 4, 2019.

4) Public comment (Discussion)

Glenn Miller, board member of GBRW and faculty member at the University of Nevada, Reno, spoke about how to best correct the lack of regulatory requirements on the ultimate use of pit lakes. He suggested that explicit beneficial uses — such as recreation or wildlife habitat — be developed before a pit lake is created. Mining companies should be required to establish a beneficial use with sustainable water quality as part of each project.

David VonSeggern, representing the Sierra Club, encouraged the SEC to make language in the agenda about public comments clearer, citing the confusing rule that the public cannot speak on an item relating to an appeal hearing until after a decision has been made. He spoke in support of the panel's decision to move forward with the appeal hearing, disagreeing with the idea of a phased permit. He

suggested that state law be clarified on how to address the unique hydrological nature of water in pit lakes, in addition to pursuing Dr. Miller's suggestions.

Chair Gans commented that NDEP was attempting to address the situation in a way that would satisfy all parties, saying he looks forward to learning more about GBRW's concerns.

Susan Juetten, representing Carolyn Bailey, read a statement (attached) into the record regarding Ms. Bailey's concerns about the effects the project will have on the farmers, ranchers, and community of Diamond Valley.

Colette Kaluza, representing Wild Horse Education, read a statement thanking the SEC for denying the motion to dismiss. The statement stressed the importance of maintaining the right to review, comment on, and amend proposed actions prior to any permitting to protect the quality of life of citizens and the natural environment.

Ian Bigley, representing Progressive Leadership Alliance of Nevada, spoke in support of SEC's decision to deny the motion to dismiss and move forward with an appeal hearing. He agreed that finding a beneficial use for pit lakes is essential when talking about water quality. He talked about the process of capturing and treating acid runoff and the danger of entrusting companies to maintain that process in perpetuity. He noted that many states across the country have passed bans on perpetuity agreements, which ensures that mining is only done in areas that are environmentally sound.

Chair Gans commended the parties for being civil and respectful throughout the process.

5) Adjournment (Discussion)

The meeting was adjourned at 10:54 a.m.

The audio recording of this meeting is available on the SEC website at sec.nv.gov.