

STATE OF NEW MEXICO  
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT  
OIL CONSERVATION DIVISION

IN THE MATTER OF THE HEARING CALLED  
BY THE OIL CONSERVATION COMMISSION FOR  
THE PURPOSE OF CONSIDERING:

APPLICATION OF THE NEW MEXICO OIL CONSERVATION DIVISION TO REPEAL AND  
REPLACE RULE 19.15.29 NMAC; STATEWIDE. CASE NO. 15959

REPORTER'S TRANSCRIPT OF PROCEEDINGS

COMMISSIONER HEARING

June 5, 2018

Volume 1 of 3

Santa Fe, New Mexico

BEFORE: HEATHER RILEY, CHAIRWOMAN  
ED MARTIN, COMMISSIONER  
DR. ROBERT S. BALCH, COMMISSIONER  
BILL BRANCARD, ESQ.

This matter came on for hearing before the New Mexico Oil Conservation Commission on Tuesday, June 5 through Thursday, June 7, 2018, at the New Mexico Energy, Minerals and Natural Resources Department, Wendell Chino Building, 1220 South St. Francis Drive, Porter Hall, Room 102, Santa Fe, New Mexico.

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ALSO PRESENT: Ms. Florene Davidson  
Mr. Leonard Lowe

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1 (9:03 a.m.)

2 CHAIRWOMAN RILEY: So we have Case Number  
3 15959, application of the New Mexico Oil Conservation  
4 Division to repeal and replace Rule 19.15.29 NMAC;  
5 statewide. We are going to roll right into that.

6 So at this point, Mr. Herrmann, would you  
7 start your case, please?

8 MR. HERRMANN: Yes, Ms. Chairman. Keith  
9 Herrmann representing the Oil --

10 CHAIRWOMAN RILEY: I'm sorry.

11 MR. HERRMANN: Keith Herrmann representing  
12 the Oil Conservation Division. We have submitted an  
13 application to repeal and replace 19.15.29 NMAC in an  
14 attempt to clarify and establish procedures for how to  
15 deal with releases of oilfield waste that do not impact  
16 groundwater.

17 We have three witnesses today, and I  
18 propose to put them on as a panel, with each witness  
19 testifying on specific sections. Because this is a  
20 repeal and replace, we feel that this is the most  
21 logical way to present the rule and to make sure the  
22 Commission gets any questions that they have addressed,  
23 as all my witnesses will be available.

24 NMOGA has indicated their objection to this  
25 presentation, but to obviate some of their concerns,

1 I've offered to pause in between switching between  
2 witnesses for cross-examination by any party who has  
3 entered an appearance.

4 We feel that because this is a total repeal  
5 and replace, going through section by section with each  
6 witness testifying on their specific sections would be  
7 the best way to present this.

8 CHAIRWOMAN RILEY: Okay. And could we also  
9 now at this time find out who else has entered an  
10 appearance, if you could just --

11 MR. FELDEWERT: Madam Chair, members of the  
12 Commission, Michael Feldewert, with the Santa Fe office  
13 of Holland & Hart, appearing on behalf of the New Mexico  
14 Oil and Gas Association. And we have two witnesses here  
15 today.

16 CHAIRWOMAN RILEY: Okay. Thank you.

17 MR. LARSON: Good morning, Madam Chair,  
18 Commissioners. Gary Larson, of the Santa Fe office of  
19 Hinkle Shanor, for the Independent Petroleum Association  
20 of New Mexico. I do not have any witnesses.

21 CHAIRWOMAN RILEY: Thank you.

22 MS. CALLAHAN: Candace Callahan, with  
23 Beatty & Wozniak, representing Cardinal Laboratory.

24 CHAIRWOMAN RILEY: Okay. Those are all the  
25 entries of appearance I think we've received officially;

1 is that correct?

2 MR. BRANCARD: Yes, that's correct.

3 CHAIRWOMAN RILEY: Mr. Feldewert and  
4 Mr. Larson and --

5 I'm sorry. Say your name for me again.

6 MS. CALLAHAN: Candace Callahan.

7 CHAIRWOMAN RILEY: Do we have any  
8 objections to how the OCD plans to present witnesses and  
9 come forward with this process?

10 MR. FELDEWERT: No, we do have some  
11 concerns here. I mean, I have not seen that before in a  
12 Commission proceeding. And the concern is it would set  
13 a bad precedent for future cases, particularly cases  
14 that may be more contested, because it raises questions  
15 about, you know, can anyone just present their case with  
16 a panel of witnesses, and how many people can you have  
17 on your panel; can you have three, five, ten? Or do you  
18 really have to present -- because we've always done  
19 cases with individual witnesses who stand on their own  
20 for questions and stand on their own for  
21 cross-examination. So it seems to me it unnecessarily  
22 opens a Pandora's box of issues that you have not faced  
23 as a commission.

24 And I do know that unlike perhaps other  
25 rulemaking bodies, the Commission does have some

1 procedural requirements for rulemaking, and as I read  
2 through them, the panel approach does not seem to fit  
3 well within them. And Mr. Brancard and members of the  
4 Commission, I'm looking at -- I always forget --  
5 19.15.3.11(B)(2). It talks about in terms of the  
6 pre-hearing statement requires that you provide a  
7 concise statement of each witnesses' testimony. I think  
8 if you read that, it contemplates that there is going to  
9 be ten individual witnesses that are going to offer you  
10 testimony on certain topics, not that you're going to  
11 offer a panel.

12                   Then you look at Subsection 3.12(B)(3). As  
13 I took a look at that, it discusses the allowed  
14 testimony and the procedures that you're to follow, and  
15 it says, "A person who testifies," not a group of  
16 persons. It says "a person." And then it says that  
17 person is subject to cross-examination on "the  
18 person's" -- that's the language -- "testimony, to the  
19 person's background and qualifications." So that kind  
20 of language doesn't signify to me that the rules  
21 contemplate a panel approach to the presentation of  
22 direct testimony or discussions of background  
23 qualifications or even cross-examination. It indicates  
24 that each witness stands alone and presents their  
25 testimony based on their particular background and

1 qualifications and stands for cross-examination based on  
2 their particular testimony.

3                   So I haven't seen this done before. I'm  
4 not the oldest guy here, but I haven't seen it done by  
5 this body. It seems, at least in my mind, that it  
6 departs from the customary manner by which technical  
7 evidence is presented, it does not seem to be  
8 contemplated by the rules, and, more importantly, in my  
9 mind, I think it sets a bad precedent for future perhaps  
10 more contested rulemaking proceedings.

11                   That's the concern.

12                   CHAIRWOMAN RILEY: And I can appreciate  
13 those concerns. Do you see the value, though, in a  
14 situation such as this where we are doing a rulemaking  
15 where there are complexities within each of the pieces  
16 of this -- and the panel that's being presented is only  
17 three; it's not a large number -- being able to question  
18 that panel as to each of these, you know, parts of this  
19 rulemaking process and that the Commission can have that  
20 discretion with each hearing that comes up, whether or  
21 not it's going to be overly burdensome, to try to do it  
22 that way and make that decision on a case-by-case basis?

23                   MR. FELDEWERT: Well, you certainly have  
24 that discretion so long as it fits within the rules that  
25 there is not a clear-cut question, and you certainly

1 have discretion.

2                   It just seems to me that, number one, we've  
3 always dealt with those types of issues by calling a  
4 witness who deals with certain parts of the rule and  
5 it's laid out ahead of time, and then call the next  
6 witness to deal with the other parts of the rule, laid  
7 out and discussed ahead of time as to what they're going  
8 to address. And if there are any questions, you can  
9 always recall a witness.

10                   So perhaps there are some efficiencies, but  
11 to me the biggest concern is it doesn't neatly fit  
12 within the rules, and, number two, if you allow it here,  
13 then I suggest you're going to see requests in the  
14 future to allow it in other matters by other parties,  
15 perhaps in a more broad platform, and you're going to  
16 have to sit there and explain to them why you allowed  
17 one party to do it in one case and didn't allow it in  
18 another.

19                   That's the concern I see.

20                   CHAIRWOMAN RILEY: Go ahead.

21                   MR. HERRMANN: I'd just like to defer to  
22 the Commission rulemaking proceedings, 19.15.3.12 NMAC,  
23 that authorizes the Commission to conduct a hearing to  
24 provide reasonable opportunity for all persons to be  
25 heard without making the hearing unreasonably lengthy,

1    cumbersome or have necessary repetition.  And it's the  
2    Commission's discretion, again, to establish the order  
3    for participants' testimony based upon pre-hearing  
4    statements, sign-in sheets and the availability of the  
5    witnesses.

6                   This will allow us to save time, not having  
7    to recall a witness to testify on specific areas, and  
8    this is not out of the ordinary in state rulemaking.  
9    It's done regularly with the Water Control Commission --  
10   the Water Quality Control Commission and the Environment  
11   Department, and neither one of those committees'  
12   rulemaking proceedings specifically authorize testimony  
13   by panel.

14                   CHAIRWOMAN RILEY:  Do you have any comment  
15   that you could give on the setting of precedence for  
16   future hearings in creating a serious issue?

17                   MR. HERRMANN:  Well, again, the Commission  
18   always has discretion to avoid cumbersome and  
19   duplicative testimony and the discretion to determine  
20   what witnesses will testify as to what matter.  Lastly,  
21   the precedence set here by allowing a proceeding in this  
22   manner would not be binding on the Commission.  It would  
23   be advisory, at best.

24                   CHAIRWOMAN RILEY:  Mr. Brancard, do you  
25   have anything?

1                   MR. BRANCARD: Madam Chair, I mean, I have  
2 seen a version of this in hearings in front of the  
3 Environmental Improvement Board and the Water Quality  
4 Control Commission where an applicant has more than  
5 three witnesses when they're putting on an entire rule,  
6 and those boards will allow all those witnesses to  
7 testify consecutively, and then they have what's called  
8 a panel cross-examination, where you have all those  
9 witnesses lined up and if you have a question about  
10 Section 12, the person who knows the most about Section  
11 12 answers the question as opposed to asking questions  
12 of witnesses who may not know that section very well.

13                   But I'm not very sure what Mr. Herrmann is  
14 proposing for a panel of testimony. Perhaps he can  
15 explain how exactly he would see this working out with  
16 his three witnesses.

17                   MR. HERRMANN: I'm going to have three  
18 witnesses up there. First, Mr. Griswold is going to  
19 present testimony on the current rule and its status and  
20 efficiencies and what our goals were to propose -- when  
21 we decided to work to propose the changes.

22                   Then I'm going to have Mr. Powell testify  
23 on the definition section and some of the notification  
24 terms of the rule.

25                   This was all laid out in my pre-hearing

1 statement. And as the sections of the rule progress,  
2 I'm going to have separate witnesses testify on specific  
3 sections of the rule. And, again, I've offered to pause  
4 in between switching through witnesses for  
5 cross-examination by either opposing counsel or the  
6 Commission, or the Commission may ask questions whenever  
7 they feel fit.

8 CHAIRWOMAN RILEY: Fellow Commissioners, do  
9 you have input on this?

10 COMMISSIONER BALCH: I don't know. Do we  
11 want to go into closed session to discuss this?

12 MR. BRANCARD: No.

13 COMMISSIONER BALCH: I guess my concern  
14 really is just sort of the change of evidence and how  
15 clearly it's laid out in the record. So when  
16 Mr. Brancard mentioned where you have a witness testify  
17 individually and cross-examined individually and at the  
18 end, you have a panel where you can throw remaining  
19 questions at them, I would feel a little more  
20 comfortable with that than having the entire panel as  
21 the witness.

22 COMMISSIONER MARTIN: I have problems with  
23 the change in the process.

24 CHAIRWOMAN RILEY: I would be concerned  
25 about -- as Mr. Feldewert points out, that doing it this

1 time, it would be difficult to say no at a later date.  
2 And it may seem at this time, you know, on its face that  
3 it's a good idea, but it might not be in the future.  
4 And, you know, just in the -- for fairness, I think we  
5 should stay with what is normal process for us.

6 COMMISSIONER BALCH: It sounds like what  
7 you're going to do is skip back and forth between  
8 witnesses during parts of the testimony.

9 MR. HERRMANN: Well, to progress with the  
10 rule in the order that it is submitted.

11 COMMISSIONER BALCH: Right, instead of the  
12 normal process where a witness will jump around in the  
13 rule and the next witness will jump around in the rule,  
14 things like that.

15 MR. HERRMANN: Yes. The intent of this  
16 rule is to create a very systematic approach dealing  
17 with releases, and in reflecting that, I would like to  
18 keep a linear progression with my testimony. If I would  
19 have to -- if I could stick to that, I'd request that  
20 I'd be able to recall witnesses in order with the rule.

21 COMMISSIONER BALCH: I don't know. Is  
22 there anything that says you can't bring your witnesses  
23 back as needed? If they're going to testify, you just  
24 don't close their testimony, right?

25 MR. BRANCARD: Well, again, I think the

1 Commission can do that, but you have to kind of make it  
2 clear that's what we're doing right at the beginning so  
3 that counsel is aware what the process is that the  
4 Commission is allowing here. So Mr. Herrmann is  
5 proposing two alternatives. One is to have people  
6 sitting up here in a panel going from section to  
7 section, back and forth, and the other is to stop a  
8 witness and then recall a previous witness to talk about  
9 the next section, which may be fine. It may accomplish  
10 the same result in effect because you'd stop the  
11 witness, then the Commission can ask questions of that  
12 witness about that section. Okay? And then we move on  
13 to the next section, and whoever it is -- the best  
14 witness for that section then sits up here and testifies  
15 about that section.

16 CHAIRWOMAN RILEY: I think that stays  
17 consistent with procedure, if we do it that way, and  
18 then we still accomplish going linear through your rule.  
19 Would that be all right?

20 COMMISSIONER BALCH: As long as there is an  
21 opportunity for all parties to cross-examine at every  
22 one of those junctions.

23 Is that a little more satisfactory to you,  
24 Mr. Feldewert?

25 MR. FELDEWERT: Yeah. I mean, like I said,

1 I'm worried about precedent-setting in this particular  
2 case. You know, I think we do that a lot. But my  
3 comment is, first off, this is not a long rule. It's  
4 only got so many sections. It's not that long. You  
5 have Sections A and X and Y, and then go back and do B,  
6 C and D. It's not all that difficult in this particular  
7 rule. But if they feel like they want to go with the  
8 initial sections, for example, and then call another  
9 witness to deal with other sections, they can certainly  
10 do that. I just think that each witness needs to stand  
11 on their own and present their own testimony and not,  
12 you know, sit up there with a panel free-for-all who is  
13 answering what.

14 COMMISSIONER BALCH: My primary concern is  
15 just the organization and order of the evidence in the  
16 record, making sure that stays clear. I don't want to  
17 have a case where in the confusion somebody loses an  
18 opportunity to cross-examine on a particular issue.

19 MR. FELDEWERT: And I think qualifications  
20 become an issue. I know Mr. Brancard -- we had a  
21 question about that last time. But certainly, you know,  
22 as you can imagine, when these get appealed, one of the  
23 issues is showing there is substantial evidence and that  
24 it is substantiated by competent testimony. And that is  
25 difficult to sort out on appeal when you have a panel.

1 And I don't know about the court reporter, how difficult  
2 it is for her to keep track because she doesn't know all  
3 these people. But, you know, that's -- I just see some  
4 concerns procedurally and with respect to the precedent  
5 it will set.

6 CHAIRWOMAN RILEY: Well, I think this is a  
7 good discussion on this, but I think we could go forward  
8 with the normal process and one witness at a time.

9 MR. HERRMANN: Okay. With the ability to  
10 recall?

11 CHAIRWOMAN RILEY: Correct, the ability to  
12 recall.

13 MR. HERRMANN: So we can proceed with the  
14 rule as written?

15 CHAIRWOMAN RILEY: Yes. That's fine.

16 MR. HERRMANN: Okay.

17 MR. FELDEWERT: Madam Chair, members of the  
18 Commission, one other housekeeping matter before we  
19 start with the witnesses: As you can imagine, the rule  
20 was filed back in January.

21 Is that right, Keith?

22 MR. HERRMANN: Uh-huh.

23 MR. FELDEWERT: And like anything else,  
24 people read through the rule again. They notice issues.  
25 They notice typos. They notice ways to make it more

1 efficient and flow and, as Mr. Herrmann said, give it a  
2 systematic approach.

3 NMOGA had filed comments to try to  
4 accomplish those goals, which were -- are NMOGA  
5 Exhibit A. We can put that aside because we have now  
6 had discussions again with the committee members with  
7 the division, and the division and NMOGA have now come  
8 up with what has been marked as NMOGA Exhibit D, as in  
9 dog, and this contains a series of red lines and  
10 strike-outs that are highlighted in yellow, which are  
11 agreed upon by the members of the committee on behalf of  
12 NMOGA and then also by the members of the committee on  
13 behalf of the division.

14 So everything you see in Exhibit D that is  
15 highlighted in yellow are the proposed changes that both  
16 parties agree are necessary to make the rule read  
17 better, to flow better, and we deal with certain typos,  
18 with one exception, which is on page 5 of Exhibit D, as  
19 in dog. We have some changes there that's highlighted  
20 in blue. The debate -- the remaining issue between  
21 NMOGA and the division is whether that phrase, "Each  
22 composite sample must not be representative of more than  
23 200 square feet," whether that should be included in the  
24 rule, or whether it should say -- what NMOGA has  
25 proposed, and that is "And individual grab samples from

1 any wet or discolored areas." There will be testimony  
2 from our side, as well as from their side, to address  
3 that particular issue.

4 The red-line strike-outs that you see in  
5 yellow have been approved by both the division and  
6 NMOGA.

7 So my contemplation is that we have this as  
8 a separate exhibit, maybe have it off to the side, and  
9 as people walk through the rule, they can use this as  
10 notes or whatever you want to do. Okay?

11 CHAIRWOMAN RILEY: And so Exhibit A is no  
12 longer being presented?

13 MR. FELDEWERT: Exhibit A has actually been  
14 filed in the record, so I guess it stays, but we will  
15 not be referencing Exhibit A. We'll be using Exhibit D,  
16 as in dog.

17 MR. HERRMANN: And that also goes for OCD  
18 Exhibit 3.

19 MR. FELDEWERT: So, essentially, Exhibit D  
20 replaces our Exhibit A and your Exhibit 3, right?

21 MR. HERRMANN: Yes.

22 MR. FELDEWERT: Okay. Mr. Herrmann and I  
23 were up late last night getting this done.

24 CHAIRWOMAN RILEY: I appreciate that.

25 MR. FELDEWERT: Not that late.

1 CHAIRWOMAN RILEY: Mr. Herrmann, do you  
2 want to introduce all three of your witnesses --

3 MR. BRANCARD: Madam Chair, I'm just  
4 concerned if the other parties have seen that exhibit.

5 MR. FELDEWERT: No, they have not, because  
6 we put it together -- finished it last night, so they  
7 have not.

8 MR. BRANCARD: Do the other parties have  
9 any --

10 MR. LARSON: I have no objection.

11 CHAIRWOMAN RILEY: Ms. Callahan?

12 MS. CALLAHAN: I have to confer with my  
13 clients, but I see no reason to anticipate an objection.

14 MR. BRANCARD: Okay.

15 CHAIRWOMAN RILEY: Mr. Herrmann, would you  
16 like to call your three witnesses and get them sworn in?

17 MR. HERRMANN: Yes, please. Jim,  
18 Brandon -- I have three witnesses. I have Mr. Brandon  
19 Powell, Mr. Jim Griswold and Bradford Billings.

20 CHAIRWOMAN RILEY: Please swear the  
21 witnesses in.

22 (Mr. Powell, Mr. Griswold and Mr. Billings  
23 sworn.)

24 MR. HERRMANN: If there are no other  
25 matters we need to discuss right now, I will begin my

1 presentation.

2 CHAIRWOMAN RILEY: Please go forward.

3 MR. BRANCARD: I think we're fine. The  
4 only thing, Madam Chair, is we've been getting some  
5 written comments in. And so at some point, we just sort  
6 of let -- I think there is a deadline today on written  
7 comments. We'll let the audience know who has submitted  
8 written comments at some point.

9 MR. FELDEWERT: And, Madam Chair, Members  
10 of the Commission, at some point I would like to  
11 address -- NMOGA has some concerns about a filing that  
12 was done by Mr. Price that we believe has some  
13 procedural and substantive issues. So we can address  
14 that at your convenience.

15 COMMISSIONER BALCH: Do you want to do that  
16 before we start?

17 CHAIRWOMAN RILEY: Well, why don't we bring  
18 up who we have written comments from, and then at this  
19 point -- unfortunately, we just -- some of us just  
20 became aware of some of these comments this morning.  
21 But I do believe we've got comments from Wayne Price.

22 Is Mr. Price in the room?

23 MR. PRICE: (Indicating.)

24 CHAIRWOMAN RILEY: Oh, there you are.

25 And there are also comments from

1 Environmental Defense Fund that we just got in our hands  
2 this morning.

3                   Anyone here from the Environmental Defense  
4 Fund?

5                   Okay. And is there anyone else in the  
6 audience that submitted comments that we're not aware  
7 of?

8                   Do the attorneys know of any other  
9 comments?

10                  MR. HERRMANN: The Oil & Gas Accountability  
11 Project. I have a copy of their comments, if you like.

12                  CHAIRWOMAN RILEY: Perhaps we can get a  
13 copy of that and get it to the panel.

14                  MR. HERRMANN: Okay.

15                  CHAIRWOMAN RILEY: So let's move back to  
16 Mr. Price's comments and procedurally what the concerns  
17 might be, Mr. Feldewert.

18                  MR. FELDEWERT: So, Madam Chair, if we  
19 focus first on Mr. Price's comments, I, quite frankly,  
20 am not sure when they were filed because they were not  
21 served on any of the parties to the case who had entered  
22 an appearance some time ago in this matter, number one.

23                  Number two, if I go -- and the only reason  
24 I became aware of them is Mr. Herrmann was kind enough  
25 to tell me yesterday afternoon -- or evening that they

1 had been filed, and so he sent them to me. So I have  
2 not had a chance to really go through them.

3 But when I do look at them, number one, I  
4 see that there is a date of May 31st, 2018. And while  
5 it is titled "Comments Submitted by Mr. Price," if you  
6 go through, essentially, it is a set of extensive  
7 proposed modifications to the rule in red-line  
8 strike-out format. As I read -- as I read the  
9 procedures and, in fact, the notice that went out, any  
10 proposed modifications had to be filed on or before May  
11 22nd. So if you would accept these as modifications,  
12 which is another issue, they're untimely. So they  
13 weren't served on us, and they're untimely.

14 More importantly -- more importantly, when  
15 I look at the rules here on participation, it indicates,  
16 when I look at 19.15.3.11(B)(1), that a person who  
17 intends to present technical testimony or cross-examine  
18 a witness at a hearing or "to submit modifications to  
19 the proposed rule shall do so ten business days before  
20 the scheduled hearing with their pre-hearing statement."  
21 So this rule indicates that if you're going to submit  
22 proposed modifications, red-line strike-outs, and submit  
23 proposed language to the rule as modifications, that you  
24 have to follow the rules that everybody else does, and  
25 that is you file your -- you conclude them -- you file

1 your pre-hearing statement ten business days before the  
2 hearing, and you include them in your pre-hearing  
3 statement.

4 In that case it was due on May 22nd, and  
5 that was not done here. So it wasn't served. It's not  
6 timely. And since it wasn't part of the pre-hearing  
7 statement and they haven't asked to be a party in this  
8 case by filing a pre-hearing statement, it should be  
9 stricken from the record.

10 Now, when you look at some of the other  
11 filings that were done by EDF and OGAP, okay, comments  
12 are one thing. Proposed language, striking or replacing  
13 or adding language, those are modifications. And if  
14 you're going to submit modifications, you have to file a  
15 pre-hearing statement and include them in your  
16 pre-hearing statement and explain what they're about.  
17 So we can't split their modifications under the guise of  
18 comments on the day of the hearing, as I read this rule.  
19 Okay?

20 So Mr. Price has submitted almost entirely  
21 red-line strike-outs. EDF and OGAP have submitted some  
22 comments that are mixed in with some proposed  
23 modifications. So I know it's difficult to strike that,  
24 but certainly Mr. Price's filing is subject to being  
25 stricken, and certainly EDF and OGAP have proposed

1 changes in the proposed language of the rule. That is a  
2 modification that is improperly filed because it was not  
3 included with the pre-hearing statement.

4 MR. HERRMANN: The division concurs,  
5 specifically regarding Mr. Price's comments and the  
6 proposed modifications, that this will not be supported  
7 by any testimony and amounts to unsworn technical  
8 testimony. There is no actual basis or weight for the  
9 Commission to consider when reviewing it. So we agree  
10 and think it should be stricken from the record.

11 CHAIRWOMAN RILEY: Ms. Callahan, do you  
12 have any comments?

13 MS. CALLAHAN: We haven't had an  
14 opportunity to see the comment, and I would agree with  
15 other counsel. It should be stricken.

16 CHAIRWOMAN RILEY: Thank you.

17 Mr. Larson?

18 MR. LARSON: I also agree with other  
19 counsel.

20 CHAIRWOMAN RILEY: Well, I tend to agree as  
21 well.

22 I'm sorry, Mr. Price, but there is a  
23 procedure for getting this -- being able to enter your  
24 appearance on this. I would be happy to entertain your  
25 comment as a public comment.

1 MR. PRICE: That's what I was going to say,  
2 Madam Chair. It looks like it's unanimous. So I would  
3 like to make just a public comment just on the overview  
4 of the rule --

5 CHAIRWOMAN RILEY: Okay.

6 MR. PRICE: -- and then if I don't get into  
7 the actual changes that I had submitted, but basically  
8 an overview and a concept of the rule itself, which I  
9 think would just be a nontechnical public comment.

10 MR. BRANCARD: Madam Chair, we were going  
11 to say this anyway, but there will be a period every  
12 day -- and the Chair will announce this -- for public  
13 comments. Every day, there will be a section, may be  
14 before lunch, maybe near the end, whatever is a good  
15 time, and then we will allow every day for public  
16 comment. So that would be the appropriate time for  
17 Mr. Price.

18 MR. PRICE: Mr. Brancard, will I have the  
19 opportunity to be sworn in?

20 MR. BRANCARD: I don't know that we swear  
21 in --

22 COMMISSIONER BALCH: But we do allow --

23 MR. BRANCARD: We will. It's all  
24 testimony.

25 COMMISSIONER BALCH: We allow them to be

1 cross-examined if they so desire.

2 MR. PRICE: Right.

3 MR. BRANCARD: You can be sworn in. Yeah.

4 MR. PRICE: Thank you.

5 MR. BRANCARD: Okay. So we have a rule  
6 about these exhibits and about proposed changes, which  
7 is why I was asking Mr. Feldewert earlier about whether  
8 anybody objected to his proposed changes that he's just  
9 submitted. Okay? So this is sort of a fluid process  
10 because the Commission itself will probably make changes  
11 to this proposal.

12 I think that the submittal by Mr. Price is  
13 fairly detailed, really could only hold much weight with  
14 this Commission if it was supported by technical  
15 testimony, which it will not be. So while it's part of  
16 the record, I don't think the Commission needs to give  
17 it much weight.

18 The EDF -- I think we need to check this  
19 because the date on the EDF filing is actually the  
20 deadline for pre-hearing statements.

21 COMMISSIONER BALCH: So May 22nd, an email  
22 to the Commission clerk.

23 MR. BRANCARD: So if that, in fact,  
24 occurred, then that would be a timely submittal changes.  
25 They're just not proposing to be a technical party to

1 the proceeding, but they have submitted written comments  
2 at that point, which includes changes. So if that is,  
3 in fact -- and that's the date on their letter. I don't  
4 know when we actually received it. We have to check  
5 when we actually received that.

6 CHAIRWOMAN RILEY: Can we table that until  
7 later --

8 MR. BRANCARD: Sure. Absolutely.

9 CHAIRWOMAN RILEY: -- until we check our  
10 records?

11 COMMISSIONER BALCH: What's the date on the  
12 OGAP?

13 MR. HERRMANN: Also the 22nd of May.

14 CHAIRWOMAN RILEY: We'll take a look at  
15 that today.

16 Are there any other considerations for  
17 these comments that we've received? Any other matters  
18 having to do with public comments?

19 I'm addressing any of the counsel. Do you  
20 have any other concerns?

21 Seeing none, I think we can probably go  
22 forward now.

23 Mr. Herrmann, call your first witness.

24 MR. HERRMANN: Yes, please. Mr. Griswold.

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JIM GRISWOLD,

after having been previously sworn under oath, was questioned and testified as follows:

DIRECT EXAMINATION

BY MR. HERRMANN:

**Q. Mr. Griswold, being previously sworn in, would you summarize your position and experience for the Commission?**

A. Good morning, Commissioners. My name is Jim Griswold. I am currently and have for the last four years been the Oil Conservation Division's Environmental Bureau chief. I've been with the OCD for a total of ten years.

Prior to that time, I spent several decades, which would admit how old I'm getting, doing environmental work nationwide, primarily focused in New Mexico but nationwide, dealing with spills and cleanups and their effects on soil and groundwater.

I originally started my professional career way back in the late 1970s, early '80s actually in the oil patch as a geophysical logger in Hobbs, New Mexico.

**Q. And you're very familiar with the current rule we're here to discuss?**

A. Yes. I mean, deal with it every day -- every working day.

1           **Q.    Could you describe the current rule?**

2           A.    Certainly.

3                         Commissioners, if you would turn to Exhibit  
4 1.    It's page 3.

5                         Brad, if you could get that slide up there.

6                         The current rule, 19.15.29 NMAC, which we  
7 just kind of generally refer to as the spill rule, is  
8 entitled "Release Notification." The entirety of the  
9 current rule is less than one-and-a-half printed pages  
10 long and predominantly deals with the reportable volume,  
11 how much of a release needs to be reported, that  
12 threshold, who is required to provide notice when a  
13 release occurs, and the information required to be  
14 reported.

15                         The last section of the current Rule 29 --  
16 Part 29, Subsection 11 is entitled "Corrective Action,"  
17 and it's only two sentences long. The first states:  
18 The responsible person shall clean up the release, and  
19 the second, that corrective action should be -- and I  
20 quote -- "in accordance with a remediation plan  
21 submitted to and approved by the division." So it's  
22 quite broad in that context.

23                         If a particular release, through the course  
24 of dealing with it, characterizing that release, it  
25 comes to light that groundwater has been impacted as a

1 result of that release, we fall out of 29 and into Part  
2 30, the consecutive section, which is entitled  
3 "Abatement." And that portion of our rule pretty much  
4 mirrors the Water Quality Commission regulations  
5 regarding groundwater contamination cases, the only  
6 difference being under the oil and gas regulations, the  
7 public notice requirements are a little less onerous on  
8 the responsible party and the State. Other than that,  
9 it's the same.

10 So we're wanting to talk still just about  
11 Part 29, the spill rule, in the context of soil  
12 contamination.

13 If you turn to the next page, page 4 in  
14 Exhibit 1, this is a graph of release data for the last  
15 five years, 2013 through the end of 2017. What is  
16 plotted is the average daily release rate on a monthly  
17 basis over that five-year period. So in looking at it,  
18 you don't really see any obvious trends. You have some  
19 months that are better than others, some months that are  
20 worse. But over that five-year time frame, we average  
21 about 3.4 releases each day. And that's not each  
22 working day. That's each calendar day of the week.

23 So proceeding on to the next page in  
24 Exhibit 1, page number 5, I've got a bar graph over that  
25 same time period that breaks up that release data into

1 three basic categories, one for each year. The blue bar  
2 on the left indicates the total number of releases for a  
3 given year. The orange bar in the middle, next to the  
4 blue bar, is how many of those total releases involve  
5 spillage of liquids. And then the gray bar on the right  
6 for each year is the number of those liquid-release  
7 cases resolved in the same calendar year in which they  
8 were discovered.

9           And so I guess the things I would like to  
10 point out to the Commission in this regard is even on a  
11 good year, perhaps half of those releases are dealt with  
12 in the same calendar year they were discovered. But  
13 more often than not, that percentage is much less than  
14 that.

15           Turning to slide six, page 6 in Exhibit 1,  
16 I've laid out some of the deficiencies with the current  
17 rule as we see them given the corrective action portion  
18 of it is basically just this one sentence. There is no  
19 guidance provided by the rule to either the responsible  
20 party or to the Environmental Bureau or the OCD as to  
21 what should be included in that corrective action plan  
22 which it speaks to in the rule. There are no hard  
23 cleanup standards for soil contamination. This is  
24 unlike Part 30, the abatement plan regulations for water  
25 impacts, which actually refer to a list in the Water

1 Quality Control regulations that have numeric standards  
2 for various chemicals in groundwater. We have no such  
3 standards for soil contamination. There are no  
4 deadlines for cleanups, and there are no explicit  
5 provisions in the rule for any variances or enforcement  
6 on the Division's part.

7           Proceeding on to page 8 -- excuse me --  
8 page 7 in Exhibit 1, what I've laid out here is kind of  
9 a generalized corrective action process, and it's not  
10 just particular to releases in the oil and gas industry.  
11 It's standard environmental practice throughout the  
12 country dealing with spills and releases. And it's a  
13 five-step generalized process of what a responsible  
14 party, in this case an operator, should do when they  
15 come across a release.

16           That first step is to eliminate the source  
17 of the release, secure the site, contain the release and  
18 recover any free liquids, and that can be taken  
19 immediately upon discovery of the site. And so  
20 thereafter, even while one is engaged in that first  
21 step, then the responsible party should notify its  
22 regulatory agency, in this case the OCD, within a time  
23 frame laid out within the rule, depending on the  
24 magnitude of the release, and provide that regulatory  
25 agency with specific and accurate information regarding

1 that release.

2                   The next step in this general corrective  
3 action process is to characterize the impact of that  
4 release. The analogy that I tend to use to people when  
5 I talk about it is the release is like a sick patient  
6 showing up at a doctor's office or an emergency room.  
7 So the step that the medical professionals undertake  
8 would be to diagnose the patient, what ails them.  
9 That's the characterization of the release. And once  
10 that diagnosis has been made, then a cure can hopefully  
11 be prescribed, and that's step four. Decide what your  
12 remediation is going to be, and you undertake it. It's  
13 hopefully successful. When you're done with that  
14 cleanup effort, then you notify -- you notify the  
15 regulatory agency again and obtain closure from them  
16 with the case, basically saying what you did and showing  
17 it was successful, and then the case can be closed.

18           **Q. If I may interject, Mr. Griswold. Just to**  
19 **clarify, this is how the Oil Conservation currently**  
20 **handles spill reports?**

21           A. Current staff, this is how we generally deal  
22 with spills, we would like spills to be dealt with, not  
23 only by our staff but by responsible parties. It is  
24 standard environmental practice.

25                   Turning to page 8 of Exhibit 1, what you

1 have here on the left is a Form C-141. This is the  
2 standard release notification form that the division has  
3 used for many years, and this is an actual C-141 from a  
4 release that occurred -- excuse me -- just about three  
5 years ago. And I wanted to go --

6 **Q. Excuse me. The C-141, that is addressed in the**  
7 **current rule, correct?**

8 A. Yes. It says that a responsible party, when  
9 they provide notice of a release, that they do it --  
10 when they provide written notice of a release --  
11 certain releases, they have to provide an even earlier  
12 verbal notice, but when their written notice is due,  
13 they would use Form C-141.

14 **Q. And what else does the rule say about**  
15 **notification currently?**

16 A. Not much. Again, if we categorize releases --  
17 and there are subsequent reasons, and we'll speak about  
18 those portions of the rule. But we break up releases  
19 basically into three categories: Releases that don't  
20 need to be reported, minor releases -- there are volume  
21 limitations on that -- and then major releases.

22 If it's a major release, then rule [sic]  
23 notification needs to be immediately provided to the  
24 division, followed up within a period of about two  
25 weeks, 15 days of written notification in the Form

1 C-141.

2                   If it's a minor release but still  
3 reportable, then they simply need to provide this form  
4 completed, the C-141, within 15 days of discovery of the  
5 release.

6           **Q. Thank you. And you can continue with the**  
7 **specific example.**

8           A. Okay. Again, this is a release that happened  
9 several years ago. It was actually come across by one  
10 of our oil and gas inspectors, not the responsible  
11 party, and that happens from time to time. There is  
12 nothing wrong with that. But I wanted to point out in  
13 this particular release case, this is not an unusual  
14 event for us -- these come in every week in this form --  
15 of what areas of that general corrective action process  
16 were and were not followed. Okay?

17                   And so I've highlighted a couple of  
18 sections on here. One is that portion of the C-141 form  
19 where the responsible party is supposed to describe to  
20 the division basically the nature of the release. And  
21 two of the parameters that are fill-in-the-blank, so to  
22 speak, on the C-141 are how much of the liquid was  
23 released and how much of it was recovered.

24                   In this case the operator states that three  
25 barrels were released, but it recovered four, more than

1 the release. Also, the note of the time of the  
2 discovery of the release. It's unclear. The box on the  
3 left shows February 5th. The date in our discovery on  
4 the next box gives me February 6th. Okay? And then  
5 you'll see at the bottom, the other part I highlighted,  
6 the date that this form was actually provided to the  
7 division, on the 27th, which was 21 or 22 days later,  
8 which is actually beyond the time frame required by the  
9 rule. Okay?

10 So proceeding on to the next page, actually  
11 pages 9, 10 and 11, I just happened to be in southeast  
12 New Mexico with former OCD Director Catanach who you see  
13 in the footage here a couple of days after this was  
14 actually filed. Okay? So about the first of March of  
15 2015. And so we stopped by the site. And so I'm just  
16 going to show you some pictures of that site.

17 The operator stated that the problem --  
18 this is at a tank battery. So there are two tanks and a  
19 heater treater associated with a single well. It's the  
20 operator's statement that cattle in the area had  
21 actually kicked some piping loose, especially at the gun  
22 barrel, and that was the cause of the release. To the  
23 operator's good, what he did do, going back to that  
24 general corrective action plan, was he stopped the  
25 source of the release. He cut power to the pumpjack of

1 the wellhead. There weren't any more fluids coming out  
2 of the ground and going to the tank battery that could  
3 have been released. But the tank, if there was anything  
4 liquid above the level of the break, would have  
5 continued to drain out. And the release was marginally  
6 contained by the berms around it. Okay? That berm is  
7 not lined, however, so we do not have containment of the  
8 release vertically.

9           Going on to the next photograph, this,  
10 again, is that same side of the berm, but it's swung  
11 around a little bit. And I don't -- can't see this well  
12 on the slide, but perhaps in your printed version, you  
13 can see it. You can see the livestock in the upper  
14 left-hand corner. The site has not been secured. And  
15 by the operator's admission, that unsecured site was the  
16 cause of the release in the first place. But  
17 nonetheless, that livestock could -- and there were some  
18 signs of tracks -- cattle tracks in the area -- could  
19 enter into that contaminated volume.

20           I also paced out the general dimensions of  
21 the affected area and measured the thickness of the  
22 ponded liquids on the surface. And so not taking into  
23 account whatever liquids it actually infiltrated into  
24 the subsurface, my estimate was that the liquids on the  
25 ground of this release, three weeks later, was in excess

1 of 35 barrels, even though only three had been reported.

2           And then going to the final photograph on  
3 this one, this is what this particular operator  
4 considered to be corrective action, actually doing  
5 something about it. He's got a wheelbarrow. There was  
6 a rake on the side. It's propped up against the tank.  
7 I didn't get it in this photograph. He takes caliche  
8 from the area, put it in his wheelbarrow, simply dump it  
9 on top of the release and spread it around. This is not  
10 good, sound environmental practice.

11           So continuing to see these kind of  
12 situations on a regular basis and that the rule really  
13 wasn't addressing them, we felt -- the division felt we  
14 needed to improve things. To that end, a technical  
15 working group was established to hopefully come up with  
16 a more workable rule, and the result is why we're here  
17 today. That working group had four basic groups of  
18 membership: The regulatory entity, the OCD; surface  
19 agencies, the BLM and the State Land Office; the oil and  
20 gas industry itself; and some third-party environmental  
21 professionals. In addition to help facilitate the  
22 group's effort, an independent facilitator was actually  
23 called in by the oil and gas industry to help us in this  
24 pursuit. So there were four members -- on OCD  
25 membership, there were four folks from the Environmental

1 Bureau, all three -- three of which are going to be  
2 testifying to you today. A fourth member, Dr. Oberdine,  
3 no longer works for the division and has moved on. And  
4 there was also periodic participation by our director,  
5 Pat McIntyre, as well as NM -- King [sic; phonetic].

6 From the service agencies, there was  
7 membership of both the BLM and the State Land Office.

8 From the oil and gas industry, there were  
9 nine members involved representing seven oil and gas  
10 companies both from NMOGA and the IPANM. And in terms  
11 of environmental professionals, there was three members  
12 representing three separate and highly experienced  
13 environmental firms that do work in New Mexico in the  
14 oil and gas section.

15 The group met on a regular basis for more  
16 than a year, a total of four large meetings, two here in  
17 Santa Fe, one in Farmington and another in Artesia, and  
18 through that process, we reached a general technical  
19 consensus what we needed in a new rule.

20 Moving on to page 13 in Exhibit 1 -- and  
21 this will go for the next two slides, for the next two  
22 pages -- what were the objectives of this rule  
23 replacement? To clarify the definition of a responsible  
24 party; to establish an attainable deadline for  
25 addressing releases, currently not in the rule; confirm

1 those situations under which a release must be reported;  
2 provide guidance to operators; and immediately begin  
3 corrective actions and not have to wait for division  
4 approval, because we have that existing statement in  
5 Part 29 that says corrective action must proceed under a  
6 division-approved plan. A strict reading of that would  
7 preclude a responsible party from taking obvious and  
8 immediate action unless you have division preapproval to  
9 do that. That doesn't quite make sense. There are  
10 things that can be done immediately.

11           Then, to expeditiously deal with releases  
12 that are contained and not posing an imminent risk to  
13 the environment. There is a fair percentage of releases  
14 that we have that fall into lined containments, and they  
15 don't pose an imminent risk to the environment. And,  
16 again, the operator should be able to take immediate  
17 action in that regard without having to wait for  
18 division approval. So we wanted to clarify what those  
19 instances would be and give clear direction to the  
20 responsible parties that they could act.

21           More objectives: Establishing a  
22 standardized means for characterization of environmental  
23 impacts. In many situations operators don't have the  
24 wherewithal either financially or maybe even on their  
25 own to necessarily know how to properly deal with a

1 spill of produced water or crude oil or even a release  
2 of methane gas, especially the smaller operators. And  
3 they don't know what to do, and the rule doesn't provide  
4 any guidance in that regard. So at least now the rule  
5 can provide some guidance, and they can make a decision  
6 as to whether or not they need to seek a third party and  
7 technical help in this regard or not or if they can  
8 handle the release on their own.

9 "To provide specific and attainable  
10 requirements for releases that do not impact  
11 groundwater," goalposts, in essence, so that responsible  
12 parties know what's good enough, what's going to be  
13 clean enough.

14 "To establish a process for deferring  
15 cleanups when warranted." In many instances or a fair  
16 number of instances, a release occurs. There is some  
17 environmental impact but nothing that's immediately  
18 threatening to public health. Whereas, dealing with  
19 that cleanup may cause an unnecessary disruption in  
20 production and operations. The site is still contained.  
21 It doesn't pose a risk to groundwater. It doesn't pose  
22 a risk to public health if the site is secured. And so  
23 it gives us a process -- we would like to have in the  
24 new rule to give us a process for deferring those  
25 cleanups to a point at which it makes more sense that

1 they be done and not adversely disrupt the business  
2 operation.

3 "To establish a procedure" -- in Part 29 --  
4 "for obtaining a variance from standards." You can't  
5 write a rule that covers everything. Different things  
6 are going to come up. And so rather than bending a  
7 rule, we'll have a formal variance procedure for a  
8 particular case.

9 And then finally, clearly directing the  
10 division in enforcement actions when provisions of  
11 Part 29 are not performed. Currently, there are no  
12 enforcement provisions within the rule itself, within  
13 the larger oil and gas regulations, there are.

14 And so with that --

15 **Q. I've got one last question for you, Jim. And**  
16 **this is actually our first proposed change. What are we**  
17 **proposing to change naming the rule from and to?**

18 A. Oh. Just to make sure -- I don't want to get  
19 it wrong. Currently, the rule is called "Release  
20 Notification." And it does more, but it's a vague  
21 statement about corrective action. And we want it to  
22 speak more broadly, so we've proposed to change the name  
23 to "Releases." Again, it's to deal with releases up to  
24 the point at which it's been shown. So if there is a  
25 reasonable possibility that there has been a groundwater

1 impact, in that case, it falls out of 29 and into 30.  
2 The soil cleanup may be handled by Part 29, but the  
3 groundwater effort under Part 30.

4 **Q. I have no other questions.**

5 CHAIRWOMAN RILEY: All right.

6 Mr. Feldewert, do you have questions?

7 CROSS-EXAMINATION

8 BY MR. FELDEWERT:

9 **Q. Just a few, Mr. Griswold. If you'll turn to**  
10 **your slide four, now, the average releases that you show**  
11 **here, I'm assuming your data here includes what would be**  
12 **categorized as minor releases?**

13 A. Yes, all reportable releases, major and minor.

14 **Q. So it could include minor releases that were**  
15 **not presenting an immediate threat to groundwater?**

16 A. Well, a minor release, as defined, could  
17 actually be a major release. There is this threshold of  
18 minimum and maximum volumes, but many times it's not  
19 known.

20 **Q. My point is that the data here is minor**  
21 **releases that have no threat to groundwater?**

22 A. Correct.

23 **Q. Okay. And so we're not talking about -- when**  
24 **you say 3.4 releases per day, we're not talking about**  
25 **circumstances always that you see on your slides nine,**

1     **ten and 11, right, those pictures?**

2           A.     Well, even those photographs, it's not clear at  
3     that point whether that particular release even posed a  
4     threat to groundwater.

5           **Q.     Just so the record's clear, in the five-year**  
6     **average, you didn't indicate what 3.4 release types you**  
7     **see in your slides on nine, ten and 11?**

8           A.     No.

9           **Q.     Okay. Thank you.**

10                   And, in fact, does this data also include  
11     **releases that would be in a contained area?**

12           A.     Yes, it would.

13           **Q.     Okay. Thereby not posing an immediate threat**  
14     **because it's contained?**

15           A.     Again, my point is to say that any contained  
16     release is not necessarily a risk.

17           **Q.     But your --**

18           A.     It's less likely, though.

19           **Q.     Your data here will include releases, as you**  
20     **put it, that are less likely to pose a threat because it**  
21     **was in contained areas?**

22           A.     It would include -- these are all releases  
23     reported to the division over that five-year period.

24           **Q.     Okay. And when I go to slide five, you make a**  
25     **note here of how many, in the gray graph, I guess, were**

1 resolved?

2 A. Yes. The case was resolved.

3 Q. You mean that there was a closure that was  
4 approved?

5 A. Yes.

6 Q. Okay. So in some circumstances here, you would  
7 have closure plans that -- or closure paperwork that had  
8 been submitted but the division had not yet gotten  
9 around to approving it?

10 A. Correct. It is very difficult to pull that  
11 information out of our databases as currently  
12 configured. Again, given the large number of releases  
13 for any given year, I'd be going through a thousand case  
14 files and having to read each one to try to kind of, in  
15 essence, figure out what happened.

16 Q. Okay. And so your gray bar here would not  
17 necessarily include circumstances where the release has  
18 been addressed and paperwork submitted?

19 A. No. It would not contain that.

20 Q. It would not include areas where perhaps the  
21 release had been deferred because it's in a working area  
22 and did not -- I'm sorry -- cleanup of the release had  
23 been deferred because it's in a working area and there  
24 is no threat?

25 A. Correct, because the case -- the case at that

1 point is still not closed.

2 Q. All right. So there are a number of reasons  
3 why these particular matters may not have been resolved?

4 A. And that's always the problem with statistics.  
5 They may say a lot of things (laughter).

6 Q. Yup. Just making sure we're on the same page.

7 And when you got -- I know you had your  
8 pictures up here of nine, ten and 11 of this spill, and  
9 you raised a number of issues that you saw with how this  
10 similar spill was recorded and handled, right?

11 A. Correct.

12 Q. You had some concerns with it.

13 And this is really one of the reasons why  
14 the division and NMOGA and the industry got together to  
15 try to address these types of issues, right?

16 A. Certainly. It's not good for anybody to have  
17 this kind of thing going on.

18 Q. My point being, NMOGA and members of the  
19 industry, likewise, want to address these types of  
20 circumstances just like you-all?

21 A. Certainly.

22 Q. And that's what we've done with this rule, in  
23 your opinion?

24 A. That's the hope. I mean, it's been a rough  
25 process, but it's been a cooperative process.

1 MR. FELDEWERT: That's all the questions I  
2 have.

3 CHAIRWOMAN RILEY: Mr. Larson?

4 MR. LARSON: I don't have any questions.

5 CHAIRWOMAN RILEY: Ms. Callahan?

6 MS. CALLAHAN: No questions.

7 CHAIRWOMAN RILEY: I'd like to leave this  
8 witness open for further testimony.

9 COMMISSIONER BALCH: Do we get to  
10 cross-examine, too?

11 CHAIRWOMAN RILEY: Oh, yes. I'm sorry.  
12 No. So sorry, Bob.

13 CROSS-EXAMINATION

14 BY COMMISSIONER BALCH:

15 Q. Especially high-quality witnesses like  
16 Mr. Griswold. And I'm not joking.

17 A. That's on the record (laughter).

18 Q. I have a couple of questions for you,  
19 Mr. Griswold.

20 A. Yes, sir.

21 Q. So going back to your slide four, "Reported  
22 Releases Per Day," what is kind of a medium or typical  
23 for one of these look like?

24 A. I'm not the best person to ask -- or answer  
25 that question. I'm not trying to evade. I'm the

1 Environmental Bureau chief. When releases are reported,  
2 they come into the district offices, and so they would  
3 be better attuned to tell you what an average release  
4 is. And I think given the three active of the four  
5 districts that we have, you'd probably get three  
6 different answers out of each of those district offices.

7 **Q. Maybe you can discuss order of magnitude. Do**  
8 **you have a sense for that, large, medium, small?**

9 A. No, I don't. I just wouldn't feel comfortable,  
10 to tell you the truth.

11 **Q. Those are statistics that could be generated, I**  
12 **guess?**

13 A. Yes, they could. And one of the things that  
14 the division does do is every quarter I go back through  
15 that release data and compile certain parameters of it:  
16 What county and what district did it occur, what was the  
17 size of the release, the recovery of materials released  
18 and so the net loss on a monthly basis. And we post  
19 those on the Web.

20 **Q. On your slide five, "Total Releases" and**  
21 **"Liquid Releases," what is the difference there?**

22 A. Sometimes you have a pure gaseous release.  
23 Sometimes you have a release that involves natural gas  
24 releases as well.

25 **Q. So that's reportable?**

1           A.    It is reportable.  There is a requirement, a  
2    minimum volume of natural gas -- or gases released that  
3    has to be reported.  But generally speaking, under  
4    gaseous releases -- at least the gaseous aspect of the  
5    release, there isn't any lingering environmental effect  
6    that anyone can -- gas dissipates quickly.

7           **Q.    Certainly no remediation?**

8           A.    No.

9           **Q.    So in that case, you still have a report of**  
10   **it -- recognized?**

11          A.    Yes, it was.  And if it comes in as purely a  
12    gaseous release, you could trip back -- or, like, at  
13    some point you'll see in the testimony, in Exhibit 1, a  
14    blank C-141.  When the operator submitted it, there is a  
15    box checked that is final, that it's actually done.  
16    And, in essence, we won't even open a case on that  
17    particular release.  It is an incident in our database  
18    but not a case because there is no follow-through  
19    required.

20          **Q.    So I guess my --**

21          A.    And those cases are reflected in this bar graph  
22    as resolved cases.

23          **Q.    The ones we're dealing with primarily are the**  
24   **liquid releases because those are things you can**  
25   **remediate.  The rest of them are informational?**

1           A.    Right.

2           Q.    So in that case, you're resolving on the order  
3 of a third to a half on an annual basis of the liquid  
4 releases?

5           A.    Well, it's not so much the -- well, the  
6 division plays a role in the resolution of it, but it's  
7 actually the responsible parties who resolve the case.  
8 We don't go out and clean things up.

9           Q.    But there is a closed file somewhere on it?

10          A.    Yes.

11          Q.    A third to half, at best, which fairly  
12 indicates a problem.

13                    Okay. Okay. What's the biggest spill in  
14 this time period, 2013 to 2017?

15          A.    The biggest spill? In terms of volume --

16          Q.    (Indicating.)

17          A.    -- probably on the order of 10,000 barrels.

18          Q.    Pipeline failure or something?

19          A.    Yeah. Yes. Sorry.

20          Q.    When you speak of providing guidance to  
21 operators, is this -- this would be kind of an  
22 administrative thing, I believe, from the OCD based on  
23 the rule, because it is short, and we're not providing a  
24 list of guidance. But do you anticipate that that's  
25 what the division would do; they would put a checklist?

1           A.    Well, we're hoping to do as much as we can in  
2   the rule because there has been -- there are voices from  
3   time to time -- and they actually came up earlier in  
4   this process -- that when the division issues guidance,  
5   that they're doing rulemaking without going through  
6   rulemaking.  So it's a hard path to follow sometimes.

7           Q.    But part of the disconnect seems to be that the  
8   operator has to wait for the division to approve a plan?

9           A.    Correct.

10          Q.    I'm sure they can turn off the valve and they  
11   can stop the leak from getting bigger, but without  
12   having instructions from the division, they can't  
13   remediate it?

14          A.    Under a strict reading of current Part 29, that  
15   argument could be made.  And as you will see in  
16   subsequent testimony as you read through the rule, we're  
17   trying to minimize that as much as we can.

18          Q.    So I'm a big proponent of best practices and  
19   that anything you put into a rule that is very  
20   perspective has a chance of being surpassed by some  
21   future better technology.

22          A.    Correct.

23          Q.    Then you have to replace the rule.  So you want  
24   to keep the language as broad as possible but also not  
25   have people waiting to clean things up.  If there is

1    **some kind of broad guidance on steps that you're**  
2    **supposed to take when there is a spill and the**  
3    **expectation that you start to pursue those as quickly as**  
4    **you can regardless of the state of the remediation plan,**  
5    **that would probably be a little more environmentally**  
6    **sound.**

7           A.    Correct.  And not to sound like I'm punching  
8    back at the Commission, but I'm very much dealing with  
9    that in Part 34, is that the rule -- state of practice  
10   in the industry regarding produced water recycling has  
11   advanced tremendously and rapidly over the last several  
12   years since Part 34 was adopted.  And what the industry  
13   is doing and desires to go causes regulatory issues.  
14   And so from time to time, you'll see in the proposed  
15   rule the phrase "other approved division" that allows  
16   some flexibility in there, but it is so hard to gather  
17   that.  And I don't think that kind of argument,  
18   especially given the state of the current rule, is a  
19   reason to not put something new forward.

20           Q.    **Sure.  And variances, I think, is an important**  
21   **concept in the last -- some years of rulemaking --**

22           A.    I would agree.

23           Q.    **-- and it's introduced increased flexibility to**  
24   **people that are closest to the problem.**

25           A.    Correct.  And you will see in the variance

1 procedure as proposed, those variances actually happen  
2 at the district level or can happen at the district  
3 level.

4 Q. Thank you very much.

5 CHAIRWOMAN RILEY: Mr. Martin.

6 CROSS-EXAMINATION

7 BY COMMISSIONER MARTIN:

8 Q. As far as the Enforcement Bureau goes -- and I  
9 think the division realizes everybody has releases, that  
10 everyone experiences spills and that releases should be  
11 somewhat handled on a case-by-case basis. But is it the  
12 Division's intent to, as far as the Enforcement Bureau  
13 goes, standardize enforcement levels and corrective  
14 action plans, I guess, across the districts? In other  
15 words, realizing that the northwest is different from  
16 the southeast, but the southeast, Hobbs, Artesia, use  
17 pretty much the same standards and pretty much the same  
18 philosophy to clean up a spill. And is there somebody  
19 that's going to come and testify later as to what  
20 standards are being applied across the division  
21 levels -- division districts?

22 A. Not per se. You will see me again later  
23 speaking about the enforcement and variance and  
24 transition provisions in that regard.

25 But, Commissioner, again, I'm not trying to

1 avoid it. At my heart, I'm a technical person. I'm  
2 actually educated in physics. And some of these  
3 questions are legal, but they're practical. I have to  
4 deal with them every day. But I very much agree with  
5 the sense that I heard you state in terms we try to, as  
6 best as we can, to get a commonality in things across  
7 the state of New Mexico and across district offices.  
8 Anyone that's been around me over the last ten years  
9 with the OCD knows that's one of my primary -- try to  
10 get us, as best we can, to all do the same thing. And  
11 it appears that historically the division has not  
12 operated in that fashion, that the districts have almost  
13 tended to forge a path ahead themselves. And maybe that  
14 was out of necessity. I'm not sure.

15 Q. Thank you. That's all I have.

16 CROSS-EXAMINATION

17 BY CHAIRWOMAN RILEY:

18 Q. I just have a clarifying question to follow up  
19 on a couple of Mr. Feldewert's questions regarding slide  
20 number five.

21 A. Yes, ma'am.

22 Q. The third column, which is entitled "Liquid  
23 Releases Resolved," in your testimony, you said in the  
24 same calendar year.

25 A. Yes, ma'am.

1           Q.    So this isn't reflective -- if we look back at  
2   2013, as of today, is it likely there are more than 303  
3   resolved cases? Do you understand my question?

4           A.    I would think it's -- I would think it's a fair  
5   statement to say there are less -- of the 2013 releases,  
6   now here in 2018, some of those 303 have been resolved  
7   since that time. Or am I not understanding your  
8   question?

9           Q.    No. I think you're understanding my question.  
10   I just want it to be clear on the record that of the 303  
11   cases in 2013, there may be some of those that have been  
12   resolved.

13          A.    Yes. And there are more than likely some that  
14   continue on.

15                    I think the last time that I tried --  
16   attempted to do what would I refer to as an aging --  
17   it's a concept you use in accounting in terms of  
18   accounts payable and accounts receivable, how long has  
19   it been since you sent out a bill someone paid you --  
20   how long has it been since somebody submitted a C-141  
21   and the time it got resolved, and for our active cases,  
22   which are numbered, they're in the hundreds, the aging  
23   at that time was over 800 days, exceeding two years.

24

25

CROSS-EXAMINATION

1 BY COMMISSIONER BALCH:

2 Q. I find that -- because it's still in January,  
3 12 months resolved December -- zero months. So it's not  
4 really telling me anything.

5 A. It's hard. And you're always taking a risk  
6 when I put this together (laughter).

7 Q. Twelve months would have been better, resolved  
8 within 12 months.

9 A. You have to do a database dive to do that. The  
10 database isn't -- well, maybe it's me not being able to  
11 write the proper query, but it just doesn't fly at you.

12 CHAIRWOMAN RILEY: Those are all my  
13 questions. Thank you.

14 It's 10:15. So are we done with  
15 Mr. Griswold for now?

16 MR. HERRMANN: Until he returns for the  
17 other presentation.

18 CHAIRWOMAN RILEY: Your next witness, how  
19 long do you expect the next witness to take?

20 MR. HERRMANN: Mr. Powell's testimony  
21 should be fairly short. It's on the first two sections  
22 regarding definitions and notification.

23 CHAIRWOMAN RILEY: Okay. We just need to  
24 take a break at some point, either do it now prior to  
25 Mr. Powell coming on or right after.

1 Do we have any redirect?

2 MR. FELDEWERT: No.

3 CHAIRWOMAN RILEY: Redirect?

4 MS. CALLAHAN: No.

5 CHAIRWOMAN RILEY: If you don't think it  
6 will take too long, let's start. Take all the time you  
7 need.

8 MR. HERRMANN: I'd like to address the  
9 members of the Commission and say that as of now, I'll  
10 start to progress through the rule. We intended for the  
11 Commission to follow along with our proposed language,  
12 and the best example of the proposed language is going  
13 to be contained in NMOGA Exhibit D.

14 BRANDON POWELL,  
15 after having been previously sworn under oath, was  
16 questioned and testified as follows:

17 DIRECT EXAMINATION

18 BY MR. HERRMANN:

19 **Q. Just to start, Mr. Powell, please inform the**  
20 **Commission on your current job experience and duties.**

21 A. I've been with the Oil Conservation Division  
22 for 12 years now. I started out as an environmental  
23 specialist. I was an environmental specialist for  
24 roughly five years, and then I was prompted to a staff  
25 supervisor, which included enforcement -- field duties

1 and enforcement duties. I oversee downhole engineering.  
2 I've also received compliance with sundry notices. I've  
3 previously testified in rules Part 17, both in the 2008  
4 version and the 2013 version, as an expert, and I  
5 testified in the Part 34 hearings as an expert in OCD  
6 knowledge, basically.

7 **Q. And you're going to provide the Commission with**  
8 **testimony on definitions and notification?**

9 A. That's correct. The first slide we'll go  
10 through will cover the definitions, 19.15.29.7. It's  
11 contained in NMOGA Exhibit D on page 1. Some of these  
12 definitions that we're going to go over are existing  
13 definitions in the rule, and there's been slight  
14 modifications for clarification of these definitions.  
15 And some of the definitions are going to be brand-new.  
16 And I'll go through the changes in the current  
17 definitions, and then I'll go through the new  
18 definitions.

19 So the first definition we're going to look  
20 at is that of a "Major release." This definition is  
21 currently used in existing Part 29. The changes to  
22 that -- the first change is in small -- subsection small  
23 A, that "results in a fire or is the result of a fire."  
24 This is one of the changes that is different between our  
25 presentation and Exhibit D. We feel that "is the result

1 of a fire" clarifies more what we're intending for. We  
2 want to ensure that if a release causes a fire, we get a  
3 report, or if a fire in the area causes a release, we  
4 get a report.

5           The second change is to section little B,  
6 which has been changed to "may with reasonable  
7 probability reach a watercourse." This is consistent  
8 with Section (c). Previously this section read "will  
9 reach a watercourse," which at the time of the release,  
10 there is not a very strong understanding at times  
11 whether it will or will not. So this gives the  
12 responsible party the ability to make that prediction to  
13 the best of their ability.

14           The last change to "Major release" is in  
15 Section 4, "a release of a volume that may with  
16 reasonable probability be detrimental to fresh water."  
17 "To fresh water" was added. The previous definition  
18 read: "To water exceed the standards in Subsection A, B  
19 or C in 19.15.30.9 NMAC." "To fresh water" -- "fresh  
20 water" is the definition currently in 19.15.2, and it  
21 covers these aspects. So it just adds clarity without  
22 exceeding --

23           Moving on, we get to "Minor release." This  
24 is the current definition used in the current rule. It  
25 "means an unauthorized release, which is not a

1 minor [sic] release and is a volume greater than five  
2 barrels but less than 25 barrels; or for gases, greater  
3 than 50 MCF but less than 500 MCF." The change to this  
4 is the clarification "which is not a major release."  
5 Because there are times when a release volume that would  
6 be considered a minor release could be considered a  
7 major release. If you have five barrels that cause a  
8 fire, it would then be kicked to a major release. So  
9 that adds clarity to this rule.

10 The other addition is "or for gases" for  
11 the 50 MCF, for the clarity that that relates directly  
12 to the gas portion of the release.

13 The first new definition that we have in  
14 the proposed Part 29 is for "Responsible party."  
15 "'Responsible party' means an operator, as defined by  
16 19.15.2 NMAC. Notwithstanding the foregoing, the  
17 division, in its sole discretion, may also consider a  
18 person causing the release, or controlling the location  
19 of the release as responsible party." What we're  
20 looking for here is there are times when a release will  
21 happen on an operator's well pad, but it may happen by a  
22 third party or a pipeline company. And ultimately, we  
23 want to have the operator remediate it if we can't get  
24 the other parties to do the remediation, because we  
25 don't want to be held for a long period of time arguing

1 with a pipeline company that really caused the release  
2 to get the release addressed. But we want to give that  
3 opportunity, for those third parties or those pipeline  
4 companies the chance to do the remediation.

5 The last new definition is for  
6 "Wellstream." This definition is also new. It'll be  
7 used to address other oilfield chemicals. We address  
8 these further on as we go through the rule.

9 "'Wellstream' means the gas, oil, water, suspended  
10 constituents, or any combination thereof which comes  
11 from the wellbore." So what we want to state with the  
12 wellstream is that's for the material that is actually  
13 coming from the wellbore itself, and then we'll address  
14 other oilfield chemicals separately.

15 Moving on: So in this slide, we are going  
16 to start going through the notification requirements  
17 that are included in 19.15.29.8 and 19.15.29.9. Those  
18 start on NMOGA Exhibit D, on page 1 and go into page 2.  
19 The responsible party must notify the OCD of all major  
20 and minor releases using OCD Form C-141. If a release  
21 occurs on state, federal or tribal surface, a copy of  
22 the C-141 must also be submitted to the State Land  
23 Office, the Bureau of Land Management or subsequent  
24 tribal authority. The reason why we singled out these  
25 entities is because they're also surface management

1 agencies that could have regulations that could impact  
2 how the OCD and the responsible party deals with that  
3 release.

4           A major release: The responsible party  
5 must provide notice to the OCD Environmental Bureau  
6 chief and the appropriate OCD district office within 24  
7 hours either verbally or by email with the available  
8 information required on the C-141 and provide written  
9 notice to the OCD district office within 15 days of the  
10 discovery of the release using a properly completed  
11 C-141. The majority of this notification requirement is  
12 currently used in the current Part 29. The changes to  
13 this is now the notification not only goes to the  
14 district office, but it's also required to go to the  
15 Environmental Bureau chief, and that notification can  
16 occur now both verbally or by email. The email is in  
17 addition to the way that it's currently handled in the  
18 rule.

19           Moving on to "Minor release," a minor  
20 release is to provide notice to the appropriate OCD  
21 district office within 15 days of the release,  
22 discovery, using a properly completed 141. This is  
23 currently done in Part 29 with very minimal change.

24           There are no reporting requirements for a  
25 release that is less than five barrels of liquid or 50

1 MCF of gas as long as those same levels do not  
2 constitute a major release, as they don't result in a  
3 fire, those kind of things.

4           Although a major and minor release needs to  
5 be reported, smaller releases which do not meet the  
6 volumes or criteria of a minor or major release, they  
7 are required to be cleaned up and addressed further in  
8 this presentation pursuant to 19.15.12.A. So even  
9 though they're not reportable, they will still be  
10 required by rule to be remediated. And we'll go over  
11 that further in the section.

12           This eliminates excessive paperwork for  
13 these small releases and excessive time by the  
14 responsible party to put it together and by the OCD to  
15 perform those reviews.

16           Moving on: This is a current slide of our  
17 current C-141 used in the existing Part 29. It  
18 addresses the who, the where, the when, the what  
19 happened and basic plans. If there are additional  
20 things that are performed that don't fit in there, we  
21 use them as attachments, and we don't see that changing  
22 a whole lot with this rule. The 141 is just going to be  
23 the basic: The operator information, location of the  
24 release and the overall nature of the release and what  
25 the operator is proposing to do. The remediation plans,

1 the more extensive plans will still be included  
2 separately.

3 And there will be changed to the 141 to  
4 incorporate anything that the Commission adopts to the  
5 rule as necessary.

6 **Q. Thank you very much. I have nothing to add to**  
7 **that.**

8 CHAIRWOMAN RILEY: Mr. Feldewert?

9 MR. FELDEWERT: No questions.

10 CHAIRWOMAN RILEY: Mr. Larson?

11 MR. LARSON: No questions.

12 MS. CALLAHAN: No questions.

13 CHAIRWOMAN RILEY: Dr. Balch?

14 COMMISSIONER BALCH: Of course.

15 CROSS-EXAMINATION

16 BY COMMISSIONER BALCH:

17 **Q. Good morning.**

18 **A. Good morning.**

19 **Q. So let's go back to the definitions of A, B, C**  
20 **and D. What they say right now is there is reasonable**  
21 **probability for (b) and (c), "reach a watercourse,**  
22 **endanger public health." And for D, it's:**  
23 **"Substantially damages property or the environment."**

24 **Those definitely require a value judgment**  
25 **by someone or some part as to whether there is a**

1 reasonable probability or whether something is  
2 substantial. And people from different perspectives are  
3 going to value those things differently. So if you're  
4 greater than 500 feet from a watercourse, you may  
5 consider that you don't have a reasonable probability of  
6 your fluid release making that, if it's a small enough  
7 volume. However, someone might counter that with if  
8 there is a big thunderstorm, then all of that material  
9 could be washed down there pretty easily. So those two  
10 people could have a different point of view on what's  
11 the reasonable probability, and certainly if it's  
12 December versus July, the probability of a rainstorm  
13 changes as well. So who makes this value judgment?

14 A. The reasonable probability judgment is made by  
15 the responsible party. It's their initial assessment  
16 when they go to a release whether they think it's going  
17 to create those types of issues. I don't see where the  
18 OCD will contend those judgment calls unless the  
19 operator or the responsible party says it won't reach it  
20 and then it does reach it. So it gives the division  
21 enforcement capabilities if the responsible party makes  
22 a judgment call and then it does happen.

23 Q. I think Mr. Griswold indicated there would be  
24 testimony of enforcement later, right, because there are  
25 some enforcement issues with the OCD as far as what you

1 can do?

2 A. That is correct. Mr. Griswold -- later on in  
3 the presentation, there is an enforcement section. And  
4 he'll give the consequences of how that will take place.

5 Q. So "substantially damages," that's also a  
6 judgment call by whom?

7 A. That would be by the responsible party. All of  
8 the definitions for a major release, when it's first  
9 reported, those -- those are done by the responsible  
10 party initially.

11 Q. So in the case of the spill from a tank  
12 battery -- we had a great example on the screen earlier  
13 of cows milling around. So that's a multiuse-surface  
14 area, a well operation on somebody's ranch, right --

15 A. Right.

16 Q. -- oil and grazing lands?

17 The responsible party would be the person  
18 with the tank battery. The person who might be trying  
19 to determine if there were "substantially damages" would  
20 be the person with the cows. Let's say the cows drink  
21 that water and get sick and die. There is a disconnect  
22 between who is responsible for it and who could be  
23 damaged in that case.

24 A. In that case the responsible party knows --  
25 we'll get into it further in the proposed rule. They

1 have the obligation to perform site security to  
2 eliminate that access. If the cows do drink it and it  
3 impacts them, then historically those individuals have  
4 come to the OCD, and then we relooked at the responsible  
5 party's assessment to see if it was correct and to see  
6 if the actions they took were correct.

7 Q. So most of the -- kind of the penalty for  
8 making a poor judgment of "reasonable probability" or  
9 "substantially damages" would be, after the fact,  
10 assessed by the division?

11 A. Correct. It's the division's effort for the  
12 responsible party to try to make those determinations up  
13 front, but the penalty would come out typically after  
14 the act.

15 Q. In Section D in the definitions, there is a  
16 definition for wellstream. It "means gas, oil, water,  
17 suspended constituents, or any combination thereof which  
18 comes from the wellbore." So if you are dealing with  
19 saltwater disposal pipeline, for example, or a natural  
20 gas or oil pipeline, say, off to a refinery or a  
21 separate plant, is that still considered to be part  
22 wellstream?

23 A. That is, because the fluids that are in that  
24 pipeline, the crude oil and the produced water,  
25 originated from the wellbore itself. So those fluids,

1 since they originated from the wellbore, will still be  
2 considered part of the wellstream.

3 **Q. So the purpose of this is to differentiate**  
4 **fluids that are originating from the mined formation**  
5 **versus rain that may have fallen into an open tank or**  
6 **something like that?**

7 A. And we'll get into this further in the rule as  
8 well, what wellstream is used for. But it's used for  
9 other oilfield chemicals, unused chemicals, solvents  
10 that may be used for cleaning surface equipment, those  
11 kinds of chemicals that are used that really don't --  
12 have never been in contact with the wellstream. So,  
13 therefore, the contents of those chemicals may not be  
14 able to be addressed in Table 1 that we'll present  
15 later.

16 **Q. Okay. Under "Notification," for release**  
17 **notification, what if they don't?**

18 A. If they don't, then that's where the  
19 enforcement provisions would apply, because then they  
20 would be out of compliance with the rule.

21 **Q. So never may -- you know, somebody may have a**  
22 **ten-barrel spill. They can walk away and not report it?**

23 A. That is correct. And that's part of what we're  
24 trying to address here, because in the past, if they  
25 didn't report it, there was no explicit enforcement

1 provisions in the rule. Where now those are being added  
2 to the rule, where if they don't report it, there can be  
3 consequences.

4 Q. One concern that I would have with this -- and  
5 I'm anticipating concerns from each of the other parties  
6 on this -- is if I have a less-than-five-barrel release  
7 or maybe a ten-barrel release and I don't report it or I  
8 just throw some dirt on it and walk away, if you're not  
9 reporting these spills at all, the less-than-five-barrel  
10 spills, there could be a cumulative effect if the same  
11 spill occurs in the same area many times. So if  
12 somebody has a faulty valve on their -- on your  
13 separator and they don't replace it, they just kind of  
14 tie it up with baling wire and it releases three barrels  
15 one day and two weeks later, it releases four or maybe  
16 it's a steady drip or something like that, is there any  
17 way to kind of capture a cumulative effect of many  
18 spills happening in the same area?

19 A. Well, later on when we get to Section 12, which  
20 addresses remediation, all releases, no matter their  
21 size, will be required to be remediated, to try to  
22 incorporate those -- that -- those comments, that if you  
23 have a small release or several small releases happening  
24 in the same place over and over, the operator is  
25 required to address those releases. And then that gives

1 us enforcement capabilities if they're not addressing  
2 those. If they're happening over and over, we can say:  
3 Pursuant to 12(A), you're required to remediate these  
4 areas.

5 **Q. The way I read it right now, the most common**  
6 **remediation is going to be to dig it up and haul it**  
7 **away.**

8 A. That is the simplest. If you get into other  
9 remediation or in situ, they're more of a case-by-case  
10 basis and site-specific basis.

11 **Q. So if they have a three-barrel release, they**  
12 **would be required by the rules to dig that up and haul**  
13 **it away or dig it up and --**

14 A. There's not specific requirements on the  
15 sampling. Some of the ways we've seen that in the field  
16 be addressed, the operators will use either an oxidizing  
17 agent, or we've seen them use microbial agents to  
18 address those in the field themselves so they didn't  
19 have to dig each one up. But it allowed it to be  
20 resolved initially on a small level on-site.

21 **Q. But do you think somewhere in here there will**  
22 **be an incentive for an operator to have a best practice**  
23 **and not have repeat small volumes, spills that they just**  
24 **clean up?**

25 A. Well, I think requiring the small-volume spills

1 to be continually addressed will be a part of the  
2 incentive for the operator to address them as they  
3 happen. And not only address the release itself but  
4 address the cause of the release, because if they're  
5 having to constantly go out and re-address the same  
6 thing over and over, then that in itself becomes an  
7 expense or a burden to that responsible party.

8 **Q. Okay. I look forward to that testimony later.**

9 **A. Sure.**

10 **Q. Thank you.**

11 CHAIRWOMAN RILEY: Mr. Martin?

12 COMMISSIONER MARTIN: I don't have  
13 anything.

14 CHAIRWOMAN RILEY: I don't have any  
15 questions for this witness.

16 MR. BRANCARD: Madam Chair, just a few  
17 questions on these definitions here.

18 CHAIRWOMAN RILEY: Okay.

19 CROSS-EXAMINATION

20 BY MR. BRANCARD:

21 **Q. So you're creating this term "Responsible**  
22 **party," but I'm sure you're aware that Rule 30 uses the**  
23 **term "Responsible person."**

24 **A. That is correct.**

25 30 has "Responsible person," and I believe

1 19.15.2 also has "Responsible person." The difference  
2 with "Responsible party" is the phrase "notwithstanding  
3 the foregoing, the division, in its sole discretion, may  
4 also consider a person causing the release, or  
5 controlling the location of the release as the  
6 responsible party." It's this provision that allows the  
7 division to ultimately say, "Okay, you need to go out  
8 and pick the operator of the site or the responsible  
9 party and have them go address the release." That way,  
10 if there are multiple entities involved, we don't get  
11 caught up in their negotiations of who needs to address  
12 it. That could go on for years.

13 **Q. So Rule 30 is not in front of the Commission,**  
14 **so if the Commission passes these changes, I would**  
15 **assume at some point you want to make those two rules --**

16 A. Right now --

17 **Q. -- work together?**

18 A. Correct. Right now "Responsible party" is  
19 solely being looked at for use in Part 29.

20 **Q. So it says, "'Responsible party' means the**  
21 **operator, as defined in 19.15.2." But it doesn't -- is**  
22 **what you're intending to say here "means the**  
23 **responsible" -- "means the operator at the location**  
24 **where the release occurs"?**

25 A. I don't have that in front of me, but I believe

1 the "Operator" is defined by 19.15.2, and that's the  
2 operator we were referring to.

3 Q. Well, look at that. "'Operator,'" under  
4 19.15.2 -- I'll read it aloud -- "means a person who,  
5 duly authorized, is in charge of a lease's development  
6 or a producing property's operation or who is in charge  
7 of a facilities operation or management." So that's --  
8 that's broader than how people often -- industry defines  
9 operator. It's not just a leasehold interest, but it's  
10 a facility. So if somebody was in charge of an off-site  
11 tank battery, they're the operator for that facility.

12 A. Correct.

13 Q. But in terms of who has the responsibility to  
14 report, it's the operator at the location where it  
15 occurs.

16 A. Right.

17 Q. You don't say that here. You just say the  
18 "Operator."

19 A. The intent of the responsible party here is say  
20 it happened at Operator X's location. It's their  
21 location, but Pipeline Company Y caused the release  
22 itself. It will allow us to work with Pipeline  
23 Company Y to perform that remediation. However, if they  
24 decline or they start arguing with the operator on who  
25 is actually responsible to do the cleanup, the division,

1 in its discretion, can say, "Okay, Operator X or  
2 Pipeline Company Y, you need to perform the  
3 remediation." And then those two entities in the  
4 background can resolve the issues between them.

5 CROSS-EXAMINATION

6 BY COMMISSIONER BALCH:

7 Q. They can deal with it outside or something  
8 to --

9 A. Correct. It could become a civil issue outside  
10 of the OCD's jurisdiction.

11 Q. But the main idea is to get somebody  
12 responsible who can address the pump?

13 A. That's correct. It's to allow the spill to be  
14 immediately addressed and remediated.

15 CONTINUED CROSS-EXAMINATION

16 BY MR. BRANCARD:

17 Q. Okay. Just to follow up on Commissioner  
18 Balch's question, the distinction between major release  
19 and minor release, again looking forward -- going  
20 forward in the rule here, is that limited to  
21 responsibilities for notification?

22 A. Yes. Notification requirements are only for  
23 major release and minor releases.

24 Q. Okay. All the remediation efforts that occur  
25 afterwards, there is no distinction between major and

1     **minor release? It's any release?**

2           A.     Correct. The characterization and the  
3     remediation efforts are for both and addressed as a  
4     release through the responsible party. However, the  
5     characterization and the remediation are limited as the  
6     rule defines to major and minor releases, except for the  
7     provision that all releases must be cleaned up.

8           **Q.     Okay.**

9                   CHAIRWOMAN RILEY: Mr. Herrmann, do you  
10    have any redirect?

11                   MR. HERRMANN: No.

12                   MR. FELDEWERT: I have just a couple.

13                   CHAIRWOMAN RILEY: Okay.

14                                   CROSS-EXAMINATION

15    BY MR. FELDEWERT:

16           **Q.     Mr. Powell, to get to what Dr. Balch is talking**  
17    **about and Mr. Brancard's reference to it, Commissioner**  
18    **Balch's concern about the cumulative effect of small**  
19    **releases, right, and smaller unreported spills --**

20           A.     (Indicating.)

21           **Q.     -- and I don't want to jump too far ahead --**  
22    **but if you look at NMOGA Exhibit D, you-all came up with**  
23    **a group of provisions, right, in 29.10, "Initial**  
24    **Response"?**

25           A.     Yes, we have.

1 Q. And isn't it true that that applies to any  
2 release, no matter how small?

3 A. That is correct.

4 Q. So in other words, an operator is required to  
5 eliminate the source of the release, to contain the  
6 release --

7 A. (Indicating.)

8 Q. -- and then to stabilize and remove the free  
9 liquids or contaminants, correct?

10 A. Correct.

11 MR. HERRMANN: I would say that this would  
12 be better served for our next witness.

13 MR. FELDEWERT: I understand. I'm just  
14 trying to give a little preview here.

15 Q. (BY MR. FELDEWERT) And you reference 29.12A.  
16 That's the other provision that again reminds everybody,  
17 no matter what the volume is, that you have to do these  
18 actions in 10; you've got to remediate them?

19 A. That is correct.

20 Q. Okay. And then secondly, there were questions  
21 about the definitions here. And one of the things you  
22 noted is that a change was made with respect to  
23 Subsection 29.7A.(2), to rather than say "may reach a  
24 watercourse," as it currently says, it says, "may with  
25 reasonable probability."

1 A. (Indicating.)

2 Q. Right?

3 A. That is correct.

4 Q. So we made it more restrictive?

5 A. We made it more -- we made it -- we clarified  
6 it. It previously stated "will reach," and now it's  
7 "may with reasonable probability." We made it more  
8 consistent and made it clearer to the responsible party  
9 that they need to make that call.

10 Q. Okay. And I understand his concern about  
11 "reasonable probability, but at some point, you can  
12 either say "may" or you can say "may with reasonable  
13 probability"; is that correct?

14 A. That is correct.

15 Q. Because the thought process is that at least  
16 with the term "reasonable probability," there is some  
17 qualifier on the "may" that both the division and a  
18 reasonable person can apply?

19 A. That is correct.

20 Q. Okay.

21 CROSS-EXAMINATION

22 BY COMMISSIONER BALCH:

23 Q. And then by Rule 17? I think that's the Pit  
24 Rule, right?

25 A. That is correct.

1           Q.    The "reasonable probability" is defined,  
2    instead, as "within 500 feet of a watercourse," right,  
3    things like that, or 300 feet -- you know, 500 feet of a  
4    school for public health --

5           A.    That's correct.

6           Q.    -- those kind of things?

7           A.    And there are provisions in the current rule  
8    with setbacks and characterization where those will be  
9    addressed in the characterization plan and the  
10   remediation with those setbacks. This is just for the  
11   initial notification portion.

12                   MR. HERRMANN: I would like some redirect.

13                               REDIRECT EXAMINATION

14   BY MR. HERRMANN:

15           Q.    Just to clarify, certain differences between  
16    this -- there are similarities and differences with this  
17    rule and the Pit Rule, correct?

18           A.    That is correct.

19           Q.    And how would you clarify -- or how would you  
20    summarize where we've diverted or provided something  
21    such as "reasonable probability" rather than a certain  
22    distance for a release? Do releases have predictable  
23    natures?

24           A.    With the Pit and items in Part 17, they're  
25    design functions. They know where they're -- the

1 operator knows where they're going to put them, so they  
2 can plan for those.

3 With releases, there's an unpredictable  
4 nature, that they can happen in one place and even flow  
5 to another place.

6 COMMISSIONER BALCH: Sure.

7 THE WITNESS: So they're unforeseen, and  
8 they're unpredictable.

9 CROSS-EXAMINATION

10 BY COMMISSIONER BALCH:

11 Q. If that flow were to get within 500 feet of a  
12 watercourse --

13 A. Correct.

14 Q. -- then that would, to me, in my mind, give you  
15 the reasonable probability that that flow would  
16 eventually reach a watercourse.

17 A. And that's addressed in the remediation portion  
18 of the rule, and we'll get into that further. But if it  
19 gets within that setback, it does increase the reaction  
20 that the responsible party must take for those types of  
21 releases.

22 Q. Okay.

23 MR. HERRMANN: Nothing further.

24 MR. FELDEWERT: No further questions.

25 CHAIRWOMAN RILEY: Mr. Larson?

1 MR. LARSON: No questions.

2 CHAIRWOMAN RILEY: Ms. Callahan?

3 MS. CALLAHAN: No, no questions.

4 CHAIRWOMAN RILEY: Would you like to keep  
5 this witness open for later testimony?

6 MR. HERRMANN: Yes.

7 CHAIRWOMAN RILEY: I propose we take a  
8 ten-minute break. Be back here at five till, give the  
9 court reporter a break.

10 (Recess, 10:44 a.m. to 11:01 a.m.)

11 CHAIRWOMAN RILEY: Mr. Herrmann, would you  
12 like to call your next witness?

13 MR. HERRMANN: Yes, Madam Chairperson. I  
14 would like to call Bradford Billings.

15 BRADFORD BILLINGS,  
16 after having been previously sworn under oath, was  
17 questioned and testified as follows:

18 DIRECT EXAMINATION

19 BY MR. HERRMANN:

20 Q. Mr. Billings, would you please just summarize  
21 your experience and duties that you perform for the Oil  
22 Conservation Division?

23 A. Certainly. Environmental specialist, actually,  
24 and do a lot of hydrology work for the OCD. I've been  
25 with the OCD for a little over three years. I've got

1 over 30 years' direct experience in delineation,  
2 characterization, remediation of soil, groundwater and  
3 surface water contamination, including more than ten  
4 years directly with the oil and gas industry.

5 My little curriculum there says "is." I no  
6 longer have my licensing for this, but I was a licensed  
7 well-driller, and I was a certified contractor with the  
8 CIB. I do other things for a living now, so I didn't  
9 bother to put them up, but I have been.

10 And I was -- and was a New Mexico  
11 Environment Department certified scientist and a  
12 corrective action program manager certified in Texas.

13 **Q. And at this juncture, you're going to be**  
14 **providing testimony on the initial response and some of**  
15 **the site assessment and characterization provisions?**

16 A. That is correct, sir.

17 **Q. And you worked in the work group on some of**  
18 **these?**

19 A. Yes, sir. That is correct. I was in the  
20 technical work group.

21 **Q. So starting with the initial response, could**  
22 **you summarize what the OCD wanted to codify here so**  
23 **operators could take immediate action?**

24 A. Okay. The section is 19.15.29.10. It's on  
25 page 2 of Exhibit D, I think, dog now it's called. And

1 if you will just track with me. I'm going to go  
2 sequentially through this so you can be able to follow  
3 me on the page as I move along.

4 "Initial Response" is what a responsible  
5 party must do following discovery in their immediate  
6 actions unless these actions create a safety hazard that  
7 results in an injury. These do not require our  
8 attendance, and they are supported as part of best  
9 management practice to move forward and move quickly to  
10 help eliminate issues.

11 The first one is "Source Elimination and  
12 Site Security." Source elimination is, in essence, what  
13 Jim, Mr. Griswold, did discuss earlier. We have a  
14 leaking pipe. We fix the pipe. We stop the pipe -- we  
15 turn the valve off. We turn the power off, whatever.  
16 You stop it from continuing to release.

17 Site security has to do with anything to  
18 limit access to the site as necessary to protect human  
19 health and the environment. Those can be fences,  
20 barriers, shutting off a road, signage, whatever. Just  
21 protect the site if something is going on at the site.

22 **Q. And that determination is left up to the**  
23 **operator?**

24 A. Absolutely. Absolutely.

25 **Q. And then once the source has been eliminated**

1     **and the site secured, where does the operator go from**  
2     **there?**

3           A.     Well, at that point you would go to a  
4     containment component of what your release was, water,  
5     oil, whatever that might be, the materials released, and  
6     most often that's berms and dikes or other absorbent  
7     materials to contain the release, to keep it from  
8     moving. And also to look at areas that it might get to  
9     and protect those areas. If it's encroaching towards an  
10    area of your pad that might have a cut in the soil near  
11    it, you want to protect it from getting to that cut, on  
12    that scenario, and basically -- and also mitigating any  
13    potential watercourse impacts. You want to have that  
14    high on your priority as you look at it.

15                 And in addition to not only containing  
16    these releases wherever they may be, the responsible  
17    party needs to monitor the containments that are built  
18    or put in place to effectively contain the material so  
19    that it doesn't continue to be degraded by weather or  
20    other on-site -- it's okay to build something, but then  
21    you've got to make sure that it stays and survives until  
22    you get to the next step in the process.

23           **Q.     And what is that next step?**

24           A.     The next step would be relative to this, is  
25    site stabilization. And after containment, the

1 responsible party is required to recover any free  
2 liquids that they can, including product or water, that  
3 can be physically removed from the surface within the  
4 containment area where you have captured that release.

5 The responsible party then has to deliver  
6 said materials that should be removed from the site to a  
7 Division-approved facility.

8 **Q. And, again, we're just --**

9 A. Again, this is what -- an operator comes  
10 on-site, sees it, and these are immediate reactions and  
11 actions that they should take to help secure the site  
12 and stability and safety.

13 **Q. And no Division approval is required?**

14 A. Absolutely none. And I don't think they should  
15 have to call us for us to come up to -- it's something  
16 that they should be able to see and just do.

17 **Q. Is there anything else you'd like to add?**

18 A. Not at the moment, no, sir.

19 **Q. So let's move on to "Site Assessment and**  
20 **Characterization," 29.11.**

21 A. Okay. 29.11 --

22 **Q. Excuse me. I'm sorry. I jumped ahead.**

23 **There is a slide here, another copy of the**  
24 **141?**

25 A. Oh, I'm sorry. Yes, you're correct. This is a

1 141.

2 I have a pointer, but I don't know if I  
3 necessarily really need it.

4 But what it does is -- it doesn't really  
5 tell us what they did at the site. If you look down  
6 here, it'll say, "Describe Area Affected and Cleanup  
7 Action Taken," initial response. It was on the road and  
8 around the tank area. That's really kind of not enough.  
9 "Describe Cause of Problem." The transfer pump was  
10 lost. It's fine to say that, but they don't indicate  
11 that they turned the transfer pump off or anything such  
12 as that.

13 Then the range, township and section were  
14 given as a location, but we really should have more  
15 information than that. If there is an API number, that  
16 should be associated. Lat and longitudinal numbers  
17 should be incorporated in this so that we can locate the  
18 map quickly -- locate it on a map quickly or locate it  
19 at the site if we wanted to go out quickly to find it.

20 Ownership -- the surface owner is Randy C.  
21 Well, that may be true, but that doesn't really tell me  
22 too much about the surface ownership.

23 This occurs fairly regularly. We get 141s  
24 that say, "We have this problem; here's a little thing,"  
25 and then it's kind of filled in. Part of that is that

1 the current rule doesn't really define what they should  
2 go do, not do, and they really need to fill it out.

3 The rule that we're proposing gives them a  
4 bit little more guidelines towards those questions so  
5 that when they fill out this 141 and submit it to us, we  
6 have more workable information for our prioritization of  
7 looking at the site. And that's basically that.

8 So if we move on to 19.15.29.11, which is  
9 titled "Site Assessment Characterization," the first  
10 thing I want to point out is these changes, right, the  
11 sequence we're using?

12 **Q. Yeah. Why don't we start with the changes in**  
13 **the title paragraph.**

14 A. Okay. I'll just read it for purposes at the  
15 moment: "After the responsible party has removed all  
16 free liquids and recoverable products, the responsible  
17 party must assess soils both vertically and horizontally  
18 for potential impacts [sic]" -- "environmental impacts  
19 from any major or minor release containing liquids."  
20 Okay? This was not spelled out and it was not spelled  
21 out in the current rule, and we're making it again known  
22 that major or minor, whatever, you need to take care of  
23 it. And there have been -- these are site assessments  
24 built upon releasing containing liquids.

25 Again, as the other people from the OCD

1 have testified, a gaseous release might be a major  
2 release, but a lot of this would not necessarily occur  
3 at all for a straight-up gaseous release. This has to  
4 do with a liquid release, a release containing liquids.

5 **Q. All right.**

6 A. Yes, sir.

7 **Q. Let's start with the characterization**  
8 **requirements. And just overall, I think Jim touched on**  
9 **this a little, but what, in general, is**  
10 **characterization?**

11 A. Characterization of the site is horizontal and  
12 vertical definition of contaminants, is basically what  
13 it is in a synopsis. Right?

14 **Q. Uh-huh.**

15 A. It needs to occur so that we can evaluate the  
16 environmental impacts of the site. It is the diagnosis  
17 performance, to stick with Jim's analogy.

18 **Q. And it also included what was released?**

19 A. Certainly. Certainly. That's part of the  
20 characterization.

21 **Q. So the Division -- or the proposed rule here**  
22 **has some specific requirements that they would like to**  
23 **include in the characterization. Let's just go through**  
24 **those one by one starting with the "Site Map."**

25 A. Well, I was going to comment, if you don't mind

1 my going off what you just said, there is a new  
2 component to this which has this 90 days of discovery of  
3 release, which -- which is logistically in front of the  
4 "Site Map." Do you want me to discuss that later?

5 **Q. Well, no. Let's talk about that.**

6 A. Okay.

7 **Q. Is there a provision for when characterization**  
8 **must be done under the current rule?**

9 A. Certainly. There is -- under the current rule,  
10 no. Right? You have a release notification, and then  
11 the clock can basically disappear for all intents and  
12 purposes. Right?

13 **Q. Uh-huh.**

14 A. With the new -- what the proposed rule is  
15 trying to do is say we have 90 days from a discovery  
16 date of release to either give us a characterization  
17 report with the remediation plan that you wish us to  
18 review and approve, or submit the characterization  
19 incorporated with the remediation of the site.

20 We will get into what has to occur relative  
21 to remediation when Mr. Powell gets back up in terms of  
22 bits and pieces.

23 But this enables the RP to move quickly and  
24 concisely with the other portions that are followed  
25 later in the rule and basically bypass us until they're

1 ready for closure, which should accelerate the time  
2 frame significantly.

3 **Q. So just in general, the characterization report**  
4 **doesn't require Division approval?**

5 A. No, it does not.

6 **Q. But we spell out exactly here what we --**

7 A. We spell out later on, in terms of either in  
8 the assessment or in the remediation and closure  
9 component, the things that we need to see in that.  
10 Since we are not approving it and not looking at it in  
11 front, we felt it was incumbent upon us to make sure  
12 that they understood what they need to submit to us,  
13 which was not spelled out in the previous rule.

14 **Q. All right. And what's the first requirement?**

15 A. The first requirement is a site map. The site  
16 map should be "a scaled diagram that shows the  
17 potentially impacted area, significant surface features  
18 including roads and site infrastructure --

19 If I get talking too fast, just let me  
20 know.

21 (The court reporter requested the witness  
22 read the material slower.)

23 THE WITNESS: I tend to do that. I  
24 apologize.

25 -- "location of borings, sample points,

1 monitoring wells and subsurface features such as known  
2 pipelines to the extent known at the time of submittal  
3 including the source of information regarding subsurface  
4 features."

5 Now, the site map doesn't have to be CAD  
6 drawn, and it doesn't have to be delivered by an  
7 engineer, but it needs to be specific. It can be  
8 hand-drawn, but it needs scale. It needs northing. It  
9 needs identification where it is. And a site map may  
10 not just be here's the leak; here's the release area.  
11 Then you've also got a site map that might identify  
12 where your supersurface stuff is or where your  
13 subsurface stuff is. You might need a sequential  
14 grouping of maps. Not everything that you're going to  
15 collect informationwise is going to be incorporated into  
16 the site map.

17 **Q. (BY MR. HERRMANN) But we're identifying**  
18 **specifically what we need?**

19 A. Right. At least -- on the site map, it must  
20 attend [sic] with other maps as well. The site map  
21 needs these components that are useful to us.

22 **Q. Okay. What's the next requirement?**

23 A. The next requirement in terms of sequence here  
24 is depth of water. The responsible -- and, again, just  
25 to read it relatively quickly. The responsible party

1 has to determine the depth to water where the release  
2 occurred. If the depth to groundwater is unknown, the  
3 responsible party must provide a reasonable  
4 determination of probable groundwater depth using data  
5 generated by numeric models, cathodic well lithology,  
6 water well data, published information or other tools as  
7 approved by the appropriate division or district office.  
8 If the responsible party uses water well data, the  
9 responsible party must provide all pertinent well  
10 information.

11                   What that specifically means is since the  
12 delineation and later remediation numbers that are  
13 involved in this in terms of standards are highly driven  
14 by a depth-to-water consideration, it behooves the RP to  
15 have an accurate description of what the depth to water  
16 is and an actual determination of cost.

17                   There are many, many sources to get  
18 information that discusses depth to water in a given  
19 area. Some of them are probably more reliable than  
20 others. But if they use water wells in that  
21 consideration, the Department also -- or the Division  
22 also requests that we have information on that well in  
23 terms of when it was drilled, when it was sampled, what  
24 its construction characteristics are, the lithology of  
25 the well boring, if possible, so that we can see if we

1 just drilled straight down to a deep aquifer for  
2 production versus other shallow zones that may have  
3 potentially gotten -- or not.

4 **Q. All right. Now, the "Wellhead Protection**  
5 **Area"?**

6 A. The wellhead protection area is "the  
7 responsible party must determine the horizontal distance  
8 from all known water sources within a half mile of the  
9 release."

10 **Q. Now, this was a point in my own confusion. So**  
11 **when you say wellhead protection area, do we mean the**  
12 **oil well or other wells?**

13 A. Well, it's the distance from a well -- from an  
14 oil well. It's the protection zone around the water.

15 **Q. But the wellhead protection area refers to**  
16 **water wells --**

17 A. Yes.

18 **Q. -- that are in a protection area?**

19 A. Yes. Yes. Sorry I didn't make it clear.

20 And they have to be identified within a  
21 half-mile radius, including private and domestic, and  
22 they may -- these water sources may include wells,  
23 springs or other sources of freshwater extraction. And  
24 that is private and domestic water sources or those  
25 water sources that are used by less than five households

1 for domestic or stock purposes. It's a way to identify  
2 what areas -- where there is water usage currently going  
3 on that we may need to pay particular attention to.

4 **Q. And, again, this is some language we'll see**  
5 **some other places, but "half a mile of the release"?**

6 A. "Half a mile of the release," according to  
7 this.

8 The next section is "Distance" --

9 And that can be relayed on a map. Again,  
10 it's the kind of thing where you will have a  
11 multiplicity of maps that are produced. Not every piece  
12 of information will be on every map.

13 You also have "Distance to Nearest  
14 Significant Watercourse." Of note -- and we just  
15 recently got to this last night, I think. But anyway,  
16 we've achieved common ground with the language of it.  
17 "The responsible party must determine the horizontal  
18 distance to the nearest significant watercourse as  
19 defined in Subsection 19.15.17.7 NMAC."

20 And this is the change agreed to: "Within  
21 a half mile of the horizontal extents [sic] of the  
22 release."

23 Do you see the difference in that as  
24 opposed to the "source of the release"? It may have  
25 traveled a significant distance, and we have many sites

1 that have traveled a significant distance on the  
2 surface. And then we need to know where the significant  
3 watercourse is relative to that extent, not just where  
4 the well or the pipe may have been.

5 Q. Just to clarify, we're referring to the  
6 definition of watercourse in Rule 17?

7 A. Yes. It's from 17.

8 Q. Yes. But "watercourse" is what we're looking  
9 for, the term in the definition?

10 A. (Indicating.)

11 Q. So now we're going to move into "Soil/Waste  
12 Characteristics," and that's Subsection A.(5). This is  
13 a lengthy section, so I think for brevity we'll just  
14 refer to this as 5A, B all the way through E.

15 A. Okay. Are we up to another slide, Jim?

16 Well, let me walk through this before we  
17 move to the next step. These are a few maps that I  
18 wanted to show you that are -- some are good. Some are  
19 not good, relative to a site map, let's say.

20 This is a site map that has no scale, has  
21 no northing. I don't know a point of release. I assume  
22 those are sample locations, but I'm not really sure how  
23 they're related to each other or whether the scale is  
24 relative to that. It's not sufficient information, but  
25 we do get them like this. And, again, I don't mind if

1 it's hand-drawn. That's perfectly appropriate as long  
2 as it's got the other components in it.

3 Next slide, Jim.

4 This is another slide that indicates --  
5 it's identified where the area of release is, which is  
6 the little white zone over here in the bottom right-hand  
7 quadrant of the map, but I have no northing. I have no  
8 scale. I can guesstimate because I've been in and  
9 around this equipment, but it's just lacking.

10 And the next slide, please.

11 This is a slide of a characterization map.  
12 It's not a site map as such, but it incorporates various  
13 pieces that might come in with the characterization  
14 and/or remediation plan. There's a dark green section  
15 where they've decided they want to remediate to a  
16 certain depth. This is a dig-and-haul.

17 Over here to the left is a lighter green,  
18 but they're going to go to shallower depths, which  
19 becomes important in discussions later because we will  
20 get variation on the theme relative to the depth of  
21 removal and/or remediation depending on what you find  
22 underneath it. It also has oversprayed areas. It has a  
23 northing. It has a scale. It has a wide variety of  
24 methodologies where they collected their sampling and  
25 how they collected their sampling. It's a good map for

1 us, not being at the site, to have a good understanding  
2 of what they did. Okay?

3 And next slide.

4 This is another one with a different  
5 technique of evaluating the potential contamination.  
6 Instead of a lot of borings up front, they did an EM  
7 survey, which is a conductivity survey, which has to do  
8 with electrical conductivities of soil, and you can  
9 estimate a chloride concentration based on it. It's  
10 useful if you have a long, wide and difficult  
11 geographical spread in a contamination. But relative to  
12 the site-map proper, it has the point of release. It  
13 has northing. It has scale. It has those other  
14 portions.

15 And by showing you these four, I'm giving  
16 you a wide range of what we get at different times.  
17 Sometimes they incorporate most of everything that we  
18 could possibly want. Sometimes they are particularly  
19 short in terms of information. They're reference  
20 points.

21 Then if we move into "Soil/Waste  
22 Characteristics," that's Sub 5, I guess you'd called it.  
23 It starts on page 2, but the bulk of it is on page 3 on  
24 Exhibit D.

25 MR. HERRMANN: And just for the

1 Commission's direction, Bradford's going to provide  
2 testimony on A through D.

3                   And then Brandon will -- I will re-call  
4 Mr. Powell to provide testimony on Subsections E and  
5 capital Bs and Cs, as well as the remediation standards.

6                   THE WITNESS: Okay. So as has sort of been  
7 discussed already, if you have -- if you utilize best  
8 management practices in the best possible way you can,  
9 one of them is to, if you have a tank battery, let's  
10 say, that it be lined with impermeable material. We get  
11 a fair number -- significant number, actually, of the  
12 releases reported to us that I'm sure -- I don't know  
13 the number, but it's a real number -- that occur in  
14 these lined containments.

15                   If they occur in a lined containment, we've  
16 said, Okay, then you don't necessarily -- and this is to  
17 move things along, to accelerate the process. You don't  
18 necessarily have to go through the entire remedial  
19 evaluation process. So we said, If it's in a lined  
20 containment, you must demonstrate liner integrity after  
21 you've removed any of the affected materials, which  
22 means soils or gravel that you may have in the liner or  
23 in the pit or in the containment, and the affected area  
24 is exposed for inspection. After removing this, if you  
25 feel that the liner is still intact and was intact at

1 the time of the release, you so state that on the C-141  
2 form, that it has the ability and continues to have the  
3 ability to contain the release.

4 And the responsible party, we've asked that  
5 they give us, the OCD, two days to come out and look at  
6 this as well to witness this inspection. If it is okay,  
7 that release is basically done. All right? There was  
8 no impact to the environment.

9 Q. (BY MR. HERRMANN) I'm sorry. I might have  
10 missed this, but we also require notice to the Division  
11 to inspect the liner?

12 A. Yeah. It's the two-day thing that I just  
13 mentioned. Yeah. Once they've exposed this, we'd like  
14 if you could leave it open for at least a couple of days  
15 or if you know exactly when it's going to happen so that  
16 we can come look at it and visualize it at the same  
17 time. We may or may not be able to be there, so there  
18 is still the attestation that you think it's good, and  
19 we will go with that if we cannot be there.

20 If the responsible party cannot demonstrate  
21 their liner integrity or the release occurred outside of  
22 this lined-containment area, such as it went over the  
23 berm or the berm was cut or it doesn't have a liner or  
24 there is a massive overspray and the gun barrel got out  
25 of control, whatever the circumstance may be, the

1 responsible party must delineate the release  
2 horizontally and vertically using Table 1 constituents.

3 Now, there is another change here in the  
4 verbiage as well. I think what we've settled on -- my  
5 thing doesn't have the color coding, so I'm going to say  
6 this and hope I am correct. "Constituents or as  
7 required by 19.15.29.12(A)(5)(e) NMAC based on the type  
8 of release." Okay?

9 **Q. Yes, that's correct.**

10 **A. Okay.**

11 Part of the problems we've had in the past,  
12 since we didn't have organization for what we expected  
13 to see, when you actually do go assess the site and  
14 characterize the site, we thought -- and the working  
15 group agreed with this -- that we should list a few  
16 nationally recognized methodologies or areas where you  
17 can go to get these methodologies if you're not sure of  
18 how to assess a site, how to grid a site, how to sample  
19 a site, how many samples, et cetera. Those are  
20 incorporated in these in various pieces.

21 Now, the ASTM one that's listed there is  
22 not actually a method for developing a site program.  
23 It's actually how to sample the stuff, the dirt, how to  
24 collect, what kind of bottles to put it in, that sort of  
25 thing. We thought this was good in terms of our

1 interaction with clients -- or operators that have  
2 environmental professionals, and it helps serve the  
3 purpose for those who may not wish to hire an  
4 environmental professional to do this, that they have  
5 some distinct guidelines to create the information in  
6 the characterization report to submit it to us so that  
7 we are comfortable and they are comfortable with the  
8 information being provided and that it should  
9 accommodate the characterization on-site. So we  
10 thought -- beforehand, it was: Just go characterize it,  
11 wide open. Okay?

12 **Q. One other --**

13 A. I also want to make sure that everybody  
14 knows -- excuse me real quickly -- is that we have this  
15 little section down at the bottom of "other  
16 Division-approved methods." You can, if you wish to do  
17 something different, get that approved, and we are  
18 perfectly willing and have been very flexible relative  
19 to that, I think.

20 **Q. That was going to be my question. Thank you,**  
21 **Bradford.**

22 A. You bet.

23 Now, understanding that not all rules cover  
24 all circumstances and in all situations, there were some  
25 caveats that needed to be put in here relative to your

1 characterization.

2 Q. Bradford, I'm going to slow you down right  
3 there. I believe on the next side, we have a copy of  
4 Table 1?

5 A. Yes. I'm sorry.

6 Q. And we mentioned that briefly, but I'd just  
7 like to have you explain Table 1.

8 A. Explain Table 1?

9 Q. Well, briefly summarize what Table 1 --

10 A. Table 1 has on it -- it is -- "Closure  
11 Criteria" is what it is titled or "Soils Impacted by a  
12 Release." It is used as a definition tool, a  
13 delineation of characterization for the various numbers  
14 on it. It is split up into less than 50 feet, 51 to 100  
15 feet and 100 feet or more. It lists constituents of  
16 concern and, in most cases, chloride TPH, which includes  
17 GRO, DRO and MRO, which is gasoline range organics,  
18 diesel range organics and motor oil range organics,  
19 BTEX, and benzene, specifically, as well.

20 We also indicate what methodologies should  
21 be used by the laboratories to assess these chemists --  
22 chemicals, and we also put limits over here to the side.  
23 You will note that they are very different based on  
24 where the depth to groundwater is. That's the basic  
25 table. Okay?

1           **Q.    You were going to describe exceptions --**

2           A.    "If the release occurred outside of a lined  
3           containment area and is in an area where depth to  
4           groundwater is greater than 50 feet and less than or  
5           equal to 100 feet" -- again referencing back to Table 1,  
6           those demarcations -- "the responsible party must  
7           delineate the vertical extent of the release to the  
8           greater of 600 milligrams chloride or background  
9           chloride, if:" -- that's important -- "if: the release  
10          contains produced water that exceeds 10,000 milligrams  
11          per liter of chloride" and the responsible party has the  
12          capacity to challenge that and prove to us with current  
13          samples that it's less than 10,000 milligrams per liter  
14          chloride, or "if the release is of an unknown quantity  
15          or results in greater than 200 barrels of unrecovered  
16          produced water." That basically means if you lost 500  
17          barrels of produced water at the original assumption and  
18          you recovered 400, well, then you skip that number. If  
19          there are 200 or more barrels left that you did not  
20          account for left, that were left in the soil or wherever  
21          they may have been, then you fall into the "if."

22          **Q.    So, specifically, this exception is relating to**  
23          **high chlorides and high volumes?**

24          A.    High chlorides and high volumes. They are the  
25          driver of the numbers of chloride. If you have lots of

1 head, meaning lots of volume, you have lots of push-down  
2 or if it's excessively high -- I may have said the wrong  
3 word -- very high chloride, if you're starting with the  
4 worst number, it has the potential to be worse.

5 **Q. And would you might see a situation like this**  
6 **on a produced water pipeline?**

7 A. Oh, certainly. Certainly. You can see it on  
8 pipelines. You can see it occasionally on the big  
9 batteries as well. Saltwater disposal wells may have  
10 many tanks, lots of capacity, well beyond a 200-barrel  
11 loss, a cumulative loss. But pipelines are important,  
12 too, because you don't really know how much you lost  
13 necessarily or how long you may have been losing it for.  
14 So it's an unknown.

15 **Q. And is that language provided for in here?**

16 A. That is provided for in here.

17 We have a couple of other little caveats  
18 relative to this section, and that is -- it's little  
19 (d). And, again, this is relative to moving the process  
20 along so you know what to submit to us so we don't hang  
21 it on up on the clock, so they know what data needs to  
22 come in. "The responsible party must submit at least  
23 two soil samples for laboratory analysis from each  
24 borehole or sample point." That would be the -- the two  
25 that would come would be the highest observed

1 contamination found in the field and the deepest depth  
2 that you got to investigate. "Field screening and  
3 assessment techniques are acceptable." And I'll explain  
4 these if you have questions relative to them, but  
5 they're: Headspace, titration, electrical conductivity.  
6 But you need to include the algorithms for validation  
7 purposes for all of these. We need to know that what  
8 you're finding in the field has some reasonable relative  
9 value to what the laboratory tells you and that "the  
10 sampling procedures must be clearly defined." Again,  
11 back to that previously --

12 Don't go back on the thing, Jim.

13 But there are protocols already defined on  
14 how to collect samples and how to work with samples.  
15 That must be clearly defined, which methodologies you  
16 used. And if you used your own, describe it in detail.

17 "The responsible party must submit copies  
18 of field notes attributable to field sampling and  
19 provide copies of the actual laboratory results  
20 including chain of custody documentation." That, in a  
21 nutshell, is what we need.

22 **Q. Is there anything else you would like to add?**

23 A. Not that I can think of at the moment, other  
24 than good management practices help cut down a lot of  
25 this.

1           **Q.    Uh-huh.**

2                   MR. HERRMANN:  I have no other questions,  
3   so if opposing counsel has any cross-examination --

4                   MR. FELDEWERT:  No questions.

5                   CHAIRWOMAN RILEY:  Ms. Callahan?

6                   MS. CALLAHAN:  No questions.

7                   CHAIRWOMAN RILEY:  The Commission?

8                   COMMISSIONER MARTIN:  No questions.

9                                   CROSS-EXAMINATION

10   BY COMMISSIONER BALCH:

11           **Q.    Just to clarify slide 19, this initial response**  
12 **is pretty much entirely the responsibility of the**  
13 **responsible party?**

14           A.    Yes, sir.

15           **Q.    And if they don't do it -- say you show up to**  
16 **inspect the site and there is a spill.**

17           A.    Okay.

18           **Q.    What happens then?**

19           A.    If we show up and see that there was a  
20 definitive release that was somewhere, then -- then we  
21 contact the operator and say, "You need to get out here  
22 and do this."  If they ignore us, then we fall back into  
23 these other things that we'll discuss later relative to  
24 enforcement issues, which, under the current rule, we  
25 really can't -- we have no skin in the game, so to

1 speak. We can ask and request that they do it, but then  
2 if they choose not to --

3 Q. Well, generally almost any site can be visited  
4 at least once a week. But you may drive up there and  
5 there is just a stain on the ground. You don't know  
6 what size of release there was or how long it was going  
7 on necessarily.

8 A. That's true.

9 Q. It's really hard to define what happened  
10 sometimes.

11 A. Well, that's often -- those kind of  
12 circumstances, "the small-ish, can't really see it  
13 unless you drive up onto it" kind of a site, if we find  
14 those, that's usually a result that we're looking  
15 somewhere else and just happen to see it or an inspector  
16 reports something to us.

17 If the inspector's out at a site -- and  
18 they visit the sites much more routinely and regularly  
19 than we do. If they see a discoloration or something  
20 that's ongoing or they suspect it's ongoing, that's  
21 relayed to us, and then we contact them to say, "We need  
22 for you to go look at this."

23 Q. So I'm wrestling a little bit about major  
24 releases and minor releases and unreported releases.  
25 It's conceivable you could have a major release that was

1 **mostly gas and, say, four barrels of liquid?**

2 A. Yes.

3 **Q. What do you do then?**

4 A. If you have a major release, let's say -- I  
5 don't know. What are the gas numbers? Over 500,000,  
6 right, cubic feet is a major release of gas. If you go  
7 out and look at that and that's done, but you have the  
8 fluids on the ground, it would still be considered under  
9 the major release because that's been triggered, and you  
10 would have to deal with those four barrels of released  
11 fluid, condensate or something that most likely it would  
12 be. But that's also covered in several other sections  
13 in here. If you leak, if there is a problem, you have a  
14 responsibility to remediate.

15 **Q. Even if it's a small volume, you have to deal**  
16 **with the cause of the -- that's a major release no**  
17 **matter what?**

18 A. Yes. If you find a release, you have to deal  
19 with it. Yes.

20 **Q. Okay. Half mile of any point on the extent of**  
21 **release would be your search distance?**

22 A. For the watercourse?

23 **Q. Uh-huh.**

24 A. It would be from the extent of a release. If  
25 you had a well and it went out here three-quarters of a

1 mile, then the half-mile extent would be from the extent  
2 of that release.

3 **Q. From any point on that boundary of a release?**

4 A. You mean would I draw a circle, then, around  
5 from this point and go on all sides?

6 **Q. You draw a shape that mimics the shape of the**  
7 **curve of that half-mile distance around that shape of**  
8 **the plume on the ground, if you will?**

9 A. I'm not sure I'm exactly following you. But if  
10 you had it -- let's just walk through a couple. If it  
11 went down a gully, right --

12 **Q. Uh-huh.**

13 A. -- and stayed fairly narrow and got to this  
14 point, then you're asking what type of arcing would I  
15 look at at the end of that release?

16 **Q. I think you would look -- you would want to**  
17 **look a half mile past that in order to know --**

18 A. Certainly. And arc it all the way around?  
19 Absolutely.

20 **Q. -- the distance from the goal on each side --**

21 A. Sure.

22 **Q. -- and then a half mile from the well on the**  
23 **other side, even though it's not going --**

24 A. I would look at it that way, although this does  
25 not specifically say that. If I was doing it -- if I'm

1 looking for half-mile extents on a release, I look at  
2 both extents, if I'm doing it as an environmental  
3 professional. You go to the source area. Say it's a  
4 half-mile extent. This would be the half mile because  
5 you would have both of those regions. But the way it's  
6 stated here, it says "extent." And the release point  
7 would be an extent.

8 **Q. Sure.**

9 A. I mean, so it's a half mile either side of  
10 that. They're both extents.

11 **Q. Right.**

12 A. It's pluralized.

13 **Q. So when I look at that language, it might ought**  
14 **to be something like "within a half mile of any**  
15 **horizontal extent of the release." Just to make it**  
16 **really clear, you're looking for any half-mile distance**  
17 **from any point on the edge of that release?**

18 A. Are you asking my opinion?

19 **Q. I am asking your opinion.**

20 A. I would agree with you, sir. Yes. And that  
21 may be something the Commission can look at and see if  
22 they want to play with the language there.

23 **Q. So Table 1, what's the source for Table 1?**

24 A. Table 1 is derived from, as I recall, Part  
25 17 -- or Rule 17, however you want to say that.

1           **Q.    Rule 17.**

2           A.    What's the correct way to say that?  Rule 17.

3           **Q.    Looked pretty familiar.  I want to make sure**  
4 **that we -- that there is some consistency being applied.**

5           A.    Yes.  And indeed this is also rolled through  
6 Part 34 as well.  There are a couple of modifications to  
7 it, which Brandon will talk about later, but the data  
8 components are pretty much right out of it.

9           **Q.    It's updated the methods, right?**

10          A.    There is a method update, and there is a little  
11 thing up in the corner that's a little different, you  
12 will note when we get to it, than from the original  
13 Table 1.

14          **Q.    The constituents and the limits are the same?**

15          A.    Yes, sir.  Relative to 17 and 34, yes, sir.

16          **Q.    Because 17, in particular, then 34, we had**  
17 **significant testimony on the impact of those**  
18 **constituents.  I think that's important for making sure**  
19 **we're promulgating safety as we go forward.**

20          A.    Uh-huh.

21          **Q.    Thank you.**

22          A.    And consistency.  Okay.

23                    CHAIRWOMAN RILEY:  Mr. Brancard, do you  
24 have any questions.

25                    MR. BRANCARD:  Sure.  I have a few.

CROSS-EXAMINATION

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BY MR. BRANCARD:

Q. Mr. Billings, you made some comments about your concerns about Form C-141?

A. Yes, sir.

Q. I assume the Division is intending on changing that form?

A. The C-141 -- we anticipate that when the Commission comes up with -- if they promulgate a new rule and don't throw us out of the door, I assume that there will be some changes that will need to be reflected in the 141.

Q. So in that regard, I'm sort of going through what you've spoken about and trying to figure out how all of that information is reported to the Division. So in Section 10, on the initial response where the operator is sort of working on their own --

A. Yes, sir.

Q. -- is there an intent that they're supposed to report that to the Division, because I don't see specifically in here --

A. Well, if you look at the form itself, I mean -- and I forget what side that is.

I think it's right before my testimony on slide 18, Jim.

1                   It's page 18. So we're on -- we're on the  
2 141, "Describe Cause of Problem and Remedial Action  
3 Taken." And that would be something that your source  
4 elimination and site security would incorporate. And it  
5 would be -- in my opinion, do the 141. That adopts --  
6 that would be more spelled out relative to that. But  
7 that section would be something that you would fill in  
8 or should. We found a leak. We turned the leak off.  
9 We bermed up the leak. We removed the soil on the  
10 plastic. We bermed the plastic. Those are initial and  
11 immediate remedial actions and cleanup actions, and they  
12 are both sort of spelled out on the 141.

13           **Q. The Commission does not review or approve these**  
14 **forms?**

15           A. As far as I know, no, sir.

16           **Q. So there is nothing in the rule that says all**  
17 **this has to be in the 141? There is nothing in the rule**  
18 **here that says any of this has to be documented to the**  
19 **Division? Would it be more helpful to tie that to the**  
20 **reporting in the rule?**

21           A. I certainly think it would. Yes, sir.

22           **Q. If I read 9, it's saying the written 141 has to**  
23 **be submitted, whether it's major or minor; the 141 has**  
24 **to be submitted within 15 days.**

25           A. Yes, sir.

1           Q.    So would it be appropriate then for 10 to say,  
2    "Whatever actions you take under 10, within the first 15  
3    days, must be reported on the C-141"?

4           A.    Sounds like reasonable language to me.  Yes,  
5    sir.  I -- I -- I concur with you.  And I had noticed  
6    that before, that there isn't anything directly relating  
7    dealing with what 141 says.

8           Q.    Okay.  So then -- let's just look then at 11A.  
9    And if I understand 11A, you're now -- you're now  
10   pointing the operator down two different paths here.  
11   Okay?  So this characterization report is done within 90  
12   days --

13          A.    Yes, sir.

14          Q.    -- right?

15                    But they seem to have the option that if  
16   they complete the cleanup within 90 days, they don't  
17   have to file a characterization report, and instead they  
18   file a closure report?

19          A.    They file a closure report, but within that  
20   closure report, it has to have the characterization  
21   components, that we have to know what they started with,  
22   where they went to, what the edges were, what the  
23   bottoms were and then what they cleaned that to.

24          Q.    Because we have a closure report under 12D.

25          A.    Yes, sir.

1           **Q.    Is that the closure report that you're**  
2 **referring to here?**

3           A.    The 12D closure report is if -- it is, yes.  It  
4 is.  But it's also -- the closure report relative to  
5 putting out into Section 12 is remedial stuff  
6 selectively.  And they still incorporate themselves.  
7 There would be bleed-over on this.  Right?  If you're  
8 doing 11 -- if you're doing 11 and you're doing the site  
9 assessment characterization and you don't plan to submit  
10 a remedial work plan for review, you would still  
11 necessarily have to meet the components in 12 to  
12 accommodate closure.  Right?  But you also must submit  
13 characterization of the site.

14           **Q.    Okay.  So -- and I guess we can keep this in**  
15 **mind --**

16                    COMMISSIONER BALCH:  The site or  
17 characterization of the release?

18                    THE WITNESS:  The release.  I sorry.

19                    COMMISSIONER BALCH:  I think the site  
20 release should be the second part of that.

21           **Q.    (BY MR. BRANCARD) Okay.  Yeah.  So I guess**  
22 **we'll sort of keep this in mind as we review this, that**  
23 **if the release is sort of manageable in terms of sort of**  
24 **immediate remediation, you can go one path, and if not,**  
25 **you have to go the full path.**

1           A.     Certainly.

2           **Q.     But in the end, everybody has to have a closure**  
3 **report; is that correct?**

4           A.     Yes, that's correct.

5                     And this, again, is an attempt to move it  
6 quickly.  If they understand what they need to do and we  
7 understand what we need to see from them so we can  
8 evaluate, then they can mushroom together, for lack of a  
9 better word, and still accomplish the same purpose, and  
10 it should speed the process immensely.

11                    COMMISSIONER BALCH:  In any case, they have  
12 to characterize the release?

13                    THE WITNESS:  Yes, in any case.  In any  
14 case, it must be characterized.

15                    COMMISSIONER BALCH:  Word change.

16           **Q.     (BY MR. BRANCARD) As we go through this, I just**  
17 **want to make it clear what everybody has to do and if**  
18 **you take a different path, what you have to do and when**  
19 **you're on that path and if you're allowed to deviate**  
20 **from all the steps that are in here.**

21           A.     Okay.

22           **Q.     I want to make sure the language says what we**  
23 **want it to say.  That's just my --**

24           A.     Yes, sir.

25           **Q.     So then on A(5)(b), okay, you have new language**

1 from NMOGA Exhibit D?

2 A. Yes, sir.

3 Q. Okay. That cross-reference doesn't work.

4 Okay? And so that might be 29.11, not 29.12. I'm not  
5 sure what you were intending, but somebody needs to  
6 clean that up. Okay?

7 Then all those methods that are listed  
8 here --

9 A. Yes, sir.

10 Q. -- are those available publicly? Are they  
11 available on the OCD Web site? How --

12 A. They're available publicly. There are probably  
13 costs associated.

14 Q. Okay. I mean, this is a very -- I'm really  
15 getting down in the weeds here. Okay? But when we have  
16 to submit rules to the State Records administrator and  
17 we cross-reference any other documents, they sometimes  
18 want to see those documents. They want to know where  
19 you can obtain them.

20 A. Okay. So they're obtainable on the Web, I  
21 assume, all of them. Some of these documents are 3-,  
22 400 pages long. The ASTM one, I think it's like 25 or  
23 30 pages, something in that range. But they can be had  
24 and gotten.

25 Q. The ASTM documents are generally not publicly

1 available; is that correct? In other words, you have to  
2 purchase them?

3 A. Certainly.

4 Q. So we couldn't just put it on our Web site  
5 without getting ASTM mad at us?

6 A. I don't know if there are copyright issues or  
7 not. I wouldn't know about that, sir. But I think we  
8 could certainly put on the Web site directing them how  
9 to go and get it without causing an issue.

10 MR. HERRMANN: If I may interject, I've  
11 worked with these documents specifically for notice.  
12 All the ASTM are publicly available. EPA methods are  
13 done by the federal government, and they're available to  
14 the public. I know the NRCS field guide is. I'm not  
15 sure what the agency is that publishes that one.

16 COMMISSIONER MARTIN: It's still a federal  
17 agency, so --

18 THE WITNESS: If it's still a federal  
19 agency, it would probably follow the same suit.

20 Q. (BY MR. BRANCARD) Okay. One last thing. In  
21 that Subsection B, you refer to let's delineate using  
22 Table 1 constituents. I think we need a better  
23 cross-reference here, because as you get down in this  
24 particular paragraph here, we reference two different  
25 Table 1s. I'm guessing you're saying Table 1 that's

1 later on in this rule, but later down in here, we  
2 reference a Table 1 in the federal regulations. So  
3 there should be --

4 A. I see what you're saying. We only have one  
5 table, but CFR has got a Table 1, too, but it's not our  
6 table.

7 Q. So for cross-referencing Table 1, it should be  
8 a little more specific as to where that Table 1 is.

9 MR. BRANCARD: Thank you, Madam Chair.

10 CROSS-EXAMINATION

11 BY COMMISSIONER BALCH:

12 Q. Just to alleviate some of the confusion in the  
13 process, since we have divergent paths -- we've actually  
14 done this before on one other rulemaking -- print a  
15 flowchart that shows the process and where you diverge  
16 and where you go to the next step. It might not hurt to  
17 have something like that just for a reference to discuss  
18 the overall flow or intent of the rule.

19 A. I'm a big fan of them myself, especially when  
20 you're trying to explain something to people that they  
21 may or may not have expertise at, but they're going to  
22 be attempting anyway. And we are setting up a scenario  
23 that that would probably happen at least occasionally.  
24 And you go and attempt to do your own evaluation, right?  
25 And the flowcharts are helpful to me, and I'm a visually

1 oriented guy.

2 Q. You're also a fan of hand-drawings, so --

3 (Laughter.)

4 A. Yeah.

5 Q. Could you produce something like that?

6 A. I started in environmental work in 1970. That  
7 shows you how long I've been in it. And in those days,  
8 we had nothing but hand-drawn stuff and slide rules and  
9 rulers.

10 Q. So at least for me -- I don't know about the  
11 rest of the Commission -- I would like to have something  
12 like that, if you feel like drawing it up.

13 A. As an example?

14 Q. Uh-huh.

15 A. Sure.

16 Jim's -- Jim's saying, "No, you don't want  
17 to do that (laughter).

18 MR. GRISWOLD: Say no. Say no (laughter).

19 COMMISSIONER BALCH: I wasn't looking at  
20 you.

21 THE WITNESS: I've got -- I've got  
22 something from 1972 that was really good but still  
23 answers all the questions.

24 Q. (BY COMMISSIONER BALCH) Well, just something  
25 that -- if we're going to give guidance to an operator

1 or the responsible parties, something like that that  
2 they can quickly look at and figure out which path  
3 they're supposed to take.

4 A. I gotcha. I understand. So they understand  
5 what a northing is. This is a northing, and this is a  
6 lat log and what it means to -- a scale.

7 Q. I don't know if you have to go into that  
8 detail, but more do I have a minor or major release.

9 A. I would certainly volunteer to create said  
10 document if I am so directed.

11 MR. BRANCARD: I think what Commissioner  
12 Balch is referring to is the fact that you're giving  
13 people two options once you have the initial reporting,  
14 which is either immediately clean it up or start  
15 characterizing it in detail. And sort of following the  
16 flow of what is required for each of those steps, I  
17 think is what Commissioner Balch is looking at.

18 COMMISSIONER BALCH: Just kind of in  
19 general. So I would want something to look at on a  
20 single page: Oh, I have minor release; I do this. I  
21 have a major release; I do this with an option to do  
22 this.

23 THE WITNESS: I concur with you. I can't  
24 do it by myself. I have to be directed to do so, but  
25 I'll be volunteering.

1 CHAIRWOMAN RILEY: Mr. Herrmann, do you  
2 have any redirect?

3 MR. HERRMANN: I do.

4 REDIRECT EXAMINATION

5 BY MR. HERRMANN:

6 Q. I want to address Commissioner Balch's query on  
7 if the Oil Conservation Division stumbles upon a release  
8 that has not been reported. So there is a timeline  
9 associated with notification, correct?

10 A. Yes, sir.

11 Q. And when the OCD stumbles upon this report,  
12 it -- or stumbles upon a release, it may not be evident  
13 that they've complied with this release?

14 A. Well --

15 Q. -- or that they complied with the notification?

16 A. -- if -- goes up to it and an inspector has  
17 access to certain Internet capacity, they may be able to  
18 find out if there has been a report filled out or not.

19 Q. But going to 29.11, Section A, the main  
20 paragraph there, once a report -- once a release is  
21 reported, that starts another timeline, correct?

22 A. It's from discovery of release. The way I  
23 would read that is if I find it, that's a discovery of  
24 release. It may be a week before an operator may get  
25 out there. Certain other companies would be out there

1 in an hour, but it may be a week or more for other  
2 people to go back out there. If it's a definitive  
3 release, I think that's the discovery date.

4 COMMISSIONER BALCH: If you have a well and  
5 a battery and a separator and you have a pumper that  
6 checks it once every few days or once a week, they may  
7 not be aware of what they're supposed to be looking for.

8 THE WITNESS: That is true. Hopefully they  
9 would be made aware by the people who hired them.

10 CROSS-EXAMINATION

11 BY COMMISSIONER BALCH:

12 **Q. But if they're slugging through mud, I think**  
13 **that's pretty obvious.**

14 A. Yeah. They should report it. Absolutely. If  
15 you pull up and it's leaking out into your environment,  
16 it should be reported, or if you drive up in a saltwater  
17 disposal plane and you drive your truck and it goes 6  
18 inches deep in water that's crusted with 2-inch  
19 crystals, you ought to report it, which I suspect most  
20 of the time is done. But there's no zero and there's  
21 no --

22 **Q. The pumper's supposed to report anything that's**  
23 **unusual to the operator, and then it becomes the**  
24 **operator's responsibility.**

25 A. I don't know that -- I don't know what -- if a

1 pumper reported it to -- if he's working for Company A  
2 and he's out there and he sees it and he reports it to  
3 Company A, then Company A should then submit -- evaluate  
4 it and submit a 141, and you have data discovery at that  
5 point. I don't know relative to the rule if the pumper  
6 reports it to Company A and Company A doesn't do  
7 anything with that and how far back that tracks.

8 **Q. We're not going to be able to track it so it**  
9 **doesn't matter.**

10 A. Yeah.

11 CONTINUED REDIRECT EXAMINATION

12 BY MR. HERRMANN:

13 **Q. But if the OCD were to discover it, the OCD**  
14 **would require characterization 90 days from the**  
15 **discovery of that release?**

16 A. As I understand the rule, yes, sir.

17 **Q. And was there a deadline in there for**  
18 **characterization prior to this version of the rule as**  
19 **currently --**

20 A. As currently standing, a deadline for when you  
21 have to have your site characterized?

22 **Q. Yes, in the current rule.**

23 A. The current rule, no.

24 **Q. That's all.**

25 MR. HERRMANN: Nothing else. Thank you.

1 MR. FELDEWERT: Madam Chair, if I may.

2 CHAIRWOMAN RILEY: Yes.

3 CROSS-EXAMINATION

4 BY MR. FELDEWERT:

5 Q. Mr. Billings, I want to clear up a couple of  
6 things. First off, on page 3 of NMOGA Exhibit D,  
7 Mr. Brancard talked about Subparagraph (b), on page 3 --

8 A. Yes, sir.

9 Q. -- that Table 1 constituents. In other parts  
10 of the rule -- we reference a Table 1 in 19.15.29.12.  
11 That's what we meant here, correct?

12 A. It is referenced in 12. Yes, sir.

13 Q. Okay. And secondly, Mr. Brancard pointed out  
14 that the language is already required by 19.15.29.12,  
15 the yellow-highlighted language? You would agree it  
16 should say "11," right, because we're referencing  
17 Subparagraph --

18 A. We're referencing this internally, yes. 11?

19 Q. Yes.

20 All right. Now, I want you to go back to  
21 page 1.

22 A. Sorry?

23 Q. Page 1 of Exhibit D.

24 Now, you were part of the committee,  
25 correct?

1           A.    Yes, sir.

2           Q.    And the committee was comprised of the Division  
3 and various technical experts from the industry?

4           A.    Proportionately, yes.

5           Q.    All right. And one of the decisions that was  
6 made by that technical committee was to not change the  
7 definitions of major or minor release? That was not  
8 changed?

9           A.    I don't remember if it was or not.

10                   MR. HERRMANN: Mr. Feldewert, Mr. Powell's  
11 going to be up in a moment, and he testified on the  
12 definitions portion. Maybe you can direct that to him.

13                   MR. FELDEWERT: Sounds good to me.

14                   Then that's all the questions I have at  
15 this point.

16                   CHAIRWOMAN RILEY: Okay. Mr. Larson?

17                   MR. LARSON: Couple of questions.

18                                   CROSS-EXAMINATION

19 BY MR. LARSON:

20           Q.    Good morning, Mr. Billings.

21           A.    Hi.

22           Q.    I would direct your attention to page 2 of  
23 NMOGA Exhibit D, specifically Subsection 11A(4).

24           A.    The "Significant Watercourse" section?

25           Q.    Yes.

1           A.    Yes, sir.  Okay.

2           **Q.    And there's some new language there, "within a**  
3 **half mile of the horizontal extent [sic] of the**  
4 **release."**

5           A.    "Extents."

6           **Q.    Why was that language added?**

7           A.    If I recall, the why isn't the question.  The  
8 language is was there -- identify significant  
9 watercourse, the nearest one.  It did not have a mileage  
10 component to it.  We felt a compromising position was  
11 appropriate so that we could certainly have a better  
12 thing than we have now.  There's always a better way of  
13 taking steps forward even if they're not as big as you  
14 want or as little as you want, but it's moving forward.  
15 But it was a mechanism to give us some control of  
16 identifying where a significant watercourse is that's  
17 relative to the release.

18          **Q.    Any specific basis for the half mile?**

19          A.    The half a mile?  I'm trying to remember if  
20 there was a specific reference to the half mile relative  
21 to the watercourse.  I'm not -- I'm not sure, because a  
22 lot of this negotiating back and forth was happening  
23 outside of my --

24          **Q.    Between the lawyers?**

25          A.    Yes, sir.  And what it may have been in

1 reference to, I'm not sure.

2 Q. And I know Commissioner Balch touched on this,  
3 and I may have missed it, but what is the start point  
4 going out half a mile?

5 A. The start point going out half a mile?

6 Q. Is it the release horizontal extent of the  
7 release?

8 A. It's basically like this. If you have a  
9 wellhead -- this would be this in my left hand  
10 (demonstrating). It's a pencil on the table. And I set  
11 this other pen to my right, and that's the extent of the  
12 release vertically in one direction. Okay? The extents  
13 of that release are the source and the termination.  
14 That's the extents. Right? The half mile would then be  
15 relative to both extents, to the points.

16 CROSS-EXAMINATION

17 BY COMMISSIONER BALCH:

18 Q. Yeah. Which I don't think actually covers what  
19 it should -- what the intent should be. Say you have a  
20 circular plume that's centered on those two points.  
21 They may be a half mile from any edge of that circle. I  
22 think to address that half mile -- is it a half mile --

23 A. I see what you're saying that. Yes, sir. I  
24 see what you're saying. That certainly needs  
25 clarification. Absolutely. I agree.

1 CONTINUED CROSS-EXAMINATION

2 BY MR. LARSON:

3 Q. Theoretically, you could add a half-mile  
4 horizontal extent of release, and you're looking at  
5 going another half mile beyond that?

6 A. Yes, sir. This extent could be a half mile in  
7 length, and then you need the other half mile on each  
8 end of those two from the extents of the release.

9 CHAIRWOMAN RILEY: Ms. Callahan, do you  
10 have any questions?

11 MS. CALLAHAN: No questions.

12 CHAIRWOMAN RILEY: That was our redirect.  
13 I think we can excuse this witness.

14 Mr. Herrmann, do you want to leave this  
15 witness?

16 MR. HERRMANN: I do.

17 CHAIRWOMAN RILEY: Your next witness is  
18 looking for guidance. It is noon. Do you want to break  
19 for lunch at this time?

20 MR. HERRMANN: We could finish our  
21 presentation of Section 11 and then break for lunch and  
22 start with 29.12 NMAC. There is only a small portion of  
23 that rule left.

24 CHAIRWOMAN RILEY: Okay.

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BRANDON POWELL

after having been previously sworn under oath, was re-called, questioned and testified as follows:

DIRECT EXAMINATION

BY MR. HERRMANN:

**Q. Mr. Powell, you were involved in some of the discussions regarding the distance to nearest significant watercourse, correct?**

A. I was. That is correct.

**Q. Can you explain some of the thought behind adding that change to the language contained in Exhibit D?**

A. The thought behind adding that change was to give an actual distance so if a release occurred several miles from a release that the responsible party doesn't have to go searching for a release that was extended out away from it. So it was brought back in with the half a mile with the clarification of the horizontal extents of the release.

And as the Commissioner explained, our intent in that negotiation was to start at the source and at the end of the release, and it would be a half mile through all the points in between, somewhere of an elliptical drawing throughout. Because if the release travels, it could travel over possibly several miles,

1 and the significant watercourse could be a part of the  
2 concern throughout that release itself. And maybe it's  
3 not clearly stated that way, but that's what the intent  
4 was, was for that half a mile to be applied to the  
5 entirety of the release.

6 CROSS-EXAMINATION

7 BY COMMISSIONER BALCH:

8 Q. So at any point on the extent of the release --

9 A. That is correct.

10 Q. A release that took a long, tortuous path  
11 through an arroyo, it would cover those ends and those  
12 ends?

13 A. That is correct.

14 CROSS-EXAMINATION

15 BY CHAIRWOMAN RILEY:

16 Q. Would "boundary" be a descriptive term?

17 A. Yes, I believe it would.

18 CONTINUED DIRECT EXAMINATION

19 BY MR. HERRMANN:

20 Q. Is there anything else you'd like to add on  
21 that section?

22 A. No, there is not.

23 Q. Would you like to continue with 11 -- how did I  
24 summarize -- refer to this -- A(5)(e)?

25 A. Yes, I would.

1           11A(5)(e), this subsection, as we started  
2 to dive into it a little bit in the wellstream  
3 discussion, the subsection, enables the Division to  
4 require the responsible party to delineate and remediate  
5 oilfield-related chemicals and constituents that are not  
6 related to the wellstream. Examples of these items, as  
7 previously discussed, could be solvents used for  
8 cleaning the surface equipment, motor oil, unused frac  
9 chemicals or even paint waste. These types of releases  
10 are not common in the oilfield.

11           The purpose of identifying other agency  
12 standards, which we'll go through, as a starting point  
13 allows the Division and the operator or responsible  
14 party consistent guidance by using standards that have  
15 been shown to be protectable on a federal or state  
16 level. Because of the broad range of chemicals that can  
17 be used or material that can be used, trying to set up  
18 individual limits by the OCD for each situation would be  
19 extremely cumbersome.

20           Moving into those specific setbacks, what  
21 this is is a staged approach. We'll work from (i) to  
22 (iii). The first (i) references contaminants that  
23 appear on RCRA's hazardous waste -- hazardous  
24 constituent list, Table 1 of 40, CFR 261 24B, the  
25 maximum concentration allowed herein. This is commonly

1 known as RCRA's hazardous waste list. So if RCRA  
2 considers it hazardous, they have certain guidelines and  
3 certain limits that a responsible party would follow.

4           If the constituent isn't listed on that  
5 list, then the second step is the NM -- New Mexico  
6 Environment Department's Risk Assessment Guidance for a  
7 Site Investigation and Remediation, Volumes 1 and 2.  
8 The Division will determine the appropriate assessment  
9 volume and remediation that must occur accordingly.  
10 These volumes address not only human health standards  
11 but also environmental standards between the two  
12 volumes.

13           So getting -- at this point if it's not in  
14 the first table and it's not in the second set of  
15 guidance, then we would move to the third set of  
16 guidance. We don't anticipate the third set of guidance  
17 to be used very often. We only see it used in very rare  
18 cases, for exotic chemicals that may have a risk  
19 component to them. So if it's not listed in the prior  
20 to, the Division and responsible party will work  
21 together to determine the appropriate level of  
22 remediation. The final determination, however, will  
23 still be with the Division as far as going forward.

24           And that completes the slide on "Other  
25 Oilfield-Related Chemicals."

1           **Q. All right. And would you like to walk us**  
2 **through the proposed language in 12B?**

3           A. Certainly. This slide will actually cover 11B  
4 and 11C.

5           **Q. Oh, sorry.**

6           A. Unless the characterization report includes  
7 completed remedial efforts, it must include a proposed  
8 remediation plan with timelines for beginning and  
9 finishing the work. An item to point out in this  
10 section is the phrase "unless characterization report  
11 concludes [sic]" -- "includes completed efforts." This  
12 illustrates the point that was previously discussed.  
13 The characterization can occur during remediation.

14                       So if an operator has a release they would  
15 like to remediate within the first 90 days, instead of  
16 performing a separate characterization, this allows them  
17 the avenue by moving straight to the remediation and the  
18 closure section of the rule. The closure requirements  
19 for the release would be used to fully characterize the  
20 release -- fully characterize the release. This could  
21 specifically apply to smaller liquid releases, or for  
22 large releases, which require simpler actions, they can  
23 be performed within 90 days.

24                       If the Division determines more information  
25 is needed, it may request such, but the request must be

1 specific, in writing and provide the responsible  
2 party -- provided to the responsible party within 30  
3 days of receipt of the characterization or remediation  
4 report. The responsible party has 14 days to respond.  
5 If the responsible party disagrees with the request, it  
6 may either consult with the Division or apply for  
7 hearing within 30 days.

8 And that concludes my testimony on 29.11.

9 **Q. Okay. I have no other questions for you.**

10 MR. HERRMANN: Michael, you wanted to ask  
11 about definitions?

12 MR. FELDEWERT: Yeah.

13 CROSS-EXAMINATION

14 BY MR. FELDEWERT:

15 **Q. Let's leave that go, Mr. Powell, and come down**  
16 **to page 3, Subparagraph (c), and onto page 4. There's a**  
17 **change up there in the last sentence. Do you recall**  
18 **that?**

19 A. Yes, I do recall that. That is for  
20 clarification that within the 30 days of the issuance of  
21 request for additional information, because the way the  
22 rule defines it, it's the request for additional  
23 information, not as conditions.

24 **Q. As the subject matter of this particular**  
25 **subsection, right, the request for additional**

1 information?

2 A. That is correct.

3 Q. Now, you were on the committee?

4 A. Yes, sir.

5 Q. It was comprised of members of the Division and  
6 technical experts from the industry, correct?

7 A. That is correct.

8 Q. All right. And in going through the rule and  
9 reviewing this rule, the decision was made by that  
10 technical committee not to change the definition of a  
11 major release or a minor release, correct?

12 A. My recollection is not to change the intent of  
13 it. The only changes to those were for clarification  
14 only.

15 Q. Okay. So, for example, definition of minor  
16 release means -- I'm looking at 29.7B on page 1. Minor  
17 release has a threshold on it of a volume greater than  
18 five barrels, correct?

19 A. Yes.

20 Q. Okay. So a decision was made, but there was  
21 no -- by the technical committee that there was no  
22 need -- there wasn't any evidence to indicate that you  
23 needed to report any -- a release that was less than  
24 five barrels?

25 A. The only time you would report a release that

1 was less than five barrels by these definitions is if it  
2 met the definition of a major release.

3 Q. All right. And the committee had no evidence  
4 and there was no suggestion that that should be changed?

5 A. That is correct.

6 Q. Now, with that in mind, if we're going to 29.8,  
7 the decision was likewise made -- and I'm looking at  
8 29.8A: "The responsible party must notify the division  
9 on form C-141 of a major or minor release," correct?

10 A. That is correct.

11 Q. So, again, the decision was made by that  
12 committee, looking at the evidence presented, that there  
13 was no need to change the reporting requirements to  
14 address a release of less than five barrels?

15 A. That is correct.

16 Q. Okay. And that, therefore, carried forward  
17 throughout the rule, right?

18 A. That is correct.

19 Q. So when we talk about all the site  
20 characterization, that occurs if there is a major or  
21 minor release containing --

22 A. Correct.

23 Q. That's all the stuff you have to do?

24 A. Yes. I have to clarify. Throughout the rule  
25 and other sections, that any major minor release would

1 be containing liquids. So if it's one of those  
2 containing -- reporting is required.

3 Q. So, for example, if the release is only two  
4 barrels or three barrels, I don't have to do -- I don't  
5 have to have a site map. I don't have to do a depth to  
6 groundwater. I don't have to do a well protection area,  
7 observation, any of that stuff?

8 A. Only if nothing else was contained. If you had  
9 a gas release that was major and it included those small  
10 volumes, then it would still be considered a major  
11 release, and you would have to do it in that case only.

12 Q. But a minor release only of one barrel or two  
13 barrels would have to go through all that process?

14 A. That is correct. You would have to do the  
15 initial response and the remediation.

16 Q. And I'm going to get to that. So I'm just  
17 getting to the reporting first, just to make that clear.

18 And that was a decision made by the  
19 technical committee?

20 A. That is correct.

21 Q. But the one thing that the technical committee  
22 did change that is not in the current rule is that there  
23 are certain things that an operator has to do no matter  
24 what the volume of release, correct?

25 A. That is correct.

1 Q. And the first one is you've got to do what is  
2 in 29A?

3 A. Right.

4 Q. Right?

5 A. That is correct.

6 Q. The second thing it makes very clear, if I go  
7 to 29.11 first, "after the responsible party has removed  
8 all free liquids and recoverable products" -- you have  
9 to do that, right?

10 A. That is correct.

11 Q. So like Dr. Balch said, if there is a stain out  
12 there at the site, under this rule, as an operator, you  
13 are required to do everything in 29.10, and then as this  
14 says, "remove all free liquids and recoverable products,  
15 right?

16 A. That is correct.

17 Q. And just to make it abundantly clear,  
18 throughout this rule, if you go over to 29.12, there are  
19 a lot of things you've got to do with remediation and  
20 closure and a lot of things you have to submit to the  
21 Division?

22 A. Correct.

23 Q. But the decision was made by the technical  
24 committee, again, that that should only apply to  
25 releases that reach either minor or major threshold

1 levels?

2 A. That is correct.

3 Q. But you did say in 29.12A that you had to  
4 remediate all releases regardless of volume?

5 A. Yes.

6 Q. So, again, now what you have in this ruling --  
7 and if we go out and there is a stain there -- if the  
8 Division goes out there and there is a stain, small  
9 stain, that has not been addressed, you have the ability  
10 under this rule to say, "Wait a minute. Under this  
11 rule, you guys have to address this" --

12 A. That is correct.

13 Q. -- correct?

14 And that was what was decided by the  
15 committee as what was needed based on experience and the  
16 circumstances that the Division has seen today?

17 A. That is correct.

18 MR. FELDEWERT: Okay. That's all the  
19 questions I have.

20 CHAIRWOMAN RILEY: Mr. Larson?

21 CROSS-EXAMINATION

22 BY MR. LARSON:

23 Q. One question. There was some discussion of how  
24 long it would take a pumper to get out to discover, say,  
25 a produced water release. Let's say he got there an

1 hour after the release, and he determined there were 15  
2 barrels released. He was able to recover 13 barrels.  
3 Is that still considered a major release for purposes of  
4 remediation?

5 A. If he lost 15 barrels, that would not  
6 constitute a major release. It would constitute a minor  
7 release because it's under the 25-barrel threshold. And  
8 the thresholds are based on total volume loss. They're  
9 not based on the recovered volume or net volume.

10 Q. So in that circumstance, you would require the  
11 site assessment and characterization?

12 A. In that circumstance, it still would require a  
13 characterization under the rule. However, I would  
14 anticipate that characterization to be very small.

15 Q. It still requires soil sampling?

16 A. It still would require soil sampling under the  
17 characterization. However, in that circumstances,  
18 because it's such a small impacted area, the operator  
19 could choose to move directly to remediation, and that's  
20 what I addressed in the latter part, is they can move  
21 directly to remediation within the first 90 days. And  
22 through that remediation, they would characterize that  
23 site using the closure sample portion of the --

24 Q. Just to carry it one step further, what if,  
25 after they recovered the free produced water, they came

1 out and scraped the sand a foot down and found dry soil?

2 Would you accept that as remediation?

3 A. The rule would still require sampling under the  
4 closure requirements, but if they went out and sampled  
5 that dry soil and it met the closure requirements, that  
6 site would be characterized as remediated.

7 Q. Could they do that with a grab sample?

8 A. The way the rule is set up -- and I'll get  
9 further into that later -- it's through a composite  
10 sample, which would be a single sample just with  
11 multiple grab points.

12 Q. I got a little ahead of you.

13 That's all I have.

14 CHAIRWOMAN RILEY: Ms. Callahan?

15 MS. CALLAHAN: No questions.

16 CROSS-EXAMINATION

17 BY COMMISSIONER BALCH:

18 Q. Major and minor releases. I'm kind of looking  
19 at the rule and just the way it's written here in NMOGA  
20 Exhibit D. The only difference between a major and  
21 minor release is when you have to report it?

22 A. That is correct.

23 Q. Everything else is exactly the same.

24 So why not just have reportable and  
25 nonreportable releases?

1           A.     Because we still want to make sure that the  
2     minor releases are reported, but we don't feel that for  
3     a minor release, that it meets the 24-hour aspect.

4           **Q.     Does it hurt to perform it within 24 hours?**

5           A.     It doesn't, but because of the number of  
6     releases that could be out there -- going back to Jim's  
7     slide earlier -- at three releases per day, that could  
8     cause a majority of our releases to be reported within  
9     24 hours that aren't currently required.

10          **Q.     As long as they're reported eventually?**

11          A.     That is correct.

12          **Q.     So you will get -- within a set amount of time,  
13     you will have all of those minor or major releases  
14     reported, plus or minus 15 days.  And they have 14  
15     additional days to report a minor release.  That's  
16     substantially the only difference between a major and  
17     minor release?**

18          A.     That is correct.  The 24-hour reporting  
19     requirement for a major is just so the Division, if a  
20     major release is reported, knows where it's at and  
21     any foreseeable issues that that major release may  
22     cause, where a minor release may not cause those same  
23     issues.

24          **Q.     I guess I'm still trying to figure out why you  
25     would have a minor release, because the only difference**

1 is when to report. They're remediated the same way.  
2 They close the same way. You do everything the same  
3 except for when you have to tell the OCD about it.

4 A. The chances of a minor release impacting areas  
5 outside of the immediate area are minor, but we still  
6 want it reported on the --

7 Q. I kind of understand that. But in my mind,  
8 there is a difference between an 11-barrel spill of  
9 5,000 TDS of water with a thin skim of oil on it and a  
10 spill of 24 barrels of oil.

11 A. Right.

12 Q. Right?

13 So somewhere in that chain, we may want  
14 somebody else to make a judgment about whether it's  
15 something that needs to be addressed more immediately  
16 than 15 days.

17 A. That is true. And I -- I think that's a notice  
18 we put on the responsible party through the site  
19 stabilization and immediate reaction of what they do  
20 with that oil or the produced water.

21 Q. But also the -- the aspect of you have to make  
22 a value judgment: Is this -- is there a narrow range or  
23 bigger than that, or is it smaller than that. There are  
24 three things that somebody has to decide: Is it  
25 unreportable; you don't have to report. You still have

1 to remediate it, of course. Is it -- if you drive out  
2 there in your pickup truck and there is a bunch of  
3 mud -- you'd have a real hard time if that was 24 or 26  
4 barrels of water that's filling the ground. I'm really  
5 wondering if you need to have that distinction between  
6 minor and major, or should it just be reportable or  
7 nonreportable.

8                   And in the case of reportable, that 3.4 per  
9 day, I'm not sure that's a great burden on the OCD to  
10 have those come in and at least have somebody else  
11 making a value judgment on whether it should be quickly  
12 or more slowly acted upon.

13           A. I would say to -- my personal experience up to  
14 this point, usually a minor release doesn't threaten the  
15 environment nearly as significantly as a major. If we  
16 were to receive all of them by a phone call within 24  
17 hours, I could see where the inspector could become  
18 complacent to those. So that's why I think it's  
19 important to call out the major release and keep that  
20 distinction available.

21           Q. But I'm playing devil's advocate a little bit  
22 here. Like I said, the 24 -- or the 11 barrels of water  
23 inside of an unlined berm -- I think you're right --  
24 that probably is not going to pose an immediate hazard.  
25 But 24 barrels of oil in an arroyo that has shot 34

1 miles downstream, I think you'd want to deal with that  
2 pretty quickly. That would be a minor release.

3 A. Well, if it went into an arroyo, that's where  
4 the caveat --

5 Q. Not arroyo. A tertiary -- a tertiary drainage.

6 A. In the -- the watercourse, as it's defined and  
7 used from 17 and then applied here, is the blue lines  
8 are first-order tributaries of those so that they -- and  
9 that's what's called out in the major. It wouldn't  
10 matter any of the volume at that point. It could be a  
11 single barrel, but if it enters in one of those areas,  
12 it would become a major release.

13 Q. I was talking about something that hit a  
14 channel on the surface that eventually will lead to one  
15 of those things. Maybe it's a half mile. I don't know.

16 A. And maybe that -- if a release stays on-site, I  
17 don't think that is near as critical. I agree if it  
18 moves off site and it becomes a threat, then it could be  
19 --

20 Q. Right now the distinction is purely volumetric?

21 A. That is correct.

22 Q. And you don't even check how close you are to  
23 anything until 15 days if it's a minor release?

24 A. It's volumetric --

25 Q. Well, you have 15 days to do it.

1           A.    That's correct.  It's volumetric except for the  
2 special conditions in the major release.

3           **Q.    As long as it's wellstream.**

4           A.    A major release, it doesn't matter what kind of  
5 product it is.

6           **Q.    Major release doesn't matter, but a minor  
7 release -- like I said, in my mind, there is a  
8 difference between 4,000 TDS water and 38 API crude.**

9           A.    True.  True.

10          **Q.    Those are created equally -- or are treated  
11 equally under the proposed rule as a volume of fluid?**

12          A.    That is correct.  And that distinction I think  
13 would be hard to make, because if you -- if you  
14 separated, say, crude and produced water, in the  
15 southeast they have TDS water that's over 200,000.

16          **Q.    Sure.**

17          A.    And there are times where that water may move  
18 even further than the crude oil would.

19          **Q.    Absolutely.**

20          A.    So I think that distinction at times can be  
21 hard to differentiate.  I think -- based on my  
22 experience, the levels that we've seen in the field of  
23 25 barrels, at least in the northwest, seems to be kind  
24 of a good cutoff as far as --

25          **Q.    So really the difference between them is just**

1 when you have to report it?

2 A. That is correct.

3 Q. It's an additional two weeks if it's a minor  
4 release.

5 A. Typically, how we handle a major release in  
6 Hobbs -- in our district, if it's reported as a major,  
7 we follow up. We look at the site, where it's at, any  
8 threats to the environment. It gives us that ability to  
9 follow up on it to a greater extent.

10 Q. So maybe you can see what I'm trying to drive  
11 at here. If you change the reporting requirement for a  
12 minor release to 24 hours, it is the same as a major  
13 release --

14 A. That is correct.

15 Q. -- under the rule.

16 A. (Indicating.)

17 Q. In every other way.

18 A. Yes. How it's handled, how it's characterized,  
19 how it's remediated is all the same.

20 Q. And at 3.4 releases per day, on average, I  
21 would still say that's probably not a large burden on  
22 the OCD to handle, especially since we get them all  
23 anyway.

24 A. We get them all anyway, but I would say the  
25 major releases at this point are looked at more closely

1 than the minor releases.

2 Q. So how many major releases in a year?

3 A. I don't have those statistics. Let's say you  
4 get two major releases a week. The depth that our  
5 inspectors take on those are far greater than they are  
6 on a minor release. They look them up. They may go  
7 down, do an on-site inspection and follow up with the  
8 operator. And a major release takes our inspectors  
9 considerably more time to investigate, and we do that  
10 because of the potential risk those pose.

11 Q. Sure. So that's a judgment on the -- on the  
12 OCD representative on whether it needs to be responded  
13 to a certain way. The operator, under the rule, is  
14 going to remediate in exactly the same way. They go out  
15 there with a backhoe, whatever, at the same time, within  
16 that 15 days and still -- and do all of that. The only  
17 additional change would be -- if you went from  
18 reportable to nonreportable, would be that somebody with  
19 the OCD, within 24 hours, would know there was a spill  
20 there and maybe they would say, "Fine. You know, we're  
21 not going to worry about it too much," or whether  
22 they'll call the operator right up.

23 A. That's correct.

24

25

1 CROSS-EXAMINATION

2 BY CHAIRWOMAN RILEY:

3 Q. I'm jumping into this.

4 But how would they know whether or not it  
5 rises to the level that they need to jump out there and  
6 go see it right away, since it's not going --

7 COMMISSIONER BALCH: Well, they're not  
8 going to know at all until it's reported. They have no  
9 basis to make any decision until it's reported. They  
10 don't even know it exists.

11 CHAIRWOMAN RILEY: Right. But on a major,  
12 they're getting it reported as a major. They can look  
13 at that and decide whether or not they should go. And  
14 I'm thinking that a lot them, they will probably do that  
15 if they have the manpower to get out there.

16 Whereas, a minor, if they're having to make  
17 that decision and determination to go run out on a  
18 minor, I mean, we don't have the manpower to do that.

19 COMMISSIONER BALCH: Well, I think if we  
20 look at the form, that would -- they would have to make  
21 that decision, whether it was important enough to go out  
22 and look at it.

23 CHAIRWOMAN RILEY: Look at the form, you  
24 said?

25 COMMISSIONER BALCH: Look at the form. How

1 is it reported? Is it reported by form or by email?

2 THE WITNESS: Form or by email.

3 I think the major difference is if you  
4 reported it to -- changed it to a reportable versus  
5 major, minor. You would move the caveat of what needs  
6 to be further looked at from the operator to the OCD.

7 COMMISSIONER BALCH: Right.

8 So my thought is something like this: If  
9 you get a call from an operator and say, "We spilled 11  
10 barrels of 4,000 TDS water. We're out in the middle of  
11 the desert near Hobbs." You would say, "Okay. Well,  
12 send us a form. Don't worry about it. Clean it up."  
13 And then you close the case and wait for the remediation  
14 and closure form.

15 So if the operator calls and says, "Hey, I  
16 spilled 24 barrels of crude, and my well site is, you  
17 know, within a quarter mile of the Pecos River," then  
18 you may want to go out and look at it.

19 I think that raises the bar from it being a  
20 minor to potentially being a major problem. So you  
21 don't necessarily have to treat it any differently, but  
22 it gives somebody else the ability to make a value  
23 judgment on whether it is something that needs to be  
24 very quickly examined or not. That's something that --

25 CHAIRWOMAN RILEY: And I -- I understand

1 what you're saying, but I think it's -- what I hear  
2 Brandon saying is that with this, they're putting the  
3 burden of that on the operator by how it's being  
4 defined, and they are making that determination, saying  
5 exactly what you just said. We're near an arroyo.  
6 They're having to -- by these rules. And that's to say  
7 that if we don't make these distinctions between major  
8 and minor within the rules and they just report them and  
9 don't have the burden of qualifying it, then it's  
10 putting a big burden on the staff to, over the phone,  
11 decide if it's major or minor.

12 COMMISSIONER BALCH: Or they may have --  
13 they may have two or more oil spills sitting there  
14 waiting until they do something about it.

15 CHAIRWOMAN RILEY: But I think that by this  
16 definition of, you know, the probability to reach a  
17 watercourse and to do damage to public health -- human  
18 health or the environment, those are the criteria that  
19 would have to -- the operator's going to use to decide  
20 if it's --

21 COMMISSIONER BALCH: And that's going to be  
22 the case based on their determination of reasonable  
23 probability of substantial damages, the operator's  
24 determination of those quantities.

25 THE WITNESS: Well, I think one other thing

1 to address, if it is an oil release, they are still  
2 required to take immediate initial response to get the  
3 oil off of the surface and do those actions immediately  
4 so then --

5 CROSS-EXAMINATION

6 BY COMMISSIONER BALCH:

7 **Q. Don't get me wrong. They're going to want to**  
8 **suck that up as quick as possible at \$70 a barrel.**

9 A. You would think so, but we've seen -- and  
10 that's why we've verified it in here, because we've see  
11 the operators where they didn't do that immediately. As  
12 Jim's photos expressed, it wasn't done for a month in  
13 that case.

14 **Q. That was oil?**

15 MR. GRISWOLD: That was oil.

16 THE WITNESS: So, you know, this rule  
17 provides that clarification of what we expect. And then  
18 that way if the oil head is removed off the top and  
19 hasn't entered a watercourse, that oil then saturates  
20 the soil and it becomes a lot less movable. So it's not  
21 a continued threat as it would be if that oil head  
22 wasn't removed.

23 **Q. (BY COMMISSIONER BALCH) That's kind of a**  
24 **situation where you -- asking permission. That's my**  
25 **concern.**

1 CHAIRWOMAN RILEY: I can see your point.

2 COMMISSIONER BALCH: Most operators are  
3 responsible.

4 CHAIRWOMAN RILEY: Uh-huh.

5 COMMISSIONER BALCH: I'd hate to -- I'd  
6 hate to see that the only thing that you can do, in the  
7 case of a bad operator, is suing them a year later. So  
8 you want to put in enough safeguards that at least if  
9 you do have to sue them, it's clear there was a breach  
10 or violation.

11 THE WITNESS: And I think on a minor  
12 release, going further into it, if an operator reports  
13 that it's ten barrels instead of what it actually is, I  
14 don't know that -- is that ten barrels going to be  
15 looked into as much 24 hours from now or two weeks from  
16 now? We've got to believe what the operator tells us  
17 they released and that it's not a threat. So it's --  
18 unless we actually dig into that release, that's going  
19 to depend a lot on our staffing levels, if we can dig  
20 into it, whether they reported it 24 hours from now or  
21 15 days from now or whether it's true or not.

22 **Q. (BY COMMISSIONER BALCH) I guarantee that a lot**  
23 **of operators will go out to their site: Yeah, it was a**  
24 **four-and-a-half barrel release.**

25 A. And we've had a lot those issues, where it's

1 four-and-a-half barrels currently under the rule,  
2 because the rule has that notification requirement.

3 Q. Uh-huh.

4 A. When I first came to work for the Division, the  
5 prior environmental specialist told me, "Take what they  
6 tell you and multiply it by three." I think working  
7 with the industry and their desire to be more upfront,  
8 we have less of those issues, but I think that's still  
9 going to continue to be an issue unless we take  
10 reporting -- unless we take enforcement action against  
11 those bad operators. And I think that's what the work  
12 group looked at and found consensus. I think that's the  
13 desire from both sides.

14 Q. I think later on we'll be talking about what  
15 the OCD actually --

16 A. That's correct.

17 CHAIRWOMAN RILEY: Any more questions,  
18 Mr. Balch -- Dr. Balch?

19 COMMISSIONER BALCH: Uh-uh.

20 CHAIRWOMAN RILEY: Mr. Martin?

21 COMMISSIONER MARTIN: No questions.

22 CHAIRWOMAN RILEY: I don't have any  
23 questions.

24 Do you have any questions?

25 MR. BRANCARD: Several members of the

1 public signed up to speak, and maybe we can do that  
2 right after lunch.

3 CHAIRWOMAN RILEY: Okay.

4 Do we have any redirect?

5 MR. HERRMANN: No.

6 CHAIRWOMAN RILEY: So yes. We're at 12:37,  
7 basically. How about if we take a break for lunch? And  
8 then those who signed up to give public comment, we'll  
9 take those right when we return. So an hour --  
10 probably, say, quarter till, come back.

11 (Recess, 12:37 p.m. to 1:53 p.m.)

12 CHAIRWOMAN RILEY: All right. Let's get  
13 started again.

14 Mr. Herrmann, you're on.

15 MR. HERRMANN: Weren't we going to do  
16 public comments?

17 CHAIRWOMAN RILEY: Oh, yes, we are. See, I  
18 have a short memory at my age.

19 All right. The first one on here is Irvin  
20 Boyd.

21 Okay, Mr. Boyd.

22 Mr. Brancard, do we have any instructions  
23 for Mr. Boyd?

24 MR. BOYD: Behave myself?

25 MR. BRANCARD: If he wants to be sworn in.

1 MR. BOYD: I've just got a few comments.

2 My name is Irvin Boyd, and I live in south  
3 Eunice, in Lea County. And the first thing I'd like to  
4 do is thank the Commission for letting us have this  
5 opportunity to speak and share our feelings. And my  
6 feelings are not scientific. I live in it every day,  
7 and I've grown up in it, and I also work in it. I make  
8 my living pipelining, but I live on a ranch that my  
9 granddad homesteaded before oil and gas, and I've grown  
10 -- I've grown up there.

11 And, you know, we as landowners, we depend  
12 upon the Commission here to protect us. Oil and gas, we  
13 depend on them to make our livings, too. So this is a  
14 pretty thin line for me because I need oil and gas, but  
15 I also want to keep my land the best that we can.

16 And a lot of times, you know, when we're  
17 looking at the sampling and the amount of contaminants  
18 that are allowed to be left, you know, most of the time  
19 these contaminants are more extensive where the ponding  
20 has occurred. And if we take out 3 or 4 foot of dirt  
21 and take the top of the contaminants out but we leave  
22 500 parts, 10,000 parts, 20,000 parts, it just so  
23 happens that area is going to be the same area that's  
24 going to pond with rainwater. And I've had -- I've had  
25 numerous companies come out and start cleaning up leaks,

1 and they dig it out to where, you know, we think it's  
2 getting pretty good. But they don't protect their  
3 excavation with a berm or anything, and when we get a  
4 good rain, it pushes it down, the chlorides that are  
5 left there, and then they wonder why groundwater is  
6 impacted.

7                   And I just -- I just really, really have a  
8 problem with the contaminant levels that's been  
9 submitted in this proposal. And, you know, if you take  
10 the background -- and the background of chlorides in my  
11 area is less than 100. Most of it is like 85 to 50.  
12 And then you talk about leaving 20,000 parts in there as  
13 opposed to what was there originally, that's not  
14 cleaning it up. That's covering it up. And I know that  
15 it's very expensive to dig it out and clean it up, but,  
16 you know what, it's very expensive for the oil and gas  
17 companies to be paying all the attorneys that are  
18 sitting in here representing them. And, you know, they  
19 don't have to live in it afterwards.

20                   Another thing is that I think that this  
21 proposal, one of the big things to make it a success, to  
22 be in the public's interest, is going to be honesty of  
23 reporting.

24                   And the same thing as Mr. Griswold showed  
25 in those pictures. I thought maybe that was a picture

1 of a battery on my place because I've got batteries that  
2 look like that. Now, does the operator want that to  
3 happen? Sure, he doesn't. But we don't get everything  
4 we want. But, you know, he shouldn't have reported a  
5 three-barrel leak or a two-and-a-half-barrel leak or  
6 whatever. And with me working in oil and gas, I have  
7 been on several cleanups, and they say, "Well, it looked  
8 like about a four-barrel leak; that's nonrecordable --  
9 or nonreportable." But we've dug over 20 foot until the  
10 excavation has to -- if anybody gets in it, it has to be  
11 removed. Well, how can a five-barrel leak contaminate  
12 that much area? That's huge, you know. And this is a  
13 pipeline. How long has it been leaking and going down  
14 before it ever surfaced? And, you know, that's one of  
15 the things that anybody -- we can't fix that. But y'all  
16 addressed that by delineating and finding out what's  
17 there and so forth.

18 So these reporting levels, they're a goal  
19 to shoot at, but they're not a science. They're not  
20 going to be perfect because you can't see it all.

21 But I just hope that y'all can sit back and  
22 look and see what was there prior to and make a  
23 consideration as what would be safe to the public to be  
24 able to leave there. And there are lots of things that  
25 have been left there that were safe until they had

1 another leak or you had a good rain that went ahead and  
2 drove it on downstream or down into the ground and, you  
3 know, then it -- then it contaminated water.

4           When I grew up as a kid, we had good  
5 drinking water. Now, we can't drink our water. If we  
6 sprinkle our plants, our foliage -- if we sprinkle it  
7 three or four times, they'll drop their leaves and die.  
8 You know, that's a combination of lack of rain,  
9 combination of casing leaks, pipeline leaks, reserve  
10 pits, you know, all kinds of activities that 50 years  
11 ago, 80 years ago, people never thought that it was a  
12 problem. But now, you know, we know it's a problem.

13           And I've always wished that these kind of  
14 meetings, these kind of hearings was putting our heads  
15 together to see what we can do to prevent it and keep it  
16 from being a problem, to be able to help the industry to  
17 be able to function and the private public to not be  
18 impacted so terribly by leaks and spills.

19           But that's kind of my feelings, and I  
20 appreciate everybody's efforts. And also, I'm the  
21 chairman of the Oil and Gas Committee for the New Mexico  
22 Cattle Growers, and I'm speaking on their behalf, but  
23 more so on my behalf as a landowner. But I appreciate  
24 y'all's time, and I appreciate you letting me speak.

25           Thank y'all.

1 CHAIRWOMAN RILEY: Thank you.

2 MR. BOYD: Anybody got anything they'd like  
3 to ask me? Scared to?

4 (Laughter.)

5 CHAIRWOMAN RILEY: Mr. Price.

6 MR. PRICE: I would like to be sworn in.

7 WAYNE PRICE,

8 after having been first duly sworn under oath,  
9 testified as follows in narrative form:

10 MR. PRICE: My name is Wayne Price, and  
11 most of you in this room probably know me, so I will  
12 skip the bio here.

13 I understand that it was kind of unanimous  
14 that I wouldn't be able to go through the rule as I had  
15 marked up, and so, therefore, I understand that.  
16 However, I hope -- I have about five or six bullet  
17 points that I think are kind of an overview of my  
18 thoughts on this rule. So I hope I'll be able to go  
19 through those.

20 I'll start off with one of the items in the  
21 rule -- and I don't particularly have the number or  
22 anything. I really don't want to go to the rule because  
23 I don't want to violate the ruling that you had. But  
24 I'll just tell you that there is a stipulation in the  
25 rule where, under this new rule, you'll be required --

1 an operator will be required to submit a C-141 to  
2 different state agencies. In my mind, that's a very  
3 slippery slope to go down. Number one, if you're going  
4 to submit a C-141 to the BLM and one to the State Land  
5 Office and one to whoever, then I'm sure Mr. Boyd will  
6 want a copy of the C-141 sent to him. He's a land  
7 owner, too. So I highly recommend that you strike that  
8 from the record. This agency has never, ever required  
9 an operator to submit any type of information to another  
10 agency. In other words, I don't think the law allows  
11 the OCD to require -- or the OCD to become a proxy for  
12 another agency, and that has happened. So, therefore, I  
13 think that is something you should seriously consider  
14 taking out of the rule.

15                   Now, notwithstanding the fact that, for  
16 example, if the State Land Office says, "We will accept  
17 a C-141 as your requirement for reporting to us," that's  
18 great, because you've got to fill a C-141 out anyway and  
19 you submit it to the agency. And then if the State Land  
20 Office or the BLM will accept the C-141, then that's  
21 good. Then I see no problem with that. But requiring  
22 an operator to submit to other agencies, I don't see  
23 where this would stop. I mean, eventually you're going  
24 to have to involve the Fish & Wildlife Services, the  
25 Corps of Engineers and the Environment Department, and

1 it's just a slippery slope that I think you should  
2 really think about and consider not doing.

3                   Moving on. And I'll just read off some of  
4 the bullet points I have. The rule as written appears  
5 to be slanted for dig-and-haul strategy, while on-site  
6 or in-situ remediation is not mentioned or referenced in  
7 the rule at all. This -- this is emphasized by the  
8 following: The extremely short time frames given for  
9 site remediation, 90 days. There is no way that you can  
10 do any sort of in-situ remediation, on-site remediation  
11 in 90 days. That's just virtually impossible. And so  
12 in my mind, that -- that leads you into the direction of  
13 having to dig and haul.

14                   I can tell you from my personal experience  
15 of working in the districts is that right now, they are  
16 in a dig-and-haul mode. Now, I can't say that for  
17 Brandon's district, District 3, but I can say that for  
18 District 1 and District 2. When you go there, unless  
19 you have a dig-and-haul strategy, you're not going to  
20 get approved. Now, that's just my experience. Okay?

21                   So, therefore, if this rule is intended to  
22 be a dig-and-haul rule, then we all need to face up to  
23 it and say that's what it is; it's a dig-and-haul rule.  
24 If not, then somewhere in the rule we need to clearly  
25 point out that an operator has another choice of some

1 kind. And that needs to be put in the rule, because if  
2 you don't put it in the rule, I can guarantee you that  
3 eventually Jim will probably retire and we'll all move  
4 on, and if it's not in the rule, then it would be very  
5 easy for personnel at the OCD to say, "Well, it's not in  
6 the rule; it's basically a dig-and-haul." So that  
7 bothers me a lot, is that it kind of leans toward being  
8 a dig-and-haul.

9           The other thing is that there are a number  
10 of references to excavation, a required sampling of  
11 excavation that -- areas required backfilling. All of  
12 those have to do with dig and haul. If you look at one  
13 part of the rule, it talks about you have to submit a  
14 bottom-hole sample, and you have to submit a sidewall.  
15 Well, if you're doing in-situ remediation, there is no  
16 sidewall. There may be a vertical delineation, but that  
17 right there in itself would make one possibly believe  
18 that this is a dig-and-haul rule. You dig it up, you go  
19 sample the bottom, you sample the side, and then you  
20 need to put backfill back in.

21           And then the absence of a definition  
22 describing remediation specific to this rule -- now,  
23 there is a -- there is a definition for a remediation  
24 plan in the general rules, but there is no site-specific  
25 definition -- no specific definition for this particular

1 rule. I think we should have a definition of  
2 remediation to basically cover -- or at least explain to  
3 operators that yes, remediation may be dig and haul, may  
4 be partial dig and haul, may be partial backfill, may be  
5 blending, may be electrical pyrolysis or any other of  
6 those options that are available out there that can be  
7 used and approved -- and I put emphasis on approved by  
8 the agency -- where it would not impact fresh water.  
9 Then I see no reason why we should be afraid not to put  
10 that in the rule and just say remediation includes all  
11 of these different options but not limited to those.  
12 And I think that just would clear it up.

13           And then I'd like to point out that -- we  
14 haven't actually talked about this yet, and I'm not sure  
15 if Brad or Brandon is going to talk about it. But the  
16 final reclamation process basically reads, if I read it  
17 correctly, that you have to excavate 4 feet.

18           Well, what if you have a site where you  
19 meet the closure requirements of the rule, but  
20 yet -- let's say you have 1,000 parts per million left  
21 in the top 4 feet, but groundwater is virtually  
22 nonexistent or greater than 150 feet or greater than 100  
23 feet. Okay? I see. In today's -- in today's  
24 sustainable society -- society, I don't think it's  
25 sustainable to go out and dig up a clean portion of

1 someone's ranch or go out and get clean soil --  
2 uncontaminated, clean soil, disturb that area to come  
3 over here and put it in this area, and then -- and then  
4 you're not -- you're not controlled by what you're doing  
5 over in this area at all because you're taking this  
6 clean, uncontaminated soil, dumping it in over here. I  
7 think in today's time, that's not a sustainable process.

8           And so where I'm heading with this is that  
9 nowhere in the rule did it say that you're allowed to  
10 blend, that you're allowed to blend down within the  
11 standards. So that's been a practice for years and  
12 years and years that I know of, that you're allowed to  
13 blend.

14           But I can tell you, when you go to the  
15 district office and you try to tell them you want to  
16 blend, you get a big, fat denied stamp real quick.  
17 That's just my experience. Okay?

18           So, therefore, I think blending is  
19 something that we should really consider in order to  
20 meet the requirements. It's a viable remediation  
21 option. I don't think going out and digging up a new  
22 portion of someone's ranch, taking that -- disturbing  
23 all the grass, taking all that clean top soil out and  
24 moving it over and putting it into a contaminated area,  
25 I don't think that makes sense. I really don't. I

1 think we should focus on recycling, recycling all of our  
2 dirt and kind of become more sustainable in that area.

3 I would like to move on and say that  
4 there's really no mechanism in this rule that allows  
5 small-quantity exemptions from the characterization  
6 criteria that Brad had talked about. Let me give you an  
7 example.

8 There are numerous, numerous leaks and  
9 spills. Whether they're reported, right or wrong, there  
10 are numerous leaks and spills that come in at six  
11 barrels, seven barrels, eight barrels and are picked up  
12 as four barrels, five barrels, and if they're telling  
13 the truth. Then you have a two-barrel spill that you're  
14 going to have to go through this tremendous amount of  
15 work to satisfy the agency with a site map and all of  
16 this. To me that is a tremendous waste of manpower  
17 because you've got bigger fish to fry, believe me.  
18 There -- there are many, many outstanding groundwater  
19 contamination cases, like Mr. Boyd had pointed out, that  
20 that's where your emphasis should be and shouldn't be on  
21 a net two- or three-barrel spill. Those should be  
22 looked at. And I think the agency should take a look at  
23 it, as Commissioner Balch had said. It's a minor spill.  
24 You stamp that "minor," and you file it and you go on  
25 and you move on. I don't see how you're going to have

1 the manpower to handle these.

2 I'll give you an example. We had a case of  
3 a minor spill where I represented an operator where nine  
4 months into this -- it was a 20-barrel spill, minor  
5 spill, produced water. Okay? Groundwater is in excess  
6 of 150 feet. Nine months later, we have not resolved it  
7 because of the stringent characterization that the  
8 district wants. And it's -- it's really a nothing site.  
9 And if you go back to cleaning up the top 4 feet -- take  
10 a standard location 200-by-200 by 4 feet deep. If you  
11 have to go in there and you have to remove that, the  
12 going rate anywhere you go is about \$80.00 a yard. That  
13 includes the yellow iron that comes out there. That  
14 includes all the consulting fees. You're looking at  
15 over a half a million dollars. The small operators  
16 can't handle that.

17 So there's got to be some viable option for  
18 the little guy, okay, that has -- or the big guy or  
19 medium size, that has real small net releases. And we  
20 shouldn't -- and I don't think the agency wants to spend  
21 a tremendous amount of time on these, but I believe the  
22 way they're set up right now is that the district  
23 offices kind of have a set of guidelines, and that's  
24 what they go by. Maybe this rule will help that out.  
25 But right now, there is no mechanism for these real

1 small net releases.

2           So I'm just saying that I think this is  
3 something the Commission should really consider and the  
4 agency consider because I don't think you have the  
5 manpower to spend nine months on a minor spill. I just  
6 don't think the district people have that kind of time.  
7 They just don't. And so I don't think we're doing  
8 justice to the bigger leaks and spills, and we should --  
9 we should have a list of things where you have the major  
10 spills that you prioritize, and then you have all these  
11 minor spills. A lot of the minor spills can be stamped,  
12 and you put your standard disclaimer and on there and be  
13 filed and be done with. Okay? If it ever comes back  
14 for some reason, you've got your disclaimer, and then  
15 the agency can always go back and take a look at these  
16 things if need be.

17           So that's -- that's -- that's the crux of  
18 my testimony really, is that I think you're spending way  
19 too much time on small spills, and you could really  
20 focus on the major leaks and spills.

21           One of the -- one of the new criteria in  
22 the rule is that you can request a hearing, which you  
23 can always request a hearing. That's always been there.  
24 But I can't fathom a number of cases that the agency may  
25 get to go to hearing. Who is going to be the hearing

1 officer? I mean, it's going to take man-hours and  
2 man-hours and man-hours to go some of these hearings.

3           So what I'd like to recommend is that both  
4 the industry and the agency allow some sort of  
5 third-party mitigation. What I mean by that is that --  
6 and I think Jim has done this in the past, I believe,  
7 where you go out and get a third party -- a suitable  
8 third-party person -- and that third-party person would  
9 have to be acceptable by both parties -- and then try to  
10 mitigate some of this back-and-forth that's going on and  
11 tying up all of the agency's manpower. And so if you  
12 could do that -- and then you could write it up where if  
13 either party could not reach some sort of resolution  
14 with this mitigation person, then you could go to a  
15 hearing, or the agency could reject it, say, "No, we  
16 reject that. If you want to go further, you need to go  
17 to hearing." That in my mind would save hundreds and  
18 hundreds of man-hours that you're going to have to  
19 spend, because a lot of these smaller operators, they  
20 just simply aren't going to be able to do what is  
21 requested of this rule.

22           I mean, you look at removing 4 feet and  
23 there's only 1,000 parts per million and the groundwater  
24 is 150 feet. It just doesn't make sense. It's just not  
25 going to make common sense. But right now, there is no

1 leeway in that. You have to submit this  
2 characterization plan where you have a bottom hole,  
3 sidewall, delineation. So I just want you to think  
4 about that.

5           And since I can't ask the agency a direct  
6 question, maybe the Commission would say, "Well, was  
7 this meant to be a dig-and-haul rule with very little  
8 emphasis on in situ?" If they say yes, well, then you  
9 have to make a decision that that's what they want to  
10 do. If they say no, then at least it gets on the record  
11 that companies can do an in-situ remediation, if  
12 approved, of course, and if the site-specific conditions  
13 warrant it.

14           I think unless you make some changes, it's  
15 going to be really hard on a lot of the smaller  
16 operators.

17           So anyway, I appreciate you giving me this  
18 opportunity, and I'll be glad to try to answer any  
19 questions from anybody.

20           Thank you.

21           CHAIRWOMAN RILEY: Mr. Sedwell [phonetic],  
22 are you here?

23           That's all we have on the list for public  
24 comment as of this time.

25           Mr. Herrmann, do you want to continue?

1 MR. HERRMANN: Yes, please. I'd call  
2 Mr. Powell.

3 BRANDON POWELL,  
4 after having been previously sworn under oath,  
5 after having been previously re-called, was  
6 questioned and testified as follows:

7 CONTINUED DIRECT EXAMINATION

8 BY MR. HERRMANN:

9 Q. We left off at the start of 19.15.29.12 NMAC.  
10 Mr. Powell, if you would continue your presentation.

11 A. I'd like to continue, as Keith mentioned, in  
12 19.15.29.12. This is located in NMOGA Exhibit D, as in  
13 dog. So Section 12 will be addressing releases  
14 remediation and closure. The remediation portion of the  
15 rule will address guidelines on how a release should be  
16 cleaned up and expectations of the responsible parties  
17 so they can submit a complete plan on how they propose  
18 to address the remediation of the release.

19 The closure portion of this rule will  
20 address the final sampling and testing required to show  
21 the release has been remediated to Division standards.

22 The sources for several of the standards in  
23 19.15.29.12 originate from 19.15.17, which is the Pit  
24 Rule, commonly referred to as the Pit Rule in 19.15.34,  
25 which is commonly known as the produced water recycling

1 rule. Using previously adopted standards provides  
2 consistency and predictability within the rules. There  
3 are additional provisions within this rule, however,  
4 which allow for additional protections and mitigations  
5 due to the unpredictable nature of the release.

6 The responsible party must remediate all  
7 releases regardless of the volume pursuant to  
8 19.15.29.12A. This language was included to ensure all  
9 releases, even ones below the reportable limits, are  
10 addressed and do not accumulate causing larger issues.

11 As addressed previously, if it's a major or  
12 minor report, we are not requiring any notification.  
13 However, we are requiring that the responsible party  
14 take action for these types of releases.

15 **Q. So is there any provision in the rule currently**  
16 **that explicitly states that?**

17 A. No, there are not.

18 **Q. Anything else you'd like to add on this slide?**

19 A. I don't believe so.

20 **Q. All right. Let's move on to the next slide.**

21 A. So in this slide, I would like to re-address  
22 Table 1 that's contained within the rule, as it will be  
23 used throughout Section 12 for the standards relating to  
24 remediation and closure of the release. I would like to  
25 point out this is the same set of standards currently

1 used in Part 17 for soils left in place below  
2 below-grade tanks, drying pads and bits where the  
3 contents are removed.

4 The same standards for depth to groundwater  
5 of 51 to 100 feet and greater than 100 feet is also used  
6 in the table in Part 34.

7 Using this table provides consistency with  
8 Part 17, Part 34 and as proposed, Part 29.

9 **Q. We had some changes contained in Exhibit D, if**  
10 **you could just intertwine those in your presentation**  
11 **right here.**

12 A. Certainly. It's hard to read on the proposal,  
13 so I would direct the Commission to their slides, as it  
14 may be a little clearer. But in the top left-hand  
15 corner of the table, there has been a change to the  
16 wording at the top. It previously stated "depth to low  
17 bottom of the pit." This has been changed because as a  
18 release is not designed, there would be no designed  
19 bottom. So this has been changed to "depth below  
20 horizontal extent of the release." So what we're  
21 looking for is depth to groundwater from the ground  
22 surface along the horizontal release.

23 The next change that I'd like to point out  
24 is the addition in the constituents from TPH for GRO,  
25 DRO and MRO. As Brad previously stated, this is

1 gasoline range organics, diesel range organics and motor  
2 oil range organics. This clarification was also used in  
3 Part 34 in this table.

4 There were a few typos in the methods as  
5 far as the methods to run the benzene, and that has been  
6 clarified as well.

7 The limits are directly from Part 17 and  
8 Part 34, and those have remained unchanged.

9 **Q. Is there anything else you'd like to add?**

10 A. That's all I have to add.

11 Moving on to slide 35, and slide 35 moves  
12 back to 19.15.29.12B and what's currently marked as 12C  
13 in the most recent exhibit, which is Exhibit D. These  
14 sections are the start of the expectations of the  
15 remediation plan, which essent- -- which is essentially  
16 how the responsible party plans to clean up the release.

17 Section B addresses: The responsible party  
18 must complete a division-approved remediation within 90  
19 days with remediation plan approval unless they seek an  
20 extension or the release gets transferred under 19.15.30  
21 due to groundwater contamination.

22 Section C.(1) addresses what is expected in  
23 the remediation plan. These standardized expectations  
24 inform the responsible party what is required, which  
25 creates plans that are informative, consistent and that

1 can be approved promptly while also reducing debates  
2 with the operator about what is expected.

3 **Q. Brandon, if I can just pause you for a second.**  
4 **When you refer to C.(1), you're referring to the added**  
5 **section in Exhibit D, correct?**

6 A. That is correct. And my slides from here  
7 further will refer to the sections that are referenced  
8 in NMOGA's exhibit.

9 **Q. And there is one change that we didn't address**  
10 **in Section B.**

11 A. Section B, that clarification was to delete --  
12 proposed to be deleted that -- the phrasing that  
13 "endanger public health or the environment." Just for  
14 clarity, that any major or minor release is required to  
15 have a remediation plan.

16 **Q. So you were -- you were on Section C.(1).**

17 A. Okay. Going further into what is -- what  
18 the remediation plan requirements are, and they're  
19 listed here. We want the results from the site  
20 characterization. We want a scaled site map showing the  
21 delineation points. We want the estimated volume of  
22 material to be remediated. We want the remediation  
23 method and the proposed schedule for remediation.

24 **Q. And while you're there, just to address**  
25 **Mr. Price's comment, this is where the Division could**

1 **entertain other remediation methods?**

2 A. That is correct. The Division -- the  
3 responsible party would, in this portion here, provide  
4 what their recommended remediation method is. If that  
5 method is going to exceed the 90-day time frame that's  
6 in this rule, they will need to get specific approval  
7 from the Division on what their proposed time frame is.  
8 That way it's not a never-ending time frame.

9 **Q. Thank you.**

10 **So you were on C.(2) now.**

11 A. Moving to slide 36, which will address C.(2) --  
12 this section of the rules addresses remediations which  
13 occur on active sites, including well pads, tank  
14 batteries. The reason the rule divides active sites  
15 from off-sites is due to the continued use of active  
16 sites, as these are working sites which include traffic  
17 and equipment usage. Due to the nature of these sites,  
18 there are certain remediations and reclamations that are  
19 not feasible compared to a nonactive site. If the rules  
20 were the same, it would provide no benefit and  
21 additional expense.

22 This section also standardizes the  
23 possibility for the operator to receive a deferment on  
24 these types of locations if the remaining soil meets  
25 certain conditions and they receive Division approval.

1                   Speaking of the Division approval, this is  
2 one of the changes in C.(2), is we have requested to add  
3 that "the remediation, restoration and reclamation may  
4 be deferred with division approval." That is clear that  
5 the deferment also requires Division approval.

6                   A couple more notes to add to the  
7 deferment, this section is also intended to consider the  
8 deferment of reme- -- I already went over that. I  
9 apologize.

10                   The remediations will not be deferred  
11 indefinitely. The deferments will not be granted if the  
12 release creates an imminent risk to human health and the  
13 environment or groundwater. Deferments are not intended  
14 to apply to large remediations that may be passed on to  
15 subsequent operators or to the State in the event of an  
16 orphaned well.

17                   Moving back to the exhibit, I would like to  
18 go over a few more of the changes, if you'd like, Keith.

19                   **Q. Yes, please. And I noticed there's one of our**  
20 **changes that did not get picked up in this exhibit.**

21                   A. One of the other changes -- and I believe it  
22 was mentioned in Exhibit 2, I believe.

23                   **Q. Of ours?**

24                   A. Of ours.

25                   **Q. That would Exhibit 3.**

1           A.     Exhibit 3.  I apologize.

2                     In C.(2), we would like to strike the  
3     portion where it states "safety issues."  As  
4     occupational safety is not part of our regulatory scope,  
5     we do not feel that it needs to be -- that safety issues  
6     in this portion need to be addressed.  And I believe we  
7     had consensus with NMOGA.  It was just missed in this  
8     exhibit.

9                     The other changes that are in this area  
10    that we have agreed to are just for clarification and  
11    the movement of the reclamation portions of those  
12    actions into 13 for consistency.

13                    Moving on to slide 37.  In this slide we'll  
14    address 19.15.29C.(3), as proposed in Exhibit D.  This  
15    section addresses remediations which occur off-site.  
16    These are sites which are not included in B.(2) -- or  
17    actually -- I apologize -- in C.(2), or where a release  
18    flows off-site as covered by C.(2).  For example, lands  
19    adjacent to well sites, pipeline leaks in the packed  
20    fields or releases which enter significant watercourses.  
21    These areas will be required to be remediated to Table 1  
22    standards and then moved directly into the restoration  
23    sections of Part 13.

24                    Now we'll move on to slide 38.  This slide  
25    will address 19.15.29.12C.(4) and C.(5) as proposed.

1 Section C.(4) addresses areas with special  
2 considerations and protections. These are the same  
3 protectable areas that are addressed in Part 17 as  
4 setbacks where a temporary pick cannot be located. As  
5 it cannot be foreseen as to whether a release will  
6 occur, our proposal is to remediate the release in these  
7 protectable areas to the most stringent standards of  
8 Table 1, which are the same levels developed for  
9 releases occurring within 50 feet of groundwater.

10 Those setbacks, as on the slide, are rivers  
11 or significant watercourses, lakebeds, sinkholes or  
12 playa lakes, a house, school, hospital or a church, a  
13 private or domestic freshwater well or spring, municipal  
14 boundaries, a subsurface mine, an unstable area or  
15 within 100-year floodplain. Again, these setbacks are  
16 consistent with 19.15.17, and the footage setbacks are  
17 in the rule under now C.(4).

18 **Q. And there was one change. I don't think you**  
19 **mentioned that.**

20 A. Yes. Correct. In the proposed Exhibit D,  
21 there is a change to (e) for the setback. Our version  
22 read "100 feet of a wetland." It was corrected to "300  
23 feet of a wetland" to be consistent with 17.

24 One item also not contained specifically in  
25 this slide that I'd like to address is Section C.(5) on

1 the top of page 5. This section states the Division has  
2 60 days to process the remediation plan. If the plan is  
3 not processed within those 60 days, the plan will be  
4 deemed denied. This timeline on the Division allows for  
5 the plan to be efficiently processed so the responsible  
6 party can move on to the remediation of the release.

7           Moving on to slide 39. This slide will  
8 address 19.15.29.12D, which provides clear expectations  
9 regarding sampling. This section accomplishes three  
10 major items. It allows the Division the opportunity to  
11 witness the sampling, if possible, due to the  
12 notification requirement. It sets a reasonable minimum  
13 standard protocol based on square footage, which can be  
14 easily calculated. This provides protection while also  
15 providing consistency to the operator and to the  
16 Division, and it allows for sampling plans to be  
17 tailored for a specific site if conditions warrant.

18           I'd like to go more into the second item.  
19 The 200-foot setback that's used in D.(1)(b) was set up  
20 as a universal sampling area. Because this was a  
21 uniform sampling area, the square footage used was  
22 conservative and could be applied to multiple types of  
23 releases. This would allow small releases to have clear  
24 sampling plans and provides operators to easily  
25 calculate the area and standard if they choose not to

1 submit a site-specific plan.

2 A couple examples of the footage reference  
3 are if a sidewall was 10 feet deep or 20 feet long, it  
4 would be combined into one five-point composite sample.  
5 Or if a release enters a drainage that is 1 foot wide,  
6 it would cover an area 200 feet long in that drainage  
7 with one five-point sample, which would be a single  
8 point every 40 feet.

9 With that being said, though, Section C  
10 does allow for a site-specific sampling plan if the  
11 conditions warrant, which I will go into more in my  
12 examples coming up.

13 **Q. Just one more change at the top I feel we**  
14 **should note for the record next to "Closure**  
15 **Requirements." Just identify this change up here.**

16 A. On D, as a whole, "The responsible party must  
17 take the following action for any major or minor release  
18 containing liquids," stating that this closure has to  
19 occur for any minor or major release.

20 So we move to my first example. This is a  
21 photo release of a release caused by a reported  
22 ten-barrel release from a corrosion hole in a production  
23 tank causing light hydrocarbons to contaminate the soil.  
24 We have added the dimensions of the hole, which we will  
25 use as part of the example. For the example, we want to

1 focus on the sidewall behind the excavator, which is  
2 located here (indicating), as this is the sidewall we  
3 have the dimensions as a whole.

4           The top linear feet of this sidewall is  
5 57 feet, and the depth is 20 feet. This calculates to  
6 an area of 1,140 square feet for the entire sidewall.  
7 As this was a large area, it was split in half for the  
8 sampling to cover an area approximately 570 square feet.  
9 As 570 square feet greatly exceeds the 200-square-foot  
10 requirements of Section B of the new rule, this sampling  
11 area will fall under Subsection C, and the responsible  
12 party would request a site-specific approval from the  
13 on-site inspector or provide the Division with a  
14 site-specific plan.

15           We approved the sampling on this large of  
16 an area, as the soil was consistent and appeared clean.  
17 As you can see, each 570, roughly, square-foot areas  
18 were gridded off, and then there are five sample points  
19 inside each one of those grids. Those sampling points  
20 were then combined and made into one sample that  
21 represented this whole area inside the grid.

22           **Q. Could you elaborate a little bit more on how an**  
23 **operator would get that approval?**

24           A. That approval can either come from an on-site  
25 inspector, if the operator requests it on-site, or if

1 there is not an on-site inspector on site, they can  
2 request that approval from the Division. Currently,  
3 there is not language in this rule standardizing how  
4 that approval could occur. So the operator could call  
5 the Division and explain what they see. They could  
6 submit to the Division a photo of the sidewall and  
7 impress the sampling plan when they provide the two-day  
8 notice for sampling. There are multiple aspects that I  
9 believe the operator could make that proposal.

10 **Q. But it is stated that the Division could**  
11 **verbally approve that?**

12 A. It's stated, and it's actually encouraged that  
13 the Division can approve a larger sampling area based on  
14 site-specific conditions.

15 We move to the next example. This site was  
16 excavated due to historical contamination that was  
17 discovered on-site from an unknown origin. We are using  
18 this photo to show the applicability of different  
19 portions of the closure requirements and how they can be  
20 used together. The yellow and the green points here and  
21 here (indicating) are approximately 200 square feet,  
22 which would fall under Subsection B. The larger red  
23 points would fall under Subsection C as the larger  
24 sampling area. And it's really hard to see the red  
25 points in the slide. I apologize. But they're located

1 here for the entire bottom. As the entire bottom was  
2 composited into one sample, this would be in Subsection  
3 C as site-specific.

4           The light blue area would fall under the  
5 general requirement of what is now D.(1) as a grab  
6 sample for any wet or discolored area. Again, I  
7 apologize for the slide. It's hard to see. But there  
8 is a dark gray area right in this area (indicating). So  
9 this would use multiple aspects of that closure  
10 requirement sampling.

11           Moving to the next slide, this is also an  
12 excavation of a historic contamination discovered  
13 on-site. The photo shows a single sidewall. The  
14 majority of the sidewall appears clean. However, in the  
15 bottom left corner is a small black area. This area is  
16 a lens of contaminated soil. And, again, it's hard to  
17 see that small lens, but that is a very black area in  
18 the bottom left corner.

19           Under the proposed closure provision of  
20 D.(1), this discolored area would require an individual  
21 grab sample to verify the level of contamination. Due  
22 to the confining soil layers, we have seen small layers  
23 like this that contain either very small amounts of  
24 contamination or highly contaminated soil, which can  
25 greatly extend laterally or horizontally for long

1 distances. If it was solely included in the composite  
2 sample, it may be diluted to the point where no  
3 additional remediation or characterization would occur,  
4 or it could contaminate the composite sample, making the  
5 entire sidewall appear to fail.

6 So if you did your composite sample  
7 including this area, this area, say one here and here  
8 and here, it could make that entire sample fail looking  
9 like the entire wall is contaminated.

10 Depending on the level of contamination,  
11 these types of areas could require additional  
12 characterization and/or remediation.

13 Looking at the final photo sample of the  
14 excavation, this is the same site as the prior slide  
15 only showing a different sidewall. This sidewall was  
16 approximately 50 feet long by 10 feet deep, which  
17 calculates out to 500 square feet. This sidewall is a  
18 great example where it would be feasible for the  
19 sampling area to be considerably larger than the 200  
20 square feet. Due to the consistency of the sidewall,  
21 this would be an area the operator would need to work  
22 with the on-site inspector or submit a specific sampling  
23 plan pursuant to C for a larger area.

24 And, again, I apologize. It's hard to see  
25 in this area, in this photo, but the entire sidewall all

1 appears clean and all appears consistent. So that would  
2 be a greater opportunity for the larger sampling area.

3 **Q. Just because this is one instance we have not**  
4 **reached consensus with NMOGA on our Exhibit D, I'd like**  
5 **to emphasis: What is the language currently proposed by**  
6 **the Oil Conservation Division?**

7 A. The language that's currently proposed is each  
8 composite sample -- this is solely in (b). Each  
9 composite sample must not be representative of more than  
10 200 square feet.

11 **Q. And there is also some language that NMOGA**  
12 **added?**

13 A. NMOGA added "and individual grab samples from  
14 any wet or discolored areas," which I feel would be  
15 reasonable, as it would give a better overview of the  
16 representation of that sidewall or the bottom.

17 There is another point I'd like to make,  
18 something that was in (a) that I didn't address fully,  
19 is the responsible party is required to provide the two  
20 business days' notice prior to the sampling. So at that  
21 point, if they feel like they would like a larger  
22 sampling area, that would be a great time frame for them  
23 to come to the Division with that larger proposal if  
24 they don't believe an on-site inspector is going to make  
25 it to the site.

1           **Q.    So just to clarify, there is a previous**  
2 **reference to a grab sample in paragraph one, correct?**

3           A.    That is correct.  The individual grab samples  
4 should be from either wet or discolored areas.

5           **Q.    So NMOGA added reference to a grab sample.  Is**  
6 **it your understanding that that wet or discolored area**  
7 **would also be included in the composite sample?**

8           A.    Depending on its level, yes, it would be  
9 appropriate to have it included in both areas.  Because  
10 if your sidewall -- using this one as an example, if  
11 your sidewall included most of the area that was wet or  
12 discolored, you wouldn't want to take your sampling  
13 points just at the very top.  You would want to include  
14 them in the sampling protocol so your sample is truly  
15 representative of the whole sidewall.

16           **Q.    But then again back to the language that they**  
17 **would like to strike the 200-foot representative sample,**  
18 **why do you feel that language is important to be**  
19 **included?**

20           A.    I think that language is important as it allows  
21 a third option.  If you eliminate that option, then  
22 everything becomes site-specific, and they have to get  
23 an approved sampling plan for every site.  The reason  
24 why we use the 200 square feet wasn't to limit all  
25 sampling in that area, but it was to give a universal

1 sampling option if the operator wanted to go out and  
2 perform the sampling without receiving a site-specific  
3 plan.

4 Just for example, small spills were  
5 discussed earlier. If you have a small spill of five  
6 barrels, you've recovered four. You've got one soaked  
7 in the ground. You have a small area to clean up. This  
8 would allow the operator to go out and perform that  
9 sampling on that small area with one sample without  
10 getting Division approval for that sampling area  
11 specifically.

12 **Q. Do you have anything else you'd like to add?**

13 **A.** I believe that's all.

14 From here, we can move on to slide 44. Now  
15 we will discuss -- we will discuss Section E, which is  
16 "Closure Reporting." The closure report is how the  
17 responsible party shows the Division how they proceeded  
18 with the remediation plan in addressing the release. At  
19 this point the release should be fully remediated, and  
20 there should be no further work that needs to be  
21 performed in relation to the remediation.

22 In this slide we also show what is required  
23 in that closure report. And the reason why we require  
24 samplings is to give the responsible party guidance on  
25 what it -- so it can be quickly and efficiently

1 processed. It requires a scaled site map and sampling  
2 diagram, photographs of the remediated site prior to  
3 backfill, laboratory analysis of the final sampling and  
4 a narrative of all the remedial activities.

5 **Q. Could you outline how you could get closure by**  
6 **characterization while doing everything that's required**  
7 **in both Rule 11 and Rule 12?**

8 A. Are you referring to sites where the  
9 responsible party would move directly into remediation?

10 **Q. Yes.**

11 A. Okay. So these same requirements in the  
12 closure report requirements -- so if an operator elects  
13 on a small spill or a simpler large spill to move  
14 directly into the remediation section of the rule, these  
15 same items, the scaled site map and the sampling  
16 diagram, photographs of the site prior to backfilling,  
17 the laboratory analysis, all of these would complete the  
18 site characterization for the operator. So instead of  
19 characterizing it in 11, they would move directly to the  
20 remediation and the closure, and then these items would  
21 perform the same characterization that 11 would address.

22 So at the end of the day, the goal is to  
23 ensure that the site is fully addressed, and by moving  
24 directly to remediation and closure, the operators in  
25 that circumstance would do that.

1           **Q.    There are a couple added changes to Section E**  
2 **under NMOGA Exhibit D that I'd just like to address**  
3 **briefly.**

4           A.    So the general one at the top of E is the same  
5 one that we previously addressed.  It's only for major  
6 and minor releases containing liquids.

7                       The second one is in E.(2).  It's been  
8 added:  "If 60 days have elapsed without response from  
9 the division," the closure work will be deemed denied.  
10 This further encourages the Division to move on the  
11 closure report giving final approval.

12           **Q.    Is there anything else you would like to add?**

13           A.    No, there is not.

14                       MR. HERRMANN:  I have no further questions.  
15 I'll open to opposing counsel.

16                                       CROSS-EXAMINATION

17 BY MR. FELDEWERT:

18           **Q.    Mr. Powell, let's look at NMOGA Exhibit D.**  
19 **Let's go to page 5.**

20           A.    Okay.

21           **Q.    And then I want to also put up there, if you**  
22 **would, slide 41.**

23                       So, Mr. Powell, you understand, do you not,  
24 that one of the remaining issues between the Division  
25 and the other members, NMOGA and the technical

1 committee, is this idea that there should be a mandatory  
2 requirement in the rule that your sample cannot be  
3 representative of more than 200 square feet, right?

4 That's an issue we haven't --

5 A. That is an issue that we have. But your  
6 statement that it's mandatory 200 square feet, it's only  
7 in that specific section.

8 Q. Okay. But this rule requires, does it not,  
9 under D.(1)(b), under your proposed language, that the  
10 operator would be required to take a five-point  
11 composite sample of not more than -- representative of  
12 not more than 200 square feet?

13 A. If they follow that provision, yes.

14 Q. And the way it's written here, it would be a  
15 mandatory requirement unless they were able to get the  
16 Division to grant an exception?

17 A. That is correct.

18 Q. Okay. As opposed to NMOGA, which is utilizing  
19 the language that says you've got to do your five-point  
20 composite sampling, and you have to do an individual  
21 grab sample of any wet or discolored soils. Okay?

22 A. (Indicating.)

23 Q. So we understand the difference?

24 A. Yes. I understand the difference.

25 Q. Okay. If I look, for example, then at slide

1 41, this is an example where under your proposed  
2 language, when we look at that wall there, it would be  
3 mandatory to take -- one, two, three, four, five, six,  
4 seven, eight and nine -- ten grab samples from that wall  
5 that we see there, correct?

6 A. It would be ten different sampling points  
7 combining the two samples.

8 Q. Okay. We have to take ten grab samples.  
9 Otherwise, it's --

10 A. Well, a grab sample is typically an individual  
11 sample that's run, but it would be ten separate sampling  
12 points.

13 Q. So my point here is, though, under the -- the  
14 reason there are ten separate sampling points is because  
15 of this 200-square-foot provision?

16 A. That is correct, if they wanted to follow that  
17 provision. This was simply used as an example for the  
18 different rules if used together.

19 Q. And if that wall would continue down further to  
20 the right, you would have another set of five and then  
21 another set of five and then another set of five,  
22 depending how far you had to go, right?

23 A. Unless the operator proposed an alternative,  
24 yes.

25 Q. And this would be one of those circumstances

1 where -- as I think you mentioned, this wall is one of  
2 the circumstance where it's clean --

3 A. Yes.

4 Q. -- right?

5 But despite that circumstance, unless they  
6 were able to get an exception, they would have to do all  
7 these grab samples?

8 A. That is correct, yes.

9 Q. Now, if we look down at the floor here, you  
10 have the normal -- you have the five grab samples --

11 A. The five points, yes.

12 Q. -- in red?

13 And then you have the additional grab  
14 sample in blue that would be one of those wet or  
15 discolored areas?

16 A. Correct.

17 Q. So if you took NMOGA's language and applied it  
18 to your example -- bear with me here -- because this  
19 wall appears clean, you would still have to do five  
20 samples, right?

21 A. Because the bottom appears clean?

22 Q. No, the wall. The wall --

23 A. Yes.

24 Q. You'd have to do five. Okay? And you'd still  
25 have to do five at the bottom, and then you'd have to do

1 a separate individually analyzed sample of the stain  
2 under NMOGA's language?

3 A. That is correct.

4 Q. And you would agree with me that that would fit  
5 this circumstance, right? That would provide --

6 A. Under that circumstance, yes, it would.

7 Q. And if I go to the next example, slide 42 --  
8 now, if I went to NMOGA's example --

9 A. Uh-huh.

10 Q. Okay? Again, I think you said we had a wall  
11 here that appeared clean except for one spot --

12 A. Right.

13 Q. -- which you have circled that dark spot.

14 So under NMOGA's proposed language, the  
15 operator would be allowed to do five spots along that  
16 wall. Just five. They wouldn't have to do five and  
17 then 10 and then 15 or 20. They'd be able to do five,  
18 right?

19 A. Yes.

20 Q. But then they'd have to also take a sample of  
21 that wet spot?

22 A. That's correct.

23 Q. And under this example, that would be  
24 appropriate, correct?

25 A. That would, under this example.

1 Q. All right. Then if I go to your next slide,  
2 43, this is another example now where we have a clean  
3 wall, right?

4 A. That is correct.

5 Q. And under your language, you'd have to do  
6 probably five, ten, maybe 15?

7 A. This one, as I previously discussed, is roughly  
8 50 feet by 10 feet, so under B, it would be split up  
9 into two sampling areas.

10 Q. So have to do five, ten?

11 A. Yes, for two samples.

12 Q. And under NMOGA's proposed language, the rule  
13 would allow this particular circumstance?

14 A. Correct. Under NMOGA's, it would allow it.  
15 And as previously discussed, under ours, we would allow  
16 it as well because of the consistency within the wall.

17 Q. If -- if --

18 A. Correct.

19 Q. -- you were able to get an exception from the  
20 Division?

21 A. Yes.

22 Q. That's the big caveat, right?

23 A. Uh-huh.

24 Q. And you would agree with me, in this  
25 circumstance, slide 43, that five samples would be

1 appropriate given the condition of this wall?

2 A. Certainly.

3 Q. We don't have any stains. We don't have any  
4 indication that five samples wouldn't work?

5 A. That is correct.

6 Q. Now, you work in the northwest?

7 A. That is correct.

8 Q. Do you have any experience in the southeast?

9 A. No, I do not.

10 Q. Do you know how difficult it is to get  
11 inspectors to sites in the southeast?

12 A. No, I do not.

13 Q. Okay. But what you're suggesting is that we  
14 shouldn't have to worry about this mandatory  
15 200-square-foot requirement because perhaps the operator  
16 could get an exception from the Division?

17 A. What I'm saying is the 200 square feet gives a  
18 universal sampling area, because our concern was -- is  
19 if we have to specifically go into a site-specific area,  
20 like (b), as NMOGA proposed, instead of incorporating a  
21 large area, you could -- with this vague of a wording,  
22 you could end up sampling a sidewall with 500 feet long  
23 and 30 feet deep with one sample, which could cause  
24 disagreement between the Division and the sampling -- or  
25 the responsible party because there is no finite area

1 that it could cover.

2 Q. So you're worried about that unusual  
3 circumstance?

4 A. Well, we see those quite often, where you have  
5 long areas. And what we wanted was a universal that the  
6 responsible party could take and immediately address the  
7 sites without getting that site-specific plan or end up  
8 in an argument with the Division, stopping the operator  
9 from getting approval.

10 Q. So in that 500-foot-long sample of the wall,  
11 that would be a lot like --

12 Let's go back to slide 41.

13 So your concern is -- if we have a slide  
14 like 41 and you've got 500 feet of a wall, even if it's  
15 clean, you're concerned that we shouldn't be allowed to  
16 take just five samples of that wall?

17 A. I'm concerned that if the 500 feet was not  
18 clean, that we would only have to take one.

19 Q. Okay. If it wasn't clean, that means we  
20 could -- a spot, right?

21 A. Yes.

22 Q. And under NMOGA's language, you not only would  
23 have to take the five samples, you would also have to  
24 test that spot?

25 A. That is correct.

1 Q. Okay. And isn't it correct, Mr. Powell, if I  
2 look -- even looking at (b), even if we adopted NMOGA's  
3 language and didn't put in this mandatory  
4 200-square-foot requirement for each case, that under  
5 NMOGA's language and this existing language, you'd still  
6 have the last sentence of (b), right?

7 A. That is correct.

8 Q. What does it say?

9 A. "The division may add additional sampling  
10 requirements dependent on the material released and any  
11 risks to human health or the environment."

12 Q. So you have the ability all along to say,  
13 "Well, we've got a long wall here. We think you need  
14 some additional samples other than the five-point  
15 composite sample"?

16 A. But as you previously stated, it would be  
17 dependent on the inspector being out there or that  
18 requirement being available. And the manpower, if we're  
19 at all sites, would have to be there.

20 Q. And that same manpower problem applies to any  
21 exceptions, right?

22 A. That is correct.

23 Q. And with respect to the manpower problem and  
24 your concern, isn't it true that under D, okay, before  
25 you approve the closure report and sign off on it, that

1 the Division is going to get a scaled site and sampling  
2 diagram?

3 A. That is correct.

4 Q. So you're going to see exactly what the  
5 operator did with respect to the sampling before you  
6 sign off on it?

7 A. That's correct.

8 Q. And if you've got any problems with it, you can  
9 say, "We need some additional sampling"?

10 A. But the problem at that point, it's a site that  
11 has been backfilled. This is a site of the clean wall,  
12 but it doesn't preclude the operator from backfilling  
13 the site at that point.

14 Q. So the operator better be pretty confident that  
15 they've done the right sampling?

16 A. Or if -- if there is a disagreement on that  
17 sampling protocol, the operator would have to go back  
18 out and re-excavate.

19 Q. And the other thing you require before you  
20 approve that closure are photographs of the remediated  
21 site prior to backfill, right?

22 A. That is correct.

23 Q. All right.

24 MR. FELDEWERT: That's all the questions I  
25 have.

1 CHAIRWOMAN RILEY: Thank you.

2 Mr. Larson?

3 CROSS-EXAMINATION

4 BY MR. LARSON:

5 Q. Good afternoon, Mr. Powell.

6 A. Good afternoon.

7 Q. I'd direct your attention to NMOGA Exhibit D,  
8 page 4, specifically 19.15.29.12, capital A.

9 A. Capital A? Okay.

10 Q. Is this intended to provide releases that don't  
11 need to be reported?

12 A. Yes, it is.

13 Q. So that would be releases under five barrels?

14 A. That is correct. It applies to all releases to  
15 ensure they don't --

16 Q. And what site characterization requirements  
17 would apply to release of less than five barrels?

18 A. There is no site-characterization requirements.

19 Q. No closure requirements?

20 A. There are no closure requirements either. The  
21 only requirement was as previously discussed, the  
22 initial response that's required by the responsible  
23 party.

24 Q. So you would ask the responsible party to  
25 propose a remediation plan for approval?

1           A.    No, we would not.  We would expect for the  
2 responsible party to properly address these types of  
3 releases.

4           **Q.    No further oversight?**

5           A.    No further oversight.

6                       MR. LARSON:  That's all I have.

7                       Thank you.

8                       CHAIRWOMAN RILEY:  Ms. Callahan?

9                       MS. CALLAHAN:  No questions.

10                      CHAIRWOMAN RILEY:  Commissioners?

11                      Commissioner Balch?

12                                       CROSS-EXAMINATION

13 BY COMMISSIONER BALCH:

14           **Q.    I'll immediately follow that up.  So you have a**  
15 **4.9-barrel spill, you could go out there and throw some**  
16 **dirt on it and walk away?**

17           A.    I would hope --

18           **Q.    That could be your removal?**

19           A.    Right.  But that would be an improper  
20 remediation plan.

21           **Q.    But there is no definition for remediation plan**  
22 **for nonreportable spills?**

23           A.    That is correct.

24           **Q.    Then how can it be a proactive remediation**  
25 **plan?**

1           A.    When we found it -- we would have to find it,  
2           and then we would follow up with the operator and tell  
3           them that it's not being remediated properly.

4           **Q.    But there is no instruction.  How would they**  
5           **know?**

6           A.    That is correct.  They wouldn't.  There should  
7           be some intrinsic knowledge by the responsible party  
8           what's required and what's expected throughout the other  
9           part of the rule, but there would be no explicit  
10          provisions on how to address those types of releases.

11          **Q.    I think that might be a weakness.**

12                               **All right.  Couple of questions.  I'm**  
13          **sensitive to Mr. Price's comments about this rule does**  
14          **seem to be set up for excavations.  So by default,**  
15          **that's dig and haul, right?**

16          A.    Yes.  Excavations would be, as he phrased it,  
17          dig and haul.

18          **Q.    Is that intent of the rule, to really just**  
19          **focus the effort in that direction?**

20          A.    The reason why it appears focused that way is  
21          because in-situ remediations are very hard to prescribe  
22          in a generalized rule.  As they become very  
23          site-specific, once it's characterized, you see how big  
24          of an area, what kind of soils you're looking at, what  
25          kind of reme- -- in-situ remediation techniques would

1 have to be available. And it becomes very  
2 site-prescriptive as to what you can do. That's why in  
3 the remediation plan submittal, part of the submittal is  
4 how they plan on remediating it.

5 And there is also the provision to the 90  
6 days, that the 90 days is standard unless they apply for  
7 Division approval. Because if an operator applies for  
8 an in-situ and they plan on it taking a year, that will  
9 be -- our approval time period would be for that year.  
10 That way, at the end of the year, if it's not done, we  
11 want to know where it's at. And they can apply for  
12 another extension if it's still working. But if that  
13 in-situ remediation didn't work for the first year, it  
14 can be re-evaluated at that point.

15 **Q. What about in practices? Is anybody doing**  
16 **blending or any in situ with microbes or anything like**  
17 **that?**

18 A. We have frowned upon blending because it's  
19 basically dilution. But we do have several sites which  
20 are using in-situ remediation. The things that we've  
21 learned as the Division is putting timelines on those  
22 specific tubing [sic] in situ, that they have reporting  
23 timelines based on what they propose and remediation  
24 timelines so then we can track it, because in the past,  
25 we've had in-situ remediations where the operator

1 proposed it, went out there, installed whatever  
2 equipment, and then never did anything. And then we're  
3 left five years later with the same release.

4 Q. So in 19.15.29.12B, "The responsible party must  
5 complete division-approved remediation for releases  
6 within 90 days of division approval of a remediation  
7 plan...." So kind of right out the gate -- and I think  
8 Mr. Price noticed this -- you're encouraging people to  
9 remediate quickly? Not necessarily --

10 A. Yes.

11 Q. -- the best way, but the fastest way?

12 A. We want them to remediate quickly or have a  
13 very specific plan on how they are going to remediate.

14 Q. So I'm wondering if 90 days is overly  
15 prescriptive. Maybe it ought to say something more like  
16 "within the time frame of the division-approved  
17 remediation plan."

18 A. What the 90 days is -- again, it's a  
19 generalized time frame. If they go out and do  
20 excavation like they will on several small releases, 90  
21 days is plenty of time, because this is from remediation  
22 plan approval --

23 Q. No disagreement, though.

24 A. Ah.

25 Q. But you can dig up a large quantity in a short

1 amount of time and haul it away.

2 A. If it's in situ, it really needs a  
3 site-specific plan. And then that's where the operator  
4 would state, you know, within two years, within a year,  
5 whatever they propose based on the remediation types  
6 that they have.

7 Also to note, the 90 days for this is after  
8 remediation plan approval. So once we get to this  
9 point, they have their 90 days to do their  
10 characterization, and then there is the time period for  
11 approval, and then this is the following 90 days. So  
12 roughly at this point, to get to the end, they're  
13 looking well over 180 days if they follow the full time  
14 periods throughout.

15 Q. They have time to do --

16 A. Correct.

17 Q. And I view most of this rule as not allowing  
18 for other methods, but there is very strong  
19 encouragement for that. And the one part of it that  
20 does read such that you have to have a hole in the  
21 excavation is -- I'm sorry -- looks like D.(1). Yeah,  
22 D.(1). Pretty much that's the remediation which --  
23 that's the closure requirements, so grabbing samples  
24 from the bottom and the side. If you were doing an  
25 in-situ remediation, receiving bacteria from the ground

1 or something, you may not have a hole here. You don't  
2 have to have a hole to meet the closure requirements.  
3 So it's providing a little less flexibility there than  
4 might be warranted.

5 A. And maybe it wasn't clear, but D.(1)(c), the  
6 in situ would follow the alternative sampling plan that  
7 they would submit for site-specific.

8 Q. We have a big problem in the southeast with  
9 truck traffic just moving sand and water around, much  
10 less moving -- conditional dirt.

11 A. Correct.

12 Q. Kind of circumvents the ability to -- to  
13 remediate an outside possible onus. This figure shows a  
14 great example of somebody who likely -- dig that up --  
15 you said this was an oil release?

16 A. This was an oil release. All of these were  
17 hydrocarbon releases in the northwest.

18 Q. Someone could take that big pile of dirt and  
19 set it out a little bit and put some microbes in it and  
20 then put it back in the hole. But at that point, there  
21 wouldn't be a whole lot left to sample. So you'd have  
22 to the sample the dirt -- sample the pit to make sure  
23 you excavate it. Then you're doing differently with the  
24 closure than what is allowed by this.

25 A. And if they wanted to remediate the large area

1 above, then you would probably be incorporating several  
2 rules. 19.15.36 has a provision for small land farms.  
3 So you would have to give a specific remediation plan,  
4 under 12, stating that that's what you're going to do.  
5 You would have to get a permit, under 36, for small land  
6 farm for that on-site remediation.

7 Q. So if you're working in the -- if you're  
8 working in the southeast, you're getting 3.4 of these a  
9 week, you know, not all of them are going to require  
10 a -- of course. And if you have a rule that pretty  
11 clearly encourages one form of remediation, you're  
12 swamped. What are you going to do? Are you going to  
13 spend a lot of time looking at alternative planes?

14 A. Well, the problem, as I understand it -- and,  
15 again, I'm not from the southeast -- with the releases  
16 down there, is most of them are chloride driven. And to  
17 my knowledge, there is not a whole lot of on-site  
18 remediation for chlorides other than simply to push them  
19 down deeper into the ground.

20 Q. You can cap them. You can blend and cap and  
21 things like that, things that are allowed by Rule 17,  
22 for example. I don't know. It sounds like those aren't  
23 being done in practice, but to isolate basically from  
24 the surface, make sure you have enough soil above it  
25 that you can move -- impacting that cover.

1           A.     Right.  But in the blending and capping, again,  
2     that would be hard to prescribe in the rule  
3     specifically, so it would -- it would be more of  
4     site-specific plan depending on what's in the area and  
5     how it's addressed.

6           Q.     29.13.(D)(1).  There is -- let me see if I can  
7     find it.

8                         This is D.(1)(b), actually.  No.  I'm  
9     sorry.  There is a place in here where it says you must  
10    have 4 feet of nonwaste material.

11          A.     That was prior, in B.(3).

12          Q.     B.(3).

13          A.     But that portion has been moved to the  
14    reclamation portion, which is 13, for the soil cover for  
15    the surface.

16          Q.     All right.  I was looking at 12B -- 12D -- no.  
17    It's 13.(D)(1), "The reclamation must contain a minimum  
18    of four feet of non-waste containing, uncontaminated,  
19    earthen material with chloride concentrations less than  
20    600 milligrams per kilogram as analyzed by EPA Method."  
21    So does that pretty much require you in every single  
22    case, no matter what type of remediation you do, to  
23    excavate and replace at least 4 feet?

24          A.     If the contamination on the surface exceeds  
25    that 400 -- or that 600 parts per million chloride, it

1 would require either excavation or movement of that soil  
2 where that originally came from. And Brad may speak to  
3 it further along in 13. But where that originated from  
4 was 19.15.17. That is the footage the Commission at the  
5 time deemed suitable for revegetation, that without that  
6 4 feet of cover less than 600 chlorides, that it was not  
7 suitable for revegetation.

8 **Q. Oh, I remember days of testimony about that.**

9 A. And I didn't directly -- I wasn't part of that  
10 testimony, but I remember that was the reason the  
11 Commission adopted that language.

12 **Q. That's all I have.**

13 **CROSS-EXAMINATION**

14 BY COMMISSIONER MARTIN:

15 **Q. At the risk of further beating this dead horse,**  
16 **would you explain to me one more time your idea -- or**  
17 **the Division's idea of the universal sampling protocol**  
18 **that requires a 200-square-foot limit on composite**  
19 **samples?**

20 A. We identified the 200 square feet. Again, it's  
21 not what we're looking at as solely applicable in all  
22 cases. The 200 square feet is a universal sampling area  
23 that we feel can be applied across the board to any type  
24 of release. Whether it be sidewalls or bottom, those  
25 are usually pretty simple sampling areas, or if a

1 release enters into a drainage.

2           For example, if a release enters into a  
3 drainage that's a foot wide, we would ask for one sample  
4 every 200 feet. So that's one sample point every 40  
5 feet, unless -- of course, if it has any wet or  
6 discolored areas in that that are different, it would  
7 require additional samples. But it would be  
8 prescriptive as far as what we've seen. And we've seen  
9 releases in those types of situations extend for miles.  
10 So this would give a standardized area that would allow  
11 the operator to move directly into sampling.

12           If they didn't -- if they felt that it was  
13 too prescriptive -- and it would be too prescriptive in  
14 some cases -- then the operator could come to the  
15 Division either through a submittal or an on-site  
16 inspector, if one's available, to ask for an  
17 alternative. And we would encourage that.

18           One of the hopes with this rule is a lot of  
19 the ambiguity is going to be taken out, so the  
20 inspectors have more time to go to the field and have  
21 more time to review those specific approvals. Because  
22 one of the issues that is my understanding is going on  
23 is the deliberations between the inspector and the  
24 industry of what's acceptable, what's not acceptable.  
25 This would just give an alternative that says, "If

1 you've got a small spill, this is acceptable. We don't  
2 even have to debate it."

3 Q. I'm not trying to give you a hard time. You  
4 said that "we would encourage" industry. You asked for  
5 exceptions to this particular mandate. I know you're  
6 speaking in a group as OCD would encourage it, but my  
7 concern is something could brought before you and that  
8 view of that will not be viewed -- or will not be  
9 adopted universally throughout all the districts.

10 A. And that was my hope in presenting testimony  
11 and examples of where it would be applicable, that that  
12 could be used in the future. I say we agreed to it. As  
13 the Division as a whole, I worked with the environmental  
14 bureau chief for the standardized and for the larger  
15 areas. And we all agreed that there are areas -- for an  
16 area bigger than 200 feet, substantially bigger, is  
17 approvable, just like the one example where it was 570  
18 feet. That's almost three times the area. And maybe  
19 that needs to be worded slightly different to encourage  
20 that. I'm not sure how to do that.

21 But our fear is if we have a large sidewall  
22 that could have multiple facets, that we don't spend our  
23 time arguing about the sidewall without some kind of  
24 clarification.

25 Q. That's all I have.

CROSS-EXAMINATION

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BY COMMISSIONER BALCH:

Q. So I think that the difference of opinion NMOGA has on this is if you have a 500-foot-by-10-foot sidewall, that would be an awful lot of composite samples, and they're proposing you could adequately sample with less. And you're saying that that would be allowed, but it would require a variance from the Division?

A. It would require a site-specific plan. Yes. And a 500-foot sidewall that's 10 feet deep, that's 5,000 square feet. I would definitely -- if it's all consistent, I would encourage operators to come forward with a site-specific plan in that case. And I say "I" speaking as the Division.

CHAIRWOMAN RILEY: Any other questions?

COMMISSIONER MARTIN: No.

CROSS-EXAMINATION

BY CHAIRWOMAN RILEY:

Q. I just had one. It shows up in a couple of places. So 12(5), and you talk about a plan -- that the Division has 60 days to review a plan. And if it's not -- and if there is no response in that time, it's deemed denied. And you pointed to that as to encourage getting these things done timely so that operators can

1    **move on and do what needs to be done. Would that need**  
2    **approval? I mean, what's the denied?**

3           A.    No. This was discussed at length in Part 17  
4    and Part 34, and the reason why it's deemed approved is  
5    so there is not an automatic approval of something that  
6    could endanger human health or the environment, that  
7    it's deemed denied and then the responsible party has  
8    the option at that point of continuing, working with the  
9    Division or go directly to hearing -- to go to the  
10   hearing examiner and explain that the Division isn't  
11   doing their charge.

12           **Q.    So what you're saying is that it's not just**  
13    **going to sit there forever and forever, and the operator**  
14    **doesn't have an opportunity to go to the next level?**

15           A.    Correct.

16           **Q.    I get the point. I understood it a different**  
17    **way when you were testifying.**

18                    COMMISSIONER BALCH: It seems like the way  
19    that it's written -- the cleanup is going to get done  
20    early whether the closure will be delayed -- cleanup  
21    right away.

22                    CHAIRWOMAN RILEY: But if it's denied -- if  
23    their plan is denied, then what happens, and they've  
24    already done the work?

25                            (The court reporter requested the parties

1 speak louder.)

2 COMMISSIONER BALCH: They would have to do  
3 something additional if their plan is denied after they  
4 already -- remediation.

5 CROSS-EXAMINATION

6 BY COMMISSIONER BALCH:

7 **Q. Is that correct?**

8 A. To go further into that, if you have a complex  
9 site that has multiple facets like an in-situ  
10 remediation, what you would probably want is you would  
11 do your characterization to identify all those facets,  
12 and then you would submit your remediation plan to the  
13 Division. And you'd really want approval of that  
14 remediation plan in that circumstance prior to moving  
15 forward. Because it is very prescriptive and  
16 site-specific, you wouldn't want to take a risk on that  
17 level of remediation.

18 **Q. So beyond the step of sucking up that --**

19 A. Correct, or the immediate dig and haul. This  
20 would be for the more prescriptive sites.

21 CROSS-EXAMINATION

22 BY COMMISSIONER MARTIN:

23 **Q. I have one more question. I'm sorry.**

24 **There's nothing in the rule for alternative**  
25 **remediation plans. I wouldn't characterize this, in my**

1 **opinion, as a dig-and-haul rule, would you?**

2 A. No, I wouldn't. And that's part of the  
3 remediation plan that's submitted to the Division, is  
4 the operators proposing their proposed remediation, is  
5 they can propose basically anything, but if they propose  
6 something that's not going to conform with the other  
7 parts, they may need to include that in the remediation  
8 plan, including timelines, if they're requesting  
9 something different.

10 COMMISSIONER BALCH: Some of the language  
11 does really push it in that direction.

12 COMMISSIONER MARTIN: It does. It's all in  
13 the implementation, just like every well.

14 COMMISSIONER BALCH: And I think it's more  
15 to encourage best practices. So three years from now,  
16 if somebody invests in chloride bacterium -- want to be  
17 able to allow that.

18 THE WITNESS: Yes. We always -- as the  
19 Division, we always want to allow, as future things come  
20 out, the ability to approve those things after review.

21 CHAIRWOMAN RILEY: Mr. Brancard?

22 CROSS-EXAMINATION

23 BY MR. BRANCARD:

24 Q. I just had a question or two about this  
25 provision where you're allowing deferrals of

1 remediation. In your testimony, you said it's not  
2 intended to apply to larger cleanups or facilities that  
3 are passed on to other operators, but I don't see any  
4 such limitations.

5 A. Those limitations are not directly referenced  
6 in the rule, except for the deferral may be granted so  
7 as long as the contamination is fully delineated and  
8 does not bring harm to human health, the environment or  
9 groundwater. Those are the only caveats. The  
10 statements that I made in the slide are it's  
11 quantifiers, that it also has to have Division approval  
12 to be granted. And our intent is the Division is not to  
13 allow those types of situations because we don't want  
14 operators just to go out and carte blanche saying,  
15 "Well, we're going to defer the whole site," and leave  
16 it for someone else.

17 We -- when the rule first provisions  
18 became -- speaking from the knowledge I have, when it  
19 had the safety issues and it had the deferral and we  
20 didn't have that intent defined, we've heard from a  
21 couple of operators anonymously that their intent was,  
22 Well, if this goes through, my company is going to push  
23 me to defer anything that happens on-site, whether it  
24 can be remediated or not.

25 And so we wanted to make sure our intents

1 were clear, that it's not for those types of situations,  
2 that it's really for the contamination -- minor  
3 contamination under tanks or contamination inside  
4 compressor stations where you can't really do any type  
5 of remediation.

6 CHAIRWOMAN RILEY: Can you tell me where  
7 that is here?

8 MR. BRANCARD: Okay. It's 12C.(2).

9 Q. (BY MR. BRANCARD) So it says here, "Deferral  
10 may be granted so long as the contamination is fully  
11 delineated." Does that mean you have to have a  
12 characterization plan done before you can request  
13 deferral?

14 A. Yes, you would. You would have to have that  
15 release fully delineated through your characterization  
16 plan.

17 Q. Does that mean you have to have a remediation  
18 plan approved?

19 A. The deferral would be part of your remediation  
20 plan approval.

21 Q. You're deferring the remediation plan, or you  
22 have to have the remediation plan approved first?

23 A. You would have -- if they wanted to address it  
24 initially when they report it, after they do the  
25 characterization, if they know they want to defer part

1 of it, they could include that in the remediation plan.  
2 If additional contaminants are found on-site, they could  
3 ask subsequently for the deferral, but that material  
4 would need to be fully characterized at that point.

5 CROSS-EXAMINATION

6 BY CHAIRWOMAN RILEY:

7 Q. So how do you track that? If the operator  
8 defers for some period of time and then you have the  
9 sale of the asset to another operator, how do you make  
10 sure that's being dealt with?

11 A. We would have to look at that from the  
12 Division. I could see it maybe possibly going in a  
13 remediation plan. Those are administrative permits that  
14 we currently grant for releases, you know, that might  
15 take long periods of time to remediate.

16 CROSS-EXAMINATION

17 BY COMMISSIONER BALCH:

18 Q. So you have (unintelligible) --

19 A. That's correct.

20 CROSS-EXAMINATION

21 BY MR. BRANCARD:

22 Q. Have you thought about requiring a bond for it?

23 A. We have not addressed that with NMOGA or in a  
24 regional consensus. If you're leaving that in place for  
25 long periods of time, I don't know whether that would be

1 a bad thing if it's a large-scale deferment.

2 Q. I was thinking of the mining scenario, where we  
3 permit mines and then they don't have to reclaim those  
4 mines until they're finished mining, but they have to  
5 post rather substantial bonds to back up a reclamation  
6 plan.

7 A. And that might be a consideration if an  
8 operator wanted to defer a larger area to ensure that it  
9 doesn't get passed down to the next operator, to the  
10 State at the end if it becomes an orphaned well.

11 COMMISSIONER BALCH: So a bonding line,  
12 does that possibly come from the legislature?

13 MR. BRANCARD: I'm not sure.

14 THE WITNESS: I don't know how bonding  
15 works.

16 COMMISSIONER BALCH: Seems like every time  
17 there is bonding, it's being --

18 CHAIRWOMAN RILEY: Do you have any other  
19 questions?

20 MR. BRANCARD: No.

21 CHAIRWOMAN RILEY: Redirect?

22 REDIRECT EXAMINATION

23 BY MR. HERRMANN:

24 Q. If you could go to slide 41 -- actually,  
25 Brandon, I'm not sure if we hit on this, but to address

1     **some of the Commission's comments, on B.(5), if the**  
2     **Division does deny a plan for timeline, is the Division**  
3     **required to provide a reason?**

4           A.     Yes.   The Division is required to provide a  
5     written summary of the deficiency on which the decision  
6     was based.

7           **Q.     Now, is all contamination visually evident?**

8           A.     No, it is not.

9           **Q.     So in this specific circumstance, which is one**  
10    **of the dangers of bringing up specific circumstances,**  
11    **could there have been a reason that the on-site**  
12    **inspector required two separate composite samples for**  
13    **that sidewall?**

14          A.     As you point out, there are times where  
15    contamination is not visible.  In the northwest,  
16    produced water, because we don't have as high of salts,  
17    may not be entirely visible.  Also, fresh condensate  
18    releases, after the wall is exposed for any period of  
19    time, is not visible.  So if this was a condensate  
20    release, a smaller sampling area may be feasible because  
21    you may not be able to see the contamination.

22          **Q.     But that would have to be based on specific**  
23    **knowledge of this site?**

24          A.     That is correct.

25          **Q.     And not to beat this topic to death, but is**

1 **NMOGA proposing any limit to the square footage of what**  
2 **could be a representative sample?**

3 A. Not that I'm aware of, no.

4 **Q. Do you think having a lack of a limit would be**  
5 **problematic, and some operators would try to take**  
6 **advantage of that?**

7 A. Based on our experience, we've had operators  
8 try to take advantage of it currently, and then we get  
9 in long-term discrepancies with the operator causing the  
10 release not to be addressed for long periods of time.

11 **Q. That's all I have.**

12 **CROSS-EXAMINATION**

13 BY COMMISSIONER BALCH:

14 **Q. One more question, Mr. Powell. What's the**  
15 **approximate cost of doing one of these, send these off**  
16 **to Cardinal Labs or something?**

17 A. The cost of the sampling, to my knowledge, is  
18 fairly minimal compared to, say, an excavation. I  
19 believe each sample suite -- and I'm guessing here.  
20 Cardinal may be able to address this better. I would  
21 say \$250 a sample, where an excavation like this, if you  
22 used Wayne's numbers, you're looking at -- if he's  
23 saying 200 -- or \$80 a yard, this is, say, roughly,  
24 2,000 yards, which is considerably more than the  
25 sampling as proposed would cost.

1           **Q. Which means operators are looking for ways to**  
2 **remediate without digging a hole?**

3           A. That's correct.

4                         And we have -- like I said, we've seen  
5 in-situ remediation -- successful, especially dealing  
6 with lighting [sic] hydrocarbons such as condensates.  
7 We have some newer technology at least for the northwest  
8 where they're doing the excavation, then running it  
9 through, basically, conveyor belts and spraying it with  
10 peroxide as an oxidizer, which eliminates the  
11 hydrocarbons, and then putting that soil right directly  
12 back in the excavation so it never leaves the site  
13 itself. So we have encouraged the on-site remediation  
14 and in-situ remediation.

15                                 CROSS-EXAMINATION

16 BY CHAIRWOMAN RILEY:

17           **Q. Is that scenario required --**

18           A. That scenario, because it's an active  
19 remediation, it does not. It's all performed on the  
20 site itself and approved through the remediation plan.

21                                 CROSS-EXAMINATION

22 BY COMMISSIONER BALCH:

23           **Q. So if we have Mr. Feldewert's 500-foot long, 25**  
24 **samples -- 25 composite samples from that entire length,**  
25 **if one of them fails, the additional remediation area**

1 will be to retest that area, or do you retest the entire  
2 area?

3 A. It is just in that area at that point. It  
4 allows the elimination of the areas that you work in.

5 REDIRECT EXAMINATION

6 BY MR. HERRMANN:

7 Q. I have one more question. Just to clarify,  
8 when we're talking about composite sample, it's five  
9 grab points but only one sample?

10 A. That is correct.

11 Q. Thank you.

12 CHAIRWOMAN RILEY: Mr. Feldewert, do you  
13 have any more questions?

14 MR. FELDEWERT: No.

15 CHAIRWOMAN RILEY: Mr. Larson?

16 MR. LARSON: Nothing further.

17 MR. HERRMANN: That concludes Mr. Powell's  
18 testimony. I think we can close the book on him  
19 (laughter).

20 THE WITNESS: Very well.

21 MR. HERRMANN: That sounded a little  
22 morbid.

23 I will just finish up my presentation with  
24 Mr. Bradford on Rule 13 and then Mr. Griswold on Rules  
25 14, 15 and 16.

1 CHAIRWOMAN RILEY: I'd like to see if the  
2 court reporter --

3 (The court reporter requested a break.)

4 (Recess, 3:29 p.m. to 3:41 p.m.)

5 CHAIRWOMAN RILEY: All right.

6 Mr. Herrmann, would you like to continue?

7 MR. HERRMANN: Yes. I'll re-call  
8 Mr. Billings to testify on Rule 13 -- or Part 13,  
9 "Restoration, Reclamation and Re-Vegetation."

10 BRADFORD BILLINGS,  
11 after having been previously sworn under oath, was  
12 re-called, questioned and testified as follows:

13 DIRECT EXAMINATION

14 BY MR. HERRMANN:

15 **Q. Bradford, if we could just break that down.**

16 **What is restoration?**

17 A. Well, basically, the restoration and  
18 reclamation and revegetation is summarily -- not  
19 summarily. But in summary, you've finished your  
20 remediation. Nominally you've substantially complied  
21 with all necessary parts of that for the release. This  
22 has to do with what you do with the soil of the areas  
23 post that, what happens next. Like, you demolish the  
24 house. You tore it down and got rid of it. Now you've  
25 got to build the bottom floor again, put it up and put

1 your utilities inside, that kind of thing as a quick  
2 analogy.

3           And the responsible party is responsible to  
4 "substantially restore the impacted surface areas to the  
5 condition that existed prior to the release" as well as  
6 possible. "Restoration of the site must include the  
7 replacement of removed material and must be replaced to  
8 the near original relative positions and contoured to  
9 achieve erosion control, long-term stability and  
10 preservation of surface water flow patterns." That  
11 basically means what it looked like before you did your  
12 remediation, torn up, washed out, flushed out, whatever  
13 you've done remediationwise, then how do you put it back  
14 together so it approaches what it was before that event.

15           "Areas reasonably needed for production  
16 operations and/or [sic] for subsequent drilling  
17 operations...." However, they don't necessarily need to  
18 go to that level, but they need to "be compacted,  
19 covered and [sic] paved" -- "or paved or otherwise  
20 stabilized and maintained in such a way as to minimize  
21 dust and erosion...." If the pad got messed up a little  
22 bit, you don't have to recontour it to pre-existing  
23 conditions that was there before the well was drilled,  
24 say, but you have to rebuild your pad so it's erosion,  
25 leak controlled, basically, and level and safe to drive

1 on.

2 "The responsible party must construct the  
3 soil cover to the site's existing grade and prevent  
4 ponding of water and erosion of the cover material." We  
5 don't want you to have to put stuff out there and have  
6 the first rain wash it away. We don't want stuff to be  
7 in a ponding scenario that continues to capture water.  
8 As other people have brought up, there may be some  
9 contamination that we consider safe at that time, but if  
10 we keep putting a head on top of it with those rain  
11 events, that may be an issue.

12 In "reclamation of areas no longer in use,  
13 the responsible party shall reclaim all areas disturbed  
14 by the remediation and closure, except areas reasonably  
15 needed for production operations or for subsequent  
16 drilling operations, as early and as nearly as practical  
17 to their original condition or their final land use and  
18 maintain those areas to control dust and minimize  
19 erosion to the extent practical. All right?

20 There is an add-in here that came from 12  
21 that was moved to 13 and with agreement that it was more  
22 logically put in this section than the other, which  
23 says: "The reclamation must contain a minimum of four  
24 feet of non-waste containing, uncontaminated, earthen  
25 material with chloride concentrations less than 600

1 milligrams per kilogram as analyzed by EPA Method 300.0,  
2 or other test methods approved by the division. The  
3 soil cover must include a top layer, which is either the  
4 background thickness of topsoil or one foot of suitable  
5 material to establish vegetation at the site, whichever  
6 is greater." This is derived from Part 17 almost  
7 verbatim, I think, pretty close.

8 **Q. Just to clarify, Mr. Hixson's -- or Mr. Price's**  
9 **comment that -- we're not requiring 4 feet of material**  
10 **to be removed in every instance?**

11 A. No, absolutely not. That's an up-to kind of  
12 scenario. If you go down 2 feet in your 600 or  
13 background, you don't have to move all 4 feet. It would  
14 just be the 2 feet in question at the top that you would  
15 need to deal with.

16 Shall I continue?

17 **Q. Yes, please.**

18 A. Okay. There is also an add-in here that  
19 becomes (2) that wasn't in the previous, but is in  
20 Exhibit D here, as in dog, NMOGA. "(2) The responsible  
21 party must reseed disturbed area in the first favorable  
22 growing season following closure of the site." And that  
23 speaks for itself to me, but I'll answer questions if  
24 you have them.

25 "(3) The division will consider reclamation

1 of all disturbed areas complete when uniform vegetative  
2 cover has been established that reflects a life-form  
3 ratio of plus or minus 50 percent of pre-disturbance  
4 levels and a total percent plant cover of at least  
5 seventy percent of pre-disturbance levels, excluding  
6 noxious weeds." So we got rid of the African rue  
7 finally, so to speak. For those of you in the field,  
8 you know what I'm talking about.

9 But anyway, this is an attempt to say, You  
10 don't have to create a Garden of Eden or a verdant  
11 environment or bring it back to exact levels of what may  
12 have existed before, but that it's been reseeded and  
13 it's in the process of regrowing itself vegetatively.

14 And there is an additional add-on, number  
15 (4), which was (3), "for any major or minor release  
16 containing liquids, the responsible party must notify  
17 the division when reclamation and revegetation are  
18 complete."

19 "The surface restoration, reclamation and  
20 re-vegetation obligations imposed by federal, state  
21 agencies, or tribes on lands managed or owned by those  
22 agencies supersede these provisions and govern the  
23 obligations of any responsible party subject to those  
24 provisions, provided that the other requirements provide  
25 equal or better protection of fresh water, human health

1 and the environment."

2 I'll go into that deeper if you want, but I  
3 think it's --

4 **Q. Probably. Just to -- there is one more change**  
5 **in that section. Was that just to clarify the language?**

6 A. Oh, I'm sorry. Yes. You're correct. In  
7 E. there, "The surface restoration, reclamation and  
8 re-vegetation obligations imposed by federal or state  
9 agencies, or tribes on lands managed...." The "or" was  
10 the statement change, the first "or."

11 **Q. Okay.**

12 MR. HERRMANN: I have no further questions  
13 of this witness.

14 MR. FELDEWERT: I have no questions.

15 CROSS-EXAMINATION

16 BY MR. LARSON:

17 **Q. Mr. Billings, looking at 13D.(1) --**

18 A. Yes, sir.

19 **Q. -- I believe you just testified that -- you**  
20 **would not put 4 feet of fresh soil in?**

21 A. No. As long as what is left and remaining  
22 there has and contains immunity, which is kind of what I  
23 was saying, you don't have to take out 4 feet and bring  
24 in -- if it isn't dirty necessarily, maybe 2 foot at the  
25 top, you've got to move off. If the bottom 2 feet is at

1 600 or less, it's relative. There is no reason to move  
2 that. You just need to bring in that other 2 feet.

3 **Q. Seems to me that's mandatory language. Is**  
4 **there something that could be done, maybe, to blend**  
5 **those two sentences together and take out that "must**  
6 **contain a minimum of four feet"?**

7 A. I suspect there is, sir. But I'm just, you  
8 know -- I mean, I read it in at a sports [sic] test, and  
9 then not knowing what I was reading, I can see how that  
10 would be a connotation of dissent. So when I look at  
11 it, it's contained. It doesn't mean you have to bring  
12 in. But that's parsing up the thing. And if the  
13 Commission wants to refine that, that's fine with me, as  
14 long as you understand my intent.

15 **Q. That's a different interpretation, I think, if**  
16 **you're saying you must have 4 feet. I assume that's**  
17 **some kind of growing zone?**

18 A. Yes, sir.

19 **Q. Maybe it could just be worded differently to**  
20 **make it clear that we're talking about a root zone as**  
21 **opposed to bringing in a minimum of 4 feet of soil.**

22 A. Does the Commission understand the intent of  
23 the 4 feet, that there could be some sort of verbiage  
24 changes to make it more clear?

25 **Q. That's all I have.**

**CROSS-EXAMINATION**

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BY COMMISSIONER BALCH:

**Q. For the most part, 29.13 is taken more or less directly out of Rule 17?**

A. I don't know about the whole of it. I can't answer that question directly.

**Q. That is certainly the intent of Rule 17, is not that you have to replace it, but what was there was substantial enough for plants to establish roots to grow.**

A. Oh. Yeah. I would agree. I understand the intent. I just don't remember the verbiage lock, stock and barrel, but the intent is the same. It's to establish the root zone, that there is no reason to seed it if you don't give it some dirt to grow in, so to speak.

MR. LARSON: That's all I have.

CHAIRWOMAN RILEY: Ms. Callahan, do you have any anything?

MS. CALLAHAN: No questions.

COMMISSIONER BALCH: That was my only question.

COMMISSIONER MARTIN: I don't have anything.

CHAIRWOMAN RILEY: Mr. Brancard, are you --

1 MR. BRANCARD: I'm fine. Thank you.

2 CHAIRWOMAN RILEY: I don't have any  
3 questions.

4 Mr. Herrmann.

5 MR. HERRMANN: No redirect.

6 You are dismissed.

7 THE WITNESS: I never move until I'm told.

8 MR. HERRMANN: I have one last witness,  
9 Mr. Jim Griswold. We will conclude his testimony on  
10 variance, enforcement and transitional provisions.

11 MR. GRISWOLD: Hello, again.

12 JIM GRISWOLD,

13 after having been previously sworn under oath, was  
14 questioned and testified as follows:

15 DIRECT EXAMINATION

16 BY MR. HERRMANN:

17 Q. So, Mr. Griswold, please walk us through 29.14  
18 NMAC, what we proposed for variance procedures.

19 A. Certainly.

20 Currently, under Part 29, under the  
21 existing -- there are no explicit provisions for any  
22 variances. So in the proposed rule, we asked that  
23 variances be filed with the OCD district office, the  
24 appropriate one, and include an explanation as to why  
25 the variance is needed and how that variance would be

1 equally protective to the environment.

2 I want to make it clear that no variance  
3 can be implemented until OCD approves it. The terms  
4 would be that if a responsible party has submitted a  
5 variance request, the Division has 60 days to approve or  
6 deny it. If we do deny such a variance request, a  
7 reason for that denial must be provided to the  
8 responsible party.

9 As we've seen elsewhere, we've got language  
10 here that if no action is taken within 60 days by the  
11 Division, that that request is deemed denied. And then  
12 that would provide the responsible party an opportunity  
13 thereafter to request a hearing on that denial. We're  
14 stipulating in the proposed regulation now that if such  
15 a request is made for a hearing on a denied variance,  
16 that they notify the surface owner as well.

17 **Q. Is there anything else you'd like to add on the**  
18 **variance procedure?**

19 A. No. That's it in a nutshell.

20 **Q. Let's move on to enforcement.**

21 A. Certainly.

22 It's similar to the variance provision we  
23 just talked about in Subsection 14. We've added -- or  
24 we have proposed to add Subsection 15, as the current  
25 rule contains no specific enforcement requirements. The

1 proposed rule specifically requires compliance by the  
2 responsible party, and if the possible party is out of  
3 compliance, there could either be an adjudicatory  
4 hearing, or a compliance order can be negotiated between  
5 the Division and the responsible party. The rule also,  
6 as proposed, would -- I think the amended language is  
7 actually granting the Division the authority to deny any  
8 permit, including a drilling permit, if a responsible  
9 party is out of compliance. I think the language as  
10 originally drafted didn't make that clear, and I think  
11 it's important that it be any permit, as we perhaps have  
12 a disproportionate number of releases associated with  
13 operators who actually don't drill wells. They acquire  
14 wells, and they operate them. And so simply restricting  
15 it to an APD would not be adequate.

16 **Q. And this language -- this -- this doesn't**  
17 **exceed the remedies already authorized by -- I believe**  
18 **it's Rule 510 under the enforcement provisions?**

19 A. I do not believe so, but I'm obviously not an  
20 attorney. But the intent here is not to exceed those.  
21 You have to specify it within this portion of the rule.

22 **Q. And since the Commission has shown some**  
23 **interest in this topic, I'd just like to -- I'd like you**  
24 **to emphasize some of the time frames that are already in**  
25 **this rule and how they could be enforced if an operator,**

1    **for example, doesn't report a release and then does not**  
2    **characterize or remediate as required by those**  
3    **timelines.**

4           A.    Well, under the current rule, the only time  
5    provision is on the release notification.  There are no  
6    specific limitations on any of the portion of the  
7    general corrective action process.

8                    It is anticipated that minor violations of  
9    the rule would be treated appropriately and -- well,  
10   basically, that any violation of Part 29 would be  
11   taken -- would be considered by staff here at the OCD  
12   technical, and our legal assistance as well, in terms of  
13   defining when something really needs to -- an  
14   enforcement action needs to be taken, if that's where  
15   you're going.

16           **Q.    Well, for example, hypothetically, the Oil**  
17    **Conservation Division discovers a release.  Would that**  
18    **be a violation of this rule?**

19           A.    No, not simply for the Division to come and  
20    process the release because the operator didn't know it  
21    was there.

22           **Q.    But if they did not report it within 15 days?**

23           A.    After we made them aware of it, they did not  
24    submit a subsequent 141, yes, that would be a violation  
25    of the rule, as it is now.

1           **Q.    Yes.**

2                           **And then another automatic deadline would**  
3 **be triggered with the characterization deadline?**

4           A.    Correct.

5           **Q.    So hypothetically, this operator -- this**  
6 **operator's continued inaction would prompt increased**  
7 **attention from the Environment Bureau?**

8           A.    Yes, it would.  And that's probably a good  
9 example, Mr. Herrmann.  Whether a release was identified  
10 and discovered by the Division or the operator, if they  
11 went ahead and filed a timely C-141, but then -- so now  
12 we've got them in there.  We've got a time clock  
13 started, and we do not want see a characterization  
14 report at that time, then we can start to intervene  
15 early, quickly, because the ultimate goal is to get the  
16 problem addressed.

17           **Q.    And that power is not currently -- is not**  
18 **currently --**

19           A.    Well, it's not well defined.

20           **Q.    I believe that's all I have to add there, if**  
21 **there is nothing else you would like to add.**

22           A.    Not on the enforcement section, no.

23           **Q.    And finally, "Transitional Provisions."**

24           A.    So here we are at our final slide, Subpart 16,  
25 the transitional provisions.  Responsible parties that

1 currently have approved plans for corrective action --  
2 and corrective action includes investigation and  
3 cleanup -- as of the effective date of the proposed  
4 rule, do not need to submit a revised plan. We've  
5 already agreed to something. We'll honor that  
6 agreement.

7                   However, those without approved plans, but  
8 nonetheless might have ongoing corrective actions as of  
9 the effective date, must submit a revised plan within 90  
10 days of the rule coming into effect.

11                   And then finally, any new releases  
12 discovered after the proposed rules' effective date  
13 should comply with the new rule.

14                   MR. HERRMANN: I have no further questions.  
15 I'll pass for cross.

16                   MR. FELDEWERT: No questions.

17                   CHAIRWOMAN RILEY: Mr. Larson?

18                   MR. LARSON: No question.

19                   MS. CALLAHAN: I have a question.

20                   CHAIRWOMAN RILEY: Okay.

21                                   CROSS-EXAMINATION

22 BY MS. CALLAHAN:

23                   **Q. I am wondering if you could tell us if a party**  
24 **such a lab were interested in using a test method other**  
25 **than what you set out as an approved method, would they**

1 **be subject to this variance rule? Would they have to**  
2 **submit the request under this rule?**

3 A. The laboratory would not. The responsible  
4 party would. That's who we regulate.

5 **Q. So you still have to go through the variance**  
6 **process to get another method approved; is that right?**

7 A. It could be contained within either -- well,  
8 the characterization report. I think it would be a  
9 little late at that point, but if the responsible party  
10 or the consultant is desiring an alternative method, we  
11 would hope they would approach the Division as soon as  
12 possible directly as seeking such a variance.

13 **Q. Okay. But they still have to go through this**  
14 **process?**

15 A. Correct.

16 **Q. Okay. Each time they wanted to use a different**  
17 **method?**

18 A. Perhaps no.

19 And we've done -- done this in the past.  
20 The rule -- the oil and gas regulations are replete with  
21 references for analyzing total petroleum hydrocarbons by  
22 Method 418.1. That's the EPA-approved method. There is  
23 also this phrase that you'll see for other  
24 Division-approved method.

25 And over time, 418.1 has proven itself to

1 not be a very effective method, but the rules haven't  
2 caught up with it. It's also true in Method 300 for  
3 chlorides. And in both those instances, the Division  
4 issued broad notification that -- in the instance of  
5 418.1, that the Division will accept Method 8015 as long  
6 as it's run in a certain way, what we call extended  
7 range, so it's equivalent TPH.

8           Also -- and I actually felt and -- because  
9 I wasn't aware that such a prior notice had come out  
10 from the Division before I actually started here, was  
11 that the Division also accepts Standard Method 4500 as a  
12 replacement for Method 300. So when one of those broad  
13 general statements is made by the Division, we don't  
14 expect parties to have to come in and ask for a  
15 variance.

16           **Q. Okay. And how is that communicated to the**  
17 **people making the decision to allow a different method?**

18           A. Well, those -- those statements or approvals of  
19 alternative methods by the Division are typically posted  
20 on our Web site. And it is incumbent upon the Division  
21 and its employees to understand those so that when they  
22 do come up in the field, they already know this has been  
23 pre-approved by the Division, and it's handled  
24 immediately at that time.

25           **Q. Okay. Thank you.**

1 CHAIRWOMAN RILEY: Dr. Balch?

2 CROSS-EXAMINATION

3 BY COMMISSIONER BALCH:

4 Q. So you're talking about the asterisk in Table  
5 1, star, "or other test methods approved by the  
6 Division"?

7 A. Correct.

8 Q. So there might be something approved by the  
9 Division that's off of this table?

10 A. Yes.

11 Q. And that would be probably part of the  
12 remediation plan, that OCD personnel would say, "Use  
13 this method in this way"?

14 A. It should. And, actually, Cardinal is going  
15 to, I guess, probably provide the Commission testimony  
16 about certain methods, and I've kind of encouraged that.

17 I'm desirous to get some of these outdated  
18 methods updated and alternatives included into the rule,  
19 because of, as I stated, personal experience. Sometimes  
20 institutional memory is lost and it gets codified into  
21 the regulation. To keep up and when we have  
22 opportunities to update our ranks, let's do it.

23 Q. Most of it's in the rule, what's up  
24 for interpretation, though --

25 A. Correct.

1 Q. -- future versions of the OCD?

2 A. Right.

3 Q. So enforcement, I'm really getting excited  
4 about that part of it.

5 A. Not anymore (laughter).

6 Q. I now realize it's pretty much the same thing  
7 as it's always has been. The only thing is to deny  
8 future permits to people who have violations.

9 A. Since the Marbob decision of 2008, the Division  
10 can't administratively levy a fine on its own. There is  
11 a process that needs to be followed that can be quite  
12 cumbersome and lengthy, and that doesn't do well for  
13 environmental situations.

14 Q. So you really don't have much of a stake here?

15 A. No. But we just want to make sure that we're  
16 able to effectively wield whatever stick we do have  
17 within 29, while still offering the distinct possibility  
18 for negotiations between the responsible party and the  
19 Division for compliance agreements and such.

20 Q. Some of these excavations can become quite  
21 expensive?

22 A. Yes, they can.

23 Q. About one or two years ago, one went to half a  
24 million dollars for remediation, and it's not done yet.

25 A. Correct.

1                   And my guess is, Commissioner, on those  
2 ones that I saw a lot when I first came here, which kind  
3 of floored me -- because a lot of times responsible  
4 parties will initiate remediation without doing  
5 characterization. And going in, they think they know  
6 what their release looks like, and they don't. And a  
7 lot of people have backhoes, front-end loaders and dump  
8 trucks, pretty simple technology. They get in there and  
9 start excavating and find out that it was a bigger  
10 problem than they thought. Now they've expended a  
11 significant amount of money, you can't go any further,  
12 and I end up with an open hole in a pasture that was not  
13 fully remediated and the operator's broke.

14           **Q. That's a very real concern.**

15           A. Yes, it is.

16           **Q. So this kind of goes back to the good operator**  
17 **versus the bad operator. Most operators --**

18           A. Well, I say good and bad. Just one with more  
19 financial muscularity, perhaps, than the other one.

20           **Q. Well, that's certainly one side of it. But I**  
21 **was talking about operators that are -- they're trying**  
22 **to do the right thing and operators that maybe are**  
23 **trying to cut a corner or two, especially when they're**  
24 **faced with a potential of a relatively small pick [sic],**  
25 **20-foot-by-10-feet-deep-by-one-foot, \$150,000.**

1 A. Correct.

2 Q. That's a potential amount of money. So there  
3 may be a little bit of motivation to say, "Well, this is  
4 an unreportable spill; it's under five barrels."

5 A. I can't put honesty in the rule, I don't think,  
6 Commissioner.

7 Q. I know you can't do that, but that's where  
8 enforcement comes in.

9 A. Yes.

10 Q. What do you do after the fact.

11 A. If we know we've been lied to?

12 Q. Well, I mean, the problem is this: You see a  
13 one-meter-square stain on the surface, and you don't  
14 know what is below that --

15 A. Correct.

16 Q. -- or what went into that small area. So sure,  
17 it might look like a small stain. It could be five  
18 gallons. It could also be 500 barrels.

19 A. Indicative of something much larger.

20 Q. So people can be -- I don't like to ascribe  
21 dishonesty to people, but I'm really concerned about the  
22 part of the rule where the responsibility of that party  
23 is to determine a release of a certain size occurred, if  
24 damages were done, et cetera. And without any real  
25 enforcement, there is not a lot of penalty for

1 **underexaggerating.**

2 A. Well, under these proposed provisions, that  
3 opportunity for punishment, if that's the word you want  
4 to use, does exist.

5 **Q. It exists.**

6 A. Properly completed C-141.

7 **Q. Right.**

8 **But in the case of an unreported spill,**  
9 **something you don't have to report, the operator just**  
10 **finds it, cleans it up, and that's it. There is no**  
11 **record of any --**

12 A. Correct. That's appropriate on small --

13 **Q. If it really is a small release, I probably**  
14 **would agree.**

15 A. Well, again, we're relying on honesty. If the  
16 operator gets in there and starts looking at it and  
17 suddenly thinks, you know what, based on what I'm  
18 seeing, this is probably a reportable release. He goes  
19 ahead and reports it.

20 **Q. I'm really curious. In your database, how many**  
21 **spills are reported between four and five barrels and**  
22 **between 24 and 25 barrels?**

23 A. Well, I shouldn't have any reported releases  
24 less than five barrels because they're not reportable,  
25 but I do. They're there.

1           **Q.    Okay.**

2           A.    And a lot of -- not a lot of times, but in  
3           several instances, the operators caught themselves.  
4           They've said, "Can I withdraw that reporting?" And the  
5           policy that I've adopted as bureau chief -- maybe it's  
6           incorrect -- is, "No, you submitted a release to me.  
7           It's now a part of the public record, so address it and  
8           get it closed."

9           **Q.    Do you have to receive a C-141 if three barrels**  
10          **or four barrels were recovered?**

11          A.    Well, that was a bit of a different instance.  
12          I mean, it was obvious, unless there was a second  
13          release that remained unreported.

14          **Q.    Very shallow oil reservoir?**

15          A.    Well, I -- I dipped it to see for sure how deep  
16          it was. And even if I was off factor of 50 percent,  
17          which I don't think I was, it was still maybe a few  
18          inches. So it still would have been reportable.

19          **Q.    So really this requires self-policing by the**  
20          **responsible party?**

21          A.    As I've often said, Speeding is only a crime if  
22          you get caught.

23          **Q.    So how is that really different than what is**  
24          **going on right now?**

25          A.    How is the proposed rule different?

1           **Q.    Yes.  I mean, we're repealing and replacing in**  
2 **this new rule.  So under the existing rule, are you**  
3 **adding additional protections, or are you subtracting**  
4 **protections, or are you putting more responsibility on**  
5 **one side than the other than previously was in place?**

6           A.   Well, I think more than anything else, the  
7 intent of this rule is to -- is to codify the  
8 regulation, which should be standard environmental  
9 practice.

10          **Q.    Uh-huh.  Best management practices.**

11          A.   Yeah.  And to have -- I mean, the intent wasn't  
12 to end up in enforcements.  It's to give industry and  
13 the Division a firmer footing than this existing  
14 statement of "Division-approved plan," which also  
15 probably inadvertently requires this level of review,  
16 work plans instead of reports, that add to the  
17 Division's workload unnecessarily and delay the cleanup  
18 on the responsible party's part when they want to  
19 proceed.  And so we think that the new rule allows the  
20 responsible party to go ahead.

21                   And, in essence, many times it could be the  
22 case that the Division only has a discussion with that  
23 operator, a conversation with that operator on two  
24 occasions, when they report the release and when they  
25 think they're done.

1           **Q.    So let me go to your slide six. That's way**  
2 **back. These are the "Deficiencies with Current Rule."**  
3 **I think we're pretty much at the last bullet, "No**  
4 **explicit provisions for variances or enforcement," such**  
5 **as enforcement --**

6           A.    Well, there are also, if I may, Commissioner,  
7 additional points in the proposal where an enforcement  
8 could be taken, because currently now --

9           **Q.    The current language is "must" or "shall."**

10          A.    And so under the current rule, under my  
11 interpretation, I've only got an opportunity to cite  
12 enforcement if a reporting deadline is missed, a  
13 notification deadline is missed on the release itself,  
14 and that's kind of it. The approved plan part, I guess,  
15 would imply -- and that's part of the problem -- that  
16 some plan be submitted, but it doesn't say when; it  
17 doesn't say what it should have. It doesn't spell these  
18 things out.

19          **Q.    Well, I think we need to put in a deadline for**  
20 **cleanup, which is, basically, you start right away.**

21          A.    Uh-huh.

22          **Q.    And then you have a plan. You execute it**  
23 **within -- whether or not 90 days is appropriate or not,**  
24 **at least you have a deadline.**

25                           **There are now standards tied to Rules 17**

1 and 34 or standards for this oil contamination to get  
2 back to. I think you hit that already.

3 "No guidance is provided by the rule to the  
4 responsible party or to the Environmental Bureau as to  
5 what should be included in a corrective action plan."

6 A. Correct.

7 Q. The rule deficiency is for these unreported  
8 spills. There is no guidance for what they should do to  
9 remediate a spill.

10 A. Well, the guidance is very simple. The cleanup  
11 isn't. The responsible party -- well, I guess you can  
12 say unreported. You mean it just happened to not be  
13 unreported, or it didn't rise to the level of a minor  
14 release even?

15 Q. It didn't rise to the level of a minor  
16 release --

17 A. You start to clean it up.

18 Q. -- but now there is a lot of latitude in what  
19 we can do with that. There is no description of what  
20 you should do in that case.

21 A. Well, not in terms of the -- of the  
22 characterization and remediation part of it. But those  
23 initial responses -- if you come across a release early  
24 on, then that's a reportable volume. It's in the  
25 regulations now, "set out the source of the release."

1 If you've got a leaky valve, you need to fix it.

2 **Q. Absolutely.**

3 A. I don't care what volume has leaked yet. You  
4 don't have to wait for five barrels to fix it. And I  
5 can tell you to fix it.

6 **Q. Right.**

7 A. And you need to get some site security. You  
8 need to contain the release, those kind of things.  
9 Those are volume independent.

10 **Q. So fortunately you're showing me an example**  
11 **where they're taking pictures of water on the ground**  
12 **that should have met all those requirements and cows**  
13 **wandering around -- on the ground 20 days later, things**  
14 **like that.**

15 A. And though they're bad practice, under the  
16 current rule, they're not in violation of any rule.

17 **Q. Really? Bad practice --**

18 A. Well, not obviously. I guess somebody could  
19 probably wind the tail, but it takes that winding.

20 **Q. Would the Division be able to provide a**  
21 **checklist of what do you do in the case of a**  
22 **less-than-five-barrel spill? Five-barrel net spill,**  
23 **right? So you may spill 20 and clean up 16, and then**  
24 **you have a four-barrel spill?**

25 A. Well, but the rule is not written about net

1 release. It's not written that way.

2 Q. Okay. So it was a little bit unclear at times,  
3 the testimony. So it could be either way on that?

4 A. Well, in terms of -- any place where a volume  
5 is cited, it's released volume --

6 Q. So it's a gross --

7 A. -- not net volume.

8 It's gross, yeah.

9 Q. Okay.

10 A. Uh-huh.

11 Q. So less than five -- if somebody has a  
12 less-than-five-barrel gross spill, right now there is  
13 nothing under the current rule and I think nothing under  
14 the present rule that requires them to do anything?

15 A. Well, under I think it's 12A, it says you must  
16 clean it up past the requirement.

17 Q. There is no way to tell if they did?

18 A. No.

19 Q. Absolutely none?

20 A. It should not have fallen on my radar.

21 But if we're out there and we see a release  
22 on the ground, and we agree [sic] with the operator that  
23 it looks like a de minimis release, he doesn't need to  
24 report it. Under 12A, you need to clean it up.

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CROSS-EXAMINATION

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BY CHAIRWOMAN RILEY:

Q. Could we add a definition that is "unreportable spill," which would be anything that is not minor or a major spill?

A. Well, I think -- yes, you could. Obviously, you can do what you want. The word that I think is operative in that portion is "all."

COMMISSIONER BALCH: Well, "all spills shall be remediated," but there is no guidance.

CHAIRWOMAN RILEY: But it's not clear --

THE WITNESS: There is no guidance.

CHAIRWOMAN RILEY: -- what happens with those that are not being reported.

THE WITNESS: And I think I spoke earlier about how I -- variance uses guidance and that it's to -- I've been accused of rewriting rules, using guidance to do rulemaking without going through the rulemaking process.

Q. (BY CHAIRWOMAN RILEY) But just to identify that there are spills that are not -- that could happen but don't fall into those two categories of minor and major.

A. Right.

Q. Those would be unreportable, but they still exist.

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CROSS-EXAMINATION

BY COMMISSIONER BALCH:

Q. And they're supposed to be cleaned up under the rule, but there is absolutely nothing -- there is no way to know if the spilling has occurred.

A. Correct. Well, there is a way. We inspect the site at times, which is part of OCD's mission or operation.

Q. But if you're an operator out there and you have a two-barrel oil spill and you siphon up a barrel and put it back in your tank, and then you go find some caliche and spread it over the barrel --

A. It is what it is.

Q. -- that's remediated, right?

A. You're not going to get me to say that (laughter).

Q. But if the inspector goes to the site, they're not going to --

A. They would -- well, even large spills, there are times when there's been a lot of caliche on the ground in some areas. When I see significant amounts of fresh caliche on an oil well pad, I stop and take a look around.

Q. So I think my -- my thought was that if you had

1 a case like that, it was discovered after the fact,  
2 which is the only way it would be discoverable, is that  
3 there be some enforcement ability. It doesn't seem like  
4 there is very much enforcement ability with the OCD as  
5 it is and most --

6 A. Well, I could see us coming across such an  
7 instance which was perhaps hidden from us. And at that  
8 point that we discover it --

9 Q. What do you do?

10 A. -- and now we've initiated the process under  
11 the rule.

12 Q. So in that case, even if they thought it was  
13 less than five barrels, you might say, "Well, you need  
14 to file a C-141, and you need characterize it," et  
15 cetera.

16 A. Uh-huh. And it becomes, I think, implicit, and  
17 maybe the Commission may want to make it explicit.  
18 There is a caveat in here for releases greater than 200  
19 barrels or an unknown volume. And you saw it in one of  
20 the examples I showed you. When someone files a C-141  
21 and we see, "I released ten barrels," what are you  
22 basing that on? Back that up. And so the Division -- I  
23 think it's a fair question for the Division to ask.

24 Q. How to address --

25 A. "How did you come up with that?"

1           **Q.    It's still a less-than-five-barrel estimated**  
2 **spill?**

3           A.    Again, it was on my radar.  It's a real tough  
4 one.  If I don't know about it, I don't know about it,  
5 knowns, unknowns and knowns, unknowns.

6                    It wasn't something we discussed as part of  
7 the work group, but in thinking about it since that  
8 time -- since that time, I think perhaps it's a critical  
9 parameter.  Don't just give me a number.  Give me where  
10 the number came from.

11                   COMMISSIONER BALCH:  If I'm operating a  
12 bunch of stripper wells out there and a six-barrel spill  
13 is going to cost me \$150,000 and a four-barrel spill is  
14 going to cost me nothing, I can imagine which way I  
15 might lean my estimation.

16                   COMMISSIONER MARTIN:  I don't think you can  
17 believe that report.  I mean --

18                   COMMISSIONER BALCH:  Make everything  
19 reportable, which is --

20                   CHAIRWOMAN RILEY:  It becomes --

21                   COMMISSIONER BALCH:  Very cumbersome.

22                   CHAIRWOMAN RILEY:  -- very cumbersome, and  
23 it's a big problem for the agency as it is now.

24                   COMMISSIONER MARTIN:  It's like putting the  
25 method of estimated size of this bill and -- global

1 idea.

2 COMMISSIONER BALCH: I guess the real stick  
3 is possible future civil action if they damage  
4 somebody's surface by not reporting the spill.

5 CHAIRWOMAN RILEY: Which is always an  
6 option. I mean --

7 COMMISSIONER BALCH: It's always there.

8 CHAIRWOMAN RILEY: The agency has the  
9 ability to issue a violation and, you know, take it  
10 through due course and go all the way through -- you  
11 know, take it to the attorney zone, fight.

12 COMMISSIONER BALCH: That is the --

13 CHAIRWOMAN RILEY: Yeah. And that is the  
14 enforcement go out to district court and get penalties  
15 assessed.

16 THE WITNESS: While that's still, I would  
17 think, potentially a tough row to hoe, the replacement  
18 as proposed makes it at least somewhat easier for us to  
19 say, "Okay, we can turn and point at that portion of the  
20 regulation," and say, "Here's where violations occur."  
21 Whereas, it's very difficult under the current rule  
22 because there is so little there.

23 CHAIRWOMAN RILEY: To me the places where  
24 we have the ability to have some control, like you said,  
25 not issuing an APD and not issuing -- go in, do a

1 recompletion, or even we can -- it's not revoke. It's  
2 cancel the C-104, which is authorization to transport,  
3 for failure -- I know we do that -- for failure to file  
4 the C-102. So there are some places where we can  
5 garnish some -- you know, a little bit of control over  
6 that. But fining is not one of them. It's a very  
7 difficult place to go.

8 COMMISSIONER BALCH: Yeah. I mean, I kind  
9 of agree with that. That's a --

10 COMMISSIONER MARTIN: Taking away the C-104  
11 is not included in this.

12 CHAIRWOMAN RILEY: No, it's not, so that's  
13 why I mentioned it.

14 THE WITNESS: Well, and I don't want to  
15 speak for industry as a whole, but there have been  
16 numerous instances in my ten years as bureau chief where  
17 operators have approached the Division about getting  
18 things reconciled, because they just don't want  
19 noncompliance out there. It's not good.

20 COMMISSIONER BALCH: No, it's not.

21 THE WITNESS: If they're anticipating a  
22 sale or they have to report to their shareholders or  
23 whatever, it is -- even if there is not a violation. If  
24 there is a violation, it's not necessarily a good thing.

25 CHAIRWOMAN RILEY: I still think on a small

1 spill, the better route is that we're going to have to  
2 rely on the operators to be self-reporting, because I  
3 don't see that we have the capability of going out and  
4 dealing with the responsibilities.

5 CROSS-EXAMINATION

6 BY COMMISSIONER BALCH:

7 Q. So kind of in general, how often does a  
8 particular site in the southeast get somebody from the  
9 OCD visiting it?

10 A. Almost turn to the director -- if it came to a  
11 straight-up environmental inspection, only if the  
12 release has occurred and been reported. We just have so  
13 few staff in that regard.

14 Q. You might never go to a well -- particular  
15 well? You may never visit it, since --

16 A. Right, whereas one of our oil and gas  
17 inspectors may come across and whatever frequency  
18 they're operating at. But even if we had a fixed,  
19 stable number of folks doing those inspection, the  
20 number of wells is increasing now. So --

21 Q. Thanks a lot.

22 CROSS-EXAMINATION

23 BY MR. BRANCARD:

24 Q. Okay. So two things to follow up on what was  
25 just asked: So in 12A, which is your catchall

1 requirement for all releases to be alleviated --

2 A. Okay.

3 Q. -- is the intent that all releases get  
4 remediated to the standards and in Table 1?

5 A. Yes.

6 Q. Okay. So could the Commission simply add that  
7 so that we actually have a standard for remediation for  
8 all the releases?

9 COMMISSIONER BALCH: I think the concept of  
10 a -- of not reportable or not need to be reported is  
11 it's not going to cause a major environmental problem,  
12 period, if it's neglected. Now, of course, that's not  
13 necessarily true. And you're relying on the operator to  
14 make that determination, of the size of the spill and  
15 whether it's damaging. So you could require that, but I  
16 would almost think it would be more of an OCD policy  
17 rather than rule, where they would just have a  
18 checklist: Hey, if you have a spill that's smaller than  
19 this, do this.

20 THE WITNESS: Well -- excuse me. If I was  
21 hearing Mr. Brancard's question correctly was that say I  
22 have one of these small releases, and I don't know about  
23 it. Okay? I'm the responsible party, and I clean it  
24 up. And so for whatever reason, I do take a soil  
25 sample, what I think -- I've dug out 6 inches, a foot,

1 whatever it is -- it's not very big -- and I send it off  
2 to the lab, and I get the numbers back. And I go look  
3 at Table 1 and I say, "Huh. Well, is my chloride level  
4 adequate given my depth to water? Is my TPA level  
5 adequate? Is my benzene level adequate?"

6 Is that the question you were asking, to  
7 apply the Table 1 standards here even on those  
8 nonreportable?

9 Q. (BY MR. BRANCARD) Well, the concern raised is  
10 that there is no -- there are no standards -- when you  
11 say you remediate the release, there is no standard for  
12 how you remediate the release. So as somebody said,  
13 just throwing a bunch of caliche on top of it is  
14 somebody's idea of remediation.

15 A. They would be mistaken.

16 Q. But you have nothing --

17 COMMISSIONER BALCH: There's nothing, so it  
18 would be perfectly justifiable.

19 MR. BRANCARD: Right.

20 Q. (BY MR. BRANCARD) That's why I'm saying should  
21 Table 1 apply to all releases?

22 A. And that's why I answered yes. I mean, if it's  
23 good enough for the big ones, it's good enough for the  
24 little ones, too.

25 Q. So my -- my -- let me get back to what you just

1 testified about, Mr. Griswold, that on enforcement here,  
2 the items you list in 15C --

3 I mean, first of all, under 15A, you say,  
4 "The division may take enforcement action against any  
5 responsible party," right?

6 A. Uh-huh.

7 Q. And then in C, you say, "The division may deny  
8 any application or permit." So is C in addition to A?

9 A. Oh, boy.

10 Q. In other words, we already have an enforcement  
11 proceeding in the rule, under Rule 5, and it already  
12 lists a whole series of remedies, as the Chair pointed  
13 out. You can take authority to transport, you can force  
14 somebody to shut in a well in addition to these  
15 requirements here, but you have to go through a formal  
16 enforcement proceeding to get to that result. Right?  
17 You have to file a case against them. You have to file  
18 a hearing to get to that result.

19 But C seems to indicate that you can make  
20 these denials without having to go through a formal  
21 enforcement proceeding. Am I reading that correctly?

22 MR. HERRMANN: Are you asking me?

23 MR. BRANCARD: Well, he's the witness.

24 MR. HERRMANN: Sorry.

25 THE WITNESS: But I want him to answer

1 (laughter).

2 It is not the Division's intent to make  
3 this an extraordinary process.

4 Q. (BY MR. BRANCARD) So I guess, then, I'm sort of  
5 wondering what the point of C is. Why don't we leave A  
6 in place?

7 A. Clarity. Clarity. Because when we do that  
8 kind of stuff, I've got to go find an attorney for an  
9 interpretation. It's clear; it's easier for the  
10 Division and the operators to know in this case what the  
11 consequences might be.

12 Q. The consequences are listed in 5.10. If you  
13 violate a permit, if you violate any provision of a  
14 rule, we take an enforcement proceeding under 5.10, and  
15 it lists all possible remedies that the Division can  
16 seek against an operator who has violated a rule.

17 A. If it's general counsel's position that item C  
18 is -- that authority is already given to the Division  
19 and clear to the operator that those consequences could  
20 occur and, therefore, C is unnecessary language, I'm  
21 willing to concede to general counsel's position. But  
22 it would ultimately be up to the Commission as to  
23 whether or not they agree or not.

24 COMMISSIONER MARTIN: I like keeping the  
25 language in there, but if you want to change it, you

1 need to point to the language you're talking about.

2 MR. HERRMANN: If I may offer some redirect  
3 to clarify this point?

4 COMMISSIONER MARTIN: Go ahead.

5 REDIRECT EXAMINATION

6 BY MR. HERRMANN:

7 Q. Mr. Griswold, what is the -- referring to NMOGA  
8 Exhibit D, Section 29.15C, after the struck-out language  
9 in the application, could you read that?

10 A. Well, can I read it as proposed and modified,  
11 basically?

12 Q. What I'm suggesting is the language after all  
13 the modifications.

14 A. "If the responsible party is not in compliance  
15 with a court order, agreed compliance order or  
16 administrative compliance order arising from 19.15.29  
17 NMAC."

18 Q. So this is already after the Division has  
19 brought some sort of formal enforcement action, agreed,  
20 administrative or in district court, correct?

21 A. Correct.

22 Q. So the ability to cancel any application or  
23 permit, including but not limited to those specific  
24 permits listed, is after an operator has, in the most  
25 likely situation, agreed to or been ordered by the

1 Division to perform corrective action and has not been  
2 able to, and there is no requirement for hearing on  
3 that, correct?

4 A. Correct.

5 CROSS-EXAMINATION

6 BY CHAIRWOMAN RILEY:

7 Q. But I still think it might be cleaner to go and  
8 just reference back to the compliance proceedings and  
9 say that those same proceedings apply in this scenario.  
10 Then it's not duplicative, and the operator is not  
11 having to flip back and forth between two different  
12 portions of the rules to figure out what could happen --

13 A. And I wouldn't disagree with that, Madam Chair.  
14 But I can tell you, in many instances that have been  
15 relayed to me by my district staff where a responsible  
16 party is in a mood, so to speak, comes in the office and  
17 says, "Tell me how" -- "Why can you make me do this?"  
18 And if they're not as well versed in the entirety -- the  
19 full breadth of the oil and gas regulations, they're  
20 stumped. And so that duplicitousness (laughter) --  
21 while it might be repetitious, I don't necessarily see  
22 it as being harmful.

23 COMMISSIONER BALCH: Well, I'd rather it be  
24 repetitious than have to repeat it verbally.

25 CHAIRWOMAN RILEY: Yeah. Exactly.

1                   COMMISSIONER BALCH: Whereas, right here,  
2     it has the same exact language.

3                   THE WITNESS: But that would be the  
4     Commission's decision regardless of my opinion.

5                   CHAIRWOMAN RILEY: I think it's cleaner to  
6     refer back, personally.

7                   Okay. Where are we? Whose turn is it to  
8     talk?

9                   MR. HERRMANN: I might have some redirect,  
10    if the Commission is done with their questions.

11                  CHAIRWOMAN RILEY: Thank you.

12                                   REDIRECT EXAMINATION

13    BY MR. HERRMANN:

14                  **Q. Jim, have you tried to put timelines and**  
15    **approvals of remediation and delineation plans?**

16                  A. Yes, we did.

17                  **Q. And how did that go?**

18                  A. It happened about two years ago, issued, in  
19    consultation with then Director Catanach, and started  
20    putting -- when we got a 141 in, we would send it back  
21    to the responsible party, piece of paper, and it was a  
22    standard form that said: We received your C-141; we  
23    have assigned you a case number, and we expect to see a  
24    characterization report by date certain. And we put the  
25    date in there. And we wanted to see these kind of

1 things. And the overall response from industry was that  
2 that wasn't good, and it's kind of what prompted us to  
3 go down -- establish a work group and --

4 **Q. And just one last question: Were Exhibits --**  
5 **OCD Exhibits 1 through 3 prepared by you or under your**  
6 **direction?**

7 A. Yes, they were.

8 MR. HERRMANN: At this time I would move to  
9 admit those exhibits to the record.

10 MR. FELDEWERT: No objection.

11 MR. LARSON: No objection.

12 MS. CALLAHAN: No objection.

13 CHAIRWOMAN RILEY: All right. Exhibits 1  
14 through 3 offered by NMOCD will be admitted into the  
15 record.

16 (NMOCD Exhibit Numbers 1 through 3 are  
17 offered and admitted into evidence.)

18 MR. HERRMANN: Thank you.

19 That concludes our presentation today.

20 CHAIRWOMAN RILEY: All right. Thank you.

21 So our next part is going to be NMOGA. You  
22 guys should probably visit about the length of your  
23 testimony. Do you want to start this afternoon? Do we  
24 want to go in a different order?

25 We do still have also another party, and I

1 don't know how long they're going to take.

2 MR. FELDEWERT: Well, ours is probably  
3 going to take a couple of hours. I don't know how long  
4 the other parties' testimony would take. Certainly we  
5 can do whatever you think. I am prepared to move  
6 forward.

7 CHAIRWOMAN RILEY: Okay.  
8 Cardinal Laboratory?

9 MS. CALLAHAN: We estimate about an hour.  
10 We have two witnesses.

11 COMMISSIONER BALCH: On direct, right, not  
12 counting cross?

13 MR. FELDEWERT: Yes. I have two witnesses,  
14 so maybe an hour and 45 minutes for the first, maybe  
15 half an hour for the next. I mean, I think I can  
16 shorten mine, but that would be asking me to guess.  
17 That would be my guess.

18 CHAIRWOMAN RILEY: All right. Well, I'm  
19 open to staying later, but --

20 COMMISSIONER BALCH: We can start now and  
21 go another hour. I'm sensitive to everyone getting  
22 home.

23 (Discussion off the record.)

24 CHAIRWOMAN RILEY: This is a clean place to  
25 break. We'll wait until tomorrow and start with NMOGA

1 in the morning.

2 MR. FELDEWERT: That would be fine. I do  
3 want to make some comments.

4 CHAIRWOMAN RILEY: Okay.

5 OPENING STATEMENT

6 MR. FELDEWERT: As I sit here -- I guess  
7 this is more of an opening statement, for lack of a  
8 better word, where we pick it up before we present our  
9 witnesses tomorrow.

10 There has been a lot of talk about small  
11 releases and the fact that they're unreportable. Okay?  
12 Now, we've also talked today about the fact that that  
13 has always been the case, that the committee got  
14 together and, with all the history involved here,  
15 determined that that was still appropriate, to have a  
16 level that is unreportable, okay, because of the volume  
17 that's involved. And clearly that has proven to be  
18 protective. Otherwise, there would be evidence brought  
19 here today seeking a change, and that has not happened,  
20 okay, number one.

21 But what they did in this rule -- and I  
22 hope it's clear, but I'm concerned it's not -- is that  
23 they have not just left it as unreportable. Unlike the  
24 current rule, they have imposed requirements that you  
25 must do regardless of volume. Okay? 29.10, as

1 applicable, regardless of the volume, and you must take  
2 the following immediate actions by rule. I've got to  
3 eliminate the source, I've got to contain it, and I've  
4 got to get rid of the free liquids and remove the  
5 proppant, by rule. Okay? That is reconfirmed in the  
6 first sentence of 29.11, "After the responsible party  
7 has removed all free liquids and recoverable products,"  
8 again saying, despite the volume, you have to do that.

9           But then 29.11 says you don't have to go  
10 through all this other extensive characterization, site  
11 maps, depth to groundwater, et cetera unless you've got  
12 a major or minor release category. Okay?

13           29.12A, "The responsible party must  
14 remediate all releases regardless of volume." Now, if  
15 somebody comes to me and asks me, "What does that mean,"  
16 I say, "Let's go take a look at 29.10 and 29.11; it  
17 tells you exactly what it means." Okay? You've got to  
18 remove the product. You can't just cover it up, and you  
19 can't just walk away. You have to remove it, by rule.

20           Then if they come to me and say, "Well,  
21 what if I don't want to do this?" I'm one of the bad  
22 actors that just don't want to do it. I would say, "You  
23 can make your own choice, but" -- and this is what I do  
24 not want to get lost here. There are certain  
25 enforcement mechanisms by regulation. There are also

1 certain enforcement regulations by statute that counsel  
2 is aware of, and I'm talking about 70-2-28, which talks  
3 about injunctions; 70-2-29, 30 and 31, particularly 31  
4 which talks about fines for each violation. Now, yes,  
5 you have to have certain conditions. You have to go to  
6 district court, file an application in district to get  
7 an injunction, or you have to file an application in  
8 district court to impose a fine and show what the heck  
9 happened out there.

10 But if I'm an operator -- if I'm a bad  
11 operator in New Mexico and I am required by rule to do  
12 everything in 29.10 and 29.11, and if you're concerned  
13 that you've got people out there that aren't going to do  
14 it, then I submit to you that there is plenty of  
15 enforcement mechanisms that exist to force someone to do  
16 it. And if you find out after the fact that they didn't  
17 do what they were supposed to, they're still subject to  
18 the enforcement mechanism.

19 So I would suggest to you that if you're  
20 concerned about unreported volumes, it should be  
21 alleviated, because under this rule, there are more  
22 requirements for unreported volumes than there has ever  
23 been, and, number two, there is no evidence that  
24 unreported volumes have caused a problem. They still  
25 remain and everybody believes that they still remain

1 unreported. The volumes are not such they have become  
2 an issue. That's my suggestion.

3 CHAIRWOMAN RILEY: And I'm following what  
4 you're saying except on 29.10. Where it does talk about  
5 volumes?

6 COMMISSIONER BALCH: I think we need a  
7 definition of release. And 29.10 should be where 29.8  
8 is now, and 8 should be renumbered 9, and 9 should be  
9 renumbered 10.

10 CHAIRWOMAN RILEY: Whoa. Slow down.

11 (Laughter.)

12 MR. FELDEWERT: 29.10, "Site Stabilization.  
13 After containment, the responsible party must recover  
14 any free liquids and recoverable product that can be  
15 physically removed from the surface within the  
16 containment area."

17 COMMISSIONER BALCH: Which is perfect. I  
18 just think that that needs to occur, and then there  
19 needs to be a D in that section that says, "Determine  
20 the volume of the release." Then you go into what is  
21 now 8 and what is now 9, depending on if it's reportable  
22 or not. You've already remediated it to a large extent  
23 in any case at that point. If you've got a spill, you  
24 fix it. Then you determine how big it is. If it's big  
25 enough, then you report it.

1 MR. FELDEWERT: Then you go to the other  
2 provisions.

3 COMMISSIONER BALCH: Then you do everything  
4 else.

5 MR. FELDEWERT: I'm not the king, but that  
6 make sense to me.

7 COMMISSIONER BALCH: There's not really a  
8 definition of kind of a generic release, which you would  
9 need for that, unless there's one already somewhere in  
10 the statute.

11 CHAIRWOMAN RILEY: Or, as we talked about  
12 earlier, you could have a definition of anything that  
13 didn't qualify for major or minor, and then you've  
14 covered all the releases.

15 MR. BRANCARD: Release is defined.

16 COMMISSIONER BALCH: That's the definition.

17 MR. BRANCARD: "Release means breaks,  
18 leaks, spills, releases, fires or blowouts involving  
19 oil, produced water, condensate, drilling fluids,  
20 completion fluids or other chemical or contaminant or  
21 mixture thereof, including oilfield waste and gases to  
22 the environment."

23 MR. FELDEWERT: You're under the general  
24 definitions?

25 MR. BRANCARD: Yes.

1                   CHAIRWOMAN RILEY: Any other comments for  
2 this evening?

3                   All right. I say we break for the evening.  
4 Everybody go vote and be back here at 9:00 in the  
5 morning.

6                   (Recess, 4:48 p.m.)

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1 STATE OF NEW MEXICO  
2 COUNTY OF BERNALILLO

3

4 CERTIFICATE OF COURT REPORTER

5 I, MARY C. HANKINS, Certified Court  
6 Reporter, New Mexico Certified Court Reporter No. 20,  
7 and Registered Professional Reporter, do hereby certify  
8 that I reported the foregoing proceedings in  
9 stenographic shorthand and that the foregoing pages are  
10 a true and correct transcript of those proceedings that  
11 were reduced to printed form by me to the best of my  
12 ability.

13 I FURTHER CERTIFY that the Reporter's  
14 Record of the proceedings truly and accurately reflects  
15 the exhibits, if any, offered by the respective parties.

16 I FURTHER CERTIFY that I am neither  
17 employed by nor related to any of the parties or  
18 attorneys in this case and that I have no interest in  
19 the final disposition of this case.

20 DATED THIS 11th day of July 2018.

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23 MARY C. HANKINS, CCR, RPR  
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