

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 PURPOSES OF CONSIDERING:

CASE NO. 15959

APPLICATION OF THE NEW MEXICO OIL
CONSERVATION DIVISION TO REPEAL AND
REPLACE RULE 19.15.29 NMAC, STATEWIDE.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

COMMISSIONER HEARING

JUNE 6, 2018

VOLUME 2 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, 120 South St.
Francis Drive, Porter Hall, Room 102, Santa Fe, New
Mexico.

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1 (Note: In session at 9:00)

2 CHAIRWOMAN RILEY: Good morning,
3 everybody. I know we're in Day 2 of this hearing,
4 but I believe we are at NMOGA's presentation now, so
5 Mr. Feldewert, if you would like to go forward.

6 MR. FELDEWERT: Certainly. We will call
7 our first witness. I don't recall whether they were
8 sworn yesterday or not.

9 CHAIRWOMAN RILEY: They were not. In
10 fact, if you would like, if both witnesses are here,
11 we can swear both in at once and save some time.

12 (Note: All witnesses sworn.)

13 JAMES MCDANIEL
14 after having been first duly sworn under oath,
15 was questioned and testified as follows:

16 MR. FELDEWERT: Madam Chair, Commission,
17 we will be using the NMOGA Exhibit D as in dog, and
18 then we will also be at times referring to what was
19 previously submitted as NMOGA Exhibit B as in boy.
20 It's going to be a challenge to keep those straight
21 but that's what we will be referring to during the
22 testimony.

23 DIRECT EXAMINATION

24 BY MR. FELDEWERT

25 **Q. Will you please state your name and**

1 **identify by whom are you employed and tell us your**
2 **occupation?**

3 A. Yeah. My name is James McDaniel. I'm
4 with Enduring Resources and I'm the HSE supervisor.

5 **Q. HSE stands for?**

6 A. Health, safety and environmental.

7 **Q. And how long have you been a HSE**
8 **supervisor for Enduring Resources?**

9 A. For Enduring I've been the HSE supervisor
10 since January of 2018, but prior to that I was the
11 EH and S supervisor for XTO Energy from 2010 to
12 2018, and then prior to that I was a project manager
13 with Envirotech from 2008 to 2010.

14 **Q. Now, you were saying you were with XTO in**
15 **what capacity?**

16 A. I was an EH and S manager, environmental
17 health and safety manager. Supervisor, I should
18 say.

19 **Q. And then what did you do with Envirotech?**

20 A. I was a project manager and it was
21 overseeing spill cleanups, emergency response,
22 sampling, groundwater sampling, a whole bunch of
23 different remediation projects.

24 **Q. Now, that was with Envirotech as the EHS**
25 **supervisor. For XTO you had the same basic**

1 **capacity, dealing with remediation?**

2 A. Yes. At XTO it was regulatory compliance,
3 groundwater sampling, soil sampling, remediation,
4 project management for environmental cleanups and
5 things like that.

6 **Q. Did you continue that type of work in your**
7 **employment currently with Enduring?**

8 A. Yes.

9 **Q. Did you participate in the work group that**
10 **resulted in this proposed rule?**

11 A. Yes.

12 **Q. What do you intend to address here with**
13 **the Commission today?**

14 A. We're going to go over some of the changes
15 that we have put in in Exhibit D and we're going to
16 go over some of the goals of the committee and
17 whether or not we met those objectives.

18 **Q. Have you previously testified before this**
19 **body?**

20 A. No.

21 **Q. What's your educational background?**

22 A. My educational background? I have a
23 bachelor's of science from Ohio State University in
24 2005 in natural resources majoring in environmental
25 sciences and a associate's of science in

1 occupational safety from San Juan College. I'm
2 working on an industrial hygiene master's degree at
3 Montana Tech University. Estimated graduation 2019.

4 **Q. Do you hold any additional certifications?**

5 A. Yes, I'm a certified safety professional,
6 CSP, and a certified hazardous material manager,
7 CHMM.

8 **Q. How long have you been a certified safety**
9 **professional?**

10 A. A certified safety professional, I
11 received that certification in 2015.

12 **Q. That a national certification?**

13 A. Yes.

14 **Q. Is there testing requirements and**
15 **educational components to it?**

16 A. Yes, there are. For CSP and CHMM both you
17 have educational and experience requirements and
18 then an examination to gauge your knowledge of the
19 subject matter that you are certifying in.

20 **Q. You mentioned the remediation work that**
21 **you have been doing and overseeing all these years.**
22 **What's been the area of focus for that type of work?**

23 A. My focus has been primarily in northwest
24 New Mexico. All of my experience over the last ten
25 years has been in northwest New Mexico but I have

1 helped out in southeast New Mexico for remediation
2 projects on an as-needed basis when I was at XTO
3 Energy.

4 **Q. Are you familiar with the state regulatory**
5 **requirements for that type of remediation and**
6 **analysis?**

7 A. Yes.

8 MR. FELDEWERT: I want to tender
9 Mr. McDaniel as an expert witness in managing
10 surface releases from oil and gas operations and on
11 state and federal regulations applicable in these
12 types of releases.

13 CHAIRWOMAN RILEY: He is accepted as an
14 expert witness. Thank you.

15 **Q (By Mr. Feldewert) Mr. McDaniel, how long**
16 **did this group work on developing the proposed rule?**

17 A. I believe we started in late 2016 and
18 we've been periodically having meetings and
19 conference calls and back and forth e-mails since
20 that time.

21 **Q. And did you participate throughout that**
22 **entire time?**

23 A. Yes.

24 **Q. Did you miss any meetings?**

25 A. Not that I'm aware of.

1 Q. Did you miss any phone calls?

2 A. Not that I'm aware of.

3 Q. Now, you were an active participant. What
4 was your role? What did you pay particular
5 attention to?

6 A. So one of my roles was doing research and
7 data management to bring to the group and then
8 providing more field expertise for how the new rule
9 would possibly affect doing the work in the field.
10 You know, how it would actually affect cleanup
11 beyond the, you know, the verbiage and what not in
12 the actual rule, how it would hit the ground in the
13 field.

14 Q. Now, you mentioned there were goals of the
15 committee?

16 A. Yes.

17 Q. And we saw a slide from the Division
18 previously that outlined those goals, correct?

19 A. Yes, we did.

20 Q. Also if you look at -- let's just go to
21 NMOGA Exhibit B as in boy 1. And you put forth the
22 goals of the committee from your perspective,
23 correct?

24 A. Yes.

25 Q. One of the goals here was to create

1 consistency with other division rules, and you
2 specifically referenced the pit rule, which is Rule
3 17, right?

4 A. Yes.

5 Q. And then the produced water rule, which is
6 Rule 34?

7 A. That is correct.

8 Q. Why is it important to have consistency
9 with other division rules, particularly when they
10 deal with sampling, testing and remediation
11 requirements?

12 A. So in the field it provides a lot more
13 ease of understanding for operators. As has been
14 said throughout the hearing yesterday, not every
15 operator has an environmental staff that they can
16 lean on, so outlining the specific requirements
17 across the rules and having them kind of jive and go
18 together provides a lot more ease of actually using
19 the rules in the field so you're not trying to think
20 well, is it a pit closure or is it a spill, and
21 bouncing back and forth.

22 That's one of the things that was
23 difficult about the current pit rule and spill
24 guidelines was you had the Rule 17 that used Table
25 1, and then when you confirmed that a release

1 occurred you had a completely different set of
2 guidelines to go with. So one of the major goals
3 was to bring those two tables together for those two
4 rules and have them have the exact same requirements
5 in both rules, especially across all three.

6 Q. In your opinion, does it assist in
7 implementing goals of the rules when there is some
8 consistency among them?

9 A. Yes.

10 Q. And in your opinion, does it avoid
11 confusion when you have -- on both sides -- when you
12 have consistency among rules that deal with sampling
13 and testing and remediation?

14 A. Yeah, it provides a lot more consistency
15 and eases understanding in the field for the
16 different situations.

17 Q. Now, if we turn to NMOGA Exhibit D as in
18 dog, there was some discussion yesterday about the
19 definitional section. Were you here for that?

20 A. Yes.

21 Q. They talked about essentially the clerical
22 change in 29.7, right?

23 A. Yes, that's correct.

24 Q. Do you have anything to add to this?

25 A. No.

1 Q. Then we have the release notification in
2 29.8. Were you here for that testimony yesterday?

3 A. Yes, I was.

4 Q. And was it the decision of the committee
5 to keep the notification requirements to the major
6 or minor release thresholds?

7 A. Yes, it was. And as I recall, there
8 wasn't a whole lot of discussion around changing
9 them at any time.

10 Q. So based on your participation in the
11 committee and also based on your experience, do you
12 agree with the proposition that there's no evidence
13 or need for change with respect to the major or
14 minor release thresholds that exist for notification
15 and action?

16 A. Yes, I would agree with that.

17 Q. When I look at 29.8, Subpart 29.8, Release
18 Notification, there's a whole list of oil field
19 waste and going to 29.8A, and included with that is
20 the term "NORM."

21 A. Yes.

22 Q. What does NORM stand for?

23 A. Naturally occurring radioactive material.

24 Q. There has been a comment filed by one of
25 the groups here that suggested that there was a need

1 to add "TENORM," T-E-N-O-R-M, to this list. What is
2 TENORM?

3 A. TENORM is technically enhanced NORM.

4 Q. And in your opinion, is there any need to
5 add that to the list of constituents we see in 29.8?

6 A. No, I don't believe so, because the rule
7 that the OCD has is that, you know, NORM is
8 considered above their threshold at 30 picocuries
9 per gram. So whether it's technically enhanced or
10 not, it doesn't really affect whether it's going to
11 be above or below 30 picocuries. Either it is or it
12 isn't, regardless of whether it's TENORM or not
13 TENORM.

14 Q. In your opinion is the term "NORM" as used
15 in here, is there any reason to expand or add
16 "TENORM" to the list?

17 A. No. In my opinion the term "NORM"
18 adequately covers what they are trying to accomplish
19 here with the 30 picocuries per gram limit.

20 Q. I'm skipping through stuff here.

21 A. Of course.

22 Q. Then in 29.9, this was some work that was
23 done here within this rule and merged in prior
24 sections of the rule, correct?

25 A. That's correct.

1 **Q. And you were here for the testimony on**
2 **that?**

3 A. Yes, I was.

4 **Q. Anything to add to that?**

5 A. No, I don't have anything to add.

6 **Q. Okay. Then let's go to 29.10, which is on**
7 **Page 2 of NMOGA Exhibit D. Now, we have the major**
8 **or minor release reporting application, correct?**

9 A. Correct.

10 **Q. Is it your understanding, as was discussed**
11 **yesterday, that 29.10 is intended to apply to all**
12 **releases no matter what the volume?**

13 A. Yes, that is the intention of Part 10.

14 **Q. And in your opinion does this adequately**
15 **address the concerns that would rise from release**
16 **volumes that are below the major or minor release**
17 **thresholds?**

18 A. Yes. For this part the initial response
19 to get to it and stabilize it to make sure it
20 doesn't get worse, this adequately covers that. And
21 then as was mentioned yesterday in 12, it requires
22 remediation of all releases which doesn't have a
23 volume quantifier on it.

24 **Q. So in particular here when I look at**
25 **29.10C, Site Stabilization, part of that requirement**

1 is that you remove the free liquids and then any of
2 the product that can be physically removed, correct?

3 A. That's correct.

4 Q. And then does it require you to deliver
5 that material to a division-approved facility for
6 disposal?

7 A. Yes.

8 Q. Then when we get to more extensive
9 releases that fall into the major or minor category,
10 we have some additional requirements then that
11 apply, correct?

12 A. That is correct.

13 Q. And those began in 29.11?

14 A. Yes.

15 Q. If I look at NMOGA Exhibit B as in boy 7,
16 does NMOGA B7 capture on your slide the extensive
17 requirements that arise when you have a major or
18 minor release containing liquids?

19 A. Yes.

20 Q. B7?

21 A. Yes. It gives a basic outline of what
22 Part 11 requires.

23 Q. And would you discuss with the Division
24 just briefly what all that is that you have to go
25 through?

1 A. Sure. So if you've got a release that
2 requires this type of delineation, so you're going
3 to have to determine your depth to groundwater and
4 that will aid you in determining what your closure
5 standard is for Table 1. You're going to have to
6 find your distance to wellhead protection area, and
7 in the rule we have that quarter mile as we
8 discussed yesterday around the horizontal extents.
9 Or half mile, I should say.

10 And then same with the significant water
11 course, and then you've got to determine the
12 horizontal and vertical extents and that's most
13 likely going to be through some kind of hand auger
14 or potentially a drill rig if you need to go deep.

15 **Q. Now, you mentioned that half-mile**
16 **examination area for wellhead protection areas and**
17 **then the nearest significant water course?**

18 A. Yes.

19 **Q. And in your opinion, does that provide a**
20 **reasonable geographic area for review of these**
21 **sensitive areas?**

22 A. Yes, I believe so. Especially considering
23 that it's significantly larger than the distance
24 that we've identified in the other section that
25 would require more stringent standards. For

1 instance, the distance to surface water in that one
2 is 300 feet and we're going out a half mile, so it's
3 more for informational purposes than anything else.

4 **Q. Now, you were also here -- if I then look**
5 **at NMOGA Exhibit D on Page 3, you were here**
6 **yesterday for the discussion about the additional**
7 **delineation and requirements that arise if the**
8 **conditions in Subpart C on Page 3 exist?**

9 A. Yes.

10 **Q. Really, in general what's the purpose of**
11 **that? What was the committee accomplishing there?**

12 A. Sure. So the thought was there was some
13 discussion around releases in that zone of 50 to 100
14 feet to groundwater. So for less than 50 feet
15 you've got a 600 part per million closure standard
16 so we have to remove all soil above the 600. But
17 the 50 to 100, in theory you could have that 51 feet
18 10,000 parts per million chloride. So this portion
19 was added to provide additional protection for
20 larger spills or unknown quantities that would pose
21 a bigger risk to getting to groundwater.

22 So if you meet both of these requirements,
23 the 10,000 milligrams per liter of chloride and the
24 unknown volume or over 200 barrels lost, then it
25 would require additional delineation beyond the

1 simple closure at 10,000 parts per million chloride.
2 That way you could ensure, theoretically ensure that
3 you didn't get to groundwater. And then if you did,
4 as was mentioned yesterday it would kick over to
5 Rule 30 for abatement.

6 Q. And just so we're clear, there's the 600
7 milligram per kilogram standard there?

8 A. Yes.

9 Q. Do you see that? If I look over a few
10 pages to Page 6 where we have Table 1?

11 A. Yes.

12 Q. Is that where that 600 milligram per
13 kilogram standard came from?

14 A. It is.

15 Q. And essentially, if I'm understanding it,
16 you're taking the chloride standard for groundwater
17 that's less than 50 feet, applying that to the
18 unique release circumstances that would be
19 identified in Subparagraph C on Page 3.

20 A. That is correct. But for delineation
21 purposes only, not necessarily closure of the
22 release.

23 Q. Okay.

24 A. You could still close the release at
25 10,000 but you would be required to delineate the

1 horizontal extents or the vertical extents, I should
2 say, to 600.

3 Q. And the committee determined it was the
4 appropriate way to go with this, given the unique
5 circumstance presented as outlined in Subparagraph
6 C?

7 A. That's correct.

8 Q. In your opinion, is that appropriate?

9 A. Yes.

10 Q. Now, when I look at Subparagraph C, there
11 is a discussion about whether release occurred
12 outside of a lined containment area, correct?

13 A. Yes.

14 Q. And there was a concern, a comment raised
15 by, I believe it was OGAP or EDF, suggesting that we
16 need the language to address a liner that did not
17 have integrity. Do you remember that comment?

18 A. Yes, I reviewed the comments.

19 Q. What do you understand to be OGAP or EDF's
20 concern with the comment?

21 A. We had a hard time understanding it at
22 first, but when you review the actual document that
23 they reference, it's referring to the liner itself,
24 not necessarily the soil beneath the liner. It was
25 a letter or something sent out by that EPA region

1 referring to the liner. And after review, it
2 doesn't really fit into what this rule is doing.
3 The OCD has specific regulations regarding disposal
4 of liner material in their waste disposal
5 requirements.

6 **Q. Okay. So you read their comments as being**
7 **concerned about the liner itself and what you do**
8 **with the liner without integrity?**

9 A. That's the idea of the document that they
10 were referencing for RCRA. It didn't have anything
11 to do with the soil. It was for the liner itself.

12 **Q. Okay. And you're aware then that the**
13 **division rule, being particularly Rule 19.15.35.8**
14 **already deals with what you do with liners that no**
15 **longer have integrity, or liners, period, that you**
16 **are disposing of?**

17 A. Right. Those rules don't speculate
18 whether it's lost integrity or not. It's still a
19 piece of plastic liner and it needs to be disposed
20 of per the regulations regardless of whether it's
21 lost integrity or not.

22 **Q. Okay. Then let's move over to 29.12**
23 **because I think everything else was covered**
24 **yesterday and discussed. Again, it was pointed out**
25 **yesterday you have in Subparagraph A the requirement**

1 that a party must remediate all releases?

2 A. Yes, that's correct.

3 Q. And take those actions that are laid out
4 in 29.12?

5 A. Yes.

6 Q. And you were here yesterday for the
7 testimony where the decision was made subsequent to
8 the initial publication of this rule to remove the
9 restoration or remediation language that we see
10 there in C2 and 3 to 29.13 so that it's all in one
11 section?

12 A. Yes.

13 Q. And does that make it easier for someone
14 like yourself who is dealing with these rules to
15 have one section that deals -- that contains the
16 remediation requirements that would be applicable?

17 A. Yeah, we just thought it flowed better.
18 It's included in the restoration and remediation or
19 revegetation section. Instead of basically
20 including the language twice in two different
21 sections. So we just changed it to reference the
22 restoration section. After you've completed the
23 cleanup then you would just move to Part 13.

24 Q. One of the changes that are highlighted on
25 Page 4 of NMOGA Exhibit D is that very section where

1 it directs the reader to go examine for the
2 restoration and reclamation requirements?

3 A. Yeah, that's correct.

4 Q. Now, there's some discussion here about
5 Subpart C4 on Page 4 of this Exhibit D.

6 A. Yes.

7 Q. And were you here yesterday for the
8 testimony where it was pointed out that this imposes
9 some additional requirements where the release is in
10 proximity to certain sensitive areas?

11 A. Yes.

12 Q. Do you recall or did you examine, in terms
13 of these siting requirements, where they came from?

14 A. Yes, these are pulled out of the pit rule
15 for the setback requirements for high chloride or
16 not low -- high concentration chloride pit. But
17 it's worded differently.

18 Q. Yes, so let's make it a little bit easier.

19 A. Not low chloride.

20 Q. If you go to NMOGA Exhibit B as in boy 9.
21 Does NMOGA Exhibit B9 contain a copy of the
22 requirements from Rule 17 that apply when you have a
23 temporary pit containing fluids that are not low
24 chloride fluids?

25 A. Yes.

1 Q. And that's the title of that section?

2 A. That is correct.

3 Q. Okay. And the distances and requirements
4 come from this provision in Rule 17?

5 A. Yes, they do.

6 Q. And after this was published and everyone
7 was going through this rule, did they note that
8 there was one typo here with respect to the distance
9 from wetlands?

10 A. Yes. That was noted and then we proposed
11 to increase it to 300 to match the setting criteria
12 on B9.

13 Q. Okay. So then if I'm on NMOGA Exhibit D
14 as in dog, that would be reflected on Page 5 or that
15 was the reason for the change from 100 to 300?

16 A. That's correct.

17 Q. Now we have consistency throughout this
18 rule with respect to these setback requirements?

19 A. That's correct.

20 Q. Okay. And in your opinion, Mr. McDaniel,
21 are these standards appropriate to use in this
22 subpart in dealing with your treatment of releases
23 within these sensitive areas?

24 A. Yes. Release in these areas would be
25 cleaned up to the most stringent requirements that

1 we have listed in Table 1 regardless of the depth to
2 groundwater.

3 Q. Looking at Page 5 of NMOGA Exhibit B,
4 there was discussion yesterday about these Subparts
5 D and E dealing with the closure requirements and
6 the closure reporting requirements when you have a
7 release that meets the major or minor requirements,
8 correct?

9 A. That's correct.

10 Q. And the one change, and I don't recall if
11 it was extensively discussed yesterday but it was
12 down there in what is now Subparagraph E2.

13 A. Okay.

14 Q. We see language was added to address what
15 occurs if the Division does not act on a closure
16 report within 60 days?

17 A. Yes.

18 Q. Where did that language come from?

19 A. That language is consistent with other
20 language throughout the rule that if we don't have a
21 consensus within 60 days, if it hasn't been approved
22 or denied then it meets the 60 days so it's
23 automatically denied.

24 Q. So if I stay on the same Page 5 and
25 instead of looking at E2 I move up and look at the

1 little Subparagraph 5 at the top of the page?

2 A. Yes.

3 Q. Does that same 60-day provision exist
4 within that section?

5 A. Yes, it does.

6 Q. And that is where the Division is to
7 approve or deny a remediation plan?

8 A. Yes, that's correct.

9 Q. All right. Then let's discuss the
10 language here that is at issue on Page 5 in Subpart
11 D1B, okay?

12 A. Okay.

13 Q. Now, this is language that, if I'm
14 understanding, addresses sampling of areas that are
15 impacted by a major or minor release, correct?

16 A. Yes, addresses performing your final
17 closure sampling when you feel like the excavated
18 area or remediated area is ready to be closed.

19 Q. Okay. Let's talk about -- this deals with
20 the sampling requirement for that area that has been
21 remediated?

22 A. Yes.

23 Q. Okay. So let's talk about the language
24 over which there's no disagreement. So if I look at
25 D1B it says there must be separate representative

1 wall and five-point composite samples. Do you see
2 that?

3 A. Yes.

4 Q. What does that mean, five-point composite
5 samples?

6 A. A composite sample, as was discussed a
7 little yesterday, is five separate grab points on
8 your wall or floor or surface, wherever you are
9 collecting your the sample, and then those
10 individual grabs are placed into a container and
11 kind of homogenized together to make one composite
12 sample and that is what would be analyzed in the
13 laboratory for your official lab results.

14 MR. FELDEWERT: Do you have paper copies
15 of division exhibits?

16 COMMISSIONER BALCH: Yes.

17 Q (By Mr. Feldewert) I would like to go to
18 Slide 40, please. So if I'm at the division exhibit
19 and I go to Division Exhibit 1 and I go to the Slide
20 43, are you there Mr. McDaniel?

21 A. Yes, I am.

22 Q. Is that an example of a five-point
23 composite sample?

24 A. Yes, it is.

25 Q. And that is in addition to -- when I look

1 at that phrase, it says -- it has the statement in
2 there that there must be separate representative
3 wall and base five-point composite samples.

4 A. That's correct.

5 Q. That term "representative," is that
6 important?

7 A. Yes, it is. Representative kind of
8 prevents you from taking all your samples maybe in
9 one corner or one area. The composite sample has to
10 be representative of the entire area that you're
11 sampling. It can't just be five spots from one side
12 of the excavation.

13 Q. So that term has meaning, right?

14 A. Yes, it does.

15 Q. And, in fact, like you said, you can't
16 just cherry-pick and just put all your samples
17 points in the left-hand side. It has to be
18 representative of the wall, correct?

19 A. That's correct.

20 Q. What NMOGA then has suggested to add here
21 to make it very clear is that there must be also
22 then, in addition to these five-point composite
23 samples, an individual grab sample from any wet or
24 discolored area.

25 A. That's correct.

1 Q. So, for example, if I go to what would be
2 slide 42 of the Division's exhibits, they have
3 circled down there of a wet or discolored area.

4 A. That's correct.

5 Q. So under NMOGA's language, you would have
6 to do a representative five-point grab sample of the
7 rest of the wall, right?

8 A. Yes.

9 Q. And what would you do with the additional
10 grab sample of the wet or discolored area?

11 A. So under our language you would take an
12 additional grab sample from only that wet or
13 discolored area and run that individually along with
14 your composite sample so you would have one sample
15 of your composite for the entire wall and you would
16 have one individual sample for that area of the
17 impacted area ran individually at the laboratory.

18 Q. So that would not be diluted by the other
19 five grab samples?

20 A. No, it would not.

21 Q. You would have the five representative
22 grab samples that would be sent to the laboratory
23 for analysis, right?

24 A. Yes.

25 Q. And then you would have your individual

1 grab sample of the wet or discolored soil and that
2 would be sent as a stand-alone sample for analysis?

3 A. That is correct.

4 Q. The Division has suggested that they need
5 a requirement in here that would make it mandatory
6 for -- that the representative five-point composite
7 samples be restricted down to an area no greater
8 than 200 square feet. Were you here for that
9 testimony?

10 A. Yes, I was.

11 Q. First off, was this 200-square-foot
12 requirement, was that discussed at any of the
13 committee meetings?

14 A. Not to my recollection.

15 Q. When was the first time anyone who are
16 members of that committee saw this particular
17 language?

18 A. When the document had already been
19 submitted for the rule in January.

20 Q. Are you aware of any source of this
21 200-square-foot provision?

22 A. No, I am not.

23 Q. Is it in Rule 17?

24 A. No.

25 Q. Is it in Rule 34?

1 A. No.

2 Q. Since there wasn't any discussion, we
3 didn't hear anything about having the opportunity to
4 comment on the reasoning that was provided yesterday
5 for this particular provision?

6 A. That is correct.

7 Q. Okay. Now, when I look at this suggestion
8 that there should be a mandatory requirement that in
9 every case the sampling five-point composite
10 comprise no more than an area of 200 square feet,
11 what's the problem with that?

12 A. Well, for most situations, and as it was
13 even discussed yesterday by Mr. Powell, in many
14 situations it's going to be too many samples that's
15 not going to provide you additional information but
16 it is going to add to cost and difficulty in
17 outlining where your samples were taken from. So in
18 most cases it's going to reflect a much larger
19 amount of samples than is required to adequately get
20 a representative of that area.

21 Q. In other words then, Mr. McDaniel, if I go
22 to Slide 41, Division Slide 41 in their Exhibit 1,
23 you understood this to be an example of what they
24 would require in all circumstances, correct?

25 A. Yes.

1 Q. And in your opinion, when I look at that
2 wall and it's homogeneous across there and we don't
3 see any staining and we have a requirement in place
4 that you do a representative five-point sample of
5 that wall, do we need to do ten grab samples of this
6 wall to be a representative?

7 A. I do not believe so.

8 Q. And, in fact, if we extended that wall
9 down, whether you want to double or triple it, under
10 their language you would be multiplying the grab
11 samples?

12 A. That is correct.

13 Q. Exponentially, right?

14 A. Yes.

15 Q. If you had a homogeneous wall with no
16 staining and it was all the same, is there any
17 reason to have to do five, 10, 15, 20, 25, 30, 35,
18 40, grab samples?

19 A. I don't believe so.

20 Q. Do you gain anything from that?

21 A. You might gain a slight better
22 understanding of each individual section, but if
23 it's clean and all of them are clean and there's no
24 individual areas that are wet or discolored, which
25 we would have to sample individually, then I don't

1 believe you gain a lot of necessary information that
2 is beyond what's really needed to close the spill,
3 and it causes a lot of extra work.

4 Q. When it comes to 200 feet, did the
5 Division offer any basis for where the square foot
6 came from?

7 A. No.

8 Q. So right now what they are suggesting is
9 to have in all circumstances a mandatory and what
10 appears to be arbitrary 200-square-foot sampling
11 requirement?

12 A. That is correct.

13 Q. Now, if a release occurred and the
14 Division actually felt that you needed to do a grab
15 point sampling for over 200 square feet, are there
16 multiple opportunities for the Division to require
17 that based on the facts of each particular spill?

18 A. I believe so.

19 Q. So what's the first opportunity for the
20 Division to take a look at the facts and say, "Well,
21 we need more than just a five-point representative
22 wall based sampling"? What's the first opportunity
23 for them to tell an operator that they think they
24 need additional samples?

25 A. Sure. Under the site characterization and

1 remediation plan, that needs to be submitted to the
2 Division for their approval prior to beginning
3 remediation activities. So in that instance if it
4 were a large delineated area, the Division would
5 have the opportunity to require a more frequent
6 sampling than just one composite for an entire wall
7 at that time.

8 Q. Okay. So let's go to specific language.
9 If I go to 29.12C on Page 4 of Exhibit D, this lays
10 out the detailed description of the proposed
11 remediation measures, correct?

12 A. Yes, it does.

13 Q. And as part of that process you have to
14 provide them information about the type of the
15 release, correct?

16 A. That is correct.

17 Q. Whether you're dealing with oil,
18 chlorides, condensate, et cetera, right?

19 A. Yes, and you would also provide that
20 information in the 15-day notice.

21 Q. And you are going to provide them
22 information on the volume that's requested?

23 A. That is correct.

24 Q. And as part of this remediation plan
25 process you will have already analyzed the lateral

1 extent of that release?

2 A. That is correct.

3 Q. And as part of this process you would have
4 already determined and identified the character of
5 the impacted area, right?

6 A. That is correct.

7 Q. The proximity to sensitive areas?

8 A. Yes.

9 Q. Depth to groundwater?

10 A. Yes.

11 Q. You would have facts about this particular
12 release?

13 A. That is correct.

14 Q. That is then provided to the Division for
15 approval of your remediation plan?

16 A. Yes, that's correct.

17 Q. And that approval that then puts some
18 language on it is in Subsection 12C5, correct?

19 A. Yes.

20 Q. And they have 60 days to approve or deny
21 it or impose additional conditions?

22 A. That is correct.

23 Q. And based on that factual information they
24 would have, if they felt like a standard five-point
25 composite sample, representative sample, was not

1 going to be sufficient, they could at that point say
2 we think we need more sampling than what's been
3 required under Rule 17 or Rule 34 or what we propose
4 to say in this rule?

5 A. That is correct.

6 Q. Then do they have another opportunity to
7 change what would otherwise be the normal
8 five-based, five-point composite sampling method?

9 A. Yes, they do.

10 Q. Where is that?

11 A. So in D1B, the last sentence of our
12 language, after it says "individual grab samples
13 from wet or discolored areas," the final sentence
14 says, "The Division may add additional sampling
15 requirements dependent on the nature of the material
16 released and any risk to human health or the
17 environment."

18 Q. Okay. So there's some additional language
19 for them to impose additional sampling requirements?

20 A. That's correct.

21 Q. And the Division being a Division doesn't
22 have to go through the variance process. They say
23 we looked at the facts and we think you need to do
24 additional sampling.

25 A. That's correct.

1 Q. And if we happen to disagree, then we
2 either have to go through the variance process or go
3 to a hearing, right? But the Division has the
4 opportunity to impose additional sampling
5 requirements pretty much at any point in time,
6 right?

7 A. That's correct.

8 Q. Then if they're on-site, if they happen to
9 be on-site when you are doing this type of work, is
10 there language in the rule that again allows them to
11 impose additional sampling requirements based on the
12 facts of this particular release?

13 A. Yes.

14 Q. And is that found within this Subparagraph
15 B as well?

16 A. Yes.

17 Q. Where is that?

18 A. In C.

19 Q. In C? Where in particular are you
20 looking?

21 A. "Division inspectors are also authorized
22 to verbally approve an alternate sampling plan based
23 on site observations."

24 Q. All right. Then you have to do a final
25 closure report, right?

1 A. That is correct.

2 **Q. And that is covered by Subparagraph E on**
3 **Page 5?**

4 A. Yes.

5 **Q. And if I look at E1, does it contain the**
6 **additional details that are sent to the Division as**
7 **part of the closure reporting requirement?**

8 A. That is correct.

9 **Q. And in particular, if I look at E1A, do**
10 **you have to provide then a scaled site and sampling**
11 **diagram?**

12 A. That's correct.

13 **Q. What do they mean by a sampling diagram?**

14 A. I would take that to mean in conjunction
15 with photos of the remediated site prior to
16 backfill. You have pictures of the excavation so
17 they could see if there were stained areas in
18 addition to the regular wall, and you would also
19 need to provide them a diagram of where you
20 collected your samples from in your excavated area
21 when you submitted your closure documentation.

22 **Q. And the Division has to approve the**
23 **closure report, right?**

24 A. That's correct.

25 **Q. And now they have some additional facts**

1 and they have concerns about the sampling based on
2 the nature of the release or what was found
3 throughout this process, they can again impose
4 additional sampling requirements, correct?

5 A. They could.

6 Q. So given all these opportunities for the
7 Division to tailor the sampling, if needed, to be
8 more than the normal representative wall and base
9 five-point composite samples, in your opinion is it
10 necessary to place in this rule an arbitrary
11 200-square-foot requirement that would be mandatory
12 in all cases?

13 A. No, I do not.

14 Q. In your opinion, would the language that's
15 in here that there must be a separate representative
16 wall and five base composite sample along with
17 individual grab samples from any wet or discolored
18 areas, is that sufficient to address a majority of
19 the release circumstances that you have come across?

20 A. I believe it is.

21 Q. Now, you referenced D1C, right?

22 A. Yes.

23 Q. And I think the Division pointed it out
24 and said, "Don't worry about this because you can
25 get an exception. You can get a variance," okay?

1 "Or we can have an inspector come out and he can
2 give you verbal approval where you don't have to do
3 this mandatory arbitrary 200-square-foot sample,"
4 okay?

5 A. Yes.

6 Q. Okay. Now, the Division has limited
7 staff, correct?

8 A. Correct.

9 Q. In your opinion are they pretty busy?

10 A. They are.

11 Q. Now, I want you to put your regulatory hat
12 on for me. Put yourself in their shoes.

13 A. Sure.

14 Q. I am a busy division employee. I have a
15 lot of things that I have to do. If somebody calls
16 me to ask me to come out to a site to give them
17 verbal approval to depart from the arbitrary
18 mandatory requirement, how difficult is it going to
19 be to get them out?

20 A. It just depends on the workload. But
21 there's no guarantee that they will have the
22 opportunity to make it out to every event based on
23 our timelines for when we are ready to take closure
24 samples.

25 Q. If you are busy, in terms of importance,

1 things that you have to do, in the scale of things
2 where is a request to come out and verbally approve
3 a variance or exception, where is that going to fall
4 with respect to the list of everything else that
5 they got to do?

6 A. It would fall fairly low since there would
7 already be requirements. If I can't make it out to
8 give you a variance it's not going to be high on the
9 list of things to do.

10 Q. What's the safest thing for you to do as a
11 regulator? You're busy and you don't really want to
12 go out there. What's the safest thing to do?

13 A. Just say there's a 200-square-foot minimum
14 and I'm not going to approve any variances.

15 Q. And isn't it one of the goals of this
16 committee to come up with methodologies and
17 requirements that apply to the majority of
18 circumstances that exist?

19 A. That is correct.

20 Q. And does NMOGA's proposed language cover
21 the majority of the circumstances that are going to
22 exist with respect to these releases?

23 A. I believe it does.

24 Q. Now, if I take a look at what's been
25 marked as NMOGA Exhibit E, that's a separate

1 document we provided to you --

2 A. Okay.

3 Q. -- prior to the hearing. Does NMOGA
4 Exhibit E capture the sampling requirements that
5 were adopted by the Commission in Rule 17 and in
6 Rule 34?

7 A. It does.

8 Q. And it includes a requirement that not
9 only do you do the five-point composite sampling but
10 you have to include sampling of any wet or
11 discolored area?

12 A. It does, and additionally the language
13 that we put in is beyond that, as that just says a
14 composite must include wet or discolored areas,
15 where our language requires an additional grab
16 sample of wet or discolored areas, not just to
17 include it in the five-point.

18 Q. In your experience, and based on your
19 participation in the committee, is there any
20 evidence that this language that was adopted by the
21 Commission for Rule 17 or for Rule 34, is there any
22 language that that -- any evidence that language has
23 caused any issues or concerns?

24 A. Not in my experience.

25 Q. Are operators familiar with these

1 requirements?

2 A. Yes, they are.

3 Q. And under NMOGA's proposed language will
4 the Division still retain authority to require more
5 extensive sampling when appropriate on a
6 case-by-case basis when they have all the facts we
7 just discussed?

8 A. Yes, at multiple times throughout the
9 rule.

10 Q. In your opinion, does NMOGA's proposed
11 language result in consistencies among these rules?

12 A. It results in a lot more consistency than
13 the 200-square-foot.

14 Q. And in your opinion will eliminating the
15 proposed mandatory and I would suggest arbitrary
16 200-square-foot requirement, if we eliminate that,
17 in your opinion is that going to result in less
18 protection to groundwater, to public health and the
19 environment?

20 A. I don't believe it will.

21 Q. I may be close to finishing. Turn to
22 NMOGA Exhibit D which has all the changes.

23 A. Okay.

24 Q. I want to go to Subpart 29.13.

25 A. Okay.

1 Q. Before we get there, the next witness is
2 going to talk about Table 1, right?

3 A. That's correct.

4 Q. So let's go to 29.13. When I look at
5 29.13D1 it sets forth the reclamation of areas no
6 longer in use, right?

7 A. That's correct.

8 Q. And there's been some language changes in
9 here that have already been discussed and then there
10 was a brief discussion yesterday about Subparagraph
11 E on Page 7.

12 A. Yes.

13 Q. This Subparagraph E on Page 7, is that
14 also found in Rule 17 and Rule 34?

15 A. Yes.

16 Q. Now, there has been a suggestion by OGAP
17 that private surface use agreements should be added
18 to Subpart E, okay?

19 A. Okay.

20 Q. Now, were you aware that OGAP was a party
21 to the proceedings under Rule 17?

22 A. I'm aware of that, yes.

23 Q. Back in 2012?

24 A. Yes.

25 Q. And did the Commission adopt, after OGAP

1 participated in that, did they adopt a suggestion
2 that you impose -- that you add private surface use
3 agreements in Subpart E?

4 A. No, they did not.

5 Q. And when the Commission examined Rule 34
6 did they add private surface use agreements to
7 Subpart E?

8 A. No.

9 Q. In your opinion or in your experience does
10 the Commission or the Division involve itself in
11 enforcing the provisions of private surface use
12 agreements?

13 A. No.

14 Q. And in your opinion is it appropriate or
15 necessary for the Commission to enforce private
16 surface use agreements between operators and
17 landowners?

18 A. No.

19 Q. Putting aside any legal limitations under
20 the statute.

21 A. Right.

22 Q. Okay. And why is that?

23 A. Because we have got individual surface use
24 agreements with our landowners that detail what we
25 will do in certain situations, details reporting and

1 those kind of things. I mean, they are very
2 individualized to that specific surface. It's a
3 literal contract between you and that surface owner.
4 We have thousands of them in the cases that we have
5 thousands of wells and each is very, very different.
6 So it's our responsibility to ensure that we meet
7 the requirement of the surface use agreements.

8 **Q. Unlike regulatory agreements, the surface**
9 **use agreements are voluntary agreements, correct?**

10 A. They are. They are between us and the
11 landowner for the use of the property where the
12 facility or well is located.

13 **Q. If either party thinks those requirements**
14 **have been breached, you have the opportunity to go**
15 **to court and enforce the agreements, correct?**

16 A. Absolutely.

17 **Q. Unlike regulatory requirements, there's no**
18 **reason for the Commission or Division to involve**
19 **itself in those types of agreements?**

20 A. No.

21 **Q. Then let's go to -- Mr. McDaniel, I have**
22 **up here Slide 13 and Slide 14 from the Division's**
23 **exhibit. I'm not sure which it is, but these lay**
24 **out the objectives, from the Division's perspective,**
25 **of what the rule is intended to accomplish, correct?**

1 A. Correct.

2 Q. And in your opinion does the proposed rule
3 with the NMOGA's modifications accomplish these
4 goals?

5 A. I believe it does.

6 Q. Does it provide clear guidelines to both
7 operators and the Division about what to do, when to
8 do it and what must be submitted when you have a
9 release?

10 A. Yes, it does.

11 Q. And with NMOGA's modifications does the
12 proposed rule maintain consistency with Rule 17 and
13 Rule 34 that have been adopted by a prior
14 commission?

15 A. I believe it does.

16 Q. And in your opinion does this rule with
17 NMOGA's modifications support a reasonable level of
18 protection to freshwater supplies and public health
19 and the environment?

20 A. Yes.

21 MR. FELDEWERT: Madam Chair, Members of
22 the Commission, I move the admission into evidence
23 of NMOGA -- I think A, B and C were already filed,
24 so we move the admission of those as well as NMOGA
25 Exhibit D, which contains the red lines, and then

1 NMOGA Exhibit E, which contains the comparison of
2 the pullouts of Rule 17 and Rule 34.

3 MS. HERRMANN: No objection.

4 MR. LARSON: No objection.

5 MS. CALLAHAN: No objection.

6 CHAIRWOMAN RILEY: Those exhibits are
7 accepted.

8 (Note: NMOGA Exhibits A - E admitted.)

9 MR. FELDEWERT: That includes my
10 examination of the witness.

11 CHAIRWOMAN RILEY: Thank you. We can go
12 to cross-examination. Do you want to start?

13 MS. HERRMANN: I want to request a brief
14 break to confer with my client.

15 CHAIRWOMAN RILEY: We can take a
16 ten-minute break.

17 (Note: The hearing stood in recess at
18 10:00 to 10:20)

19 CHAIRWOMAN RILEY: We are ready for
20 cross-examination?

21 MS. HERRMANN: Yes.

22 CROSS-EXAMINATION

23 BY MS. HERRMANN

24 Q. Mr. McDaniel, I wanted to revisit some of
25 your testimony on 29.11, Site Assessment and

1 **Characterization.**

2 A. Okay.

3 **Q. There's specifically a 90-day deadline to**
4 **characterize a release. In your opinion is that**
5 **sufficient time to accomplish that?**

6 A. To characterize a release?

7 **Q. Yes.**

8 A. Yes, I believe it is.

9 **Q. Do you think that would be a good example**
10 **of a best management practice to put that timeline**
11 **on an operator?**

12 A. I think it's a good practice for both the
13 operator and the Division so you have a definite
14 amount of time, yes.

15 **Q. And also to require immediate attention to**
16 **a release?**

17 A. Yeah. In Part 10 we have the immediate
18 attention and from there you go to the rest of the
19 rule.

20 **Q. So going into the point of contention in**
21 **29.10, the sampling requirements. 29.12, what is**
22 **now under B, in your experience what's the largest**
23 **release you have ever worked on?**

24 A. I can't tell you the largest in footage
25 because you would catch me making up numbers, but

1 the largest I have ever worked on was close to, I
2 want to say, 10,000 cubic yards.

3 Q. Of excavation?

4 A. Yes.

5 Q. And do you know approximately the
6 dimensions of that excavation?

7 A. I don't. I know it was close to 15 feet
8 deep, but I couldn't tell you the length and width.

9 Q. But if it were 15 feet deep divided by
10 10,000 cubic yards, do you have any idea what linear
11 footage that would put us at?

12 A. No, I don't. It was a large excavation.

13 Q. Did you do any composite samples on that
14 release?

15 A. We did.

16 Q. How many?

17 A. I don't know the answer to that.

18 Q. Was it more than one?

19 A. Yes, it was more than one composite
20 sample.

21 Q. Have you ever in your experience had a
22 sample fail requirements where you thought it would
23 pass?

24 A. Yes.

25 Q. And is all contamination visually evident?

1 A. No, it is not.

2 **Q. Going to 12 -- what is now marked as C1 in**
3 **the NMOGA Exhibit D as in dog.**

4 A. Remediation Plan Requirements?

5 **Q. Yes. That remediation plan is required to**
6 **be approved by the Division, correct?**

7 A. Yes.

8 **Q. Under the requirements, is a sampling plan**
9 **required?**

10 A. Not necessarily a sampling plan but your
11 remediation technique and the Division at that time
12 could request a sampling plan based on the
13 delineation that you got and the size of the
14 theoretical remediated area. They will have that
15 ability.

16 **Q. Jumping forward to what is now 12E,**
17 **Closure Reporting, is a sampling plan required to be**
18 **included there?**

19 A. Not a sampling plan but a sampling
20 diagram, which would give you where the samples were
21 taken. So they would have the opportunity to
22 approve or deny the samples that were collected.

23 **Q. So the sampling diagram is only going to**
24 **be sent to the Division in the closure phase?**

25 A. That is correct.

1 **Q. Now, one of the goals of this proceeding**
2 **was to provide clarity and certainty to the**
3 **operator, correct?**

4 A. That's correct.

5 **Q. Do you think allowing that denial to occur**
6 **at the closure phase provides certainty to the**
7 **operator instead of allowing the preliminary**
8 **approval by the Division so the operator doesn't go**
9 **through an entire remediation plan only to have it**
10 **kicked back on sampling requirements?**

11 A. The Division would still have the
12 opportunity to deny the sampling at that time
13 regardless of whether the 200 is in there or not.

14 **Q. Where would they have --**

15 A. Because it says, "The Division may require
16 additional sampling as they deem necessary based on
17 threat to human health and the environment." So the
18 Division could -- you don't have -- whether there's
19 a 200, a 500 or anything, you don't have guaranteed
20 approval of your sampling regardless. The Division
21 can always impose additional sampling based on the
22 language that's already in here.

23 **Q. So the Division would have to inspect a**
24 **site to determine the risks?**

25 A. I'm not sure what the question is.

1 **Q. The language you cited, that would require**
2 **the Division to review and approve the sampling**
3 **plan?**

4 A. To review the sampling plan? I guess I'm
5 not following you.

6 **Q. If the Division would like to impose**
7 **additional conditions, it would have to review the**
8 **remediation?**

9 A. It also gives -- I guess yes, they could,
10 at that point. But they also could, right
11 afterwards where it says, "The Division may add
12 additional sampling requirements depending on the
13 material released and risk to human health and the
14 environment."

15 **Q. And how do you propose that the Division**
16 **would determine those risks to human health and the**
17 **environment?**

18 A. Based on testimony, the Division plans on
19 being at all of our spills so I'm assuming their
20 inspector would do it at that time.

21 **Q. And then you also testified that you were**
22 **afraid that the Division would not be there.**

23 A. Yes, but I'm not -- yes, that's correct.

24 **Q. So that burden is on the Division**
25 **regardless?**

1 A. It is.

2 **Q. Is there a minimum of representative area**
3 **that you feel would be applicable in every**
4 **situation?**

5 A. No, I don't believe that there is one that
6 would be applicable in every situation.

7 **Q. So that would be a judgment call based on**
8 **every release?**

9 A. Could be. Each release has a potential to
10 be different based on site circumstances.

11 **Q. Now, releases are generally unplanned,**
12 **correct?**

13 A. Correct.

14 **Q. Whereas the difference between a pit or a**
15 **surface waste management facility that you cited in**
16 **NMOGA Exhibit E, those are all design, correct?**

17 A. They are, but the contaminants of concern
18 are the same.

19 **Q. However, wouldn't the area of impact be**
20 **much more unknown?**

21 A. Could be, depending on the type of
22 release.

23 **Q. And again, it's not visually evident?**

24 A. It's not always going to be visually
25 evident but usually wet or discolored areas are

1 pretty standard when you have a spill.

2 Q. One more point of clarification I would
3 like on the proposed language. Regarding the
4 five-point composite samples, is it NMOGA's
5 intention that the sample from the wet or discolored
6 area be included in those composite samples?

7 A. Yes, I believe it is.

8 Q. Would that be a six-point or would one of
9 the five points be the discolored areas?

10 A. One of the five points should be in the
11 discolored area for a composite and then you would
12 take an individual grab of the impacted area as
13 well. So you would have a composite of the entire
14 wall, including that discolored area, but then you
15 would also have an individual of the area to give
16 you a better idea of, by itself, what that impacted
17 area would be. Whereas your composite may pass even
18 with that impacted part in there, the potential for
19 your grab sample to not pass is greater since you
20 are taking it completely of that stained area.

21 Q. Do you think that would be representative
22 of the entire wall if the grab sample were to cause
23 the whole composite sample to exceed limits?

24 A. No, but that's why you would take the
25 individual grab sample of the stained area, so you

1 would know that this is how high the stained area is
2 and you could compare it to the composite results.

3 **Q. Is it a concern of yours that that**
4 **composite sample might cause an entire wall to fail**
5 **where it could only be a small area?**

6 A. Not really, because you are taking that
7 individual sample of that stained area, and so if I
8 was going to attack that spill further I would focus
9 my efforts on the stained area and if there was no
10 longer a stain, resample at that time as a composite
11 and then that would give you an idea of if the
12 entire wall was bad or if it was just that stained
13 area that was driving your analysis higher.

14 **Q. Which would be resampled?**

15 A. Yes. You would have to resample for
16 closure. If you had a failure you would need to
17 resample after additional remediation activity
18 occurred. Closure samples are designed when you are
19 completely finished so when you feel you are
20 completely finished take your closure samples; if
21 they are not below the standards additional work
22 would go in and you would have to take additional
23 closure samples at that time.

24 **Q. Nothing further. Thank you.**

25 CHAIRWOMAN RILEY: Mr. Larson?

1 MR. LARSON: No questions.

2 CHAIRWOMAN RILEY: We will take it to the
3 Commission. Mr. Balch, do you have questions?

4 COMMISSIONER BALCH: Just a couple. Kind
5 of following up on that point of difference between
6 Rule 17, 34 and this rule. So 17, you are dealing
7 primarily with pits or berms under tanks, things
8 like that, that are relatively contained.

9 THE WITNESS: Uh-huh.

10 COMMISSIONER BALCH: Then you will do the
11 same, one five-point sample for what could be a
12 40-acre pond in Rule 34, right?

13 THE WITNESS: That's correct.

14 COMMISSIONER BALCH: Do you think that's
15 enough for one 40-acre pond?

16 THE WITNESS: With the stipulation that
17 you individually sample any wet or discolored areas
18 additionally, I think it would give you an idea. If
19 you have a wet or discolored area that would give
20 you an idea. And then as the operator, it's our
21 responsibility to get it into closure so it would
22 behoove me to take additional samples unless I want
23 to dig out that entire area. Because if it's one
24 sample or ten, if it fails it's up to me to
25 remediate to the point at which it will pass.

1 COMMISSIONER BALCH: Keep sampling until
2 you're positive it passes?

3 THE WITNESS: Yeah, after the acre or
4 whatever with that wet area.

5 COMMISSIONER BALCH: When you have that
6 large of an area, assuming you get rid of all your
7 wet or discolored areas, you can pretty much sample
8 anywhere in the five or how would you do that? How
9 would you go out and sample that?

10 THE WITNESS: How would I go out and
11 sample that? If it were me, so for a pond, for
12 instance, most of your liquid is going to be -- the
13 best potential for a leak would be on the bottom.
14 So if I pulled the liner back and there was a wet
15 area, I would personally take an individual sample
16 of the wet area to see exactly what it is. If it
17 failed then we would jump over to the spill rule and
18 remediate as a release at that time.

19 COMMISSIONER BALCH: So the word
20 "representative" in the proposed rule language,
21 "representative sample" --

22 THE WITNESS: Yes.

23 COMMISSIONER BALCH: What does
24 "representative" mean to you?

25 THE WITNESS: To me it means you need a

1 sample that represents the entire face of the -- in
2 terms of an excavation the entire area. So on a
3 wall what I typically do is kind of a dice pattern.
4 So two on the top, two sides, one in the middle and
5 two on the bottom so it gives you samples along the
6 entire vertical and the horizontal in different
7 areas to make sure you capture the whole wall.

8 COMMISSIONER BALCH: And somebody else
9 working for a different company may have a different
10 procedure or a different idea of what's
11 representative?

12 THE WITNESS: They could but that's a
13 pretty general industry practice for a composite
14 sample.

15 COMMISSIONER BALCH: Part of your
16 certification?

17 THE WITNESS: Not necessarily, but part of
18 education in sampling, and then some of that
19 language is included in some of the sampling
20 mechanisms that were included in the rule on how to
21 collect composite samples and things like that for
22 best practices.

23 COMMISSIONER BALCH: If you take you and
24 nine other of your contemporaries and other
25 companies, you're probably sampling roughly the same

1 soils? Roughly similar?

2 THE WITNESS: It would probably be
3 generally the same. The example that was on Slide
4 43 is another good example kind of where it zigzags
5 up and down the wall. That's another good
6 representative but I would say most people would
7 consider a five-point. They would have some kind of
8 a representative sample across the entire wall at
9 varying heights and along the length. They wouldn't
10 just take them from one area.

11 COMMISSIONER BALCH: So there's a fair
12 amount of production in New Mexico that's attributed
13 to smaller producers?

14 THE WITNESS: Yes.

15 COMMISSIONER BALCH: Not companies your
16 size, companies that may not have an HSE supervise
17 or even a HSE staff. Might just be their engineer
18 that does that if it comes up. So they might not
19 have that level of background experience to know how
20 to go out there and acquire a pattern. What kind of
21 guidance should the rule be giving those people for
22 sampling?

23 THE WITNESS: Sure. For that kind of
24 guidance, that's why we kind of wanted to include
25 those federal and, you know, generally approved

1 sampling techniques and stuff that are included in
2 the section with the EPA method and all that in
3 there because it gives you a general basis of how to
4 collect samples and how to put them in a jar and
5 that kind of stuff. Gives you the basics on how to
6 do that if you don't know how.

7 COMMISSIONER BALCH: Does it go into the
8 cross pattern with the two up and two down?

9 THE WITNESS: I have personally not
10 reviewed each of those documents in their full
11 length so I can't attest to whether they do or not,
12 but from what I understand they have that kind of
13 information in them.

14 COMMISSIONER BALCH: It seems like the
15 intent of the rule as proposed is that any release,
16 regardless of size, has to be remediated and
17 reclaimed pretty much in the same way.

18 THE WITNESS: That is correct.

19 COMMISSIONER BALCH: The only difference
20 being if it's a major or minor release there would
21 be some reporting and some forms and some
22 verification of those steps.

23 THE WITNESS: Yes.

24 COMMISSIONER BALCH: So what appears to be
25 lacking in here from my reading of it is that if you

1 have an unreportable release, less than five
2 barrels, it's clear you are supposed to go out
3 immediately, stop the source of the leak, pick up
4 any free liquids that you can, right? At some point
5 in there you make a determination how big the leak
6 was. If it's less than five then you are just
7 supposed to clean it up but there's no guidance on
8 that. All the guidance here for 29.11 refers to
9 major or minor spills.

10 THE WITNESS: Uh-huh.

11 COMMISSIONER BALCH: When you go to
12 remediation and restoration, they don't specifically
13 say major or minor spills. They just say release.
14 So the step that is missing for just the
15 unreportable releases, how do you determine the best
16 way to remediate and restore?

17 THE WITNESS: Sure. Like Mr. Powell
18 testified yesterday, there are several different
19 ways you can remediate a small spill. Some people
20 use a chemical called Microblaze that breaks down
21 the material. Some people use little bioremediation
22 bacteria that are popular that you can buy, but most
23 people are going to just shovel it up and dispose of
24 it. You know, I feel like the language that's in
25 here, I believe, that responsible party must

1 remediate all releases, I believe that's pretty
2 explanatory in the industry that we would all
3 understand what that meant.

4 COMMISSIONER BALCH: But if I'm a small
5 producer down in Hobbs and I have gone out to my
6 wellhead and the water tank in the separator has a
7 leak. I fix it, I look at it and I determine it
8 must be 4.99 barrels, not 5.01. The next step in
9 the rule is site characterization, which says major
10 or minor release, you must do this. Doesn't say
11 anything about any other release. I might just stop
12 reading right there and not go on to remediation
13 where it says all leaks must be remediated. So I'm
14 just wondering if the language needs to be cleared
15 up a little bit to make it explicit that all
16 releases need to be treated essentially the same.
17 It's just the reporting and monitoring requirements
18 that are different for the size of the spill.

19 THE WITNESS: I see what you're saying,
20 but I believe that the way the language is
21 currently, I think if you were to review it I think
22 you would gain the knowledge that you do need to
23 remediate it. And I would argue that operators,
24 regardless of what is in the rule, if they don't
25 want to comply with the rule, we can write whatever

1 we want in here and if they're not going to do it
2 with what's in here currently....

3 COMMISSIONER BALCH: Of course that's
4 understood. For your company, you go out there and
5 you spill three barrels, scrape up two of them.
6 Suck up two of them and do something else with the
7 other one. Is there some level in there where you
8 would feel like you need a characterization?

9 THE WITNESS: Yes.

10 COMMISSIONER BALCH: A plan to deal with
11 even a small spill like that?

12 THE WITNESS: Yes, there is. It depends.
13 A good example is if you had a small spill in an
14 area, you went to, you know, hand shovels and then
15 started digging, and I believe like was mentioned
16 before he had a two barrel release that went 20
17 feet, right? So if you started digging it up a
18 little bit and you started getting into some more
19 stained soil, started thinking that doesn't seem
20 right, at that point then we would probably do some
21 kind of characterization to see how deep was, how
22 wide, what we were dealing with, because it just
23 doesn't fit the mold for what was reported, right?

24 COMMISSIONER BALCH: You scrape off the
25 two inches and everything looks clean, then you're

1 thinking you don't need a plan? You can just walk
2 away from it once you're done with that?

3 THE WITNESS: That's correct.

4 COMMISSIONER BALCH: Thank you very much.

5 CHAIRWOMAN RILEY: Mr. Martin?

6 COMMISSIONER MARTIN: Under Closure
7 Requirements, is it your interpretation that the
8 five-points composite sample can be made up of the
9 base and the wall samples or does it mean you take
10 separate five-point composite samples, one on the
11 base and one on the wall?

12 THE WITNESS: My interpretation is
13 individual composite samples from the base and each
14 of the walls.

15 COMMISSIONER MARTIN: Two separate ones?

16 THE WITNESS: Five. So for the case of
17 the square excavation you would have one sample for
18 the south wall, the east wall, the west wall, four
19 on the walls and then one on the bottom. So each
20 excavation would comprise five samples basically.

21 COMMISSIONER MARTIN: Okay. That answered
22 my question. Let me ask you one more.

23 THE WITNESS: Sure.

24 COMMISSIONER MARTIN: On the Division's
25 Exhibit 1/41, you would combine that sample, the

1 grab sample from the bottom, with the four on the
2 wall per that rule, to follow that rule?

3 THE WITNESS: Could you repeat the
4 question, please?

5 COMMISSIONER MARTIN: Would you take four
6 from the wall or three from the wall and two from
7 the base including the stained area?

8 THE WITNESS: No. In my interpretation,
9 the way NMOGA's rule is outlined, where the red area
10 is on the bottom it would be exactly the same. We
11 would have collected composite exactly the way that
12 that's outlined. We would have taken an individual
13 grab sample of the wet or discolored area. The only
14 area where we would be different on this is the
15 yellow and green area. Instead of being two
16 separate composites it would be one composite
17 consisting of five individual points that are
18 representative of that wall.

19 COMMISSIONER MARTIN: That's all I've got.

20 COMMISSIONER BALCH: May I follow up on
21 that? So if you go to the regular pit rule pit,
22 maybe the wall is 30 or 40 feet long. You go to
23 40-acre produced water pit and maybe the wall is a
24 couple hundred feet long, right? 1,000 feet long?
25 You go to a release that occurred down some kind of

1 a tertiary drainage and you could have a half mile
2 long wall on each side. In each of those cases
3 you're talking about one five-point sample
4 representing the entire wall?

5 THE WITNESS: Not necessarily. I mean,
6 what we're discussing is more of your typical
7 release and excavation. Things where it might
8 travel down a wash are a little different. You
9 know, I would anticipate that the OCD when we called
10 in a release into a waterway, it would be a major
11 release, that we would be in discussion. And when I
12 would be on the phone with the inspector I would
13 say, "Hey, it's a mile down the wash," and they
14 would say, "We are going to need more than just your
15 one sample."

16 That's typically how it's been handled in
17 my area with my experience. They would at that
18 point guide you to require additional samples based
19 on that type of release.

20 COMMISSIONER BALCH: As a health safety
21 professional you're going to make sure the sampling
22 is adequate enough to protect your company?

23 THE WITNESS: Absolutely. The way we have
24 it currently written, it would add an additional
25 grab sample for any wet or discolored areas beyond

1 the usually composite that we would take, which is
2 not currently in the regulation.

3 COMMISSIONER BALCH: Thank you.

4 CHAIRWOMAN RILEY: I don't have any
5 questions.

6 MR. BRANCARD: I have one or two.
7 Mr. McDaniel, I believe you testified that you were
8 present at all these committee meetings.

9 THE WITNESS: Yes, I believe so.

10 MR. BRANCARD: At these committee meetings
11 were there participating in these representatives of
12 landowner organizations?

13 THE WITNESS: No, I don't believe so.

14 MR. BRANCARD: So you testified you were
15 familiar with these surface use agreements?

16 THE WITNESS: I'm familiar with them in
17 the sense that I know that they exist and I have had
18 to deal with them in some cases where we have had a
19 release on a property and we have had to get the
20 surface use agreement to see what exactly our
21 agreement is with that particular landowner.

22 MR. BRANCARD: So in that situation you're
23 looking to see whether the agreement has its own
24 standards for requiring cleanups?

25 THE WITNESS: No, it won't have its own

1 standards for requiring cleanup but there will be
2 points that were brought up during the agreement.
3 If the landowner wanted to know any time you moved a
4 rock on location, I mean, that would be in there and
5 things like that. So to make sure we don't do
6 anything we're not supposed by the surface use
7 agreement, if we had a release with my company we
8 would check that first to make sure that we are
9 meeting all the requirements that are in that
10 particular agreement. A lot of times they are not
11 that specific but, you know, it varies greatly from
12 one landowner to another.

13 MR. BRANCARD: Sure. But in your
14 experience with these agreements do they normally
15 require the landowner be informed if there is a
16 spill?

17 THE WITNESS: Not normally in New Mexico,
18 no, they don't.

19 MR. BRANCARD: Because we do have the
20 testimony yesterday of the landowner and the
21 proposals that were submitted by the environmental
22 defense and other groups a question of whether the
23 notice that comes to us of reporting a spill should
24 also go to the landowner. Do you have an opinion on
25 that?

1 THE WITNESS: My opinion on that is the
2 OCD has the responsibility to enforce their own
3 rules and regulations and not necessarily whether or
4 not we comply with other industry or surface use
5 agreement type agreements.

6 MR. BRANCARD: But you are saying the
7 surface use agreements don't normally require notice
8 so this would be something beyond?

9 THE WITNESS: They may not, but I don't
10 believe it's the job of the OCD to imply additional
11 regulations beyond what we have agreed on with our
12 surface owners. If the surface owner wanted to be
13 notified of releases on their property they would
14 have stipulated it in the surface use agreement.

15 MR. BRANCARD: So just to switch gears a
16 second here, on the process for each of these plans,
17 we have the site characterization plan, we have a
18 remediation plan, which as I read it is part of the
19 site characterization plan.

20 THE WITNESS: Yes.

21 MR. BRANCARD: Separate document but part
22 of the site characterization submitted.

23 THE WITNESS: Yes and no. It's a separate
24 requirement but, I mean, they could be the same
25 document but it would have different -- so the site

1 characterization you would have the samples and
2 where you took them and how big the area is and you
3 would have a separate portion of how you are going
4 to remediate it now that you know what the site is
5 and what the contaminants are. So it could be the
6 same document but it would be two distinctly
7 different parts covering two distinctly different
8 things.

9 MR. BRANCARD: Then there's a closure
10 plan?

11 THE WITNESS: Yes or closure report.

12 MR. BRANCARD: If I read this correctly,
13 the rules require the Division to approve/deny the
14 remediation plan and the closure report.

15 THE WITNESS: That is correct.

16 MR. BRANCARD: There's no decision
17 required on the site characterization; is that
18 correct?

19 THE WITNESS: Yeah, I guess I'm not sure.
20 I believe that they have the ability to approve the
21 characterization/remediation plan and if they didn't
22 feel that there was adequate characterization or
23 delineation they couldn't really approve your
24 remediation plan because you hadn't adequately
25 characterized the site.

1 So I feel like they would have the ability
2 to deny it in that way. They would say, "Hey, we
3 can't approve this remediation plan because you
4 didn't take samples of this side of the well pad and
5 we don't know what's over there."

6 MR. BRANCARD: But there is a provision in
7 the characterization that within 30 days the
8 Division can request additional information?

9 THE WITNESS: Yes.

10 MR. BRANCARD: But then within 60 days
11 they have to make a decision on the remediation.

12 THE WITNESS: That is correct.

13 MR. BRANCARD: So 30 days, and then you
14 get 14 days to respond to the information request
15 and then decision within 60 days.

16 THE WITNESS: Yes.

17 MR. BRANCARD: Upon you getting that
18 decision, if the decision requires either a denial
19 or in the case of a remediation plan adds
20 conditions, you have the ability to request a
21 hearing?

22 THE WITNESS: That's correct.

23 MR. BRANCARD: Then it says in each of
24 these situations, "Request a hearing or consult with
25 the Division." Can you give me your understanding

1 of what that means?

2 THE WITNESS: Sure. If there was a denial
3 and I didn't necessarily agree with why it was
4 denied, instead of just immediately going to hearing
5 I might call up Brandon or Cory with the Aztec
6 office and try to discuss our differences and if we
7 couldn't come to agreement then at that time maybe
8 if we just couldn't compromise at all, then maybe I
9 would go to hearing at that point. But I would
10 first want to try to negotiate or discuss our
11 differences of opinions with the OCD before I took
12 it to the level of a hearing.

13 MR. BRANCARD: Thank you.

14 CHAIRWOMAN RILEY: Do we have any
15 redirect?

16 REDIRECT EXAMINATION

17 BY MR. FELDEWERT

18 Q. Mr. McDaniel, first off, on Mr. Brancard's
19 question, let's put language to it. If I go to
20 29.11C.

21 A. Okay.

22 Q. So now I'm in the provisions dealing with
23 site assessment and characterization, right?

24 A. Yes.

25 Q. That's where I have to do the site map,

1 the depth to groundwater, distance from wellhead
2 protection area and nearest significant
3 watercourses. I've got to demonstrate liner and
4 delineate the release horizontally and vertically,
5 right?

6 A. That's correct.

7 Q. I have to develop the remediation plan?

8 A. Yes.

9 Q. As part of that, Submission C sets forth
10 that the Division has the opportunity at times to
11 determine whether more information is needed to
12 understand the character of release and the
13 potential impact on freshwater, public health or the
14 environment, right?

15 A. That is correct.

16 Q. And as part of that delineation there is a
17 sampling methodology requirement, correct?

18 A. Sampling. I guess I'm --

19 Q. So if I -- I'm on Page 3 and I go up to
20 Subparagraph B.

21 A. Okay, yes.

22 Q. Right? If the responsible party is unable
23 to demonstrate liner integrity. So I'm outside of
24 the lined area.

25 A. Right.

1 Q. You must delineate the release
2 horizontally and vertically.

3 A. Yes.

4 Q. Then provides sampling methods.

5 A. That's correct.

6 Q. There was discussion about those and we
7 are going to address those with another witness, but
8 those certainly deal with -- when you look at these
9 guidelines they discuss representative samples, do
10 they not?

11 A. They do. That's my understanding.

12 Q. All right. So if the Division feels that
13 there's additional information that's needed,
14 perhaps additional sampling with delineation, they
15 can require a hearing.

16 A. They can.

17 Q. Okay. Or again, as we talked about
18 earlier, they can require the party discuss the
19 remediation plan.

20 A. Yes.

21 Q. Or if they decided -- or at the closure
22 plan stage?

23 A. Yes.

24 Q. Or any time in between, right?

25 A. That's correct.

1 Q. Now I want to get to what you had the
2 discussion about with Mr. Herrmann. If I go to Page
3 5 and those closure requirements and I go to that
4 area of disagreement, D1D, there's a last sentence
5 there that says, "The Division may add additional
6 sampling requirements dependent on the material
7 release and any risk to human health or the
8 environment," right?

9 A. Yes.

10 Q. There's no caveat there. It doesn't say
11 that they have to be on-site to do that, does it?

12 A. No.

13 Q. Doesn't say when that can be done?

14 A. No.

15 Q. So is it your understanding that can be
16 done any time throughout this entire process?

17 A. That's correct.

18 Q. And if I then look at Subparagraph C, last
19 sentence, there it says, "If a Division inspector is
20 witnessing the samples, that inspector is authorized
21 to verbally approve it." So the verbal approval can
22 only exist if they are witnessing, the way it is
23 written?

24 A. The way it's written, that's correct.

25 Q. But the other sampling requirements are

1 conditional requirements that don't require them to
2 be witnessed?

3 A. No.

4 Q. They can be done at any time?

5 A. That's correct.

6 Q. Then while we're here, and I want to make
7 sure we all understand what that language means by
8 separate -- and I think we need to look at it
9 carefully, D1B. There must be separate
10 representative wall and base five-point composite
11 samples.

12 A. That's correct.

13 Q. So if I go here, we have one wall.

14 A. Uh-huh.

15 Q. Your point was under the language that's
16 being proposed by NMOGA, you got to take five grab
17 samples from that wall?

18 A. That's correct.

19 Q. Do you also have to take five grab samples
20 from any other wall?

21 A. Yes, from each of the other walls.

22 Q. So five, ten, 15, 20?

23 A. That's correct.

24 Q. Individual grab samples?

25 A. Yes.

1 Q. And then you take each of the five and
2 combine them together and that's the sample you send
3 off to the lab for analysis?

4 A. That's correct.

5 Q. In addition to that, you have to take the
6 five samples on the floor?

7 A. Yes.

8 Q. Combine those?

9 A. Yes.

10 Q. Send them off to the lab?

11 A. Yes.

12 Q. Under NMOGA's language you have the little
13 blue circle because we have a wet area there.

14 A. Yes.

15 Q. You take a sample of that, correct?

16 A. That's correct.

17 Q. That stand-alone sample then goes to the
18 lab?

19 A. That's correct.

20 Q. That's what this language means?

21 A. That's correct.

22 Q. And there was a lot of scenarios brought
23 up. Maybe we've got a release that goes down a
24 wash.

25 A. Uh-huh.

1 Q. Maybe we got a release that encompasses a
2 very large area. Maybe we got a release that
3 includes chlorides or condensate or a release where
4 the Division or even the operator is concerned that
5 you may not be able to see the release. All these
6 points that we just talked about, the Division can
7 require additional sampling. They would have the
8 information necessary to make that determination,
9 correct?

10 A. Yes.

11 Q. So if we had a very large release and they
12 were concerned about these five-point composite
13 samples not being enough, they would have the
14 information to say, "We think in this particular
15 circumstance you need to do additional sampling"?

16 A. Yes.

17 Q. Okay. Or if we had a constituent that
18 maybe they were concerned about wouldn't show up as
19 a stain, they could use that as a reason to require
20 additional sampling?

21 A. Yes, I believe they could.

22 Q. And the difference here, though, is if we
23 make this arbitrary 200-square-foot obligation
24 mandatory in every single case, then for you to
25 depart from that as an operator in those

1 **circumstances you would have to go get some kind of**
2 **variance?**

3 A. That's correct.

4 Q. **Right? We would have to be inundating the**
5 **Division with variances or requests for exceptions**
6 **because of the 200-square-foot requirement?**

7 A. That's correct.

8 Q. **Is it your testimony, Mr. McDaniel, in**
9 **most circumstances you don't need a representative**
10 **sample every 200 square feet?**

11 A. In most circumstances, no.

12 Q. **That's all I have.**

13 MS. CALLAHAN: No questions.

14 RE CROSS-EXAMINATION

15 BY MR. HERRMANN:

16 Q. **One brief question. When you witness a**
17 **release, you are looking for wet or discolored**
18 **areas, is it possible in that 90 days that's**
19 **required by this rule a wet area could dry?**

20 A. Absolutely. But you wouldn't wait 90 days
21 to collect the sample.

22 Q. **You wouldn't or all operators wouldn't?**

23 A. Well, I wouldn't. I can't say all
24 operators wouldn't but I personally would not. I
25 would want to get a sample as quickly as possible to

1 determine what my contaminant levels are in order to
2 be able to address what we have.

3 **Q. I think that's all I have.**

4 MS. HERRMANN: I would like to recall Mr.
5 Powell to rebut some specific testimony based on
6 whether or not the change was discussed with NMOGA
7 after NMOGA's presentation.

8 MR. FELDEWERT: I have one more witness.

9 CHAIRWOMAN RILEY: So we will do it at the
10 end?

11 MR. BRANCARD: Yes.

12 CHAIRWOMAN RILEY: Are you done with the
13 witness?

14 MR. FELDEWERT: Yes, ma'am.

15 CHAIRWOMAN RILEY: Call your next witness,
16 please.

17 MR. FELDEWERT:

18 BRETT FULKS

19 (being duly sworn, testified as follows:)

20 DIRECT EXAMINATION

21 BY MR. FELDEWERT

22 **Q. Would you please state your name and**
23 **identify by whom are you employed and what you do as**
24 **an occupation?**

25 A. Brett Fulks. I work for Devon Energy

1 currently and I'm the environmental health and
2 safety professional for them.

3 **Q. How long have you been held that position?**

4 A. Six years.

5 **Q. What are your job responsibilities as an
6 environmental public safety representative?**

7 A. Managing initial response and remediation
8 for releases, managing engine testing and general
9 compliance with other federal and state rules, air
10 compliance and things of that nature.

11 **Q. So are you familiar with state and federal
12 regulations that govern, for example, releases from
13 oil and gas operations?**

14 A. Yes, sir.

15 **Q. Did you participate in a work group that
16 resulted in this proposed rule?**

17 A. Yes.

18 **Q. Have you testified previously before
19 either the Commission or the Division?**

20 A. No, sir.

21 **Q. What's your education level?**

22 A. I received my bachelor in science from
23 Texas A & M University in environmental science in
24 2011.

25 **Q. As part of that what type of training is**

1 **involved?**

2 A. Coursework such as environmental rules and
3 regulations at a general level as well as soil
4 science and soil microbiology.

5 Q. What has been -- you mentioned your work
6 **experience deals with managing and coordinating**
7 **releases from oil and gas operations?**

8 A. Yes.

9 Q. Do you have experience then in the
10 **notifications, the response, the sampling, the**
11 **testing and the remediation that's involved?**

12 A. Yes, sir.

13 Q. How long have you been working on dealing
14 **with releases in New Mexico?**

15 A. Three years.

16 Q. And throughout that time do you have
17 **experience implementing the Table 1 standards that**
18 **were adopted by the Commission for Rule 17?**

19 A. Yes.

20 Q. And also the Table 1 standards that were
21 **adopted by the Division for Rule 34?**

22 A. Yes.

23 Q. And as a result of your experience were
24 **you also familiar with the testing methods?**

25 A. Yes.

1 Q. And that would be for determining
2 inorganic compounds and hydrocarbon constituents in
3 soils?

4 A. Yes.

5 Q. Did I say that right?

6 A. Yes.

7 MR. FELDEWERT: I would tender Mr. Fulks
8 as an expert witness in the testing methods, the
9 standards and the New Mexico regulations addressing
10 surface releases from oil and gas operations.

11 CHAIRWOMAN RILEY: Thank you for providing
12 us the background on Mr. Fulks. It will help the
13 Commission understand what his testimony is going to
14 be about, but I have been instructed by the
15 commission counsel that we don't have to tender him
16 as an expert.

17 MR. FELDEWERT: I am going to have him
18 offer opinions so I would like him tendered as an
19 expert.

20 MR. BRANCARD: Mr. Feldewert, anybody can
21 offer an opinion.

22 MR. FELDEWERT: Okay. Anybody?

23 COMMISSIONER BALCH: If they sign the
24 sheet in the back of the room.

25 MR. FELDEWERT: Comments are one thing,

1 opinions are another, particularly if we have an
2 appellate review. So I'm not as worried about that
3 here. I would worry if we were looking at
4 circumstances where there may be appellate review
5 which is the only reason I bring this up.

6 Q. (By Mr. Feldewert) Take a look at NMOGA
7 Exhibit C. Now, there are three pages to this
8 exhibit, Mr. Fulks?

9 A. Yes.

10 Q. If I look at NMOGA Exhibit C1 and C2, does
11 that contain the Table 1 standards and the methods
12 that you have been working with since they were
13 enacted in 2013?

14 A. Yes, sir.

15 Q. And C1 contains the initial Table 1 that
16 was adopted by the Commission in 2013 for pits and
17 surface facility closure, correct?

18 A. That is correct.

19 Q. And NMOGA Exhibit C2 contains the Table 1
20 that was adopted by the Commission in 2015 following
21 a hearing for closure of produced water recycling
22 containment?

23 A. That is correct.

24 Q. And at that time isn't it true that the
25 Commission modified the EPA testing methods for TPH

1 and benzene?

2 A. Correct.

3 Q. And finally if I look at NMOGA Exhibit C3,
4 does that contain the Table 1 for the proposed rule
5 governing release?

6 A. Yes.

7 Q. Now, there has been some changes made to
8 this initially filed table, correct?

9 A. Correct.

10 Q. And those changes are reflected in NMOGA
11 Exhibit B at Page 6?

12 A. That is correct. Exceptions.

13 Q. There were no changes made to the Limit
14 column?

15 A. Correct.

16 Q. Now, before we get into this too deep,
17 just generally how is Table 1 used in this proposed
18 rule?

19 A. In the proposed rule Table 1 would be used
20 for characterization, as we discussed yesterday and
21 in the testimony today. For initial
22 characterization and then also for closure. And so
23 just walking through the columns, based on depth to
24 groundwater, from the horizontal extents of the
25 release you would first identify what your depth to

1 groundwater was. Next you would be looking under
2 the Constituent column. You would then begin
3 sampling in accordance with that. The analytic
4 methods are outlined in the Methods section and then
5 the limits would apply for both characterization and
6 closure.

7 Q. I want to focus then on the Limit column.

8 A. Okay.

9 Q. On either C3 or Page 6 of NMOGA Exhibit D.
10 Does that proposed Table 1 carry forward the same
11 cleanup or closure standards that were adopted by
12 the Commission for Rule 17 and Rule 34?

13 A. It does.

14 Q. Now, there were some written comments that
15 were filed by EDF, NRDC, Earthworks and OGAP stating
16 that they, as a group, advocate science-based
17 safeguards for clean air, water and the environment,
18 okay? Were the standards that we see here in Table
19 1 the result of extensive science-based testimony
20 garnered by the Commission in 2012?

21 A. Yes.

22 Q. And groups like Earthworks and OGAP
23 actively participated and presented evidence in 2012
24 that assisted in adopting the science-based
25 standards?

1 A. Yes, they did.

2 Q. If I turn to what's been marked as NMOGA
3 Exhibit G, which is a separate handout, does NMOGA
4 Exhibit G contain a copy of the Division's order
5 that was issued following receipt of that extensive
6 science-based evidence in 2012?

7 A. Yes, it does.

8 Q. And in particular, what we have included
9 here, just for the purposes of this exhibit, are
10 certain findings that begin on Page 41 of that
11 order?

12 A. Yes.

13 Q. And do these findings demonstrate the
14 extent of the science-based evidence and summarize
15 the science-based evidence that was presented to the
16 Commission at that time which resulted in the
17 adoption of these limits in Table 1?

18 A. Yes, they do.

19 Q. In your opinion, Mr. Fulks, is there,
20 based on your experience, is there any evidence or
21 any reason to depart from these science-based
22 standards that were adopted by the Commission
23 following receipt of that extensive evidence in
24 2012?

25 A. No.

1 Q. And would the use of these same standards
2 promote understanding, efficiency and consistency by
3 the Division and the operators in addressing surface
4 releases?

5 A. Yes.

6 Q. Now, the proposed Table 1 then, if we then
7 move over one column and go to the Method column,
8 does this proposed Table 1 carry forward the updated
9 testing methods adopted by the Commission in Rule 34
10 in 2015?

11 A. Yes.

12 Q. And when the Commission looked at the
13 table and these methods in 2015, did they replace
14 the method utilized for TPH and chlorides?

15 A. For TPH, yes.

16 Q. What was the change that was made?

17 A. They removed a method that is considered
18 outdated. That method utilized Freon and they
19 replaced that with the 8015.

20 Q. 8015M?

21 A. Yes, sir.

22 Q. And was that method that they removed, was
23 that method 4.18.1?

24 A. Yes, sir.

25 Q. And, in fact, as garnered at the time of

1 the hearing, does the EPA normally recommend use of
2 4.18.1?

3 A. That's correct.

4 Q. Now, one of the things I noticed in
5 looking through this table is I see a GRO plus DRO
6 constituent line under the constituent row or
7 column.

8 A. That's correct.

9 Q. And I see that in 51 feet to 100 feet and
10 I see it in greater than 100 feet but I do not see
11 the same line in less than 50 feet.

12 A. Yes.

13 Q. Can you explain the reason for that?

14 A. Yes. If you look at the limits section
15 for TPH for less than 50 feet, that limit is 100
16 milligrams per kilogram. It is very conservative
17 and there would be no need to break out between GRO
18 and DRO specifically.

19 Q. For groundwater less than 50 feet?

20 A. Absolutely.

21 Q. And we see that same thing if we look at
22 Table 1 that was adopted in Rule 17, right?

23 A. Absolutely.

24 Q. Now, if I look at Page 6 which contains
25 the modifications to this table since it was filed,

1 **you see what's been added is GRO plus DRO plus MRO?**

2 A. That's correct.

3 **Q. And that's exactly what the Commission did**
4 **when they adopted Table 1 under Rule 34, correct?**

5 A. That's correct.

6 **Q. Why was that done?**

7 A. When conducting 8015M in the lab, you will
8 get all the ranges of carbons, so it was intended to
9 limit that range that you are actually looking for
10 to the constituents of concern for hydrocarbon-based
11 releases.

12 **Q. So does that provide an organic range, C**
13 **something to C something else?**

14 A. Yes. It provides a range and then it also
15 -- so the entire incentive was consistency. And one
16 thing that has been a topic of discussion under the
17 rule as-is in the past is you submit your GRO and
18 your DRO and you may hear back that that's
19 insufficient, they want you to go look for this or
20 that or extend the ranges. The intent here was to
21 follow in the footsteps of 34 and make sure that
22 range was limited to exactly the constituents of
23 concern in our releases.

24 **Q. By providing the range, does that provide,**
25 **I would call them, false positives or areas of**

1 concern because without this range you would pick up
2 organics that have nothing to do with petroleum
3 production?

4 A. That's exactly correct.

5 Q. And in your opinion, does this language
6 under TPH in Table 1 provide a sufficient
7 description or the carbon range to be tested under
8 Method 8015M?

9 A. Yes.

10 Q. Now, the other change we see here is that
11 there's some strikeouts of 8015M for benzene in
12 favor of 8260B.

13 A. Correct. If you -- we did that because it
14 appeared that that was a typo. If you look at the
15 51 to 100-foot area, it was not included there, and
16 if you look at Rule 34 it specifically utilizes
17 8260, not 8015.

18 Q. Why do you use 8260B rather than 8015M?

19 A. That's what was determined in previous
20 hearings as the appropriate method for the Rule 17
21 and Rule 34. One potential reason might be that
22 under 8015M you can get interference through gas
23 chromatography between some of the organic compounds
24 and your benzene, and so you would have to add to
25 8015M as it is to get that clarity. Whereas 8260B

1 is already prescriptive to identify benzene.

2 Q. So that's a method that's actually
3 designed to identify benzene?

4 A. Yes.

5 Q. And is that a method that also identifies
6 BTEX?

7 A. Yes.

8 Q. What does BTEX stand for?

9 A. Benzene, toluene, ethylbenzene xylene.

10 Q. So it makes sense to have the same method
11 used for BTEX as well as benzene?

12 A. Yes.

13 Q. Now, the other thing I have a question
14 about is when I look at this table here for using
15 the 8015M method for TPH and GRO plus DRO, but we
16 then use 8260M for BTEX and benzene, correct?

17 A. Correct.

18 Q. Why?

19 A. At the time of the hearings it was
20 determined that 8015M is reliable for determining
21 TPH, but it's my understanding based on the
22 testimony given during 17 and 34 that it's
23 inappropriate to use that for benzene.

24 Q. Are they different boiling points for the
25 test methods?

1 A. There are different boiling points.
2 Again, I mentioned this earlier but when you are
3 doing the gas chromatography under 8015M you can
4 have interference between other organic carbons, as
5 mentioned earlier.

6 **Q. In your opinion, will the use of these**
7 **updated testing methods in Table 1 promote**
8 **understanding, efficiency and consistency by the**
9 **Division and the operators in addressing surface**
10 **releases?**

11 A. Yes.

12 **Q. And are these testing methods ones that**
13 **are familiar with and can be utilized by**
14 **laboratories?**

15 A. Yes.

16 **Q. Now, there's been, if I look at Page 6 of**
17 **NMOGA Exhibit D, there's been a change made to the**
18 **upper left-hand corner?**

19 A. Yes.

20 **Q. Where we struck "bottom" and it was**
21 **replaced with "the horizontal extents." Do you see**
22 **that?**

23 A. Yes.

24 **Q. Briefly, what was the reason for that**
25 **change? Why didn't we just continue with bottom?**

1 A. The intent there was to make sure that we
2 stayed consistent with the intent of Rule 17 and
3 Rule 34. So in those rules if you find a release
4 underneath that pit you're starting at the bottom of
5 the pit. If you apply the same thing to a release
6 you would constantly be changing your depths to
7 groundwater if you use that term "bottom." It was
8 to maintain an apples-to-apples comparison.

9 **Q. And in your opinion, will this proposed**
10 **change degrade in any way the standards adopted by**
11 **the Commission in Table 1 following extensive**
12 **hearings?**

13 A. No.

14 **Q. I want you to turn to Page in NMOGA**
15 **Exhibit D, going to 29.11A5E on Page 3. You were**
16 **here for the discussions yesterday about this**
17 **subsection?**

18 A. Yes.

19 **Q. And you were here with respect to the**
20 **purpose of that subsection?**

21 A. Yes.

22 **Q. And how it was implemented?**

23 A. Yes.

24 **Q. In your opinion -- have you worked with**
25 **these tables and these CFRs that we see in**

1 **Subsection E?**

2 A. Yes.

3 **Q. And in your opinion, does this subpart**
4 **provide appropriate testing methods and standards to**
5 **address non-wellspring releases in the majority of**
6 **the circumstances?**

7 A. Yes.

8 **Q. And if there was a release out there that**
9 **contains constituents not addressed by these public**
10 **sources, does the Division have the authority to**
11 **determine the appropriate response?**

12 A. Yes, under Triple I they have that
13 authority.

14 **Q. So 29.11.A5B Triple I?**

15 A. Yes, sir.

16 **Q. Okay. Then staying on this page, if I**
17 **move up above, I'm in 29.11A5B and it talks about**
18 **what you do if the release is outside the lined**
19 **containment area, right?**

20 A. Yes.

21 **Q. Now, explain -- this is for**
22 **characterization and delineation?**

23 A. Yes.

24 **Q. And it references various soil sampling**
25 **methods for characterization in that subsection.**

1 A. Yes, sir.

2 **Q. Would you please explain to us why these**
3 **methods are in here and why they were chosen?**

4 A. Yes, sir. Those methods were chosen
5 because of the some of the concerns that were
6 brought up today actually. When you discuss an
7 operator that may not have the staff appropriate to
8 be knowledgeable on what adequate sampling may or
9 may not look like, these methods are here to provide
10 that sort of guidance. So specifically, you know,
11 it says the operator may, or other approved methods,
12 correct? So the idea was to provide several options
13 to operators.

14 So yesterday in testimony there was a
15 question specifically on this that came up which was
16 are these documents available to the public. So one
17 that I would point out is EPA SW846 is available to
18 the public and very clearly in Chapter 9 of that
19 method extensively outlines how to conduct three
20 different strategies of randomized sampling across
21 an area of unknown hazardous waste constituents. So
22 it clearly outlines, and it's based on your
23 regulatory thresholds.

24 So we have regulatory thresholds in this
25 rule, in 17 and 34, and that method can be utilized

1 by a layman to read through and determine how he
2 would randomly sample that area, he or she, to
3 verify constituents of concern levels.

4 **Q. If I'm an operator not sophisticated and I**
5 **don't know what sampling means, are these the types**
6 **of documents that provide guidelines on what that**
7 **means and how it's to be done?**

8 A. Yes, absolutely. Again, specifically
9 under EPA SW846, it very clearly almost goes through
10 a stats course on what is specifically relevant and
11 specifically defines how to accomplish a confidence
12 interval of 80 percent you would conduct
13 representative sampling in a given area.

14 **Q. And in your opinion does this provide**
15 **sufficient guidance to operators?**

16 A. Yes.

17 **Q. With respect to both delineation and how**
18 **to conduct representative sampling?**

19 A. Yes.

20 **Q. In your opinion does this proposed rule**
21 **with NMOGA's changes provide the Division and**
22 **operators an efficient and effective procedure for**
23 **addressing releases from oil and gas operations?**

24 A. Yes.

25 **Q. Does this rule with NMOGA's proposed**

1 changes provide flexibility where needed to
2 efficiently and effectively address releases from
3 oil and gas operations?

4 A. Absolutely.

5 Q. In your opinion, does this proposed rule
6 with NMOGA's changes contain standards and
7 requirements that afford a reasonable level of
8 protection to the freshwater supplies, public health
9 and the environment?

10 A. Yes.

11 MR. FELDEWERT: Madam Chair, I move the
12 admission into evidence of NMOGA Exhibit G.

13 CHAIRWOMAN RILEY: Are there any
14 objections?

15 MS. CALLAHAN: No objection.

16 MS. HERRMANN: No objection.

17 (Note: NMOGA Exhibit G admitted.)

18 MR. FELDEWERT: That concludes my
19 examination of the witness.

20 CHAIRWOMAN RILEY: Do we have
21 cross-examination?

22 MS. HERRMANN: No.

23 MR. LARSON: No questions.

24 MS. CALLAHAN: No questions.

25 CHAIRWOMAN RILEY: Commissioners?

1 COMMISSIONER MARTIN: Table 1. We include
2 specific methods for analyzing these, and as we have
3 seen today or heard today, the standards or
4 standardly accepted methods change all the time.

5 THE WITNESS: Correct.

6 COMMISSIONER MARTIN: Do you consider that
7 problematic if we stipulate certain ones in a rule
8 like this and at some point in time we might have to
9 go and get alternative methods approved by the
10 Division?

11 THE WITNESS: No, sir. Numerous states do
12 the exact same thing. Specifically the reason I'm
13 not concerned in our specific rule is under Method
14 there's an asterisk, a single asterisk up there that
15 says, "Or other test methods approved by the
16 Division." So when I say that other states do that,
17 they usually simply do a list of other methods that
18 are approved.

19 So specifically, I believe part of the
20 testimony coming in today from the labs, from
21 Cardinal, is going to be to a specific chloride
22 method that is regularly used today in cleaning up
23 our releases that I don't think the Division is
24 going to have any issue with because today they
25 currently approve that method.

1 COMMISSIONER MARTIN: That's all I have.

2 COMMISSIONER BALCH: Staying with Table 1,
3 the far top left corner, depth below the horizontal
4 extents of release to groundwater?

5 THE WITNESS: Yes, sir.

6 COMMISSIONER BALCH: Is the intent of that
7 to be if in anywhere under the horizontal extent you
8 would take the minimum depth to apply the table?

9 THE WITNESS: Yes. One specific example
10 that came up when defining that is if you have a
11 release from a wellhead at surface level, that is
12 where your horizontal extent would begin. But if
13 you have a ten-foot buried pipeline it would begin
14 at that ten-foot.

15 COMMISSIONER BALCH: That was not exactly
16 my question.

17 THE WITNESS: Sorry.

18 COMMISSIONER BALCH: If you have a 40-acre
19 surface spill and you have a contour map of
20 groundwater depth underneath that area, do you
21 measure the minimum depth under any part of that
22 extent?

23 THE WITNESS: Yes.

24 COMMISSIONER BALCH: That would be what
25 you apply the tables to?

1 THE WITNESS: Yes, sir.

2 COMMISSIONER BALCH: That's the intent?

3 THE WITNESS: That is the intent.

4 COMMISSIONER BALCH: Thank you.

5 MR. BRANCARD: Mr. Fulks, on those
6 sampling methods, that's supposed to be the
7 exclusive list. In other words, that's the
8 question. Is this the exclusive list, these four or
9 something the Division approves?

10 THE WITNESS: Yes, sir. Something the
11 Division approves is, I think, pretty open.

12 MR. BRANCARD: Right. So wouldn't it be
13 better to have a sentence that leads in that says
14 the operator shall use one of the following?

15 THE WITNESS: I see what you're saying.
16 Yeah.

17 MR. BRANCARD: And then in the next
18 section under Closure Requirements where again you
19 are doing soil sampling, is the intent then that the
20 soil sampling methods you used for closure would be
21 the same as that are listed here in 11?

22 THE WITNESS: No, sir. As described in
23 the existing rule, that is a five-point composite
24 sample for closure of the bag there.

25 MR. BRANCARD: Okay. So it would not be

1 one of these methods listed in 11?

2 THE WITNESS: It could be. You could be
3 using that method as your foundation for how you
4 conducted your sampling and it would make sense that
5 you were.

6 MR. BRANCARD: In other words, for 12 for
7 soil sampling you're not limited to these methods?

8 THE WITNESS: Come again:

9 MR. BRANCARD: So this list you have for
10 the delineation of soil sampling, that's what the
11 universe is for soil sampling delineation?

12 THE WITNESS: Correct.

13 MR. BRANCARD: But for closure you can do
14 our methods other than those four?

15 THE WITNESS: So delineation results
16 including laboratory analysis under 19.15.29.12C1
17 little A are included as part of that. Those
18 delineation results are part of the characterization
19 report so you are using the methods outlined in the
20 other section.

21 MR. BRANCARD: Right. But then you are
22 taking new samples for the closure?

23 THE WITNESS: Correct, yes.

24 MR. BRANCARD: So again, are those soil
25 sampling methods delineations the ones you should be

1 using for the closure?

2 THE WITNESS: I believe currently you are
3 using the composite sample; is that correct?

4 MR. BRANCARD: Yes. That's different
5 then?

6 THE WITNESS: That is different.

7 CHAIRWOMAN RILEY: Redirect?

8 MR. FELDEWERT: No.

9 CHAIRWOMAN RILEY: Are you done with the
10 witness?

11 MR. FELDEWERT: Yes. Madam Chair,
12 Commissioners. That concludes our presentation.

13 CHAIRWOMAN RILEY: Thank you. So that
14 leads us to our next party which is Cardinal Labs.

15 COMMISSIONER BALCH: Was there a request
16 for a rebuttal witness?

17 CHAIRWOMAN RILEY: There is. Do you want
18 to do it now or after?

19 MR. BRANCARD: I think we should save the
20 rebuttal until after the direct testimony.

21 CHAIRWOMAN RILEY: Would you like to get
22 started now?

23 MS. CALLAHAN: Can we take a quick break?

24 CHAIRWOMAN RILEY: Sure.

25 (Note: The hearing stood in recess at

1 11:31 to 12:50.)

2 CHAIRWOMAN RILEY: Good afternoon. Let's
3 start back up. We are on the record and we are
4 going to start with Cardinal Labs.

5 MS. CALLAHAN: Thank you Madam Chair. I
6 would like to call Ms. Keene.

7 CELEY KEENE

8 (being duly sworn, testified as follows:)

9 DIRECT EXAMINATION

10 BY MS. CALLAHAN

11 **Q. Ms. Keene, would you please state for the**
12 **record your name, and identify whom you are employed**
13 **by?**

14 A. My name is Celey Keene. I'm employed by
15 Cardinal Laboratories.

16 **Q. In what capacity?**

17 A. I am the lab director and quality manager.

18 **Q. How long have you been employed by**
19 **Cardinal?**

20 A. Eleven years.

21 **Q. And what kind of service does Cardinal**
22 **provide?**

23 A. We are an environmental laboratory. We
24 are located in Hobbs, New Mexico and we also have a
25 receiving station in Farmington, New Mexico and a

1 sister laboratory in Durango, Colorado which is
2 Green Analytical. We perform analysis organics,
3 inorganics, metals such as found in soil and water,
4 and also we do analysis based on the OCD regulations
5 for spills in oil and gas operations.

6 **Q. And one of those contaminants is chloride?**

7 A. Correct.

8 **Q. How long has Cardinal been in business?**

9 A. Since 1992.

10 **Q. And what are your responsibilities as lab**
11 **director?**

12 A. My responsibilities include ensuring that
13 the quality system is implemented and followed,
14 overseeing all quality control data, conducting
15 internal audits, monitoring corrective actions,
16 revisions of all documents, conducting
17 demonstrations of capabilities of all my analysts,
18 signing all reports, supervision of analysts on
19 day-to-day operations of the laboratory, monitoring
20 and implementing new and current certification
21 programs, maintaining turn-around times of analysis,
22 client relations, hiring new employees, and also I'm
23 responsible for monitoring expenses and revenues of
24 the laboratory.

25 **Q. Generally for whom do you provide your**

1 **services?**

2 A. Mostly it's oil and gas companies,
3 environmental consultants, public utilities,
4 regulatory agencies, dairies and private landowners.

5 **Q. And does Cardinal's service extend to**
6 **states other than New Mexico?**

7 A. Yes. We also do work in Colorado and
8 Texas.

9 **Q. What certifications does Cardinal hold?**

10 A. We are NELAC certified, which is a
11 national environmental laboratory accreditation
12 program through the state of Texas. We also have
13 drinking water certification through the state of
14 New Mexico, Colorado and Texas.

15 **Q. Are copies of those certifications posted**
16 **on Cardinal's website?**

17 A. Yes.

18 **Q. Have you previously testified before the**
19 **Division?**

20 A. No.

21 **Q. Would you please outline your educational**
22 **background?**

23 A. I have a bachelor's in chemistry from the
24 University of Texas of the Permian Basin. I got
25 that in 1998. I have got over 22 years of

1 laboratory experience as either an analyst, an
2 organic or inorganic technical director, quality
3 manager or lab director.

4 **Q. And you had work prior to Cardinal where?**

5 A. I started out with Maxim Technologies and
6 I worked there from 1995 to 1999. I was an analyst
7 doing organics, inorganics and petroleum. Then I
8 went to work at Environmental Labs of Texas, which
9 is now Xenco, and I worked there 1999 to 2007. I
10 was an analyst and also the organic technical
11 director. And then I have been at Cardinal Labs
12 since 2007.

13 **Q. Do you hold any professional**
14 **certifications?**

15 A. I'm a NELAC-accredited technical director
16 for organics, inorganics and microbiology.

17 **Q. Are you familiar with the application that**
18 **has been filed by the OCD in this case?**

19 A. Yes.

20 **Q. Are you familiar with Rule 19.15.29 as**
21 **it's currently in effect as well as how it's been**
22 **proposed?**

23 A. Yes.

24 MS. CALLAHAN: I understand you are not
25 accepting experts but I wanted her to give her

1 background.

2 CHAIRWOMAN RILEY: Thank you.

3 Q. Is chloride a common contaminant
4 associated with unauthorized releases in oil and gas
5 operations in New Mexico?

6 A. Yes. In New Mexico it's one of the most
7 common contaminants that we see.

8 Q. What are the most common methods used for
9 soil chloride analysis in New Mexico?

10 A. That would be EPA300 and Standard Method
11 4500 Cl B are the two most common ones used in New
12 Mexico.

13 Q. For ease of reference I'm going to refer
14 to them as Method 300 and Method 4500. So what
15 method do you typically use in your analysis for
16 chloride in soil sampling?

17 A. At Cardinal we normally use the Standard
18 Method 4500.

19 Q. How long have you been using that method?

20 A. For over 25 years.

21 Q. You're speaking for Cardinal, since you
22 have not been there for 25 years?

23 A. Yes.

24 Q. Cardinal has been doing it for 25 years?

25 A. Correct.

1 **Q. And can you explain why you've chosen to**
2 **use 4500 for chloride testing and soil rather than**
3 **EPA300?**

4 A. The Standard Method 4500 is a tried and
5 true method. In practice I found that it's the most
6 practical and a very robust methodology for the
7 varying and challenging soil matrices that we see on
8 a day-to-day basis. It's just as reliable as the
9 EPA300 method. Standard Method 4500 is also a
10 NELAC-approved method and it has been routinely used
11 and allowed by regulatory bodies such as BLM.

12 **Q. And we're speaking specifically about its**
13 **use in analyzing chloride and soil; is that right?**

14 A. Correct.

15 MS. CALLAHAN: So Madam Chairwoman, in the
16 interest of time we have submitted written testimony
17 of Ms. Keene that goes into very specific detail of
18 both the 4500 and 300 methods. In the interest of
19 conservation of time I thought we would just offer
20 this written testimony rather than going through the
21 very detailed specifics, which I personally don't
22 understand.

23 CHAIRWOMAN RILEY: I'm good with that.
24 I'm like you, I don't know that I would understand
25 the detail of it. Dr. Balch and Mr. Martin?

1 COMMISSIONER MARTIN: No objection.

2 MR. BRANCARD: This is Exhibit 7, Counsel?

3 MS. CALLAHAN: Yes, it is. It's the only
4 exhibit that is in addition to the others that were
5 in the prehearing statement.

6 COMMISSIONER BALCH: I don't know how much
7 time it would take to go through the exhibit, but I
8 guess I would be concerned that anybody that would
9 like to cross-examine the witness on that testimony
10 would not have as much opportunity if the evidence
11 is not presented.

12 MS. CALLAHAN: Could we perhaps ask of the
13 other counsel if they have witnesses who would be
14 interested in doing that?

15 CHAIRWOMAN RILEY: For clarification, are
16 you just wanting to add this 4500 method to the
17 table? Is that the goal?

18 MS. CALLAHAN: Yes, that is the goal.

19 CHAIRWOMAN RILEY: So do the attorneys for
20 the other parties have questions for the witness?

21 MS. HERRMANN: This is the first time I
22 have seen Exhibit 7. It wasn't submitted with the
23 prehearing statement so I can't say yes or no to
24 that question.

25 CHAIRWOMAN RILEY: It doesn't seem like

1 it's all that long so maybe --

2 MS. CALLAHAN: Have her just read it into
3 the record? Is that your preference?

4 CHAIRWOMAN RILEY: Would you be
5 comfortable with having it read and that way it's in
6 the record and then we can have questions and deal
7 with it at that time?

8 COMMISSIONER BALCH: I'm sure
9 Mr. Feldewert will have questions.

10 MR. FELDEWERT: Actually, we do not have
11 any questions for this witness, so I don't know if
12 you necessarily need to read it into the record.

13 COMMISSIONER BALCH: Maybe a summary.

14 CHAIRWOMAN RILEY: I was trying to catch
15 her eye.

16 COMMISSIONER BALCH: Maybe a summary of
17 the testimony and the relevance if you are asking
18 for it to be added into the rule.

19 MS. CALLAHAN: She does plan to give an
20 overview of these methods. She just doesn't want to
21 go into the specifics of them so I don't know if you
22 want to wait until we give the overview and then
23 maybe supplement it?

24 COMMISSIONER BALCH: Probably that would
25 be fine. The purpose of the standard method is that

1 they are standard and accepted already.

2 MS. CALLAHAN: Yes.

3 Q (By Ms. Callahan) So just for point of
4 reference, in the event that we decide to put it in
5 the record as an affidavit, does the affidavit
6 accurately describe or give a technical description
7 of both the 4500 and the 300 method as employed by
8 Cardinal and Green respectively?

9 A. Yes, it does.

10 Q. Can you give us an overview of the 4500
11 method?

12 A. The Standard Method 4500 is a modified
13 water method. We're using a deionized water
14 extraction to get the chloride out of the soil. We
15 perform the chloride soil analysis with a classical
16 wet chemistry method. It's just a basic color
17 change. And that's all described in more detail in
18 the affidavit.

19 The 4500 method has very few interferences
20 which can easily be taken care of with either
21 dilution or a simple pH adjustment. Unlike other
22 methods, dilution does not affect the reporting
23 limit of the Standard Method 4500.

24 Q. What do you mean when you refer to
25 interference? Can you give us an example?

1 A. The interference basically refers to the
2 efficiency of the method. The most common ones that
3 we see, they will prevent like the correct color
4 change that you're looking for, so you just may see
5 a different color and then you know that you need to
6 go adjust for that.

7 That's for the Standard Method 4500. For
8 the 300, the general interference is you see that
9 something masks the peak that you're looking for or
10 comes out at the same time. A general one, one of
11 the most common ones we see for the Standard Method
12 4500 is sulfide, and that one, whenever you are
13 doing the titration you will see like a black color
14 instead of a salmon color is what you're normally
15 looking for. So you just use hydrogen peroxide to
16 off-gas the sulfide and then you can go about your
17 business titrating.

18 The EPA300, one of the common
19 interferences would be another peak, say sulfate.
20 So you may have a real low chloride that you're
21 looking for, maybe 50 parts per million, but your
22 sulfate is extremely high, like 2000. So in that
23 case it would cause interference with the chloride
24 peak and you would actually have to go back and
25 dilute the sample in order to see the chloride

1 clearly. And that definitely raises the detection
2 level of your chloride.

3 **Q. So what is the significance of there being**
4 **fewer interferences with the 4500 method?**

5 A. What it means is the method is more
6 efficient, so analysis by the 4500 method can be run
7 quickly, efficiently and is just as accurate as the
8 EPA300. Using this method we are able to provide
9 our clients with reliable, defensible data in a very
10 timely manner.

11 **Q. Can you give us an overview of the 300**
12 **method?**

13 A. The EPA300 is actually a NELAC-approved
14 method. What it is, it's used in anion
15 chromatograph so it separates the anions in their
16 acidic form and measures them chromatographically
17 based on the conductivity.

18 **Q. Would you give us an example of an anion?**

19 A. Anion?

20 **Q. Anion.**

21 A. So the anions that you can see via the IC
22 or the 300 method would be chloride, fluoride,
23 sulfate, nitrate, nitrite, orthophosphate and
24 bromide.

25 **Q. Is it fair to say if you want to measure**

1 more than chloride the 300 method might be the
2 preferred method?

3 A. Yes.

4 Q. Is that typically so when you're dealing
5 with water?

6 A. Yes.

7 Q. As opposed to soil?

8 A. Yes.

9 Q. So what are the main challenges of the
10 EPA300 method?

11 A. The main challenges of the EPA300 method
12 would be -- the biggest one is the soil itself. The
13 soil matrices. Also color, turbidity, any
14 unsettleable solids. They must be completely
15 removed from the extract before you can put it on
16 the IC. Otherwise, any particulates will clog up
17 the instrument in the sample port or in the column
18 that's used for analysis. This requires instrument
19 maintenance and a loss of instrument downtime if you
20 do have particulates that get through. But this is
21 normally taken care of with centrifuging the sample
22 and extensive filtering or dilution, and those
23 usually ultimately account for the interferences.

24 Q. So the EPA300 method is performed by --
25 not by Cardinal but by your sister lab?

1 A. Correct.

2 **Q. And Jacob Miller will be testifying more**
3 **specifically about the EPA300 method since he uses**
4 **it more frequently. You have had experience with**
5 **the EPA300, have you not?**

6 A. Yes, I have.

7 **Q. So could we turn now to Cardinal's Exhibit**
8 **1 through 5. Maybe could we run through those and**
9 **would you explain those?**

10 A. Exhibit 1 is just the basic outline
11 comparison of the quality control parameters that
12 are required by EPA300 and the Standard Method 4500.
13 They are very similar in what's required. And this
14 is also run every 20 samples. So all of this QC is.

15 **Q. Exhibit 2?**

16 A. Exhibit 2 is an independent lab study that
17 we did in a NEMAC-accredited laboratory which is
18 Alamo Analytical, and they performed the EPA300 and
19 the Standard Method 4500 on a wide range of samples,
20 different chloride levels that we would normally
21 see. And it shows the reproducibility between the
22 two methods. And then the graph shows the same
23 thing, the results in the graphic form.

24 Exhibit 3 is a semi-independent study.

25 No, this one actually is a low level chloride

1 comparison data of the EPA300 and the 4500 showing
2 that the most variation that we see between the two
3 methods is around 100 parts per million or less, and
4 that's usually because of the different
5 sensitivities in the two methods. Also the
6 homogenous nature -- the non-homogenous nature of
7 the soils, they do require two different extraction.

8 Exhibit 4 is a semi-independent study
9 comparison between the EPA300 and the Standard
10 Method 4500. We, at Cardinal, did the Standard
11 Method 4500 on these samples and we sent out the
12 EPA300 to an independent laboratory, Permian Basin
13 Environmental Laboratory. And it shows the
14 variation between the two methods. It does also
15 include the quality control data of the two methods.

16 And then Exhibit 5 is an internal method
17 comparison study that we did between Cardinal and
18 Green showing the difference between the two methods
19 and variations.

20 **Q. So overall, what does the data reflected**
21 **in Exhibit 1 through 5 tell us?**

22 A. Overall, it shows that the most variation
23 that you're going to see between the two methods is
24 below 100 parts per million at the low levels. And
25 as I explained, this is mainly because of the

1 difference in the sensitivities of the two methods
2 as well as the non-homogenous nature of the soils.
3 And these are well below the regulatory limits that
4 are set forth in Rule 29 which is 600.

5 Q. So the limit in the rule would have to be
6 a lot lower before the EPA300 would test as more
7 reliable?

8 A. Not necessarily more reliable, but you
9 would definitely see more variation between the two
10 methods at the low levels.

11 Q. Okay. So in a sense, both these
12 methods -- would the results of the data show us
13 that both are equally reliable?

14 A. Yes.

15 Q. Historically has the Division routinely
16 administratively approved the use of the 4500 method
17 for chloride analysis in soil?

18 A. Yes.

19 Q. However, have there been times in the
20 recent past, the past year or so, that testing has
21 been delayed pending division approval of the 4500
22 method?

23 A. Yes.

24 Q. But at times it is approved and other
25 times it is not approved?

1 A. Correct.

2 **Q. It's inconsistent?**

3 A. Whenever we receive samples we don't
4 necessarily know where they are coming from. We
5 don't know if it's a pit closure or delineation
6 unless a client, you know, explicitly tell us that.
7 So we just start analyzing the samples that they
8 bring in.

9 **Q. Let's look at Exhibit 6 now, please.**

10 **Would you tell us what is reflected by this exhibit?**

11 A. So Exhibit 6 is a memo issued by the OCD
12 whenever the pit rule came out in 2008. We started
13 having a lot of calls from clients because listed in
14 the pit rule it says EPA Method 300.1 for chlorides,
15 so that was not a method that was used in the state
16 at that time and many people were like, what is this
17 method?

18 So we made some calls to the OCD along
19 with many clients and industry personnel, and the
20 OCD issued this memo saying that EPA300 and the
21 Standard Method 4500 were to be accepted in lieu of
22 the EPA300.1.

23 **Q. So in addition to Rule 17, the pit rule,**
24 **this memo also applies to Rule 34; is that right?**

25 A. Correct.

1 Q. Okay. And do all three rules address the
2 same contaminants and standards for remediation,
3 protection of the environment and groundwater?

4 A. Yes, they all ask for BTEX and chloride.

5 Q. And as it is proposed, and I guess in the
6 past, Table 1 has reflected more than one approved
7 method for other contaminants; is that right?

8 A. Yes.

9 Q. Alternative methods given?

10 A. Yes.

11 Q. And are those two methods given because
12 they both provide reliable and comparable value?

13 A. Correct. And in this instance it would be
14 the method used for BTEX or benzene, which is Method
15 8021B and 8260B, so they both provide reliable data.
16 They are two different methods but you will get the
17 same comparable data.

18 Q. So that's true for the EPA300 and the
19 Standard Method 4500?

20 A. Correct.

21 Q. The 4500 rule is not specifically
22 expressly listed in Table 1; is that right?

23 A. No, it's not.

24 Q. Is it your understanding that the 2008
25 division memo reflected in Exhibit 6 has been the

1 **basis for division personnel approving Cardinal's**
2 **use of the 4500 method for chloride soil analysis**
3 **for your clients?**

4 A. Yes.

5 **Q. Have you been able to locate another copy**
6 **of this memo anywhere?**

7 A. No.

8 **Q. So this copy came from where?**

9 A. This copy was actually sent to us from one
10 of our clients back in 2008 that they received from
11 the OCD. I have never been able to find it anywhere
12 else so we keep a copy on file.

13 **Q. Why do you keep a copy on file? What use**
14 **do you have for it now?**

15 A. Every once in a while over the years we
16 have gotten a call. You know, somebody coming in to
17 do remediation and they read the rules and it lists
18 EPA300.1 or EPA300 and we don't provide that method
19 on a regular basis so they ask or they may say,
20 "Well, you ran the wrong method." And we say, "No,
21 it's actually accepted based on this memo," and so
22 we just e-mail them the memo and we're able to use
23 that.

24 **Q. Were you present yesterday at the hearing**
25 **when the Division testified regarding the variance,**

1 Mr. Griswald testified regarding the variance rule?

2 A. Yes.

3 Q. And we heard that it would be neutral for
4 obtaining division approval of a method other than
5 those listed in the table; is that correct?

6 A. Yes.

7 Q. So as an independent laboratory whose role
8 requires a complete absence of bias, would Cardinal
9 be able to request a variance on behalf of a
10 responsible party under the rule?

11 A. No, we would not be able to do that. Only
12 an operator would be able to do that.

13 Q. It would impinge on your appearance of
14 being an unbiased, disinterested third party, would
15 it not?

16 A. Correct.

17 Q. So that variance would have to be
18 requested by an operator or the operator's agent?

19 A. Correct.

20 Q. Is it practical or realistic to expect
21 that each of your clients would take it upon
22 themselves to seek a variance that wouldn't
23 necessarily apply to other cases either for itself
24 or an operator?

25 A. No.

1 Q. Is it your opinion that expressly
2 including the 4500 method in the new release rule
3 would, in addition to adding it to the table in
4 addition to the EPA300 rule, would avoid confusion
5 and clearly confirm for the responsible parties, the
6 operators, the reliability of the 4500 and the
7 acceptance by the Division of the 4500?

8 A. Yes.

9 Q. Then no need would exist for the
10 responsible party to ask the Division for approval?

11 A. Correct.

12 Q. Would it also allow more timely reporting
13 of chloride releases?

14 A. Yes, it would.

15 MS. CALLAHAN: I am offering Exhibits 1
16 through 7 into the record.

17 CHAIRWOMAN RILEY: Is there any
18 objections?

19 MR. FELDEWERT: No objection.

20 MS. HERRMANN: No objection.

21 MR. LARSON: No objection.

22 CHAIRWOMAN RILEY: Do you have any
23 objection?

24 MR. BRANCARD: No, but I will note that we
25 will accept Exhibit 7 because nobody objected to it,

1 but normally it's a bigger deal when we accept a
2 technical exhibit not presented in the prehearing
3 statement. So in this case nobody's objected to it.

4 CHAIRWOMAN RILEY: So accepted.

5 (Note: Exhibits 1 through 7 admitted.)

6 MS. CALLAHAN: That concludes our
7 presentation with this witness.

8 CHAIRWOMAN RILEY: Can we go ahead and get
9 direct or cross?

10 CROSS-EXAMINATION

11 BY MS. HERRMANN

12 **Q. I have a couple questions. Ms. Keene,**
13 **thank you for your testimony today. Does Cardinal**
14 **Labs also run any of the other EPA methods listed in**
15 **Table 1?**

16 A. Yes, all of them.

17 **Q. Is there any overlap between the EPA300**
18 **and some of the other methods?**

19 A. No.

20 **Q. So there's no added benefit by keeping**
21 **everything standard with the EPA?**

22 A. No.

23 **Q. That's my only question.**

24 MR. FELDEWERT: I have no questions.

25 MR. LARSON: No questions.

1 CHAIRWOMAN RILEY: How about the
2 Commission?

3 COMMISSIONER BALCH: I have a couple. We
4 have been through Exhibits 1 through 7. I noticed a
5 lot of the comparison tables. There's not like a
6 full statistical workup on them but it looks like
7 4500 is higher than EPA300 at lower numbers and
8 lower than EPA300 once you get above a couple
9 thousand milligrams per kilogram. Is there some
10 reason for that shift?

11 THE WITNESS: Not necessarily. You know,
12 you can run one sample multiple times and get
13 different numbers. You may run it one time and get
14 580. The next time you may get 600. The next time
15 610.

16 COMMISSIONER BALCH: That's with either/or
17 both methods?

18 THE WITNESS: Yes. That's correct.
19 That's just the nature of the soil and it's also
20 because soil is not homogenous. It's very difficult
21 to make it completely homogenous across the board.

22 COMMISSIONER BALCH: How big is a typical
23 grab sample?

24 THE WITNESS: Usually it's a four-ounce
25 jar.

1 COMMISSIONER BALCH: How much of that do
2 you use for an individual test?

3 THE WITNESS: So for the EPA300 we use ten
4 grams and then for the standard method we use 25
5 grams.

6 COMMISSIONER BALCH: And you do several
7 and average them or just take one and call it good?

8 THE WITNESS: You take one.

9 COMMISSIONER BALCH: So Standard Method
10 4500 has been used by Cardinal for 25 years? I
11 believe that was the testimony?

12 THE WITNESS: Yes.

13 COMMISSIONER BALCH: Everybody knows what
14 EPA is. So with the EPA300 you know where you might
15 be able to find it. Where does Standard Method 45
16 come from?

17 THE WITNESS: Standard Method comes from
18 standard methods of water and wastewater
19 examination. It's also an EPA-approved method.
20 We're certified for that method through NELAC, so
21 it's used very widely. It's probably what you would
22 say is one of the bibles of environmental chemistry.
23 So between EPA SW846 methods, standard methods,
24 those are the most common methods that are used in
25 laboratories.

1 COMMISSIONER BALCH: Okay. So my next
2 question is answered already, but that is in your
3 other jurisdictions, so you have federal, people
4 might have reporting requirements through a federal
5 agency. Also you work in Texas and Colorado. So
6 all of those locations will accept SM4500 in lieu
7 of --

8 THE WITNESS: Yes.

9 COMMISSIONER BALCH: -- EPA300?

10 THE WITNESS: Yes.

11 COMMISSIONER BALCH: You said 4500 is best
12 for just chlorides. 300 is when you are analyzing
13 for multiple constituents?

14 THE WITNESS: Originally EPA300 was
15 designed for waters and it's been adapted to soils.
16 So, you know, it's for multiple anions. So whenever
17 you are looking at a water you want to see kind of a
18 gamut of what's in the water. In soil, for the most
19 part we're looking for just chloride. So using a
20 method that is just ion selective such as just a
21 chloride method is much more efficient for these
22 purposes.

23 COMMISSIONER BALCH: Rule 17, specifically
24 we use chloride as a marker for whatever else might
25 be in there?

1 THE WITNESS: Correct.

2 COMMISSIONER BALCH: You mention the speed
3 of the method, the speeds were different, 4500
4 versus 300?

5 THE WITNESS: Extremely different.

6 COMMISSIONER BALCH: What's the
7 approximate time to run each of those?

8 THE WITNESS: For Standard Method 4500 a
9 sample can be run in a matter of minutes. Depending
10 on if it's really high or low we may have to go back
11 and rerun and do a dilution and that kind of thing.
12 For EPA300, for every sample the run time is 21
13 minutes. That's not counting the prep time. So in
14 order to get it on the instrument it has to look
15 like this.

16 COMMISSIONER BALCH: The centrifuging
17 takes --

18 THE WITNESS: Centrifuging -- so first we
19 have to take conductivity of the sample. Then we
20 centrifuge the sample. It has to go through two
21 different types of filtration because the sample
22 ports on the instrument are extremely small so we
23 are filtering down to a .2 mikron to put it on the
24 instrument.

25 COMMISSIONER BALCH: So several orders of

1 magnitude of difference?

2 THE WITNESS: Correct.

3 COMMISSIONER BALCH: What about cost?

4 THE WITNESS: The cost is the same and
5 that's just because of competitors, their cost.

6 COMMISSIONER BALCH: The going rate for
7 the chloride sample and how it's done?

8 THE WITNESS: Yes.

9 COMMISSIONER BALCH: You also mentioned --
10 this is in your Exhibit 7 testimony. Dilution does
11 not affect testing limits with SM4500?

12 THE WITNESS: Correct.

13 COMMISSIONER BALCH: Why is that?

14 THE WITNESS: With the SM4500 you are able
15 to use less sample, but however much deionized water
16 you add to that does not make a difference. So you
17 are just titrating chloride that is in what you have
18 taken out of that sample. So say we have a sample
19 that's 10,000 parts per million of chloride. We
20 wouldn't be able to run that as a straight 25
21 milliliter sample because it would be too high so we
22 would have to dilute that. So we would maybe take
23 one mill of that sample into the flask and add some
24 deionized water, which has no chloride, and then we
25 would just titrate that amount.

1 So it does not affect -- because your
2 reporting limit is based on how much you titrate and
3 what your burette can see so the increments on the
4 burette. On the EPA300 you actually have a
5 calibration range that you have to work with. And
6 on that instrument we are able to calibrate from
7 usually zero to 50 parts per million so you have to
8 dilute that sample to get it within that range to
9 put it on the instrument.

10 COMMISSIONER BALCH: You can't dilute it
11 out of that range or it won't work either?

12 THE WITNESS: Right. Or else you won't be
13 able to see it because the peak will be so high and
14 you just blow out the instrument. So you have to
15 dilute it to be within that. And it's based on --
16 you have to do MDL studies, all of those kinds of
17 things. And your reporting limit is adjusted based
18 on the dilution factor that you use. So if you
19 did -- if you had 10,000 parts per million chloride,
20 you would have to do a significant dilution. So if
21 you had to do a 500X dilution, you would also have
22 to adjust your reporting limit based on that.

23 COMMISSIONER BALCH: So what passes for
24 soil, I imagine you see some pretty interesting
25 things come in, right? There could be a rock in

1 your jar?

2 THE WITNESS: Correct.

3 COMMISSIONER BALCH: Or it could be gravel
4 or caliche or mud or who knows what?

5 THE WITNESS: Right.

6 COMMISSIONER BALCH: Are any of these
7 methods more or less affected by that? How do
8 process a sample of, say, caliche chunks?

9 THE WITNESS: No, that's all taken care of
10 in sample prep. We actually have to grind the
11 sample down to a certain size and then we proceed
12 with extraction from there. So that's done on both
13 methods equally.

14 COMMISSIONER BALCH: So it sounds like
15 this has really been an ongoing informal practice
16 for some time, ever since at least since 2008.

17 THE WITNESS: Correct.

18 COMMISSIONER BALCH: To allow this method
19 for a variety of purposes?

20 THE WITNESS: Correct.

21 COMMISSIONER BALCH: For OCD Rules 17 and
22 34. I'm losing track of all of them. So what
23 you're really asking for is just this method to be
24 recognized and in the table and usable as a
25 specified method and not always have the shadow of

1 getting your one copy of the memo lost in a fire
2 hanging over your head.

3 THE WITNESS: Correct. Not to mention
4 that we have, you know, lots of new people that come
5 into Southeast New Mexico to do work, new
6 consultants, that kind of thing. They're from out
7 of state and they don't know about this. They don't
8 know that our method is included in the asterisk of
9 other approved methods by the Division. And
10 sometimes with new personnel they don't know about
11 the memo. They just see what's in the rules and,
12 you know, we start to have issues again.

13 COMMISSIONER BALCH: So A lot of the
14 methods have sub methods, 300, 300.1. I saw 4500,
15 SM4500B. What is the exact precise designation you
16 would like in the table?

17 THE WITNESS: We would like SM4500CLB,
18 because there are several.

19 COMMISSIONER BALCH: SM4500 --

20 THE WITNESS: Cl B.

21 CHAIRWOMAN RILEY: C as in cat?

22 THE WITNESS: Yes. Cl stands for
23 chloride.

24 COMMISSIONER BALCH: I see.

25 THE WITNESS: And B is the part that we

1 would like.

2 COMMISSIONER BALCH: Thank you very much
3 for your testimony.

4 THE WITNESS: Thank you.

5 CHAIRWOMAN RILEY: Mr. Brancard?

6 MR. BRANCARD: No questions.

7 CHAIRWOMAN RILEY: Redirect?

8 MS. CALLAHAN: In light of the question
9 about the use of the 4500 in Colorado and Texas, I
10 just wanted to ask Ms. Keene whether the BLM also
11 accepts this method?

12 THE WITNESS: Yes, they do.

13 MS. CALLAHAN: That's it.

14 CHAIRWOMAN RILEY: Okay. Are you done
15 with the witness?

16 MS. CALLAHAN: I am.

17 CHAIRWOMAN RILEY: Thank you. Call your
18 next witness.

19 MS. CALLAHAN: I would call Jacob Miller.

20 JACOB MILLER
21 after having been first duly sworn under oath,
22 was questioned and testified as follows:

23 DIRECT EXAMINATION

24 BY MS. CALLAHAN

25 Q. Mr. Miller, for the record, would you

1 please state your name and identify by whom you are
2 employed and in what capacity?

3 A. Sure. My name is Jacob Miller and I am
4 the technical director of Green Analytical
5 Laboratories in Durango.

6 Q. What do you do as technical director?

7 A. Very similar to what you heard from Celey.
8 Method validation, technical oversight, data review,
9 training new analysts, things of that nature.

10 Q. And does Green also provide the same types
11 of services as Cardinal?

12 A. Yes. We are sister labs. Same type of
13 methodology. We test water and soil, environmental
14 work, largely oil and gas, but we do work for
15 federal agencies and the same list as Celey.

16 Q. Does Green also hold the same
17 certifications?

18 A. Same certifications. NELAC.

19 Q. You're also on the website?

20 A. Yes, also on the website.

21 Q. Have you previously testified before the
22 Division?

23 A. No.

24 Q. Would you please outline your educational
25 background?

1 A. Sure. I have a B.S. in chemistry from Ft.
2 Lewis College up in Durango that I received in 2006.

3 **Q. So how long have you worked for Green**
4 **Analytical?**

5 A. Between ten and eleven years.

6 **Q. And do you hold personal certification?**

7 A. Yes, same as Celey. I'm a lead technical
8 director from the lab, which allows me to run a
9 facility like Cardinal.

10 **Q. Are you familiar with the application**
11 **that's been filed by the OCD in this case?**

12 A. I am.

13 **Q. And are you also familiar with the rule,**
14 **both as proposed and as it currently exists?**

15 A. Yes.

16 MS. CALLAHAN: I would say the same thing
17 about this witness as I said about Ms. Keene in
18 terms of offering a basis for his opinions.

19 CHAIRWOMAN RILEY: Thank you.

20 **Q. (By Ms. Callahan) So Ms. Keene has**
21 **testified that Green performs the EPA300 method for**
22 **Cardinal's clients.**

23 A. Correct.

24 **Q. That is correct?**

25 A. Yes.

1 **Q. Can you explain what the Cardinal/Green**
2 **relationship is?**

3 A. Sure. So we are a little bit more than a
4 traditional sub lab relationship. We are relatively
5 small laboratories. We share in ownership and
6 management and so when we are required to do a new
7 methodology that we currently don't support,
8 oftentimes only one of the two facilities will pick
9 it up. So Green Analytical in Durango specializes
10 more in metals, inorganic type analysis, and then
11 Cardinal down in Hobbs specializes more in organic
12 analysis.

13 So the two facilities are second sending
14 samples back and forth to each other. It allows us
15 to have a presence in both markets and also really
16 focus in on our own area of expertise while still
17 offering clients a whole spectrum of services.

18 **Q. But you are familiar with the 4500 and the**
19 **300 method?**

20 A. Yes.

21 **Q. Would you look at Cardinal's Exhibit 7,**
22 **please.**

23 A. Yep.

24 **Q. So have you had a chance to read through**
25 **this?**

1 A. I have.

2 **Q. And is it an accurate description of the**
3 **technique involved in those methods?**

4 A. It is, yes.

5 **Q. In your experience, what is the best use**
6 **of the EPA300 method?**

7 A. Sure. So yeah, it's a perfectly fine
8 technique. It certainly has its place. It's really
9 designed to be special in two ways. One, it is
10 quite a sensitive technique. It has low detection
11 limits so unprecedented accuracy at a low
12 concentration. However, I would note that it's not
13 really relevant to these particular samples. The
14 type of application that it could be used for is
15 irrelevant when you are talking about soil
16 chlorides.

17 And then the second piece it offers is
18 simultaneous analysis of multiple anions. So the
19 beauty of the instrumentation is that you
20 theoretically can run a sample through a single pass
21 and receive seven different anion concentrations all
22 at once, not just one. Again, not super relevant if
23 you are looking at just chloride.

24 Also, on these particular samples we have
25 been discussing here they are relatively dirty by

1 our standards. There's high salt content, high TDS.
2 And you lose a lot of that simultaneous analysis.
3 The dirtier the sample, the more different dilutions
4 you have to reanalyze the sample at so you lose a
5 little bit of the multi-analyte ability.

6 **Q. So it's not always possible?**

7 A. No. It all depends on the nature of the
8 sample. And the technique was originally developed
9 as a clean water technique and it works beautifully
10 in that capacity but it loses those benefits with
11 those soils.

12 **Q. In your opinion, what are the drawbacks of**
13 **the EPA300 method in soil analysis of chloride?**

14 A. The real reason why we are here and the
15 issue is efficiency of the laboratories. You know,
16 21 minutes per position with the EPA300, per
17 position means every calibration point, every QC
18 standard, every blank check. So if Green Analytical
19 receives 20, 30 chlorides to run post a fairly
20 lengthy extraction process, that actual analytical
21 batch will take six, seven, eight, nine hours and
22 then there will be reruns. Whereas, a well trained
23 analyst in 4500 can sit down and titrate 20
24 chlorides via 4500 in a matter of a couple hours and
25 produce data that's just as accurate.

1 So yeah, it's slow. It's a bit
2 cumbersome. It's a more sophisticated technique.
3 We're not really getting the pros and we are having
4 to deal with some of the cons.

5 **Q. Do both methods provide comparable,**
6 **reliable data for analyzing chloride in soils?**

7 A. Absolutely.

8 **Q. And in your opinion is there a need to**
9 **expressively include SM4500 Cl B in the table?**

10 A. Yes. It just alleviates a lot of
11 confusion. It doesn't only save us time, it saves
12 OCD time, it saves oil and gas companies time. As
13 you can imagine, people come in the lab. They are
14 looking for guidance. They kind of want us to tell
15 them what to do and we can't always offer that, but
16 when a method that we use routinely isn't listed in
17 a table all kinds of red flags go up for people and
18 they worry that either we don't know what we're
19 doing or -- you know, there is just complications.

20 So in this case where Cardinal doesn't
21 just do one or two chlorides a week, this is a major
22 test for them. A relatively high volume. It would
23 alleviate a lot of headaches to have both methods
24 clearly listed.

25 **Q. Thank you. That concludes my witness'**

1 **direct testimony.**

2 CHAIRWOMAN RILEY: Cross?

3 CROSS-EXAMINATION

4 BY MS. HERRMANN

5 **Q. Mr. Miller, earlier in your testimony you**
6 **were saying, I believe, EPA Method 300 is better for**
7 **lower levels of chlorides?**

8 A. Sure. It can be. It has more
9 sensitivity, right? So we can achieve a lower
10 detection limit, which means on a clean, raw,
11 undiluted sample this method can see a lower number
12 more accurately. That is one of the benefits.

13 **Q. Now, the lowest number of chlorides on**
14 **Table 1 is 600 milligrams per kilogram.**

15 A. Correct.

16 **Q. Would you consider that a lower level, the**
17 **EPA Method 300?**

18 A. No, what you are talking about with EPA300
19 is if you had two samples and you were trying to
20 accurately determine whether the chloride
21 concentration was five or ten, if those were
22 necessary differences, then the EPA300 would be a
23 superior technique. But when you get up even into
24 100, 200, 300, you are well above the sensitivity of
25 either of the methods.

1 Q. That's all I have.

2 CROSS-EXAMINATION

3 BY MR. FELDEWERT

4 Q. Mr. Miller, if I'm understanding, given
5 the limits set forth in Table 1, from a detection
6 standpoint it really makes no difference whether you
7 use EPA300 or SM4500 C1 B?

8 A. That is correct. You are an order of
9 magnitude higher for either method.

10 Q. So the only real distinction here then is
11 the fact that you mentioned EPA300 would take how
12 many hours?

13 A. So 21 minutes per position, and a position
14 is defined as any time an auto-sampler probe has to
15 go in and test a sample. And that sample could be a
16 client sample, the submitted soil for chloride
17 analysis, or it could be -- you know, we run --
18 about 50 percent of the samples that we run at the
19 laboratory are quality control samples to prove that
20 our data is valid, so when we run 20 soil chlorides
21 we run approximately 30 positions. So a 20-sample
22 batch has about 30 actual positions analyzed, and
23 with 21 minutes a position, you can do the math but
24 it's an all-day process.

25 Q. SM4500 allows it to be done, you said, in

1 **a couple hours?**

2 A. Yes.

3 **Q. So why would you ever do -- if you had**
4 **your choice you would always do SM4500?**

5 A. That's correct. We deal with a lot of
6 industries, a lot of other types of monitoring. So
7 we analyze a lot of clean water samples for
8 chloride, fluoride, sulfate, nitrate, nitrite, all
9 five of those perimeters.

10 **Q. But for soils?**

11 A. For soils it's very rare that we're doing
12 a full suite of anions like that. And for those
13 soils it's debatable. Even if you wanted to analyze
14 five anions in the soil, it's still debatable which
15 would be the faster technique because of the
16 multiple different extraction ratios and dilutions
17 that might be required.

18 **Q. I think you answered my question. If you**
19 **had your choice?**

20 A. If I had my choice on soil chlorides, 4500
21 everyday.

22 **Q. Okay. Thanks.**

23 CHAIRWOMAN RILEY: Ms. Callahan?

24 MS. CALLAHAN: No.

25 CHAIRWOMAN RILEY: Commissioners?

1 COMMISSIONER BALCH: Good afternoon, Mr.
2 Miller.

3 THE WITNESS: Good afternoon.

4 COMMISSIONER BALCH: What's the cited
5 accuracy of both of those methods?

6 THE WITNESS: Sure. So it's determined on
7 annual studies. So it's something that does
8 fluctuate slightly. But currently at Green
9 Analytical we're using a report limit for EPA300 of
10 one part per million and for 4500 Cl B, I think
11 theirs is going to be between five and ten. Four.

12 **Q. Four?**

13 A. Yes.

14 **Q. So plus or minus four?**

15 A. It's actually not plus or minus. So
16 that's the lowest concentration we can see with
17 guaranteed accuracy.

18 COMMISSIONER BALCH: That's the accuracy
19 of detection.

20 THE WITNESS: Yes.

21 COMMISSIONER BALCH: You mentioned the QC
22 samples, so you put in some samples of known
23 chloride concentration to make sure the instruments
24 are calibrated?

25 THE WITNESS: Correct.

1 COMMISSIONER BALCH: If you've put in a
2 known sample, what is the --

3 THE WITNESS: Sure. So there are
4 different types of knowns we run that have different
5 acceptance windows, but in summary it's either 90 to
6 110 or 85 to 115 depending on the QC parameter. So
7 90 to 110 percent recovery would be the tightest
8 window, and something like 80 to 120 I think would
9 be the widest window on a matrix spike. But your
10 traditional, true second source known calibration
11 verification QC parameters are either going to be 90
12 to 110 or 85 to 115 both methods.

13 **Q. Okay. Thank you.**

14 MR. BRANCARD: No questions.

15 CHAIRWOMAN RILEY: Redirect?

16 MS. CALLAHAN: No.

17 CHAIRWOMAN RILEY: Are you done with the
18 witness?

19 MR. BRANCARD: We are.

20 CHAIRWOMAN RILEY: At this time I would
21 ask if you have any rebuttal witnesses you would
22 like to call?

23 MS. HERRMANN: Yes, I would like to call
24 Mr. Brandon Powell.

25 MR. FELDEWERT: May I request a short

1 recess?

2 (Note: The hearing stood in recess at
3 1:42 to 1:50.)

4 CHAIRWOMAN RILEY: Back to where we were?

5 MS. HERRMANN: Yes. We would recall
6 Mr. Powell. I don't know if his previous swearing
7 in from yesterday is still valid? We have a thumbs
8 up from Mr. Brancard so he was previously sworn in.

9 BRANDON POWELL

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

12 DIRECT EXAMINATION

13 BY MS. HERRMANN

14 **Q. Mr. Powell, were you involved in all the**
15 **committee meetings?**

16 A. Yes, I was.

17 **Q. Are you aware of the 200-square-foot**
18 **language that was submitted to NMOGA and when it was**
19 **submitted?**

20 A. Yes I am. That language originated from
21 the Division in approximately November of 2017.
22 That was part of revised language that we prepared
23 and sent to NMOGA through the cabinet secretary's
24 office. After it was presented to NMOGA through the
25 cabinet secretary's office we received a draft back

1 through the cabinet secretary's office which I
2 received on December 1, 2017 where they provided
3 comments on several different items that was in the
4 revised language, but that portion did not contain
5 comments.

6 **Q. Do you recall specifically speaking to**
7 **NMOGA about the language?**

8 A. I do in a subsequent meeting. After that
9 we sat down to discuss some of the changes that were
10 in the draft, and I remember specifically bringing
11 that up to representatives of NMOGA in that meeting
12 and explaining what the intent of it was, and at
13 that time there was no objections.

14 **Q. No further questions.**

15 CHAIRWOMAN RILEY: Mr. Feldewert?

16 MR. FELDEWERT: No questions.

17 MS. CALLAHAN: No questions.

18 MR. LARSON: No questions.

19 CHAIRWOMAN RILEY: No questions from the
20 Commission?

21 COMMISSIONER BALCH: One. Where did the
22 number 200 square feet come from? I know it came
23 from the secretary's office but what is the basis
24 for it?

25 THE WITNESS: No, it actually came from

1 the Division itself. I was part of the drafting of
2 that. What that was was based my field experience
3 and then I also got with some of our field
4 inspectors to try to find an actual, in-the-field
5 acceptable rate that would apply across the board.
6 As we were looking at something that could be
7 universally applied, that's what we did based on
8 field experience.

9 COMMISSIONER BALCH: So the intent of 200
10 square feet is to do what?

11 THE WITNESS: The intent of every 200
12 square feet was to allow a preapproved area that
13 could be applied either to side wall excavations,
14 which are relatively simple, or to waterway
15 drainages, which become more complex. It was to
16 allow the expedience of a universal number where
17 there wasn't a debate between industry and the OCD
18 on what was acceptable and what wasn't.

19 COMMISSIONER BALCH: So the two other
20 places where this sampling is applied in the
21 existing regulation is 17 and 34. In 17 you're
22 looking at something -- I mean, everything is going
23 to be bigger than 200 square feet that you would be
24 sampling, but that's only requiring one sample for
25 an excavated pit, right?

1 THE WITNESS: Correct.

2 COMMISSIONER BALCH: And then in 34 with
3 produced water, you could have a truly immense,
4 many-acre pit of water that you would also only
5 require one sample from. So it's a little bit of a
6 dichotomy in how this is being applied across the
7 different parts of the code. So really the -- go
8 ahead and address that.

9 THE WITNESS: So in 17 you're typically
10 talking about a pit. It's a pit that as the
11 operator uses it, the material in it is usually very
12 homogenous. So if you do have a release underneath
13 it, it should be consistent with what's in the pit
14 and what areas you're looking at. If a pit is
15 dark-colored you know what you're looking for.

16 In Part 34, that is also for a large area.
17 A couple things in Part 34 that isn't addressed in
18 either 29 or 17 is most of those have secondary
19 containment. So it really is an ultimate safeguard
20 at the end, where in 34 your initial releases should
21 be detected through the secondary containment.

22 And again, the material in Part 34 should
23 be homogenous. So if it does leak, it should all
24 leak in the same place and flow in the same rough
25 area. Whereas a spill, you don't have those

1 engineering controls. It could flow following
2 different soil types. It can move separately. You
3 don't always have the control of what kind of
4 release occurs, whether it be produced water, as in
5 34, or pit contents from drilling as in 17. It can
6 provide the full spectrum of any type of release.

7 COMMISSIONER BALCH: So sort of the
8 compromise between what the OCD is requesting and
9 what NMOGA is proposing is which scenario is going
10 to lead to more variance requests or more oversight
11 from the OCD?

12 THE WITNESS: I think depending on how you
13 look at it, depending on the release type, your
14 small releases I really think are going to follow --
15 it could fall under both of them and be acceptable.
16 That's the majority of your releases, your
17 five-barrel releases. They're not going to
18 contaminate areas where it's going to be to a
19 greater level where either one are going to be
20 applicable.

21 Your larger releases is where there's
22 going to be variation, the major releases. All the
23 200 was to give up-front guidance on how that was to
24 be handled if they didn't want to risk coming back
25 later and the Division telling them their samples

1 weren't sufficient.

2 The difference in the way the rule is
3 written is the closure sampling is provided in a
4 report. It's not a preapproved sampling area unless
5 you go with the Division's version where it's an
6 alternative to that. It's not part of the
7 remediation plan requirements so it really doesn't
8 get a chance for approval of the samples themselves
9 until the very end.

10 NMOGA pointed out that the Division does
11 have the powers to add sampling throughout the
12 process. One of the complications with that would
13 be on a sampling that NMOGA has within the first --
14 that wants to address within the first 90 days.
15 That doesn't require approval as long as -- and it
16 doesn't require site characterization if they feel
17 they can complete it. So if they follow that
18 process all the way through to closure,
19 theoretically we wouldn't get the information until
20 it was closed.

21 COMMISSIONER BALCH: Okay. So kind of
22 after the fact, this is how we sampled it?

23 THE WITNESS: Right.

24 COMMISSIONER BALCH: But you would still
25 have to give the final approval of that.

1 THE WITNESS: We would.

2 COMMISSIONER BALCH: Except it may already
3 be closed.

4 THE WITNESS: It may already be closed.
5 We have had that concern in the existing rule where
6 the operator felt it was clean and submitted the
7 closure. They thought it was clean, they took their
8 samples, they backfilled, and it ended up exceeding
9 the samples or we felt it wasn't sampled enough.
10 And it's a fight getting an operator back out on a
11 site that's already backfilled to take additional
12 samples.

13 COMMISSIONER BALCH: Pretty much have to
14 go out with a borehole?

15 THE WITNESS: You either have to borehole
16 it. If it comes back that it's contaminated you
17 have to re-excavate it, and it could be an area as
18 small as ten yards. So then you are re-mobilizing
19 out to take ten yards out of the hole to show that
20 you fully cleaned it up.

21 COMMISSIONER BALCH: So of these larger
22 spills, one or two a week I think is the number that
23 I heard in testimony yesterday?

24 THE WITNESS: The larger spills, yes.

25 COMMISSIONER BALCH: Out of those, how

1 many of those would be someplace where you would
2 want to step in with specialized sampling plan?

3 THE WITNESS: If they are larger spill
4 that's simply an excavation, probably a majority of
5 those you would want a larger area. It's the -- and
6 that's really what we were looking at the 200 feet
7 was a universal to try to catch the small caveats.
8 We weren't really trying to use that as a mandatory
9 number. Maybe that wasn't phrased properly in the
10 rule but that was the intent, that that was the
11 preapproved amount. However, if you have a larger
12 excavation that is simple and you want a larger
13 area, we want to at least have the ability to say
14 yes, what you are doing is good on the up-front end.

15 COMMISSIONER BALCH: So for the majority
16 of sites, either way would probably be sufficient?
17 A reasonable sample or the every 200 square feet?

18 THE WITNESS: Yes, on a majority of the
19 sites.

20 COMMISSIONER BALCH: It's the larger ones
21 where you might need to have a more specific
22 sampling plan?

23 THE WITNESS: That's correct.

24 COMMISSIONER BALCH: Maybe the way to put
25 it into the rule would be to allow NMOGA's language

1 for the minor spills and require a sampling plan to
2 be approved for larger spills.

3 THE WITNESS: Right. And that's what we
4 were trying to at least give some guidance on is for
5 the larger spills. If they really didn't want to
6 give a preplan approval for the larger sites they
7 could do this sampling, but if they wanted something
8 greater they would have to submit it to the Division
9 or get an on-site approval.

10 COMMISSIONER BALCH: Thank you.

11 CHAIRWOMAN RILEY: Anything else?

12 COMMISSIONER MARTIN: Nothing.

13 CHAIRWOMAN RILEY: I just have one
14 question for you. After listening to the testimony
15 for the last two days, do you have any level of
16 comfort of changing the language in here?

17 THE WITNESS: Well, I think there was some
18 clarifications made by NMOGA that I don't think we
19 were looking at the same as far as their intent was
20 to sample each side wall separately. Because one of
21 the things we looked at on a small release was say
22 you have a release that's ten foot deep with a
23 ten-foot side wall. Then in your 200 square feet
24 you could combine two of the side walls together.
25 Because the representation of both side walls was

1 still below 200 square feet. So if it had an
2 exceedance, you would go back to the two side walls
3 and further delineate or remediate as necessary.

4 CHAIRWOMAN RILEY: That was eye opening
5 for me as well that that was the plan to get each
6 wall and the base. It seems to me that's quite a
7 bit of sampling regardless.

8 THE WITNESS: Right.

9 COMMISSIONER MARTIN: I do have a
10 question. Since the Division didn't mean this to be
11 mandatory -- is that what you testified to?

12 THE WITNESS: That is.

13 COMMISSIONER MARTIN: Do you have some
14 suggested language to make it voluntary?

15 THE WITNESS: I don't know if maybe help
16 reorganizing the area would be more beneficial to
17 maybe put the sampling plan has to be preapproved
18 and will include this information. However -- and
19 put in B that if you don't want to get preapproval
20 then the 200 feet is acceptable. I'm not sure quite
21 how that wording would go, but the overall intent
22 wasn't for it to be mandatory. It was really to
23 give the operator the option of moving forward with
24 the sampling that they could come to the Division
25 and say, "You automatically are okay with this.

1 We're not going to fight you about it. By rule you
2 can't fight us on this." Just to provide that
3 clarity. Because that's why the closure sampling
4 was just provided in a closure report instead of as
5 part of the remediation plan itself.

6 CHAIRWOMAN RILEY: So if they were to do
7 the 200 square feet then there would be no question
8 at the end of the day and they closed it?

9 THE WITNESS: Correct.

10 CHAIRWOMAN RILEY: You wouldn't go back
11 and say you want more sampling?

12 THE WITNESS: We wouldn't go back and say
13 we want more sampling.

14 COMMISSIONER BALCH: So it's not a
15 requirement, but if they do that they won't be
16 questioned?

17 THE WITNESS: Exactly.

18 CHAIRWOMAN RILEY: It doesn't say that.

19 COMMISSIONER BALCH: It doesn't say that.

20 THE WITNESS: In the language the way it
21 was drafted, maybe it was drafted wrong, but that
22 was truly the intent was to give the operator that
23 option.

24 CHAIRWOMAN RILEY: I think this one needs
25 worked on. I think you guys need to sit at a table

1 and hammer this out.

2 THE WITNESS: I don't know if all sides
3 are willing to do that. I can't say.

4 COMMISSIONER BALCH: We'll lock you in the
5 room and don't give you dinner until it's done.

6 CHAIRWOMAN RILEY: It's only 2:00.

7 MR. FELDEWERT: I have questions.

8 CROSS-EXAMINATION

9 BY MR. FELDEWERT

10 Q. Okay. So Mr. Powell, I hear everything
11 you're saying but I think what I understood didn't
12 quite square up with what you were saying.

13 A. That's correct. The interpretation seems
14 to be misinterpreted.

15 Q. When I look at, for example, B1B, and if
16 there's a sentence in there that says, "Each
17 composite sample must not be representative of more
18 than 200 square feet," the very next sentence says,
19 "The Division may add additional sampling
20 requirements depending on the material." Number
21 one. And number two, it is written, you would
22 agree, as if it's mandatory?

23 A. For that specific section, yes.

24 Q. Now, a couple other things I want to make
25 sure I understand as with the current, and that is

1 if I am in D and I'm conducting my sampling, one
2 paragraph really we haven't looked at at all was
3 D1A. Can you get that out in front of you?

4 As I see that, one of the things that is
5 required is that the Division is given notice of
6 when sampling is to occur and afforded the
7 opportunity to come two days before or come out
8 during that sampling, correct?

9 A. That is correct.

10 Q. Okay. And it was written that if they are
11 out there at that time they can, as written, require
12 additional sampling, correct?

13 A. That is correct.

14 Q. Even under the current language?

15 A. Even under the current.

16 Q. And even if we accept NMOGA's language?

17 A. Yes.

18 Q. Then the other point that someone made was
19 the closure reporting. First off, when they submit
20 their closure report, the operator, for final
21 sign-off, they at least have some assurance that
22 it's going to be done within 60 days, right?

23 A. That's correct.

24 Q. So if an operator does sampling and
25 decides on their own just to go ahead and backfill

1 it, fill it up and hope to goodness they did it
2 right, that's their risk, isn't it?

3 A. That is their risk but it's not a risk
4 typically taken because they have costs associated
5 with the methods on-site.

6 Q. But they run a risk, don't they? Because
7 even under your language, your 200-square-foot
8 language, if I do that as an operator and I backfill
9 it up and I send in my sampling diagram and I send
10 in my photographs and I send in my lab analysis and
11 do everything it talks about in this rule, even if I
12 did 200 square feet you would have the option under
13 E within that 60 days to say, "No, we do not approve
14 the closure report. There's other things you need
15 to do."

16 A. That's correct.

17 Q. All right. That's all the questions I
18 have.

19 CHAIRWOMAN RILEY: Are there any other
20 questions for this witness?

21 MS. HERRMANN: Just one to clarify.

22 REDIRECT EXAMINATION

23 BY MR. HERRMANN

24 Q. On closure reporting there are other
25 reasons beyond sampling that the Division could or

1 **should deny a closure report, correct?**

2 A. Yes. If it doesn't meet any of the other
3 requirements it could be denied as well.

4 **Q. So you think that language is still**
5 **important to have in the closure report section?**

6 A. Yes.

7 **Q. And if we do deny something or if the**
8 **Division denies a closure report, are they required**
9 **to provide a reason?**

10 A. Yes, they are.

11 MR. FELDEWERT: Under the current
12 language?

13 MS. HERRMANN: I believe so.

14 MR. FELDEWERT: Okay. You and I are going
15 to change that.

16 MS. HERRMANN: That might be a good one to
17 bring up.

18 A. Actually, after looking at it, the reason
19 is not required in this portion.

20 MR. FELDEWERT: Let me ask you -- well, go
21 ahead. It's my understanding prior to now that the
22 parties agreed that independent of this debate we
23 have about the 200-square-foot, that this Subpart E2
24 should have the same language as we see up top on
25 Page 5 under Subparagraph 5 where it says approve or

1 deny within 60 days and if deny you give your
2 reasons for your denials so everybody understands
3 why it was denied.

4 A. I can answer that. I think it's been the
5 Division's intent through the rule making in this
6 one, 34 and 17, if something is denied to provide
7 that reasoning so the responsible party has approved
8 the reason of why the denial is in place so they can
9 take the appropriate action to correct the denial.
10 If they don't know why it's denied they don't know
11 where to start to correct the denial.

12 MR. FELDEWERT: Madam Chair, following up
13 on your suggestion, NMOGA is more than happy to sit
14 down and talk with them about this provision now
15 that we all have a better understanding about it.
16 And, you know, I think I don't dispute Mr. Powell's
17 recollection of events, although I can tell you that
18 when we talked about this at lunch nobody remembers
19 really talking about this. So I think they are on
20 board that if you want us to take the time here at
21 the end to sit down and see if we can figure it out,
22 it makes sense to me.

23 CHAIRWOMAN RILEY: It would make our jobs
24 easier if we had a clean set of language.

25 COMMISSIONER MARTIN: I agree.

1 CHAIRWOMAN RILEY: Much better if you guys
2 figure it out than for us. Look at all the smart
3 people here in this room.

4 MR. BRANCARD: Madam Chair, Commissioner
5 Balch during discussions raised the possibility, and
6 we just did this in the horizontal well rule of
7 trying to reorganize a little bit the sections to
8 make it sort of clear up front what the requirements
9 to the parties are. And what he was suggesting was
10 taking the first step, which is the initial response
11 and putting that up front. Perhaps also clarifying
12 right up front what is the responsibility for all
13 releases.

14 So I have a quick rewrite here which moves
15 Section 10 into the slot for Section 8 and then
16 moves 8 and 9 to 9 and 10. But also provides a new
17 Subsection A which states -- and if the Commission
18 wants to consider this we can announce it to the
19 parties. If you don't want to consider it, you
20 don't have to worry about it.

21 It states, "For all releases, regardless
22 of volume, the responsible party shall comply with
23 19.15.29.8," which is the initial response section,
24 "and shall remediate the release to meet at minimum
25 the standards in Table 1 of 19.15.29.12. Then it

1 says, "For major and minor releases, the responsible
2 party shall also comply with 29.9," 10, 11, 12 and
3 13 which is the release reporting, the remediation
4 plan, closure sections. That's not what everybody
5 intended, but I think the Commission was sort of
6 struggling with what's required of just releases
7 that are not major or minor and try to get that out
8 in the open and then everything else sort of
9 afterwards for the major or minor releases, which is
10 the focus of this rule is the major and minor
11 releases, as the exhibit was submitted by NMOGA
12 tries to focus those later sections on the major and
13 minor releases.

14 CHAIRWOMAN RILEY: I like it. I was
15 hoping to see something that would give us that
16 clarification and this is pretty clear. A
17 suggestion I was going to make is in other agency
18 rules they have kind of a table as well that you can
19 look through and if it's this, this notice applies.
20 If it's this, you have to fill out a form. And a
21 table with a yes/no, which could still be
22 incorporated but this is really clean.

23 COMMISSIONER MARTIN: If these are
24 reported how is the Division going to verify it?

25 COMMISSIONER BALCH: It's more for

1 enforcement after the fact or if there's some issue
2 with reporting. It really just tells the operator.
3 Doesn't make them do it.

4 CHAIRWOMAN RILEY: Right.

5 COMMISSIONER BALCH: But it does give them
6 accountability.

7 CHAIRWOMAN RILEY: And instructs them on
8 what is required. You don't get to just ignore it
9 because it's not major and minor.

10 COMMISSIONER MARTIN: If the rule is this,
11 it doesn't say you can ignore it.

12 CHAIRWOMAN RILEY: True.

13 COMMISSIONER BALCH: It's not clear what
14 you are supposed to do either.

15 COMMISSIONER MARTIN: I don't have an
16 alternative.

17 MR. FELDEWERT: I would submit that
18 it's -- we're talking about minor -- we're talking
19 about releases that fall below the threshold of
20 major and minor. So we're talking about anything
21 from a slight drip to anything below five barrels.
22 And what I'm hearing is if there is a stain this big
23 on soil, that all the sudden they're going to have
24 to do whatever is necessary, depending on what that
25 is, to demonstrate that it complies with Table 1

1 standards. And there is no way that Table 1 was
2 meant to apply to a spot that's this big
3 (indicating). No way. And it makes no sense and
4 there's no evidence to support that.

5 Now, what do you do with a spot this big
6 or this big or a spot this big or a spot as big as
7 the table? You have to stop the leak. You have to
8 contain the leak and you got to clean it up. That
9 means I got to remove the soils. Now, if you
10 wanted -- if you don't think that's clear in here
11 for whatever reason, perhaps you can make that
12 clarification. But everybody in here has told you
13 that is what is meant by remediate, that you got to
14 remove that contaminated material.

15 We're talking about a volume that small
16 with no head, no nothing. There is no reason to go
17 through the Table 1 requirements and the only way
18 you get to the Table 1 requirements is you do all
19 that stuff that is laid out in 29.11 and 29.20 and
20 29 -- and that makes absolutely no sense in my
21 opinion and there's no evidence to support it
22 whatsoever. No historical evidence, no historical
23 problems and no evidence presented here today.

24 MR. HERRMANN: Are you providing
25 testimony, Mr. Feldewert?

1 MR. FELDEWERT: I am providing argument.

2 MS. HERRMANN: You might need to sign in
3 on the comment sheet.

4 COMMISSIONER BALCH: Come on. That's all
5 right. I think it's useful discussion.

6 CHAIRWOMAN RILEY: I don't know that Table
7 1 -- my comments related more to the organization.
8 And you're not looking at this, right?

9 MR. FELDEWERT: Well, the organization was
10 fine. Where I thought it went off the rails was
11 wait a minute, then you have to do something to
12 Table 1.

13 COMMISSIONER BALCH: That's what this says
14 now.

15 MR. FELDEWERT: That's where it went off
16 the rails. The reorganization totally makes sense
17 to me.

18 COMMISSIONER MARTIN: I agree with the
19 order this is in but I don't agree with the
20 application of Table 1 to --

21 CHAIRWOMAN RILEY: Yeah.

22 COMMISSIONER BALCH: But then you do need
23 to have something in here that says, "Hey, haul it
24 away. Scrape it up and haul it away." And there's
25 nothing in the existing version, nothing in the

1 current versions that does that.

2 MR. FELDEWERT: Well, I think if you look
3 at 29.10C, that can be physically removed from the
4 surface within the containment area and you got to
5 have the material removed from the site to a
6 division-approved facility. I understand that to
7 mean I got to scrape all that stuff up or do
8 remediation. That's stuff I don't understand.

9 MR. GRISWALD: If I could make a comment?

10 MR. BRANCARD: No.

11 MR. GRISWALD: Only an attorney can?

12 MR. BRANCARD: Yes.

13 CHAIRWOMAN RILEY: Take the rest of the
14 sentence out because then initial response applies
15 and you get site stabilization.

16 COMMISSIONER BALCH: Maybe we can strike
17 the language in what is now 10B3 or what would be
18 8B3, strengthen that a little bit.

19 COMMISSIONER MARTIN: How would you strike
20 it?

21 COMMISSIONER BALCH: This doesn't say suck
22 up the oil and scrape up the oil that you can't suck
23 up and then you're done. It doesn't talk about
24 moving the soil or anything like that.

25 CHAIRWOMAN RILEY: It says deliver

1 material removed from the site to Division-approved
2 --

3 COMMISSIONER BALCH: It says free liquids
4 and recoverable product. Product is what?

5 COMMISSIONER MARTIN: Do we want to add
6 standard soil? I mean, I kind of see what you're
7 saying.

8 COMMISSIONER BALCH: Maybe instead of
9 saying recoverable product.

10 COMMISSIONER MARTIN: I see what you're
11 saying. I think that was the intent.

12 CHAIRWOMAN RILEY: Recover any liquids.
13 Recoverable products. That leaves it kind of wide
14 open. It needs to be physically removed.

15 COMMISSIONER BALCH: It can be physically
16 removed.

17 MS. HERRMANN: I do have a comment about
18 the physically remove language. Putting it in what
19 is now under 29.10 and 29.A would make it a dig a
20 hole rule and it seems to me that would apply to a
21 major release of massive volumes, and that was not
22 our intent and we do want to include other
23 remediation which I have been informed does happen
24 on a fairly regular basis for minor releases.

25 MR. FELDEWERT: You're talking about

1 having --

2 CHAIRWOMAN RILEY: This is under initial
3 response?

4 MS. HERRMANN: Initial response.

5 CHAIRWOMAN RILEY: So I think the initial
6 response was intended to be the initial emergency
7 response to contain the problem.

8 COMMISSIONER BALCH: Under the intent of
9 reformatizing this way is that the initial response
10 for a very small spill or release would be clean up
11 what you can see and you're done. You don't have to
12 go through all the other stuff in the process.

13 COMMISSIONER MARTIN: I agree. I think
14 something like that. But that's the extent of it.

15 CHAIRWOMAN RILEY: And under
16 requirements -- you guys need a copy.

17 MR. BRANCARD: The point that I would
18 make, and I think it's the same point Mr. Herrmann
19 makes, is that initial response applies to all
20 releases.

21 CHAIRWOMAN RILEY: I think we want to go
22 off the record and allow you to hammer stuff out.
23 Take what Mr. Brancard prepared and see if you can't
24 clean up the language.

25 COMMISSIONER BALCH: I think we're

1 comfortable with taking out "to meet at minimum the
2 standards in Table 1" from that first sentence.

3 MR. FELDEWERT: Okay.

4 MR. BRANCARD: The Commission meeting can
5 be recessed, and do you want to give the parties
6 time? You can give the parties until tomorrow
7 morning, frankly.

8 MR. FELDEWERT: Let us walk out in the
9 hall and see where we're at.

10 CHAIRWOMAN RILEY: We're off the record.

11 (Note: The hearing stood in recess at
12 2:26 to 2:32.)

13 CHAIRWOMAN RILEY: So did the parties come
14 to an agreement on language?

15 MR. FELDEWERT: Yes, Madam Chair.

16 CHAIRWOMAN RILEY: What would that be?

17 MR. FELDEWERT: With respect to what was
18 handed to us, which is labeled 19.15.29.8, Releases,
19 we have an A and a B underneath that. Under 29.8A,
20 Requirements, if the language in the first sentence
21 beginning with "to meet" and continuing on to the
22 period after NMAC, if that is deleted then the
23 parties agree this makes a lot of sense and provides
24 the flexibility needed to deal with small
25 unreportable releases.

1 CHAIRWOMAN RILEY: Did you have
2 suggestions for site stabilization?

3 MR. FELDEWERT: No. I think that was the
4 language the Committee talked about earlier.

5 COMMISSIONER BALCH: Did you happen to
6 solve sampling while you were out there, too?

7 CHAIRWOMAN RILEY: No wonder you were so
8 fast.

9 MR. FELDEWERT: One bite at a time. We
10 certainly engaged that. That might take a little
11 bit longer. I don't know.

12 CHAIRWOMAN RILEY: I would like to see you
13 guys to come together on sampling.

14 MR. FELDEWERT: I think that would allow
15 you to use your time as you see fit while we engage
16 in what perhaps may be a more extensive effort.

17 CHAIRWOMAN RILEY: I think that needs to
18 be looked at, and if you could come up with some
19 wording on silent stabilization that --

20 COMMISSIONER BALCH: We could probably do
21 that.

22 MR. BRANCARD: I think what we're looking
23 at for site stabilization is there is the flow chart
24 that we never saw --

25 MR. GRISWALD: Because it doesn't exist.

1 MR. BRANCARD: -- in Section 11 indicates
2 that you do a delineation within 90 days unless you
3 already remediated the site within 90 days. So,
4 therefore, perhaps under that little Section C, Site
5 Stabilization, you can create the segue to allow an
6 operator to begin work immediately on remediating
7 the site if it is of a scale that can be done
8 immediately.

9 MR. FELDEWERT: I'm looking at A and I'm
10 reading, "The responsible party must submit
11 information characterizing the release to the
12 appropriate division district office within 90 days
13 of discovery of the release. Or characterize the
14 site by submitting a final closure report within 90
15 days of discovery of the release in accordance with
16 this rule." If you choose the second option, then
17 that throws them into the approval of the closure
18 report, does it not?

19 MS. HERRMANN: Yes. And the site
20 assessment and characterization was intended only to
21 apply for major and minor releases.

22 MR. BRANCARD: But I think what we're
23 simply suggesting is simply allowing someone to
24 begin reclamation work if it's at a suitable scale.
25 Whether that triggers a final closure report will

1 depend on whether it's a major or minor release.

2 MS. HERRMANN: So a reference to what is
3 currently 11 and 12 is applicable?

4 MR. BRANCARD: No.

5 COMMISSIONER BALCH: We could just put a 4
6 that says, "Remediation efforts may begin
7 immediately, if appropriate" or something like that.
8 I don't know.

9 MR. BRANCARD: Yeah. Because we're simply
10 allowing that under 11A.

11 COMMISSIONER BALCH: It's in the spirit of
12 telling them what to do right away. And basically
13 maybe we want to encourage them to begin their
14 remediation as soon as practicable even if they are
15 waiting for their permits or approvals or something
16 of that form.

17 MS. HERRMANN: As part of the initial
18 response?

19 COMMISSIONER BALCH: As part of the
20 initial response they start the remediation.

21 MS. HERRMANN: So 4 that says start
22 remediation as required based on the release?

23 MR. GRISWALD: It's not required, it's an
24 option.

25 MR. BRANCARD: It's not required, it's an

1 option.

2 COMMISSIONER BALCH: I think we can come
3 back on this one, though.

4 CHAIRWOMAN RILEY: Is that just for those
5 that are non-reportable?

6 COMMISSIONER BALCH: Any. Anything.

7 MR. BRANCARD: So I guess if you're coming
8 back at some point you should indicate what version
9 of the rule changes you're all agreeable with. It
10 would be good to know whether the other three
11 parties are okay with Cardinal's proposed change,
12 just so the Commission sort of knows where all the
13 parties sit at the end of the hearing. And if you
14 have remaining disagreements, that's fine. Just
15 indicate to the Commission what they are.

16 MR. FELDEWERT: Okay.

17 MS. HERRMANN: All right. Should we --

18 CHAIRWOMAN RILEY: How much time do you
19 need?

20 MS. HERRMANN: Do you want to say meet
21 back at the top of the hour? Will that be enough
22 time?

23 CHAIRWOMAN RILEY: Twenty minutes?

24 MR. FELDEWERT: We can give you an update.

25 CHAIRWOMAN RILEY: Sure. Okay.

1 (Note: The hearing stood in recess at
2 2:37 to 3:31.)

3 CHAIRWOMAN RILEY: Back on the record.

4 MS. HERRMANN: If I may submit to the
5 Commission what I've marked as Oil Conservation
6 Division Exhibit 4. This specifically has language
7 under the closure requirements, Section D, that has
8 been agreed to by the Oil Conservation Division,
9 NMOGA, and IPANM. It's not red-lined but we
10 reorganized and reworded the language requiring
11 sampling requirements. We started in Section A
12 identifying that the responsible party must verbally
13 notify the appropriate division district office two
14 days prior to conducting final sampling, so we
15 provided the notice requirement.

16 Then in Section B we explicitly said that
17 "The responsible party may submit a composite and
18 grab sample plan for the Division's review and
19 approval separately or with the remediation plan."
20 Then subsection C, alternatively, "Without Division
21 approval, the responsible party may elect to perform
22 a composite and grab sample plan of the remediated
23 area where each composite sample is not
24 representative of more than 200 square feet."

25 We moved wall and base up to Section 1, or

1 walls and base to be inclusive of more than one wall
2 and the base separately, and still require the
3 individual grab samples from any wet or discolored
4 areas.

5 MR. FELDEWERT: Madam Chair, Commission, I
6 think that addresses your first task for us. The
7 second task is to ascertain if anybody has any
8 objection to the method proposed by Cardinal Labs by
9 the parties, and I did a poll and nobody objects.
10 Third task was, as I understand it, to take what has
11 been handed to us on the reorganization and place
12 something within what had been considered as 29.8B
13 but add a Subsection 4, and the thought was quite
14 simply we could put something in there that --
15 Subparagraph 4 would be entitled Remediation,
16 period, and then say that the responsible party may
17 commence remediation immediately.

18 COMMISSIONER BALCH: I think there are a
19 lot of good reasons for that. The more you wait the
20 larger the spill might get.

21 MR. BRANCARD: Mr. Feldewert,
22 Mr. Herrmann, Mr. Larson, one of the corrections was
23 do the parties otherwise agree to changes in NMOGA
24 Exhibit D?

25 MR. FELDEWERT: We do.

1 COMMISSIONER BALCH: You mean the parts
2 highlighted yellow?

3 MS. HERRMANN: We do. There was one
4 change I wanted to recall the Commission's attention
5 to. On Page 4, 12B2, the removal of the
6 language "could cause safety issues or." So it
7 would read, "If contamination is located in areas
8 immediately under or around production equipment,
9 such as production tanks, wellheads and pipelines
10 where remediation could cause a major facility
11 deconstruction, the remediation, restoration or
12 reclamation may be deferred" and so forth.

13 CHAIRWOMAN RILEY: So we're taking out
14 Safety Issues?

15 MS. HERRMANN: Starting at Safety Issues
16 through "or", removing that language. I don't think
17 there's an objection.

18 MR. FELDEWERT: No, other than we might
19 end up with two causes. Take out one of the causes.

20 CHAIRWOMAN RILEY: The other change I
21 recall, too, was to make E2 match the language
22 above. Were we going to add that in?

23 MR. FELDEWERT: Yes.

24 CHAIRWOMAN RILEY: I don't see it.

25 MR. FELDEWERT: No, just take that

1 sentence and move it into E2. And then I think on
2 Page 3 while you're on Exhibit E, there's a
3 reference up there in 29.11.A5B at the top, Table 1,
4 I think, there's a consensus we need to say Table 1,
5 19.15.29.12.

6 MS. HERRMANN: And also correct the
7 citation in the sentence below that.

8 MR. FELDEWERT: Where it says 29.11?

9 MR. BRANCARD: Mr. Herrmann, you're okay,
10 then, with E2 having the same language as C5?

11 MS. HERRMANN: Yes.

12 MR. BRANCARD: Except that E2 does not
13 have conditions. E2 is just a straight-up approve
14 or deny.

15 MS. HERRMANN: Yes. Whatever language
16 necessary to make it consistent with closure
17 reporting. Commissioners, there was one more change
18 we agreed to on Page 2 of NMOGA Exhibit D under
19 29.11A where the language says, "Within 90 days of
20 discovery of the release or characterize the
21 site," we wanted to change the word "site" to
22 "release."

23 COMMISSIONER BALCH: I had that in my
24 notes.

25 MS. HERRMANN: I was going through my

1 notes and I found that in there.

2 CHAIRWOMAN RILEY: Was there going to be a
3 change to 29.15.29.11A5 in the yellow within a half
4 mile of the horizontal extents of the release? We
5 talked about changing that word "extents" to
6 something else like "boundaries."

7 MR. FELDEWERT: I think it goes by
8 boundary.

9 MS. HERRMANN: Yes, that's referred to
10 several times in the rule so if we do change it
11 there we will have to change it in other areas.

12 CHAIRWOMAN RILEY: Other changes or
13 clarifications?

14 MR. BRANCARD: There was one change that I
15 requested of a witness and the witness agreed and I
16 don't know if the parties agree to it. That's on
17 Page 3. It's 11A5B. It says, "The operator may use
18 one of the following sample methods." I think I
19 said should that be the operator shall use? And it
20 could be one of the following. The drafters of the
21 rule change don't seem to like the word "shall" so
22 we can be consistent and use "must."

23 MS. HERRMANN: Do you have an objection to
24 that?

25 MR. LARSON: It's on the table.

1 COMMISSIONER BALCH: We can do that among
2 ourselves.

3 MS. HERRMANN: We do not have consensus on
4 that. The Division does not have any objection to
5 the language of "must" or "shall." However, IPANM
6 has indicated their objection. NMOGA?

7 MR. FELDEWERT: We're neutral.

8 COMMISSIONER MARTIN: Did the Division
9 mean for it to be that prescriptive when it came up
10 with "may"?

11 MS. HERRMANN: Well, we do provide for
12 other Division-approved methods, but I think it's
13 the Division's intent that the sampling methods and
14 characterizations be limited to those five
15 identified, and by five identified, I mean another
16 method that the Division might approve.

17 MR. FELDEWERT: If I may comment on that.
18 Nevermind. I have no comment.

19 CHAIRWOMAN RILEY: So it would be -- yeah,
20 it's time for deliberation. It would be really nice
21 to have a clean copy of this.

22 COMMISSIONER BALCH: We need closing
23 statements.

24 MR. FELDEWERT: I do have one issue that
25 was raised by one of the parties that filed comments

1 based on similar discussions today I would like to
2 briefly address it at the appropriate time.

3 CHAIRWOMAN RILEY: Do you want to do that
4 in a closing argument? Do you guys want to close?
5 Do you have those?

6 MR. FELDEWERT: I didn't really anticipate
7 closing argument beyond addressing this one issue
8 because I'm looking at all my notes that I made and
9 we addressed every one of them except the last one
10 so I don't have anything else to say.

11 CHAIRWOMAN RILEY: Mr. Herrmann, do you
12 have anything to say?

13 MS. HERRMANN: I would just care to take a
14 moment to reiterate the testimony that we have
15 provided and state that we're all in, I would say,
16 99 percent consensus right now. I would also like
17 to release my witness from the witness stand. He's
18 been there for some time.

19 CHAIRWOMAN RILEY: I thought we did that
20 already. You may be excused.

21 COMMISSIONER BALCH: It's probably a more
22 comfortable seat than the red chairs.

23 CHAIRWOMAN RILEY: Why don't you go ahead,
24 Mr. Herrmann.

25 MS. HERRMANN: All right. So in the

1 Division's application we presented our version of
2 this rule. We have general consensus on all our
3 changes. We feel that this rule does obtain our
4 objectives of clarifying and -- of clarifying how a
5 release should be responded to. It implements best
6 management practices, it removes unnecessary
7 approvals and explicitly states what the Division
8 will require.

9 This rule meets our goals and we believe
10 that the Commission should implement it as
11 presented.

12 CHAIRWOMAN RILEY: Thank you. NMOGA?

13 MR. FELDEWERT: Yeah. I think we agree
14 with what was said by the Division. I believe with
15 the changes we talked about here today, I think the
16 parties made a tremendous effort coming up with a
17 rule that is workable, understandable and consistent
18 with other rules addressing similar topics, and when
19 you think about where you started and where you
20 ended, I know it doesn't look like a lot on a piece
21 of paper, but just dealing with what we dealt with
22 during this hearing represents how much work has to
23 go into something like this. And to have consensus
24 upon that, more importantly, among the various
25 parties affected by this is quite remarkable in my

1 opinion. I think it gives testament to the effort
2 that was put into this.

3 Now, we had a number of parties that
4 submitted comments/modifications. Sometimes at the
5 last minute. Certainly without providing notice
6 that that was going to be done. I again object to
7 any modifications, for example, specific changes
8 that they suggest should be made to the language,
9 because I don't view these as prehearing statements
10 and I don't view them as meeting the requirements of
11 prehearing statements. But that's my opinion.

12 But more importantly, there's one comment
13 that was made and one suggestion that was made that
14 I think was discussed briefly today that I want to
15 address. That is, the question of whether a
16 landowner should receive notice of a release.

17 Now, first thing I think of is what do you
18 mean by a landowner? Are we talking about a grazing
19 lessee, are we talking about a business lessee? Who
20 are we talking about in terms of landowner?

21 The second thing I'm concerned about is
22 when you begin to require notice to a particular
23 group, then there is an argument that you have now
24 afforded them party status. And I would argue that
25 you've now afforded them party status to participate

1 then in proceedings or issues arising out of that
2 release.

3 And my question would be, for what
4 purpose? What's the purpose? Because the Division,
5 not a landowner, controls what is required from a
6 release with these regulations. And there are
7 certain other agencies that have regulations that
8 control what is required by a release. But a
9 private landowner does not control that. That is a
10 regulatory matter, and a private landowner at most
11 has perhaps a surface use agreement that has been
12 voluntarily entered into by the parties that may or
13 may not have its own notice requirements.

14 But the point is that those private
15 surface use agreements and that relationship there
16 is governed by contract. It's not governed by a
17 regulation. It's not enforceable by a regulation or
18 even by this body. It's enforceable by a court.

19 So I don't see what regulatory purpose is
20 fostered or served by mandating notice of a release
21 to a landowner. That is the Division that controls
22 the matter, not landowners from a regulatory
23 standpoint.

24 It makes sense to notify, as Mr. Powell
25 said, other agencies that may have similar

1 regulations and regulatory requirements, but I don't
2 understand why you would provide notice to a
3 landowner of a release. Because like I said, I
4 think it's fraught with problems. I think it grants
5 a status that does not foster the regulatory purpose
6 and if it's for purposes of surface use agreements
7 it's not something this division does, it's not
8 something that they enforce and it's not something
9 they should embroil themselves in. That's a matter
10 between the parties.

11 CHAIRWOMAN RILEY: Thank you. Mr. Larson?

12 MR. LARSON: Thank you. IPANM was also an
13 active participant in the work group that formulated
14 the rule proposed by the Division, and IPANM thanks
15 both the Division and NMOGA for their time, effort
16 and energy. And because a significant number of
17 IPANM's members are small operators, IPANM had and
18 continues to have a particular concern about
19 potentially unnecessary and financially burdensome
20 delineation and remediation requirements.

21 In that regard, I would strongly reinforce
22 Mr. Feldewert's comments yesterday about the lack of
23 a need for any specific standards to address
24 releases of less than five barrels. I agree with
25 him there's been no historical evidence of problems

1 of what we have been calling non-reportable
2 releases. Throughout the study group process and
3 during the hearing the Division hasn't asked for
4 requirements for that.

5 I think the reality has been the operators
6 address them, do what's necessary, whether it's
7 scraping, whatever. I think the new rule does give
8 some teeth to the Division because it requires
9 remediation of those releases, and if the operator
10 disregards that obligation they do it at their own
11 peril.

12 Overall, IPANM's position is that the
13 collective efforts of the work group and the parties
14 during this hearing have created a balanced and
15 workable rule. For example, based on the testimony
16 the Division's witnesses, IPANM is comfortable that
17 the Division will consider alternative modes of
18 remediation, other forms other than digging and
19 hauling.

20 In sum, IPANM requests the Commission
21 adopt the proposed rule including the modifications
22 that the parties have agreed to today.

23 CHAIRWOMAN RILEY: Thank you. Where did
24 Ms. Callahan go?

25 COMMISSIONER BALCH: She left.

1 MR. BRANCARD: Do you want --

2 MS. HERRMANN: I would like to move to
3 admit OCD Exhibit 4 into the record.

4 CHAIRWOMAN RILEY: Any objections?

5 MR. FELDEWERT: No objections.

6 MR. LARSON: No.

7 CHAIRWOMAN RILEY: Exhibit 4 is accepted
8 into the record.

9 (Note: Exhibit 4 admitted.)

10 CHAIRWOMAN RILEY: Any other matter of
11 business we need to take care of before we go into
12 deliberation?

13 MR. FELDEWERT: No. Thank you.

14 MS. HERRMANN: I would also like to thank
15 the Commission for listening to our presentation and
16 we thank NMOGA and IPANM for their cooperation and
17 collaboration.

18 CHAIRWOMAN RILEY: Well, I want to
19 reiterate that. I know that the spill rule has been
20 something that you all have worked on for a long
21 time and there were times, from what I heard, that
22 everybody was far apart on coming to independent
23 consensus. And for you all to get to a place where
24 we are sitting in the room together and you've
25 provided us with something that we can work with and

1 not have to make those really difficult decisions
2 that are going to impact so many different groups,
3 we are able to look at a nice, concise document that
4 might need some tweaking here and there, but to know
5 that you all are in agreement was very, very
6 helpful, I think. So thank you for the work that
7 you all did.

8 At this point it's 4:00 o'clock. Again, I
9 would love to see a clean version of this to look at
10 but we could start. Do you guys want to start
11 deliberations tonight and then could we look forward
12 to a clean copy by tomorrow?

13 COMMISSIONER BALCH: I wonder if we give
14 Mr. Brancard an hour now and an hour in the morning
15 he might be able to provide us a clean copy.

16 MR. BRANCARD: Somebody will have to give
17 me a Word version.

18 MS. HERRMANN: I can do that.

19 COMMISSIONER BALCH: You might want
20 NMOGA's Exhibit 4.

21 MS. HERRMANN: I have that on my computer.
22 We worked on it upstairs.

23 COMMISSIONER BALCH: I wouldn't mind
24 leaving the yellow highlights in because my notes
25 related to a lot of that.

1 MS. HERRMANN: Okay. Just to note that
2 the changes we submitted on Exhibit 4 weren't
3 highlighted or marked because leaving track changes
4 on that section would have made it almost illegible.

5 MR. BRANCARD: I can highlight that.

6 COMMISSIONER BALCH: Okay.

7 MR. BRANCARD: It's just those two
8 subparagraphs.

9 CHAIRWOMAN RILEY: I like how you did it
10 in the last hearing where you had the highlights.
11 Just the yellow. It didn't have to be red but, you
12 know, highlighted so we can see it.

13 MR. BRANCARD: But I think there's not a
14 lot to do here. It's highlighting the changes.
15 It's taking Exhibit D and highlighting the changes
16 that we see which include -- well, we have to
17 incorporate the restructure and I'll just highlight
18 the new language, not the fact that it everything
19 has been restructured.

20 And then there's this change, the Cardinal
21 Labs change. And then about the Division needing to
22 provide a written summary of deficiencies with a
23 closure plan denial, and then the last sentence
24 added to the beginning section about beginning
25 reclamation. Commence remediation immediately. I

1 think that's it.

2 COMMISSIONER BALCH: Plenty of time for
3 you to do that before 9:00 a.m.?

4 MR. BRANCARD: Yes.

5 MS. HERRMANN: And the safety issues.

6 MR. BRANCARD: Yeah.

7 COMMISSIONER BALCH: At this point it
8 might be better just to wait for the clean copy.

9 CHAIRWOMAN RILEY: I would prefer that.

10 COMMISSIONER BALCH: We will come up with
11 a couple drafts tomorrow.

12 COMMISSIONER MARTIN: Sure.

13 MR. BRANCARD: You want the highlighting
14 to stay?

15 COMMISSIONER BALCH: Yes, just because all
16 my notes are easier to track it.

17 CHAIRWOMAN RILEY: How much time would you
18 like to have?

19 MR. BRANCARD: It will be ready by
20 tomorrow morning.

21 CHAIRWOMAN RILEY: By 9:00?

22 COMMISSIONER MARTIN: 9:00 o'clock?

23 CHAIRWOMAN RILEY: So we are adjourned
24 until 9:00 o'clock tomorrow morning. We are
25 officially off the record.

1 (Note: The hearing was adjourned at
2 4:05).
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REPORTER'S CERTIFICATE

I, JAN GIBSON, Certified Court Reporter for the State of New Mexico, do hereby certify that I reported the foregoing proceedings in stenographic shorthand and that the foregoing pages are a true and correct transcript of those proceedings and was reduced to printed form under my direct supervision.

I FURTHER CERTIFY that I am neither employed by nor related to any of the parties or attorneys in this case and that I have no interest in the final disposition of this case.

JAN GIBSON, CCR-RPR-CRR
New Mexico CCR No. 194
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