

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

CONSOLIDATED

APPLICATION OF THE OIL CONSERVATION DIVISION TO EXTEND THE EFFECTIVE DURATION OF AN EMERGENCY ORDER TO OPERATE ISSUED TO GANDY MARLEY, INC.

**CASE NO. 13454
ORDER NO. 12306-A**

AND

APPLICATION OF THE OIL CONSERVATION DIVISION TO EXTEND THE EFFECTIVE DURATION OF AN EMERGENCY ORDER TO OPERATE ISSUED TO ARTESIA AERATION, LLC.

**CASE NO. 13455
ORDER NO. 12307-A**

ORDER OF THE DIVISION

BY THE DIVISION:

This case came on for hearing at 10:00 a.m. on March 25, 2005, at Santa Fe, New Mexico, before Examiner William V. Jones.

NOW, on this 25th day of March 2005, the Division Director, having considered the requests,

FINDS THAT:

(1) Due public notice has been given, and the Oil Conservation Division ("Division") has jurisdiction over these cases and their subject matter.

(2) The Division seeks an order extending the effective duration of Emergency Order R-12306 issued to Gandy Marley Inc. and Emergency Order R-12307 issued to Artesia Aeration, LLC, until a determination is made on the applications of those operators to amend their landfarm permits.

(3) These cases were consolidated for purpose of the hearing.

(4) Notice of this hearing was provided to Gandy Marley Inc. and to Artesia Aeration, LLC ("Operators"). Notice of the hearing was also published in the Lovington Daily Leader on March 15, 2005, and in the Roswell Daily Record on March 17, 2005. Additionally, notice was posted on the Division's website and sent by e-mail to those parties who had requested notice of Division hearings.

(5) Gandy Marley, Inc. was present at the hearing and represented by counsel.

- (6) Artesia Aeration, Inc. was not represented by counsel.
- (7) Dr. Don Neeper appeared and provided testimony at the hearing.
- (8) Controlled Recovery, Inc. ("CRI") was represented by counsel and appeared at the hearing in opposition to the Division's applications and presented testimony from one witness.

(9) The Division presented the following testimony and evidence:

a) Gandy Marley, Inc. ("Gandy Marley") is the operator of record and surface owner of a commercial landfarm located in Sections 4, 5, 8, and 9, Township 11 South, Range 31 East, in Chaves County, New Mexico. This landfarm is permitted pursuant to 19.15.9.711 NMAC under permit number NM-01-0019.

b) Artesia Aeration, L.L.C. ("Artesia Aeration") is the operator of record and surface owner of a commercial landfarm located in the N/2 of Section 7, Township 17 South, Range 32 East, in Lea County, New Mexico. This landfarm is permitted pursuant to 19.15.9.711 NMAC under permit number NM-01-0030.

c) The public notice given prior to issuance of a majority of landfarm permits in New Mexico stated: "Hydrocarbon contaminated soils associated with oil and gas production will be remediated...."

d) The language of those landfarm permits, however, was broader than the language in the public notice, allowing the facilities to accept oilfield wastes that are exempt from RCRA Subtitle C regulations and that do not contain Naturally Occurring Radioactive Materials regulated pursuant to 20 NMAC 3.1 Subpart 1403 (NORM) and "Non-hazardous" non-exempt oilfield wastes.

e) Salt contamination decreases the biodegradation capacity of the landfarms and because salts leach more easily than hydrocarbons, a landfarm accepting salt-contaminated oilfield wastes could pose a threat to groundwater.

f) According to the terms of the landfarm permits referred to in "c" above, the Division may change the permit conditions administratively for good cause shown as necessary to protect fresh water, human health, and the environment.

g) Division Director Mark Fesmire notified the holders of the aforementioned landfarm permits by letter dated March 4, 2005, that the Division had determined that it was necessary to modify the landfarm permits in order to protect fresh water, human health and the environment. The permits were modified to add the following conditions: "Effective immediately, the NMOCD permitted landfarm ... is prohibited from accepting oilfield waste contaminated with salts."

The March 4th letter stated that for a landfarm to accept salts, the operator was required to apply for a modification of the permit pursuant to 19.15.9.711.B(1) NMAC and follow the notice requirements of 19.15.9.711.B(2).

h) The Operators have each applied for a modification of their permits to allow them to accept salt-contaminated oilfield wastes. The applications to modify those permits are set for hearing on May 19, 2005, before the Division.

i) On March 10, 2005, Gandy Marley applied for an emergency order allowing it to accept salt-contaminated oilfield waste pending a decision on its application for a permit modification. In support of this request, Gandy Marley asserted the following:

- i. The depth to groundwater at the location of the landfarm is 150 feet.
- ii. The TDS level of the groundwater at the location of the landfarm is in excess of 15,000 PPM.
- iii. There are no fresh water wells or watercourses (wet or dry) within 1,000 feet of the landfarm.
- iv. There is an impermeable redbed clay barrier of approximately 150 feet between the surface and the groundwater.
- v. The groundwater at the site is nonproduceable in both volume and quality.
- vi. An emergency order is necessary because there is a critical need in the area of the landfarm for a facility that can accept salt contaminated soils due to extensive drilling programs and remediation programs in the area.

j) On March 11, 2005, Artesia Aeration applied for an emergency order allowing it to accept salt contaminated oilfield waste pending a decision on its application for a permit modification. In support of this request, Artesia Aeration asserted the following:

- i. There is no groundwater at the site as evidenced by a 120 feet deep monitor well.
- ii. There are no fresh water wells or watercourses (wet or dry) within 1,000 feet of the landfarm.
- iii. An emergency order is necessary because there is a critical need in the area of the landfarm for a facility that can accept salt-contaminated soils due to extensive drilling and remediation programs in the area by oil and gas operators.

k) The records of the Division confirm both Operators' descriptions of conditions at their landfarms.

l) Division staff confirmed that both Operators intend to keep salt contaminated oilfield waste separate from hydrocarbon contaminated oilfield waste.

m) By Emergency Order R-12306, issued on March 11, 2005, the Division Director determined that Gandy Marley had demonstrated an emergency need for the issuance of an order without hearing. This order allows Gandy Marley to accept salt contaminated oilfield wastes pending a decision on its application for a permit modification.

n) By Emergency Order R-12307, issued on March 11, 2005, the Division Director determined that Artesia Aeration had demonstrated an emergency need for the issuance of an order without hearing. This order allows Artesia Aeration to accept salt contaminated oilfield wastes pending a decision on its application for a permit modification.

o) In Emergency order R-12307, issued on March 11, 2005, the Division Director determined that Artesia Aeration had demonstrated an emergency requiring the issuance of an order without a hearing allowing Artesia Aeration to accept salt contaminated oilfield wastes pending a decision on its application for a permit modification.

p) Pursuant to NMSA 1978, § 70-2-23, an emergency order shall expire fifteen days from its effective date.

q) Division Orders R-12306 and R-12307 will expire after March 26, 2005.

CONCLUDES THAT:

(1) Prior to the March 4, 2005 letter, the original permits allowed the Operators to accept salt-contaminated oilfield wastes.

(2) The public notices for the permits issued to the Operators did not include acceptance of salt-contaminated oil field wastes as a requested term or condition of the permits.

(3) The public notices given for the permit applications were inadequate, rendering the permits voidable.

(4) The public did not receive proper notice of pending applications before the Division in order to have an adequate opportunity to comment upon the permit applications.

(5) The Division's March 4, 2005 administrative action, which notified all operators of landfarms who had received the voidable permits, that effective immediately, their permits were administratively modified. This modification prohibited them from accepting oilfield waste contaminated with salts, and was permissible and necessary to protect fresh water, human health and the environment.

(6) The Division's action administratively amending previously approved permits resulted in a majority of the landfarms no longer being able to receive salt contaminated oil field wastes.

(7) The recent adoption of the Pit Rule (19.15.2.50 NMAC) has increased the need for remediation and disposal of drill cuttings within New Mexico.

(8) Removing the capability of a majority of landfarms to accept salt contaminated oil field wastes represented to the Division an unforeseen combination of circumstances calling for immediate action by the Division. This constituted an emergency. See definition of "Emergency," Blacks Law Dictionary, 5th ed.

(9) It was necessary for the Division to take appropriate action to ensure that adequate facilities would continue to be available to receive and treat salt contaminated oil field wastes.

(10) It was reasonable for the Division not to wait until a crisis in the disposal of contaminated soil exists, but to take action quickly to protect fresh water, human health and the environment.

(11) Preliminary evidence indicates that the hydrologic and geologic characteristics associated with the Gandy Marley and Artesia Aeration disposal sites are sufficient to prevent water contamination and to protect human health and the environment.

(12) Division Rule 1202.A allows emergency orders to be issued without a hearing and to have the same validity as if a hearing had been held, provided that the order may remain in effect for a period no longer than 15 days.

(13) The purpose of Division Rule 1202 is to allow an emergency order to be extended beyond the 15 day period, provided a hearing is held thereon, and provided further that notice of such hearing may be given within a lesser period than 20 days, as the Division may order. See also NMSA 1978, § 70-2-23.

(14) Adequate notice in compliance with OCD Rule 1202.B of the Division's application to extend the emergency order was provided.

(15) Any extensions of the two emergency orders at issue will be temporary, until final determination concerning the Operator's applications for permit modifications is made by the Division.

(16) Preliminary evidence indicates that allowing Gandy Marley and Artesia Aeration to accept salt-contaminated oilfield wastes at their landfarm facilities will not pose a danger to fresh water, human health or the environment.

(17) The decisions on the applications of Gandy Marley and Artesia Aeration for permit modification should be acted upon with dispatch and not be allowed to pend before the Division for an extended period of time.

IT IS THEREFORE ORDERED THAT:

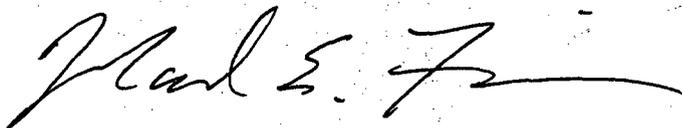
(1) The Division's application to extend Emergency Order R-12306 to allow Gandy Marley, Inc. to continue to operate under permit number NM-01-0020 without being subject to the Division's March 4, 2005 letter, is hereby approved; provided that any salt contaminated oil field waste shall be kept separate from non salt contaminated waste; and provided, further, that such extension shall only remain in effect until a determination is made by the Division on Gandy Marley's application to amend its current landfarm permit.

(2) The Division's application to extend Emergency Order R-12307 to allow Artesia Aeration, LLC to continue to operate under permit number NM-01-0030 without being subject to the Division's March 4, 2005 letter, is hereby approved; provided that any salt contaminated oil field waste shall be kept separate from non salt contaminated waste; and provided, further, that such extension shall only remain in effect until a determination is made by the Division on Artesia Aeration's application to amend its current landfarm permit.

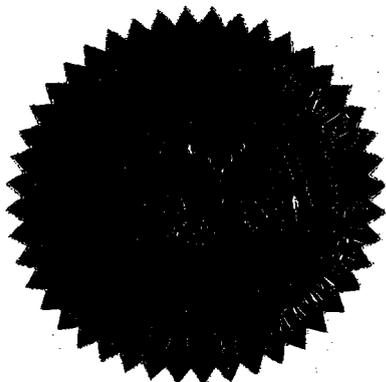
(3) Jurisdiction of these cases is retained for the entry of such further orders as the Division may deem necessary.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.

STATE OF NEW MEXICO
OIL CONSERVATION DIVISION



MARK E. FESMIRE, P.E.
Director



SEAL

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

IN THE MATTER OF THE HEARING CALLED BY)	
THE OIL CONSERVATION DIVISION FOR THE)	
PURPOSE OF CONSIDERING:)	
)	
APPLICATION OF THE OIL CONSERVATION)	CASE NOS. 13,454
DIVISION TO EXTEND THE EFFECTIVE)	
DURATION OF AN EMERGENCY ORDER TO)	
OPERATE ISSUED TO GANDY MARLEY, INC.)	
)	
APPLICATION OF THE OIL CONSERVATION)	and 13,455
DIVISION TO EXTEND THE EFFECTIVE)	
DURATION OF AN EMERGENCY ORDER TO)	
OPERATE ISSUED TO ARTESIA AERATION, LLC)	
)	(Consolidated)

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EXAMINER HEARING

BEFORE: WILLIAM V. JONES, JR., Hearing Examiner

March 25th, 2005

Santa Fe, New Mexico

This matter came on for hearing before the New Mexico Oil Conservation Division, WILLIAM V. JONES, JR., Hearing Examiner, on Friday, March 25th, 2005, at the New Mexico Energy, Minerals and Natural Resources Department, 1220 South Saint Francis Drive, Room 102, Santa Fe, New Mexico, Steven T. Brenner, Certified Court Reporter No. 7 for the State of New Mexico.

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I N D E X

March 25th, 2005
 Examiner Hearing
 CASE NOS. 13,454 and 13,455 (Consolidated)

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E X H I B I T S

Division	Identified	Admitted
Exhibit 1	12	-
Exhibit 2	12	-
Exhibit 3	13	-
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Exhibit 5	16	-
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(Continued...)

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CRI	Identified	Admitted
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* * *

A P P E A R A N C E S

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Santa Fe, New Mexico 87504-2208
By: MICHAEL H. FELDEWERT

* * *

ALSO PRESENT:

DONALD A. NEEPER
New Mexico Citizens for Clean Air and Water, Inc.
Los Alamos, New Mexico

* * *

1 WHEREUPON, the following proceedings were had at
2 10:00 a.m.:

3 EXAMINER JONES: Let's call the hearing in this
4 special docket. This is Docket Number 10-05, the 05
5 meaning 2005. This is Friday, March 25th, 2005.

6 My name is William Jones, I'm the appointed
7 Examiner today for the Division, and my counsel today will
8 be Ted Apodaca, Assistant General Counsel for the
9 Department of Energy, Minerals and Natural Resources.

10 And we may have a little break in 30 minutes or
11 so if Ted gets called away for a few minutes, but it won't
12 be but a break of 10 or 15 minutes or so, so... And Ted's
13 going to help me ask questions today too, so be prepared
14 for that.

15 We have two cases on the docket today. Is there
16 any other -- is there any continuances or dismissals today?
17 I don't have any. So if you guys don't have any, we'll go
18 ahead and call the first case.

19 Call Case 13,454, Application of the Oil
20 Conservation Division to extend the effective duration of
21 an emergency order to operate issued to Gandy Marley,
22 Incorporated.

23 Call for appearances in this case.

24 MS. MacQUESTEN: Gail MacQuesten, attorney for
25 the Oil Conservation Division. And we would ask that Case

1 13,454 be heard together with 13,455. Much of the evidence
2 will be similar for both cases.

3 EXAMINER JONES: Any other appearances in this
4 case, 13- -- ?

5 MR. DOMENICI: Yes, Pete Domenici, Jr., for Gandy
6 Marley.

7 EXAMINER JONES: Any other appearances?

8 MR. FELDEWERT: May it please the Examiner,
9 Michael Feldewert with the Santa Fe office of the law firm
10 of Holland and Hart, appearing on behalf of Controlled
11 Recovery, Inc.

12 EXAMINER JONES: Any other appearances in this
13 case?

14 DR. NEEPER: I'm Donald Neeper, I will appear
15 speaking on behalf of New Mexico Citizens for Clean Air and
16 Water.

17 EXAMINER JONES: Can you spell your last name?

18 DR. NEEPER: Yes, it's N as in November, double
19 e, p as in Peter, e-r.

20 EXAMINER JONES: And that was representing who,
21 now?

22 DR. NEEPER: New Mexico Citizens for Clean Air
23 and Water, Incorporated.

24 EXAMINER JONES: Any other appearances?

25 Any objections to combining these two cases?

1 MR. FELDEWERT: No, Mr. Examiner.

2 MR. DOMENICI: No objection.

3 EXAMINER JONES: Okay, let's combine Case 13,454
4 and 13,455.

5 And you can go ahead, Gail.

6 MS. MacQUESTEN: Mr. Examiner, before I begin I
7 would like to bring up a packet of exhibits to Mr. Apodaca.
8 You should already have a packet --

9 MR. APODACA: Thank you.

10 MS. MacQUESTEN: -- in front of you, Mr.
11 Examiner.

12 I have one witness, Mr. Ed Martin.

13 EXAMINER JONES: Mr. Martin, will you stand to be
14 sworn?

15 (Thereupon, the witness was sworn.)

16 EDWIN E. MARTIN,

17 the witness herein, after having been first duly sworn upon
18 his oath, was examined and testified as follows:

19 DIRECT EXAMINATION

20 BY MS. MacQUESTEN:

21 Q. Would you please state your full name for the
22 record?

23 A. My name is Edwin E. Martin.

24 Q. And where are you employed?

25 A. I'm employed with New Mexico Oil Conservation

1 Division, Environmental Bureau.

2 Q. What is your title there?

3 A. Environmental Engineer.

4 Q. How long have you been with the OCD?

5 A. Twelve years.

6 Q. Do your duties at the OCD include the review of
7 permits, including landfarm permits?

8 A. Yes.

9 Q. Are you familiar with the issues related to
10 landfarm permits issued to Gandy Marley, Inc., and Artesia
11 Aeration, LLC?

12 A. Yes.

13 Q. I'd like to start with an overview of what we are
14 asking for today. Now, both Gandy Marley and Artesia
15 Aeration have filed applications for a permit modification
16 that will allow them to accept salt-contaminated oilfield
17 wastes?

18 A. That's correct.

19 Q. And both are currently accepting salt-
20 contaminated oilfield wastes pursuant to an emergency order
21 issued by the Division?

22 A. That's right.

23 Q. And that emergency order was issued pending a
24 decision on their applications for permit modification?

25 A. Yes.

1 Q. But those emergency orders expire tomorrow?

2 A. Yes.

3 Q. So we're here today asking for an order that will
4 allow these two landfarms to continue to accept salt-
5 contaminated wastes, pending a determination on their
6 application for permit --

7 A. That's correct.

8 Q. -- modification?

9 All right. Let's back up now and explain how we
10 got to this point.

11 Under what rule were these landfarm permits
12 issued?

13 A. OCD Rule 711.

14 Q. How many active landfarm permits are there in New
15 Mexico?

16 A. About 20.

17 Q. When a permit is initially issued, does it
18 require written notice to certain parties and public notice
19 in the newspaper?

20 A. Yes.

21 Q. And may the Division require a public hearing
22 before issuing a permit?

23 A. Yes.

24 Q. Who writes the notice that goes into the
25 newspaper?

1 A. We have written the notices and supplied the
2 verbiage to the applicant.

3 Q. And did the OCD write the notices that were given
4 in Gandy Marley's case and in Artesia Aeration's case?

5 A. Yes.

6 Q. Do we have the notices that were sent out to
7 these two landfarms?

8 A. Yes.

9 Q. Are those Exhibits 1 and 2 in your packet?

10 A. Yes.

11 Q. How do these notices that were sent to the
12 newspapers describe what was going to take place at the
13 Gandy Marley and Artesia Aeration landfarms?

14 A. They both use the same words in that it was
15 described that "Hydrocarbon contaminated soils associated
16 with oil and gas production will be remediated by spreading
17 them on the ground surface in 6 inch lifts or less and
18 periodically disking them to enhance biodegradation of
19 contaminants."

20 Q. Although we're talking specifically about the
21 notices that were sent regarding the Gandy Marley landfarm
22 and the Artesia Aeration landfarm, were similar notices
23 sent out regarding other landfarms in the State?

24 A. Yes.

25 Q. Did the permits that were eventually issued to

1 Gandy Marley and Artesia Aeration landfarms have the same
2 language as the public notice that was sent out?

3 A. No, they did not.

4 Q. How did they differ?

5 A. They were broader, the permits themselves were
6 broader.

7 Q. Do we have copies of the permits in our packets?

8 A. Yes.

9 Q. Are those Exhibits 3 and 4?

10 A. Yes.

11 Q. How is the language in the permits broader than
12 the language in the public notice?

13 A. They both say that the landfarms can accept only
14 oilfield wastes that are exempt from RCRA Subtitle C
15 regulations and that do not contain NORMs, naturally
16 occurring radioactive materials.

17 Q. Could this language in the permits be interpreted
18 to allow the landfarms to accept salt-contaminated wastes?

19 A. Yes.

20 Q. Is that, in fact, how these two operators
21 interpreted that language?

22 A. Yes.

23 Q. Was that OCD's intent?

24 A. No.

25 Q. Why not?

1 A. Because the additions of salt-contaminated
2 oilfield waste would degrade the performance of the
3 microbes that caused the biodegradation of the hydrocarbon-
4 contaminated soils.

5 Q. Is there any concern related to groundwater?

6 A. Yes, salts generally leach more readily than
7 hydrocarbons and are not remediatable if the groundwater is
8 -- if there's proximity to groundwater, either/or surface
9 water, then there's a possibility that the salts will leach
10 into the water and contaminate it.

11 Q. So if you were to issue a permit for a facility
12 to accept salt-contaminated waste, you would be looking at
13 different concerns than you would for a landfarm that was
14 remediating hydrocarbon-contaminated soils?

15 A. Yes.

16 Q. How did the discrepancy between the language in
17 the public notice and the language in the permits for
18 landfarms come to the attention of the OCD?

19 A. A citizen called it to our attention
20 approximately three weeks ago that the public may not have
21 been adequately noticed as to what was going on with the
22 landfarms.

23 Q. Who is that citizen?

24 A. Mr. Ken Marsh.

25 Q. And is he here today?

1 A. Yes.

2 Q. All right, and is he affiliated with a waste
3 facility?

4 A. Yes.

5 Q. What facility is that?

6 A. Controlled Recovery, Inc.

7 Q. Is that a facility that can accept salt-
8 contaminated soils?

9 A. Yes.

10 Q. Why is that?

11 A. Because of its location and the fact that they're
12 -- they have a -- they are permitted for a landfarm but
13 they're not using it right now; they're using their
14 landfill, which is a more acceptable way to handle salt-
15 contaminated wastes.

16 Q. And the landfill permits specifically -- or the
17 landfarm permit is -- I'm sorry, the landfill permit that
18 CRI has does allow them to accept salt-contaminated wastes?

19 A. It doesn't specifically allow it, but it doesn't
20 disallow it, and that would be an acceptable place to
21 dispose of the...

22 Q. What did the OCD do when this discrepancy was
23 brought to its attention?

24 A. We wrote a letter, OCD wrote a letter, to all the
25 landfarms whose public notice did not agree with the permit

1 prohibiting the acceptance of salt-contaminated oilfield
2 waste at those facilities.

3 Q. Was -- How many landfarms fell into that category
4 of the 20 or so that you --

5 A. About 18.

6 Q. Is Exhibit Number 5 a copy of the letter --
7 actual Exhibit Number 5 is the letter that went to Artesia
8 Aeration and 6 the letter that went to Gandy Marley?

9 A. Yes.

10 Q. Similar letters went to these other landfarms who
11 also had a discrepancy between the public notice and the
12 permit language?

13 A. Yes.

14 Q. Now, the letter states that landfarms may apply
15 for a permit modification that would allow them to accept
16 salt-contaminated waste. If they do that, will they be
17 required to go through the public notice process?

18 A. Yes, they will.

19 Q. Now, that public notice process is not required
20 for permit modifications under Rule 711; is that right?

21 A. Gen- -- no -- Yes, that is correct. Generally
22 speaking, we would consider this a major modification, no
23 one would so do -- so call that to hearing or give the
24 opportunity for a hearing for these types of modifications.

25 Q. Why does the Division want to go through the

1 public notice process before issuing permit notifications
2 for landfarms to accept salt-contaminated wastes?

3 A. Because of the increased danger to groundwater in
4 the case of acceptance of those types of wastes. The OCD
5 would like to give the public ample opportunity to hear
6 what's going on, discuss it, object to it if they can or if
7 they want to, and it's a little more important to us, I
8 think, that the public be made aware of this in particular,
9 as opposed to the hydrocarbon-contaminated soil.

10 Q. The letter that went out on March 4th to Artesia
11 Aeration, Gandy Marley, and the other landfarm operators
12 states that landfarms that wish to accept salt-contaminated
13 wastes while their applications for permit modification are
14 pending may apply for an emergency order under OCD Rule
15 1202. Why was the Division suggesting the emergency-order
16 procedure in these letters?

17 A. OCD was concerned that pit remediations and pit
18 cleanups and other remediation projects in the state would
19 be hampered by the lack of availability of suitable sites
20 to take the wastes.

21 Q. You mentioned pit remediation. Is that a fairly
22 recent problem?

23 A. It is, OCD promulgated our OCD Rule 50, imposing
24 more stringent restrictions, more stringent restrictions,
25 when a pit is cleaned up. In certain cases they have to --

1 the operator has to remove the contents and haul them to
2 some suitable facility.

3 Q. And the pit contents may include salt-
4 contaminated wastes?

5 A. Correct.

6 Q. What would happen if there were no facilities to
7 accept salt-contaminated wastes or if the number of
8 facilities that were eligible to accept such wastes were
9 dramatically reduced?

10 A. It was OCD's feeling that it would -- that some
11 of the projects would cease or at least be curtailed or
12 delayed somewhat until the problem could be worked out.

13 Q. Now, Gandy Marley and Artesia Aeration did, in
14 fact, apply for emergency orders; is that right?

15 A. Correct.

16 Q. And is Exhibit Number 7 the application that was
17 filed for an emergency order by Artesia Aeration?

18 A. Yes.

19 Q. And is Exhibit Number 8 the application for an
20 emergency order filed by Gandy Marley?

21 A. Yes.

22 Q. These applications look like a form; is that what
23 it was?

24 A. It was a form devised by the Division for this
25 purpose, specifically for this purpose.

1 Q. And it was provided to those operators who
2 intended to ask for emergency orders?

3 A. Correct.

4 Q. And the forms were filled out by the operators or
5 by OCD?

6 A. By the operators.

7 Q. What did you -- What did the OCD ask for in these
8 forms, what sort of information?

9 A. Some description of conditions at the site that
10 would prevent the contamination of groundwater, either lack
11 of groundwater or some geological substructure that would
12 prevent the contaminations, salt contaminations, from
13 reaching groundwater.

14 Q. And did we also request information on why an
15 emergency order should be issued?

16 A. Yes.

17 Q. I'd like you to take a look at Exhibit Number 7,
18 which is the application for Artesia Aeration, and go
19 through the information they provided about the site and
20 why it was a good candidate for accepting salt-contaminated
21 waste, and ask you what -- First of all, let's just go
22 through what they presented to you on the form.

23 A. They described the site as being at least a
24 thousand feet from any freshwater well, a thousand feet
25 from any watercourse, and lack of groundwater at the site,

1 and that's all. And they said they were going to keep the
2 reserve pit or the drill cuttings in a separate cell, away
3 from the hydrocarbons.

4 Q. They also provided for a monitor well?

5 A. Yes.

6 Q. And that monitor well shows no water at 120 feet?

7 A. Yes.

8 Q. Did you verify the information that was provided
9 in this application?

10 A. Yes.

11 Q. And according to OCD records, the information
12 provided by Artesia Aeration is correct?

13 A. Yes.

14 Q. Do you have any additional information about the
15 Artesia Aeration site that would make it either a good
16 candidate or a bad candidate for accepting salt-
17 contaminated waste?

18 A. The existence of a clay barrier below their site
19 that would inhibit the migration of contaminants.

20 Q. And where did you get that information?

21 A. Just from general knowledge of personnel in the
22 Division.

23 Q. Let's turn to Exhibit Number 8, and this is the
24 application submitted by Gandy Marley in seeking an
25 emergency order, and could you tell us what information

1 they provided regarding the nature of their site as a
2 possible candidate for accepting salts?

3 A. They also say that their facility is more than a
4 thousand feet from any freshwater well or watercourse. In
5 addition, they have an impermeable redbed clay barrier of
6 approximately 150 feet between the surface and the
7 groundwater. Groundwater at the site is nonproducing in
8 both volume and quality. They say that the TDS of that
9 water should be 1000 parts per million. And that's it.

10 Q. Okay. Now, unlike the Artesia Aeration
11 application, the Gandy Marley application doesn't say
12 anything about keeping salt-contaminated wastes separate
13 from other wastes.

14 A. Correct.

15 Q. Did you talk to them about that?

16 A. I did.

17 Q. And what was their response?

18 A. They said they would keep it separate.

19 Q. Okay. Why is it important that it be kept
20 separate?

21 A. Because of the effect that salt has on the
22 biodegradation of the hydrocarbons. It tends to kill the
23 microbes that are responsible for that, causing that
24 biodegradation to cease.

25 Q. What do you know about the Gandy Marley site,

1 other than the information that's provided in their
2 application, that would make it a good or bad candidate for
3 accepting salts?

4 A. I'm sorry, say that again?

5 Q. Is there anything that you know about the Gandy
6 Marley site, aside from what in this application, that
7 would make it a good or bad candidate for accepting salts?

8 A. Nothing they haven't described in here.

9 Q. Did you verify the information that they provided
10 in the application?

11 A. Yes.

12 Q. Now, both applications state that they need an
13 emergency order because of the need for a facility to
14 accept salt-contaminated wastes in their particular areas.

15 A. Correct.

16 Q. How many facilities are there in New Mexico who
17 can accept this type of waste?

18 A. Well, the OCD does not have a rule concerning
19 salt specifically, so in effect there is no rule that
20 prohibits anybody from accepting salt-contaminated wastes.

21 If an operator or a landfarm operator -- If an
22 oil and gas operator or a landfarm operator questioned us
23 on it, we would discourage -- generally discourage taking
24 it to landfarms and suggest they take it to landfills in
25 the state, in southeast Lea County.

1 Q. Now, you say there's no rule that says that -- to
2 prevent the facility from accepting these wastes, but right
3 now, after Mr. Fesmire's March 4 letter, landfarms are not
4 allowed to accept this?

5 A. That's correct.

6 Q. So that letter eliminated all the landfarms in
7 the state from accepting salt-contaminated waste?

8 A. Correct.

9 Q. If you eliminate the landfarms, how many
10 facilities can accept this waste?

11 A. I think in the part of the state that's in
12 question that leaves only CRI and Sundance.

13 Q. And what part of the state are we talking about
14 here?

15 A. Lea County, generally the Permian Basin portion
16 of -- that's in New Mexico, the Lea County part, portion of
17 that.

18 Q. Well, if there's a CRI landfill facility -- and I
19 assume Sundance is also a landfill; is that right?

20 A. Yeah, yes.

21 Q. Your head is shaking "yes", but your --

22 A. Yes, I'm sorry.

23 Q. -- eyes are saying no.

24 Okay. If we have those two facilities eligible
25 to accept this type of waste, why do we need Artesia

1 Aeration and Gandy Marley to accept these wastes?

2 A. Artesia Aeration and Gandy Marley are located in
3 the more northern part of Lea County and western part, and
4 would serve to pick up some of the work from Eddy County,
5 for instance, and other remediations going on in Chaves
6 County and northern Lea County.

7 Q. Where are Artesia Aeration and Gandy Marley
8 located in relation to CRI and Sundance?

9 A. Both north and east of there.

10 Q. As the crow flies, how many miles, approximately?

11 A. Maybe 60 miles, 50 or 60 miles.

12 Q. For someone who has to drive waste to these
13 facilities, how far is it a driving distance?

14 A. I'm not sure but my guess would be on the order
15 of 100 miles' difference, or 75 miles' difference.

16 Q. Is distance a critical factor in how expensive it
17 is to dispose of wastes?

18 A. Yes.

19 Q. What type of remediation activity is going on in
20 the southern part of the state right now?

21 A. Pit cleanups, per Rule 50, and other remediation
22 sites on -- not historical sites, but older sites that
23 either have or have not contributed to contamination of
24 groundwater, the source of contamination in those sites is
25 being removed and disposed of somewhere.

1 Q. Where is the bulk of that work being done?

2 A. Kind of all over Lea County and Eddy County as
3 well.

4 Q. In your experience dealing with compliance issues
5 at the OCD, does compliance go down as the expense and
6 inconvenience of compliance goes up?

7 A. Generally speaking.

8 Q. Were emergency orders issued for Gandy Marley and
9 Artesia Aeration?

10 A. Yes.

11 Q. And is Exhibit 9 the order that was issued to
12 Artesia Aeration?

13 A. Yes.

14 Q. And Exhibit 10 the order that was issued to Gandy
15 Marley?

16 A. Correct.

17 Q. Now, these were both issued on, it appears, March
18 11th?

19 A. Right.

20 Q. And they were signed by Daniel -- Well, it's hard
21 to read this signature. Do you know who signed it?

22 A. Daniel Sanchez.

23 Q. All right, who is he?

24 A. He is the -- what's called the compliance officer
25 or enforcement officer in the Division.

1 Q. And it looks as though he's signing for Mr.
2 Fesmire. Mr. Fesmire is our Division Director?

3 A. Correct.

4 Q. Why weren't these orders signed by Mr. Fesmire
5 himself?

6 A. Mr. Fesmire was out of town during this period of
7 time.

8 Q. Is he aware of the orders?

9 A. Yes.

10 Q. Did he authorize them?

11 A. Yes.

12 Q. Have any other landfarms applied for emergency
13 orders as a result of Mr. Fesmire's March 4 letter?

14 A. Yes.

15 Q. Have any other emergency orders been issued?

16 A. No.

17 Q. Why not?

18 A. Because there was some reservation on the OCD's
19 part as to the acceptability of those sites for acceptance
20 of salt-contaminated waste without further proof that
21 groundwater would be protected.

22 Q. Did you have such concerns about the Gandy Marley
23 or Artesia Aeration permits?

24 A. No.

25 Q. Now, you stated before -- we went through these

1 orders that were issued on March 11th. Now by statute, an
2 emergency order stays in effect for no longer than 15 days;
3 is that right?

4 A. That's correct.

5 Q. So when will these orders lose any effect?

6 A. Tomorrow, March 26th.

7 Q. Do Gandy Marley and Artesia Aeration have pending
8 applications for permit modifications?

9 A. Yes.

10 Q. And we are going to go through the 30-day public
11 notice process on those applications?

12 A. Yes.

13 Q. Has the notice been issued --

14 A. For the regular hearing?

15 Q. Yes.

16 A. No.

17 Q. Okay, when will that be done?

18 A. April -- I think the deadline is April 20th or
19 so.

20 Q. Okay. Do we have a hearing date set?

21 A. Yes.

22 Q. And when is that?

23 A. May 19th.

24 Q. So basically we are here today asking to continue
25 the effect of these emergency orders until the OCD can act

1 on a permit modification after going through the complete
2 notice procedure; is that right?

3 A. That's correct.

4 Q. Have you reviewed the permit-modification
5 applications filed by Gandy Marley and Artesia Aeration?

6 A. Briefly.

7 Q. Based on the information that you have available
8 to you today, would you expect those permit-modification
9 applications to be granted?

10 A. I would expect they would be.

11 Q. All right. Now of course, you may receive
12 additional information through the public comment period or
13 through the hearing process, and that would affect your
14 opinion on that?

15 A. Correct.

16 Q. So you're just speaking based on what you have
17 available to you today?

18 A. That's correct.

19 Q. What was done to give notice of this particular
20 hearing today?

21 A. Public notices were placed in the Roswell paper
22 and the Lovington paper. Additionally, anybody -- any
23 interested parties that are on the list for e-mail of the
24 docket for the hearings received notification. Also it was
25 posted on the website, our website.

1 Q. Let's go through some of these public notice
2 efforts. Normally we need to give at least 10 days' notice
3 before a hearing; is that right?

4 A. Correct.

5 Q. But that doesn't apply in an emergency hearing
6 situation?

7 A. That's my understanding.

8 MS. MacQUESTEN: And I would direct the
9 Examiner's attention to Rule 1202.B in that respect.

10 Q. (By Ms. MacQuesten) Was notice sent to Artesia
11 Aeration and Gandy Marley?

12 A. Yes.

13 Q. And is Exhibit Number 11 a letter that was sent
14 to Jim Wilson of Artesia Aeration?

15 A. Yes.

16 Q. And Exhibit Number 12 a letter that was sent to
17 Larry Gandy of Gandy Marley, Inc.?

18 A. Yes.

19 Q. And these were sent on March 17th, both of them?

20 A. That's correct.

21 Q. By certified mail and by fax?

22 A. Yes.

23 Q. And for Gandy Marley also sent by e-mail?

24 A. Correct.

25 Q. Gandy Marley is present today for the hearing and

1 represented?

2 A. Yes.

3 Q. Is Artesia Aeration is present?

4 A. No -- Oh, I'm sorry, yes, he is. I see him back
5 there. Beg your pardon.

6 Q. Was effort made to contact the surface owners of
7 the Gandy Marley and Artesia Aeration landfarms?

8 A. Yes.

9 Q. For Gandy Marley, who is the surface owner?

10 A. Bill Marley, the Marley family.

11 Q. So they are the owners, in fact, of the surface
12 area?

13 A. Yes.

14 Q. How about for Artesia Aeration?

15 A. A family -- the Caswells, the Caswell family.

16 Q. Is Exhibit Number 13 a letter that was sent to
17 the Caswells notifying them of this?

18 A. Yes.

19 Q. And that was dated March 18th?

20 A. Yes.

21 Q. Now, this one was sent regular mail rather than
22 certified mail. Why is that?

23 A. I don't know.

24 Q. Is it generally faster to get notice --

25 A. Probably, yes.

1 Q. I notice on here that it's also sent by fax, but
2 there's a notation, "(in care of Jim Wilson)". Who's Jim
3 Wilson?

4 A. Jim Wilson is the operator of Artesia Aeration.

5 Q. Why was it sent to him?

6 A. Because he knows the Caswells very well and said
7 that he would hand-deliver it to them.

8 Q. Was that again a concern to get notice to them in
9 time for the hearing?

10 A. Yes.

11 Q. Do you know if he was successful in getting in
12 touch with the Caswells?

13 A. I don't know.

14 Q. I'd like you to turn to Exhibit Number 14. Is
15 this the newspaper advertisement for this hearing sent to
16 the *Lovington Daily Leader*?

17 A. Yes.

18 Q. With the affidavit of publication showing it was
19 published on March 15th?

20 A. Yes.

21 Q. And if you could turn to Exhibit 15, is this an
22 affidavit of publication showing the same ad published in
23 the *Roswell Daily Record*?

24 A. Yes.

25 Q. On March 17th?

1 A. Yes.

2 Q. Now, you stated that notice was sent by e-mail to
3 those who had requested notice of OCD hearings?

4 A. Yes.

5 Q. What sort of list is that?

6 A. It's a separate list kept by OCD, and my
7 understanding of what's done is, a copy of all the dockets
8 is sent to each one on the list whenever there's a hearing
9 coming up.

10 Q. And that was done in this case?

11 A. Yes.

12 Q. When was that done?

13 A. March 8th.

14 Q. March 8th?

15 A. March 18th, sorry.

16 Q. Was notice provided to Mr. Marsh of CRI?

17 A. Yes.

18 Q. How was that done?

19 A. I called him and told him -- and advised him that
20 it was coming up.

21 Q. When did that happen?

22 A. Monday the 21st.

23 Q. Why did you call him?

24 A. Because I thought he might be interested.

25 Q. Was there any legal requirement that you notify

1 him in particular?

2 A. No.

3 Q. Have emergency orders been issued in the past,
4 based on the need to provide options for waste disposal?

5 A. Yes.

6 Q. If you would turn to Exhibit Number 16, please,
7 is this one such emergency order issued in 2001?

8 A. Yes.

9 Q. And this dealt with the disposal of solid wastes?

10 A. Oilfield waste at a municipal landfill or other
11 landfill.

12 Q. Okay. And this was the result of a change in the
13 law that required disposal only upon approval of the
14 Division?

15 A. Right.

16 Q. And that law took effect immediately and before
17 the OCD had rules in effect --

18 A. Yes.

19 Q. -- describing how this would be handled?

20 And the upshot was that this emergency order,
21 Number E-34, was granted providing a place -- providing
22 rules so that the OCD could approve facilities accepting
23 that sort of waste.

24 Was this issued with a hearing or without
25 hearing?

1 A. This was without a hearing.

2 Q. And this would have had the same sort of limit
3 that our emergency orders in Gandy Marley and Artesia
4 Aeration have, that it would expire after 15 days?

5 A. Yes.

6 Q. Where did you get this order?

7 A. From Florene Davidson's book where she keeps all
8 the emergency orders.

9 Q. Okay, you say "all emergency orders". Are all
10 emergency orders kept in that notebook?

11 A. I don't know, I assume that.

12 MS. MacQUESTEN: This would conclude our
13 evidence. I would move for admission of OCD Exhibits 1
14 through 16.

15 EXAMINER JONES: Any objections?

16 MR. DOMENICI: No objection.

17 MR. FELDEWERT: No objection.

18 EXAMINER JONES: Before we grill Ed Martin more
19 closely here, I forgot to actually call the other case --
20 we combined it -- and I also didn't call for appearances in
21 this case.

22 Let me make sure that the people in the audience
23 know what we're doing here. On Case 13,455, it's the
24 Application of the Oil Conservation Division to extend the
25 effective duration of an emergency order to operate issued

1 to Artesia Aeration, LLC.

2 Is there any other appearances for Artesia
3 Aeration, LLC, that weren't noted -- that didn't stand up
4 earlier? I guess not, so I guess we'll go ahead and -- Mr.
5 Domenici?

6 MR. DOMENICI: Thank you.

7 EXAMINATION

8 BY MR. DOMENICI:

9 Q. Mr. Martin, are you involved in issuing discharge
10 permits?

11 A. Yes.

12 Q. And do you use the Water Quality Control
13 Commission regulations?

14 A. That's correct.

15 Q. And isn't it true that pursuant to those
16 regulations a discharge permit isn't even required unless
17 the TDS is less than 10,000?

18 A. That's correct.

19 Q. So based on your testimony that you just
20 indicated, that you agree with Gandy Marley's emergency
21 application and said that the TDS was 15,000, they don't
22 even need a discharge permit, or at least arguably they
23 wouldn't require one?

24 A. Correct.

25 Q. So it is very cautionary, or overly

1 precautionary, isn't it, that they have a discharge permit
2 for their landfarm?

3 A. That's correct.

4 Q. And isn't it true, sir, that if you take your
5 March 4th letter, which is Exhibit 5 -- that's the one to
6 Artesia -- and if you take the March 4th letter to Gandy
7 Marley -- let me see if I can find the exhibit -- that
8 would be Exhibit 6 -- in the bold part there, or right
9 before the bold part it says, "...OCD has determined that
10 it is necessary to protect fresh water, human health and
11 the environment to modify the permit as follows:", and you
12 mention, "Effective immediately, the NMOCD permitted
13 landfarm identified above -- " which is Gandy Marley
14 " -- is prohibited from accepting oilfield waste
15 contaminated with salts."

16 Do you see that?

17 A. Correct, yes.

18 Q. And it's true, based on your testimony, that in
19 fact that administrative determination is not accurate as
20 to Gandy Marley, as of your information today?

21 A. That's correct.

22 Q. So in effect --

23 A. Well --

24 Q. -- in effect --

25 A. -- yes.

1 Q. -- they are able to persuade you and OCD that
2 they have just cause that this modification not apply to
3 them?

4 A. This emergency order not apply to them, yes,
5 and --

6 Q. And this is a modification of that?

7 A. Correct, yes.

8 Q. And this modification not apply to them?

9 A. Right.

10 Q. Is there any other way that they can continue
11 operating, that you're aware of, until they have a hearing
12 on May 19th, other than going through this process?

13 A. No.

14 Q. That's the only way they can establish the right
15 to continue operating?

16 A. As far as I know.

17 Q. And in the -- Where in the Water Quality Control
18 regulations are they required to establish an emergency in
19 order to keep operating?

20 A. These are -- Let me clarify a little bit. The
21 permits that Gandy Marley and Artesia Aeration operate
22 under are OCD -- are not permits under the Water Quality
23 Act. However, we use the 10,000 parts per million TDS
24 standard in these permits. These are permitted under the
25 OCD Rule 711.

1 Q. Even in that rule, though, there is no
2 requirement that they establish an emergency to continue
3 operating --

4 A. No.

5 Q. -- with a modification that the OCD says doesn't
6 apply to them?

7 A. Correct.

8 Q. So that's -- that was the form prepared, because
9 that's a standard process --

10 A. Right.

11 Q. -- that OCD has, is going through these emergency
12 hearings?

13 A. That's correct.

14 Q. But isn't it true that if, in fact, all they had
15 to establish was just cause or a likelihood that their
16 modification would be successful, then from a technical
17 standpoint they've satisfied you that they have just cause
18 to continue operating?

19 A. That's correct.

20 Q. And I understand that you indicate you don't use
21 the Water Quality Control Commission regulations for your
22 permitting process, but you do refer to them for exceptions
23 to various provisions, don't you?

24 A. Correct.

25 Q. And are you aware that in those provisions, that

1 if the agency wants to modify a permit, that they have to
2 provide some kind of notice and opportunity for the
3 applicant to respond?

4 A. Correct, we generally require notice for a
5 modification.

6 Q. Okay, and what notice did you give to my clients
7 in this case, before actually ordering them shut down, with
8 your modification?

9 A. Before this letter went out --

10 Q. Yes.

11 A. -- prohibiting it?

12 Q. Yes.

13 A. None.

14 Q. And so they have had no due process, no
15 opportunity for a hearing other than today?

16 A. Correct.

17 Q. Now, under the Water Quality Act, the OCD is
18 authorized to administer the water quality regulations --

19 A. Yes.

20 Q. -- as it -- if it deals with oilfield issues,
21 correct?

22 A. (No response)

23 Q. And under that act, under -- Mr. Hearing Officer,
24 Counsel, under 74-6-7, administrative action, judicial
25 review, if someone wanted to appeal a decision under the

1 Water Quality Act -- which in fact is what we are having
2 here, correct?

3 A. (Nods)

4 Q. -- they would have to show -- and they wanted a
5 stay of that decision --

6 A. Uh-huh.

7 Q. -- while they were appealing, they would have to
8 show, quote, good cause?

9 A. Correct.

10 Q. Are you familiar with that provision?

11 A. Correct, we have similar provisions in the OCD
12 Rules.

13 Q. And in fact, is it your testimony that my clients
14 have shown good cause to stay or stop temporarily this
15 modification, at least until their hearing on May 19th?

16 A. Yes.

17 Q. And just for the record, that's 74-6-7, subpart
18 C.

19 And isn't it also possible, under the Water
20 Quality Control Commission regulations, for someone to
21 obtain a discharge permit for 120 days without -- or excuse
22 me, to have a discharge for up to 120 days without a
23 discharge permit?

24 A. Yes, there is.

25 Q. And under that, the standard they have to show is

1 good cause, with a 120-day discharge?

2 A. Yes.

3 Q. And it's your testimony that my clients have
4 shown that type of good cause today?

5 A. Yes.

6 Q. And do you anticipate that their modification
7 will be final around May 19th? How would that process work
8 out? I know there's a hearing scheduled for May 19th.

9 A. It will be public-noticed prior to that, and the
10 public -- the hearing on May 19th will allow everybody to
11 come in and comment on the modification proposed. Based on
12 my knowledge right at the moment, I don't see anything that
13 would prevent that from happening.

14 Q. Well, I'm more describing how the process would
15 work. Was the decision made that day, or is an order
16 entered at some point later --

17 A. Oh --

18 Q. -- how does that work?

19 A. -- it varies, but generally it's delayed, and the
20 decision could be delayed for some point in time after May
21 19th, possible.

22 Q. Do you have any idea what -- Is there a
23 requirement to have a decision within a certain amount of
24 time?

25 A. I don't know, I don't know.

1 Q. Okay. And when you said May 19th, would that be
2 a hearing on a number of facilities?

3 A. Possibly, it could be. Right now all we have
4 scheduled are these two, Gandy Marley and Artesia Aeration.

5 Q. Okay, so these two come up for their modification
6 process at that point?

7 A. (Nods)

8 Q. Thank you.

9 Now, when -- in your application for an emergency
10 order -- And as I understand your testimony, that was a
11 form that was prepared by OCD and then sent to anyone who
12 received a copy of this letter?

13 A. Correct.

14 Q. Where did that form come from?

15 A. I devised it on the spur of the moment, the day
16 we sent the letters out.

17 Q. And what if anything were you referencing when
18 you used the terminology "emergency"?

19 A. The general activity that's going on in the
20 southeast -- in the northwest part of the state, but mostly
21 the southeast, which is what this is really directed at,
22 for remediations, pit cleanups, being enforced by the
23 district offices down there.

24 Q. So it wasn't some written standard that I could
25 look up in one of your regulations or a rule book or

1 something like that?

2 A. No.

3 Q. You were trying to make sure there wasn't a
4 significant impact on activities -- cleanup and
5 environmental-related activities --

6 A. Right.

7 Q. -- something like that?

8 A. Correct.

9 Q. Did you consider an emergency might be the impact
10 on an operator, like my clients, who had just cause to
11 continue operating under the standard we've just set and
12 who had good cause to continue operating under the 120-day
13 exception to a discharge permit? Would you consider those
14 types of harm to my client an emergency, or a possible
15 emergency?

16 A. I wouldn't say it was a consideration, no.

17 Q. As the OCD rep- -- is there any reason my client
18 should be shut down, from an environmental concern, any
19 environmental concerns you have why my client should not
20 operate?

21 A. No.

22 MR. DOMENICI: That's all I have.

23 EXAMINER JONES: Mr. Feldewert?

24 MR. FELDEWERT: Mr. Examiner, I'm going to go a
25 little bit out of order here, because I wanted to -- you

1 know, we found out about this hearing, I think, on Monday,
2 thanks to Mr. Martin. CRI is here. I've heard what the
3 Division has presented and what Domenici has to say, and I
4 have a couple comments before I get into our examination,
5 and then I do intend to call Mr. Marsh as a witness here
6 today.

7 EXAMINER JONES: Okay.

8 MR. FELDEWERT: Controlled Recovery, Inc., is
9 here because it's concerned, and I think extremely
10 concerned, about the process that has resulted in the
11 issuance of these emergency orders. Okay?

12 There apparently was no notice of a request by
13 emergency order to anyone. There was apparently no
14 evidence taken prior to the issuance of these emergency
15 orders, and they were based primarily, I think, on the
16 claims that were set forth in these forms. We'll go into
17 that a little bit more.

18 But essentially what these emergency orders have
19 allowed to occur here is, these two landfarms are able to
20 bypass the normal permitting process that is required for
21 them to modify their permits. There is no question here
22 that the Division has determined that their permits do not
23 authorize them to take this waste. That has been
24 determined.

25 As a result, they have to go through this

1 modification process before they can even accept this
2 oilfield waste. This is not a water-quality-control-
3 discharge issue, this is a Rule-711-can-I-accept-the-waste
4 issue. So we are under Rule 711 here.

5 These orders were issued presumably on the basis
6 of an emergency, and that's why they were allowed to bypass
7 the normal permitting process.

8 There are -- Mr. Martin talks about two; I think
9 there's at least three properly permitted facilities that
10 exist in southeast New Mexico that filed the right
11 paperwork a long time ago, that gave proper notice to the
12 public, that allowed the public to comment at hearings in
13 which evidence was taken, expert testimony was utilized, to
14 eventually issue permits to these existing properly
15 permitted facilities in southeast New Mexico who have
16 served the needs, the waste-issue needs, in this area for
17 quite some time now.

18 Artesia Aeration and Gandy Marley are just at the
19 beginning of this process now of modifying their permit to
20 accept these salt-contaminated wastes, yet they are allowed
21 to leapfrog this public-review process by virtue of an
22 emergency order on a claim that an emergency exists.

23 So I would suggest that as you sit here today,
24 that you ask yourself what disposal emergency exists in
25 southeast New Mexico, and is there any evidence of a

1 disposal emergency issue in southeast New Mexico, because
2 absent an emergency and facts to support an emergency, an
3 emergency order cannot issue.

4 You will see that -- at this hearing, that
5 neither of these landfarms offered to the Division any
6 evidence of a disposal emergency. They made a claim. In
7 fact, Artesia Aeration's application, which we will go
8 through here shortly, asks for an emergency order simply
9 because, and I quote, it's more feasible and less expensive
10 to haul to their facility than to a properly permitted
11 facility.

12 Now, I'm sure that's true for some operators.
13 It's always cheaper to dump locally than it is to haul your
14 waste to a properly permitted facility.

15 But my question to the Division and to you is
16 whether that is the right criteria to determine whether
17 there is a disposal emergency. Does the economic
18 convenience of a few operators, or the economic benefit
19 that a landfarm will receive by avoiding the permitting
20 process -- is that a right -- is that a proper standard for
21 issuing an emergency order?

22 Because there's a couple things that occur when
23 you issue emergency orders. Okay? They're issued without
24 notice. Okay? And you're allowing facilities that are not
25 permitted to accept waste. You're allowing facilities to

1 accept waste for which they're not permitted. And I would
2 suggest to you that that process infringes upon the
3 property rights of properly permitted facilities who have
4 gone through the process and are authorized to accept that
5 waste without due process. An emergency order does that.
6 So it's a pretty drastic step to take.

7 Secondly, you're allowing them to take wastes
8 without going the -- do the normal permitting process, and
9 therefore you're not affording the public review that you
10 would normally give to any facility before it could accept
11 a certain type of oilfield waste.

12 Now, my concern -- and I would suggest to you --
13 is that if these emergency orders are allowed to issue
14 based on some economic convenience to some operators in the
15 area -- okay? -- what you're going to likely see is that
16 when an operator applies for a C-108, a disposal well,
17 they're going to accompany that with an emergency order,
18 because I guarantee you, it is always cheaper and more
19 economic to dispose down a disposal well than it is to haul
20 your waste to a properly permitted facility.

21 And sure, it's cheaper. But nonetheless, those
22 operators, when they file for a C-108, they've got to go
23 through the process. Everybody has to go through the
24 process, that takes time, there is reasons behind it.

25 And my question, my concern, is whether the

1 Division is willing to set a precedent here that will
2 invite applications for emergency orders for disposal
3 wells, for example, simply because it is more feasible and
4 less expensive than trucking the waste to properly
5 permitted facilities, because I think that's essentially
6 what's going to happen here if these emergency orders are
7 allowed to stand.

8 The Division, I think, has been reluctant in the
9 past to issue emergency orders because it circumvents the
10 normal public notice and hearing process, it circumvents
11 the careful examination and evidence that's necessary
12 before you accept waste. But if you're going to use that
13 process, I think you have to use -- make sure that it's
14 carefully examined and that you've got -- have evidence to
15 support an emergency.

16 Now, in the cases here today CRI is not aware of
17 any evidence of a disposal emergency for salt-contaminated
18 waste. I think there's at least three facilities that can
19 accept it. There is no imminent threat to the public
20 health or environment by requiring these two facilities to
21 go through the normal permitting process.

22 So at the end of the day we're going to ask that
23 you strike these emergency orders down because it sets a
24 bad precedent here under these facts, they're not supported
25 by any evidence of an emergency, and I would suggest to you

1 that these emergency-order powers that the Division has
2 should not be invoked for the convenience of a select group
3 of operators or landfarms.

4 Now having said that, another concern that has
5 surfaced here this morning is that we now have a hearing in
6 which the Division attempted, I think, to comply with the
7 notice provisions of Rule 711. And I'm looking -- without
8 being too lawyerly here, I'm looking at Rule 711.B.(1),
9 which requires that any applications for a new facility or,
10 and I quote, to modify an existing facility shall comply
11 with certain requirements.

12 This is certainly a request for a modification of
13 a facility by way of an emergency order.

14 Notice of this hearing was apparently given to
15 the surface land owners. I don't know whether it was
16 within a mile of the facility; I assume it was. But part
17 of this notice requirement in Subsection B.(2) is notice to
18 the county commissioners. Now that has not occurred here,
19 the county commissioners have not received notice of this
20 hearing. So I think there is a notice problem with respect
21 to this particular hearing.

22 Now, having said that, I would like to ask some
23 questions of Mr. Martin. And then at the end, assuming
24 there's no other witnesses, I will be calling Mr. Marsh.

25 EXAMINER JONES: Okay.

1 MR. FELDEWERT: Thank you.

2 MR. DOMENICI: Before he does, I have a
3 supplemental witness to identify, which is a Mr. Larry
4 Gandy, in response to their notice which I received at the
5 close of business Wednesday.

6 And I would also like to point out, I didn't make
7 an opening statement, but -- and I don't plan to, really,
8 except to point out that there is a severe misstatement, I
9 think, or misinterpretation between the two parties here,
10 which is, the OCD clearly felt they had to modify my
11 client's permit, and I think their statement was my
12 client's permit prohibits this waste. And I think the
13 record is crystal clear that what, in fact, happened here
14 was a unilateral modification by the agency, and I don't
15 think that can be in dispute. It says we are modifying
16 your permit, it tells my client that.

17 And so in terms of due process, I think it's
18 really a much more serious issue, which is, can you take
19 someone's permit away from them, which is what they're --
20 what you're doing, and give them absolutely no remedy? You
21 gave them no prior notice, and according to what they're
22 stating now you're giving us no post-deprivation procedure,
23 because we have to prove some kind of a general economic
24 emergency, rather than simply demonstrating that your
25 modification itself is unsupportable, which we already have

1 of these.

2 Now, I'd like to have you turn, Mr. Martin, to
3 Exhibit Number 1, which, if I'm interpreting this
4 correctly, this was an application to modify Mr. -- or the
5 Gandy Marley facility that was filed in July of 2004; is
6 that correct?

7 A. Correct.

8 Q. And if I'm reading it correctly, this was an
9 application to modify their permit to allow them to accept
10 brine-contaminated soils --

11 A. Correct.

12 Q. -- which essentially would be a type of salt-
13 contaminated waste, correct?

14 A. Right.

15 Q. Okay. This was filed way back in July of last
16 year, so apparently Mr. Gandy recognized that he did not
17 have the authority at that time to accept salt-contaminated
18 waste. Is that how you would interpret this?

19 A. No, I wouldn't.

20 Q. Okay.

21 A. This probably was a result of a letter that went
22 out from us expressing OCD concerns about salt-contaminated
23 waste.

24 Q. Okay, now that letter is marked as Exhibit 3, I
25 believe, and that was sent out in September, was it not?

1 A. Right.

2 Q. Okay, so this is before that letter?

3 A. Right.

4 Q. Okay, so this would have been activity Mr. Gandy
5 took himself to modify --

6 A. Right.

7 Q. -- your permit?

8 A. Right.

9 Q. There would be no reason to do that if his permit
10 already allowed him to accept salt-contaminated waste?

11 A. I would assume.

12 Q. Okay. Do you know what happened to this permit?

13 A. The modification requirement?

14 Q. The modification request.

15 A. Nothing yet.

16 Q. In fact, it was withdrawn by Mr. Marley, was it
17 not?

18 A. Pardon?

19 Q. I'm sorry, I think it was withdrawn by Mr.
20 Marley, if you look at Exhibit Number 2?

21 A. Right.

22 Q. Do you know why it was withdrawn?

23 A. No, I don't.

24 Q. Okay. All right, so that happens in July. He
25 files in August. For whatever reason, he withdraws his

1 permit -- his application to modify his permit.

2 A. Correct.

3 Q. Okay. All right, then we get to your letter,
4 which is Exhibit -- I'm sorry, the Division's letter that
5 you were referencing, which is Exhibit Number 3, and you
6 sent a letter both to Mr. Gandy, right? --

7 A. Right.

8 Q. -- and Exhibit Number 4 is a letter to Artesia
9 Aeration?

10 A. Correct.

11 Q. This was six months ago?

12 A. Correct.

13 Q. Okay. And just for the record, I attached the
14 notice of publication for each of these facilities that
15 went out in -- for Gandy it was 1994 and for Artesia it
16 went out in 1999 when they first received their landfarm
17 permit?

18 A. Correct.

19 Q. Okay. Now, in this -- This letter was sent by
20 the Division. It doesn't have a signature on it. Is this
21 -- I'm assuming this letter was sent out at the direction
22 of Mr. Fesmire?

23 A. No, it wasn't.

24 Q. Okay, who directed that these letters go out?

25 A. Basically, this was decided upon by the

1 Environmental Bureau, that we needed to get some
2 information as to who intended to accept salt-contaminated
3 waste, or who was doing it. So more of a request for
4 information than anything else.

5 Q. Well, did this letter reflect the position of the
6 Division?

7 A. No, not really.

8 Q. It did not?

9 A. Oh, I'm sorry, it did, yes. We do have some
10 notations in there about that.

11 Q. Okay.

12 A. So -- It's more of a notification to them that we
13 were concerned about it and wanted to know if that
14 particular landfarm wanted to accept it or had accepted in
15 the past.

16 Q. Well, I'll quibble with you a little bit because
17 if I'm looking at the second paragraph, the last
18 sentence --

19 A. Uh-huh.

20 Q. -- it says, "If you want to accept salt-
21 contaminated cuttings or any other salt-contaminated
22 wastes, your 711 permit must be modified to ensure that
23 your acceptance of those wastes will not adversely affect
24 public health or the environment."

25 A. Correct.

1 Q. Okay. So in September, six months ago, the
2 Environmental -- or at least the Division had determined
3 that a permit modification was necessary before they could
4 accept salt-contaminated waste, correct?

5 A. Correct.

6 Q. All right. And that was based on the concerns
7 that were expressed in this letter --

8 A. Correct.

9 Q. -- about salts and the effects that they have --

10 A. Yeah --

11 Q. -- right?

12 A. -- yes.

13 Q. And it points out the -- some of those I think
14 you've already expressed, and that is that it lessens the
15 effectiveness of the biodegradation capacity of your
16 landfarm?

17 A. Correct.

18 Q. If I'm interpreting that correctly, that means
19 salts don't work very well in the landfarm?

20 A. Correct.

21 Q. All right. And now with respect to the salts,
22 the concern is the effect on groundwater because they leach
23 more rapidly, right?

24 A. Correct.

25 Q. Okay --

1 EXAMINER JONES: Mr. Feldewert?

2 MR. FELDEWERT: Yes.

3 EXAMINER JONES: I apologize, but I'm going to
4 lose my counsel here for 15 minutes and --

5 MR. FELDEWERT: Do you want to take a break?

6 EXAMINER JONES: Yes, sir.

7 MR. FELDEWERT: Let's do that.

8 EXAMINER JONES: We'll take a break for 15
9 minutes, come back about 11:20.

10 (Thereupon, a recess was taken at 11:05 a.m.)

11 (The following proceedings had at 11:23 a.m.)

12 EXAMINER JONES: Okay, let's go back on the
13 record here, and Mr. Feldewert, go ahead and continue.

14 MR. FELDEWERT: Thank you.

15 Q. (By Mr. Feldewert) Mr. Martin, we were viewing
16 the letter that was sent out six months ago that informed
17 these landfarms that they were not authorized to accept the
18 salt-contaminated waste without modification of their
19 permit.

20 Now, you were not -- the Division with this
21 letter was not shutting these facilities down, were you?

22 A. No.

23 Q. You were just telling them that they could not
24 take salt-contaminated wastes?

25 A. If they were -- we were telling them that -- We

1 weren't telling them that that was prohibited; we were
2 saying if you are or you intend, you need to file -- apply
3 for modification.

4 Q. Okay. And then you asked them to check one of
5 the two boxes?

6 A. Correct.

7 Q. All right. Now, so these facilities were free to
8 continue to operate as a landfarm, as they always had --

9 A. Correct.

10 Q. -- correct? Accepting hydrocarbon wastes,
11 because that's what they had been advertised to accept?

12 A. Correct.

13 Q. All right. And so am I correct that at this
14 point in time what you were dealing with here in September,
15 and really what we're dealing with here today is not the
16 discharge issue, it's whether they can or cannot accept
17 certain types of waste?

18 A. That's correct.

19 Q. All right. And that's governed by Rule 711 in
20 the permitting process?

21 A. Correct.

22 Q. Did -- I got this out of the files that were
23 provided for me by the Division, and I didn't see any
24 response from either one of these two landfarms. Do you
25 recall whether you got any kind of a signed letter back

1 from them as you had requested?

2 A. In response to the September 17th letter?

3 Q. Yes.

4 A. I don't believe I ever got the forms themselves
5 back in on either -- I don't recall that, I don't think so.

6 Q. If you had, it would be in the file?

7 A. Yeah.

8 Q. Now, in terms of having sent this letter out, do
9 you know whether these two landfarms, after receipt of this
10 letter, accepted salt-contaminated waste?

11 A. I don't know.

12 Q. Did you do any kind of an inspection or follow-up
13 to see whether they were accepting salt-contaminated waste,
14 either before or after this letter was sent?

15 A. No. I've done inspections on both facilities
16 since this letter, but not specifically -- it wasn't
17 specifically prompted by this letter.

18 Q. Okay. Did your inspections of these facilities
19 indicate whether or not they were accepting salt-
20 contaminated waste?

21 A. No.

22 Q. No, they weren't accepting --

23 A. No, it didn't indicate -- it didn't -- it didn't
24 really cover that as a separate issue. It was just a
25 general inspection as to how they were keeping the

1 landfarm. I didn't inspect any records on either one of
2 these facilities.

3 Q. Okay. But having expressed concern that salt-
4 contaminated wastes would effectively neutralize the
5 biodegradation capacity of a landfarm, did you inquire
6 whether they were accepting salt-contaminated wastes?

7 A. Verbally or otherwise?

8 Q. Yes.

9 A. I might have, yes. I probably did.

10 Q. And what did they tell you?

11 A. They said they were taking drill cuttings, which
12 in the southeast is -- I didn't phrase it that way,
13 probably, but they were taking drill cuttings. In the
14 southeast generally those are salt-contaminated waste.

15 Q. Did you -- Having sent this letter out, did you
16 do anything -- did the Division do anything to stop that?

17 A. No.

18 Q. Didn't take any action whatsoever?

19 A. No.

20 Q. Are there landfarms today that are accepting
21 salt-contaminated waste without modification to their
22 permit?

23 A. I don't know.

24 Q. Do you know whether these landfarms are accepting
25 today salt-contaminated wastes, absent the modification of

1 their permit?

2 A. These two?

3 Q. Yeah.

4 A. To my knowledge they're not.

5 Q. Have both of these facilities actually applied
6 for a permit modification?

7 A. Yes.

8 Q. And when did that occur?

9 A. Gandy Marley's was -- I don't have the exact
10 dates, but fairly recently, and Artesia Aeration was a
11 little before that one, before that.

12 Q. Recently?

13 A. Fairly recently.

14 Q. Within the last month?

15 A. Gandy Marley, yes. Artesia Aeration, I don't
16 believe so.

17 Q. You don't believe -- ?

18 A. -- it was within the last month.

19 Q. Do you whether there's -- has Artesia Aeration
20 actually applied for the permit modification?

21 A. Yes.

22 Q. Because -- and the reason I ask, Mr. Martin, is,
23 I asked for the files related to these two facilities, and
24 I found an application for a permit modification that was
25 filed by Mr. -- apparently by Gandy Marley, that I've

1 marked as Exhibit Number 5. I did not find one for Artesia
2 Aeration. Are you sure that Artesia Aeration has filed?

3 A. Yes.

4 Q. Okay. You just don't know whether it's been
5 within -- You don't think it's been within the last month?

6 A. I don't recall exactly, but I don't think it's
7 been within the last month --

8 Q. Where would that --

9 A. -- I think it's longer ago than --

10 Q. -- where would that application be?

11 A. It may be on my desk --

12 Q. Oh, is that right?

13 A. -- in a separate -- in a --

14 Q. So maybe that's why --

15 A. -- a file --

16 Q. -- because you were gone this week?

17 A. Possibly, yeah.

18 Q. Okay, so maybe that's why I didn't get a copy.

19 A. (Nods)

20 Q. All right. But -- so they've applied -- they
21 apparently have applied. They certainly apply immediately
22 after your letter in September; they waited a little while,
23 I guess, right?

24 A. I believe that's correct. I'd have to look at
25 the dates, but I think that's true.

1 Q. Okay. Now, if we turn to Exhibit Number 5,
2 recognizing that I pulled this out of the files that were
3 given to me, is this the modification that Gandy Marley has
4 filed --

5 A. Yes.

6 Q. -- with the Division?

7 A. Yes.

8 Q. Okay. And this is not just an application to
9 accept salt-contaminated wastes; this is much more than
10 that, right?

11 A. Correct.

12 Q. This is a modification to essentially take all
13 types of oilfield waste?

14 A. Correct.

15 Q. Muds, sludges, tank bottoms, et cetera?

16 A. Right.

17 Q. Now, landfarms don't take any liquid material?

18 A. Correct.

19 Q. So this is -- I mean, this is kind of a -- this
20 is not a modification of a landfarm permit, this is
21 essentially an application to become almost an oilfield
22 waste disposal facility?

23 A. Correct. I haven't reviewed this in detail, but
24 I believe that they do not intend to put this waste in
25 their landfarm cells, they intend to build more of a

1 landfill-type facility at that site.

2 Q. So that's -- I mean, would you consider this a
3 drastic change to their existing permit?

4 A. Yes.

5 Q. Now, is there -- What's the status of this
6 application?

7 A. Like I said, it hasn't been reviewed. It will
8 probably be part of their application that will modify
9 their facility that will be heard on the 19th. The status
10 of it is -- It's been received, but that's about it.

11 Q. All right, so we're just at the beginning of the
12 process?

13 A. Right.

14 Q. There hasn't been any public notice?

15 A. No.

16 Q. You really haven't had a chance to look at the
17 feasibility of this option?

18 A. No.

19 Q. Okay, have -- Now we mentioned Artesia. I didn't
20 see their application. What have they applied for?

21 A. They've applied for a little different -- it's
22 not a landfill -- as I recall, it's not a landfill-type
23 operation. They want to set up a separate cell and handle
24 the salts differently, but still accept them into that
25 sell.

1 Q. So they want to store it in a cell separate and
2 apart from their landfarm operations?

3 A. Right, separate from the hydrocarbon-
4 contamination cells.

5 Q. Okay. So this would be another -- this would
6 be -- instead of a landfarm operation, this would
7 essentially be a storage operation, would it not?

8 A. I'd have to look at it, but I guess you could
9 classify it that way.

10 Q. Okay, so that would -- would you consider that a
11 drastic change to their existing permit?

12 A. Yes.

13 Q. And where are we in the process of that
14 application?

15 A. Same, no public notice has been sent out yet.

16 Q. Right at the beginning?

17 A. Uh-huh.

18 Q. Okay. Have other landfarms applied for permit
19 modifications to accept salt-contaminated waste?

20 A. Yes.

21 Q. How many?

22 A. I think about five other ones.

23 Q. Do you know what the status is of their
24 applications?

25 A. Same as the other two --

1 Q. Right at the beginning?

2 A. -- they've been received, yeah, right at the
3 beginning.

4 Q. Okay. Are you expecting action on those other
5 applications by May 19th?

6 A. Probably not, but they will go through the same
7 process as Artesia Aeration and Gandy Marley are going to
8 go through. They'll go to public hearing, whether that's
9 specifically requested by the public or not.

10 Q. Why are they behind the Gandy Marley and Artesia
11 applications?

12 A. I don't -- You mean in time frame?

13 Q. Yes, I'm sorry.

14 A. I don't anticipate getting a hearing scheduled
15 where we can get all the research done between now and May
16 19th. We wanted to concentrate on these two, to go ahead
17 and take them to public hearing, because we had most of the
18 technical information that we required.

19 Q. Are you intending to provide notice of these
20 modifications -- Let me back up. Are you intending to
21 provide notice of these modifications to the landfarm
22 permits to Controlled Recovery, Inc.?

23 A. If Controlled Recovery, Inc., intends to accept
24 salts into the landfarm portion of that facility, yes. If
25 they don't, probably not.

1 Q. You would not provide notice to Controlled
2 Recovery, Inc.?

3 A. Oh, provide notice to them of the other ones?

4 Q. Yeah, I'm sorry, the other ones. I'm sorry.

5 A. Yes, I would.

6 Q. Okay. So -- And why are you intending to provide
7 notice to Controlled Recovery, Inc., of these applications
8 that have been filed to modify landfarm permits?

9 A. Mr. Marsh and Controlled Recovery, Inc., are on
10 the list to be notified of such modifications to any waste
11 disposal facility permit.

12 Q. Are other surface waste management facility
13 operators on that list as well?

14 A. Yes.

15 Q. Okay. Let me have you look at Exhibit 8, if you
16 would, please. This is a letter that was sent to me in
17 August by Mr. Fesmire. Are you familiar with this letter?

18 A. Yes.

19 Q. Okay. And Mr. Fesmire states in this letter that
20 -- in the last paragraph, that you maintain a master
21 notification list. He goes on to point out that CRI is
22 currently on this list, and then he says that "OCD will
23 begin including notification to these persons of surface
24 waste management facility permits and major modifications.
25 We have added all operators of surface waste management

1 facilities to the list so that all such operators may
2 participate in any decision concerning any such facilities
3 including formal enforcement actions."

4 A. Correct.

5 Q. Now, you agree with that, I assume?

6 A. Yes.

7 Q. All right. And do you think it's a good idea to
8 have operators of surface waste management facilities
9 involved in decisions on permit modifications in formal
10 enforcement actions?

11 A. I don't think I have a problem with it, no.

12 Q. Okay. Did you notify operators of surface waste
13 management facilities of this hearing here today?

14 A. No.

15 Q. Why is that?

16 A. Because mostly of the time frame that's involved
17 here, I didn't get a chance to do that. And I was hoping
18 that the public notices in the newspapers and that type of
19 thing would suffice.

20 Q. Okay. But you do intend to offer this notice
21 when it comes to the decision about these permit
22 modifications?

23 A. For the 19th hearing, yes.

24 Q. Okay. And I assume any subsequent hearings?

25 A. Yes.

1 Q. All right. Okay, now I want to go to -- and what
2 we've marked as Exhibit Number 6, and this is Artesia's
3 application for a temporary order allowing a landfarm to
4 accept salt-contaminated waste?

5 A. Right.

6 Q. Okay. And this was filed March 11, 2005?

7 A. Right.

8 Q. And this was filed six months after Mr. Fesmire's
9 -- I'm sorry, after the Division's September, 1994 [sic],
10 letter?

11 A. Correct.

12 Q. Okay. Now, the emergency order that was issued
13 in connection with this application I've marked as Exhibit
14 7, and that was the same day that this application was, I'm
15 assuming, filed and received?

16 A. Correct.

17 Q. Can you tell me procedurally, Mr. Martin, how
18 this application was received and handled? Can you take me
19 through the steps?

20 A. It was received by myself and reviewed to see if
21 everything that was in it needed -- that was -- needed to
22 be there was there. And then I consulted other members of
23 the Environmental Bureau as to the veracity of the
24 information and utilized their knowledge of the groundwater
25 situation at the site and whether they thought it would be

1 harmful to groundwater for them to accept salt-contaminated
2 waste.

3 Q. Who did you consult with?

4 A. Wayne Price.

5 Q. Okay. So did that occur the day that you got
6 this -- I mean, this -- between the time that you received
7 this application and the time the order was entered, is
8 that when this consultation took place?

9 A. Correct.

10 Q. Okay, dealing with the suitability -- the
11 groundwater allegations, I guess, in this application?

12 A. Correct.

13 Q. All right. Did you have any other discussions
14 with anyone?

15 A. No.

16 Q. Was there -- I'm assuming, then, there was no
17 kind of -- there wasn't any kind of a hearing?

18 A. No.

19 Q. There wasn't any -- Was there any kind of a
20 telephonic interview with the Applicant?

21 A. Not in this case.

22 Q. Okay. Did -- Now the order says it came for
23 decision before the Director of the Oil Conservation
24 Division, which would be Mr. Fesmire, but then we pointed
25 out it was signed by Mr. Sanchez, right?

1 A. Correct.

2 Q. Okay. Now, was Mr. Fesmire -- between the time
3 that you received this application and the time that the
4 order was issued, did you consult with Mr. Fesmire?

5 A. Yes. He knew the circumstances that were coming
6 about. He had been brief on the problem in general and
7 knew that these requests for emergency orders may be coming
8 in. That's why he allowed -- or he had the foresight to
9 allow Mr. Sanchez to sign them.

10 Q. Okay. Did he know that this was coming in by
11 Artesia Aeration?

12 A. Yes.

13 Q. Okay. And how did you know that?

14 A. I had talked to them on the phone, and he told me
15 he was going to -- he had asked me what to do.

16 Q. Who's "he"?

17 A. Mr. Wilson --

18 Q. Oh.

19 A. -- from Artesia Aeration.

20 Q. Okay.

21 A. And I had sent him -- He said what he wanted to
22 do, and I had sent him a form, or faxed him a form, that he
23 needed to use to apply for the emergency order.

24 Q. And he indicated to you that he was going to file
25 it?

1 A. Yeah.

2 Q. Okay. And then -- so then after having sent him
3 the form, that's when you consulted with Mr. Fesmire and
4 asked whether he would approve the issuance of an emergency
5 order, based on this application?

6 A. Yes.

7 Q. Did you consult with Mr. Fesmire before the
8 issuance of this order, the nature -- or what Artesia
9 indicated as the reason for emergency?

10 A. Not specifically.

11 Q. Okay. Did you -- between the time that --
12 between the time that the Division received this
13 application and the entry of this emergency order, you
14 mentioned that you consulted with Mr. Price concerning the
15 groundwater allegations, correct?

16 A. Correct.

17 Q. Okay, did you consult with him about the
18 freshwater allegations in this application?

19 A. Oh, the freshwater wells within 1000 feet?

20 Q. Yes.

21 A. No.

22 Q. Did you consult with him about the allegation in
23 here that there are no watercourses within 1000 feet?

24 A. No.

25 Q. Did you consult with him about the conditions in

1 the landfarm as set forth in here?

2 A. The -- that the pit cuttings would be kept
3 separate?

4 Q. No, I'm sorry, it says conditions of the landfarm
5 -- you have a question in here, conditions at the landfarm
6 site which would make it acceptable for disposal of salt-
7 contaminated oilfield --

8 A. And he -- he says there's no water at 120 feet?

9 Q. Right.

10 A. Yes.

11 Q. Okay. All right. And then that the reserve pit
12 cuttings would be kept in a separate cell, that's what you
13 took from Mr. Wilson, right?

14 A. Right.

15 Q. Okay. Did you do anything else besides consult
16 with Mr. Price with respect to the allegations about
17 freshwater -- Let me back up. You said you didn't consult
18 with Mr. Price about the freshwater and watercourse
19 allegations. Did you do any investigation whatsoever to
20 determine the accuracy of those statements?

21 A. No.

22 Q. Did anybody at the Division investigate the
23 accuracy of those statements before the issuance of that
24 emergency order?

25 A. Not to my knowledge.

1 Q. You mentioned to Ms. MacQuesten that you had
2 reviewed Division records. Did you look at those records
3 between the time that you received this application and the
4 entry of that order?

5 A. The records of Artesia Aeration?

6 Q. Yes.

7 A. Yes.

8 Q. Okay, so you did look at those?

9 A. Uh-huh.

10 Q. All right. Within those records, are there any
11 testimony or affidavits from any hydrologists about the
12 water situation in this area?

13 A. In the original application?

14 Q. In the Division files that you looked at?

15 A. Not that I recall.

16 Q. Is there any affidavits or testimony from
17 geologists?

18 A. Not that I recall, no.

19 Q. Is there any -- I think -- I guess a surveyor
20 would be important concerning watercourses. Is there any
21 affidavits or testimony in those records from a registered
22 surveyor?

23 A. Not that I recall.

24 Q. Is there any testimony or affidavits in those
25 Division records from a registered engineer that addresses

1 any of these subjects?

2 A. Not that I recall, no.

3 Q. Would it be fair to say that what's in those --
4 in the Division files are essentially statements that were
5 made by Artesia Aeration when they filed their initial
6 application?

7 A. That would be a fair statement.

8 Q. Did you -- Now, I know you had this form that you
9 filled out, okay? Now, before issuing this order allowing
10 this Artesia Aeration to accept these salt-contaminated
11 wastes, did the Division consider any other factors, other
12 than what's set forth on this form?

13 A. No.

14 Q. Did you -- So you didn't look into any erosion
15 concerns with wind or water?

16 A. No.

17 Q. You didn't consider any effects on wildlife?

18 A. No.

19 Q. What about endangered or threatened species --

20 A. No.

21 Q. -- was that taken into account?

22 A. No.

23 Q. Now, there's a section in here about why do you
24 consider this an emergency, okay? Now, I'm assuming that
25 that's an important section, because they're asking for

1 some extraordinary relief here.

2 A. Right.

3 Q. Okay. Now this statement says, "With only one
4 site in southern Lea County, to haul reserve pit cuttings
5 to, our location would make it more feasible [sic] and less
6 expensive for the oil companies to haul their reserve pit
7 cuttings to from Northern Lea County."

8 A. Correct.

9 Q. Okay. Now, between the time that you received
10 this application and the entry of this emergency order, did
11 you investigate whether there was only one site in southern
12 Lea County, as this represents?

13 A. No, I know there's more than one.

14 Q. Okay, so that's not entirely accurate?

15 A. Correct.

16 Q. All right. In fact, how many -- aren't there --
17 you mentioned, I think, during your testimony there's
18 Controlled Recovery, Inc.'s, facility, right?

19 A. Yes.

20 Q. Sundance?

21 A. Sundance.

22 Q. Okay, what about Lea Lands?

23 A. Lea Lands has a landfill not permitted by us but
24 permitted by ED, the Environment Department, so they would
25 be acceptable also.

1 Q. They're authorized to accept salt-contaminated
2 waste? Let me have you look at Exhibit Number 9. Now this
3 is a map that we put together of the area, and you'll see
4 it has color codings on it which show the Gandy Marley
5 facility?

6 A. Right.

7 Q. Show the Artesia Aeration facility in green?

8 A. Correct.

9 Q. It shows the Sundance Services facility with a
10 blue dot outlined in yellow?

11 A. Right.

12 Q. That's the one you were talking about, right?

13 A. Correct.

14 Q. Okay. And then it shows the Lea Land facility in
15 a blue dot outlined in orange?

16 A. Correct.

17 Q. And then it shows Controlled Recovery, Inc.'s,
18 facility?

19 A. Correct.

20 Q. To your knowledge, does this map accurately
21 depict the location of these facilities?

22 A. Yes.

23 Q. All right. So at the time that Artesia files its
24 application and says there's only one site, in fact,
25 there's actually three sites that are already permitted and

1 authorized to accept this waste?

2 A. Correct.

3 Q. Okay, then they -- the only other basis they
4 offer is that it's more feasible and less expensive for oil
5 companies to haul their reserve pit cuttings to and from
6 northern Lea County. I guess you don't -- We're not going
7 to dispute that, are we?

8 A. No.

9 Q. Okay. Is that the criteria for invoking -- Based
10 on your experience, is that the criteria that the Division
11 uses for invoking emergency orders?

12 A. I think it's unfair to say that it's the
13 criteria, but it's a consideration.

14 Q. So is it your opinion that the economic
15 convenience of operators and waste haulers should indicate
16 whether an emergency exists?

17 A. To the extent that that increased expense
18 inhibits the remediations that are going on, and pit
19 cleanups that are going on, currently.

20 Q. Did -- I'm sorry, what did you say?

21 A. If increased expense is going to cause pit
22 cleanups and existing remediation projects to cease or be
23 delayed, then it becomes a concern of the Division.

24 Q. Okay. But Artesia didn't allege in their
25 application that that was occurring, did they?

1 A. No.

2 MR. FELDEWERT: Okay --

3 EXAMINER JONES: Mr. Feldewert?

4 MR. FELDEWERT: Yes.

5 EXAMINER JONES: We intend to break for lunch
6 about noon. How long -- We can go over past 12:00 of your
7 question --

8 MR. FELDEWERT: You know, I'm thinking -- I'm
9 probably about halfway through. Do you want to break now?

10 EXAMINER JONES: We can, sure. We'll break now
11 and come back at one o'clock.

12 MR. FELDEWERT: That's fine.

13 EXAMINER JONES: Okay, let's go off the record
14 and come back, everybody, back at one o'clock.

15 (Thereupon, noon recess was taken at 11:49 a.m.)

16 (The following proceedings had at 1:04 p.m.)

17 EXAMINER JONES: Okay, let's go back on the clock
18 here, and Mr. Feldewert, go ahead and continue. Sorry
19 about the two interruptions.

20 MR. FELDEWERT: That's fine.

21 Q. (By Mr. Feldewert) Mr. Martin, before we broke
22 for lunch we had gone through the application that had been
23 filed by Artesia Aeration, which we marked as Exhibit
24 Number 6, and in order to continue that line of examination
25 I'd like to now move to the order that was issued for

1 Artesia Aeration, which I've marked as Exhibit Number 7.

2 Mr. Martin, you didn't draft this order, did you?

3 A. No.

4 Q. Okay. Have you reviewed it?

5 A. Uh-huh, briefly.

6 Q. Are you familiar with it?

7 A. Yeah.

8 Q. Okay. Who actually drafted it? Was it the
9 Division's attorney?

10 A. Yes.

11 Q. Okay. And recognizing the fact that you didn't
12 draft it, I just have a couple of questions about some of
13 the points in this order. My first one is in paragraph
14 (10), finding -- or I guess it's a finding paragraph (10),
15 Artesia Aeration, and that is, this -- I think this
16 paragraph is intended to set forth the allegations that --
17 by Artesia in support of their request for an emergency
18 order.

19 A. Correct.

20 Q. Okay. And the question I had was, when I looked
21 at paragraph (10).c, it says that the operator asserts that
22 "An emergency order is necessary because there is a
23 critical need in the area of the landfarm for a facility
24 that can accept salt-contaminated soils..." and then it
25 goes on.

1 A. Right.

2 Q. Okay. I did not see that -- or I don't see that
3 in Artesia's application as the basis for an emergency --
4 their basis for an emergency. I just wanted to make sure.
5 Was there any conversation that you had with Artesia on
6 which they expounded upon their request for an emergency,
7 other than what's in the application that they filed?

8 A. Telephone conversations concerning the amount of
9 work that's been going on in that general area, on
10 remediations and pit closures.

11 Q. Okay. But at least their application didn't
12 purport to say that there was a critical need in the area
13 for an additional landfarm --

14 A. No, it didn't.

15 Q. -- Artesia's application?

16 A. No, it did not.

17 Q. Okay. And then it goes on in paragraph (14) in
18 this order to say that the "Operator has demonstrated an
19 emergency requiring the issuance of an order..." Did
20 Artesia do anything as an operator other than file this
21 application that's been marked as Exhibit 6 in order to
22 demonstrate an emergency?

23 A. No.

24 Q. Then I want to look at paragraphs 11 and 12 of
25 this order. Paragraph 11 indicates that the records of the

1 Oil Conservation Division confirm the Operator's
2 description of the conditions at the site of the landfarm.
3 Is that -- Those are the records that we were talking about
4 earlier, correct?

5 A. Records in the Artesia Aeration file?

6 Q. Well, let me ask you, what records -- do you know
7 what records are being referenced in this paragraph 11?

8 A. There are general records existing in the Oil
9 Conservation Division concerning depth to groundwater and
10 other public-access information, like the State Engineer's
11 Office, for that type of information. Those are the
12 records that are being cited here, I think.

13 Q. Okay, and are those -- are there records within
14 the Division that indicate that the depth to groundwater at
15 this landfarm is no water at 120 feet?

16 A. Generally, that -- yes, generally, and the public
17 -- and the OCD personnel expertise and knowledge about that
18 particular area, yeah.

19 Q. And if I'm looking at their application, are
20 there records that talk about whether freshwater wells are
21 within a thousand feet of this facility?

22 A. I don't know. Not to my knowledge.

23 Q. Okay. And would the same hold true for the
24 watercourses?

25 A. Correct.

1 Q. Okay, so I guess to be clear here, then, the
2 records of the Division, I guess, support some of the
3 allegations of the operator, but with respect to some of
4 the other allegations in this application, you don't have
5 records to support that at this point in time?

6 A. That's true.

7 Q. Which is the reason we have a hearing?

8 A. That's correct.

9 Q. Okay. Then in paragraph (12) -- and I want to
10 ask you, this seems to be written as if there was a finding
11 by the Division that the conditions at the site of the
12 landfarm are such that the landfarm may accept salt-
13 contaminated oilfield wastes without posing a hazard to the
14 groundwater?

15 A. Right.

16 Q. Has that -- has the Division actually -- does the
17 Division feel that it has enough information at this point
18 to actually make that determination as a matter of fact?

19 A. It has enough information at hand, I believe, to
20 grant an emergency order in this case. We may require
21 further information or more extensive information at the
22 time of the hearing.

23 Q. Would you agree with me that before the Division
24 makes that kind of a finding of fact, that it would be
25 prudent to have public notice and at least an opportunity

1 for a -- if necessary, a public hearing on whether the site
2 is suitable to accept oil-contaminated wastes without
3 posing a hazard to groundwater?

4 A. Yes, I would agree with that.

5 Q. So perhaps at this point in time it would have
6 been better, at least in this order, to say that the
7 operator has alleged facts that would appear to indicate?

8 A. Possibly.

9 Q. Okay. Now, I want to ask you, then, about the
10 Gandy Marley application, which I've marked as Exhibit
11 Number 10. And I don't want to go through all the
12 questions. Was this application -- did it basically go
13 through the same process that we've just described for
14 Artesia?

15 A. Yes.

16 Q. Okay. The only thing -- and so there's a couple
17 points, additional concerns that I have about this
18 application in the process, in addition to what we've
19 already gone through, and that is, first of all it says --
20 there's an allegation in here that the depth to groundwater
21 at the landfarm is 150 foot to water, and then it says TDS
22 in excess of 15,000 parts per million.

23 A. Okay.

24 Q. Okay? Now, 15,000 parts per million, is that the
25 same as saying that there's 15,000 milligrams per liter, or

1 how is that ratio --

2 A. Milligrams per liter.

3 Q. Is that the same thing?

4 A. (Nods)

5 Q. It is?

6 A. Uh-huh.

7 Q. Okay, so whether you say, 15,000 parts per meter
8 [sic] or 15,000 milligrams per meter, you're saying the
9 same thing?

10 A. Right.

11 Q. Okay. All right. Then that's what's said in
12 this application.

13 I'd like yo to turn to Exhibit Number 3, and
14 Exhibit Number 3 is the letter that Mr. Fesmire sent out in
15 September of 2004 to Mr. Gandy -- to the Gandy Marley --

16 A. Right.

17 Q. And then -- I shouldn't say Mr. Fesmire, I should
18 say the Division. And then the -- there's a statement in
19 here that the landfarm application -- second paragraph --
20 that the landfarm application and permit have been written
21 with only hydrocarbon-contaminated soils in mind?

22 A. That's correct.

23 Q. Okay. And I attached to that letter the notice
24 of publication that was sent out when Mr. Marley applied
25 for his landfarm permit --

1 A. Right.

2 Q. -- okay? Which was back in 1994?

3 A. Right.

4 Q. Okay. And the question that I have concerns the
5 -- about -- in bold there's the public advertisement?

6 A. Uh-huh.

7 Q. Okay. And the second-to-the-last sentence says,
8 "Ground water most likely to be affected by an accidental
9 release is at a depth of 150 feet...", which is consistent
10 with what they say in their application, right?

11 A. Right.

12 Q. And then it says, "...with a total dissolved
13 solids concentration of approximately 4920 milligrams per
14 liter."

15 A. Right.

16 Q. Now, that would be 4920 parts per million?

17 A. Right.

18 Q. Which is -- as advertised, what, two-thirds less
19 than what is in his application for emergency order?

20 A. Correct.

21 Q. Did the Division -- I keep saying "you", and
22 that's not fair. You're just here testifying on behalf of
23 the Division, and I don't mean to --

24 A. I understand.

25 Q. -- to put everything on you, okay? So I'm going

1 to try to say "Division", and correct me if I'm -- if I say
2 "you", and I apologize.

3 When the Division received this application from
4 Mr. Marley in which he represented that -- TDS in excess of
5 15,000 parts per million, was that allegation -- between
6 the time you received that application and before that
7 order was entered, was that allegation at all examined by
8 the Division?

9 A. No.

10 Q. Did you -- So as a result, you didn't notice the
11 inconsistency between what was said in 1994 --

12 A. Correct.

13 Q. -- at the public notice, and what was said in two
14 thousand and -- what are we, five?

15 A. Right.

16 Q. Okay. Which again is why we would want to have a
17 hearing on these issues --

18 A. Correct.

19 Q. -- these groundwater issues, before we would --
20 the Division would make a final determination as to whether
21 this facility should actually accept this waste?

22 A. Right.

23 Q. Okay. Does it -- Well, we don't need to get into
24 that now.

25 The one thing that this application from Mr.

1 Marley does say is, it talks about -- he does make the
2 allegation in here, under the paragraph why you consider it
3 an emergency, Exhibit Number 10 --

4 A. Yeah.

5 Q. -- he does say in here, in the second sentence, I
6 guess, under that paragraph, it says, "With the
7 administrative modification of landfarm permits there is a
8 critical need for a facility in this area to be able to
9 accept this material."

10 A. Right.

11 Q. Okay. He may have said "allegation" in his
12 statement.

13 Did Mr. Marley -- or -- who signed this? Larry
14 Gandy, I'm sorry. Did Larry Gandy at the time that he
15 filed this application, did he submit any evidence in
16 support of this critical need?

17 A. No.

18 Q. Between the time that the Division received this
19 application and they entered its order, did the Division
20 investigate whether there was a critical need for a
21 facility in this area to accept salt-contaminated waste?

22 A. Not to any extent.

23 Q. Did -- Are you aware of any reason why the
24 operators in and around the Roswell and Artesia area would
25 not be able to haul salt-contaminated waste to the properly

1 permitted facilities in southeast New Mexico?

2 A. No.

3 Q. Those facilities are all open, right?

4 A. As far as I know.

5 Q. To your knowledge, they have the capability and
6 the space to accept this waste?

7 A. Right, yes.

8 Q. In fact, they've been -- some of these facilities
9 -- I think Sundance was permitted some time ago?

10 A. Yes, it was.

11 Q. So some of these facilities have been accepting
12 this type of oilfield waste for quite some time now?

13 A. Yes.

14 Q. Wouldn't the existence of these facilities
15 indicate to you that there's not a disposal crisis in
16 southeast New Mexico?

17 A. "Crisis" is probably not the right term.
18 However, it was considered that if the increased cost --
19 there is increased transportation cost --

20 Q. Uh-huh.

21 A. -- occasionally, going to where Sundance and CRI
22 are located, as opposed to Artesia Aeration or Gandy
23 Marley, which may curtail or hamper some projects in Chaves
24 County, Eddy County.

25 Q. Now, you say -- you were very careful and said

1 "may".

2 A. Uh-huh.

3 Q. Do you have any evidence that that's occurring?

4 A. No.

5 Q. None whatsoever?

6 A. No.

7 MR. FELDEWERT: That's all I have. Thank you,
8 Mr. Examiner.

9 EXAMINER JONES: Mr. Domenici?

10 FURTHER EXAMINATION

11 BY MR. DOMENICI:

12 Q. If I could, if you look in the exhibits from your
13 counsel, if you'll look at Exhibit Number -- Number 6,
14 which is the March 4th, 2005, letter to my client --

15 A. Right.

16 Q. -- now, you were asked questions about whether a
17 hearing might be appropriate or necessary to make certain
18 findings. You agree no hearing took place before this
19 letter was issued, correct?

20 A. I agree.

21 Q. And without a hearing, the Division made a
22 finding that they needed to modify my client's permit
23 because it was necessary to protect freshwater, human
24 health and the environment?

25 A. Correct.

1 Q. And you agree, had a hearing been held on that
2 issue, there's no evidence that you're aware of or that
3 you've seen presented in this hearing or are aware of from
4 any source that would have supported that finding at that
5 point in time?

6 A. Not at the present time.

7 Q. So the lack of a hearing prevented my client from
8 presenting information to this Division, saying this
9 modification is unnecessary; is that correct?

10 A. That's correct.

11 Q. And isn't it true that there is no process that
12 you could look to as to how your Division should modify a
13 permit in existence, that's already in existence? If the
14 Division wants to modify it, there's nothing you could
15 point to saying, this is how we do it; is that correct?

16 A. How we do it?

17 Q. Yes.

18 A. We have the ability and the authority to
19 administratively change permits. Is that what you mean?

20 Q. Yes. And where is that ability?

21 A. It's in the rule, I believe, Rule 711.

22 Q. Can you find that for me? I couldn't see --

23 A. I'm not sure myself, I shouldn't be telling you
24 that.

25 Q. If you can --

1 A. No, it's in the permit itself, the permit
2 conditions, I believe.

3 Q. And the permit says you can administratively
4 modify this permit?

5 A. Right.

6 Q. But then there's nothing anywhere that says how
7 you administratively modify it?

8 A. No.

9 Q. Correct?

10 A. Right.

11 Q. And isn't it true that after you told some of the
12 permit holders that this might happen and then they were
13 concerned that there was no process, and that's how you
14 came up with that emergency form?

15 A. That's correct to a certain degree, yes.

16 Q. Because permit holders like my client were
17 concerned, there's no reason this modification should apply
18 to me, and you're providing me with no notification and no
19 opportunity for a hearing. And then you came up with the
20 emergency application to try to provide them an
21 opportunity?

22 A. I don't remember anybody specifically saying
23 that, although that's a legitimate complaint.

24 Q. How who is Mr. Price?

25 A. He's one of my co-workers in the Environmental

1 Bureau.

2 Q. In terms of the order of hierarchy, is he higher
3 than you or equal or --

4 A. Equal.

5 Q. Equal. Let me show you what I've marked as GMI
6 Number 1. First of all, have you seen this e-mail?

7 A. I have.

8 Q. You have. And where it refers to Wayne Price,
9 that's your co-worker?

10 A. That's the Wayne Price, yes.

11 Q. And on here it says -- dated August 21st, 2004,
12 from Larry Gandy to Wayne Price -- "Also on the landfarm,
13 could we have documentation that our facility is able to
14 accept drilling muds and chloride impacted soils, there are
15 numerous new drilling pits and swd leaks in the area that
16 the producers would like to clean up."

17 A. Correct.

18 Q. Do you see that?

19 A. Uh-huh.

20 Q. And the response up above says, "As discussed
21 during your last visit, your permit allows you to except
22 [sic] oilfield exempt material."

23 A. Yes, I see that.

24 Q. And have you confirmed the understanding that
25 Larry Gandy and Mr. Price have in the August, 2004, time

1 period that this facility could accept chloride-impacted
2 materials?

3 A. In regard to this e-mail, yes.

4 Q. And that was your understanding at the time?

5 A. I wasn't involved in the conversation. I didn't
6 see this until later.

7 Q. Okay, but in terms of confirming, you confirmed
8 that that conversation took place --

9 A. Right.

10 Q. -- and that was the understanding of the Division
11 and --

12 A. Yes.

13 Q. -- the permit holder?

14 And if you'll turn to the next page, and on that,
15 who is Roger Anderson?

16 A. He's the Environmental Bureau Chief.

17 Q. And how would that fit with your --

18 A. He's my boss.

19 Q. Your boss. Okay. And then it's also addressed
20 to Mark Fesmire. Who is that, sir?

21 A. He's the Division Director.

22 Q. And this is an e-mail wrote by -- written by Mr.
23 Price, correct?

24 A. Yes.

25 Q. And copied to you and other people at the OCD?

1 A. Yes.

2 Q. In the second paragraph there, the last --
3 second-to-the-last sentence, kind of in the middle, it
4 says, "These type of material were permitted knowing that
5 they can contain salts and these materials would be placed
6 where as not to interfere with the bio-remediation of the
7 other cells."

8 A. Yes, I see that.

9 Q. And then it says, "So in essence, OCD has already
10 permitted this facility."

11 A. Yes.

12 Q. So as of March 1st, 2005, at least according to
13 Mr. Price, the OCD considered that the Gandy Marley permit
14 allowed them to take salt-containing materials; is that
15 correct?

16 A. That's correct.

17 Q. And then three days later my client was informed
18 that there was a finding that their permit had to be
19 modified because it was necessary to protect fresh water,
20 human health and the environment, correct?

21 A. Yes.

22 Q. Even though three days later their own person had
23 told everyone in the OCD that in fact that was not the
24 case?

25 A. That's correct.

1 Q. And salt is not -- salt or salt-contaminated
2 oilfield waste is not the type of material that is not
3 exempt, according to RCRA, correct?

4 A. Not the type of material that is not exempt,
5 right, correct.

6 Q. So when you have a permit says you can take the
7 exempt -- RCRA-exempt oilfield material, that doesn't say
8 you can or cannot take salt-related --

9 A. Doesn't specify.

10 Q. And you don't need a RCRA permit to take --

11 A. No.

12 Q. -- salt-contaminated soil?

13 A. No.

14 Q. And are yo aware that Gandy Marley has a RCRA
15 permit on this facility?

16 A. Yes.

17 Q. And were you aware of any groundwater studies
18 that were done after that 1994 notice, up to 2005, that
19 provided more data on the groundwater?

20 A. No.

21 Q. Have you -- In looking at the permit language
22 itself, which is, in your exhibit package, Gandy Marley
23 permit, is Exhibit 4, the last page of that, or the very
24 last -- two last lines, it talks about the administrative
25 change.

1 A. Last page of the letter?

2 Q. Of the permit itself, so the permit is attached
3 to that letter, essentially. I think it's probably the
4 last page of that exhibit.

5 A. Exhibit 4?

6 Q. Yes, the very last page of the attachment.

7 A. Oh, yes, I see it.

8 Q. Right there.

9 A. Uh-huh.

10 Q. The "...requirements of this permit may be
11 changed administratively by the Division for good
12 cause -- "

13 A. Correct.

14 Q. " -- shown as necessary..."

15 What other permits have you participated in that
16 were changed administratively for good cause?

17 A. We have added certain conditions into discharge
18 plan permitted facilities as conditions change. No land
19 farms that I can recall, or no waste management facilities
20 that I was involved in.

21 Q. And when you say a change administratively, what
22 does that mean?

23 A. In the cases I'm referring to, it's just a matter
24 of modifying their permit, administratively modifying their
25 permit, via a letter from the Division Director saying your

1 permit is modified as follows.

2 Q. And does the Director have to make the finding of
3 good cause?

4 A. The Division does, yeah.

5 Q. Or the Division?

6 A. Uh-huh, right.

7 Q. And are you disturbed at all by the fact that
8 there, in fact, is no good cause and my client's permit has
9 been modified?

10 A. No, because the reason the letter went out was
11 because of a discrepancy between their original public
12 notice and the permit terms. That's what prompted the
13 letter to begin with.

14 Q. When you say "the letter", that's the March 4?

15 A. Yes.

16 Q. That would be more a notice issue than a finding
17 of what's necessary for good cause in this language,
18 though, wouldn't it?

19 A. It's a notice problem, but the upshot is that the
20 public did not get -- possibly did not get an adequate
21 picture of what was going to happen at the landfarm.

22 Q. And is that different than the modifications you
23 talked about in the waste management facilities that were
24 done administratively, the conditions you indicated?

25 A. What we did here?

1 Q. Yes, this sees to have been a notice problem, and
2 the other ones you're talking about adding conditions.

3 A. We thought it would be better to disallow the
4 acceptance of salts and let them come back and apply for
5 it, have that modification, that type of modification, go
6 to public hearing and let the public be fully aware of what
7 was happening out there.

8 MR. DOMENICI: That's all I have.

9 I'd like to move admission of Exhibit 1.

10 EXAMINER JONES: Any objections?

11 MS. MacQUESTEN: No objection.

12 MR. FELDEWERT: No, Mr. Examiner.

13 EXAMINER JONES: Okay, Exhibit 1 for Gandy Marley
14 will be admitted into evidence.

15 Mr. Feldewert, did you want to admit these
16 exhibits?

17 MR. FELDEWERT: Mr. Examiner, I appreciate the
18 opportunity to do that --

19 EXAMINER JONES: Okay.

20 MR. FELDEWERT: -- since I had seriously
21 overlooked that. I would move the admission of Exhibits 1
22 through 9.

23 EXAMINER JONES: 1 through 10?

24 MR. FELDEWERT: 1 through 10, thank you.

25 EXAMINER JONES: Any objection?

1 MS. MacQUESTEN: No objection.

2 MR. DOMENICI: No objection.

3 EXAMINER JONES: Okay, Exhibits 1 through 10 of
4 -- CRI Exhibits 1 through 10 will be admitted into
5 evidence.

6 Mr. Neeper, do you have any questions for Mr.
7 Martin?

8 DR. NEEPER: No, I will not be examining the
9 witnesses.

10 EXAMINER JONES: Okay, you just want to make a
11 closing statement later?

12 DR. NEEPER: Yes. I will not have, I think, what
13 you'd legally call an appearance. I'll be making a
14 citizen's statement. I am not represented by counsel
15 today.

16 EXAMINER JONES: Okay.

17 EXAMINATION

18 BY EXAMINER JONES:

19 Q. Okay, Mr. Martin, we have a few questions here.
20 This whole thing seems to revolve around what's salt and
21 what's not salt, so what do you define a salt -- how do you
22 tell if it's salt when it arrives at their facility?

23 A. The whole effort and the letter that went out
24 were directed predominantly at drill cuttings in the
25 southeast because of the salt section that was drilled

1 through, and produced-water-contaminated soils.

2 Q. So the -- basically you're saying the drill
3 cuttings would be considered to be the salt-contaminated
4 waste --

5 A. (Nods)

6 Q. -- and that there is no hazardous waste, right?

7 A. Right.

8 Q. And this NORMs, is that considered hazardous
9 waste?

10 A. They're not to accept NORMs --

11 Q. So NORMs is --

12 A. -- so yes.

13 Q. -- NORMs is not even in the picture here?

14 A. No.

15 Q. And tank bottoms, sometimes they have norms in
16 them, don't they?

17 A. Sometimes.

18 Q. But the tank bottoms were mentioned in this
19 permit application by Gandy Marley.

20 A. I'd have to look, I'm not sure. Probably.

21 Q. How often are these pits cleaned up? Are they
22 taking the waste and pump it down a well, is that --

23 A. Well, they can't --

24 Q. -- the landfarms itself?

25 A. No, they're just spread into a cell -- in these

1 two cases, apart from the hydrocarbon-contaminated soil --
2 and remediated that way, either diluted or somehow --
3 remediation is the wrong term to use with salt, because it
4 can't be done -- to my knowledge, it can't be done, but
5 it's somehow diluted and mixed so that the concentration is
6 reduced.

7 Q. How are they kept separate, the salt-
8 contaminated --

9 A. They have a separate cell.

10 Q. How is that separated? Is it a membrane
11 separation or is it --

12 A. Separated from -- They have a cell dedicated to
13 salt, to drill cuttings and saltwater produced, saltwater-
14 spill-contaminated soils. All the other cells are devoted
15 strictly to hydrocarbon-contaminated wastes --

16 Q. Okay --

17 A. -- so "segregated" is a better term, I guess.

18 Q. Okay, and the Artesia site doesn't have any water
19 in the well, right?

20 A. Right.

21 Q. Okay, that's -- Is there someplace we can go to
22 verify that? Is this water well that's -- supposedly
23 doesn't have any water in it, is that an OCD observation
24 well, or is that --

25 A. I don't know who said to install the well, but

1 it's being called a monitor well of some sort.

2 Q. So on the Artesia site is it flat, flat land,
3 real flat?

4 A. (Nods)

5 Q. Is that the one up around Monument or --

6 A. Maljamar.

7 Q. Maljamar.

8 A. It's right off the cap.

9 Q. Okay. So it's sandy land, then?

10 A. Uh-huh, down to the clay.

11 Q. Okay. Basically you're -- There's 20 of these
12 sites in New Mexico; is that right?

13 A. Twenty active landfarms.

14 Q. Landfarms. And there's a total of seven of them
15 that are being applied to accept salt right now?

16 A. About, yeah.

17 Q. But you don't have the date that these two in
18 question here today have applied, it's just within the
19 last --

20 A. Well, I think the applications are in one of the
21 exhibits, and the date should be on there.

22 Q. Yeah. But you gave them within two weeks, right,
23 of the time that --

24 A. Right, if they had not already submitted --

25 Q. -- if they had not already done it.

1 And do you agree with Mr. Price in his e-mail
2 that these -- I think his e-mail addressed the Gandy Marley
3 site as possibly the best site in the state to take salt-
4 contaminated wastes?

5 A. I'd say it's -- I don't disagree with it, that's
6 his opinion, but I'd say it's certainly an acceptable site,
7 as far as groundwater is concerned.

8 Q. Because there is no groundwater?

9 A. Because there is no groundwater, and there's a
10 clay layer, pretty thick clay layer, right below them.

11 Q. This clay layer is part of -- do you know what
12 formation name it is?

13 A. The red -- just redbed clay.

14 Q. Considered red beds?

15 A. Uh-huh.

16 Q. Triassic red beds?

17 A. Right, thank you.

18 Q. So that's a generally held knowledge that this
19 red beds exist out there, there's no question about that,
20 right?

21 A. There's -- It's not only generally held, but we
22 have maps that show where the redbed extends to and where
23 it doesn't exist, in OCD.

24 Q. And the Artesia site, it's -- well, the Gandy
25 Marley site has the 15,000 TDS, right?

1 A. Right.

2 Q. Okay. Now, why is it different in their 1994
3 application than it is now?

4 A. I don't know.

5 Q. Okay. Because the 10,000 limit there kind of
6 raises a question. Has that been verified that it's 15,000
7 right now?

8 A. Not by OCD.

9 Q. So we do know they have a well, and they have
10 water in the well, but all we know is from them, they say
11 it's 15,000 TDS?

12 A. That's correct.

13 Q. But they said it's 4900 TDS nine years ago?

14 A. Correct.

15 Q. And what other reasons would they have to -- that
16 be a good site? Is it -- They have the clay layer there
17 too?

18 A. Yes.

19 Q. That site, where is it located?

20 A. Are we still talking about Gandy Marley?

21 Q. Yeah.

22 A. It's a little north and west of Tatum.

23 Q. Okay, so it's --

24 A. I'm sorry -- Yes, that's right.

25 Q. So it's a caprock site --

1 A. Right.

2 Q. -- with the caliche layers and everything?

3 A. Uh-huh, right.

4 Q. Okay, can you explain in your own words why this
5 is an emergency, just one more time?

6 A. The OCD felt that the absence of the lack of
7 facilities suitable for accepting salts in proximity to
8 that where the remediations were going on, such as the pit
9 cleanups, most of which were required by our Rule 50, we
10 thought -- OCD felt that the absence of such facilities in
11 that area would hamper those remediation efforts by the
12 industry.

13 Q. And the remediation efforts is very important?

14 A. Correct.

15 Q. What would happen if the remediation efforts
16 stopped for a period of time?

17 A. Well, you would just have -- progress would not
18 -- progress in cleaning up the sites would not be as fast,
19 and it's in -- the OCD felt it was in the State's and the
20 OCD's best interest to facilitate those operations at those
21 sites.

22 Q. Has part of this been exasperated by the new
23 drilling pit rule?

24 A. Absolutely.

25 Q. And the issuance of the letter about the salt, in

1 your opinion is that letter what precipitated this -- not a
2 crisis, you said, but an emergency?

3 A. The letter that prohibited salt being accepted?

4 Q. Yeah.

5 A. Yes.

6 EXAMINER JONES: Okay. I think Ted's got some
7 even more pertinent questions here.

8 MR. APODACA: I don't know if they're more
9 pertinent, but I have some additional questions.

10 EXAMINATION

11 BY MR. APODACA:

12 Q. Mr. Martin, maybe you can explain to me, when the
13 original 711 application was filed by Gandy Marley in 1994
14 and the original 711 application was filed by Artesia
15 Aeration in 1998, the applicants had to comply with Rule
16 711; is that correct?

17 A. Correct.

18 Q. And I'm just looking at one of the requirements
19 in Rule 711. It's in Subsection B.(j). It requires that
20 with the application the applicant has to comply and
21 provide and include the geological, hydrological evidence,
22 including depth to all of the groundwater beneath the site,
23 demonstrating that disposal of oilfield waste will not
24 adversely impact freshwater.

25 A. Correct.

1 Q. Both applicants had to comply with that?

2 A. Correct.

3 Q. So I assume that that information is in OCD
4 files?

5 A. I don't have the applications in front of me, but
6 I assume so too.

7 Q. Okay. Did you have an opportunity to consult
8 those files, or do you know if -- did Mr. Price consult
9 those files when the emergency application was acted upon?

10 A. We had the opportunity, but probably -- but did
11 not.

12 Q. Okay. Did Mr. Price, to your knowledge, verify
13 any information for you that appeared in the two
14 applications?

15 A. Yes, he helped me make the decision as to whether
16 those were suitable sites. Is that the question?

17 Q. Right. And he helped you verify that
18 information?

19 A. Yeah.

20 Q. Okay. Now, since issuing the emergency order,
21 did the Oil Conservation Division have an opportunity to
22 verify -- do some additional verification with respect to
23 the assertions in the applications for the emergency order?

24 A. We've -- to verify further?

25 A. We've probably had -- We've had ample time, but

1 we haven't done so. I've been out of town almost since
2 then, and so has Mr. Price. We haven't done that, but we
3 have time to do it normally.

4 Q. Have you and/or Mr. Price visited these sites --

5 A. Yes.

6 Q. -- from time to time?

7 A. Yes.

8 Q. So you're familiar with them?

9 A. Yes.

10 Q. And you're generally familiar with the geological
11 characteristics?

12 A. Yes.

13 Q. Do you know if Gandy Marley has any other permits
14 from the New Mexico Environment Department, including to
15 accept hazardous waste?

16 A. They do.

17 Q. What are those permits?

18 A. They have a hazardous-waste permit, to accept
19 hazardous waste, RCRA-defined hazardous waste.

20 Q. So does that normally suggest that there's
21 probably been rigorous examination of the environmental,
22 geological characteristics of the site?

23 A. That would be a logical assumption.

24 Q. And you had that knowledge when the emergency
25 order was issued?

1 A. Yes.

2 Q. Do you know if Gandy Marley and Artesia Aeration
3 are currently accepting any salt-contaminated waste?

4 A. As far as I know, they did not accept waste
5 between the time of Mark Fesmire's letter and the
6 application to accept them, and whether they are after the
7 issuance of the emergency order, I don't know.

8 Q. Were they accepting them before Mr. Fesmire's
9 letter?

10 A. Probably -- as far as I know.

11 Q. Okay. And this is a point that the Hearing
12 Examiner touched upon, but I'd just like a little further
13 clarification.

14 Up until the time that Mr. Fesmire advised the
15 landfarms that they could not accept salt-contaminated
16 material, the landfarms were accepting it; is that correct?

17 A. That's possible.

18 Q. And then with the notice that Mr. Fesmire sent
19 out March 4th, was it your impression that the Oil
20 Conservation Division was, in fact, creating at least an
21 emergency situation for the industry, if not for these
22 landfarms that were already licensed to accept --

23 A. Pretty much, that and a combination of Rule 50, I
24 would say, yes.

25 Q. So I guess it -- was it your impression that we

1 were kind of taking away from permit holders what they had
2 been, at least up to that point, assuming and planning the
3 business operations they could do?

4 A. Yes.

5 Q. Now, I just have two more questions, and maybe
6 you or your counsel can help respond to these.

7 Is it possible for the Division to extend an
8 emergency order, and if so, under what authority?

9 A. As far as I know, it is.

10 MS. MacQUESTEN: If I may address that?

11 MR. APODACA: Please, counsel.

12 MS. MacQUESTEN: We do believe it is possible to
13 extend it. An emergency order can be issued without a
14 hearing but can only stay in effect for 15 days. If a
15 hearing is held, it can be extended, but only until the
16 time that a formal, full-blown hearing has taken place.

17 And I had intended to ask Mr. Martin some
18 questions about this, but maybe I could just respond
19 directly on this point.

20 We had -- If you look at the provision for
21 emergency action, it's actually by statute, it's in Section
22 70-2-23 and it specifically contemplates emergency actions
23 without a hearing, but provides that such emergency orders
24 expire in 15 days.

25 It also provides -- and this is interesting --

1 that hearings can be held with less than 10 days' notice in
2 the event of an emergency.

3 So the statute contemplates two types of
4 emergency orders, one issued without any hearing at all,
5 and one issued with hearing, with shortened notice
6 provisions.

7 Now, there's another authority that we need to
8 look at, and that is in the Rules. It's Rule 1202. That
9 provides that in the event an emergency is found to exist,
10 a hearing may be conducted on less than the normal 23-day
11 notice. Normally notice -- filings must be made 23 days
12 before a hearing and notice must be given 20 days before.

13 That Rule 1202 was revised last year, it was
14 revised on June 15 of '04. You can see that in the
15 notations of the Rule.

16 I would ask the Examiner to take administrative
17 notice of the rulemaking proceeding in that case that gave
18 us the current rule. It changed the rule, because the rule
19 used to require a minimum amount of notice, which was that
20 20-day period. It made no provision for emergency
21 hearings.

22 But the rule was changed in June of '04 to modify
23 that and to bring us in line with the statute and recognize
24 that hearings could be held on less than the full 20-day
25 notice period.

1 The reason that was done was that otherwise
2 emergency orders would expire in 15 days, hearings require
3 20 days, there would be a gap between the end of an
4 emergency order and any sort of hearing to try to extend
5 it. The provision changing the notice requirements was
6 intended to take care of that gap.

7 And if you look at the testimony that was
8 presented in the rulemaking proceeding you will discover a
9 discussion of the need to provide for that gap, because
10 there's a recognition that some emergency orders need to
11 extend until the time an order can be issued with hearing.
12 Some emergency orders need to stay in effect longer than 15
13 days, but to do that we need a hearing. And that's what
14 we're doing today.

15 This is not going to end the process in this
16 case. We recognize that to get the permit modifications
17 that these two entities are asking for, we want a full-
18 blown hearing. We want to give every aspect of public
19 notice that we would provide under the rules.

20 I would point out to you that the permit-
21 modification rules under 711 -- the notice requirement
22 under 711, describes notice requirements for the initial
23 permit application.

24 There's a separate provision that talks about
25 what happens when a permit modification is done, and it

1 provides that in the event a permit modification is
2 requested, the Division may request the same public notice
3 and written notice that's provided for in an initial
4 application.

5 But notice the word is "may". We are not
6 required to go through all of that by law. As Mr. Martin
7 testified, we do as a matter of policy. We try to provide
8 the same sort of notice that we do in discharge-permit
9 hearings. We believe that is the best policy, and we want
10 to follow that policy in this case.

11 That is why we are going through and asking these
12 entities to go through the full-blown notice requirements
13 and have the hearing.

14 Again, hearings are not even required for permit
15 modifications. They may be requested by the Division
16 Director. We plan to go through that entire process. But
17 we can't do that in 15 days, and that is the lifespan of an
18 emergency order. What we're asking for in this case is to
19 give us the opportunity to allow these operators to
20 continue during that gap period. But we fully intend to go
21 through the complete permit-modification process at that
22 time.

23 MR. APODACA: Ms. MacQuesten, I have one
24 additional question. The Rule 711 process for permit
25 modification that we don't -- or that Oil Conservation

1 Division is not strictly required to follow, Mr. Feldewert
2 made mention earlier of the county commission having to be
3 notified.

4 So am I understanding you that that is a
5 requirement with respect to the original 711 application,
6 but not with respect to a modification of a 711 permit?

7 MS. MacQUESTEN: It's not an absolute legal
8 requirement. It is a requirement that we intend to meet
9 when we have the permit-modification applications at
10 hearing.

11 And in a perfect world, I agree with Mr.
12 Feldewert, it would have been better if we had given notice
13 to the County Commissioners and done all of the notice that
14 we possibly could have done under Rule 711, but I don't
15 believe it is legally required, and our time was such that
16 we did not, in fact, get that done.

17 MR. APODACA: So that would have been the notice
18 that would have been ideal but not required for today's
19 hearing?

20 MS. MacQUESTEN: That is our position, yes.

21 MR. APODACA: Okay, Mr. Examiner, I have no --
22 (Off the record)

23 MR. APODACA: I have no further questions, Mr.
24 Examiner.

25 EXAMINER JONES: Okay, I guess I should ask one

1 more to Mr. Martin.

2 FURTHER EXAMINATION

3 BY MR. JONES:

4 Q. The RCRA permit for the -- you say for the Gandy
5 Marley facility --

6 A. (Nods)

7 Q. -- is it also -- did the other facility, the
8 Artesia facility, have that permit also?

9 A. No.

10 Q. What about the other five that have applied so
11 far?

12 A. No.

13 Q. So this is the only one, Gandy Marley?

14 A. (Nods)

15 Q. And do you know how old that facility -- I guess
16 they're going to testify later, so I'll ask them later.

17 A. Okay.

18 EXAMINER JONES: And I think -- Gail, do you have
19 any further questions for your witness here?

20 MS. MacQUESTEN: I would like to do a redirect on
21 that. I think I can keep it shorter than --

22 EXAMINER JONES: Okay.

23 MS. MacQUESTEN: -- I expected, because I was
24 able to address some of my concerns directly rather than
25 through the witness, but I do have a few questions.

REDIRECT EXAMINATION

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BY MS. MacQUESTEN:

Q. Mr. Martin, could we go back to Exhibit Number 3 in CRI's exhibit packet, and this is the letter that the OCD sent out in 2004 seeking information from landfarms about whether they intended to accept salt-contaminated waste; is that right?

A. That's correct.

Q. And it's dated September 17th, 2004?

A. Yes.

Q. That would make it shortly after Mr. Price's e-mail, which is Gandy Marley's Exhibit Number 1; is that right?

A. Well, his reply -- Oh, yes, yes, I see it, yes.

Q. The exchange about whether Gandy Marley --

A. Right.

Q. -- could accept "exempt oilfield material". Is this e-mail exchange -- does this demonstrate when the OCD became aware of the problem they had that the landfarm permits as originally written were broader than they intended them to be?

A. That wasn't the driving force.

Q. Okay, were there other issues where the salt-contamination issue was coming to the foreground?

A. Oh, it has come up historically over time, and

1 OCD does not have a rule prohibiting it, and probably
2 should in certain cases. So it's a question, it's an often
3 recurring question, from landfarm operators and from oil
4 and gas operators, as to whether they can put salts in
5 there.

6 Q. And your letter of September 17th, 2004, was an
7 effort to get information on what landfarms were actually
8 doing with regard to salt-contaminated materials?

9 A. Right, to kind of gauge the magnitude of the --
10 not problem, but the upcoming hearings in anticipation of
11 possibly writing something in Rule 711 to cover salt
12 specifically.

13 Q. All right, but that hasn't happened yet?

14 A. No.

15 Q. When you sent out that September, 2004, letter,
16 it indicates that if they were accepting salts you wanted
17 them to do a permit modification?

18 A. Right, yes.

19 Q. And the intent was that they would go through the
20 public notice process and allow the public the opportunity
21 to comment on whether it was an appropriate decision to
22 allow the --

23 A. Yes.

24 Q. But if they weren't accepting salts, then there
25 was no intent to do anything to change their permit at that

1 time?

2 A. At that time, no.

3 Q. But then we go forward to the March 4, 2005,
4 letter from Mr. Fesmire. Again, that letter discusses the
5 concern about landfarms accepting salts and the
6 environmental issues that arise?

7 A. Yes.

8 Q. But there was an additional concern, wasn't
9 there, at that time, and that was notice?

10 A. Yes, there was concern that public notice was not
11 sufficient to cover the eventual allowances in the permit
12 itself as to what the could accept.

13 Q. And that was the issue that Mr. Marsh brought to
14 OCD's attention --

15 A. Yes.

16 Q. -- the notice deficiency?

17 And Mr. Price's e-mail when he discusses why he
18 feels that Gandy Marley should be able to accept salt-
19 contaminated soils doesn't discuss the notice issue, does
20 it?

21 A. No.

22 Q. He's strictly looking at it in terms of an
23 environmental issue?

24 A. Yes.

25 Q. And you would agree with him that in Gandy

1 Marley's case, based on what you know, that it appears that
2 there are no environmental concerns --

3 A. It would appear so.

4 Q. -- if they accept salt?

5 But the notice issue is still there, isn't it?

6 A. That's correct.

7 Q. And we had the same notice problem with some 20-
8 odd landfarms; is that right?

9 A. Correct.

10 Q. When you started to investigate the notice issue
11 and look at the notice versus the permit language?

12 A. (Nods)

13 Q. Now, it's true that, as in the Gandy Marley case,
14 once you do the investigation you may find out that some of
15 those landfarms are appropriate for salts?

16 A. It's possible.

17 Q. But you hadn't done that investigation when the
18 original permits were issued?

19 A. No, I had not.

20 Q. They weren't evaluated for that particular type
21 of waste?

22 A. No.

23 Q. So for those we had two concerns. We had the
24 fact that they had not yet been evaluated for their
25 appropriateness for salt-contaminated wastes, and we also

1 have the notice issue?

2 A. That's correct.

3 Q. Now, the solution to these two problems that the
4 OCD chose was to administratively modify all of those
5 landfarm permits so that they would not accept salts?

6 A. In which the public notice was different from the
7 landfarm conditions, yes.

8 Q. Okay. Now, for those landfarms who hadn't been
9 accepting salts and never intended to accept salts, that
10 didn't impact their operations?

11 A. No, that's correct.

12 Q. And they didn't have to take any further action,
13 their permit now matched the public notice, and it matched
14 what they were doing?

15 A. That's correct.

16 Q. But for those who were accepting salts or who
17 wanted to accept salts in the future, you were requiring an
18 individual review of the environmental issues?

19 A. Correct.

20 Q. They would have to go forward and file an
21 application for permit modification, and the intent was to
22 follow the strictest possible public-notice requirements?

23 A. Yes.

24 Q. There has been some question about our authority
25 to administratively modify those permits, and I believe you

1 testified that that language is in the permits themselves?

2 A. Correct.

3 Q. Do you have those permits before you today, the
4 files for Gandy Marley and Artesia Aeration?

5 A. Oh, yes.

6 Q. If you could look at the last page of one those
7 permits, whichever one you have in front of you -- Is this
8 Gandy Marley or Artesia? --

9 A. This is Gandy Marley.

10 Q. -- and if you could look at, I believe it's the
11 last paragraph before the operator signs --

12 A. The very last page?

13 Q. Yeah, check and see -- I'm looking for the
14 language that allows the administrative modification.

15 A. Okay, that's right here.

16 Q. Could you read that for us?

17 A. Under the certification, "Gandy Marley, Inc., by
18 the officer whose signature appears below, accepts this
19 permit and agrees to comply with all terms and conditions
20 contained herein. Gandy Marley, Inc., further acknowledges
21 that these conditions and requirements of this permit may
22 be changed administratively by the Division for good cause
23 shown as necessary to protect fresh water, human health and
24 the environment."

25 Q. Are you also aware of the OCD's general statutory

1 mandates that include the requirement to protect human
2 health and the environment?

3 A. Yes.

4 Q. And our authority to take such actions as are
5 necessary to protect human health and the environment?

6 A. Yes.

7 Q. In this case, when Mr. Fesmire wrote the letter
8 March 4th, the OCD felt it was necessary to modify all
9 landfarm permits to state that they could not accept salt-
10 contaminated waste?

11 A. Yes.

12 Q. And that's because you have not had the
13 opportunity to review each of those 20 applications to
14 determine whether they would be good candidates for salt-
15 contaminated waste?

16 A. That and the fact that there were discrepancies
17 between the public notice and the permit in those cases.

18 Q. That was an added complication in these --

19 A. Yes.

20 Q. -- in these cases?

21 Now, just looking at the environmental side of
22 it, it might be overkill --

23 A. Correct.

24 Q. -- for us to modify all 20 landfarm permits that
25 existed, because some could very well satisfy the

1 requirements?

2 A. Some could.

3 Q. So we could have evaluated each one individually,
4 possibly requested additional information on a case-by-case
5 analysis to determine whether it was appropriate for the
6 environmental concerns?

7 A. Yes.

8 Q. But that wouldn't have solved the notice problem?

9 A. No, it would not have.

10 Q. If we determined that it was all right for an
11 entity to accept salt-contaminated waste from an
12 environmental point of view, we could have left the permit
13 as written, but we would still have to deal with the notice
14 problem?

15 A. Correct.

16 Q. And because there was a notice problem, the
17 permit could have been invalidated strictly on the fact
18 that there wasn't appropriate public notice?

19 A. I agree.

20 Q. So we still had that problem to solve?

21 A. Yes.

22 Q. The solution that was selected was to have each
23 operator who wanted to accept salt-contaminated waste to go
24 through a complete permit-modification process?

25 A. Correct.

1 Q. That way the permit could be issued after public
2 notice, and you could make sure the permit matched the
3 public notice, and we could air all the environmental
4 concerns?

5 A. Yes.

6 Q. In these two cases, do you have environmental
7 concerns about Gandy Marley or Artesia Aeration accepting
8 salt-contaminated wastes?

9 A. No.

10 Q. Mr. Feldewert asked you whether you had received
11 affidavits, certified information, et cetera, to support
12 the information that was in the application for emergency
13 order?

14 A. Correct.

15 Q. And you did not have those things?

16 A. No.

17 Q. Are they required for a permit application?

18 A. Generally speaking, no. Well, there's certain
19 hydrologic information that is required, but it doesn't
20 need to be certified or attested to by any registered
21 engineer or surveyor or anything like that, generally
22 speaking.

23 Q. And as Mr. Apodaca's question suggested, much of
24 this information is in the original permit applications in
25 these cases?

1 A. Correct.

2 Q. We've had some discussion about the reason for
3 issuing an emergency order in this case, rather than just
4 waiting until the permit applications are heard in the
5 normal hearing process. You were asked about the economic
6 consequences to operators if the emergency orders are not
7 extended?

8 A. Oil and gas operators.

9 Q. Oil and gas operators.

10 A. Yes.

11 Q. Is it the OCD's concern to worry about whether a
12 particular operator can continue to operate economically?

13 A. No.

14 Q. And it's not our business to try to help out a
15 particular operator by guiding business in his direction
16 either, is it?

17 A. No.

18 Q. But it is our business to make sure that oil and
19 gas operations do not harm the environment?

20 A. Correct.

21 Q. You, in your day-to-day work, are aware of the
22 remediation efforts that are going on in the southern part
23 of the state?

24 A. I am.

25 Q. And you're aware of the need for facilities to

1 accept salt-contaminated waste?

2 A. I am.

3 Q. Will -- If we grant these two Applications and
4 allow Gandy Marley and Artesia Aeration to continue to
5 accept salt-contaminated wastes pending action on their
6 permit application, do you see any harm to the environment
7 happening?

8 A. I don't have any reservations about these two
9 sites.

10 Q. If we don't allow them to continue operating, do
11 you believe it will affect compliance in the southern part
12 of the state?

13 A. I believe it's possible.

14 MS. MacQUESTEN: No more questions.

15 FURTHER EXAMINATION

16 BY EXAMINER JONES:

17 Q. Do you believe it's possible to the effect that
18 you'd need an emergency order to keep these two facilities
19 going until they can be decided on by hearing?

20 A. It's hard to assess, but like I say, it's within
21 the realm of possibility, yeah.

22 Q. Were you one of the ones making the
23 recommendation for the emergency order?

24 A. Was I personally?

25 Q. Personally?

1 A. Yeah.

2 EXAMINER JONES: Okay, I think --

3 MS. MacQUESTEN: If I could follow up just on
4 those questions?

5 EXAMINER JONES: Okay.

6 FURTHER EXAMINATION

7 BY MS. MacQUESTEN:

8 Q. The March 4 letter from Mr. Fesmire mentions the
9 possibility of operators asking for emergency orders; is
10 that right?

11 A. Yes.

12 Q. So that decision was made before that letter went
13 out and was a decision that Mr. Fesmire agreed with --

14 A. That's true.

15 Q. -- authorized?

16 A. Yes.

17 Q. When you say you worked on the -- how those
18 orders were issued, you are talking about your
19 conversations with operators on how they could go about
20 applying for such an emergency order?

21 A. Yeah, basically.

22 Q. And the upshot of that was that you prepared a
23 form that would cover those issues that you thought were
24 important to resolve the issue of whether an emergency
25 order --

1 A. Correct.

2 Q. -- should be granted?

3 And that was as a convenience to operators who
4 were going to request one, as Mr. Fesmire had suggested?

5 A. Correct.

6 MS. MacQUESTEN: Thank you.

7 MR. FELDEWERT: Mr. Examiner?

8 EXAMINER JONES: Briefly.

9 MR. FELDEWERT: Yeah, I've sat here, and --

10 EXAMINER JONES: Okay.

11 MR. FELDEWERT: -- I have two questions.

12 EXAMINER JONES: Okay.

13 MR. FELDEWERT: Okay?

14 FURTHER EXAMINATION

15 BY MR. FELDEWERT:

16 Q. First of all, we talked about this RCRA permit
17 that Gandy Marley has. Is that for a different site?

18 A. Different site.

19 Q. Miles away, right?

20 A. Not -- I don't think it's miles away, no.

21 Q. How far, do you know?

22 A. No, I don't.

23 Q. Okay, but it is for a different site, not the
24 site we're talking about here today?

25 A. Correct.

1 Q. Okay, secondly, I know we have feelings, we have
2 possibilities, we -- I'm not even sure you've set it in
3 terms of concerns. My question, now that we're having a
4 hearing today on this emergency order, is, do you have any
5 evidence whatsoever that there is a waste-disposal
6 emergency in southeast New Mexico associated with salt-
7 contaminated waste?

8 A. No, I don't.

9 MR. FELDEWERT: That's all I have.

10 EXAMINER JONES: Okay, do you have any more?

11 MR. DOMENICI: One more.

12 EXAMINER JONES: Okay.

13 FURTHER EXAMINATION

14 BY MR. DOMENICI:

15 Q. Other than an emergency-order format, is there
16 any expedited-order process?

17 A. No.

18 Q. Is it possible to interchange the word
19 "expedited" with "emergency" and capture the idea in this
20 form?

21 A. In hindsight, I wish we had.

22 Q. That was your goal, that was your intent, wasn't
23 it, to provide an expedited appeal process and review
24 process?

25 A. My understanding is, the only expedited action is

1 called an emergency order, yes.

2 Q. And there's no requirements to what that
3 emergency might be, though?

4 A. No, not that I know of.

5 Q. Including a need to expedite review, could be --
6 fall within an emergency?

7 A. I suppose.

8 MR. DOMENICI: That's all.

9 EXAMINER JONES: Okay, thanks, Mr. Martin.
10 And Mr. Domenici?

11 MR. DOMENICI: I'd like to call Larry Gandy.

12 EXAMINER JONES: Okay, Larry Gandy, would you
13 please stand and be sworn?

14 (Thereupon, the witness was sworn.)

15 EXAMINER JONES: Okay, go ahead.

16 LARRY D. GANDY,

17 the witness herein, after having been first duly sworn upon
18 his oath, was examined and testified as follows:

19 DIRECT EXAMINATION

20 BY MR. DOMENICI:

21 Q. State your name, please.

22 A. Larry Dale Gandy.

23 Q. I'm going to try to keep this brief so, first of
24 all with the RCRA permit, how far away is the site that's
25 permitted for a RCRA disposal facility from the location

1 where the salt waste is handled?

2 A. It's in the adjoining section --

3 Q. So as far as --

4 A. -- within one mile.

5 Q. -- as the crow flies, about a mile?

6 A. Yes.

7 Q. And to your knowledge, what's the -- what
8 difference is there in the subsurface geology between those
9 two locations?

10 A. Very little, or none at all.

11 Q. And when was that RCRA permit issued?

12 A. Four years ago, I believe.

13 Q. And was there a substantial inquiry into the
14 geology, hydrology?

15 A. Extensive inquiry.

16 Q. And just briefly, if you could, could you confirm
17 what the subsurface strata is there?

18 A. The surface is I believe what the geologists call
19 Quaternary alluvium sand, then it gets into clay and
20 siltstones, and then mudstones, more clays, Triassic-age
21 clays.

22 Q. Is that why it was selected for a RCRA disposal
23 facility?

24 A. Yes.

25 Q. And that's permanent disposal --

1 A. Yes.

2 Q. -- of hazardous wastes are allowed?

3 A. Yes. This site was selected for a RCRA facility
4 before it was also selected as a -- for a landfarm.

5 Q. Talking about your understanding of the ability
6 for you to handle salt-contaminated oilfield waste, what
7 has your understanding been, say, in the last 12 months?

8 A. It has been our understanding that we have been
9 able to accept it.

10 Q. How did you confirm that understanding?

11 A. By language in our permit and conversations with
12 the people that work with the Oil Conservation Division.

13 Q. And those were -- that was demonstrated by the
14 exhibit that showed those e-mails?

15 A. Correct.

16 Q. What is -- What's the nature of the salt-
17 contaminated waste materials that are handled at Gandy
18 Marley?

19 A. The nature, are you talking about where they're
20 coming from?

21 Q. Yes.

22 A. Reserve pits from newly drilled oil and gas
23 wells, old historic cleanups, produced water, leaks and
24 spills, brine-impacted soil.

25 Q. And geographically where does most of that

1 material come from?

2 A. Within 15 miles, 20 miles, of our facility.

3 Q. And what impact would the inability of your
4 facility to have that material have on the schedules or the
5 plans for disposals that are currently planned right now?

6 A. I know it would shut numerous of them completely
7 down.

8 Q. When you say "of them", what type of -- drilling
9 pits, remediation, what type of --

10 A. Drilling pits, workover pits, produced water
11 spills.

12 Q. Why are you now checking that?

13 A. We already have contracts in place coming to our
14 entire facility.

15 Q. What kind of commitments impact have you made to
16 handle salt-contaminated oilfield wastes?

17 A. We have hired more employees, we have purchased
18 hundreds of thousands of dollars' worth of equipment, we
19 have enlarged our facility and designed our facility around
20 accepting these types of materials.

21 Q. What impact has Rule 50 had, if you can identify
22 that impact?

23 A. The Rule 50 has made a huge impact on our
24 drilling operations in New Mexico as far as reserve pit
25 cleanups.

1 Q. And what impact has that made on the demands and
2 the scheduling demands to dispose of that material?

3 A. Before Rule 50, there was no demand. Now there
4 is a huge demand, every day. Numerous pits are ready to be
5 cleaned up.

6 Rule 50 states in there that a reserve pit has to
7 be cleaned and closed in six months. Before Rule 50 there
8 was no time line on cleaning up a reserve pit.

9 Q. And what impact on the cost of your customers
10 would the inability for you take this material located in
11 this 15-mile geographic area have, from your communications
12 with them?

13 A. It would at least quadruple their transportation
14 cost, and I also know that it would -- their disposal fees
15 would go up also.

16 Q. Okay. What part of the disposal -- overall
17 disposal cost is transportation?

18 A. Normally about 50 percent.

19 Q. So if you quadrupled that, then the entire
20 project cost could go up as much as --

21 A. It could increase double.

22 Q. When you were told that there was this emergency
23 option for you in the letter of March 4th, did you consider
24 that that would -- that you had an emergency in terms of
25 needing an expedited, quick hearing?

1 A. Absolutely.

2 Q. And did you have any concerns that you actually
3 posed an environmental threat or a threat to human health
4 or a threat to groundwater?

5 A. None.

6 Q. Have you seen anything that shows good cause to
7 modify your permit to protect fresh water, human health or
8 the environment?

9 A. No good cause to help protect our groundwater,
10 human health or animals.

11 MR. DOMENICI: That's all I have, thank you.

12 EXAMINER JONES: Gail? Ms. MacQuesten?

13 EXAMINATION

14 BY MS. MacQUESTEN:

15 Q. Mr. Gandy, the testimony you've just given on the
16 need for a permit to continue to allow you to accept salt-
17 contaminated waste, the reasons you gave, would they also
18 apply to Artesia Aeration?

19 A. Absolutely.

20 MS. MacQUESTEN: Thank you, no other questions?

21 EXAMINER JONES: Mr. Mike Feldewert?

22 MR. FELDEWERT: is Mr. Price still here? I'm --
23 Not Mr. Price --

24 MS. MacQUESTEN: Mr. Martin?

25 MR. FELDEWERT: Mr. Martin, I'm sorry. Does he

1 have those -- the exhibits?

2 MR. FESMIRE: He'll be back, he just stepped out.

3 MR. FELDEWERT: Does he have the exhibit package
4 over there?

5 EXAMINER JONES: Here's --

6 MR. FELDEWERT: Our exhibit package, I'm sorry?

7 EXAMINATION

8 BY MR. FELDEWERT:

9 Q. Mr. Gandy, when you -- would you turn to Exhibit
10 3? Okay, now, Exhibit -- the exhibits you introduced --
11 Exhibit 1 was a communication that you had with Mr. Price
12 in August of 2004, correct?

13 A. Correct.

14 Q. Okay. Mr. Price is not the Director of the Oil
15 Conservation?

16 A. Correct.

17 Q. All right, and you knew that, right?

18 A. Yes, sir.

19 Q. Okay. In September of 2004, which was a month
20 later, when you received this letter from the Division, did
21 you read the second paragraph?

22 A. I have no recollection of this letter.

23 Q. You're saying you didn't get it?

24 A. Correct.

25 Q. Is that your address --

1 A. I'm saying that I do not remember seeing it.

2 Q. All right, is that your address at the top?

3 A. Yes, sir.

4 Q. Okay. Now, Mr. Martin testified he sent this to
5 you. Is he wrong, or do you just don't -- you don't
6 remember?

7 A. I don't remember receiving this letter.

8 Q. Okay. Which means that you don't remember
9 looking at the second paragraph?

10 A. Not -- I have today, yes.

11 Q. Okay. And in that second paragraph the Division
12 informs you -- assuming you got this letter, okay? -- that
13 if you want to accept salt-contaminated cuttings or any
14 other salt-contaminated wastes, your Rule 711 permit must
15 be modified to ensure that your acceptance of those wastes
16 will not adversely affect public health or the environment,
17 okay?

18 A. Correct.

19 Q. Now -- and I'm -- did you -- and I -- and let me
20 back up. If you're -- You're saying you did not get this
21 letter, or you just don't know?

22 A. I do not remember this letter.

23 Q. So I'm assuming, then, you didn't do anything in
24 response to this letter?

25 A. Correct.

1 Q. Did you continue to accept salt-contaminated
2 waste?

3 A. Yes.

4 Q. In March 4th of 2005, you got a letter from Mr.
5 Fesmire, correct?

6 A. Correct.

7 Q. All right, in which he said, Effective
8 immediately, permitted landfarms, such as yourself, is
9 prohibited from accepting oilfield waste contaminated with
10 salts.

11 A. Correct.

12 Q. Did you get that letter?

13 A. Yes.

14 Q. And that's -- what is it, sent to the same
15 address as what's been marked as Exhibit Number 3?

16 A. That letter was also e-mailed and faxed directly
17 to my office.

18 Q. Okay. When you received that letter, what did
19 you do? Did you stop receiving salt-contaminated waste?

20 A. Yes.

21 Q. You did? Did you stop receiving salt-
22 contaminated waste when you received that letter on March
23 4th from Mr. Fesmire?

24 A. The day we received that, we were not accepting
25 -- we were not receiving any salt-contaminated waste.

1 Q. Okay, and did you -- prior to the time that you
2 -- Now, you got your emergency order on March 11th?

3 A. I believe so.

4 Q. Okay. Between the receipt of this letter and
5 March 11th when you got your emergency order, did you
6 receive any salt-contaminated waste?

7 A. Yes, we did.

8 Q. Okay, despite the directive not to?

9 A. We'd had numerous telephone conversations with
10 the Oil Conservation Division telling us to -- that we
11 could go ahead and continue accepting this.

12 Q. You're telling me that someone from the Division,
13 after Mr. Fesmire's letter, and before you received your
14 emergency order, that someone from the Division said, Go
15 ahead and ignore Mr. Fesmire's letter, you can take salt-
16 contaminated waste?

17 A. Correct.

18 Q. You mentioned -- you said -- you offered the
19 opinion that if this emergency order was not extended, that
20 these remediation efforts would be shut down. Was that
21 your words?

22 A. Correct.

23 Q. And you said it was because they have contracts
24 with your facility?

25 A. Yes, sir.

1 Q. Is there any other basis for that opinion that
2 these operations would be shut down?

3 A. That is the only basis.

4 Q. That's the only basis. So let me ask you, Mr.
5 Gandy, if you were unable to accept this waste, these
6 operators would be able, would they not, to travel the 50
7 to 100 miles down to the properly permitted facilities and
8 dispose of their wastes?

9 A. Yes, they could.

10 Q. The only concern you have is that the cost of the
11 disposal operation would go up for them?

12 A. Correct.

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

14 EXAMINATION

15 BY EXAMINER JONES:

16 Q. Okay. Mr. Gandy, what about this well that --
17 this sampling of water that now appears to be 15,000 and
18 then -- may have used to have been less than that?

19 A. Mr. Examiner, I apologize. The day we filled out
20 our emergency order we did this off of memory. I did not
21 have my 1994 permit application with me.

22 In my original permit application from 1994 I
23 have various 200-foot wells drilled through the facility
24 that are showing dry. I had three that had perched water
25 in them, and my TDS's ranged from the 4920 to 18,800. So I

1 -- that was my mistake, I did that off of memory.

2 Q. Okay, so the groundwater that exists out there
3 has a big range in TDS, and it's naturally occurring. In
4 your opinion, it hasn't been compromised by the operation
5 so far?

6 A. No, sir, it is perched water, it is not an
7 aquifer.

8 Q. And there's been no influx of leaching from the
9 facility into these perched waters?

10 A. No, sir.

11 Q. Okay. Now, this RCRA permit, is that -- that
12 means it can take NORMs; is that what that means?

13 A. (Nods)

14 Q. What else is it taking besides NORMs?

15 A. The RCRA facility has no been built yet. We're
16 not in operation yet.

17 Q. Okay. Okay, another question is how this -- how
18 do you get the drill cuttings from the drill site to your
19 facility? How does it get there?

20 A. Dump truck.

21 Q. Okay, is it a dump truck. And so -- you know the
22 names of a couple of the truck companies down there?

23 A. There are numerous.

24 Q. Numerous of them, out of Tatum maybe or whatever?

25 A. Yes, sir.

1 Q. And so are they hard on the roads?

2 A. Yes. Yes, sir.

3 Q. So -- Do they ever spill any cuttings when
4 they're traveling?

5 A. Yes, sir.

6 Q. They're not enclosed at all?

7 A. Most -- No, sir, most of the time they are not.

8 Q. They're not. And you say that they're pretty
9 much -- usually you consider drill cuttings to be salt-
10 contaminated waste; is that -- That's what Mr. Martin
11 said --

12 A. Correct.

13 Q. -- in his opinion, but you agree with that?

14 A. Yes, sir.

15 Q. So in your opinion, your facility is an ideal
16 facility to accept salt-contaminated wastes with no harm to
17 the environment?

18 A. Correct.

19 Q. That's your opinion?

20 A. That's my opinion.

21 EXAMINER JONES: Okay, that's all the questions
22 we have.

23 Any redirect, Mr. Domenici?

24 MR. DOMENICI: Let me see, one second.

25 Nothing further.

1 MS. MacQUESTEN: Mr. Examiner, may I have a brief
2 redirect?

3 EXAMINER JONES: Sure.

4 FURTHER EXAMINATION

5 BY MS. MacQUESTEN:

6 Q. Mr. Gandy, did I understand you correctly to say
7 that someone at OCD told you it was all right to accept
8 salt-contaminated soil after Mark Fesmire's March 4th
9 letter and before the issuance of the emergency order on
10 March 11th?

11 A. Correct.

12 Q. Who was that?

13 A. That would have been Mr. Martin.

14 Q. And when did this conversation take place?

15 A. The day that this was faxed to us.

16 Q. The March 4th letter?

17 A. Correct.

18 Q. How did that conversation take place? Did you
19 call him and ask for permission to do this, or was -- how
20 did it happen that you were speaking to him about it?

21 A. We called him.

22 Q. You called him?

23 A. Yes, ma'am.

24 Q. And you asked him if you could accept salt-
25 contaminated wastes until you got an emergency order in

1 place?

2 A. Correct.

3 MS. MacQUESTEN: Okay, thank you.

4 I may want to present a rebuttal witness at the
5 end of this proceeding.

6 EXAMINER JONES: Okay.

7 Mr. Feldewert?

8 MR. FELDEWERT: No questions.

9 MR. DOMENICI: I have a follow-up.

10 EXAMINER JONES: Okay.

11 REDIRECT EXAMINATION

12 BY MR. DOMENICI:

13 Q. Is it correct that you received that letter on
14 March 10th, and you received the emergency order the
15 following day, if you can recall?

16 A. The best of my memory, we did -- that is correct.

17 Q. And did you fill out the emergency application as
18 soon as you received this letter?

19 A. Immediately, yes.

20 Q. And faxed it to Santa Fe?

21 A. Correct.

22 Q. And the material that you received, was it
23 stockpiled in some way --

24 A. Yes.

25 Q. -- or staged in a way --

1 A. Yes, it is.

2 Q. -- that you could -- you haven't permanently
3 disposed of it, or you hadn't at that time?

4 A. Correct.

5 Q. Until you got the emergency order?

6 A. Correct.

7 Q. So you just took the -- you let it come on site,
8 is basically what you did?

9 A. Yes.

10 MR. DOMENICI: That's all.

11 FURTHER EXAMINATION

12 BY EXAMINER JONES:

13 Q. Okay, just a follow-up on that. What -- Can you
14 elaborate on what you did to change your facility? You
15 said you spent thousands of dollars after this salt letter
16 came out. You're holding things separate, or do you have
17 to modify your facility?

18 A. To be able to handle this type of material it
19 requires larger equipment, it requires a larger dozer, it
20 requires a larger loader and clearing out -- and designing
21 and building more cells to segregate the salt-laden
22 materials.

23 Q. And you've already done all that?

24 A. Yes, we have, sir.

25 EXAMINER JONES: Okay, that's -- I think we're

1 done grilling you. Thanks very much.

2 Mr. Feldewert, do you have a witness?

3 MR. FELDEWERT: I do, Mr. Examiner. Call Mr.

4 Marsh.

5 Can you leave the exhibits up there, please, Mr.

6 Gandy? Thank you.

7 EXAMINER JONES: Mr. March, will you please stand

8 to be sworn?

9 (Thereupon, the witness was sworn.)

10 KENNETH R. MARSH,

11 the witness herein, after having been first duly sworn upon

12 his oath, was examined and testified as follows:

13 DIRECT EXAMINATION

14 BY MR. FELDEWERT:

15 Q. Could you please state for the record your name
16 and where you reside?

17 A. My name is Kenneth Ray Marsh, and I reside in
18 Hobbs, New Mexico.

19 Q. And are you the president of Controlled Recovery,
20 Inc.?

21 A. Yes, I am.

22 Q. CRI operates -- and I'll use the term CRI, if I
23 may -- operates a commercial waste-management facility in
24 Lea County; is that correct?

25 A. That's correct, we're a full-service treatment

1 and waste-disposal facility.

2 Q. How long have you been authorized to accept all
3 types of oilfield waste?

4 A. We were authorized by Division Order R-9166 in
5 1990 to accept all oilfield materials that is nonhazardous
6 or RCRA-exempt.

7 Q. Now, prior to receiving that authorization from
8 the Oil Conservation Division, did you have to go through
9 an extensive hearing process?

10 A. Yes, we did. First we had to do a site
11 selection, which included hiring a geologist and a
12 hydrologist.

13 After we determined that the site was -- we
14 thought it was suitable, we contacted the OCD for their
15 input.

16 Then we engaged a law firm to file an application
17 with the OCD and had the hydrologist and geologist do soil
18 borings to confirm what their original thoughts were.

19 Then we had a -- the OCD issued a public notice,
20 and we had a public hearing here in Santa Fe before an
21 Examiner.

22 Our engineer, hydrologist and geologist presented
23 written reports and confirmed that the information we had
24 put in our application was correct, gave expert testimony,
25 allowed the Examiners, OCD staff and the public to ask questions.

1 After the permit was issued, we constructed the
2 facility, and then the OCD inspected it before we were
3 allowed to accept any waste.

4 Q. How long, Mr. Marsh, did this entire process take
5 for you to become authorized to accept oilfield waste,
6 including salt-contaminated waste?

7 A. About nine months.

8 Q. Okay. Now, Controlled Recovery, Inc., is not the
9 only facility down in southeast New Mexico authorized to
10 accept salt-contaminated waste, is it?

11 A. There are three facilities that are properly
12 sited and permitted to accept that waste. That would be
13 Sundance Services at Eunice, Lea Land on the -- halfway
14 between Hobbs and Carlsbad -- and Controlled Recovery,
15 Inc., halfway between Hobbs and Carlsbad.

16 Q. Okay, and these facilities are depicted on our
17 exhibit -- CRI's Exhibit Number 9?

18 A. That's correct.

19 MR. FELDEWERT: Okay, and I'll invite the
20 Examiner to turn to that exhibit. I have a couple
21 questions, and a map may be helpful.

22 EXAMINER JONES: Which one was it?

23 MR. FELDEWERT: Exhibit Number 9.

24 Q. (By Mr. Feldewert) Now, you mentioned your
25 facility. The Lea Land facility is shown here on --

1 outlined right next to yours; is that correct?

2 A. That's correct.

3 Q. All right. And that facility has been permitted
4 to accept oilfield wastes, including salt-contaminated
5 wastes?

6 A. Lea Land?

7 Q. Yes.

8 A. Lea Land has a permit from the Environment
9 Department for industrial waste and also a permit from the
10 Oil Conservation Division under Rule 711 for oilfield
11 waste.

12 Q. Does that include salt-contaminated waste?

13 A. Yes.

14 Q. And did that -- Lea Land have to go through the
15 extensive permitting and review process that you've talked
16 about it?

17 A. Yes, they had to go through the same process we
18 did, as did Sundance in earlier years.

19 Q. Sundance is shown in -- outlined -- blue dot
20 outlined in yellow, correct?

21 A. That's correct.

22 Q. Okay. Was that facility permitted before yours?

23 A. Which one?

24 Q. Sundance?

25 A. Yes.

1 Q. Do you recall when?

2 A. No, I think it's about 30 years old.

3 Q. Okay. So -- And these facilities have been
4 operating for -- well, yours have been operating since
5 1990?

6 A. That's correct.

7 Q. Sundance before that. Do you compete with these
8 facilities for jobs to accept oilfield waste?

9 A. Yes, we do. We all have sales forces and often
10 get to bid on the same job, so we know we're in the arena
11 of competing with each other.

12 Q. Does CRI routinely take oilfield waste from the
13 Roswell and Artesia area?

14 A. CRI routinely takes waste, oilfield waste, from
15 virtually every oil- and gas-producing area in New Mexico.

16 Q. Can you give us some examples?

17 A. Yes, we take oil -- we take filters and tank
18 bottoms and things from the Aztec area, we take --

19 Q. Let me -- let me stop you there.

20 A. Okay.

21 Q. Tank bottoms, is that going to be liquidy?

22 A. Yes.

23 Q. It is?

24 A. Yes.

25 Q. Okay, and that's transported on our highways?

1 A. Yes.

2 Q. Presumably without spills, right?

3 A. That's correct.

4 Q. Okay, go ahead.

5 A. We take a lot of waste from the Roswell-Artesia
6 area, Carlsbad, back up in the mountains, we've taken waste
7 from the Otero Mesa. So we take waste all over that, as
8 does Sundance and Lea Land.

9 Q. You anticipated my next question. They -- you --
10 They take waste from various parts of New Mexico as well?

11 A. Yes, they do.

12 Q. Okay, in your -- and you have operated -- you
13 have been president of CRI since the inception?

14 A. That's correct.

15 Q. All right. And your experience -- in your 15
16 years of experience, Mr. Marsh, has the location of CRI's
17 facility and Sundance facility and the Lea Land facilities,
18 has it been sufficient to cover the oilfield waste disposal
19 needs for southeast New Mexico?

20 A. Yes, for many years we've serviced the industry,
21 and none of us are at capacity. Our hours are adequate for
22 our customers' usage. We have callouts if they want to
23 work on the weekends or at night, so there is no shortage
24 of capacity. But like I said, we're often competing for
25 the same jobs?

1 Q. And you're open 24 hours a day?

2 A. We're not open 24 hours a day, we're on call 24
3 hours a day.

4 Q. On call, available to accept waste 24 hours a
5 day, seven days a week?

6 A. That's correct.

7 Q. All right. Now, in the time you've been in the
8 oilfield waste disposal business for the last 15 years,
9 have you lived and worked in the Hobbs and Carlsbad area?

10 A. Yes.

11 Q. As the operator of a surface waste management
12 facility, do you keep track of oilfield waste and disposal
13 issues in southeast New Mexico?

14 A. Yes, I do. We network together with the other
15 companies on regulatory things. We also, like I said, bid
16 against each other, against the other companies. But we
17 have daily contact with the waste haulers, the
18 environmental consultants that manage waste stream for
19 different oil companies and with the OCD.

20 I serve on the New Mexico Oil and Gas Association
21 Environmental Affairs Board, I've been involved in writing
22 Rule 711 and the rewrite of Rule 711 for the OCD, I was on
23 the original NORM committee, oilfield waste in New Mexico,
24 and so I have a quite extensive knowledge of waste issues
25 in southeast New Mexico, as well as the total state. One

1 of my positions in our company is regulatory and compliance
2 issues.

3 Q. Do you presently serve on the Environmental
4 Improvement Board?

5 A. Yes, I do.

6 Q. Does your facility have daily contact with
7 operators and waste haulers in the Roswell and Artesia
8 area?

9 A. Yes, we do, as well as other parts of the state.

10 Q. Mr. Marsh, are you or CRI aware of any crisis
11 concerning the disposal of salt-contaminated oilfield waste
12 as a result of the passage of the pit rule?

13 A. No, but we are not aware of any emergency or
14 crisis. As an example, Phoenix Environmental Services of
15 Hobbs was cleaning up a reserve pit inside the Hobbs city
16 limits, they'd cleaned up about three for Texland. They
17 were hauling those things to Rhino Landfarm between Hobbs
18 and Eunice, and the Division said you can't haul those
19 anymore because they're salt-laden. Those materials went
20 to Sundance Services at Eunice, and it didn't slow the job
21 down or impede the progress of the cleanup.

22 Q. Went to your competitor?

23 A. That -- my competitor.

24 On the other hand, Patterson Drilling Company was
25 drilling a well at Riverside --

1 Q. Now where's Riverside?

2 A. Riverside is right outside of Artesia.

3 Q. Okay.

4 A. -- and they were illegally hauling the drill
5 cuttings to Artesia Aeration. The Division shut that
6 operation down, and those drill cuttings started that very
7 day coming to our facility, Controlled Recovery, and have
8 been since, so there was no -- the drilling operations
9 wasn't shut down or any progress impeded.

10 Q. So you -- when the Division has enforced the Rule
11 711 and the permit restrictions on landfarms, in cases
12 where that's been enforced, you haven't observed any
13 shutdown of remediation efforts?

14 A. No.

15 Q. Instead, the waste is being hauled to either you
16 or your competitors?

17 A. That's correct.

18 Q. Have any operators expressed to your or your
19 employees that there's a shortage of facilities to accept
20 the salt-contaminated waste?

21 A. No, they have not.

22 Q. Have any waste haulers expressed to you or your
23 employees a concern that there is a shortage of facilities
24 to accept salt-contaminated waste?

25 A. No.

1 Q. Mr. Marsh, are you aware of any facts to indicate
2 that there is a critical and immediate need to allow these
3 two landfarms to accept salt-contaminated waste?

4 A. I don't think there's any critical need. I don't
5 think there's any reason that they should. I think they
6 should go through the same permitting process that's
7 required by the OCD of other facilities, like we went
8 through.

9 We don't mind competition. I don't know the
10 Artesia Aeration guys, but I know the Gandys for long, long
11 time. Very good people, responsible operator, good
12 community folks. Their character is not in doubt. We're
13 all in this business for a reason. I think that it should
14 be a level playing field. We don't mind competition, but
15 we want everybody to play by the same rules, observe the
16 same -- I don't think that anybody is entitled to any
17 special consideration in this thing. I think we ought to
18 be on a level playing field. We can compete on a level
19 playing field, and we welcome that.

20 Q. Are you aware of any imminent threat to the
21 public health or the environment that would warrant
22 granting an exception to the normal permitting process for
23 Gandy Marley's facility or Artesia Aeration?

24 A. I'm not aware of any, and I can't think of any.

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

1 EXAMINER JONES: Okay. Ms. MacQuesten?

2 EXAMINATION

3 BY MS. MacQUESTEN:

4 Q. Mr. Marsh, have you seen an increased need for
5 waste facilities that can accept salt-contaminated waste
6 after the adoption of the pit rule?

7 A. No.

8 Q. So you haven't been taking any more salt-
9 contaminated waste than you did before?

10 A. Yes, I have, but that wasn't your question. Your
11 question was, have I seen a need increase in the
12 facilities, so...

13 Q. Increase in the need for facilities to --

14 A. No, I haven't.

15 Q. But your facility has accepted more salt-
16 contaminated waste after the issuance of the pit rule?

17 A. Yes. We have adequate capacity, as do Sundance
18 and Lea Land.

19 Q. About how much more contaminated waste have you
20 accepted after the pit rule?

21 A. I don't have a clue about the -- give you a hard
22 number. I'm going to say it probably picked up 20 percent.

23 Q. Have you had to change your business at all to
24 deal with that increased need?

25 A. No.

1 Q. Have you had additional personnel?

2 A. Yes, we have had additional personnel.

3 Q. Now, you're aware that the permits that were
4 issued to the landfarms, Gandy Marley, Artesia Aeration and
5 other landfarms, had language that allowed them to accept a
6 broad variety of oilfield waste, the language was very
7 broad?

8 A. Well, that's a determination that I don't believe
9 is correct that the Department has lived with, and you're
10 referring to the section out of Rule 711 that they copy out
11 and put into every permit. I might point out to you that
12 that language is also in treating plant permits, and we
13 know that treating plant permits weren't intended to accept
14 oilfield waste. So I don't agree with the interpretation
15 that the Department says gives that permit holders the
16 opportunity to take all this waste. I think that the waste
17 that they take is what was presented in their application,
18 number one, and in their public notice.

19 Q. And the process that we're going through in
20 asking operators to file permit modifications is consistent
21 with that, right, to try to correct the language in those
22 permits?

23 A. That's correct.

24 Q. But up until now, operators have been accepting
25 salt-contaminated wastes, whether we agree with their

1 interpretation of the permit language or not. Is that
2 true?

3 A. Yes, that is true. Or that's my belief.

4 Q. And they're still accepting that waste, at least
5 Gandy Marley and Artesia Aeration now, under an emergency
6 order that's about to expire; is that right?

7 A. That's my understanding. That's what we heard
8 here today. But I have no knowledge of their facility.

9 Q. So we don't really know what the impact will be
10 when we finally say no, you can't accept this until we
11 resolve the permit issue?

12 A. Well, I think we already know what some of the
13 problems are. Some of the problems are that landfarming is
14 a process that's supposed to remediate the soil so that it
15 can be returned to its natural state. I don't think that
16 there's anybody that will disagree with me, saying that if
17 you put salt on that landfarm and leave it on top of the
18 ground it is never going to remediate or turn to its
19 natural state, which is what the applications and the
20 public notice said.

21 Q. And I'm not disagreeing with you on that at all,
22 and I'm also not disagreeing with you on the need to go
23 through the permit-modification process and try to correct
24 this, because I agree with you that there is an error in
25 how the OCD handled this in the past.

1 A. That's correct.

2 Q. And in fact, I think you said that you had -- it
3 took you nine months to get your permit through OCD?

4 A. That's correct.

5 Q. Is it your testimony that OCD could take that
6 permit away without any notification to you and without
7 giving you a hearing, based on your knowledge of Section
8 711?

9 A. I don't know, I think that would be an
10 interpretation problem, and I haven't examined that, so I
11 don't know that answer.

12 Q. Would you expect, based on your tenure on EIB and
13 Oil and Gas, that if someone tried to take that permit away
14 from you, they would offer you an opportunity for a hearing
15 or something quicker than a nine-month process to reapply?

16 A. I think if they were going to interrupt my permit
17 that, yes, it would be a quicker process. But on the other
18 hand, if I'm starting from scratch and it takes me nine
19 months, it just takes me nine months.

20 Q. But I'm talking about -- You have a permit,
21 right?

22 A. I have a permit.

23 Q. And where would they get the authority to
24 expedite your review, other than the emergency clause that
25 we're talking about today, based on your knowledge?

1 A. I guess I would have to ask for a review, and
2 then if I asked for a review it would go through the normal
3 process.

4 Q. And you would be shut down that entire time
5 period?

6 A. Well, I don't -- If you're applying that to
7 what's happening here today then I would say no, because
8 Gandy Marley and Artesia Aeration are not being shut down,
9 they're only supposed to be -- they're asked to be -- to
10 comply with the original terms of their permit, and they've
11 exceeded those, they've exceed those -- authority given to
12 them.

13 So we're asking that they be -- continue with the
14 original authority that they were issued until they go
15 through the process, the correct process, the public notice
16 and the expert testimony to prove that these sites are
17 suitable for that, before the be granted this, which is
18 only fair.

19 Q. Well, you've read the March 4th letter, and that
20 really doesn't say what you just indicated, does it? It
21 says that this agency modified their permit, very clearly,
22 doesn't it?

23 A. Well, I guess it did. I guess maybe the agency
24 was a little nice to them, because they could have sent
25 them a letter and said, you're in violation of your permit,

1 you know.

2 Q. And could have given them the opportunity to
3 address that issue, just like if they shut you down?

4 A. Sure.

5 Q. Instead they said, We are modifying your permit
6 and this is your opportunity to come before us in an
7 emergency hearing to indicate that you're likely to achieve
8 your modification?

9 A. No, I think they said that if you want to keep
10 accepting these salts, then you have to modify your permit.
11 Is that not what I --

12 Q. That's correct.

13 A. -- read it to say?

14 Q. That's correct, and then -- Well, my exhibits are
15 over here.

16 Landfarms that wish to accept oilfield waste
17 contaminated with salts while their application is pending
18 may apply for an emergency order. Correct?

19 A. Correct.

20 Q. But in order to prohibit them from taking that
21 waste, the Department modified their permits unilaterally,
22 correct?

23 A. I suppose so.

24 Q. And all I'm trying to say is, based on your
25 knowledge and involvement of these rules, there's nothing

1 in there that allows the permit holder, whether it be you
2 or my clients, to ask for an expedited review or any kind
3 of review if their permit is modified or terminated?

4 A. No, and if you're going to do a major
5 modification or a modification to your permit, you should
6 go through the hoops like everybody else does, so there
7 should be no reason for it to be expedited or an emergency
8 order issued for that.

9 Q. You wouldn't object if your permit was terminated
10 and you had to reapply?

11 A. Sure, I would. Keep in mind that you're -- I
12 guess the allegations you're making is that their permits
13 are terminated, and that is not correct.

14 Q. Well, let me ask you to assume there was a
15 question to Mr. Martin that said because of the notice we
16 could have terminated these permits. And I think you were
17 here and that was the question. And the answer was yes,
18 but we chose to modify them.

19 A. I didn't hear that language, I'm sorry.

20 Q. Okay, let me ask you to assume that that's what
21 Mr. Martin testified in response to a question. He could
22 have invalidated your permit because of the lack of notice,
23 but instead he modified -- we chose as an agency to modify
24 your permit.

25 A. I don't know if he said that or not.

1 Q. Okay. Are you familiar with the Water Quality
2 Control Commission regulations?

3 A. Not much.

4 Q. Are you aware that for an agency, the Environment
5 Department, to modify a groundwater permit, they have to
6 actually issue the modification and go through a hearing
7 process?

8 A. I'm not intimate with those rules.

9 Q. And I think you're -- your familiarity with
10 Section 311, you understand that "emergency" is not
11 defined, don't you?

12 A. Yes.

13 MR. DOMENICI: That's all I have.

14 EXAMINATION

15 BY EXAMINER JONES:

16 Q. Mr. Marsh, does the permit that you have require
17 you to keep monitor wells underneath your property to
18 monitor the groundwater?

19 A. No.

20 Q. Okay, what -- Do you have an idea what percentage
21 of the waste coming in probably by volume would be this
22 salt-contaminated waste? Is it 50-50?

23 A. I'd say that of the waste treatments we take,
24 it's probably 80 percent, because I think probably 80
25 percent of the waste generated out there has some salt in

1 it associated with oil and gas production.

2 EXAMINER JONES: Yeah. Okay, any redirect?

3 MR. FELDEWERT: Just one -- or two, I guess.

4 EXAMINER JONES: Go ahead.

5 REDIRECT EXAMINATION

6 BY MR. FELDEWERT:

7 Q. Mr. Marsh, when the Division -- let's see, the
8 Division issued its letter in March this year, the
9 landfarms. That's been -- Mr. Domenici talked to you
10 about.

11 When the Division halted the transportation of
12 salt-contaminated waste from that well, that Murchison
13 well, to Artesia Aeration's landfarm, what happened to that
14 waste?

15 A. What happened to it? It came to CRI.

16 Q. And when they halted the hauling by Rhino
17 Landfarm, the illegal hauling of salt-contaminated waste to
18 Rhino Landfarm, where did that waste go?

19 A. It went to Sundance Services at Eunice.

20 Q. So don't we have a fairly -- don't we have
21 somewhat of a track record here to determine what will
22 happen if the OCD would enforce the provisions set forth in
23 its letter?

24 A. Yes, I think so, I think the waste would go to
25 properly permitted facilities.

1 MR. FELDEWERT: Okay, that's all the questions I
2 have.

3 EXAMINER JONES: Any more follow-ups?

4 MR. DOMENICI: Nothing further.

5 MS. MacQUESTEN: (Shakes head)

6 EXAMINER JONES: Okay, thank you, Mr. Marsh.

7 THE WITNESS: Thank you.

8 EXAMINER JONES: Let's take a 10-minute break
9 here before our closing statements.

10 Do you have a rebuttal witness?

11 MS. MacQUESTEN: Yes, I would like to call Ed
12 Martin briefly.

13 EXAMINER JONES: Let's do that now, then.

14 MS. MacQUESTEN: Okay. Mr. Martin, you're still
15 sworn.

16 EDWIN E. MARTIN (Recalled),
17 the witness herein, having been previously duly sworn upon
18 his oath, was examined and testified as follows:

19 DIRECT EXAMINATION

20 BY MS. MacQUESTEN:

21 Q. Were you present when Mr. Gandy testified?

22 A. Yes, for the most of it, for most of it.

23 Q. Were you there when he testified that he had a
24 conversation with you in which you told him that it was all
25 right for his landfarm to accept salt-contaminated waste

1 and that that conversation took place after the March 4
2 letter from Mr. Fesmire and before the issuance of the
3 emergency order on March 11th?

4 A. Yes.

5 Q. Is that your recollection?

6 A. My recollection -- yes, that's true, but my
7 recollection is that his receipt of the letter and the
8 signature on the emergency order and this conversation all
9 took place on the same day.

10 The -- once -- My understanding is, once the
11 order is signed, it becomes effective. Whether or not
12 Gandy Marley has received the order is, you know, a
13 secondary consideration. So I had not mailed the emergency
14 order out to them, but we did have a conversation on that
15 same day and I said yes, everything is okay, you can go
16 ahead and accept the waste.

17 Q. So you were informing him that there was an
18 emergency order --

19 A. Right.

20 Q. -- signed or being signed at that moment?

21 A. I didn't log the phone calls or anything, but
22 that's my recollection of what happened.

23 Q. Would you have told Mr. Gandy or any other
24 landfarm operator to go ahead and accept salt-contaminated
25 waste after Mr. Fesmire's letter?

1 A. No.

2 Q. Thank you.

3 EXAMINER JONES: Nothing further? Okay, thanks.

4 Okay, can we take a little break here before --

5 Maybe five after, come back?

6 (Thereupon, a recess was taken at 2:57 p.m.)

7 (The following proceedings had at 3:15 p.m.)

8 EXAMINER JONES: Okay, let's go back on the
9 record.

10 And Ms. MacQuesten, you requested administrative
11 notice to be made of the rulemaking behind Rule 1202?

12 MS. MacQUESTEN: Yes.

13 EXAMINER JONES: Okay, we'll take administrative
14 notice of that. Do you have a case number for that, or --

15 MS. MacQUESTEN: Unfortunately, I don't. I could
16 probably get one for you.

17 EXAMINER JONES: Let's just say we'll make Number
18 1202 -- Rule 1202, just do it that way.

19 And do you guys have an idea how long you're
20 going to talk on these?

21 MR. DOMENICI: Ten minutes for me.

22 EXAMINER JONES: Ten minutes, we'll start out at
23 ten minutes apiece and -- Ms. MacQuesten, do you want to go
24 first?

25 MS. MacQUESTEN: Mr. Examiner, we came here today

1 to try to solve two problems, correct two errors that --
2 frankly, that the OCD made.

3 The first problem was that when the OCD issued
4 its permits to landfarms, the language was too broad. It
5 was far broader than the OCD intended. That was problem
6 number one, and that raises environmental concerns.

7 But there was a second problem that compounded
8 that original problem, and that was the notice problem,
9 because not only were the permits broader than the OCD
10 intended, they didn't match the public notice that had gone
11 out, which was much narrower.

12 So we're here today in the middle of the process
13 to try to resolve those two issues.

14 In resolving those issues, we have tried to find
15 a solution that would cause the least disruption to
16 remediation efforts in the state, because the potential
17 impact is there, and the impact is even greater now than it
18 was in the past because of the adoption of the pit rule,
19 because operators need facilities that can accept salt-
20 contaminated waste, and we have more operators seeking that
21 sort of remediation now than we ever had before.

22 To try to resolve the two problems I've
23 identified and cause the least disruption to our
24 remediation efforts, we adopted the procedure that we've
25 talked about today.

1 We administratively modified the landfarm permits
2 so that they were consistent with the notice, but obviously
3 there were some landfarms that could meet the environmental
4 requirements for accepting salt-contaminated waste. For
5 those, they would need to go through the hearing process,
6 as would any applicant.

7 The problem that arose was, that hearing process
8 takes time. No matter how we try to shorten it, we still
9 have the 30-day notice period if we're trying to give
10 notice to the public, and it is our intention to do that.
11 Fortunately in these cases, we probably won't have to go
12 through the time-consuming process that Mr. Marsh described
13 in his case, because these applicants have already gone
14 through the permit process for landfarms.

15 We have considerable information on these sites,
16 but we still do need to go through the hearing process and
17 want to go through that, and that is going to take
18 additional time.

19 Unfortunately, we don't want to be in a situation
20 where we are shutting down all existing landfarms from
21 accepting salt-contaminated soils during that time period.
22 That is why we invited those applicants who wanted to
23 accept salt-contaminated wastes to use the emergency-order
24 process which is set out in statute and in the rules.

25 In these two cases, we feel that these applicants

1 have made the preliminary showing that there will not be
2 harm to the environment. In fact, in Gandy Marley's case
3 you can see from the e-mail exchange with Mr. Price that he
4 thought they were an ideal candidate for accepting salt-
5 contaminated waste. If we didn't have the notice issue, we
6 probably wouldn't be here today on that case, we would be
7 able to allow them to accept it.

8 So the real issue here is getting through the
9 notice process. And in order to do that and not have a gap
10 in service, not interrupt remediation, we have asked
11 operators to apply for the emergency order process, and
12 we've gone through that process.

13 We believe that the showing has been made that
14 there will not be environmental harm, which is our primary
15 concern, and the need for an emergency order is there
16 because of the increased need for salt-contaminated soils,
17 the disruption that would be caused by eliminating an
18 entire category of waste facilities from accepting salt-
19 contaminated soils, and as Mr. Martin testified, the
20 ongoing remediation efforts in that area.

21 Thank you.

22 EXAMINER JONES: Mr. Domenici?

23 MR. DOMENICI: I would concur with most of what
24 counsel said for -- counsel for OCD said.

25 I would say not only are there possibly two

1 problems, but I think the procedure to fix those potential
2 problems has really steered us in this direction, and I
3 think we're kind of predetermining that there was an
4 original notice issue without ever having a hearing on
5 that, and the Department -- or the Division did that, but
6 they didn't really say they were doing that. In fact,
7 what's pretty clear in their March 4th letter is, they were
8 not modifying these permits based on a notice problem; they
9 were modifying them on their authority in the permits which
10 says they could modify permits if necessary to protect
11 fresh water, human health and the environment.

12 So they did, in fact, take a permit, which is a
13 property right in New Mexico, and they modified it. I
14 think it's unequivocal that's what they've done.

15 They say that there's an underlying notice issue,
16 and if that were the case we would be in a different
17 situation.

18 They might have said we think there's a notice
19 problem, here's a show-cause order, or here's some proposed
20 revocation which is extremely common in these kind. You
21 propose a revocation and let the party come in and say why
22 you don't think it's appropriate.

23 But when you take the dramatic step to modify a
24 permit with the intent of changing operations, and you base
25 it on fresh water, human health and the environment, which

1 are pretty high and important standards, and then your
2 witness sits there and says, We don't have any of those
3 with respect to Gandy Marley, but we did give him an
4 opportunity to come forward with an emergency process, I
5 think that, in fact, that emergency process needs to be
6 considered pretty broadly.

7 And it's a process for Gandy Marley to come
8 forward and show just cause why this modification should be
9 either not implemented at all or delayed until Gandy Marley
10 has a chance to go through its own modification process
11 without the impact, because there's virtually no evidence
12 that there's any basis for the original modification.

13 We went back, we made a big circle here
14 procedurally in that the original modification is without
15 support. Then we went through the process that was
16 described, and what we now feel pretty clearly was
17 unsupported modification and asked for a hearing -- asked
18 for an order and then asked for the hearing, and now we're
19 being asked to present evidence on issues that really are
20 not pertinent to the modification, some general emergency
21 or some unspoken emergency that's not defined in the
22 regulations, hasn't been defined by the witnesses.

23 I would say, frankly, there's a procedural
24 emergency here, is really what's at the heart of this.
25 There's a procedural due-process emergency where you're

1 modifying a permit without any notification. There's
2 really no just- -- the justification you site and what's in
3 the permit that allows you to do that is not applicable in
4 this case, by your own testimony it's undisputed.

5 And based on that, it's clear in my mind we have
6 proven there's a procedural emergency and we've proven that
7 we can meet the environmental issues. We have just cause
8 to keep operating and to hold this -- a stay, essentially,
9 on this unilateral modification by the agency while we
10 apply for our modification.

11 Now, if we don't get that I could see, you know,
12 obviously, then, this modification should go into effect,
13 at that point we should modify or adjust our operations.
14 But to say we can't operate because we've been modified by
15 this and we -- when there's no basis for it doesn't make
16 sense.

17 It doesn't comply with any other procedural
18 regulations I'm familiar with on permits, all of which say
19 if the agency is going to modify or terminate, they need to
20 meet due process for the permit holder, not a third party.

21 And if we are going to create some due process,
22 it's this emergency-order process which, as counsel said,
23 it was recently revised by stat- -- to meet the statute, to
24 broaden it, to make it more flexible is what it appears, to
25 suit a situation like this.

1 Rule 711 doesn't provide any guidance for this
2 kind of situation, it doesn't say any way how this agency
3 should modify a permit, doesn't provide you any guidance
4 how you should do that or protect on balance, which I think
5 is really what needs to be here.

6 Clearly if there's a balance, looking at the
7 public welfare, it's far in favor of Gandy Marley. There's
8 no impact at all, whereas there's this huge detriment to
9 Gandy Marley.

10 So I would suggest -- and I agree, if we're
11 looking for some other kind of other industrywide
12 emergency, I think disruption and interruption are more
13 than sufficient.

14 There's testimony, and even the map shows Gandy
15 Marley is far removed from these three facilities
16 geographically.

17 There's a large demand, there's much work in
18 progress, as we speak. This isn't prospective work we're
19 talking about. These are jobs that are underway, people
20 are in the field, commitments have been made, my clients
21 have invested money and equipment and made modifications,
22 physical modifications, all of which we think satisfy that
23 concept of an emergency which we think really should be
24 interpreted in light of kind of a due-process or a just-
25 cause analysis.

1 So I would suggest the evidence that there are
2 other facilities that might be able to handle this and they
3 have capacity that are far distance doesn't overcome at all
4 the procedure set out to try to fix these historic
5 problems, to try to give clear notice and guidance to my
6 clients how to proceed.

7 If my clients would have known that this
8 emergency process required them essentially to prove the
9 impossible, which is somehow that there's no place this can
10 go at any cost, which is essentially the argument -- it
11 could go to Utah, it could go to Texas, I mean, that's
12 basically what they're saying.

13 Unless you can prove something like that, you
14 can't get an emergency, then this -- you don't have an
15 emergency procedure here, unless it's really interpreted
16 realistically in light of this situation, which is 18 out
17 of 20 operators are not going to keep operating, five that
18 have applied for temporary approval have been denied, so a
19 substantial part of the market is impacted substantially in
20 a situation of rising demand, increased strictness of
21 timelines for cleanups and remediations.

22 So in that sense, if this is a meaningful letter
23 from March 4th, we're entitled to continue to have our
24 emergency order.

25 Thank you.

1 EXAMINER JONES: Thank you.

2 Mr. Feldewert?

3 MR. FELDEWERT: Mr. Examiner, I am not here to
4 question in this hearing whether they should have issued an
5 emergency order. The question for this hearing is as
6 advertised, and that is, the Oil Conservation Division
7 seeks an order extending emergency order, blank, blank,
8 blank, to accept salt-contaminated waste until a
9 determination is made by the Hearing Examiner on the
10 pending applications.

11 So the issue here today is whether an emergency
12 exists to extend this emergency order. And we have sat
13 here today, and there's absolutely no evidence of a
14 disposal emergency in southeast New Mexico. In fact, the
15 evidence is just the opposite.

16 To the extent that the OCD has enforced the
17 restrictions on landfarms, the remediation projects have
18 not ceased, the wastes have been instead transported to
19 properly permitted facilities.

20 So without an emergency, without a disposal
21 emergency, how can we continue a disposal -- an emergency
22 order?

23 We have had a hearing now to determine whether an
24 emergency exists. And I ask you, what facts are there from
25 which you can conclude that a disposal emergency exists in

1 southeast New Mexico that warrants bypassing the normal
2 permitting process? Zero.

3 Division Order E-34 was issued in 2001 by Ms.
4 Wrotenbery. That's an emergency order. The interesting
5 thing about this, the previous emergency order, E-33,
6 issued in 1979. This is not something you all do very
7 often, okay? This is an exception.

8 E-34 was issued because of what is said in
9 paragraph 7, and I will read it to you. Improper disposal
10 or stockpiling of nondomestic waste that was previously
11 disposed of in a solid waste facility presents an imminent
12 threat to the public health and the environment.

13 Now, what evidence is there today of any
14 stockpiling of waste? Zero. What evidence is there today
15 of an imminent threat to public health and environment?
16 Zero. What evidence is there here today that there's going
17 to be a shutdown of these remediation efforts? Zero.

18 That is the issue before you. We're not here to
19 determine whether this -- whether there's discharge permits
20 under the Water Quality Control regs. That's not here
21 today, that's not your task today.

22 And we're not here to determine whether these
23 facilities are adequate to accept these salt-contaminated
24 wastes. That's going to happen. That's not your task here
25 today.

1 And we're not here to determine whether the
2 Division has legally modified their permits or somehow
3 rescinded their permits or otherwise acted inappropriately.
4 If they feel that that has occurred, they have legal
5 remedies available to them, one of which they're pursuing
6 now, and that is the permitting process. That's not before
7 you here today.

8 The issue before you here today is, is there a
9 disposal emergency that warrants the extraordinary relief
10 -- okay? -- of granting an emergency order that bypasses
11 the normal permitting process? And I haven't seen anything
12 here today, any facts, to support that. That's our
13 position.

14 Now, I always like timelines. I think it's
15 helpful to put the things in perspective. These guys --
16 Gandy Marley applies for a permit in July of 2004 to accept
17 salt-contaminated wastes. He clearly didn't view his
18 permit as authorizing him to accept salt-contaminated
19 wastes, otherwise he wouldn't have applied.

20 Mr. Fesmire sends out a letter six months ago. I
21 read you the language, they're very clear: You cannot take
22 these salt-contaminated wastes without a modification to
23 your permit.

24 And Mr. Marley says he doesn't remember whether
25 he got it or not. Okay? Mr. Martin said that letter was

1 sent. Certainly the record indicates it was sent to
2 Artesia. That was six months ago. Those guys do nothing,
3 zero. They don't apply, they don't do a thing.
4 Essentially, they ignore it.

5 Mr. Fesmire sends another letter in March of this
6 year, says again, you cannot accept this waste.

7 Then they finally getting around -- they get
8 around to filing a modification of the permit. And they
9 come before the Division and they say, Feel sorry for us,
10 please give us an emergency order because we want to take
11 this waste now, you know, we'll make some money, it will be
12 cheaper for the operators, economic convenience. That is
13 not a basis for an emergency order. And if you're going to
14 use that as a basis, that is a slippery slope, that is some
15 dangerous precedent, and I've alluded -- I alluded to that
16 earlier.

17 We -- Things get confused, okay? And I think
18 this is more of a legal issue more than anything else,
19 okay? And -- unfortunately for Mr. Apodaca. It's more of
20 a legal issue because the issue before the Division is
21 whether -- okay? -- there's an emergency. Because under
22 the statute, in case an emergency is found to exist by the
23 Division, then you can issue an emergency order. Step one,
24 is there an emergency? Do we have evidence of emerg- --
25 That's the first step.

1 The second step in this case would be, okay, if
2 we got an emergency, are these facilities -- are we going
3 to be comfortable allowing them to accept this waste?
4 Well, they've gone to step two and completely ignored step
5 one, both at the time they issued the emergency order and
6 now at this hearing.

7 Both the applicants -- both the Division and both
8 these landfarms, they've had an opportunity to come before
9 this Division and demonstrate the emergency that would
10 justify an order. They have not. There is no disposal
11 emergency. And accordingly, there is no basis for you to
12 grant this extraordinary relief.

13 And I submit to you that, given the dangers that
14 are associated with salt-contaminated wastes, the imminent
15 threat to public health and environment is more likely
16 allowing this to go forward without a public review process
17 than denying them special treatment.

18 So we ask that you now not -- that you deny the
19 application by the Division, that you do not continue this
20 emergency order, and that you allow the process to forward
21 as it should, with all the evidence, with a public comment
22 period, with a public input, before you determine whether
23 you want to be dumping these salt-contaminated wastes on
24 the ground out there at these facilities.

25 We appreciate the opportunity to comment here

1 today.

2 EXAMINER JONES: Thank you.

3 Mr. Neeper?

4 DR. NEEPER: Do you wish to swear, swear me in?

5 EXAMINER JONES: Give a closing statement if you
6 want to. Do you want to --

7 DR. NEEPER: I expect to give sworn testimony, I
8 expect to be subject to cross-examination --

9 EXAMINER JONES: Okay --

10 DR. NEEPER: -- if anyone chooses to examine me.

11 EXAMINER JONES: Please stand to be sworn.

12 (Thereupon, the witness was sworn.)

13 EXAMINER JONES: I think we've decided that you
14 can ahead and talk, give a closing statement, but probably
15 no cross-examination, the other attorneys.

16 DR. NEEPER: That is up to you to rule on that.
17 I have simply expressed that I expect cross-examination
18 should you allow it.

19 EXAMINER JONES: Okay.

20 DR. NEEPER: I am open to that.

21 EXAMINER JONES: Okay.

22 DR. NEEPER: The rule states that those who give
23 testimony are subject to cross-examination, as I read the
24 rules.

25 Since I do not have legal counsel here to qualify

1 me, with your permission I'll qualify myself as a technical
2 witness.

3 EXAMINER JONES: Okay.

4 DONALD A. NEEPER,

5 the witness herein, after having been first duly sworn upon
6 his oath, testified as follows:

7 DIRECT TESTIMONY

8 BY DR. NEEPER: I hold a PhD in thermal physics,
9 I've worked in thermal physics throughout my career.
10 Thermal physics is very similar to contaminant transport in
11 many ways, and that drew my interest and my technical work
12 into contaminant transport.

13 At the time I retired from Los Alamos National
14 Laboratory 11 years ago, I was in charge of RCRA facility
15 investigation of an area of approximately 160 acres
16 containing radioactive and hazardous waste. That brought
17 me into familiarity with some of the waste processes.

18 In addition, for the last 35 years I have worked
19 as a volunteer with a citizens' organization, New Mexico
20 Citizens for Clean Air and Water, dealing with pollution of
21 all various types. The group is most known for their work
22 on power plants and copper smelters, but we have worked on
23 other issues.

24 A concern brings me here, we have had a long-term
25 concern with salt, sodium chloride. I remember working on

1 those issues dealing with road-salting in the 1970s, and
2 one of the things we were able to do through technical work
3 -- actually through neutron activation -- was to show that
4 the deaths of significant areas of pine trees in northern
5 New Mexico were due to road salting, even as much as 100
6 yards from the road. This was due to the accumulation of
7 sodium, not the chloride but the sodium in the needles.

8 So therefore when I noticed this issue on the
9 docket it attracted my attention. And particularly it
10 attracted my attention because of the emergency nature.

11 There is a question of procedure here, as has
12 been suggested by various witnesses and counsel. In the
13 past, some of these issues of landfarms have not been
14 subjected to public hearing; the citizens have not had,
15 thereby, opportunity to comment on them.

16 We have long as citizens held the suspicion,
17 shall we say, that the landfarms were accepting saline
18 wastes, but there was no arena within which to address
19 that. The arena we chose, in part, was to look at pits and
20 to suggest that drilling wastes should not be buried in
21 pits, in part because of the salinity, in part because of
22 other toxic chemicals that sometimes appear in the drilling
23 wastes due to drilling fluids. So we have an interest in
24 the things that are going on here.

25 I want to insert a few items that I would call

1 clarification. We have heard various witnesses say there
2 is no environmental threat with the two facilities under
3 question. But we have also heard environmental threat
4 interpreted strictly in terms of groundwater.

5 As has been mentioned, the OCD is charged under
6 the Oil and Gas Act with protecting human health and the
7 environment. It is only their second charge under the
8 Water Quality Control Commission that requires them to
9 particularly examine water issues, but they are required to
10 look at environmental issues broadly.

11 I probably don't need to go into the technical
12 reasons. Sodium in salt replaces the calcium in the soil.
13 If you put enough salt on the soil, you wind up with soil
14 that's called sodic. It will not support life. It's kind
15 of like talcum powder. So if you continue to put salt on
16 the land, it's only a matter of time before the land will
17 not again support life. The salt has to be washed away or
18 blown away before that can happen, and the washing-away
19 process, particularly in an arid environment, takes a long
20 time.

21 Therefore, our concern is with the whole issue of
22 landfarms accepting saline wastes. We don't have a
23 particular bone to pick with the particular operators, and
24 we understand they're responsible operators. But we do
25 have a bone to pick with the procedure.

1 Under the current procedure, it is possible you
2 could rule that the emergency permits should continue. We
3 would prefer, if you did so, that you could establish a
4 date at which they would terminate, because we know from
5 experience that procedures within the OCD and hearing
6 things can go on for much longer than a year. We went
7 through that with the pit hearing, with the hearing being
8 repeatedly delayed and canceled.

9 So we would therefore request, if you did allow
10 this, that you put a terminus date on it, so that we know
11 that those permits would expire.

12 I will then conclude by stating our general
13 position that facilities accepting saline wastes should be
14 certified as landfills with proper closure procedures, not
15 landfarms. The closures are different for the two.

16 It may be that the current facilities could be
17 converted to proper landfills. They may be in an ideal
18 location for that. But the closure conditions are
19 different, and we feel that saline waste should go either
20 to proper landfills or be treated.

21 We believe it's possible to treat the wastes to
22 where they might be even harmless and could be spread
23 anywhere.

24 Thank you for your attention.

25 EXAMINER JONES: Okay, thank you very much.

1 With that, we'll take -- Ted and I will take
2 Cases 13,454 and Cases 13,455 under advisement.

3 And this docket is closed.

4 Thank you all.

5 (Thereupon, these proceedings were concluded at
6 3:43 p.m.)

7 * * *

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9
10
11
12 I do hereby certify that the foregoing is
13 a complete record of the proceedings in
14 the Examiner hearing of Case No. _____
15 heard by me on _____

16 _____
17 Oil Conservation Division, Examiner

CERTIFICATE OF REPORTER

STATE OF NEW MEXICO)
) SS.
 COUNTY OF SANTA FE)

I, Steven T. Brenner, Certified Court Reporter and Notary Public, HEREBY CERTIFY that the foregoing transcript of proceedings before the Oil Conservation Division was reported by me; that I transcribed my notes; and that the foregoing is a true and accurate record of the proceedings.

I FURTHER CERTIFY that I am not a relative or employee of any of the parties or attorneys involved in this matter and that I have no personal interest in the final disposition of this matter.

WITNESS MY HAND AND SEAL March 29th, 2005.



STEVEN T. BRENNER
 CCR No. 7

My commission expires: October 16th, 2006