

GW - 55

ENFORCMENT

DATE:
1988

THIRTEENTH JUDICIAL DISTRICT COURT
COUNTY OF SANDOVAL
STATE OF NEW MEXICO

NEW MEXICO WATER QUALITY
CONTROL COMMISSION and
RICHARD MITZELFELT, DIRECTOR
of the ENVIRONMENTAL IMPROVEMENT
DIVISION of the NEW MEXICO HEALTH
AND ENVIRONMENT DEPARTMENT,

Plaintiffs,

vs.

No. SD-88-131-CV

THRIFTWAY MARKETING CORPORATION,

Defendant.

PLAINTIFFS' REQUESTS FOR ADMISSION

Plaintiffs New Mexico Water Quality Control Commission ("Commission") and Richard Mitzelfelt,* Director of the Environmental Improvement Division of the New Mexico Health and Environment Department ("Division"), pursuant to SCRA 1986, Rule 1-036, hereby request that Defendant Thriftway Marketing Corporation ("Thriftway") make the following admissions, under oath, within thirty (30) days of service.

The "Plateau" self-service gasoline station (No. 168) owned and operated by Thriftway and located on Highway 44 in Bernalillo, Sandoval County, New Mexico, west of the intersection of Highway 114 and Highway 313, will be referred to as "the station" and "the site" in the following requests. "Containment" is defined as the hydraulic or chemical control of a contaminant plume such that it does not spread.

*Richard Mitzelfelt has replaced Michael Burkhart as the Director, and is automatically substituted as a party pursuant to SCRA 1986, Rule 1-025.D.

REQUEST NO. 1:

Thriftway purchased the station in 1984.

REQUEST NO. 2:

In the spring of 1986, a prospective buyer of the Station contracted a consultant to perform an environmental investigation of the Station prior to purchase.

REQUEST NO. 3:

The investigation described in Request No. 2 was completed in May 1986.

REQUEST NO. 4:

The investigation described in Request No. 2 indicated that the soil adjacent to the underground storage tanks on the east and south was contaminated with hydrocarbons.

REQUEST NO. 5:

Hydrocarbons are the major constituents of petroleum products.

REQUEST NO. 6:

At all times relevant to this lawsuit, the underground storage tanks at the station contained petroleum products.

REQUEST NO. 7:

Thriftway was provided with the results of the investigation

described in Request No. 2 on or before May 31, 1986.

REQUEST NO. 8:

Thriftway did not inform the Groundwater Bureau of the Division of the contamination revealed by the investigation described in Request No. 2 until July 22, 1986.

REQUEST NO. 9:

For an unknown period of time prior to February 11, 1987, gasoline product leaked from a gasoline supply "Subline" or other portion of the station's underground gasoline storage, supply and sale system.

REQUEST NO. 10:

The soil and groundwater underlying the station and in proximity thereto are contaminated with petroleum products, dissolved petroleum constituents and petroleum vapors.

REQUEST NO. 11:

The gasoline lost at the station has caused the soil underlying the station and in proximity thereto to become contaminated with petroleum products, dissolved petroleum constituents and petroleum vapors.

REQUEST NO. 12:

The gasoline lost at the station has caused the ground water

underlying the station and in proximity thereto to become contaminated with petroleum products, dissolved petroleum constituents and petroleum vapors.

REQUEST NO. 13:

The gasoline lost at the station contains numerous chemical compounds which are toxic.

REQUEST NO. 14:

The gasoline lost at the station contains benzene, which is toxic, carcinogenic, teratogenic and mutagenic, and may otherwise be injurious to public health and safety, and animal and plant life.

REQUEST NO. 15:

A true and correct copy of the state groundwater standards are set out in the attached Exhibit "D".

REQUEST NO. 16:

Benzene, Toluene and Xylenes have all been found in the groundwater at concentrations above state groundwater standards at the station.

REQUEST NO. 17:

A drinking water supply well is located on property adjacent to the station.

REQUEST NO. 18:

The well described in Request No. 17 serves a restaurant.

REQUEST NO. 19:

Thriftway has been aware of the presence of the petroleum products and gasoline vapors in the subsurface soil and ground water beneath the station since May 1986.

REQUEST NO. 20:

Thriftway knew, or should have known, of the loss of petroleum products at the station on or before February 11, 1987.

REQUEST NO. 21:

Product recovery at the site was not initiated at the site until December 15, 1986.

REQUEST NO. 22:

The exact quantity of product loss at the station is not known.

REQUEST NO. 23:

Inventory records from the station reflect losses of 2310 gallons unleaded gasoline between January 1986 and June 1986.

REQUEST NO. 24:

At some time prior to February 11, 1987, a leak occurred at

the station in a "subline" at the top the underground storage tank containing unleaded gasoline.

REQUEST NO. 25:

The underground storage tank containing unleaded gasoline at the station was repaired sometime subsequent to the leak described in Request No. 9.

REQUEST NO. 26:

The station is within the inner valley of the Rio Grande.

REQUEST NO. 27:

The groundwater in the inner valley of the Rio Grande is less than 15 feet deep.

REQUEST NO. 28:

Both residential and commercial development bound the site.

REQUEST NO. 29:

The Station has since 1980 had four (4) underground storage tanks aligned east-west at the eastern end of the facility.

REQUEST NO. 30:

Two (2) of the tanks at the Station store regular gasoline; one (1) stores unleaded gasoline; and one (1) stores diesel fuel.

REQUEST NO. 31:

The Rio Grande Valley fill is a principal water bearing unit in the Bernalillo area.

REQUEST NO. 32:

The regional water table gradient is to the southwest at approximately .0014 feet/foot.

REQUEST NO. 33:

The regional gradient is anticipated to exhibit locally altered conditions due to pumping of the recovery well at the station.

REQUEST NO. 34:

Thriftway hired Fox & Associates to perform an investigation to determine the presence and thickness of floating product on the watertable, determine the extent and magnitude of dissolved contaminants, and design a recovery system.

REQUEST NO. 35:

Based upon an estimated range of hydraulic conductivities for the Rio Grande alluvial aquifer of 200 to 1000 gallons per day per foot squared a porosity of 20% and the calculated gradient, the flow velocity at the site is estimated to range from 50 to 100 feet/year.

REQUEST NO. 36:

Gasoline compounds are mobile, and move in the direction of the groundwater gradient.

REQUEST NO. 37:

The compounds benzene and EDC are the most mobile of the gasoline compounds present at the station.

REQUEST NO. 38:

At the site the product thicknesses measured in the installed wells immediately after the Fox investigation was initiated indicate that the free floating product plume encompassed an area of approximately 10,000 square feet.

REQUEST NO. 39:

The product plume at the site surrounds the tank area and is elongated to the southwest in the direction of groundwater flow.

REQUEST NO. 40:

At the site, ten inches of free product floating on the water table was measured in monitor well 6 in September 1986.

REQUEST NO. 41:

Based upon the areal extent of the free product in September 1986 and an assumed average thickness of one (1) inch, approximately 6,000 gallons of product have been present floating

on top of the water table at the site.

REQUEST NO. 42:

The remedial action system installed at the site consists of two (2) components. These components are:

- . A free product recovery system; and
- . A dissolved phase recovery and treatment system.

REQUEST NO. 43:

The highest concentrations of hydrocarbon contamination at the site were detected on the south side of the tanks at the station, just above and below the water table.

REQUEST NO. 44:

Fuel recovered from the environment at the station has been pumped to an on-site above ground tank for storage.

REQUEST NO. 45:

Recently the tank described in Request No. 44 has been removed and product at the site is being collected in barrels.

REQUEST NO. 46:

Thriftway first attempted containment of free floating and dissolved contaminants on November 3, 1987.

on top of the water table at the site.

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- . A free product recovery system; and
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Fuel recovered from the environment at the station has been pumped to an on-site above ground tank for storage.

REQUEST NO. 45:

Recently the tank described in Request No. 44 has been removed and product at the site is being collected in barrels.

REQUEST NO. 46:

Thriftway first attempted containment of free floating and dissolved contaminants on November 3, 1987.

REQUEST NO. 47:

Until November 3, 1987, free-floating product had been skimmed with a "scavenger" pump at the station.

REQUEST NO. 48:

Thriftway placed a recovery well at the site in the fall of 1987 as part of its first attempt to contain the contamination there.

REQUEST NO. 49:

Thriftway did not in the fall of 1987 through the spring of 1988 pump sufficient quantities of water from the recovery well described in Request No. 48 to reach the downgradient edge of the plume.

REQUEST NO. 50:

Thriftway proposed the installation of a new recovery well at the site in March 1988.

REQUEST NO. 51:

In response to the proposal described in Request No. 50, the Division told Thriftway's consultant that the proposed well would not capture the entire plume and that the well design would slow cleanup at the site.

REQUEST NO. 52:

Thriftway installed the proposed well described in Request No. 50.

REQUEST NO. 53:

In February 1989, the Division and Thriftway met to discuss the reclamation system at the site.

REQUEST NO. 54:

In the meeting described in Request No. 53, the Division reiterated its concerns that the entire plume at the site was not being contained and that the system design was not cleaning up the site efficiently.

REQUEST NO. 55:

In February 1989 Thriftway agreed to redesign the system at the site.

REQUEST NO. 56:

A new reclamation system was installed at the site in April 1989.

REQUEST NO. 57:

In September 1987, the City of Bernalillo gave its permission to Thriftway to send treated water to the city's wastewater treatment plant.

REQUEST NO. 58:

As a result of delays at the site, the contamination spread beyond its original extent.

REQUEST NO. 59:

As a result of delays at the site, more free floating gasoline was allowed to dissolve into groundwater.

REQUEST NO. 60:

It is more difficult and more costly to reclaim petroleum products dissolved in groundwater than petroleum products floating on the water table.

REQUEST NO. 61:

The "Scavenger" used at the site was capable only of skimming product in the immediate vicinity of the well.

REQUEST NO. 62:

The "Scavenger" used at the site was not capable of inducing free product to move toward the recovery well.

REQUEST NO. 63:

To induce free product to flow toward a recovery well, it is necessary to depress the water table to create a depression in the water table surface into which the product flows.

REQUEST NO. 64:

When Thriftway found that a pump was broken at the site in October 1987, they did not immediately replace or repair it.

REQUEST NO. 65:

Remediation at the site ceased for approximately four (4) weeks between October 14 and November 12, 1987.

REQUEST NO. 66:

Product recovered at the site to August 1989 has totalled less than 1,000 gallons.

REQUEST NO. 67:

The attached Appendix "A" is a true and complete copy of the Hydrogeologic Investigation Report prepared by Fox and Associates for Thriftway.

REQUEST NO. 68:

The Investigation Report described in Request No. 67 was delivered to Thriftway on or about February 11, 1987.

REQUEST NO. 69:

The Commission is an administrative agency of the State of New Mexico.

REQUEST NO. 70:

The Commission is authorized to enforce the New Mexico Water Quality Act, §§74-6-1 et seq. NMSA 1978, and the Water Quality Control Commission Regulations ("WQCC Regulations") and standards promulgated by the WQCC under that Act.

REQUEST NO. 71:

The attached Exhibit "B" is a true and correct copy of the WQCC Regulation, Section 1-203 in effect from September 3, 1972 to December 24, 1987.

REQUEST NO. 72:

The attached Exhibit "C" is a true and correct copy of WQCC Regulation 1-203, following amendments, effective December 24, 1987 to the present.

REQUEST NO. 73:

The Division is a constituent agency of the Commission and is charged by law to protect the environment, and is authorized to enforce the New Mexico Hazardous Waste Act, §§74-4-1 et seq. NMSA 1978, and the Regulations adopted pursuant to that Act.

REQUEST NO. 74:

Richard Mitzelfelt is the Director of Division, and is a public officer, as defined in §30-1-12.I NMSA 1978.

REQUEST NO. 75:

Mr. Mitzelfelt authorized to bring common law public nuisance abatement actions, and to enforce the public nuisance statutes, §§30-8-1, 30-8-2 and 30-8-8 NMSA 1978.

REQUEST NO. 76:

The discharge of petroleum products from the station's leaking tanks, pumps and/or transmission lines was of such a kind and in such a quantity as may with reasonable probability injure or be detrimental to human health, animal or plant life, or property, or unreasonably interfere with the public welfare or the use of property.

REQUEST NO. 77:

Thriftway failed to notify the Chief of the Division's Ground Water Bureau (formerly the Water Pollution Control Bureau) as soon as it had notice or knowledge of the discharge from the station.

REQUEST NO. 78:

Thriftway failed to take appropriate and necessary steps to contain and remove or mitigate the damage caused by its discharge until November 3, 1987.

REQUEST NO. 79:

Thriftway knowingly and unlawfully introduced petroleum products into a body of public water, i.e., ground water, causing

it to be offensive or dangerous for human or animal consumption or use.

REQUEST NO. 80:

Thriftway has knowingly maintained a condition without lawful authority, which affects an undetermined number of citizens and which is injurious to public health and welfare.

REQUEST NO. 81:

Thriftway's actions as described above constitute a common law public nuisance, as they adversely affect public health, welfare and safety.

REQUEST NO. 82:

Reclamation of some product from a plume is not the equivalent of the containment of that plume.

REQUEST NO. 83:

A large volume loss of gasoline in an urban setting constitutes a threat to public health and the environment.

REQUEST NO. 84:

As long as gasoline lies on top of groundwater, ground water will continue to become contaminated.

REQUEST NO. 85:

EID does not receive regular or written progress reports concerning reclamation at the site from Thriftway or Thriftway's consultant.

REQUEST NO. 86:

Thriftway first completely contained the dissolved phase plume in April 1989.

Respectfully submitted,



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(505) 827-2990

Attorney for Plaintiffs

[THRFTWY.FO]

THIRTEENTH JUDICIAL DISTRICT COURT
COUNTY OF SANDOVAL
STATE OF NEW MEXICO

NEW MEXICO WATER QUALITY
CONTROL COMMISSION and
RICHARD MITZELFELT, DIRECTOR
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DIVISION of the NEW MEXICO HEALTH
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Plaintiffs,

vs.

No. SD-88-131-CV


THRIFTWAY MARKETING CORPORATION,

Defendant.

CERTIFICATE OF SERVICE

I hereby certify that the Plaintiffs' Requests for Admission
was mailed on this 29th day of August, 1989 to the following:

James B. Collins
Miller, Stratvert, Torgerson
and Schlenker, P.A.
Post Office Box 869
Farmington, New Mexico 87499


FELICIA L. ORTH
Special Assistant Attorney General
Assistant General Counsel
Office of General Counsel
1190 St. Francis Drive
Santa Fe, New Mexico 87503
(505) 827-2990

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I hereby certify that copy the foregoing Certificate of Service was mailed on this 29th day of August, 1989 to the following:

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Felicia L. Orth
FELICIA L. ORTH



FOX & ASSOCIATES OF NEW MEXICO, INC.

CONSULTING ENGINEERS AND GEOLOGISTS

ALBUQUERQUE OFFICE 3412 BRYN MAWR DRIVE, NE
ALBUQUERQUE, NEW MEXICO 87107
(505) 884-0900

HYDROGEOLOGIC INVESTIGATION

PLATEAU STATION NO. 168

BERNALILLO, NEW MEXICO

Prepared for:

Thriftway Marketing Corporation

Job No: 0119810

February 11, 1987

EXHIBIT "A"

NEW MEXICO
WATER QUALITY CONTROL COMMISSION REGULATIONS
AS AMENDED THROUGH JUNE 18, 1986

EXHIBIT "B"

C. Plans and specifications required to be filed under this section must be filed prior to the commencement of construction.

1-203. NOTIFICATION OF DISCHARGE--REMOVAL.

A. Any person in charge of a facility, as soon as he has notice or knowledge of a discharge from the facility, of oil or other water contaminant, in such quantity as may with reasonable probability injure or be detrimental to human health, animal or plant life, or property, or unreasonably interfere with the public welfare or the use of property, shall immediately:

1. notify the chief, Water Pollution Control Bureau, Environmental Improvement Division, of the nature, amount and location of the discharge; provided, however, that such notification shall not be required if notification is required under rules, regulations or orders promulgated by the Oil Conservation Commission; and

2. take appropriate and necessary steps to contain and remove or mitigate the damage caused by the discharge.

B. Exempt from the requirements of this section are continuous or periodic discharges which are made:

1. in conformance with water quality control commission regulations and rules, regulations or orders of other state or federal agencies; or

2. in violation of water quality control commission regulations but pursuant to an assurance of discontinuance or schedule of compliance approved by the commission or one of its duly authorized constituent agencies.

C. As used in this section:

1. "discharge" means spilling, leaking, pumping, pouring, emitting, emptying, or dumping into water or in a location and manner where there is a reasonable probability that the discharged substance will reach surface or subsurface water;

2. "facility" means any structure, installation, operation, storage tank, transmission line, motor vehicle, rolling stock, or activity of any kind, whether stationary or mobile; and

3. "oil" means oil of any kind or in any form including petroleum, fuel oil, sludge, oil refuse and oil mixed with wastes.

D. Notification of discharge received pursuant to this regulation or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except for perjury or for giving a false statement.

1-210. VARIANCE PETITIONS.

A. Any person seeking a variance from a regulation of the commission pursuant to Section 74-6-4(G) NMSA 1978, shall do so by filing a written petition with the commission. The petitioner may submit with his petition any relevant documents or material which the petitioner believes would support his petition. Petitions shall:

1. state the petitioner's name and address;
2. state the date of the petition;
3. describe the facility or activity for which the variance is sought;
4. state the address or description of the property upon which the facility is located;
5. describe the water body or watercourse affected by the discharge;
6. identify the regulation of the commission from which the variance is sought;
7. state in detail the extent to which the petitioner wishes to vary from the regulation;
8. state why the petitioner believes that compliance with the regulation will impose an unreasonable burden upon his activity; and
9. state the period of time for which the variance is desired.

NEW MEXICO
WATER QUALITY CONTROL COMMISSION REGULATIONS
AS AMENDED THROUGH DECEMBER 24, 1987

EXHIBIT "C"

C. Plans and specifications required to be filed under this section must be filed prior to the commencement of construction.

1-203. NOTIFICATION OF DISCHARGE--REMOVAL.

A. With respect to any discharge from any facility of oil or other water contaminant, in such quantity as may with reasonable probability injure or be detrimental to human health, animal or plant life, or property, or unreasonably interfere with the public welfare or the use of property, the following notifications and corrective actions are required;

1. As soon as possible after learning of such a discharge, but in no event more than twenty-four (24) hours thereafter, any person in charge of the facility shall orally notify the Chief, Ground Water Bureau, Environmental Improvement Division, or his counterpart in any constituent agency delegated responsibility for enforcement of these rules as to any facility subject to such delegation. To the best of that person's knowledge, the following items of information shall be provided:

- a. the name, address, and telephone number of the person or persons in charge of the facility, as well as of the owner and/or operator of the facility;
- b. the name and address of the facility;
- c. the date, time, location, and duration of the discharge;
- d. the source and cause of discharge;
- e. a description of the discharge, including its chemical composition;
- f. the estimated volume of discharge; and
- g. any actions taken to mitigate immediate damage from the discharge.

2. When in doubt as to which agency to notify, the person in charge of the facility shall notify the Chief,

effective Nov. 24, 1982

Ground Water Bureau, Environmental Improvement Division. If that division does not have authority pursuant to Commission delegation, the division shall notify the appropriate constituent agency.

3. Within one week after the discharger has learned of the discharge, the facility owner and/or operator shall send written notification to the same division official, verifying the prior oral notification as to each of the foregoing items and providing any appropriate additions or corrections to the information contained in the prior oral notification.

4. The oral and written notification and reporting requirements contained in the three preceding paragraphs and the paragraphs below are not intended to be duplicative of discharge notification and reporting requirements promulgated by the Oil Conservation Commission (OCC) or by the Oil Conservation Division (OCD); therefore, any facility which is subject to OCC or OCD discharge notification and reporting requirements need not additionally comply with the notification and reporting requirements herein.

5. As soon as possible after learning of such a discharge, the owner/operator of the facility shall take such corrective actions as are necessary or appropriate to contain and remove or mitigate the damage caused by the discharge.

6. If it is possible to do so without unduly delaying needed corrective actions, the facility owner/operator shall endeavor to contact and consult with the Chief, Ground Water Bureau, Environmental Improvement Division or appropriate counterpart in a delegated agency, in an effort to determine the division's views as to what further corrective actions may be necessary or appropriate to the discharge in question. In any event, no later than fifteen (15) days after the discharger learns of the discharge, the facility owner/operator shall send to said Bureau Chief a written report describing any corrective actions taken and/or to be taken relative to the discharge. Upon a written request and for good cause shown, the Bureau Chief may extend the time limit beyond fifteen (15) days.

7. The Bureau Chief shall approve or disapprove in writing the foregoing corrective action report within thirty (30) days of its receipt by the division. In the event that the report is not satisfactory to the division, the Bureau Chief shall specify in writing to the facility owner/operator any shortcomings in the report or in the corrective actions already taken or proposed to be taken relative to the discharge, and shall give the facility owner/operator a reasonable and clearly specified time within which to submit a modified corrective action report. The Bureau Chief shall

approve or disapprove in writing the modified corrective action report within fifteen (15) days of its receipt by the division.

8. In the event that the modified corrective action report also is unsatisfactory to the division, the facility owner/operator has five (5) days from the notification by the Bureau Chief that it is unsatisfactory to appeal to the division director. The division director shall approve or disapprove the modified corrective action report within five (5) days of receipt of the appeal from the Bureau Chief's decision. In the absence of either corrective action consistent with the approved corrective action report or with the decision of the director concerning the shortcomings of the modified corrective action report, the division may take whatever enforcement or legal action it deems necessary or appropriate.

B. Exempt from the requirements of this section are continuous or periodic discharges which are made:

1. in conformance with water quality control commission regulations and rules, regulations or orders of other state or federal agencies; or

2. in violation of water quality control commission regulations but pursuant to an assurance of discontinuance or schedule of compliance approved by the commission or one of its duly authorized constituent agencies.

C. As used in this section:

1. "discharge" means spilling, leaking, pumping, pouring, emitting, emptying, or dumping into water or in a location and manner where there is a reasonable probability that the discharged substance will reach surface or subsurface water;

2. "facility" means any structure, installation, operation, storage tank, transmission line, motor vehicle, rolling stock, or activity of any kind, whether stationary or mobile;

3. "oil" means oil of any kind or in any form including petroleum, fuel oil, sludge, oil refuse and oil mixed with wastes.

4. "operator" means the person or persons responsible for the overall operation of a facility; and

5. "owner" means the person or persons who own a facility, or part of a facility.

D. Notification of discharge received pursuant to this regulation or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except for perjury or for giving a false statement.

1-210. VARIANCE PETITIONS.

A. Any person seeking a variance from a regulation of the commission pursuant to Section 74-6-4 (G) NMSA 1978, shall do so by filing a written petition with the commission. The petitioner may submit with his petition any relevant documents or material which the petitioner believes would support his petition. Petitions shall:

1. state the petitioner's name and address;
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4. state the address or description of the property upon which the facility is located;
5. describe the water body or watercourse affected by the discharge;
6. identify the regulation of the commission from which the variance is sought;
7. state in detail the extent to which the petitioner wishes to vary from the regulation;
8. state why the petitioner believes that compliance with the regulation will impose an unreasonable burden upon his activity; and
9. state the period of time for which the variance is desired.

NEW MEXICO
WATER QUALITY CONTROL COMMISSION REGULATIONS
AS AMENDED THROUGH NOVEMBER 25, 1988

EXHIBIT "D"

PART 3

Water Quality Control

3-100. REGULATIONS FOR DISCHARGES ONTO OR BELOW THE SURFACE OF THE GROUND.

3-101. PURPOSE.

A. The purpose of these regulations controlling discharges onto or below the surface of the ground is to protect all ground water of the state of New Mexico which has an existing concentration of 10,000 mg/l or less TDS, for present and potential future use as domestic and agricultural water supply, and to protect those segments of surface waters which are gaining because of ground water inflow, for uses designated in the New Mexico Water Quality Standards. The regulations are written so that in general:

1. if the existing concentration of any water contaminant in ground water is in conformance with the standard of Section 3-103 of these regulations, degradation of the ground water up to the limit of the standard will be allowed; and

2. if the existing concentration of any water contaminant in ground water exceeds the standard of Section 3-103, no degradation of the ground water beyond the existing concentration will be allowed.

B. Ground water standards are numbers that represent the pH range and maximum concentrations of water contaminants in the ground water which still allow for the present and future use of ground water resources.

C. The standards are not intended as maximum ranges and concentrations for use, and nothing herein contained shall be construed as limiting the use of waters containing higher ranges and concentrations.

3-102. AUTHORITY.--Standards are adopted by the commission under the authority of Section 74-6-4, NMSA 1978 (the New Mexico Water Quality Act, Chapter 326, Laws of 1973, as amended). Regulations are adopted by the commission under the authority of Sections 74-6-4 and 74-6-5 NMSA 1978.

3-103. STANDARDS FOR GROUND WATER OF 10,000 mg/l TDS CONCENTRATION OR LESS.--The following standards are the allowable pH

range and the maximum allowable concentration in ground water for the contaminants specified unless the existing condition exceeds the standard or unless otherwise provided in Subsection 3-109.D. or Section 3-110. Regardless of whether there is one contaminant or more than one contaminant present in ground water, when an existing pH or concentration of any water contaminant exceeds the standard specified in Subsection A, B, or C, the existing pH or concentration shall be the allowable limit, provided that the discharge at such concentrations will not result in concentrations at any place of withdrawal for present or reasonably foreseeable future use in excess of the standards of this section.

These standards shall apply to the dissolved portion of the contaminants specified with a definition of dissolved being that given in the publication "Methods for Chemical Analysis of Water and Waste of the U.S. Environmental Protection Agency," with the exception that standards for mercury and the organic compounds shall apply to the total unfiltered concentrations of the contaminants.

A. Human Health Standards-Ground water shall meet the standards of Section A and B unless otherwise provided. If more than one water contaminant affecting human health is present, the toxic pollutant criteria of Section 1-101.UU. for the combination of contaminants, or the Human Health Standard of Section 3-103.A. for each contaminant shall apply, whichever is more stringent.

Arsenic (As)	0.1 mg/l
Barium (Ba)	1.0 mg/l
Cadmium (Cd)	0.01 mg/l
Chromium (Cr)	0.05 mg/l
Cyanide (CN)	0.2 mg/l
Fluoride (F)	1.6 mg/l
Lead (Pb)	0.05 mg/l
Total Mercury (Hg)	0.002 mg/l
Nitrate (NO ₃ as N)	10.0 mg/l
Selenium (Se)	0.05 mg/l
Silver (Ag)	0.05 mg/l
Uranium (U)	5.0 mg/l
Radioactivity: Combined	
Radium-226 and Radium-228	30.0 pCi/l
Benzene	0.01 mg/l
Polychlorinated biphenyls (PCB's)	0.001 mg/l
Toluene	0.75 mg/l
Carbon Tetrachloride	0.01 mg/l
1,2-dichloroethane (EDC)	0.01 mg/l
1,1-dichloroethylene (1, 1-DCE)	0.005 mg/l
1,1,2, 2-tetrachloroethylene (PCE)	0.02 mg/l
1,1, 2-trichloroethylene (TCE)	0.1 mg/l

ethylbenzene	0.75 mg/l
total xylenes	0.62 mg/l
methylene chloride	0.1 mg/l
chloroform	0.1 mg/l
1,1-dichloroethane	0.025 mg/l
ethylene dibromide (EDB)	0.0001 mg/l
1,1,1-trichloroethane	0.06 mg/l
1,1,2-trichloroethane	0.01 mg/l
1,1,2,2-tetrachloroethane	0.01 mg/l
vinyl chloride	0.001 mg/l
PAHs: total naphthalene plus	
monomethylnaphthalenes	0.03 mg/l
benzo-a-pyrene	0.0007 mg/l

B. Other Standards for Domestic Water Supply

Chloride (Cl)	250. mg/l
Copper (Cu)	1.0 mg/l
Iron (Fe)	1.0 mg/l
Manganese (Mn)	0.2 mg/l
Phenols	0.005 mg/l
Sulfate (SO ₄)	600. mg/l
Total Dissolved Solids (TDS)	1000. mg/l
Zinc (Zn)	10.0 mg/l
pH	between 6 and 9

C. Standards for Irrigation Use - Ground water shall meet the standards of subsections A, B, and C unless otherwise provided.

Aluminum (Al)	5.0 mg/l
Boron (B)	0.75 mg/l
Cobalt (Co)	0.05 mg/l
Molybdenum (Mo)	1.0 mg/l
Nickel (Ni)	0.2 mg/l

THIRTEENTH JUDICIAL DISTRICT COURT
COUNTY OF SANDOVAL
STATE OF NEW MEXICO

NEW MEXICO WATER QUALITY
CONTROL COMMISSION and
RICHARD MITZELFELT, DIRECTOR
of the ENVIRONMENTAL IMPROVEMENT
DIVISION of the NEW MEXICO HEALTH
AND ENVIRONMENT DEPARTMENT,

Plaintiffs,

vs.

No. SD-88-131-CV

THRIFTWAY MARKETING CORPORATION,

Defendant.

PLAINTIFFS' INTERROGATORIES TO DEFENDANT

Plaintiffs New Mexico Water Quality Control Commission ("Commission") and Richard Mitzelfelt, Director of the Environmental Improvement Division of the New Mexico Health and Environment Department ("Division"), hereby request, in accordance with SCRA 1986, Rule 1-033, that Defendant Thriftway Marketing Corporation ("Thriftway") answer under oath the following interrogatories within thirty (30) days of service.

The "Plateau" self service gasoline station (No. 168) owned and operated by Thriftway and located on Highway 44 in Bernalillo, Sandoval County, New Mexico, west of the intersection of Highway 114 and Highway 313, will be referred to as "the station" and "the site" in the following interrogatories. "Containment" is defined as the hydraulic or chemical control of a contaminant plume such that it does not spread.

INTERROGATORY NO. 1:

Please state all facts which you intend to use at trial in support of your Second Affirmative Defense in your answer to the Plaintiffs' Complaint.

INTERROGATORY NO. 2:

Please state all facts which you intend to use at trial in support of your Third Affirmative Defense in your answer to the Plaintiffs' Complaint.

INTERROGATORY NO. 3:

Please state all facts which you intend to use at trial in support of your Fourth Affirmative Defense in your answer to the Plaintiffs' Complaint.

INTERROGATORY NO. 4:

Please state all facts which you intend to use at trial in support of your Sixth Affirmative Defense in your answer to the Plaintiffs' Complaint.

INTERROGATORY NO. 5:

Please state all facts which you intend to use at trial in support of your Eighth Affirmative Defense in your answer to the Plaintiffs' Complaint.

INTERROGATORY NO. 6:

Please state all facts which you intend to use at trial in support of your Tenth Affirmative Defense in your answer to the Plaintiffs' Complaint.

INTERROGATORY NO. 7:

Please state all facts which you intend to use at trial in support of your Eleventh Affirmative Defense in your answer to the Plaintiffs' Complaint.

INTERROGATORY NO. 8:

Please state all facts which you intend to use at trial in support of your Twelfth Affirmative Defense in your answer to the Plaintiffs' Complaint.

INTERROGATORY NO. 9:

List the names, phone numbers and addresses of any and all witnesses you will call or may call at trial.

INTERROGATORY NO. 10:

With regard to all persons listed in your answer to Interrogatory No. 9, briefly summarize the substance of their anticipated testimony.

INTERROGATORY NO. 11:

Do you intend to call any expert witnesses at trial? If so, please state:

- a. the name, address and telephone number of the expert;
- b. the subject matter to which the expert is expected to testify;
- c. the substance of the facts and opinions to which the expert is expected to testify; and
- d. a summary of the grounds for each opinion of the expert.

INTERROGATORY NO. 12:

Do you expect to introduce as an exhibit at trial any document that has not previously been produced to the plaintiffs? If so, please list and describe each document.

INTERROGATORY NO. 13:

Please identify all persons in the corporation whose duties include the creation, possession, analysis, control or custody of inventory records for Thriftway's underground storage tanks at the station.

INTERROGATORY NO. 14:

Please state the date when Thriftway was provided with the results of the environmental investigation performed at the station in the spring of 1986.

INTERROGATORY NO. 15:

Please state the date when Thriftway first informed the Division of the contamination revealed by the investigation described in Interrogatory No. 14.

INTERROGATORY NO. 16:

Please state the date when product recovery at the site was first initiated, and the method of that product recovery.

INTERROGATORY NO. 17:

Please state the date and manner of any repair since January 1, 1987 of the underground storage tank containing unleaded gasoline at the station, and the name of the persons performing the repair.

INTERROGATORY NO. 18:

Please state the number of gallons of gasoline that have been recovered at the site.

INTERROGATORY NO. 19:

Please state the earliest date of containment of the free floating product plume at the site.

INTERROGATORY NO. 20:

Please state the earliest date of containment of the dissolved phase plume at the site.

INTERROGATORY NO. 21:

Please state the currently existing areal extent of the free floating and dissolved phase plumes at the site.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Felicia L. Orth", is written over a horizontal line.

Felicia L. Orth
Special Assistant Attorney General
Assistant General Counsel
Office of General Counsel
Health and Environment Department
1190 St. Francis Drive
Santa Fe, New Mexico 87503
(505) 827-2990

THIRTEENTH JUDICIAL DISTRICT COURT
COUNTY OF SANDOVAL
STATE OF NEW MEXICO

NEW MEXICO WATER QUALITY
CONTROL COMMISSION and
RICHARD MITZELFELT, DIRECTOR
of the ENVIRONMENTAL IMPROVEMENT
DIVISION of the NEW MEXICO HEALTH
and ENVIRONMENT DEPARTMENT,

Plaintiffs,

vs.

No. SD-88-131-CV

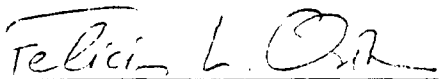
THRIFTWAY MARKETING CORPORATION,

Defendant.

CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of Plaintiffs' Interrogatories to Defendant was mailed on this 29th day of August, 1989 to the following:

James B. Collins
Miller, Stratvert, Torgerson
and Schlenker, P.A.
Post Office Box 869
Farmington, New Mexico 87499



FELICIA L. ORTH
Special Assistant Attorney General
Assistant General Counsel
Office of General Counsel
1190 St. Francis Drive
Santa Fe, New Mexico 87503
(505) 827-2990

CERTIFICATE OF SERVICE

I hereby certify that copy the foregoing Certificate of
ce was mailed on this 29th day of August, 1989 to the
wing:

James B. Collins
Miller, Stratvert, Torgerson
and Schlenker, P.A.
Post Office Box 869
Farmington, New Mexico 87499

Felicia L. Orth
FELICIA L. ORTH

THIRTEENTH JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANDOVAL

NEW MEXICO WATER QUALITY
CONTROL COMMISSION and
MICHAEL J. BURKHART, DIRECTOR
of the ENVIRONMENTAL IMPROVEMENT
DIVISION of the NEW MEXICO HEALTH
AND ENVIRONMENT DEPARTMENT

Plaintiffs,

vs.

THRIFTWAY MARKETING CORPORATION,

Defendant.

No. _____

SD-28-100-0V

COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF

The Plaintiffs, New Mexico Water Quality Control Commission ("WQCC") and Michael J. Burkhardt, Director of the Environmental Improvement Division of the New Mexico Health and Environment Department ("Director") state:

1. The WQCC is an administrative agency of the State of New Mexico and is authorized to enforce the New Mexico Water Quality Act, §§74-6-1 et seq. NMSA 1978, and the Water Quality Control Commission Regulations ("Regulations") and standards promulgated by the WQCC under that Act. The Environmental Improvement Division of the Health and Environment Department ("EID") is a constituent agency of the WQCC and is charged by law to protect the environment, and is authorized to enforce the New Mexico Hazardous Waste Act, §§74-4-1 et seq. NMSA 1978, and the Regulations adopted pursuant to that Act. Michael J. Burkhardt is the Director of EID, and is a public officer, as

defined in §30-1-12.I NMSA 1978, and is thus authorized to bring common law public nuisance abatement actions, and to enforce the public nuisance statutes, §§30-8-1, 30-8-2 and 30-8-8 NMSA 1978.

2. Defendant Thriftway Marketing Corporation ("Thriftway") is a New Mexico corporation. Its registered agent is Jerry Clayton, 710 East 20th, Farmington, New Mexico, 87401.

3. Thriftway owns and operates a "Plateau" gasoline station ("the station"), located on Highway 44 in Bernalillo, Sandoval County, New Mexico, slightly west of the intersection of Highway 44 and Highway 313. Thriftway owns, maintains and operates pumps, underground storage tanks and transmission lines, used for the storage, supply and sale of gasoline, at the station.

4. For an unknown period of time prior to February 11, 1987, gasoline product leaked from a gasoline supply "subline" or other portion of the station's underground gasoline storage, supply and sale system.

5. In the Spring of 1986, Thriftway considered selling the station, and a prospective buyer hired a consultant to perform an investigation of the station.

6. The investigation was completed in May, 1986, and indicated that the soil at the station adjacent to the underground storage tanks on the east and south was contaminated with hydrocarbons, (major constituents of petroleum products).

7. Upon information and belief, Thriftway was aware of the results of this investigation in May, 1986.

8. Thriftway did not inform the Ground Water Bureau of

the EID of the contamination revealed by the investigation until July 22, 1986.

9. The gasoline lost at the station has caused the soil and ground water underlying the station and in proximity thereto, to become contaminated with petroleum products, dissolved petroleum constituents and petroleum vapors.

10. The gasoline lost at the station contains numerous chemical compounds which are toxic, carcinogenic, teratogenic and mutagenic, and may otherwise be injurious to public health and safety, and animal and plant life.

11. There is a drinking water supply well located on property adjacent to the station. This well serves a Pizza Hut restaurant.

12. The drinking water supply well is threatened by the petroleum contamination from the station because it is adjacent to the area of ground-water contamination.

13. Thriftway is aware of the presence of the petroleum products and gasoline vapors in the subsurface soil and ground water beneath the station.

14. Upon information and belief, at all times relevant to this Complaint, Thriftway knew, or should have known, of the loss of petroleum products at the station.

15. The WQCC and the Director have satisfied all conditions precedent for the filing of this lawsuit.

FIRST CLAIM

16. The WQCC incorporates by reference paragraph 1 through 15.

17. The discharge and loss of petroleum products from the station's leaking tanks, pumps and/or transmission lines was of such a kind and in such a quantity as may with reasonable probability injure or be detrimental to human health, animal or plant life, or property, or unreasonably interfere with the public welfare or the use of property.

18. Thriftway failed to notify the Chief of EID's Ground Water Bureau (formerly the Water Pollution Control Bureau) as soon as it had notice or knowledge of the losses and discharges from the station, as is required by §1-203 of the WQCC Regulations.

19. Thriftway's failure to timely notify EID constitutes a violation of §1-203 of the WQCC Regulations, and Thriftway is liable, pursuant to Section 74-6-10.B NMSA 1978, for a civil penalty of up to \$1,000.00 per day for each day it failed to notify the Chief of EID's Ground Water Bureau of the discharge, from the time Thriftway knew or should have known of the discharge and loss.

SECOND CLAIM

20. The WQCC incorporates by reference paragraph 1 through 15, and paragraph 17.

21. Thriftway has failed to take appropriate and necessary steps to contain and remove or mitigate the damage caused by its discharge as required by §1-203 of the WQCC Regulations.

22. Thriftway's failure to contain and remove or mitigate the damage caused by the discharge constitutes a violation of §1-203 of the WQCC Regulations, and Thriftway is liable,

pursuant to §74-6-10.B NMSA 1978, for a civil penalty of up \$1,000.00 per day for each day it failed and continues to fail to comply with §1-203 of the WQCC Regulations.

23. In addition, it would be appropriate and necessary for this Court to enter a permanent injunction, pursuant to §74-6-10.A NMSA 1978, requiring Thriftway to contain and remove or mitigate the damage caused by its discharge.

24. The WQCC and the public will be irreparably harmed, damaged, and injured unless a permanent injunction is entered in this case.

THIRD CLAIM

25. The Director incorporates by reference paragraphs 1 through 15.

26. Thriftway knowingly and unlawfully introduced petroleum products into a body of public water, i.e., ground water, causing it to be offensive or dangerous for human or animal consumption or use.

27. Thriftway's conduct as described in paragraph 26 constitutes the public nuisance of "polluting water" as defined by §30-8-2 NMSA 1978.

28. It is appropriate and necessary for this Court to enter a permanent injunction pursuant to §30-8-8 NMSA 1978 requiring Thriftway to abate the public nuisance described in paragraph 26 above.

29. The Director and the public will be irreparably harmed, damaged, and injured unless a permanent injunction is entered in this case.

FOURTH CLAIM

30. The Director incorporates by reference paragraphs 1 through 15, and paragraph 26.

31. Thriftway has knowingly maintained and is maintaining a condition, described in paragraph 26, without lawful authority, which affects an undetermined number of citizens and which is injurious to public health and welfare.

32. Thriftway's conduct constitutes the maintenance of a public nuisance within the meaning of §30-8-1 NMSA 1978.

33. It is appropriate and necessary for this Court to enter a permanent injunction pursuant to §30-8-8 NMSA 1978 requiring Thriftway to abate the public nuisance described in paragraph 26.

34. The Director and the public will be irreparably harmed, damaged, and injured unless a permanent injunction is entered in this case.

FIFTH CLAIM

35. The Director incorporates by reference paragraphs 1 through 15.

36. Thriftway's actions as described above constitute a common law public nuisance, as they adversely affect public health, welfare and safety.

37. The public nuisance created by Thriftway's actions is continuing in nature, by Thriftway's failure to abate it.

38. The Director has no adequate remedy at law for the harm, damage, and injury caused by the loss of petroleum products at the station.

39. The Director and the public will be irreparably harmed, damaged, and injured unless a permanent injunction is entered in this case requiring Thriftway to abate the common law public nuisance described herein.

SIXTH CLAIM

40. The Director incorporates by reference paragraphs 1 through 15.

41. The loss of petroleum products from the station constitutes a "hazardous substance incident" as defined by §102.A.42 of the New Mexico Hazardous Waste Management Regulations and by §74-4-3.G NMSA 1978.

42. Thriftway violated §402 of the New Mexico Hazardous Waste Management Regulations by failing to report the hazardous substance incident to EID as soon as it had notice or knowledge of it, and by failing to file a written description of the incident within seventy-two hours of the incident.

43. Thriftway is liable, pursuant to §74-4-12.A NMSA 1978, for a civil penalty of up to \$10,000.00 for each day it failed to comply with §402 of the New Mexico Hazardous Waste Management Regulations, from the time Thriftway knew or should have known of the hazardous substance incident.

SEVENTH CLAIM

44. The Director incorporates by reference paragraphs 1 through 15 and paragraph 41.

45. Thriftway has failed to employ its best efforts to effect a prompt and thorough cleanup of the hazardous substance incident described in paragraph 41, as is required by §403.a of

the New Mexico Hazardous Waste Management Regulations.

46. Thriftway's failure to effect a prompt and thorough cleanup of the hazardous substance incident constitutes a violation of §403.a of the New Mexico Hazardous Waste Management Regulations, and Thriftway is liable, pursuant to §74-4-12.A NMSA 1978, for civil penalties of up to \$10,000.00 for each day it failed to comply with §403.a of the New Mexico Hazardous Waste Management Regulations.

47. In addition, it is appropriate and necessary for this Court to issue a permanent injunction, pursuant to §74-4-10.A NMSA 1978, requiring Thriftway to clean up the hazardous substance incident described in paragraph 41.

PRAYER FOR RELIEF

WHEREFORE, the WQCC and the Director request that this Court grant the following relief:

1. On Plaintiff WQCC's first claim, assess a civil penalty, pursuant to §74-6-10.B NMSA 1978, of \$1,000.00 per day for each day Thriftway was in violation of §1-203.A of WQCC Regulations.

2. On Plaintiff WQCC's second claim, assess a civil penalty, pursuant to §74-6-10.B NMSA 1978, of \$1,000.00 per day for each day Thriftway was in violation of §1-203.B of the WQCC Regulations, and enter a permanent injunction requiring Thriftway to take all appropriate and necessary steps to contain and remove or mitigate the damage caused by its discharge.

3. On Plaintiff Director's third, fourth and fifth claims, enter a permanent injunction requiring Thriftway to

abate the public nuisance that Thriftway has created and maintained.

4. On Plaintiff Director's sixth claim, pursuant to §74-4-12.A NMSA 1978, assess a civil penalty of \$10,000.00 per day for each day Thriftway was in violation of §402 of the New Mexico Hazardous Waste Management Regulations.

5. On Plaintiff Director's seventh claim, pursuant to §74-4-12.A NMSA 1978, assess a civil penalty of \$10,000.00 per day for each day Thriftway was in violation of §403.a of the New Mexico Hazardous Waste Management Regulations, and enter a permanent injunction requiring Thriftway to clean up the hazardous substance incident as is required by §403.a of the New Mexico Hazardous Waste Management Regulations.

6. The costs of bringing this action, including the filing fee to be paid to the Clerk of the Court, pursuant to §34-6-40.1 NMSA 1978.

7. Any other relief the Court deems just and proper.



Patrick J. Anderson
Special Assistant Attorney General
Assistant General Counsel



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SIXTH JUDICIAL DISTRICT COURT
COUNTY OF GRANT
STATE OF NEW MEXICO

NEW MEXICO WATER QUALITY
CONTROL COMMISSION and the
ENVIRONMENTAL IMPROVEMENT DIVISION
of the NEW MEXICO HEALTH and
ENVIRONMENT DEPARTMENT,

Plaintiffs,

vs.

No. _____

PHELPS DODGE CHINO, INC.
d/b/a CHINO MINES COMPANY,

Defendant.

COMPLAINT FOR CIVIL PENALTIES
AND OTHER RELIEF

Plaintiffs New Mexico Water Quality Control Commission ("WQCC") and the Environmental Improvement Division of the New Mexico Health and Environment Department ("EID"), for their complaint, state:

INTRODUCTION

1. The WQCC brings this action for injunctive relief and civil penalties against Defendant Phelps Dodge Chino, Inc. ("Phelps Dodge") to enforce the Water Quality Act, Sections 74-6-1 et seq. NMSA 1978, and the regulations adopted thereunder. The EID brings this action to collect the money due and owing for Phelps Dodge's violation of a Settlement Agreement between the parties.

PARTIES

2. The WQCC is an administrative agency of the State of New Mexico and is authorized by law to administer and enforce the Water Quality Act, Sections 74-6-1 et seq. NMSA 1978, and the regulations and standards promulgated thereunder, to prevent or abate water pollution.

3. The EID is an administrative agency of the State of New Mexico, created by the Health and Environment Department Act, Section 9-7-4.C NMSA 1978, and is a constituent agency of the WQCC.

4. Phelps Dodge is a Delaware corporation doing business in New Mexico. Phelps Dodge owns and operates a large copper mine, copper smelter, and other related facilities, known as Chino Mines Company, near Hurley, New Mexico. Phelps Dodge's registered agent is C.T. Corporation System, located at 217 W. Manhattan Ave., Santa Fe, New Mexico, 87501.

FIRST CLAIM FOR RELIEF

5. Upon information and belief, during September, 1987 Phelps Dodge began construction of a new solvent extraction-electrowinning ("SX/EW") plant near its copper mine in Hurley.

6. The SX/EW plant extracts copper from solution by using organic chemical reagents, and plates the copper on sheets using an electric current. A pregnant leach solution ("PLS") carrying copper is piped to the plant from nearby leach dumps. The PLS is held in a 1.4 million gallon pond, lined with 80-mil high density polyethylene.

7. Phelps Dodge uses kerosene (Orfom SX-7), an organic

reagent (ACORGA M5640, an alkyl hydroxy aryl aldoxime based composition in a hydrocarbon solvent), and cobalt sulfate heptahydrate in the plant as reagents in part of the process. Although the reagents are generally recirculated within the plant, low concentrations are discharged from the plant as part of the barren leach solution or raffinate. The raffinate is discharged to a 2.3 million gallon capacity holding pond. The raffinate pond, like the PLS pond, is lined with 80-mil high density polyethylene. Raffinate is then pumped from the pond back to the leach dumps. Phelps Dodge also uses sulfuric acid as part of the extraction process. The sulfuric acid is used to control pH. Additional sulfuric acid is added to the raffinate to lower the pH before the raffinate is recirculated to leach dumps near the plant.

8. The raffinate solution contains between approximately 21.7 mg/l and 80.0 mg/l of kerosene, which contains naphthalene and other water contaminants. Tests of the raffinate shows that the raffinate contains naphthalene at 0.125 mg/l, toluene, and ethylbenzene. Naphthalene, toluene, and ethylbenzene are "water contaminants" within the meaning of Section 74-6-2.A NMSA 1978 and WQCC Reg. 1-101.BBB. The concentration of naphthalene exceeds the WQCC's ground water standard contained in WQCC Reg. 3-103.

9. In addition to the organic chemicals listed above, the raffinate contains aluminum, cobalt, copper, iron, manganese, nickel, sulfate, total dissolved solids (TDS), and zinc. Each of these inorganic chemicals is present in concentrations in excess of the WQCC's ground water standards contained in WQCC Reg. 3-103,

and is a "water contaminant" within the meaning of Section 74-6-2.A, supra and WQCC Reg. 1-101.BBB.

10. WQCC Reg. 3-104 provides:

Unless otherwise provided by [the WQCC] regulations no person shall cause or allow effluent or leachate to discharge so that it may move directly or indirectly into ground water unless he is discharging pursuant to a discharge plan approved by the director [of the EID].

11. WQCC Reg. 3-106.B requires that "[a]ny person who intends to begin, after [June 18, 1977], discharging any of the water contaminants listed in [WQCC Reg] 3-103 or any toxic pollutant so that they may move directly or indirectly into ground water shall notify the director [of the EID] giving the information enumerated in [WQCC Reg] 1-201.B. "Within sixty (60) days after receipt of the notice, the director", pursuant to WQCC 3-106, is required to notify the person "if a discharge plan is required."

12. Under the regulations, the discharger may seek review of the director's determination that a discharge plan is required, by filing a notice of appeal with the WQCC within thirty (30) days of receiving the director's determination. WQCC Reg. 3-112.B.

13. The effluent from the SX/EW plant described above contains water contaminants listed in WQCC Reg. 3-103 and is discharged so that it may move directly or indirectly into ground water.

14. On July 8, 1988, Phelps Dodge submitted flow information concerning the SX/EW plant to EID. On July 18, 1988, Phelps Dodge submitted water quality and locational data. By letter dated July

21, 1988, EID notified Phelps Dodge that EID considered the July 8 and July 18 correspondence as constituting Phelps Dodge's notice of intent to discharge, as required by WQCC Reg. 1-201.B and that based on the information, a discharge plan was required for the SX/EW plant. A true and correct copy of the letter is attached as Exhibit A to this complaint. The July 21, 1988 letter gave Phelps Dodge until November 19, 1988 to obtain an approved discharge plan, during which time EID would not bring an action against Phelps Dodge for violating the Water Quality Act and regulations.

15. By letter dated August 1, 1988, Phelps Dodge advised the EID that it did not agree with EID's determination that a discharge plan was required for the discharges from the SX/EW plant, but would "voluntarily" submit a discharge plan application. A true and correct copy of the letter is attached on Exhibit B to this Complaint.

16. On December 1, 1989 EID approved a discharge plan for the SX/EW plant. Therefore, since at least July, 1988 until December 1, 1989 Phelps Dodge discharged effluent from the SX/EW plant, without having obtained an approved discharge plan for those discharges.

17. By discharging from the SX/EW plant, without an approved discharge plan, Phelps Dodge violated WQCC Reg. 3-104 and the Water Quality Act, Sections 74-6-1 et seq. NMSA 1978.

18. The WQCC is entitled to seek civil penalties from Phelps Dodge, pursuant to Section 74-6-5.P NMSA 1978, of \$5,000 and, pursuant to Section 74-6-10.B NMSA 1978, of \$1,000 per day for each

violation of WQCC Reg. 3-104.

SECOND CLAIM FOR RELIEF

19. WQCC Reg. 1-203.A provides:

With respect to any discharge from any facility of oil or other water contaminant, in such quantity as may with reasonable probability injure or be detrimental to human health, animal or plant life, or property, or unreasonably interfere with the public welfare or the use of property, the following notifications and corrective actions are required;

1. As soon as practicable after learning of such a discharge, but in no event more than twenty-four (24) hours thereafter, any person in charge of the facility shall orally notify the Chief, Ground Water Bureau [EID]. . . .

.

3. Within one week after the discharger has learned of the discharge, the facility owner and/or operator shall send written notification to the same division official, verifying prior oral notification. . . .

.

5. As soon as possible after learning of such a discharge, the owner/operator of the facility shall take such corrective actions as are necessary or appropriate to contain and remove or mitigate the damage caused by the discharge.

6. . . .[N]o later than fifteen (15) days after the discharger learns of the discharge, the facility owner/operator shall send to said Bureau Chief a written report describing any corrective actions taken and/or to be taken relative to the discharge....

20. On or about May 2, 1989, the tailings decant return line from Axiflo Lake broke, resulting in a discharge of eighty (80)

thousand gallons of tailings decant return water to Whitewater Creek. According to Phelps Dodge, the water from the discharge flowed about one-half mile down Whitewater Creek before it was completely absorbed by the creek bed.

21. Phelps Dodge reported the May 2, 1989 spill orally to EID on May 3, 1989 and submitted written notification on May 4, 1989 and May 17, 1989. However, Phelps Dodge did not contain and remove or mitigate the damage caused by the discharge, as required by WQCC Reg. 1-203.A.5, and did not submit a corrective action report to EID on or before May 17, 1989, as required by WQCC Reg. 1-203.A.6.

22. As a result of Phelps Dodge's failure to contain and remove or mitigate the damage and to submit the corrective action report, Phelps Dodge violated WQCC Reg. 1-203.

23. In addition, during February, 1989, an underground pipeline which feeds sulfuric acid to the raffinate pond of the SX/EW plant failed, resulting in "leakage" of raffinate and sulfuric acid. Phelps Dodge detected the leak on February 12, 1989. Based upon information and belief, an inspection on that day revealed that the leakage was causing the pond's synthetic liner to "float." In order to prevent the liner from "floating", Phelps Dodge pierced the liner, eventually allowing the material in the pond to discharge to the ground below the pond. On February 22, 1989, Phelps Dodge determined that the synthetic liner had failed at the point where the acid feed line enters the pond.

24. The pipeline failure and "leakage" resulted in discharges

of water contaminants, as defined in Section 74-6-2.A, supra, to the ground water in the area of the pond. The pipeline that failed transmits 50 tons per day of undiluted sulfuric acid into the pond. Upon information and belief, the failure resulted in approximately 6500 to 13,000 gallons of sulfuric acid being discharged. An unknown amount of leach solution may have drained from the raffinate pond through the "failed" pipe and the pierced liner. The discharges continued until March 14, 1989, when necessary repairs were completed by Phelps Dodge.

25. The discharge from the failure and "leakage" described in paragraph 23 was of such quantity as may with reasonable probability injure or be detrimental to human health, animal or plant life, or property, or unreasonably interfere with the public welfare or the use of property.

26. Phelps Dodge did not report the failure or "leakage" until August 17, 1989 when, during an EID field inspection at the site, it verbally advised the EID inspector of the discharge. Phelps Dodge submitted written notice on August 23, 1989. Therefore, Phelps Dodge violated WQCC Reg. 1-203.A.1 and 3 by its failure to timely report the failure and resulting discharge.

27. The discharge plan for the SX/EW plant approved on December 1, 1989 contains the necessary and appropriate measures to investigate and remediate the contamination caused by the February and March, 1989 discharges. However, Phelps Dodge did not "take such corrective actions as are necessary to contain and remove or mitigate the damage caused by the [February and March]

discharge[s]" as soon as possible, as required by WQCC Reg. 1-203.A.5. Therefore, Phelps Dodge violated WQCC Reg. 1-203.A.5.

28. Additionally, Phelps Dodge did not submit a corrective action report for the February discharge, as required by WQCC Reg. 1-203.A.6. Therefore, Phelps Dodge violated WQCC Reg. 1-203.A.6.

29. The WQCC is entitled to seek civil penalties from Phelps Dodge, pursuant to Section 74-6-10.B NMSA 1978, of up to \$1,000 per day for each violation of WQCC Reg. 1-203.A.1, 3, 5 and 6.

THIRD CLAIM FOR RELIEF

30. On January 25, 1988, Phelps Dodge and the EID entered a Settlement Agreement, settling disputes between the parties over the propriety of discharges to Whitewater Creek. A true and correct copy of that Settlement Agreement is attached as Exhibit C to this complaint.

31. Pursuant to paragraph 5 of the Settlement Agreement,

[i]f [Phelps Dodge] discharges in the future from [its] precipitation plant or stormwater pond to Whitewater Creek, and such discharge does not result from a precipitation event that qualifies for a 10-year, 24-hour storm exemption, [Phelps Dodge] shall pay to EID one thousand dollars (\$1,000) for each day of such discharge for each 100,000 gallons or any fraction thereof. Each day in which any such discharge occurs shall constitute a separate violation; for these purposes a day shall be from 12:01 a.m. to the following midnight. Any violation of DP-214 or any provision of law, other than discharges from the precipitation plant or stormwater pond, which do not result for a 10-year, 24-hour event, shall not be subject to this Agreement, but rather shall be subject to all other applicable laws and/or regulations.

32. On May 18, 1989, the No.4 high-head tailwater pipeline

between the precipitation plant and the south side booster station "leaked", resulting in a discharge of about 10,000 gallons into Whitewater Creek.

33. On July 28, 1989, Phelps Dodge submitted analyses of the May 18, 1989 discharge to the EID. Those analyses showed that the discharges contained 1.29 mg/l chromium, 0.35 mg/l cadmium, and 0.32 mg/l lead.

34. The May 18, 1989 discharge described above violated the January 25, 1988 Settlement Agreement.

35. As a result, pursuant to paragraph 5 of the Agreement, Phelps Dodge owes the EID \$1,000.00.

36. Phelps Dodge has refused to pay and has not paid the \$1,000.00 as required by paragraph 5 of the Settlement Agreement.

WHEREFORE, the WQCC and the EID pray that this Court grant the following relief:

1. On the first claim for relief, assess a civil penalty in the amount of five thousand dollars (\$5,000.00) per day, as authorized by Section 74-6-5.P, supra, and one thousand dollars (\$1,000.00) per day, as authorized by Section 74-6-10.B, supra, for each day Phelps Dodge violated WQCC Regs. 3-104 and 3-106;

2. On the second claim for relief, assess a civil penalty of one thousand dollars (\$1,000.00) per day, as authorized by Section 74-6-10.B, supra, for each day Phelps Dodge violated WQCC Reg. 1-203;

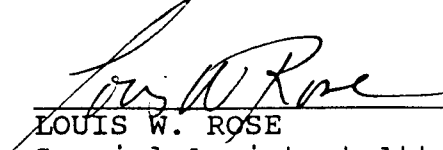
3. On the third claim for relief, order Phelps Dodge to pay

one thousand dollars (\$1,000.00) for the May 18, 1989 discharges to Whitewater Creek, as required by the January 25, 1988 Settlement Agreement;

4. The costs of bringing this action, including payment of the filing fee to the clerk of the court, pursuant to Section 34-6-40.1 NMSA 1978; and

5. Such other relief as this Court deems just and proper.

Respectfully submitted,



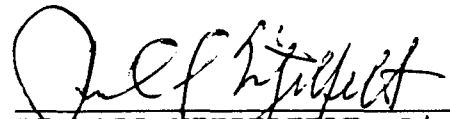
LOUIS W. ROSE
Special Assistant Attorney General
Deputy General Counsel
Office of General Counsel
Health and Environment Department
1190 St. Francis Drive
Santa Fe, New Mexico 87503
(505) 827-2990

Attorney for Plaintiffs

V E R I F I C A T I O N

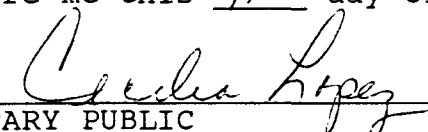
STATE OF NEW MEXICO)
) ss.
COUNTY OF SANTA FE)

I, Richard Mitzelfelt, Director of the Environmental Improvement Division of the New Mexico Health and Environment Department, and Chairman of the New Mexico Water Quality Control Commission, have read the allegations of the foregoing Complaint For Civil Penalties and Other Relief and assert that the allegations therein contained are true, as I am informed and I believe.



RICHARD MITZELFELT, Director
Environmental Improvement Division
Health and Environment Department

SUBSCRIBED AND SWORN to before me this 11th day of January, 1990.



NOTARY PUBLIC

My Commission Expires:

10-25-90

[compl.phe]



ENVIRONMENTAL IMPROVEMENT DIVISION

Michael J. Burkhart
Director

CARLA L. MUTH
Secretary

July 21, 1988

D.P. Milovich
General Manager
Chino Mines Company
Hurley, NM 88043

RE: Discharge Plan Requirements for Solvent Extraction Electrowinning Plant

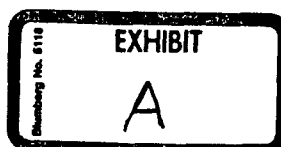
Dear Mr. Milovich:

The Environmental Improvement Division (EID) received flow information from you for the above referenced facility on July 8, 1988 and water quality and locational data from Tim Oliver on July 18, 1988. EID is considering the two items together as constituting a notice of intent. Those items have been reviewed along with information provided by Tim Oliver and Mike Koranda at a meeting held March 16, 1988 in Santa Fe. Based on EID's review you are hereby notified that a discharge plan as defined in Section 1-101.P. of the New Mexico Water Quality Control Commission Regulations (Regulations) is required for the solvent extraction electrowinning plant to be located near Hurley in Grant County, New Mexico.

Accordingly, any discharges from this facility prior to approval of a discharge plan are in violation of Section 3-104 of the Regulations and 74-6-5 and 74-6-10 NMSA 1978. Violations of these provisions will subject Chino Mines Company to potential penalties under the New Mexico Water Quality Act.

With the liner emplaced and providing that the liner is not damaged, the EID does not anticipate any significant ground water degradation for periods as short as 120 days. In light of this the EID will not bring any legal action against Chino Mines Company for discharges from the solvent extraction electrowinning plant during a period of 120 days after the date of this letter, to allow Chino Mines Company to obtain a discharge plan through normal processing. It is EID's position that any and all potential penalties will still accrue during this 120-day period. At the end of this 120-day period the EID will decide whether or not to bring legal action against Chino Mines Company for penalties and injunctive relief, if appropriate. That decision will be based on a totality of the circumstances with particular emphasis on finalizing a discharge plan.

Plans and specifications are to be filed with the EID field engineer at the EID District Office, in this case the District III office located at Las Cruces, ATTN: Gabe Garcia, 1001 Solano Drive, Box 965, Las Cruces, NM, 88004, telephone 624-6046. The information you submitted as a notice of intent also is being forwarded to that EID office.



EQUAL OPPORTUNITY EMPLOYER

If you have any questions, please contact Ernest C. Rebuck of my staff at 827-2900 or myself at 827-2841.

Sincerely,

A handwritten signature in dark ink, appearing to read "Richard Mitzelfelt", written over the typed name.

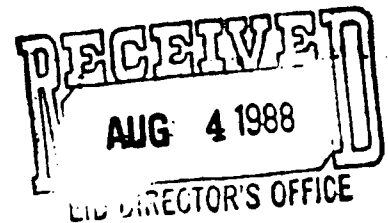
Richard Mitzelfelt
Deputy Director
Water Management Programs

RM:ECR:dg

cc: Gabe Garcia, EID District III Office, Las Cruces

Chino Mines Company
Hurley, New Mexico 88043
505 537-3381

Ermer — RM a



August 1, 1988

Mr. Richard Mitzelfelt
Deputy Director
NM Environmental Improvement Division
P. O. Box 968
Santa Fe, New Mexico 87504-0968

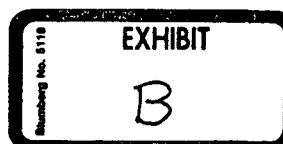
Dear Mr. Mitzelfelt:

Re: Applicability of Discharge Plan Requirements for Solvent Extraction
Electrowinning Plant

This letter is in response to your July 21, 1988 letter to me in which you notified the company that in the view of the Environmental Improvement Division ("EID" or "Division") a discharge plan is required for the Company's solvent extraction electrowinning (SX-EW) plant. In your letter you also stated that EID will not bring any legal action against Chino Mines Company during a period of 120 days to allow the Company to obtain a discharge plan through normal processes. Chino appreciates the action of EID in granting the 120-day period to discharge in the context of EID's belief that a discharge plan is required.

As you know, Chino Mines Company does not believe a discharge plan is required in instances such as this where the ponds, although in operation, are fully lined and there is, in fact, no discharge nor the intent to discharge. However, in an effort to be cooperative with the Division and even though we disagree with the Division's legal position, Chino Mines Company agrees to work with the Division to pursue efforts to secure an appropriate plan for this facility. Chino does this to insure that the SX-EW plant is able to continue operating unencumbered by possible legal action, but the Company reserves the right to seek further clarification of EID's position regarding a discharge plan requirement with regard to the operation of the SX-EW plant. The Company is considering a number of options to insure its integrity, including such measures as monitoring a ravine downgradient from the lined impoundment and/or visual inspection of the lined impoundment for leakage or potential leakage and/or the use of shallow groundwater monitoring wells.

To be responsive to your letter, we believe it is appropriate to summarize our legal position here so that the record is complete. First, your letter states that EID construes the information provided to it, with letters dated July 8 and July 18 by Messrs. Milovich and Oliver, respectively, of Chino Mines Company, as a "notice of intent to discharge." As you know, Chino Mines Company did not intend those items to constitute such a notice. It is the Company's intention not to discharge from the SX-EW plant since the company believes there is not a reasonable probability that solutions placed in the lined impoundment will reach surface water.



August 1, 1988

Your letter also states any potential penalties will continue to ~~accrue~~ during the 120-day period you have set aside for the Company to obtain a discharge plan. Since the Company is not in violation of the New Mexico Water Quality Control Council Commission Regulations because no discharge is being made as defined by the regulations and hence no discharge plan is required, it is the Company's position that no such penalties will or can accrue.

We will be glad to meet with you or other members of the EID staff at your convenience to explain and further elaborate upon our position that no discharge plan is required and to seek clarification of the legality of your position. In the meantime, however, as stated earlier, we will go forward to obtain the discharge plan on a voluntary basis. In accordance with your request, we will be contacting Mr. Gabe Garcia of your District III office. Please contact Mike Koranda at 538-5331, extension 165, if you have any questions concerning the Company's position.

Yours very truly,



D. P. Milovich
Manager

ENVCA/DPM/abc

xc: Gabe Garcia, EID District III Office
S. A. Crozier, Esq.
J. G. Clevenger
M. R. Koranda

SETTLEMENT AGREEMENT

This Agreement is made between the Environmental Improvement Division (EID) of the New Mexico Health and Environmental Department and the Chino Mines Company (Chino).

1. Statement of Dispute. EID is a duly created agency of the State of New Mexico charged by law to protect the environment, and authorized by delegation of the Water Quality Control Commission to enforce the terms of the Water Quality Act, Sections 74-6-1 et. seq., NMSA 1978 (Repl. 1987). EID is authorized to seek injunctive relief and civil penalties by the New Mexico Water Quality Act. EID is further authorized to seek injunctive relief to abate public nuisances and the public nuisance of polluting water, including ground water, as those two nuisances are defined at Sections 30-8-1 and 30-8-2 NMSA 1978 (Repl. 1984), pursuant to Section 30-8-8 NMSA 1978 (Repl. 1984).

Chino owns and operates a tract of land located on several sections in T19S, R12W; T17S, R12W; T18S, R12W; T18S, R13W; and T19S, R13W near Hurley, New Mexico on which it operates a copper mine, mill and smelter. One portion of the operation, the precipitate plant, is located near Whitewater Creek. Chino operates this plant under the terms of an EID-approved ground water discharge plan (DP 214).

EID contends that Chino violated its discharge plan DP-214 by discharging acidic process and storm water in the amount of approximately 127,700 gallons down Whitewater Creek on August 9, 1987, which did not



result from an exceedance of a 10-year, 24-hour event. Chino denies that it has violated its discharge plan, the Water Quality Act or any regulations thereunder.

2. Compromise and Settlement. The Agreement is executed by the parties for the sole purpose of compromising and settling all disputes concerning the alleged violations described in the Statement of Dispute. The terms, execution and/or performance of the Settlement Agreement shall not constitute an admission of any fact or liability by Chino. This is a settlement of disputed claims.

In consideration of signing the Agreement, the parties will be obligated to and bound by all terms and conditions of the Agreement. EID agrees that as long as Chino is in compliance with the terms of this Agreement, EID will not pursue any other relief, civil, criminal, or administrative, including the right to seek and recover penalties against Chino, its successors, assigns and employees, that EID might have obtained against Chino related to the releases of acidic fluids on August 9, 1987. EID retains the right to seek enforcement of this Agreement, and to seek and collect sanctions for noncompliance as provided in Paragraph 5 should Chino violate this Agreement. The provisions of this Agreement shall apply to and be binding upon EID, the New Mexico Water Quality Control Commission, their respective successor agencies of government, their employees and agents, and upon Chino, its officers, directors, agents, employees, receivers, successors, trustees, assigns, heirs, executors and contractors.

3. Payment by Chino. Within thirty (30) days of the execution of this Settlement Agreement, Chino will submit payment in the amount of two thousand dollars (\$2,000.00) to the hazardous waste emergency fund, as established by Section 74-4-8 NMSA 1978. The payment shall be made out to the State of New Mexico c/o EID, and shall be mailed to Health and Environment Department, Office of General Counsel, P. O. Box 968, Santa Fe, New Mexico 87504-0968.

4. Enforcement and Court Jurisdiction. The parties agree that either of them may seek enforcement of any of the terms contained in this Agreement by the filing of a civil action in the district court of Grant County. In the event of such civil action, the parties agree that such court has jurisdiction over the subject matter of the Agreement and the parties hereto waive their right to challenge such jurisdiction either in the district court of Grant County or any other forum.

5. Sanctions for Future Discharges to Whitewater Creek. If Chino discharges in the future from Chino's precipitation plant or stormwater pond to Whitewater Creek, and such discharge does not result from a precipitation event that qualifies for a 10-year, 24-hour storm exemption, Chino shall pay to EID one thousand dollars (\$1,000.00) for each day of such discharge for each 100,000 gallons or any fraction thereof. Each day in which any such discharge occurs shall constitute a separate violation; for these purposes a day shall be from 12:01 a.m. to the following midnight. Any violations of DP-214 or any provision of

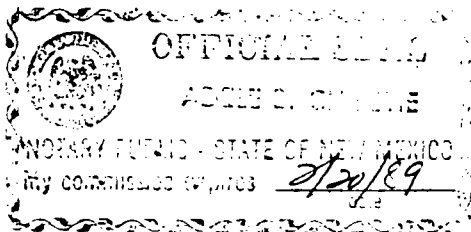
law, other than discharges from the precipitate plant or stormwater pond, which do not result for a 10-year, 24-hour event, shall not be subject to this Agreement, but rather shall be subject to all other applicable laws and/or regulations.

6. Effective Date. This Agreement shall become effective upon execution of both parties.

CHINO MINES COMPANY

By: D. P. Milovich
D. P. Milovich, Manager

Subscribed and sworn to before me this 14th day of January, 1988.



Adelle C. Christie
Notary Public

ENVIRONMENTAL IMPROVEMENT DIVISION

By: Michael J. Burkhardt
Michael J. Burkhardt, Director

Subscribed and sworn to before me this 28th day of January, 1988.

Charles R. Rove
Notary Public

10-15-88
Commission Expires:

ENVCE/Jan88