

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

**IN THE MATTER OF THE HEARING
CALLED BY THE OIL CONSERVA-
TION COMMISSION FOR THE
PURPOSE OF CONSIDERING:**

**REHEARING
CASE NO. 11635
Order No. R-10767-A**

**APPLICATION OF THE NEW MEXICO
OIL CONSERVATION DIVISION TO
ENACT A NEW RULE ESTABLISHING
METHODS AND STANDARDS FOR THE
PREVENTION AND ABATEMENT OF
WATER POLLUTION ASSOCIATED
WITH OPERATIONS IN THE OIL AND
GAS INDUSTRY.**

ORDER OF THE COMMISSION

BY THE COMMISSION:

This cause came on for hearing at 9 o'clock a.m. on October 29, 1996 and November 14, 1996 at Santa Fe, New Mexico, before the Oil Conservation Commission of New Mexico, hereinafter referred to as the "Commission." A rehearing on this matter, limited to certain issues, was held by the Commission on April 10, 1997.

NOW, on this 5th day of June, 1997, the Commission, a quorum being present, having considered the record and being fully advised in the premises,

FINDS THAT:

(1) Due public notice having been given as required by law, the Commission has jurisdiction of this cause and the subject matter thereof.

(2) On August 3, 1995, the Commission commenced a public hearing to consider revisions to current Oil Conservation Division (OCD) Rule 116 which deals with spill/release reporting requirements and to consider any requirements of the Water Quality Control Commission (WQCC) Abatement Regulations as appropriate for inclusion in OCD Rule 116 or as a separate rule.

(3) On August 25, 1995, the Chairman of the Commission appointed a Rule 116 Committee (Committee) to study this matter and to report to the Chairman of the Commission by February 1, 1996.

(4) On October 29, 1996, the Commission commenced a public hearing to hear testimony on Rule 116 revisions. The appointed chairman of the Rule 116 Committee and other witnesses presented the Committee report containing recommended rule changes in the form of a draft rule including a recommendation for adoption of a section dealing with corrective action. The Committee draft rule was made a part of the public record and distributed to all those who requested a copy.

(5) On November 14, 1996 the Commission continued the public hearing and received additional testimony from Marathon Oil Company, the U.S. Bureau of Land Management (BLM), Public Service Company of New Mexico (PNM), Southwest Research and Information Center, and New Mexico Citizens for Clean Air and Water on the Committee draft rule.

The record was then left open for an additional two weeks for additional comment. Written comment was received from Giant Industries, El Paso Natural Gas Company, Mack Energy, Yates Petroleum, Marathon Oil Company, OCD, Amerada Hess, Texaco Exploration and Production Company and PNM.

(6) Commission Order No. R-10767 was issued February 13, 1997. Upon application of El Paso Natural Gas Company and others for a rehearing, the Commission granted a rehearing limited to written comments and testimony relating to findings in Order No. R-10767 and to Subpart 19.M(1) of OCD Rule 19 NMAC 15.A.

(7) On April 10, 1997, the Commission conducted a rehearing of Case No. 11635. Additional testimony was received from the El Paso, Giant, Marathon, PNM group and from the Division. A written statement was received from Chris Shuey of the Southwest Research and Information Center.

(8) The Commission has not adopted in its rules the numerical ground water standards of Subpart III of the Water Quality Control Commission (WQCC) regulations nor has it adopted a rule requiring corrective action involving ground water or surface water contamination at exploration and production (E&P) sites.

(9) The OCD has used the WQCC numerical ground water standards in the OCD guidelines for remediation of contamination within OCD jurisdiction.

(10) The Committee recommends that the Commission adopt Rule 19 that addresses methods and standards for the prevention and abatement of water pollution associated with operations in the oil and gas industry by incorporating the same provisions as those in relevant portions of the WQCC Regulations to accomplish the following:

- a. continued administration of the Water Quality Act as to Section 70-2-12 B.(22) NMSA 1978, as amended;

- b. adoption for Section 70-2-12 B.(21) NMSA 1978, as amended, activities of the same water quality standards as those of the WQCC for its regulated activities (being the numerical standards set forth in Subpart 3103 of the WQCC Regulations; the “toxic pollutants” definition in Subpart 1101 of the WQCC Regulations and the non-aqueous phase liquid standards) and in doing so provide for the use of consistent water quality standards throughout the State of New Mexico;
- c. adoption for Section 70-2-12B.(21) NMSA 1978, as amended, activities a corrective action rule that is the same as the WQCC new “abatement” regulations only as to pollution of ground water and surface water caused by OCD B.(21) regulated activities and in doing so respond to the request of committee members from Amoco, Marathon and Amerada Hess that the OCD provide regulatory flexibility to the oil and gas industry so that releases which exceed the water quality standards can be abated either to those standards or to alternative abatement standards based upon risk analysis;
- d. approval of the OCD guidelines for abatement/remediation of the soils and the vadose zone caused by the OCD B(21) regulated activities;
- e. appeals of OCD B.(21) activities to the OCD;
- f. adoption of the same process for public notice and participation in the process of the abatement of OCD B.(21) activities as Subpart 4108 of the WQCC Regulations for Section 70-2-12B.(22) NMSA 1978, as amended, activities;

(11) The rehearing brought forth the confusion and ambiguity that exist with concurrent OCD and WQCC jurisdiction over B.(22) activities and the processing of appeals. It was suggested that the best solution to this ambiguity lies in directing the Division staff to present a rule change to the Commission which would bring all B.(22) facilities under the jurisdiction of the OCC. The Commission concurs. However, until such a rule is promulgated, appeals for Section 70-2-12B.(22) NMSA 1978 activities will continue to be to the WQCC.

(12) There was written and oral testimony concerning “the feasibility of treating water to drinking water standards at the time and place of such use” --- sometimes referred to as the “feasibility of point-of-use treatment.” PNM and Marathon argued for inclusion of point-of-use treatment language because the same good (reduction or elimination of hazard to public health) could be achieved at a lesser cost. Treating in situ ground water to drinking water standards is not necessary if the water is never used for drinking water. PNM said the language would confirm the hazard definition to the language of the Water Quality Act (Section 74-6-4(D) NMSA 1978 “Duties and powers of Commission”).

OCD, Neeper and others disagree stating that there is no statutory support for point-of-use treatment language. The language in Section 74-6-4 (D)(5) NMSA 1978 of the Water Quality Act was intended to allow the WQCC to consider beneficial reuses of effluent at waste water treatment facilities and was not intended to allow a responsible party who pollutes fresh water to defer remediation of polluted waters until, or if, the waters are used. Such proposed language, if adopted, would set a different abatement standard for the oil industry than for other non-oil industries.

The Commission believes point-of-use treatment language should not be included because inclusion would depart from the current use of this language by the WQCC. A suggested OCD proposed 19.B(6)(b) change should be inserted to emphasize the acceptance of risk analysis by the OCD. The inserted sentence should read: *“The petition may include a transport, fate and risk assessment in accordance with accepted methods, and other information as the petitioner deems necessary to support the petition.”*

(13) Amendments to Rule 7 as presented in the Committee report should be adopted with minor definition changes as proposed by Marathon and supported by OCD and others.

(14) Rule 19. N of the Committee draft dealing with notification should be eliminated from Rule 19 and incorporated in Rule 116 so as to eliminate confusion in reporting requirements.

(15) The Commission believes that Marathon’s suggested changes to Rule 19, specifically changes 1, 2, 4, 5, 6, 7, 7 (second one listed), 12, and 13 in their post hearing comment letter dated November 27, 1996, clarify and improve the intent of the Committee draft of Rule 19 and should be adopted.

(16) The Commission believes that the language proposed by Mr. Donald Neeper of New Mexico Citizens for Clean Air and Water on November 14, 1996 in D. Neeper exhibit 2, page 3 of 4, 19.G.2. and page 4 of 4 19.G.3. is much clearer and more comprehensively sets out a public comment process consistent with OCD’s existing policies and eliminates the need for public hearings during the Stage I abatement plan process. Said language should be adopted.

(17) Public health and the environment will be protected by adoption of amendments to Rule 7 and by adoption of Rule 19, and shown on Exhibits "A" and "B" attached hereto.

IT IS THEREFORE ORDERED THAT:

(1) OCD Rule 7 is hereby amended, adopted and shown in Exhibit "A", attached hereto and made a part of this order.

(2) OCD Rule 19 is hereby adopted and shown in Exhibit "B", attached hereto and made a part of this order. Rule 19 shall apply to "B.(21) activities". "B.(22) activities" shall continue to be regulated under the Water Quality Act and the WQCC regulations until further action is taken by this Commission.

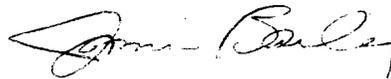
(3) OCD Rule 7 as amended and Rule 19 shall be effective as of the date of publication in the New Mexico Register.

(4) Order No. R-10767 entered on February 13, 1997, is hereby superseded.

(5) Jurisdiction of this cause is retained for the entry of such further orders as the Commission may deem necessary.

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

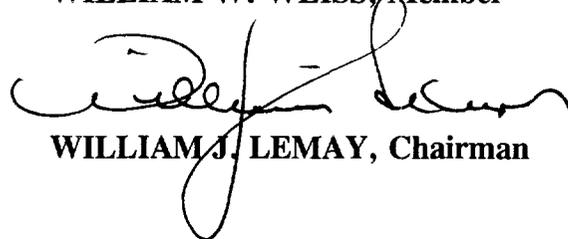
STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION



JAMI BAILEY, Member



WILLIAM W. WEISS, Member



WILLIAM J. LEMAY, Chairman



CASE NO. 11635
Rehearing
Order No. R-10767-A
EXHIBIT "A"

ADD TO RULE 15.A.7

ABATE or ABATEMENT shall mean the investigation, containment, removal or other mitigation of water pollution. [- -97]

ABATEMENT PLAN shall mean a description of any operational, monitoring, contingency and closure requirements and conditions for the prevention, investigation and abatement of water pollution. [- -97]

BACKGROUND shall mean, for purposes of ground-water abatement plans only, the amount of ground-water contaminants naturally occurring from undisturbed geologic sources or water contaminants occurring from a source other than the responsible person's facility. This definition shall not prevent the Director from requiring abatement of commingled plumes of pollution, shall not prevent responsible persons from seeking contribution or other legal or equitable relief from other persons, and shall not preclude the Director from exercising enforcement authority under any applicable statute, regulation or common law. [- -97]

DIRECTOR shall mean the Director of the Oil Conservation Division of the New Mexico Energy, Minerals and Natural Resources Department [- -97].

FACILITY shall mean any structure, installation, operation, storage tank, transmission line, access road, motor vehicle, rolling stock, or activity of any kind, whether stationary or mobile. [- -97]

GROUND WATER shall mean interstitial water which occurs in saturated earth material and which is capable of entering a well in sufficient amounts to be utilized as a water supply. [- -97]

HAZARD TO PUBLIC HEALTH exists when water which is used or is reasonably expected to be used in the future as a human drinking water supply exceeds at the time and place of such use, one or more of the numerical standards of 20 NMAC 6.2.3103.A, or the naturally occurring concentrations, whichever is higher, or if any toxic pollutant as defined at 20 NMAC 6.2.1101 affecting human health is present in the water. In determining whether a release would cause a hazard to public health to exist, the Director shall investigate and consider the purification and dilution reasonably expected to occur from the time and place of release to the time and place of withdrawal for use as human drinking water. [- -97]

NON-AQUEOUS PHASE LIQUID shall mean an interstitial body of liquid oil, petroleum product, petrochemical, or organic solvent, including an emulsion containing such material. [- -97]

OIL FIELD WASTES shall mean those wastes produced in conjunction with the exploration, production, refining, processing and transportation of crude oil and/or natural gas and commonly collected at field storage, processing, disposal, or service facilities, and waste collected at gas processing plants, refineries and other processing or transportation facilities. [- -97]

PERSON shall mean an individual or any other entity including partnerships, corporation, associations, responsible business or association agents or officers, the state or a political subdivision of the state or any agency, department or instrumentality of the United States and any of its officers, agents or employees. [- -97]

RELEASE shall mean all breaks, leaks, spills, releases, fires or blowouts involving crude oil, produced water, condensate, drilling fluids, completion fluids or other chemical or contaminant or mixture thereof, including oil field wastes and natural gases to the environment. [- -97]

REMEDIATION PLAN shall mean a written description of a program to address unauthorized releases. The plan may include appropriate information, including assessment data, health risk demonstrations, and corrective action(s). The plan may also include an alternative proposing no action beyond the submittal of a spill report. [- -97]

RESPONSIBLE PERSON shall mean the owner or operator who must complete Division approved corrective action for pollution from releases. [- -97]

SIGNIFICANT MODIFICATION OF AN ABATEMENT PLAN shall mean a change in the abatement technology used excluding design and operational parameters, or relocation of 25% or more of the compliance sampling stations, for any single medium, as designated pursuant to 19 NMAC 19.E(4)(b)(iv). [- -97]

SUBSURFACE WATER shall mean ground water and water in the vadose zone that may become ground water or surface water in the reasonably foreseeable future or may be utilized by vegetation. [- -97]

VADOSE ZONE shall mean unsaturated earth material below the land surface and above ground water, or in between bodies of ground water. [- -97]

WATER shall mean all water including water situated wholly or partly within or bordering upon the state, whether surface or subsurface, public or private, except private waters that do not combine with other surface or subsurface water. [- -97]

WATER CONTAMINANT shall mean any substance that could alter if released or spilled the physical, chemical, biological or radiological qualities of water. "Water contaminant" does not mean source, special nuclear or by-product material as defined by the Atomic Energy Act of 1954. [- -97]

WATERCOURSE shall mean any lake bed, or gully, draw, stream bed, wash, arroyo, or natural or human-made channel through which water flows or has flowed. [- -97]

WATER POLLUTION shall mean introducing or permitting the introduction into water, either directly or indirectly, of one or more water contaminants in such quantity and of such duration as may with reasonable probability injure human health, animal or plant life or property, or to unreasonably interfere with the public welfare or the use of property. [- -97]

WELL BLOWOUT shall mean a loss of control over and subsequent eruption of any drilling or workover well or the rupture of the casing, casinghead, or wellhead or any oil or gas well or injection or disposal well, whether active or inactive, accompanied by the sudden emission of fluids, gaseous or liquids, from the well. [- -97]

CASE NO. 11635
Rehearing
Order No. R-10767-A
EXHIBIT "B"

19. **PREVENTION AND ABATEMENT OF WATER POLLUTION.**

19.A. **PURPOSE**

(1) The purposes of this Rule are to:

(a) Abate pollution of subsurface water so that all ground water of the State of New Mexico which has a background concentration of 10,000 mg/L or less TDS, is either remediated or protected for use as domestic, industrial and agricultural water supply, and to remediate or protect those segments of surface waters which are gaining because of subsurface-water inflow, for uses designated in the Water Quality Standards for Interstate and Intrastate Streams in New Mexico (20 NMAC 6.1); and [- - 97]

(b) Abate surface-water pollution so that all surface waters of the State of New Mexico are remediated or protected for designated or attainable uses as defined in the Water Quality Standards for Interstate and Intrastate Streams in New Mexico (20 NMAC 6.1). [- -97]

(2) If the background concentration of any water contaminant exceeds the standard or requirement of Paragraph B(1), B(2) or B(3), pollution shall be abated by the responsible person to the background concentration. [- -97]

(3) The standards and requirements set forth in Paragraph B(1), B(2), or B(3) 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. [- -97]

19.B. **ABATEMENT STANDARDS AND REQUIREMENTS**

(1) The vadose zone shall be abated so that water contaminants in the vadose zone will not with reasonable probability contaminate ground water or surface water, in excess of the standards in Subparagraphs (2) and (3) below, through leaching, percolation, or other transport mechanisms, or as the water table elevation fluctuates. [- -97]

(2) Ground-water pollution at any place of withdrawal for present or reasonably foreseeable future use, where the TDS concentration is 10,000 mg/L or less, shall be abated to conform to the following standards: [- -97]

(a) Toxic pollutant(s) as defined in 20 NMAC 6.2.1101 shall not be present; and [- -97]

(b) The standards of 20 NMAC 6.2.3103 shall be met. [- - 97]

(3) Surface-water pollution shall be abated to conform to the Water Quality Standards for Interstate and Intrastate Streams in New Mexico (20 NMAC 6.1). [- -97]

(4) Subsurface-water and surface-water abatement shall not be considered complete until eight (8) consecutive quarterly samples, or an alternate lesser number of samples approved by the Director, from all compliance sampling stations approved by the Director meet the abatement standards of Subparagraphs (1), (2), and (3) above. Abatement of water contaminants measured in solid-matrix samples of the vadose zone shall be considered complete after one-time sampling from compliance stations approved by the Director. [- -97]

(5) Technical Infeasibility:

(a) If any responsible person is unable to fully meet the abatement standards set forth in Subparagraphs (1) and (2) above using commercially accepted abatement technology pursuant to an approved abatement plan, he may propose that abatement standards compliance is technically infeasible. Technical infeasibility proposals involving the use of experimental abatement technology shall be considered at the discretion of the Director. Technical infeasibility may be demonstrated by a statistically valid extrapolation of the decrease in concentration(s) of any water contaminant(s) over the remainder of a twenty (20) year period, such that projected future reductions during that time would be less than 20% of the concentration(s) at the time technical infeasibility is proposed. A statistically valid decrease cannot be demonstrated by fewer than eight (8) consecutive quarters. The technical infeasibility proposal shall include a substitute abatement standard(s) for those contaminants that is/are technically feasible. Abatement standards for all other water contaminants not demonstrated to be technically infeasible shall be met. [- -97]

(b) In no event shall a proposed technical infeasibility demonstration be approved by the Director for any water contaminant if its concentration is greater than 200% of the abatement standard for that contaminant. [- -97]

(c) If the Director cannot approve any or all portions of a proposed technical infeasibility demonstration because the water contaminant concentration(s) is/are greater than 200% of the abatement standard(s) for each contaminant, the responsible person may further pursue the issue of technical infeasibility by filing a petition with the Division seeking approval of alternate abatement standard(s) pursuant to Paragraph B(6) below. [- -97]

(6) Alternative Abatement Standards:

(a) At any time during or after the submission of a Stage 2 abatement plan, the responsible person may file a petition seeking approval of alternative abatement standard(s) for the standards set forth in Subparagraphs (1) and (2) above. The Division may approve alternative abatement standard(s) if the petitioner demonstrates that:

- (i) either:
 - 1. compliance with the abatement standard(s) is/are not feasible, by the maximum use of technology within the economic capability of the responsible person; or
 - 2. there is no reasonable relationship between the economic and social costs and benefits (including attainment of the standard(s) set forth in this Paragraph B) to be obtained, and
- (ii) the proposed alternative abatement standard(s) is/are technically achievable and cost-benefit justifiable; and
- (iii) compliance with the proposed alternative abatement standard(s) will not create a present or future hazard to public health or undue damage to property. [- -97]

(b) The petition shall be in writing, filed with the Division Environmental Bureau Chief. The petition may include a transport, fate and risk assessment in accordance with accepted methods, and other information as the petitioner deems necessary to support the petition. The petition shall:

- (i) State the petitioner's name and address;
- (ii) State the date of the petition;
- (iii) Describe the facility or activity for which the alternate abatement standard(s) is sought;
- (iv) State the address or description of the property upon which the facility is located;
- (v) Describe the water body or watercourse affected by the release;
- (vi) Identify the abatement standard from which petitioner wishes to vary;
- (vii) State why the petitioner believes that compliance with the regulation will impose an unreasonable burden upon his activity;

- (viii) Identify the water contaminant(s) for which alternative standard(s) is/are proposed;
- (ix) State the alternative standard(s) proposed;
- (x) Identify the three-dimensional body of water pollution for which approval is sought;
- (xi) State the extent to which the abatement standard(s) set forth in Paragraph B is/are now, and will in the future be, violated [- -97].

(c) The Division Environmental Bureau Chief shall review the petition and, within sixty (60) days after receiving the petition, shall submit a written recommendation to the Director to approve, approve subject to conditions, or disapprove any or all of the proposed alternative abatement standard(s). The recommendation shall include the reasons for the Division Environmental Bureau Chief's recommendation. The Division Environmental Bureau Chief shall submit a copy of the recommendation to the petitioner by certified mail. [- -97]

(d) If the Division Environmental Bureau Chief recommends approval, or approval subject to conditions, of any or all of the proposed alternative abatement standard(s), the Division shall hold a public hearing on those standards. If the Division Environmental Bureau Chief recommends disapproval of any or all of the proposed alternative abatement standard(s), the petitioner may submit a request to the Director, within fifteen (15) days after receipt of the recommendation, for a public hearing on those standards. If a timely request for hearing is not submitted, the recommended disapproval shall become a final decision of the Director and shall not be subject to review. [- -97]

(e) If the Director grants a public hearing, the hearing shall be conducted in accordance with Division hearing procedures. [- -97]

(f) Based on the record of the public hearing, the Division shall approve, approve subject to condition, or disapprove any or all of the proposed alternative abatement standard(s). The Division shall notify the petitioner by certified mail of its decision and the reasons therefore. [- -97]

(7) Modification of Abatement Standards. If applicable abatement standards are modified after abatement measures are approved, the abatement standards that are in effect at the time that abatement measures are approved shall be the abatement standards for the duration of the abatement action, unless the Director determines that compliance with those standards may with reasonable probability create a present or future hazard to public health or the environment. In any appeal of the Director's determination that additional actions are necessary, the Director shall have the burden of proof. [- -97]

19.C. ABATEMENT PLAN REQUIRED.

(1) Unless otherwise provided by this Rule, all responsible persons who are abating, or who are required to abate, water pollution in excess of the standards and requirements set forth in Paragraph B. shall do so pursuant to an abatement plan approved by the Director. When an abatement plan has been approved, all actions leading to and including abatement shall be consistent with the terms and conditions of the abatement plan. [- -97]

(2) In the event of a transfer of the ownership, control or possession of a facility for which an abatement plan is required or approved, where the transferor is a responsible person, the transferee also shall be considered a responsible person for the duration of the abatement plan, and may jointly share the responsibility to conduct the actions required by this Rule with other responsible persons. The transferor shall notify the transferee in writing, at least thirty (30) days prior to the transfer, that an abatement plan has been required or approved for the facility, and shall deliver or send by certified mail to the Director a copy of such notification together with a certificate or other proof that such notification has in fact been received by the transferee. The transferor and transferee may agree to a designated responsible person who shall assume the responsibility to conduct the actions required by this Rule. The responsible persons shall notify the Director in writing if a designated responsible person is agreed upon. If the Director determines that the designated responsible person has failed to conduct the actions required by this Rule, the Director shall notify all responsible persons of this failure in writing and allow them thirty (30) days, or longer for good cause shown, to conduct the required actions before setting a show cause hearing requiring those responsible persons to appear and show cause why they should not be ordered to comply, a penalty should not be assessed, a civil action should not be commenced in district court or any other appropriate action should not be taken by the Division. [- -97]

(3) If the source of the water pollution to be abated is a facility that operated under a discharge plan, the Director may require the responsible person(s) to submit a financial assurance plan which covers the estimated costs to conduct the actions required by the abatement plan. Such a financial assurance plan shall be consistent with any financial assurance requirements adopted by the Division. [- -97]

19.D. EXEMPTIONS FROM ABATEMENT PLAN REQUIREMENT.

(1) Except as provided in Subparagraph (2) below, Paragraphs C and E do not apply to a person who is abating water pollution:

(a) from an underground storage tank, under the authority of the Underground Storage Tank Regulations (20 NMAC Part 5) adopted by the New Mexico Environmental Improvement Board, or in accordance with the New Mexico Ground Water Protection Act; [- -97]

(b) under the authority of the U.S. Environmental Protection Agency pursuant to either the federal Comprehensive Environmental Response, Compensation and Liability Act, and amendments, or the Resource Conservation and Recovery Act; [- -97]

(c) pursuant to the Hazardous Waste Management Regulations (20 NMAC 4.1) adopted by the New Mexico Environmental Improvement Board; [- -97]

(d) under the authority of the U.S. Nuclear Regulatory Commission or the U.S. Department of Energy pursuant to the Atomic Energy Act; [- -97]

(e) under the authority of a ground-water discharge plan approved by the Director, provided that such abatement is consistent with the requirements and provisions of Paragraphs A, B, E(3), E(4), F, and K of this Rule. [- -97]

(f) under the authority of a Letter of Understanding, Settlement Agreement or Administrative Order on Consent or other agreement signed by the Director or his designee prior to June 30, 1997, provided that abatement is being performed in full compliance with the terms of the Letter of Understanding, Settlement Agreement or Administrative Order or other agreement on Consent; and [- -97]

(g) on an emergency basis, or while abatement plan approval is pending, or in a manner that will likely result in compliance with the standards and requirements set forth in Paragraph B within one year after notice is required to be given pursuant to 19 NMAC 15.C.116.B provided that the Division does not object to the abatement action. [- -97]

(2) If the Director determines that abatement of water pollution subject to Paragraph D(1) will not meet the standards of Paragraphs B(2) and B(3), or that additional action is necessary to protect health, welfare, environment or property, the Director may notify a responsible person, by certified mail, to submit an abatement plan pursuant to Paragraphs C and E(1). The notification shall state the reasons for the Director's determination. In any appeal of the Director's determination under this Paragraph, the Director shall have the burden of proof. [- -97]

19.E. ABATEMENT PLAN PROPOSAL.

(1) Except as provided for in Paragraph D of this Rule, a responsible person shall, within sixty (60) days of receipt of written notice from the Director that an abatement plan is required, submit an abatement plan proposal to the Director for approval. Stage 1 and Stage 2 abatement plan proposals may be submitted together. For good cause shown, the Director may allow for a total of one hundred and twenty (120) days to prepare and submit the abatement plan proposal. [- -97]

(2) Voluntary Abatement.

(a) any person wishing to abate water pollution in excess of the standards and requirements set forth in Paragraph B may submit a Stage 1 abatement plan proposal to the Director for approval. Following approval by the Director of a final site investigation report prepared pursuant to Stage 1 of an abatement plan, any person may submit a Stage 2 abatement plan proposal to the Director for approval. [- -97]

(b) Following approval of a Stage 1 or Stage 2 abatement plan proposal under E(2)(a) above, the person submitting the approved plan shall be a responsible person under this Rule for the purpose of performing the approved Stage 1 or Stage 2 abatement plan. Nothing in this Rule shall preclude the Director from applying 19 NMAC 15.C.116.D to a responsible person if applicable. [- -97]

(3) Stage 1 abatement plan. The purpose of Stage 1 of the abatement plan shall be to design and conduct a site investigation that will adequately define site conditions, and provide the data necessary to select and design an effective abatement option. Stage 1 of the abatement plan may include, but not necessarily be limited to, the following information depending on the media affected, and as needed to select and implement an expeditious abatement option: [- -97]

(a) Descriptions of the site, including a site map, and of site history including the nature of the release that caused the water pollution, and a summary of previous investigations; [- -97]

(b) Site investigation work plan to define:

(i) site geology and hydrogeology, the vertical and horizontal extent and magnitude of vadose-zone and ground-water contamination, subsurface hydraulic parameters including hydraulic conductivity, transmissivity, storativity, and rate and direction of contaminant migration, inventory of water wells inside and within one (1) mile from the perimeter of the three-dimensional body where the standards set forth in Subparagraph B(2) are exceeded, and location and number of such wells actually or potentially affected by the pollution; and

(ii) surface-water hydrology, seasonal stream flow characteristics, ground-water/surface-water relationships, the vertical and horizontal extent and magnitude of contamination and impacts to surface water and stream sediments. The magnitude of contamination and impacts on surface water may be, in part, defined by conducting a biological assessment of fish, benthic macro invertebrates and other wildlife populations. Seasonal variations should be accounted for when conducting these assessments. [- -97]

(c) Monitoring program, including sampling stations and frequencies, for the duration of the abatement plan that may be modified, after approval by the Director, as additional sampling stations are created; [- -97]

(d) Quality assurance plan, consistent with the sampling and analytical techniques listed in 20 NMAC 6.3107.B and with Section 1103 of the Water Quality Standards for Interstate and Intrastate Streams in New Mexico (20 NMAC 6.1), for all work to be conducted pursuant to the abatement plan; [- -97]

(e) A schedule for all Stage 1 abatement plan activities, including the submission of summary quarterly progress reports, and the submission, for approval by the Director, of a detailed final site investigation report; and [- -97]

(f) Any additional information that may be required to design and perform an adequate site investigation. [- -97]

(4) Stage 2 Abatement Plan:

(a) Any responsible person shall submit a Stage 2 abatement plan proposal to the Director for approval within sixty (60) days, or up to one hundred and twenty (120) days for good cause shown, after approval by the Director of the final site investigation report prepared pursuant to Stage 1 of the abatement plan. A stage 1 and 2 abatement plan proposal may be submitted together. The purpose of Stage 2 of the abatement plan shall be to select and design, if necessary, an abatement option that, when implemented, will result in attainment of the abatement standards and requirements set forth in Paragraph B, including post-closure maintenance activities. [- -97]

(b) Stage 2 of the abatement plan should include, at a minimum, the following information:

(i) Brief description of the current situation at the site;

- (ii) Development and assessment of abatement options;
- (iii) Description, justification and design, if necessary, of preferred abatement option;
- (iv) Modification, if necessary, of the monitoring program approved pursuant to Stage 1 of the abatement plan, including the designation of pre- and post-abatement-completion sampling stations and sampling frequencies to be used to demonstrate compliance with the standards and requirements set forth in Paragraph B;
- (v) Site maintenance activities, if needed, proposed to be performed after termination of abatement activities;
- (vi) A schedule for the duration of abatement activities, including the submission of summary quarterly progress reports;
- (vii) A public notification proposal designed to satisfy the requirements of Paragraphs G(2) and (3);
- (viii) Any additional information that may be reasonably required to select, describe, justify and design an effective abatement option. [- -97]

19.F. OTHER REQUIREMENTS.

(1) Any responsible person shall allow any authorized representative of the Director, upon presentation of proper credentials and with reasonable prior notice, to:

- (a) enter the facility at reasonable times;
- (b) inspect and copy records required by an abatement plan;
- (c) inspect any treatment works, monitoring and analytical equipment;
- (d) sample any wastes, ground water, surface water, stream sediment, plants, animals, or vadose-zone material including vadose-zone vapor;

(e) use monitoring systems and wells under such responsible person's control in order to collect samples of any media listed in (d) above; and

(f) gain access to off-site property not owned or controlled by such responsible person, but accessible to such responsible person through a third-party access agreement, provided that it is allowed by the agreement. [- -97]

(2) Any responsible person shall provide the Director, or a representative of the Director, with at least four (4) working days advance notice of any sampling to be performed pursuant to an abatement plan, or any well plugging, abandonment or destruction at any facility where an abatement plan has been required. [- -97]

(3) Any responsible person wishing to plug, abandon or destroy a monitoring or water supply well within the perimeter of the 3-dimensional body where the standards set forth in Paragraph B(2) are exceeded, at any facility where an abatement plan has been required, shall propose such action by certified mail to the Director for approval, unless such approval is required from the State Engineer. The proposed action shall be designed to prevent water pollution that could result from water contaminants migrating through the well or borehole. The proposed action shall not take place without written approval from the Director, unless written approval or disapproval is not received by the responsible person within thirty (30) days of the date of receipt of the proposal. [- -97]

19.G. PUBLIC NOTICE AND PARTICIPATION.

(1) Prior to public notice, the applicant shall give written notice, as approved by the Division, of Stage 1 and Stage 2 abatement plans to the following persons:

(a) surface owners of record within one (1) mile of the perimeter of the geographic area where the standards and requirements set forth in Paragraph B are exceeded;

(b) the county commission where the geographic area where the standards and requirements set forth in Paragraph B are exceeded is located;

(c) the appropriate city official(s) if the geographic area where the standards and requirements set forth in Paragraph B are exceeded is located or is partially located within city limits or within one (1) mile of the city limits;

(d) those persons, as identified by the Director, who have requested notification, who shall be notified by mail;

(e) the New Mexico Trustee for Natural Resources, and any other local, state or federal governmental agency affected, as identified by the Director, which shall be notified by certified mail;

(f) the appropriate Governor or President of any Indian Tribe, Pueblo or Nation if the geographic area where the standards and requirements set forth in Paragraph B are exceeded is located or is partially located within tribal boundaries or within one (1) mile of the tribal boundaries, who shall be notified by certified mail;

(g) The distance requirements for notice may be extended by the Director if the Director determines the proposed abatement plan has the potential to adversely impact public health or the environment at a distance greater than one (1) mile. The Director may require additional notice as needed. A copy and proof of such notice will be furnished to the Division. [- 97]

(2) Within fifteen days after the Division determines that a Stage 1 abatement plan or a Stage 2 abatement plan is administratively complete, the responsible person will issue public notice in a form approved by the Division in a newspaper of general circulation in the county in which the release occurred, and in a newspaper of general circulation in the State. For purposes of this paragraph, an administratively complete Stage 1 abatement plan is a document that satisfies the requirements of Paragraph E.(3), and an administratively complete Stage 2 abatement plan is a document that satisfies the requirements of Paragraph E.(4)(b). The public notice shall include, as approved in advance by the Director:

(a) name and address of the responsible person;

(b) location of the proposed abatement;

(c) brief description of the source extent, and estimated volume of release, whether the release occurred into the vadose zone, ground water or surface water; and a description of the proposed Stage 1 or Stage 2 abatement plan;

(d) brief description of the procedures followed by the Director in making a final determination;

(e) statement that a copy of the abatement plan can be viewed by the public at the Division's main office or at the Division's District office for the area in which the release occurred, and a statement describing how the abatement plan can be accessed by the public electronically from a Division-maintained site if such access is available;

(f) statement that the following comments and requests will be accepted for consideration if received by the Director within thirty (30) days after the date of publication of the public notice:

(i) written comments on the abatement plan; and

(ii) for a Stage 2 abatement plan, written requests for a public hearing that include reasons why a hearing should be held.

(g) address and phone number at which interested persons may obtain further information. [- -97]

(3) Any person seeking to comment on a Stage 1 abatement plan, or to comment or request a public hearing on a Stage 2 abatement plan, must file written comments or hearing requests with the Division within thirty (30) days of the date of public notice, or within thirty (30) days of receipt by the Director of a proposed significant modification of a Stage 2 abatement plan. Requests for a public hearing must set forth the reasons why a hearing should be held. A public hearing shall be held if the Director determines that there is significant public interest or that the request has technical merit. [- -97]

(4) The Division will distribute notice of the filing of an abatement plan with the next Division and Commission hearing docket following receipt of the plan. [- -97]

19.H. DIRECTOR APPROVAL OR NOTICE OF DEFICIENCY OF SUBMITTALS.

(1) The Director shall, within sixty (60) days of receiving an administratively complete Stage 1 abatement plan a site investigation report, a technical infeasibility demonstration, or an abatement completion report, approve the document, or notify the responsible person of the document's deficiency, based upon the information available. [- -97]

(2) If no public hearing is held pursuant to Paragraph G(3), then the Director shall, within ninety (90) days of receiving a Stage 2 abatement plan proposal, approve the plan, or notify the responsible person of the plan's deficiency, based upon the information available. [- -97]

(3) If a public hearing is held pursuant to Paragraph G(3), then the Director shall, within sixty (60) days of receipt of all required information, approve Stage 2 of the abatement plan proposal, or notify the responsible person of the plan's deficiency, based upon the information contained in the plan and information submitted at the hearing. [- -97]

(4) If the Director notifies a responsible person of any deficiencies in a site investigation report, or in a Stage 1 or Stage 2 abatement plan proposal, the responsible person shall submit a modified document to cure the deficiencies specified by the Director within thirty (30) days of receipt of the notice of deficiency. The responsible person shall be in violation of this Rule if he fails to submit a modified document within the required time, or if the modified document does not make a good faith effort to cure the deficiencies specified by the Director. [- -97]

(5) Provided that the other requirements of this Rule are met and provided further that Stage 2 of the abatement plan, if implemented, will result in the standards and requirements set forth in Paragraph B being met within a schedule that is reasonable given the particular circumstances of the site, the Director shall approve the plan. [- -97]

19.I. INVESTIGATION AND ABATEMENT.

Any responsible person who receives approval for Stage 1 and/or Stage 2 of an abatement plan shall conduct all investigation, abatement, monitoring and reporting activity in full compliance with this Rule and according to the terms and schedules contained in the approved abatement plans. [- -97]

19.J. ABATEMENT PLAN MODIFICATION.

(1) Any approved abatement plan may be modified, at the written request of the responsible person, in accordance with this Rule, and with written approval of the Director. [- -97]

(2) If data submitted pursuant to any monitoring requirements specified in the approved abatement plan or other information available to the Director indicates that the abatement action is ineffective, or is creating unreasonable injury to or interference with health, welfare, environment or property, the Director may require a responsible person to modify an abatement plan within the shortest reasonable time so as to effectively abate water pollution which exceeds the standards and requirements set forth in Paragraph B, and to abate and prevent unreasonable injury to or interference with health, welfare, environment or property. [- -97]

19.K. COMPLETION AND TERMINATION.

(1) Abatement shall be considered complete when the standards and requirements set forth in Paragraph B are met. At that time, the responsible person shall submit an abatement completion report, documenting compliance with the standards and requirements set forth in Paragraph B, to the Director for approval. The abatement completion report also shall propose any changes to long-term monitoring and site maintenance activities, if needed, to be performed after termination of the abatement plan. [- -97]

(2) Provided that the other requirements of this Rule are met and provided further that the standards and requirements set forth in Paragraph B have been met, the Director shall approve the abatement completion report. When the Director approves the abatement completion report, he shall also notify the responsible person in writing that the abatement plan is terminated. [- -97]

19.L. DISPUTE RESOLUTION.

In the event of any technical dispute regarding the requirements of B, D, E, J, or K or Section 116.D, including notices of deficiency, the responsible person may notify the Director by certified mail that a dispute has arisen, and desires to invoke the dispute resolution provisions of this Paragraph, provided that such notification must be made within thirty (30) days after receipt by the responsible person of the decision of the Director that causes the dispute. Upon such notification, all deadlines affected by the technical dispute shall be extended for a thirty (30) day negotiation period, or for a maximum of sixty (60) days if approved by the Director for good cause shown. During this negotiation period, the Director or his/her designee and the responsible person shall meet at least once. Such meeting(s) may be facilitated by a mutually agreed upon third party, but the third party shall assume no power or authority granted or delegated to the Director by the Oil and Gas Act or by the Division or Commission. If the dispute remains unresolved after the negotiation period, the decision of Director shall be final. [- -97]

19.M. APPEALS FROM DIRECTOR'S AND DIVISION'S DECISIONS.

(1) If the Director determines that (i) an abatement plan is required pursuant to Rule 116.D or Rule 19.D.(2), ii) approves or provides notice of deficiency of a proposed abatement plan, technical infeasibility demonstration or abatement completion report, or (iii) modifies or terminates an approved abatement plan, he shall provide written notice of such action by certified mail to the responsible person and any person who participated in the action. [- -97]

(2) Any person who participated in the action before the Director and who is adversely affected by the action listed in Subparagraph (1) above may file a petition requesting a hearing before a Division Examiner [- -97]

(3) The petition shall be made in writing to the Division and shall be filed with the Division within thirty (30) days after receiving notice of the Director's action. The petition shall specify the portions of the action to which the petitioner objects, certify that a copy of the petition has been mailed or hand-delivered to the Director, and to the applicant or permittee if the petitioner is not the applicant or permittee, and attach a copy of the action for which review is sought. Unless a timely petition for hearing is made, the Director's action is final. [- -97]

(4) The hearing before the Division shall be conducted in the same manner as other Division hearings. [- -97]

(5) The cost of the court reporter for the hearing shall be paid by the petitioner. [- -97]

(6) Any party adversely affected by any order by the Division pursuant to any hearing held by an Examiner, shall have a right to have such matter heard de novo before the Commission. [- -97]

(7) The appeal provisions do not relieve the owner, operator or responsible person of their obligations to comply with any federal or state laws or regulations. [- -97]