

NEW MEXICO OIL CONSERVATION COMMISSION

COMMISSION HEARING

ILLEGIBLESANTA FE, NEW MEXICO

Hearing Date

APRIL 10, 1997Time: 9:00 A.M.

NAME	REPRESENTING	LOCATION
Louis W Rose	Montgomery Law Firm	SF
Tom Jensen	McElvain O & G (IPANM)	SF
Bill Olson	OCD	SF
Claudette Bonham	PNM	Alb
MARK ASHLEY	OCD	SF
ROBERT L THORNTON	THORNTON OPERATING CORP	MIDLAND
SCOTT HALL	MILLER LAW FIRM	SF
Michael E. Sogner	NMOCIA	Santa Fe
C. Wade Howard	Texaco	Midland

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

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

CASE NO. 11,635

IN THE MATTER OF THE HEARING CALLED BY)
THE NEW MEXICO OIL CONSERVATION DIVISION)
UPON ITS OWN MOTION 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)

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

COMMISSION HEARING

BEFORE: WILLIAM J. LEMAY, CHAIRMAN
WILLIAM WEISS, COMMISSIONER
JAMI BAILEY, COMMISSIONER

April 10th, 1997

Santa Fe, New Mexico

This matter came on for hearing before the Oil Conservation Commission, WILLIAM J. LEMAY, Chairman, on Thursday, April 10th, 1997, at the New Mexico Energy, Minerals and Natural Resources Department, Porter Hall, 2040 South Pacheco, Santa Fe, New Mexico, Steven T. Brenner, Certified Court Reporter No. 7 for the State of New Mexico.

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I N D E X

April 10th, 1997
 Commission Hearing
 CASE NO. 11,635

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E X H I B I T S

Division	Identified	Admitted
Exhibit 1	20	-

* * *

Additional Submissions, not identified, offered or
 admitted:

Case No. 11,635
 Order No. R-10,767

* * *

A P P E A R A N C E S

FOR THE COMMISSION:

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FOR THE OIL CONSERVATION DIVISION:

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FOR EL PASO NATURAL GAS COMPANY, GIANT INDUSTRIES,
MARATHON OIL COMPANY, PUBLIC SERVICE COMPANY and
NEW MEXICO GAS SERVICES:

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Santa Fe, New Mexico 87504-2307
By: LOUIS W. ROSE

* * *

1 WHEREUPON, the following proceedings were had at
2 10:05 a.m.:

3 CHAIRMAN LEMAY: We shall continue. We've had a
4 request to take the rehearing first, which we will do, so
5 we will hear Case 11,635 first, then Case 11,762.

6 So I shall now call Case Number 11,635, which is
7 a rehearing of just part of the case before the Commission,
8 and we've also received some written comments, but I'll
9 call the Case, 11,635, and now I'll call for appearances.

10 MR. ROSE: Yes, Mr. Chairman, my name is Louis
11 Rose with the law firm of Montgomery and Andrews in Santa
12 Fe, and I'm here representing petitioners El Paso Natural
13 Gas Company, Giant Industries, Marathon Oil Company and
14 Public Service Company and New Mexico Gas Services.

15 CHAIRMAN LEMAY: Thank you, Mr. Rose.

16 MR. CARROLL: May it please the Commission, my
17 name is Rand Carroll appearing on behalf of the Oil
18 Conservation Division.

19 CHAIRMAN LEMAY: Thank you, Mr. Carroll.

20 Additional appearances?

21 MR. ANDERSON: Roger Anderson for the Oil
22 Conservation Division.

23 CHAIRMAN LEMAY: Are you going to be appearing
24 with --

25 MR. CARROLL: Yes, he's appearing with --

1 CHAIRMAN LEMAY: You don't have to make an
2 appearance, then, Mr. Anderson. You will be a witness of
3 his.

4 Those people that will be giving testimony, will
5 you kindly stand and raise your right hand?

6 Are you going to be giving testimony as well as
7 -- You'll be cross-examining yourself?

8 MR. ROSE: It's dangerous, but I'm going to go
9 ahead.

10 CHAIRMAN LEMAY: Well, we have a casual policy
11 here, so we'll accept that.

12 (Thereupon, the witnesses were sworn.)

13 CHAIRMAN LEMAY: Mr. Rose, you may begin.

14 MR. ROSE: Thank you, Mr. Chairman. I thought
15 this was going to be simple, and hopefully it will be.

16 There are two requests before you. One was the
17 petition for rehearing, the other was the request to
18 correct or revise a finding with respect to this particular
19 Order.

20 Let me take the request for rehearing first,
21 because I think that's the simplest issue. That deals with
22 -- What we're dealing with here is Section 19.M.(1) of the
23 rule, which is on page 14, and that --

24 CHAIRMAN LEMAY: Do you have an exhibit here that
25 we're working with or --

1 MR. ROSE: I'm working off of your Order, Mr.
2 Chairman.

3 COMMISSIONER WEISS: I don't have that Order.

4 CHAIRMAN LEMAY: We don't have that. Let's get
5 -- each one of us get a copy of the Order. Do you have
6 three copies for us?

7 MR. ROSE: No, I don't, because actually I
8 thought you might have that.

9 (Off the record)

10 CHAIRMAN LEMAY: Let's just -- Let's take about a
11 three- or four-minute break here. I think if we're working
12 with the Order, we need to have some copies of it.

13 MR. ROSE: Okay.

14 (Thereupon, a recess was taken at 10:09 a.m.)

15 (The following proceedings had at 10:12 a.m.)

16 CHAIRMAN LEMAY: Okay, we shall continue. We all
17 have copies of the Order.

18 MR. ROSE: Let me direct you to page 14 of the
19 rule. It's Section 19.M.(1). It's on your next-to-the-
20 last page, actually. And what it outlines is the appeal
21 provisions from the Director's determination to the
22 Commission, and it lists a number of things that are
23 appealable.

24 And what we're asking for in terms of the
25 rehearing is a rehearing just on this section, to add a

1 reference to Section 19.D.(2). It would be 19 NMAC -- it
2 would be --

3 CHAIRMAN LEMAY: I think you're confusing us
4 here, let's --

5 MR. ROSE: Okay, let's go back.

6 CHAIRMAN LEMAY: Let's just take it one thing at
7 a time here. I mean, I'm confused too.

8 MR. ROSE: Okay, let's --

9 COMMISSIONER WEISS: 19.M or 19.B or 19 what?

10 MR. CARROLL: If I could interject here, maybe we
11 can clean things up a little bit right from the start and
12 delete the preliminary and NMAC sections. We're in our own
13 rules, so I don't think we have to refer to 19 NMAC 15.C.

14 MR. ROSE: I don't have a problem with that.

15 CHAIRMAN LEMAY: Okay, this is rule-making, so we
16 can be informal.

17 MR. CARROLL: Right.

18 CHAIRMAN LEMAY: So that Steve can get -- That
19 was Rand Carroll, OCD. He's got that, okay.

20 MR. ROSE: And I'm hoping to make this clearer,
21 as opposed to --

22 CHAIRMAN LEMAY: Yeah, let's make it clearer.
23 Where are we specifically?

24 MR. ROSE: We're on the second --

25 CHAIRMAN LEMAY: We're on page 12, right?

1 MR. ROSE: We're on page 14.

2 CHAIRMAN LEMAY: 14, that's why I'm having
3 trouble.

4 MR. ROSE: 19.M.(1), line 2.

5 CHAIRMAN LEMAY: 19.M.(1), line 2.

6 MR. ROSE: And what Mr. Carroll has suggested,
7 and I think it makes sense, is, the reference to 19 NMAC
8 15.C.116.D is really Rule 116.D. So if you want to clarify
9 that, you can strike the reference and make that pursuant
10 to 116.D.

11 CHAIRMAN LEMAY: 19 NMAC 15 -- that deal, and --

12 MR. ROSE: Just make that Rule 116.D, because
13 that's what that is, and that's the way it's commonly
14 referred to.

15 And what we're proposing is to add after that,
16 "and Rule 19.D.2". Same sentence.

17 So it would read, an abatement plan is required
18 pursuant to Rules 116.D or Rule 19.D.2.

19 CHAIRMAN LEMAY: "Or" or "and"? You said "and"
20 first.

21 MR. ROSE: "Or", it should be "or".

22 CHAIRMAN LEMAY: "Or Rule 19.D.2"?

23 MR. ROSE: Correct.

24 MR. CARROLL: The Division has no objection to
25 that.

1 CHAIRMAN LEMAY: Okay.

2 MR. ROSE: And what that does is, under the rules
3 you adopted, you provided some exemptions, and you also
4 provided -- they're conditional exemptions in a process by
5 which that exemption can be terminated in the rule.

6 That rule specifies that if the Division decides
7 to terminate an exemption, that in an appeal to this
8 Commission, the Division has the burden of proof.

9 But in your rule dealing with appeals, it doesn't
10 specify that that's an appealable decision. So we have a
11 disconnect between the provision dealing with the
12 exemption, which implies an appeal, and the provision
13 dealing with appeals, which doesn't specifically provide
14 for one. And all we're doing is making it clear that that
15 decision is appealable.

16 And we've talked to the Division. They agree
17 that it is an appealable decision. At least that was their
18 intent.

19 CHAIRMAN LEMAY: Well, I think you've confused
20 me. I don't know if you've confused my fellow
21 Commissioners. If you all agree that this is what we need
22 as a fix, I think --

23 MR. ROSE: This is -- The bottom line is, the
24 reg's not clear that termination of an exemption is
25 appealable to this Commission. And the intent in drafting

1 the language of the rule on terminating the exemption was
2 to have the review by this Commission for that decision.
3 We just -- make it clear --

4 CHAIRMAN LEMAY: I think -- Yeah, my
5 understanding was, the overlap or the confusion between
6 whether an operator was subject to Oil Conservation
7 Commission review of an appeal or Water Quality Control
8 Commission.

9 MR. ROSE: That's the next issue.

10 CHAIRMAN LEMAY: That's the next issue, okay.

11 MR. ROSE: That's the next issue.

12 CHAIRMAN LEMAY: But this issue makes it -- an
13 appeal like an abatement -- an alternate abatement plan
14 appeal to us rather than the WQCC?

15 MR. ROSE: No, what this does is, your rule
16 provides exemption that if you're abating for -- There's a
17 list of exemptions. So if you're cleaning up under some
18 other requirement, you're not under this rule. But there's
19 a provision that allows the Division to terminate that
20 exemption if the abatement is not effective, so that you're
21 out from under this rule.

22 And say we're dealing with a production facility
23 so we don't get mixed up in terms of the oil and gas --

24 CHAIRMAN LEMAY: Give us an example, that helps.

25 MR. ROSE: Okay. You're dealing at a production

1 facility which has an agreement with the Department, with
2 the Division, over how to clean up, that's worked over
3 time, it's worked informally. Because it had a pre-
4 existing agreement with the Division, it's not subject to
5 this rule.

6 Now, the Division -- If that cleanup doesn't
7 clean up to the standards provided in this rule or somehow
8 isn't effective, the Division has the authority to
9 terminate that exemption. It can say, That's not
10 effective, we want to kick you into these rules.

11 And so what your rules provide in that
12 termination provision is that if the Division chooses to do
13 that, the question is, is that a decision which this
14 Commission could then review? Did they do it properly?
15 Should it have been terminated?

16 And your rule implies that it's reviewable by
17 this Commission, but it's not explicit. And all we're
18 doing by this change is making sure that that decision is
19 explicitly reviewable by you.

20 CHAIRMAN LEMAY: I think I understand it now.
21 Thank you.

22 Commissioner Bailey, do you want to ask at this
23 point --

24 COMMISSIONER BAILEY: Well, I'll kind of have to
25 read through it --

1 CHAIRMAN LEMAY: All right, okay.

2 But do you concur with that, Mr. Anderson?

3 MR. CARROLL: That is correct, Mr. Chairman.

4 CHAIRMAN LEMAY: Okay, Mr. Carroll. Fix one.

5 How about fix two?

6 MR. ROSE: Fix two. Fix two had to do with your
7 findings, and we can get into what those findings mean now,
8 which is the difficulty that the Chairman alluded to in the
9 confusion over Water Quality Act and the Oil and Gas Act.

10 The issue that we raised wasn't with the
11 regulations themselves or the substance; it's with Finding
12 Number 8, which is on page 2 of your Order.

13 And as we provided in our request, Finding Number
14 8 references what the Rule 116 Committee recommended to
15 you. And as you recall, the Committee had a big report
16 that Mr. Kellahin prepared, and Mr. Kellahin also testified
17 at your hearing.

18 And what happened here is that the language in
19 Finding 8 is almost a verbatim reflection of what was in
20 Mr. Kellahin's report.

21 However, what he testified to before this
22 Commission, at least as to the substance of how the so-
23 called B.(21) and B.(22) facilities, production versus
24 proce- -- gas plant, oil refinery facilities,
25 jurisdictionally played out, his testimony in the hearing

1 was somewhat different.

2 And that -- So there's a disconnect between what
3 Mr. Kellahin testified the Committee recommended and the
4 language that this Commission picked up from the
5 Committee's order -- or the Committee's report. And what
6 we're saying, it's my understanding that what Mr. Kellahin
7 testified to was, in fact, the Committee's recommendation.

8 I'm not here to suggest the propriety of that
9 recommendation, only to say what's in this Order doesn't
10 reflect Mr. Kellahin's testimony with what I understand the
11 Committee's recommendation to be. And we've debated what
12 that means, whether it's a good idea or a bad idea, at
13 least between myself and OCD staff, and I think there's a
14 disagreement over the Committee's recommendation. I think
15 if you've got other people in the room, you'd probably have
16 even more opinions as to how it ought to work.

17 What I would -- Our petition suggested a cure,
18 and that is to specifically add the language that Mr.
19 Kellahin testified to.

20 Rather than do that, because it raises the
21 question, my suggestion here would be to keep Finding 8 as
22 it is, with this change, and that is, strike subparagraphs
23 8.a through h and just put a period after the word
24 "regulation" in Finding 8, line 4.

25 So the finding would read, "The Committee

1 recommends that the Commission adopt Rule 19 that addresses
2 methods and standards for the prevention and abatement of
3 water pollution associated with operations in the oil and
4 gas industry by incorporating the same provisions as those
5 in relevant portions of the WQCC Regulations", period, and
6 that your findings be silent on the question of the B.(21)
7 and B.(22) facilities, because Rule 19 is silent on that
8 jurisdictional issue, so that we not, in the context of
9 Rule 19, decide that issue, and just leave the regulation
10 the way it is.

11 CHAIRMAN LEMAY: Well, I think that may be a
12 point of contention. We've discussed the ambiguity as it
13 exists. You're recommending we keep the ambiguity and not
14 institutionalize it with findings, as I understand it, and
15 I thought we had a fix with the ambiguity.

16 MR. ROSE: Well, and in fact, Mr. Chairman, I
17 think there is no ambiguity, but we have a disagreement. I
18 think the question really arises in the context of Rule
19 116.

20 As I pointed out to Mr. Carroll and to Mr.
21 Anderson, as I read the rule, as you've adopted it, the
22 rule requires reporting of spills at both upstream and
23 downstream facilities.

24 Rule 116.D says that for certain types of spills
25 that endanger the environment -- using a broad term, I'm

1 not sure that's the exact language -- that the party has
2 two options: They can either clean up under a remediation
3 approved by the Division, or they can abate under Rule 19.

4 So you've got two options. There's no option to
5 clean up under the Water Quality Control Commission
6 Regulations, under your rule. So that by merely changing
7 Rule 19, I don't think resolves the ambiguity either.

8 I think if you're going to resolve it, whichever
9 way you resolve it, it seems to me 116 needs to be revised
10 to clarify that issue, not Rule 19, because Rule 19, as
11 it's adopted, only applies in two circumstances: There's a
12 requirement that you submit a plan, and the only
13 requirement in your rules is under 116.D; or the company
14 voluntarily come forward and subjects themselves to these
15 requirements.

16 Those are the only two options. It's not self-
17 effectuating in that situation. So that I believe that to
18 do what the Division wants to do in terms of their proposed
19 clarification, I believe you have to go back and look at
20 116.D, which is not the subject of this hearing.

21 CHAIRMAN LEMAY: Can we hear from the Division on
22 that? I mean, I think --

23 MR. ROSE: I'm not sure they agree. We've sort
24 of had this debate in the --

25 CHAIRMAN LEMAY: Well, maybe not, but is there

1 anything else that you would suggest before they --

2 MR. ROSE: Other than, I think -- I wasn't a
3 party to all of the debate before the 116 Committee.
4 You've gotten Mr. Shuey's written submittal as to his
5 recollection. I have nothing to counter that, other than
6 Mr. Kellahin's testimony before this Commission, which
7 seems at odds, in part, with what Mr. Shuey has said the
8 Committee's recommendation is.

9 As I understand what Mr. Kellahin testified to,
10 was that, in fact, the Committee's recommendation is for
11 cleanups at these B.(22) facilities, that, in fact, to be
12 subject to this Commission's jurisdiction. That's what I
13 understood the import of his testimony to be. So that's
14 the only thing I can point to in terms of a disagreement as
15 to the Committee's recommendation.

16 Now, whether that was unanimous, not so, whether
17 there was a minority opinion -- Obviously, Mr. Shuey, who's
18 served on that Committee, doesn't agree with that
19 recommendation.

20 It seems to me that the question of how these
21 things are handled administratively may actually take more
22 analysis and more review.

23 Certainly from the industry's perspective, we
24 would rather see this Commission's oversight of all those
25 activities, whether they're B.(21) or B.(22) activities,

1 whether they're cleanups or the remedial prog- -- or the
2 preventive program, the discharge plan program.

3 How you do that and what policies and what
4 process you have to go through to do that, obviously, we
5 can look at. But we're not going to resolve that in the
6 context of this particular proceeding now, and that if, in
7 fact, that's explored, we would suggest that you look at
8 that and involve the affected community, both regulated
9 community, perhaps, and someone like Chris or those -- the
10 citizens, in terms of deciding how that plays out.

11 But as I testified at your hearing on these
12 rules, it's my interpretation of the Water Quality Act,
13 that it's this Commission's decision as to what it wants to
14 regulate that drives the Water Quality Act applicability.
15 That is, under the way the statute was amended in 1992, if
16 this Commission chooses to regulate, then there is no
17 jurisdiction on the part of the Water Quality Control
18 Commission.

19 So you have the ultimate decision as to, at least
20 for B.(22) facilities, how far you want to extend your
21 authority. And I would suggest that as to these programs,
22 perhaps, that that issue be looked at, but that the rules
23 as you've adopted them now stay in place, or that if you
24 want to revisit the B.(22) facilities, you do it in the
25 context of Rule 116, not in the context of Rule 19; you

1 leave Rule 19 the way it is, and you make the findings
2 neutral as to the question of resolution of that
3 jurisdictional dispute.

4 CHAIRMAN LEMAY: Why don't we just have some
5 discussion from the Division, and then it might serve us
6 better to ask questions from all of you at one time,
7 because it is rule-making. Is that agreeable?

8 COMMISSIONER WEISS: Yeah.

9 COMMISSIONER BAILEY: Recapping what B.(21) and
10 B.(22) --

11 CHAIRMAN LEMAY: Okay. B.(21) facilities, as I
12 understand it, are the upstream facilities, those
13 facilities definitely referred to in the Oil and Gas Act,
14 the well locations.

15 The B.(22) facilities, as I understand it, are
16 those facilities downstream, the refineries, the service
17 company facilities, those facilities with discharge plans
18 are issued by our Division under the Water Quality Control
19 Commission Act.

20 The confusion was, why we refer to B.(21) and
21 B.(22) with two jurisdictional acts, two jurisdictional
22 agencies, basically. There's confusion there because
23 there's overlap.

24 And I thought that by revisiting this we could
25 eliminate some of that confusion or overlap with our Order,

1 with the idea that I don't know if it will ever resolved
2 until the courts, maybe, look at it, if, in fact, you find
3 someone who wants to take it to the courts.

4 But if there's an understanding involved, from
5 operational simplicity, I thought that's where we could
6 come forth with an order and reduce that confusion, at
7 least in our minds, operating under some clarity.

8 If someone wants to take to the courts to resolve
9 jurisdictional problems between the Water Quality Act and
10 the Oil and Gas Act, you know, go to it.

11 But, you know, we're kind of a direct-course type
12 -- we're on fast tracks here, we have clarity, we work with
13 industry cooperation. So if there are problems with --
14 like was brought up here, we wanted to solve it. We didn't
15 necessarily want to institutionalize the ambiguity, like I
16 guess we've done.

17 Does that kind of clarify a little bit of it?

18 COMMISSIONER WEISS: Barely.

19 CHAIRMAN LEMAY: Barely.

20 COMMISSIONER WEISS: Let me make a comment. I'm
21 all for getting rid of one-page reviews.

22 CHAIRMAN LEMAY: Well, I think you have a
23 supporter there in terms of eliminating part of the
24 findings.

25 MR. CARROLL: Mr. Chairman?

1 CHAIRMAN LEMAY: Yes, Mr. Carroll?

2 MR. CARROLL: You hit the nail on the head. It's
3 this Commission's decision. I mean, even if the finding as
4 to the Committee recommendation is changed, that doesn't
5 mean you necessarily have adopted that recommendation, and
6 you haven't ruled specifically on that recommendation.

7 So, you know, changing the findings is not going
8 to alter your order. You're going to have to specifically
9 adopt it or specifically disagree with that.

10 So if you find that B.(22) facilities should
11 continue to be regulated under the Water Quality Act and
12 the WQCC recommendations, as the OCD Environmental Bureau
13 opposes, then that should be part of your ordering
14 paragraph. And I've prepared an exhibit changing Ordering
15 Paragraph 2 to reflect that.

16 If you agree with the Committee recommendation --
17 and there's some confusion as to what exactly the Committee
18 recommendation says; the written report apparently says
19 different than what Mr. Kellahin testified at the hearing,
20 and Mr. Kellahin's recollection varies from Mr. Shuey's
21 recollection.

22 But regardless of what the Committee
23 recommendation was, you have to decide where B.(22)
24 activities are regulated. If you decide that the OCC wants
25 them, then you should rule therefor. And if you think it

1 should stay under WQCC, you should state that.

2 And like I said, the Environmental Bureau of the
3 OCD has recommended that B.(22) stay over with the WQCC,
4 and that is the way my exhibit reads.

5 CHAIRMAN LEMAY: Does industry want to bring it
6 over? I mean, assuming we're going to face that issue
7 here, right now, and do something with it and have it
8 challenged, they would like to see those -- that B.(22)
9 facility question reside with the Oil Conservation
10 Commission?

11 MR. ROSE: That's correct, Mr. Chairman, with
12 respect to remediation, not the discharge-plan piece of
13 that, only the remediation.

14 CHAIRMAN LEMAY: Well, can you bring over some
15 and not the other? That's always been a problem; we take a
16 little piece of it here, but the rest of it stays over
17 there.

18 MR. ROSE: I believe you can, and here's the
19 reason why I believe you can: The discharge-plan program,
20 as it applies under the Water Quality Act, is primarily a
21 prevention program. That is, it designs provisions for how
22 to prevent contamination from occurring.

23 What's going on in these regulations is to
24 provide a regulatory framework for cleaning up
25 contamination once it's occurred.

1 Now, what happens is, unfortunately, those things
2 come together in the discharge-plan program if you have a
3 discharge plan which, you know, you've designed to assure
4 that standards will be met doesn't work for some reason.
5 You get contamination.

6 Under the Water Quality regs, the constituent
7 agency, which in this case would be the OCD, can require
8 modification to that plan to require cleanup under the
9 discharge plan. So you have that problem.

10 What we believe is that making the B.(21)/B.(22)
11 distinction can be artificial as well. You can have
12 contamination plumes from, arguably, upstream and
13 downstream facilities that commingle, and then you've got a
14 question of where do you go in terms of your approvals?
15 Not in terms of the OCD oversight, because under the Water
16 Quality Act, or under this rule, they get to review it
17 anyway.

18 The real -- The crux of it comes in to review of
19 the OCD's decision. Under what industry is proposing, that
20 you keep B.(22) facilities under your rules, the review
21 would be to this Commission as to review of the OCD
22 decisions and ultimate approval of alternative standards.
23 That is, if the groundwater standards turn out, because of
24 technology or other reasons, to be not attainable, the
25 rules provide for a request to either the Water Quality

1 Control Commission under their rules, or to the OCD with
2 ultimate review by this Commission under your rules, as to
3 what the ultimate cleanup level should be.

4 And that's really the distinction, because your
5 Rule 19 and the Water Quality Control Commission's rules
6 are almost virtually identical on everything else. The
7 cleanup standards that you start at are identical. So that
8 where you have the overlap is in the discharge plan piece.

9 It was discussed at one of the Committee meetings
10 I was at, the industry representatives, I think, were
11 unanimous as to recommending that all cleanups, whether
12 they be B.(21) or B.(22) facilities, to the extent that you
13 can, come under this Commission's rules and not under the
14 Water Quality Control Commission.

15 Also understand that the Chairman of this
16 Commission is a member of the Water Quality Control
17 Commission as well.

18 But that's industry's perception as to how those
19 jurisdictional lines ought to resolve in this case.

20 Now, I'm not -- haven't discussed the discharge-
21 plan question as to whether a comparable program ought to
22 be proposed for this Commission and how that ought to be
23 integrated. That hasn't been something that -- at least
24 formally, that I'm aware of, that's been proposed. I would
25 be surprised if anyone would oppose that from the industry

1 perspective, but I haven't talked to anybody specifically
2 about that issue.

3 CHAIRMAN LEMAY: What's the Division
4 recommendation, or would it be an Environmental Bureau
5 recommendation?

6 MR. CARROLL: I'll let the Environmental Bureau
7 tell you what the --

8 CHAIRMAN LEMAY: Fine.

9 MR. CARROLL: -- future course of action --

10 CHAIRMAN LEMAY: Do you have a question, Bill?
11 Yeah, Commissioner Weiss has a question.

12 COMMISSIONER WEISS: What's the -- What happens
13 if we cut out page 3 but leave this such as you suggest,
14 and then something goes wrong in the next hearing and the
15 regulatory jurisdiction remains split?

16 MR. ROSE: I guess it would depend on the fact
17 situation. And let me give it to you this way: Say, for
18 example -- Take a gas plant for an example. You had a
19 spill that was reported under Rule 116.A. If a cleanup was
20 proposed and approved under Rule 19, I don't think there
21 would be any conflict.

22 However, if you had a discharge plant at that gas
23 plant where you had a failure of that plant, for some
24 reason, that caused the contamination, and the Division
25 required some kind of cleanup, I think you might have some

1 confusion because it could be under the Water Quality Act,
2 under the Water Quality Control Commission regs as a
3 modification to the discharge plan, or it could be a
4 cleanup under Rule 116.D of your rules. It would really be
5 the Division's choice, ultimately, as to how that -- which
6 one of the jurisdictional lines that it worked under.

7 I suspect that if the Division chose to require a
8 modification of your discharge plan, the company might not
9 be too happy about that, there may be a challenge to that.

10 Or if the agency chose to do it under your Rule
11 19, there may be citizens' groups that are unhappy about
12 that for some reason.

13 I don't see, though -- and ultimately, from an
14 industry standpoint, it doesn't behoove us to get it too
15 complicated, because we want to make the agency happy,
16 they're the ones that have to approve this in the first
17 instance in any event.

18 So I suspect in an individual case it's going to
19 work out, and we may not see that dispute, and I think we
20 can come to a resolution as to which jurisdiction. But it
21 does leave an argument for questions where you have overlap
22 and a disagreement.

23 COMMISSIONER WEISS: And that page 3 does not
24 clarify that disagreement and that overlap and that --

25 MR. ROSE: I don't believe it does. I think it

1 draws into question exactly what your Rule 19 -- I think --
2 What I read is that page 3 is at odds with the language in
3 Rule 116, and that was the problem that I have, that your
4 rule is silent as to that jurisdictional dispute.

5 The finding implies that it -- you meant to
6 decide how it was going to happen.

7 MR. CARROLL: May I point out that page 3 just
8 finds what the Committee recommended --

9 MR. ROSE: Rise.

10 MR. CARROLL: -- and anything the Committee
11 recommended doesn't have to jibe with what's in Rule 116.

12 MR. ROSE: And I agree with Mr. Carroll. My
13 concern is what -- originally when we raised this was, we
14 didn't believe that your Finding Number 8, in fact,
15 reflected what the Committee recommended because it was
16 odds with Mr. Kellahin's testimony. That was the only
17 reason why we brought it forward.

18 We thought your rule had resolved the issue of
19 how that split was supposed to be set up. Now I think
20 there is some disagreement as to what your rules ultimately
21 do.

22 CHAIRMAN LEMAY: My understanding is, we -- we
23 certainly didn't resolve the split with the rules. We just
24 raised the issue to a higher plane, which we're kind of
25 getting into now.

1 I think, obviously, that joint jurisdiction was
2 not handled by the Committee, nor any of the testimony; it
3 just came to light when you wanted the rehearing.

4 And Lyn, feel free to jump in on this any time
5 you've got a question here, because some of this definitely
6 is --

7 MR. CARROLL: Mr. Chairman, I remember at the
8 hearing, I tried to clarify for the Commission the
9 jurisdictional issue. I know your eyes glazed over, but it
10 is on the record.

11 CHAIRMAN LEMAY: I will -- I'll accept that, Mr.
12 Carroll.

13 MR. CARROLL: And actually, I think the
14 Commission would want to keep a lot of these findings on
15 page 3.

16 For instance, b., say we want to keep consistent
17 water quality standards across the State, and that's why
18 we're using the WQCC regulation as a model.

19 So I don't think we should just scrap all the
20 findings under Finding 8, or the subfindings.

21 And I'd like our Environmental Bureau to state
22 their thinking on where the Environmental Bureau is going
23 with this, because we are moving toward having everything
24 over at the OCC -- we just don't want to do it piecemeal.
25 We want to wait till the discharge plan and then have the

1 appeals all go to the OCC. But until then keep B.(22) over
2 at the WQCC.

3 So Roger --

4 MR. ANDERSON: Mr. Chairman, ultimately our goal
5 is to bring discharge plans, which are out of Part 3 and
6 Part 5 of Water Quality Control Commission Regulations,
7 over to OCD regulations, bring a rule change before this
8 body, and have discharge plans under -- That are reviewed
9 by the Oil Conservation Commission.

10 The example Mr. Rose gave of a groundwater
11 contamination due to a discharge plan violation, if we
12 required a company to modify a discharge plan, the appeal
13 to that would go to the Water Quality Control Commission.

14 If they ruled that the discharge plan should not
15 be modified, then they would go under abatement regs, under
16 Mr. Rose's proposal, under the OCD, and that abatement reg
17 would go to the Oil Conservation Commission.

18 Consequently, one act of water contamination
19 could have to go to both bodies.

20 What we propose is to leave the B.(22), the
21 downstream facilities, under the Water Quality Control
22 Commission, just for uniformity, until we can draft and
23 present a rule change to bring discharge plans over to the
24 Oil Conservation Commission.

25 CHAIRMAN LEMAY: So you're recommending that we

1 don't do anything with the issue now, to be continued -- I
2 mean, not to be continued. You want to close out this
3 particular order or rule, or do you have some modifications
4 in light of that --

5 MR. ANDERSON: We do, Mr. --

6 CHAIRMAN LEMAY: -- recommendation?

7 MR. ANDERSON: -- Chairman. We do have a
8 proposed rule change to add -- not a rule change, but this
9 is to add to the order itself an ordering paragraph, and I
10 think Mr. Carroll could probably explain that a little bit
11 better.

12 MR. CARROLL: All it does is add two sentences to
13 your Ordering Paragraph 2 to clarify this issue, because,
14 as industry pointed out and admitted, you know, they want
15 to leave the ambiguity there, and we want to remove the
16 ambiguity. And I think this Commission can do that at this
17 time.

18 MR. ROSE: Mr. Chairman, if I might --

19 CHAIRMAN LEMAY: Yes, please, jump in here, Mr.
20 Rose.

21 MR. ROSE: -- even if you adopt the OCD's
22 proposed amendment to the ordering paragraph, I think the
23 question of the Committee's recommendation probably ought
24 to be clarified, because there is -- The reason why we
25 raise the issue initially is because we didn't believe that

1 your Finding Number 8 accurately represented the Rule 116
2 Committee's recommendation to you.

3 We believe that Mr. Kellahin's oral testimony, in
4 fact, represents what the Committee's recommendation --

5 CHAIRMAN LEMAY: Let's take it one issue at a
6 time.

7 MR. ROSE: Okay.

8 CHAIRMAN LEMAY: Two issues here. One is the
9 recommended Division Ordering Paragraph 2. You don't have
10 any objection to that?

11 MR. ROSE: It's not something I'm particularly
12 thrilled with, but as a practical matter, it certainly
13 resolves that question.

14 CHAIRMAN LEMAY: Why aren't you thrilled with it?
15 I thought you wanted ultimately the activities to be under
16 the Oil Conservation -- I mean at least the alternate
17 abatement regs or appeals to come here, not necessarily --

18 MR. ROSE: I think ultimately that's true. I
19 think we believe that even in the interim, at least with
20 respect to cleanups, they all ought to come here as well.

21 And what this does is keeps the status quo as to
22 cleanups, where those alternative abatement standards would
23 go -- at least for the downstream facilities, would
24 continue to go to the Water Quality Control Commission.

25 So that's the part that we disagree with, not --

1 CHAIRMAN LEMAY: Well, that's not the way I heard
2 it. I heard it as a matter of both agencies would be
3 involved, which is -- would be the problem. Sure, you'd
4 have us involved, but you'd also keep the WQCC involved,
5 because of theirs. So that perpetuates the ambiguity, as I
6 understand it.

7 MR. ROSE: Well, Mr. Chairman, I think that at
8 least in most cases the cleanups are separable, that, in
9 fact, you can draw distinctions about which agency it would
10 ultimately go to. I think there are fact patterns where it
11 could be confusing.

12 We believe, though, that the more likely scenario
13 is, in fact, a cleanup at a facility which might be subject
14 to a discharge plan but which isn't -- the cleanup isn't
15 interrelated with the existing discharge plan, and that it
16 wouldn't interfere with the Water Quality Control
17 Commission's jurisdiction over the discharge plan to have
18 the abatement activities subject to this Commission's
19 oversight.

20 You're dealing with the same standards,
21 ultimately.

22 CHAIRMAN LEMAY: Well, we are. I mean, that's
23 why we want to -- I mean, I thought the recommendation in
24 its simplest form brings those standards over here --

25 MR. ROSE: And that's -- and in fact, that's --

1 CHAIRMAN LEMAY: -- and that's what we're trying
2 to get to, not necessarily -- If we can get to that by two
3 stages with this recommended rule change, more to follow, I
4 think that sounds like a positive development.

5 MR. ROSE: And we believe it would be positive if
6 the ultimate resolution were to bring all of that over. We
7 just think that the interim step, maybe, should be a little
8 longer than what the staff's recommending.

9 MR. CARROLL: And Mr. Chairman, the status quo is
10 being changed. We are bringing B.(21) activity regulation
11 over to the OCD with this order. We're just leaving the
12 B.(22) with the Water Quality Commission until we also
13 bring the discharge-plan permit rule over here.

14 CHAIRMAN LEMAY: Can you enlighten the
15 Commission, the other Commission members, on any
16 discussions you've had with Water Quality Control
17 Commission legal counsel and Commissioners or --

18 MR. CARROLL: Yes, we had a meeting with the
19 attorney for the Water Quality Control Commission on
20 Monday, and he recommended that we make an informational
21 briefing to the Water Quality Control Commission on
22 Tuesday, which we made. They were as confused as -- more
23 confused than you three are. So I didn't get many
24 questions after the fact.

25 Mr. Olson sits on that Commission. He, I

1 believe, did answer a few questions of fellow
2 Commissioners.

3 But we told them what we were doing and that we
4 intended to also bring the discharge plan permit rule over
5 here in the future.

6 CHAIRMAN LEMAY: In the future. You didn't say
7 that would be the subject of this particular --

8 MR. CARROLL: I said --

9 CHAIRMAN LEMAY: -- rehearing today. You said it
10 would be a separate action --

11 MR. CARROLL: Yes, I told -- I told that
12 Commission that this Commission was holding a rehearing on
13 the issue of whether B.(22) activities would be regulated
14 under OCD Rule 19, which is our new abatement rule, which I
15 told them was modeled on the WQCC rule. And I said, I
16 don't know which way you guys are going to rule.

17 CHAIRMAN LEMAY: So in a nutshell, you're saying,
18 as an interim, you'd like to keep the B.(22) activities
19 under WQCC. I understand what the industry recommendation
20 is, is, certain of those activities, obviously, would stay
21 there, but if it's under -- if it's a spill, that would be
22 part of our jurisdiction, and we would have that
23 jurisdiction reside with OCC.

24 So you'd still have double jurisdiction on
25 B.(22), but you would -- depending on the type of spill,

1 would be which agency would have the jurisdiction?

2 MR. ROSE: That's correct, Mr. Chairman, with the
3 ultimate goal, in essence, what the Division is
4 recommending, that ultimately it would all be over here.
5 It's just a question of --

6 CHAIRMAN LEMAY: Certainly you could resolve is
7 -- What's the Division recommendation on, I guess, the
8 Committee report, item -- Finding 8 -- actually leaving 8
9 but striking a. through h. under the findings?

10 MR. CARROLL: You know, actually all of 8 is
11 fine. That is what the Committee report stated. And you
12 did quote it almost verbatim. You could add a 9 saying
13 there is confusion as to what was presented as the
14 Committee recommendation --

15 CHAIRMAN LEMAY: I don't think you want to -- Mr.
16 Carroll, we're trying to eliminate the confusion.

17 MR. CARROLL: 8 is fine as it reads.

18 CHAIRMAN LEMAY: Is there any objection to
19 eliminating it? Would it affect the ultimate goal that the
20 Division has, or -- Obviously there's something in those
21 things that bothers industry, or some elements of industry.

22 MR. ROSE: Mr. Chairman --

23 MR. CARROLL: I think it would be 8 f., f. and
24 g., is what bothers industry. But if that's how the
25 Commission rules -- Like I said, you don't have to adopt

1 the Committee recommendation.

2 MR. ROSE: Correct. And Mr. Chairman, maybe the
3 easiest thing to do is -- I mean, the Committee
4 recommendation and your language is merely explanatory of
5 how you get to what your rule is. Your rule says what it
6 says. It seems to me that's what really is the
7 determination of what your intent was. And I think even if
8 you strike Finding Number 8, the rule still says what it
9 says.

10 So I don't know that we necessarily -- You know,
11 maybe we've avoided at least highlighting the ambiguity by
12 deleting the finding.

13 My recommendation is to at least incorporate that
14 portion of the Committee's recommendations, as doing
15 abatement, regardless, under this Commission's jurisdiction
16 is a good idea, and it ought to be like the Water Quality
17 Control Commission regs. And that's all that -- the first
18 part of that finding says. It doesn't deal with the
19 specific jurisdictional dispute.

20 And I think that that piece of the
21 recommendation, I don't think there's any disagreement to,
22 and I think it adds something to the order. But I think if
23 you delete it, your finding -- Your rule is what it is and
24 it says what it says, and you're going to ultimately have
25 to interpret it. I don't know that the finding offers that

1 much --

2 CHAIRMAN LEMAY: I guess that's my confusion as
3 to why the -- why all the problem with the finding. It
4 bothers some people, and some people want it left in there.
5 I'm confused as to why --

6 MR. CARROLL: Mr. Chairman, it's your finding.
7 How much reasoning do you want to list behind the rule you
8 adopt?

9 CHAIRMAN LEMAY: You're putting it back on us
10 here.

11 Well, let's get to it, then, I mean because it
12 was part of the Committee's written recommendation.

13 What parts of that written recommendation, taking
14 a. through h. -- Do you want to eliminate all, Mr. Rose?
15 Are there in particular there that you find that are in
16 direct conflict with the intent as you say Mr. Kellahin
17 expressed.

18 MR. ROSE: Let me read through them specifically.
19 f. certainly is, I think, a problem.
20 g. is a problem.

21 Let's see if h. is -- h. might be a problem. I'm
22 not quite sure what it says. I didn't write this; it's all
23 Tom's fault.

24 CHAIRMAN LEMAY: Well, let me do this: Obviously
25 the rule says what it says, obviously there are elements in

1 industry that want some of the findings not carried through
2 because -- for whatever reason, and there -- the Division
3 would like the findings to remain in there for certain
4 reasons.

5 Why don't you submit recommended draft findings,
6 incorporating what is acceptable, or your interpretation of
7 what's acceptable under item a. -- a. through h., as you
8 get it from Mr. Kellahin, and the Division do the same, and
9 we may accept all or none of your recommended findings, and
10 we'll go from there?

11 I'm really confused as to who's recommending what
12 in the findings. That's my problem. I don't know if my
13 fellow Commissioners have that clear, but...

14 COMMISSIONER BAILEY: I have a couple questions.

15 CHAIRMAN LEMAY: Okay, Commissioner Bailey,
16 please.

17 COMMISSIONER BAILEY: Mr. Anderson, you said that
18 you intend to eventually bring all of B.(21) and B.(22)
19 over to the OCC.

20 MR. ANDERSON: That's correct.

21 COMMISSIONER BAILEY: But in the meantime you
22 have to draft rules and provide some structure on how
23 that's going to be accomplished, right?

24 MR. ANDERSON: That's correct, Commissioner,
25 Bailey.

1 COMMISSIONER BAILEY: How soon would you expect
2 that this project would be completed so that all of B.(21)
3 and (22) would be over here?

4 MR. ANDERSON: Probably somewhere between six
5 months and a year.

6 COMMISSIONER BAILEY: So within a year, the
7 findings that are part -- the a. through h. of Finding 8
8 will be carried out anyway, through the rules that you will
9 be drafting?

10 MR. ANDERSON: That's correct, yes.

11 COMMISSIONER BAILEY: The question on Ordering
12 Paragraph 2 will be resolved. I fail to find the point of
13 Mr. Rose's problems.

14 MR. ROSE: Mr. Chairman, Commissioner Bailey, if
15 I might, the Department's proposal to bring the discharge
16 plan program over, as I understand it, is of fairly recent
17 vintage.

18 And in fact, I think, unfortunately, your Finding
19 Number 8 in the request to clarify it may have been the
20 genesis for them actually considering the regulatory move.

21 We certainly weren't aware of a proposed
22 recommendation to do that until we were advised on Monday
23 that staff was, in fact, going to appear before the Water
24 Quality Control Commission, so that actually contemplating
25 the entire program coming over here was not something that

1 we, in fact, have done, because we just weren't aware that
2 that was under consideration. And so that was part of the
3 concern.

4 The second piece of the concern is -- and I think
5 six months to a year sounds like a short period of time.
6 Given my experience -- and I worked with government for 16
7 years before going into private practice -- six months to a
8 year can be a very long period of time. In other words, it
9 can take significantly longer than that, number one.
10 Number two is that that predicates the decision on the fact
11 that this Commission will, in fact, agree to accept
12 responsibility for the discharge plans for those
13 facilities.

14 And while I would hope that you would, I don't
15 want to assume that that's the way you're going to rule as
16 a foregone conclusion, because there may be issues that we
17 haven't anticipated in opposition to doing that. So that
18 I'm not sure that ultimately that's what's going to happen.

19 And so my only concern was that the Committee
20 considered this -- as reflected in Mr. Kellahin's
21 testimony, the Committee made a recommendation to this
22 Commission as to how that ought to be handled. We believe
23 that this Commission accepted that recommendation because
24 it adopted the rules as proposed with respect to that, and
25 that therefore we believe that the findings should, in

1 fact, reflect what we believe to be the Committee's
2 recommendation.

3 We're not disputing the language in the rule;
4 we're disputing the Commission's representation of what the
5 Committee actually recommended to you. And that was why we
6 styled it as a correction to the finding, because we
7 believe the finding misstated the Committee's
8 recommendation.

9 We believe that the rule as adopted is, in fact,
10 proper and does what the Committee recommended that you do
11 with respect to the jurisdictional disputes.

12 COMMISSIONER WEISS: I guess that's the crux of
13 the matter. Is there a jurisdictional dispute? Do we know
14 that? I don't know that.

15 CHAIRMAN LEMAY: No, I don't think we would know
16 that until --

17 MR. CARROLL: That's a dispute.

18 CHAIRMAN LEMAY: That's a dispute here. We're
19 pretty hypothetical. I mean, we're assuming that there is
20 a dispute. I don't know of one that's arisen concerning
21 joint jurisdiction. I think it's trying to anticipate that
22 dispute in the future.

23 MR. CARROLL: Well, all this has to do with
24 appeals. I mean, the OCD enforces the regulations under
25 either act. We're the enforcement agency.

1 If industry has a problem with our enforcement
2 action, where do they go? Currently under B.(22) they go
3 to WQCC. Now, under B.(21), they go here, to the OCC.

4 We would prefer -- We prefer just to digest the
5 bite we can chew and digest right now, rather than taking a
6 bigger bite than we feel we're ready to at the moment.

7 CHAIRMAN LEMAY: Yeah, that's -- I think you've
8 really condensed it. I mean, we're talking about who hears
9 the appeals.

10 MR. ROSE: And I think we agree, that's exactly
11 what the issue is, because the rules are virtually
12 identical.

13 CHAIRMAN LEMAY: Uh-huh, uh-huh. You're saying
14 you'd like to leave the appeals over at WQCC until you
15 draft some language otherwise.

16 MR. CARROLL: Right.

17 CHAIRMAN LEMAY: Can there be an argument made
18 legally that by adopting this that the appeals come over
19 here?

20 Let's say we --

21 MR. CARROLL: Mr. Rose is already doing that.

22 CHAIRMAN LEMAY: Well, I think he's left some
23 ambiguity in there, because he still says WQCC under
24 certain discharges would have jurisdiction.

25 MR. CARROLL: Under discharge plan permit rules,

1 yes.

2 CHAIRMAN LEMAY: So as I understand it, Mr.
3 Rose -- I mean, Mr. Rose is acknowledging the joint
4 jurisdiction because under certain circumstances WQCC would
5 hear the appeal, but under most circumstances those would
6 still come here. That's the ambiguity.

7 You're saying that -- as I understand it, that
8 there may be a few situations you could contrive where
9 there would be a problem.

10 But he's willing to undergo that problem or
11 ambiguity by keeping this in here because he's not sure
12 what will happen in the future, where I think you're saying
13 let's clean up -- let's be specific in granting the WQCC
14 their jurisdiction, but we will bring all that over here
15 with recommended rule changes.

16 MR. CARROLL: Correct. Let's handle B.(21)
17 entirely here right now, and let's keep B.(22) over there
18 until six months to a year.

19 CHAIRMAN LEMAY: That's kind of what we're
20 considering. That's really it in a nutshell.

21 Lyn, do you have any legal input on that?

22 MS. HEBERT: Well, Mr. Rose, you said something
23 about you wanted the interim step should be a little
24 longer, and that confused me because it would seem that you
25 support a quicker move of the discharge permits to this

1 jurisdiction as well.

2 MR. ROSE: Mr. Chairman, Ms. Hebert, yes, I
3 would. What was talking is their recommendation that
4 B.(22) facilities, at least in the interim, all remain
5 under the Water Quality Act with appeals to the Water
6 Quality Control Commission.

7 The interim step I was referring to is the B.(21)
8 step. I think they ought to step the way the Committee's
9 recommending and bring part of the B.(22) actions over here
10 in the first step before going to the discharge-plan step.
11 That's the only disagreement.

12 MS. HEBERT: Rather than doing it all at once?

13 MR. ROSE: Correct.

14 CHAIRMAN LEMAY: Is this a big deal? We're
15 talking about an interim step here and arguing pretty --

16 MR. CARROLL: In practical effect, probably not.

17 CHAIRMAN LEMAY: As a practical effect? How many
18 appeals have we heard to date?

19 MR. CARROLL: How many has WQCC heard to date?

20 CHAIRMAN LEMAY: How many has WQCC --

21 MR. ANDERSON: Two.

22 CHAIRMAN LEMAY: Two?

23 MR. ANDERSON: Well, for abatement of water
24 pollution, nobody's heard anything.

25 MR. ROSE: Well, they've only been in effect for,

1 what? A year or so?

2 MR. ANDERSON: A year and a half.

3 MR. ROSE: But I think even under the discharge
4 plan program, I think what you were saying --

5 MR. ANDERSON: The OCD has had two appeals of a
6 requirement for a discharge plan in 12 years, before the
7 WQCC.

8 MR. ROSE: And Mr. Chairman, if I might, the real
9 issue, if you really want to break it down, is the question
10 of where alternative standards get approved for --

11 CHAIRMAN LEMAY: That's the crux.

12 MR. ROSE: That's really the crux of the issue.

13 And from our perspective, we'd much rather come
14 to you guys than go to the Water Quality Commission and --
15 well, a glazed look from three individuals is bad enough,
16 but when you have eleven there looking at it, that's
17 really --

18 CHAIRMAN LEMAY: I can sympathize with you, Mr.
19 Rose, and I thought under this existing rule and findings
20 that in most cases alternate abatement plans and regs would
21 come here, even under B.(22).

22 MR. ROSE: That's the way we understood the
23 Committee's recommendation, Mr. Chairman.

24 CHAIRMAN LEMAY: Mr. Anderson, you're not buying
25 into that, I see?

1 MR. ANDERSON: Well, the -- Mr. Chairman -- and
2 I'll have to agree, the last meeting of the Committee, it
3 was not unanimous; it was by one vote, to bring the B.(22)
4 facilities over to the OCC also. The OCD did not vote in
5 that, we abstained on that one.

6 But as a practical matter, six months to a year
7 to bring them all over, it's going to take -- If somebody
8 applied for alternate abatement standards tomorrow, it
9 would be over a year before they got them anyway, before it
10 would go to a commission anyway.

11 The length of time to process alternate abatement
12 standards and bring it to hearing is very lengthy, just
13 by -- by either Rule 19 or by the WQCC rules.

14 So, you know, it would be -- If we can draft and
15 the Commission accepts --

16 CHAIRMAN LEMAY: Well, I think that's the
17 confusion. I think there's not that complete trust that it
18 will happen. Otherwise, I assume industry would say, Hey,
19 let's go with it.

20 MR. ROSE: If we can do it quicker, that would
21 even be better.

22 MR. ANDERSON: But to back up on what Mr. Rose
23 said before, that they had just found out about this, we
24 have been contemplating this, bringing discharge plans
25 over, for -- since before Rule 116 and Rule 19 started in

1 committee.

2 Granted, that was not made public knowledge. And
3 this is the first part of it, is to bring the B.(21)
4 facilities under OCD -- under OCC, and then work on the
5 discharge plans and the B.(22). That's been contemplated
6 for about three years now.

7 CHAIRMAN LEMAY: Well, what about -- I'm trying
8 to find an impasse here, and I'm just -- Let me throw
9 something else out. I don't want to confuse the issue.

10 What if the Commission came up with a finding
11 directing the Committee and OCD to come up with rules,
12 regulations, to bring those discharge plans over here?
13 Then you would have direction from us to get busy and do
14 it.

15 Any confusion in the interim would be certainly
16 understandable under that kind of direction.

17 MR. CARROLL: I would object to the re-formation
18 of that committee.

19 MR. ANDERSON: Mr. Chairman, I don't know that it
20 needs to be in a finding or anything, just the Commission
21 ordering the staff of the Division to come up with that and
22 giving us a time frame, we would do it. That --

23 CHAIRMAN LEMAY: That may be better. I'm not
24 sure this would require a committee if, in fact -- Mr.
25 Rose, I think you're concurring -- if we had a

1 recommendation, a finding in there that because of
2 ambiguity that exists with this re-hearing that we think
3 that the answer lies in directing the Division in a timely
4 manner to present a rule change to bring all the B.(22)
5 facilities over here or whatever, you know.

6 MR. ROSE: Mr. Chairman, we certainly have no
7 objection to that.

8 I would concur with staff in terms of a -- re-
9 forming the Committee. I think if you want to move this
10 quickly, sending it to the Committee probably isn't the way
11 to go.

12 CHAIRMAN LEMAY: Thank you. I was hoping that
13 you would come to that recommendation. We did not want you
14 to feel left out.

15 MR. ROSE: Oh, no --

16 CHAIRMAN LEMAY: We've heard in the past you want
17 involvement. However --

18 MR. ROSE: We will certainly be participants.

19 CHAIRMAN LEMAY: -- involvement can be in a
20 number of ways.

21 You'll have a draft rule out there to take pot
22 shots at, in case you want to, I mean, before we even hear
23 it.

24 MR. ROSE: And Mr. Chairman we know where Mr.
25 Anderson hides, and we can find him.

1 MR. ANDERSON: Well, we would propose not to have
2 a committee but let the Division draft rules and then
3 circulate them and hold public meetings in the affected
4 areas prior to presentation of a rule to the Commission.

5 CHAIRMAN LEMAY: Doesn't that make sense?

6 COMMISSIONER WEISS: Yes.

7 CHAIRMAN LEMAY: Okay, let's have a draft finding
8 by both of you to -- substitute draft finding for
9 direction, the Commission will direct that to happen.

10 MR. CARROLL: Thank you, Mr. Chairman.

11 CHAIRMAN LEMAY: If we direct it to happen,
12 there's a pretty good chance that we want it to happen,
13 that we want to take authority, Mr. Rose. So that also
14 satisfies that other question you had, whether we really
15 want it or not.

16 MR. ROSE: Mr. Chairman it wasn't whether you
17 really want it; it's six months or a year from now, nobody
18 quite knows what the situation is going to be.

19 And I hate to predict what might happen six
20 months or a year from now in any kind of governmental body,
21 especially one like this Commission where certain positions
22 are subject to appointment. You never quite know how those
23 things happen.

24 CHAIRMAN LEMAY: We are insecure too. We
25 appreciate your concern for our high anxiety.

1 MR. ROSE: Thank you, Mr. Chairman.

2 CHAIRMAN LEMAY: Thank you, Mr. Rose.

3 Anything else?

4 MR. CARROLL: No.

5 CHAIRMAN LEMAY: We'll take the case under
6 advisement.

7 (Thereupon, these proceedings were concluded at
8 11:01 a.m.)

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CERTIFICATE OF REPORTER

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

I, Steven T. Brenner, Certified Court Reporter and Notary Public, HEREBY CERTIFY that the foregoing transcript of proceedings before the Oil Conservation Commission was reported by me; that I transcribed my notes; and that the foregoing is a true and accurate record of the proceedings.

I FURTHER CERTIFY that I am not a relative or employee of any of the parties or attorneys involved in this matter and that I have no personal interest in the final disposition of this matter.

WITNESS MY HAND AND SEAL April 19th, 1997.



STEVEN T. BRENNER
 CCR No. 7

My commission expires: October 14, 1998

CASE NO. 11635
Order No. R-10767

Amended Ordering Paragraph (2):

(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.

BEFORE THE OIL CONSERVATION COMMISSION Santa Fe, New Mexico	
Case No. <u>11635</u>	Exhibit No. <u>1</u>
Submitted by <u>OCD</u>	
Hearing Date <u>4/10/97</u>	

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:

CASE NO. 11635
Order No. R-10767

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".

NOW, on this 13th day of February, 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) 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.

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

(8) 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 of the OCD;
- f. provide that appeals for Section 70-2-12 B.(22) NMSA, 1978 as amended (B.(22)) activities be processed through the WQCC hearing procedures;
- g. continued enforcement by OCD of cleanup "abatement" of B(22) activities and appeals to the WQCC; and
- h. 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;

(9) 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, Neepner 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."*

(10) 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.

(11) 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.

(12) 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.

(13) The Commission believes that the language proposed by Mr. Donald Neepner of New Mexico Citizens for Clean Air and Water on November 14, 1996 in D. Neepner 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.

CASE NO. 11635
Order No. R-10767

Page -5-

(14) 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.
- (3) OCD Rule 7 as amended and Rule 19 shall be effective as of the date said order is recorded in the State Records Center.
- (4) 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.

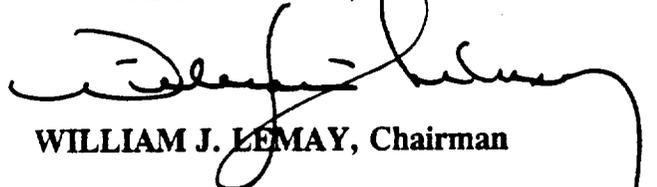
STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION



JAMI BAILEY, Member



WILLIAM W. WEISS, Member



WILLIAM J. LEMAY, Chairman

S E A L

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]

REMEDICATION 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]

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 (insert effective date of Rule), 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 19 NMAC 15.C.116.D, (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]