

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

DEC

IN THE MATTER OF THE HEARING CALLED BY)	
THE OIL CONSERVATION COMMISSION FOR THE)	
PURPOSE OF CONSIDERING:)	
)	
HEARING CALLED BY THE OIL CONSERVATION)	CASE NOS. 11,352
DIVISION TO AMEND RULE 116 OF ITS)	
GENERAL RULES AND REGULATIONS PERTAINING)	
TO THE NOTIFICATION OF FIRES, BREAKS,)	
LEAKS, SPILLS AND BLOWOUTS)	
)	
HEARING CALLED BY THE OIL CONSERVATION)	and
DIVISION TO ENACT A NEW RULE)	11,635
ESTABLISHING METHODS AND STANDARDS FOR)	
THE PREVENTION AND ABATEMENT OF WATER)	
POLLUTION ASSOCIATED WITH OPERATIONS IN)	
THE OIL AND GAS INDUSTRY)	
)	(Consolidated)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
COMMISSION HEARING

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

Order

November 14th, 1996
Santa Fe, New Mexico

This matter came on for hearing before the Oil Conservation Commission, WILLIAM J. LEMAY, Chairman, on Thursday, November 14th, 1996, 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

November 14th, 1996
 Commission Hearing
 CASE NOS. 11,352 and 11,635 (Consolidated)

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A P P E A R A N C E S

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* * *

ALSO PRESENT:

DON ELLSWORTH
Senior Technical Specialist for Environmental Compliance
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(Continued...)

A P P E A R A N C E S (Continued)

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NMOCD

SAM SMALL
Amerada Hess Corporation

ROBERT J. MENZIE, JR.
Marathon Oil Company

* * *

1 WHEREUPON, the following proceedings were had at
2 9:10 a.m.:

3 CHAIRMAN LEMAY: Now we shall call Cases 11,352
4 and 11,635.

5 11,352 is the hearing called by the Oil
6 Conservation Division to amend Rule 116 of its General
7 Rules and Regulations.

8 As a companion case, Case 11,635 is in the matter
9 of the hearing called by the Oil Conservation Division to
10 enact a new rule establishing methods and standards for
11 prevention and abatement of water pollution.

12 These are associated cases. It's my
13 understanding that testimony will be taken on both of them
14 together; they will be consolidated for testimony.

15 This case has been continued from the June 20th
16 hearing, the October -- I'm sorry, the October 29th
17 hearing.

18 And we shall now call for appearances in Case
19 11,352

20 MR. CARROLL: May it please the Commission, my
21 name is Rand Carroll, appearing on behalf of the Division.
22 I will have one witness.

23 CHAIRMAN LEMAY: Okay, Mr. Carroll.
24 Additional appearances?

25 MR. ROSE: Louis Rose with Montgomery and Andrews

1 on behalf of Marathon Oil Company. We'll have one witness
2 as well.

3 CHAIRMAN LEMAY: Okay, thank you.

4 MR. ELLSWORTH: Don Ellsworth on behalf of the
5 Bureau of Land Management.

6 CHAIRMAN LEMAY: Do you have any witnesses, Mr.
7 Ellsworth?

8 MR. ELLSWORTH: No, sir.

9 CHAIRMAN LEMAY: Okay. Additional appearances?
10 Yes?

11 MS. RISTAU: Yes, Toni Ristau on behalf of PNM.

12 CHAIRMAN LEMAY: Okay. Additional appearances?

13 MS. RISTAU: No, just myself.

14 CHAIRMAN LEMAY: Okay, other appearances in the
15 case?

16 Those witnesses who will be giving testimony,
17 would you kindly stand and raise your right hand?

18 (Thereupon, the witnesses were sworn.)

19 CHAIRMAN LEMAY: Mr. Carroll, you may begin.

20 MR. CARROLL: May it please the Commission, at
21 this time I will submit what has been marked OCD Exhibit
22 Number 1, which was the draft Rule 116 that was prepared by
23 the Division incorporating their suggestions as to the
24 inclusion of volumes of gas that have been released that
25 need to be reported.

1 And also at this time I'd like to give to the
2 Commission what's been marked OCD Exhibit Number 3, which
3 is the new report, C-141, which will be used by the
4 Division in the reporting of such releases, and it's my
5 understanding that the BLM has agreed to the contents of
6 the form, and they will be using the same form for reports
7 to them.

8 And with that, that's all the Division has at
9 this time.

10 We have one witness that is prepared to address
11 concerns brought up by other parties. Otherwise, we stand
12 by the draft Rule 116 which was proposed at the October
13 hearing with our suggested language regarding the release
14 of gases.

15 CHAIRMAN LEMAY: Okay. Thank you, Mr. Carroll.

16 Mr. Rose?

17 LOUIS ROSE,

18 the witness herein, after having been first duly sworn upon
19 his oath, testified as follows:

20 DIRECT TESTIMONY

21 BY MR. ROSE: Thank you, Mr. Chairman. I'm going to be the
22 witness, so if I might, hopefully we'll make this
23 relatively short and painless.

24 Mr. Chairman, members of the Commission, my name
25 is Louis Rose. I'm an attorney with the Montgomery law

1 firm. Just by way of background, I've been with that law
2 firm for about four and a half years now, doing primarily
3 environmental law.

4 Before I joined Montgomery and Andrews, I was an
5 attorney with what's now the New Mexico Environmental
6 Department for 16 years, working on both water and air
7 matters, primarily. I participated in the Water Quality
8 Control Commission rule-making that established these
9 abatement regulations, as well as most of the rule-makings
10 before that commission that established the remainder of
11 the Water Quality Control Commission regulations.

12 I'm appearing here today on behalf of Marathon
13 Oil Company, and what I'd like to address, if that's
14 appropriate, Mr. Chairman, is the proposed changes that I
15 submitted on behalf of Marathon, and my letter that was
16 dated, I believe, Friday, November the 8th, which you
17 should have, which I submitted to the Commission on the
18 8th. I don't know whether the secretaries provided those
19 to the Commissioners or not.

20 CHAIRMAN LEMAY: Is this this draft that we have
21 here? Give us just a second. We can get that --

22 MR. ROSE: Sure.

23 CHAIRMAN LEMAY: -- out for the Commission.
24 Proposed amendments, Montgomery and Andrews?

25 MR. ROSE: They should be dated November the 8th.

1 CHAIRMAN LEMAY: Yeah.

2 MR. ROSE: And I submitted three copies, one for
3 each of the Commissioners.

4 CHAIRMAN LEMAY: Is it two pages?

5 MR. ROSE: It's comprised of three pages totally,
6 I believe, Mr. Chairman. There was a previous submittal
7 that we made before the October 29th hearing, which we've
8 since withdrawn as part of the November 8th letter.

9 CHAIRMAN LEMAY: We have it.

10 MR. ROSE: Thank you, Mr. Chairman. I'll try to
11 go through these and explain these and then be available
12 for questions.

13 First, let me state for the record that Marathon
14 supports the proposed rule that was submitted by the Rule
15 116 committee but requests that the Commission make the
16 changes that we've submitted on November 8th, which we
17 believe are consistent with the purpose of the Committee's
18 draft but make some of the provisions more clear and, we
19 believe, further that purpose appropriately.

20 And I'll go through these one at a time. Some of
21 these are editorial, and I'll try not to dwell on those.
22 There are some fairly substantial changes, or at least
23 substantive changes, also included.

24 The first change, which we've labeled as
25 "General" and is something that I think is just an

1 editorial comment, and that is, throughout the draft
2 defined terms are sometimes capitalized, sometimes not, and
3 it was our position, or at least concern, that someone
4 reading that might construe the capitalized terms
5 differently than the uncapitalized. It's just a question
6 of style. And we are concerned that they just be
7 consistent throughout.

8 So if you're going to capitalize defined terms,
9 you ought to do that throughout or not do it throughout.

10 The second changes -- And we'll go through these
11 by rule. The first change to Rule 7 is to insert a
12 definition of "Director". Again, this is an editorial
13 comment. I think it's fairly clear from the text who
14 they're talking about, but this would make it absolutely
15 clear. Someone picking up these regulations who isn't as
16 familiar with them as most of the operators are might not
17 necessarily know who they're talking about, and that's just
18 something we suggest.

19 In terms of the second change, which is an
20 amendment to the definition of "hazard to public health",
21 the only change we're recommending to the Committee's draft
22 is to insert the letter A after the citation of 20 NMAC
23 6.2, Section 3103, and this would make it consistent with
24 the Water Quality Control Commission's definition of
25 "hazard to public health", which in fact references only

1 the Paragraph A standards in the definition, which are the
2 human-health-related standards.

3 And if you want, Mr. Chairman, I can give you the
4 parallel cite to the Water Quality Control Commission
5 regulations. It's 20 NMAC 6.2, Section 1101.W, and you can
6 compare those. But all we've done is compare the
7 definitions, and the proposed change here makes it
8 identical with the WQCC's definition.

9 The third proposed change is a change to the
10 definition of "remediation plan". And first, the context
11 in which the term is used is in proposed Rule 116.D,
12 dealing with corrective action, which states that a
13 responsible party is required to remediate unauthorized
14 releases, and they are required to do that either under a
15 remediation plan approved by the Division or an abatement
16 plan under Rule 19.

17 And we were concerned that, as we understood the
18 purpose of that remediation plan, was to be an all-
19 encompassing document that would deal with both soil
20 contamination and other media contamination, but that would
21 be relatively easy to clean up or that the Department did
22 not think was -- that necessitated an abatement plan, a
23 more complicated and certainly a more procedurally
24 difficult procedure, and that these remediation plans would
25 handle everything else.

1 The way the language was drafted in the proposal,
2 it appeared as though, in fact, remediation plans were much
3 more limited and would only apply in situations where it
4 was likely that the contamination would be remediated
5 within a year.

6 If, in fact, you had soil contamination but no
7 groundwater contamination or surface-water contamination,
8 but remediation took more than a year, under the proposed
9 definition it didn't look like there was any process to
10 remediate.

11 And so what we tried to do was limit or delete
12 the limitations in the applicability of the term, so that
13 it, in fact, would deal with cleanups of all types of
14 contaminations and then would basically be the process that
15 would be used where an abatement plan was not appropriate.

16 And so we think that's consistent with the
17 Committee's intent in these regulations, and we think that,
18 in fact, would give the Department more flexibility in
19 terms of how it approaches contamination.

20 And that's our proposed changes to Rule 7.

21 In terms of Rule 19, the first change is, again,
22 an editorial change. There's a parentheses missing at the
23 end of that sentence.

24 The second change -- let's find my Rule 19 here
25 -- deals with deleting some proposed language on page 3,

1 and that language deals with point-of-use treatment and its
2 consideration in alternative standards.

3 By deleting this language, we believe we've more
4 closely conformed -- in fact, we have more closely
5 conformed the proposal to the existing Water Quality
6 Control Commission regulation.

7 We've dealt with the concept of consideration of
8 point-of-use treatment in our proposed number 3, which
9 allows for a point-of-use treatment to be part of a
10 petition but does not require its use and does not require
11 consideration in establishing alternative standards. And
12 we believe that while it may be appropriate for -- that
13 point-of-use treatment be utilized in some situations, we
14 don't think that it's likely that it will in all
15 situations.

16 And so we wanted to make sure that the
17 Commission's rules allowed its consideration but did not
18 require it in all circumstances.

19 And so by deleting what's B.(6)(a)(iii) here and
20 inserting the language we've proposed in number 3, we
21 believe we've done that.

22 And as I pointed out, that the language in (iii)
23 is not in the Water Quality Control Commission regulations,
24 and by deleting it in this context, that the regulations
25 will precisely conform to that so that there's no

1 difference in treatment of alternative standards, if these
2 rules are adopted with our proposed changes, between how
3 the Water Quality Control Commission would deal with
4 alternative standards and how this Commission would deal
5 with the same issue.

6 Amendment Number 3, as I've indicated, includes
7 point-of-use treatment. And in addition, it's somewhat
8 editorial, and that is, if you look at the language in
9 B.(6)(b), particularly -- You have to look at this change
10 in conjunction with change number 4, which is to delete
11 (xi) and (xii) -- or is it -- it should be -- (xiii) there,
12 Roman numeral (xiii).

13 If you look at the way that the sentence is
14 drafted, it starts on page 3, "the petition shall", and
15 then you go down to number (xiii) there, it says, "the
16 petition may". It's a separate sentence. It's
17 discretionary, as opposed to mandatory.

18 And all we've done is take it out of the sentence
19 that's a requirement and made it a separate sentence that
20 makes it clear that that's discretionary. And we believe
21 we haven't changed the purpose of the sentence, only made
22 it clearer in terms of that being discretionary, as opposed
23 to being a mandatory item.

24 Change number 5, the change which is on page 5,
25 is a change to the proposal, number 7 there, dealing with

1 modification of abatement standards. And there is, as I
2 recall, no equivalent for this language in the Water
3 Quality Control Commission's regulations, although the
4 concept was discussed at length in the original hearings,
5 adopting the abatement regulations.

6 What this language, I thought, was intended to do
7 was to deal with situations where a company had made a
8 proposal to remediate, that proposal had been accepted and
9 vested in capital to remediate, and then after that's
10 ongoing, then the standards change.

11 And we didn't think it was appropriate,
12 certainly, for the companies, then, to have to re-evaluate
13 their abatement process and, in fact, maybe have to go re-
14 engineer controls that we thought that unless there was
15 some important reason why -- particularly related to public
16 health -- why, in fact, that ought to be re-looked at, that
17 once you've been approved to remediate, you ought to carry
18 that on in the investment. Particularly the capital
19 investment you made should not be revisited.

20 And that was the thrust of why at least Marathon
21 and other companies were interested in some language on
22 modification of abatement standards in the Water Quality
23 Control Commission context.

24 The draft that's in 7 here, we were concerned,
25 could be read to allow the Director unilaterally to second-

1 guess this Commission and the Water Quality Control
2 Commission's adoption of standards.

3 It could be read, for example, the state standard
4 for benzene is higher than -- for cleanup, is higher than
5 the Safe Drinking Water Act primary standard.

6 And we thought under this language, the Director
7 could, without going back to the Water Quality Control
8 Commission or to this Commission and recommending the
9 regulations establishing the cleanup standards,
10 unilaterally decide, Well, the current benzene standard is
11 not appropriate; we'll just require something different.

12 And we didn't think that was appropriate, that
13 it's this Commission or the Water Quality Control
14 Commission that's empowered to make those judgments as to
15 the appropriate standards, and that that process -- that
16 the standards ought to hold, unless either of the
17 commissions go through and amend those standards.

18 And what we've proposed in B.(7) is in essence to
19 deal with those situations, that if this Commission were --
20 after remediation is initiated, were to change the cleanup
21 standards, make them more stringent or less stringent,
22 that, in fact, the cleanup would be tied to the standards
23 at the time of approval, except if they're -- the
24 Commission were to determine that compliance with those
25 standards created a present or future hazard to public

1 health or the environment, in which case, then, the
2 companies would have a right to appeal to this Commission
3 in terms of that determination.

4 But we believe that's the appropriate test and
5 that that's -- in only those limited circumstances, should
6 the issue of the standards, the cleanup standards, be
7 revisited after remediation has been initiated.

8 The change number 6 here is, again, an editorial
9 change. The word "provision" isn't the right tense; it
10 should have been "provisions".

11 And then the language -- There's no Section (3);
12 it's actually, we believe, referring to E(3).

13 Change number 7, again, is editorial. There were
14 some situations which we understood in terms of these kinds
15 of agreements, which were not signed by the Director but
16 were, in fact, signed by someone in the Division working
17 for the Director, and wanted to make sure that it was clear
18 that whether the Director himself signed it or one of his
19 employees signed it, that, in fact, these agreements were
20 still binding.

21 The second change, adding "or other agreement",
22 just makes sure that the second part of the provided
23 sentence is parallel to the first part, includes exactly
24 the same types of documents.

25 Change number 7 is, again, an editorial change.

1 The word "likely" here, in terms of one year, was borrowed
2 from the language that had previously been in the
3 definition of "remediation plan". And this is the
4 provision and the regulations that exempts cleanups from
5 the abatement-plan process, as long as it's likely that
6 you'll clean up within a year. And we thought that it was
7 appropriate to add the word "likely" here to conform with
8 the Committee's proposal in terms of the definition of
9 "remediation plan".

10 Changes 8, 9, 10 and 11 are actually all part of
11 one proposal. As you heard last time, this proposed
12 regulation would allow for notice and comment both for
13 Stage 1 -- and potential public hearing, for Stage 1 and
14 Stage 2 abatement plans.

15 The company has reviewed the Water Quality
16 Control Commission regulations and, in fact, those
17 regulations do not allow for public hearing for Stage 1
18 plans. In fact, the company believes that it's really
19 inappropriate to do that for a Stage 1 plan, that, in fact,
20 you want to -- well, you want review by the agency, that
21 the purpose of that is to establish a plan to go out and
22 investigate contamination.

23 And we believe that the notice and potential
24 hearing process established in the committee's proposal
25 could substantially delay those efforts. We believe it's

1 more appropriate, on balance, to try to get that done
2 quickly and therefore try to get a remediation proposal
3 together.

4 Those remediation proposals would be the subject
5 of notice and potential hearing, but we don't think that
6 it's appropriate to have notice and public hearing and
7 comment periods at both stages.

8 And we believe the Water Quality Control
9 Commission's model is the appropriate one. The language we
10 propose to insert here, number 8, is, in fact, from the
11 Water Quality Control Commission regulations. Again, I'll
12 give you the cite if I can find it. It's, again, 20 NMAC
13 6.2, Section 4108.A, is the language that we've borrowed
14 here and inserted. That's our proposed number 8.

15 That's precisely the kind of notice that's given
16 for a Stage 1 plan at the Water Quality Control Commission
17 for those cleanups.

18 And we believe that that's appropriate to borrow
19 here, so that what it requires is a news release that would
20 give the public notice of the proposed investigation but
21 that would -- and then I guess the public could comment to
22 the Division if they saw appropriate, but would not
23 establish a formal process that would allow for notice and
24 opportunity for a public hearing at that stage.

25 And the change number 9, 10 and 11 would be

1 necessary to effectuate that change and ensure that the
2 notice, the kind of formal public notice that's specified
3 in these rules, and the opportunity for public hearing
4 would not apply to a Stage 1 plan.

5 Change number 12 is on page 11. With that --
6 what we're asking to delete here -- Let's see if I can find
7 it. Page 12, excuse me. -- is to delete H.(2), which
8 requires -- It says, The Director shall, within 30 days of
9 receiving a fact sheet, approve or notify the responsible
10 person of the document's deficiency.

11 That's language straight out of the Water Quality
12 Control Commission regulations. And it makes sense,
13 because for the WQCC's rules, a fact sheet is developed for
14 a public hearing on a Stage 2 abatement plan.

15 Under these proposed rules there's no equivalent
16 fact sheet development that's required, so there should be
17 no requirement to approve the fact sheet.

18 So unless you insert a requirement for a fact
19 sheet for a public hearing on a Stage 2, there's no need
20 for this section. And, in fact, there's nothing to
21 approve. So we think it's more appropriate just to delete
22 that section.

23 Change number 13 is, again, an editorial change.
24 The reference to 116.E is incorrect. There is no proposed
25 116.E. We believe that they're talking about Rule 116.D.

1 And the final change is to strike what's proposed
2 Rule 19.N, dealing with notification. We believe that,
3 first of all, having two notification rules, 116 and 19, is
4 confusing.

5 Secondly, we believe that the kinds of releases
6 which are covered by proposed Rule 19.N are, in fact,
7 covered by Rule 116 and that the redundant notification
8 requirements, we believe, are inappropriate. And
9 therefore, there really is no need for Rule 19.N.

10 And we believe it would be a lot clearer to the
11 regulated community if there were just one notification
12 rule, as opposed to two with potentially different
13 standards, albeit giving it the same releases.

14 So we propose that Rule 19.N be deleted.

15 That concludes my testimony, Mr. Chairman, and
16 I'm available for questions.

17 CHAIRMAN LEMAY: Thank you, Mr. Rose.

18 Questions from the audience?

19 Mr. Carroll?

20 MR. CARROLL: Mr. Rose -- First of all, I'll
21 advise the Commission that the OCD has been discussing
22 Marathon's suggested changes, and we agree with all the
23 changes up to change 8.

24 And as Mr. Rose has testified, 8, 9, 10 and 11
25 are all related.

EXAMINATION

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BY MR. CARROLL:

Q. Mr. Rose, it is my understanding that Marathon objects to the provision of hearings at both the Stage 1 and Stage 2 phases?

A. That's correct.

Q. And the Division agrees with that, that we don't think there's a hearing necessary at both the Stage 1 and Stage 2 phases. What the Division would like is an opportunity for comment on the Stage 1 provision.

Mr. Rose, why give notification as to Stage 1 if there's no provision for comment?

A. I guess I'd have to guess at what the Water Quality Control Commission intended, because this is their proposal.

I would guess that the Stage 1 plan, as I understand it, is merely a plan to investigate, in terms of how to conduct an investigation, and that it's less likely that there would be significant public input at that stage, and certainly that it's more of a technically-oriented-type review, and we believe that the Department is certainly equipped to do that and that's really the Department's function.

Where we think public input is most appropriate is at the remedy stage, that is, choosing the type of

1 remedy that would be effectuated in terms of cleaning up a
2 proposal and how long that would take to do.

3 But given that we believe that time is of the
4 essence in most of these kinds of cleanups, we believe on
5 balance that it's better and more appropriate in the public
6 interest to reduce the public-input and public-notice
7 process, in order to get on with the process of
8 investigating the contamination.

9 Q. Well, wouldn't public input be important if the
10 Division and the Applicant forgot something? Wouldn't
11 comment maybe fill in some gaps? Wouldn't it be
12 beneficial?

13 A. It could potentially be beneficial, and certainly
14 we don't believe our proposal precludes public input.

15 Q. But it doesn't provide for it?

16 A. It doesn't require it, certainly, it doesn't
17 authorize it. Although it's been my experience with
18 government that if the public is concerned about a matter,
19 they tend not to be shy about bringing them to the
20 attention of the government officials, regardless if
21 there's a specific regulation authorizing that input.

22 Q. Well, I don't think our suggested rule would
23 require public input; we can't require public input. But
24 to provide for it, the Division feels, is important.

25 A. And I can -- And I understand that, and we're not

1 suggesting that no public input is appropriate. We believe
2 that, particularly given the timing in these regulations on
3 approval of these plans -- and as I recall, the -- and I'd
4 have to look at the specific provision. I think the
5 regulations call for approval of these Stage 1 plans,
6 actually, fairly quickly after they're submitted.

7 And it didn't look like -- the approval process
8 really allows for -- so within 60 days after receiving the
9 proposal -- I guess it depends on when you get the public
10 notice out and how long you allow for public comment, but
11 certainly we have no objection -- If you didn't compromise
12 that 60-day time frame, you could get public comment.
13 Certainly that would be appropriate.

14 But we're concerned that the expeditious nature
15 of these kinds of reviews would be -- would, in fact, be
16 compromised if you put in a formal-notice process, and
17 that's the primary concern here.

18 Q. Well, would Marathon agree to it if the 60-day
19 time frame was left intact and let's say a 30-day comment
20 period for public comment be included also?

21 A. I'd have to discuss that with my client, and we
22 can certainly get back to you. I'm not authorized to agree
23 to that at this point.

24 Q. But you do agree that public comment might
25 provide some insight as to what type of investigation

1 should be performed?

2 A. Certainly, and -- not that the Division is not
3 all-knowing, but I suspect there are situations where the
4 Division and the regulated party could be missing something
5 that it might be appropriate to look at.

6 So sure. I mean, it's -- I think it can be
7 valid. Sometimes it is, sometimes it isn't. But I
8 wouldn't dismiss the possibility of some valid comments
9 coming in and directing those investigations, certainly.

10 Q. And the Division, you know, wants to see this
11 proceed as fast as possible also, but believes that public
12 comment is essential at the investigation phase, besides
13 this Stage 2.

14 The Division agrees with 12 and 13 of your
15 comments.

16 And then the only other change or disagreement is
17 number 14 on the last page. You testified that the notice
18 of ground contamination contained in Rule 19.N would be
19 covered by the notice provisions of Rules 116?

20 A. Well, that was certainly the way we read proposed
21 Rule 119.N [sic], that's correct.

22 Q. Rule 116 deals with unauthorized releases, as
23 currently drafted; is that correct?

24 A. As currently drafted, that is correct.

25 Q. And how does Marathon intend to address the

1 situation where authorized releases, through discharges
2 into an unlined pit, or a discharge plan contaminates
3 groundwater?

4 A. Well, I guess there's a couple of issues in terms
5 of how you look at it, and that is, I guess, it depends on
6 whether the release -- exactly how the release is
7 authorized and what authorization there is for the release.

8 It wasn't clear, in terms of the types of release
9 that 19.N is talking about, whether, in fact -- For
10 example, if you're authorizing a release under a discharge
11 plan, certainly, it's my understanding that the Division
12 can attach monitoring requirements that would ensure -- and
13 reporting requirements, in fact, in the context of that
14 authorization, that they would get notice if, in fact,
15 something wasn't operating the way it was supposed to.

16 And I assume that's true in the other rules as
17 well, whether it's a pit or any other kind of disposal
18 activity. Certainly there's the ability to regulate those.

19 I guess I was -- We were concerned about exactly
20 what the context was and what that meant, and that
21 certainly -- We didn't think that releases that impacted
22 groundwater or that caused exceedences of standards were
23 necessarily authorized. And so it was our position that,
24 in fact, those kinds of releases were covered by Rule 116.

25 But I certainly will admit that there may be fact

1 patterns where perhaps Rule 19.N would apply that 116
2 wouldn't. And if that's the case, we believe that the
3 better way to deal with this is to modify Rule 116 to
4 encompass those changes, as opposed to have two separate
5 reporting rules that, in fact, could apply to the same
6 release.

7 We think there's a universe of releases, in fact,
8 that there's more commonality than, in fact, differences
9 between a release subject to 116 and 19.N, and that
10 therefore you would end up with two potentially different
11 reporting requirements that would apply to two different
12 parts of the same agency that could lead to -- with
13 different potential standards upon it, that could lead to
14 violations for exactly the same release.

15 We thought it was more appropriate that if it was
16 the Division's intent that there was releases that 116
17 didn't cover, to modify 116, not include a whole separate
18 notification rule.

19 Q. Yeah, you've hit the nail on the head. The
20 Division is concerned that there would be a gap, that
21 certain releases that would contaminate groundwater would
22 not be reported to the Division. And as Rule 116 is
23 currently drafted, it only applies to unauthorized
24 releases.

25 And you're right, the Division never authorizes

1 releases that contaminate groundwater. But there is a gap
2 there, where an authorized release would contaminate
3 groundwater, that wouldn't necessarily be required to be
4 reported.

5 The Division has prepared what has been marked
6 Exhibit Number 2, which I haven't provided the Commission,
7 which would incorporate the notice provisions of 19.N into
8 Rule 116 so that all the notifications are contained in
9 Rule 116 and we wouldn't have this hanging notice
10 requirement at the end of Rule 19.

11 And I can provide that to the Commission now or
12 later.

13 CHAIRMAN LEMAY: Want it now?

14 COMMISSIONER WEISS: Yeah.

15 CHAIRMAN LEMAY: Yeah, we'd like to have it now,
16 please, Mr. Carroll.

17 MR. CARROLL: That's all the questions I have of
18 Mr. Rose.

19 CHAIRMAN LEMAY: Additional questions of Mr. Rose
20 from the audience?

21 Commissioner Bailey?

22 EXAMINATION

23 BY COMMISSIONER BAILEY:

24 Q. A lot of information, quickly, without a lot of
25 explanation, so it would take a while to go through all of

1 your suggestions.

2 For Rule 7, within remediation, following up the
3 conversation that just occurred, there's also that
4 discrepancy between reportable and unauthorized, so that is
5 in an area that would need to be reviewed closely. I'd
6 like to explore this area a little bit.

7 Is your definition here saying that authorized
8 releases which may adversely impact groundwater do not have
9 to quality for remediation plans or improvements?

10 A. Mr. Chairman, Commissioner Bailey, it was our
11 intention that remediation plans -- And as I indicated in
12 response to Mr. Carroll's questions, it was certainly not
13 our interpretation that discharges causing exceedences of
14 groundwater standards were, in fact, authorized, so that
15 this would encompass all of the situations where
16 groundwater contamination would have occurred. I can't
17 conceive of any of those situations occurring.

18 But certainly it's not our intent to limit the
19 applicability of remediation plan only to those discharges
20 which, in Mr. Carroll's parlance, are unauthorized.
21 Certainly, the kinds of -- that remediation plan would be
22 broader and cover releases that, in fact, adversely impact
23 groundwater.

24 However, with this proviso -- and that is that
25 there are regulations already in place to deal with some of

1 these authorized -- what Mr. Carroll would qualify or
2 explain as authorized discharge -- For example, if you have
3 a discharge plan that's approved under the Water Quality
4 Control Commission Regulations, those regulations
5 specifically provide that if a discharge that's approved
6 under those plans causes an exceedence of standards,
7 there's a remedy to require their cleanup. So that for
8 those kind of discharges, in fact, there is a requirement
9 to clean up, and that this definition would not need to
10 encompass those kinds of activities.

11 And then quite frankly, I'm not sure what other
12 options are there. We'd certainly agree that remediation
13 plan ought to apply more broadly than, in fact, the
14 committee's proposal is, and it is the committee's proposal
15 that only reportable releases be -- in fact, be covered by
16 these.

17 But as to whether or not, given Mr. Carroll's
18 position on authorized versus unauthorized, which is --
19 this is broad enough -- that's something we'd certainly
20 have to look at, and that if this Commission were to allow
21 a post-hearing comment period, we could address after
22 discussion with the Division.

23 But I'm not sure about the entire universe of
24 releases we're really talking about here, and whether there
25 may be, in fact, other remedies already in this

1 Commission's rules, or in the Water Quality Commission
2 rules, to cover those kinds of situations.

3 COMMISSIONER BAILEY: That's all I have right
4 now.

5 CHAIRMAN LEMAY: We'll explore the whole issue
6 later with an informal question-and-answer period.

7 Commissioner Weiss?

8 COMMISSIONER WEISS: I have no questions.

9 CHAIRMAN LEMAY: I have to second Commissioner
10 Bailey's comments. There's a whole lot here that it's
11 difficult for us to absorb and comment on at this point,
12 but that's why it's important.

13 Those of you in the audience, like Mr. Carroll,
14 if there are any others of you that have comments on the
15 Marathon changes, the Commission would like to hear those,
16 those of you that have been working with the document,
17 especially committee members.

18 Now, your comments were from the Division,
19 weren't they, Mr. Carroll?

20 MR. CARROLL: That's correct.

21 CHAIRMAN LEMAY: Is there someone representing
22 the committee here that can comment on --

23 EXAMINATION

24 BY CHAIRMAN LEMAY:

25 Q. Were you part of the committee, Mr. Rose,

1 Marathon?

2 A. Marathon was a part of the committee, Mr.
3 Chairman.

4 Q. Do you happen to know the committee's response to
5 your suggested changes?

6 A. It's hard to gauge since -- We certainly
7 discussed it with members of the committee, and my
8 understanding is, some members of the committee agree, some
9 don't. And it depends on which change.

10 But it's our understanding that for the most
11 part, the committee agrees. But there's been no formal
12 action. And Mr. Kellahin's here; he can certainly explain
13 that.

14 Q. I was looking for Mr. Kellahin. I --

15 A. He was here.

16 Q. -- to spot him.

17 A. I don't know if he --

18 Q. We may get him later on, to comment.

19 A. He may have disappeared when I came up here. I
20 think he's tired of hearing all of this.

21 But there were no formal committee action in
22 terms of reviewing these changes, Mr. Chairman.

23 Q. Were these changes submitted to the committee for
24 consideration, or were they submitted just to the
25 Commission?

1 A. They've been submitted in part just to the
2 Commission, primarily because some of these changes were --
3 or at least some of the -- how shall we put it? -- the
4 results of the proposed rule weren't determined until after
5 a more thorough review of the regulations were proposed.

6 And quite frankly, we believe that our proposals
7 are, in fact, consistent with the committee's
8 recommendation. But we can't speak for the committee; only
9 they can speak for themselves. But --

10 Q. I'm not sure they can --

11 A. And there are some --

12 Q. -- since I can't find Mr. Kellahin, but if
13 there's anyone --

14 A. Well, then there are members of the committee who
15 -- and individuals who sat in on committee's deliberations
16 who are here, that I understand will testify as well.

17 CHAIRMAN LEMAY: Okay. Well, let's -- Then we
18 may call you back.

19 Commissioner Weiss?

20 EXAMINATION

21 BY COMMISSIONER WEISS:

22 Q. Are we premature in this hearing, if the
23 committee has not reviewed these proposed changes?

24 A. Mr. Chairman, Mr. Weiss, I think the answer is
25 no. And I think -- I think if -- And I guess it depends on

1 how you perceive these changes.

2 Certainly it's Marathon's position that these
3 changes are not substantive, at least for the most part,
4 and certainly don't detract from the major thrust of these
5 regulations.

6 If, in fact, we had significant problems with the
7 actual -- the bulk of the regulations themselves, I would
8 agree with you. But Marathon's in agreement with the
9 committee's proposal as to the basic notification rules, of
10 the requirements for abatement and how that process is set
11 up and certainly the concept of a Stage 1 and Stage 2 and
12 alternative standards.

13 So the vast majority of this proposal, in fact,
14 the company is supporting, and we believe that our
15 proposals, in fact, do not deal with the bulk of that. And
16 I think that they're such that this Commission can deal
17 with after these hearings. We don't think they're -- they
18 deal with the very nature of the proposal, so that --

19 And I think quite frankly that if we went back to
20 the committee and discussed them, while we might get an
21 agreement on everything, we may not. And I think we'd be
22 right back before you, doing exactly what we're doing now.

23 One thing that I know that we have discussed with
24 the Division -- and certainly the Commission will have to
25 address it at the close of these proceedings -- is whether

1 to allow a post-hearing comment period or some kind of
2 other action. And it may be appropriate for responses to
3 both Marathon's proposal, and I understand that there may
4 be others, including some from environmental groups that
5 are going to be submitted as well.

6 So we think that any problem with that can be
7 cured in the post-hearing process.

8 But again, we don't believe that these are so
9 substantial that, in fact, they can't be dealt with in this
10 process.

11 CHAIRMAN LEMAY: Thank you.

12 FURTHER EXAMINATION

13 BY CHAIRMAN LEMAY:

14 Q. I just have one clarification. You were talking
15 about -- And this is just for, maybe, the Commission's
16 clarification or edification.

17 You're talking about the Stage 1. That's just
18 the investigation stage of a leak or spill?

19 A. Mr. Chairman, a Stage 1 plan is, in fact, the
20 proposal to investigate a --

21 Q. The proposal to investigate?

22 A. That's correct.

23 Q. And your -- I think your recommendation changed
24 the notification requirements somewhat from the -- at least
25 the Committee's recommendation.

1 You say just a news publication would be
2 sufficient; is that --

3 A. We believe it is, Mr. Chairman.

4 In fact, what we're proposing is that the Water
5 Quality Control Commission's regulations, in fact, be
6 what's applied.

7 And what we've proposed is language that's
8 straight out of WQCC's regulations. So that's the way that
9 that commission's chosen to deal with precisely the same
10 issue.

11 And it was our understanding that, for the most
12 part, it was the Committee's intention not to change the
13 requirements but to change who administered those
14 requirements by putting them in Rule 19.

15 And we believe this more closely conforms with
16 what we understood the committee's intent and this
17 Commission's review of the proposed Rule 19 was.

18 So we're actually trying to conform these to the
19 current WQCC rules.

20 CHAIRMAN LEMAY: Well, I think the Commission
21 will have a comment period after we take the case under --
22 I mean, we'll leave the case file open for a couple weeks
23 to get comments before we take it under advisement. So
24 there will be some comment times.

25 Mr. Carroll?

FURTHER EXAMINATION

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BY MR. CARROLL:

Q. Mr. Rose, I have another couple questions. I guess just one question.

The Stage 1 plan deals with groundwater contamination and not leaks and spills; is that correct?

A. It deals with the -- in essence, the impact of the leaks and spills, to investigate what the impact was on both groundwater and surface water.

So -- I mean, you're not investigating the cause of the spill, *per se*; you're investigating what the results of that spill were.

Q. The extent of the contamination?

A. That's correct.

Q. Mr. Rose, are you aware that there are many types of discharges authorized by the OCD under Order Numbers R-3221 and R-7940, which are no-pit rules, which would be not covered by a discharge plan and would not require, you know, the notification that we are trying to cover through either 19.N or Rule 116, and by the deletion of 19.N, and not incorporating 19.N into Rule 116, would leave them uncovered?

A. I'm not -- I'm certainly not familiar with all of those rules and couldn't speak to whether, in fact, they would be uncovered.

1 Certainly, until Rule 19.N is adopted for certain
2 of those releases, I guess there's a question about
3 whether, in fact, there are notification and cleanup
4 requirements currently, I think.

5 I'm not familiar enough between the interplay of
6 what's happening at production sites, particularly in terms
7 of the applicability of the Water Quality Control
8 Commission's notice and cleanup rule, which is 20 NMAC 6.2,
9 1203 -- And, in fact, I think under the discussion we had
10 at the last hearing, at least in my mind, there's a legal
11 question about whether, in fact, that rule applies at all
12 at production sites, so that I'm not sure that deleting
13 Rule 19 changes the current requirements at all.

14 But without looking at this further, I'd delay
15 the -- I think it would be better to comment on that in a
16 post-hearing comment period as well. I'm just not familiar
17 enough with the specific rules.

18 But I do think there's a question, at least there
19 is in my mind, as to whether or not there is a current
20 notice requirement under the existing rules for those kinds
21 of leaks.

22 Q. So you're not sure if you can cover releases at
23 such pits that contaminate groundwater; there's a question
24 as to whether the WQCC regs would cover those releases?

25 A. That's correct, under the amendment of the

1 statute we discussed, in fact, that you discussed at the
2 last hearing, and that's Section 74-6-12 -- if I can find
3 it here -- G. And we've discussed it in the context of
4 production sites.

5 What the statute says is, the Water Quality Act
6 does not apply to any activity or condition subject to the
7 authority of the Oil Conservation Commission under the Oil
8 and Gas Act -- and it cites 70-2-12, NMSA, 1978 -- and
9 other laws conferring power on the Oil Conservation to
10 prevent or abate water pollution.

11 As we discussed last time, it's my understanding
12 that most of the activities of production sites are subject
13 to regulation by the OCC under 70-2-12, and I think it's
14 subparagraph (21).

15 And as we pointed out, and I think as we
16 discussed last time, there was a question -- there's a
17 dichotomy between the subparagraph (21) and (22) provisions
18 where paragraph (22), which is the so-called downstream
19 facilities, there is some discussion about administering
20 the Water Quality Act. There isn't for the upstream, which
21 is what I understand these pits to be.

22 And that therefore, there's at least a question
23 in my mind, without reviewing it further, as to whether or
24 not the Water Quality Act at all, and specifically their
25 spill rate, applies to those situations, particularly after

1 1993, when this provision of the statute was adopted by the
2 Legislature.

3 MR. CARROLL: That's all I have.

4 CHAIRMAN LEMAY: Additional questions of Mr.
5 Rose?

6 If not, thank you, Mr. Rose. You may be excused.

7 THE WITNESS: Thank you, Mr. Chairman.

8 CHAIRMAN LEMAY: Mr. Ellsworth, we'd like to hear
9 what the BLM has to say.

10 DON ELLSWORTH,

11 the witness herein, after having been first duly sworn upon
12 his oath, testified as follows:

13 DIRECT TESTIMONY

14 BY MR. ELLSWORTH: Good morning, Mr. Chairman, members of
15 the Commission.

16 My name is Don Ellsworth. I'm the senior
17 technical specialist for environmental compliance with the
18 Farmington District Office, Bureau of Land Management, in
19 Farmington, New Mexico.

20 And the purpose for my involvement today is to
21 say that the BLM is in agreement with NMOCD for the
22 proposed Rule 116. We do support the rule as it is
23 written, I guess both in Exhibits 1 and 2.

24 And also, as was stated earlier, Exhibit 3 does
25 serve all the purposes for the BLM for notification of

1 releases, which is covered under our Notice to Lessees 3A,
2 which is the reporting of undesirable events.

3 So from that part, the Bureau is in complete
4 agreement with NMOCD for the proposed rule.

5 And also on our part, since you said that the
6 time would be open for any other comments later on, we will
7 be drafting up a reply or a letter from our state director
8 to the Chairman concerning this issue, which will cover the
9 State of New Mexico, our other offices in Roswell, Carlsbad
10 and Albuquerque.

11 And that was really the extent of what I had to
12 say to the Commission today.

13 CHAIRMAN LEMAY: Appreciate that.

14 MR. ELLSWORTH: Also on my part, I was a member
15 of the committee.

16 There were some disagreements that we never did
17 come to consensus or a majority on, and those were, from my
18 part, from the last meetings, were ones that were left in
19 there, that were sent to the Commission.

20 But for my part, what we did, we did have
21 consensus on the majority of Rule 116 as we left the last
22 committee meeting. And then, like I say, it was 119.A
23 [sic], was where there were still some difference of
24 opinions on some wording as it was sent to the Commission.

25 And that was all I had for the Commission.

1 happen, it would help us out. It would reduce the
2 paperwork.

3 CHAIRMAN LEMAY: It's my understanding -- Maybe
4 since this is informal, Roger, you could comment on it.

5 This form, as such, approved by both BLM and you
6 all, does this lend itself to having this form on our World
7 Wide Web page and having it ultimately being filed
8 electronically and --

9 MR. ANDERSON: Yes, sir, Mr. Chairman, we
10 designed that form specifically so that it can be
11 electronically submitted, basically two ways:

12 Either direct input through the Internet, which
13 would link directly to our databases,

14 Or to where we could scan it in, and the
15 databases would pick the information off and automatically
16 enter it into the databases.

17 And that's what we have tried to do. We don't
18 have the software, but we think -- Mark has told me he
19 thinks he's got it to where it can be done that way, based
20 on the technology available today.

21 CHAIRMAN LEMAY: That's a big step. I think the
22 coordination of this form, or approval by the BLM, with
23 also this dual purpose of being able to file this thing
24 electronically and have it registered in the database, I
25 think, hopefully, will serve as an example with other forms

1 that we come up with.

2 MR. ELLSWORTH: Right now what we have is a form
3 that was --

4 CHAIRMAN LEMAY: Thank you, Mr. Anderson.

5 MR. ELLSWORTH: -- developed by our past state
6 director for the reporting of the events, which, if this
7 goes through, what we would do is probably re-do our order,
8 and we would use this form as a reporting form by industry,
9 which then they could use it for both the OCD and the BLM.

10 CHAIRMAN LEMAY: Thank you, Mr. Ellsworth.

11 That's a big help. We have one form that's less
12 by more than one regulatory agency. That just eliminates
13 the confusion that industry faces in that area.

14 Thank you.

15 Additional questions? If not, thank you for your
16 testimony, and you may be excused.

17 Ms. Ristau, we'd like to hear what PNM has to
18 say.

19 TONI K. RISTAU,

20 the witness herein, after having been first duly sworn upon
21 her oath, testified as follows:

22 DIRECT TESTIMONY

23 BY MS. RISTAU: Good morning. I do -- I hope my voice
24 holds out here. I've had a bad cold the last few days.

25 I would like to submit one exhibit. Is that the

1 appropriate way to do this, Roger?

2 Okay, let me do this, let me stamp another one
3 for you. And also if there are people in the audience who
4 would like to follow along, I do have some extra copies.
5 So please speak up if you would also like to have a copy of
6 this.

7 Those are yours, three copies.

8 Anyone else interested in copies? I ask you guys
9 to do the marking on the exhibit number, if you will.
10 Paperwork here.

11 Anybody else need copies? Any of you that got a
12 copy that's unmarked, if you could just mark it PNM Exhibit
13 1, I'd appreciate it.

14 Does everyone have copies who desires one here?

15 Again, I don't want to belabor these points.
16 We're largely in agreement with the suggestions that have
17 already been made by Marathon and are here, in addition to
18 Marathon's statements, to support the promulgation of this
19 rule.

20 We regard it as a good rule. We didn't get
21 everything we wanted, but we think by and large this is a
22 good regulatory framework in which to proceed on abatement
23 of groundwater issues related to the industry.

24 I think -- I was also a member of the committee,
25 and so I agree with Don Ellsworth here that we didn't come

1 to agreement in some of the meetings on exact wordings and
2 such like. But I've tried to note in my testimony my
3 recollection of what the committee said on those points.

4 In many cases, we didn't agree on specific
5 wording, but we agreed on specific concepts, and I've tried
6 to so indicate in my write-up where my recollection is that
7 that has occurred. Of course, my other committee members
8 are -- fellow committee members are free to dispute that if
9 their recollection is different.

10 To run through this very quickly, on the Rule 7
11 changes, we agree with the proposed change to add the
12 definition of "director", and for largely the same reasons
13 as Marathon. Someone coming in who is not thoroughly
14 familiar with the regulatory framework might have some
15 difficulty discerning who the director is, and I think it
16 hurts nothing and adds to the rule to include that
17 definition.

18 On the definition of "hazard to public health",
19 Marathon's suggested language change was to include the
20 cross-reference.

21 We had an additional language change we would
22 like to submit for your consideration, and that is shown on
23 page 7 of my write up, after the first paragraph. The
24 definition would read, as suggested by Marathon, with the
25 addition of the cross-referencing, but adding in at the end

1 of that paragraph also the words, "and taking into account
2 the feasibility of treatment of the water to drinking water
3 standards at time and place of such use." We think this is
4 an essential concept, as far as hazard determination goes,
5 hazard to public health.

6 For your consideration, we've included the
7 language of the statute and the Water Quality Act, which
8 states at 74-6-4 (D) under the duties and powers of the
9 Commission, that the Commission "shall adopt, promulgate
10 and publish regulations to prevent or abate water pollution
11 in the state ... Regulations shall not specify the method
12 to be used to prevent or abate water pollution but may
13 specify a standard of performance for new sources ... In
14 making regulations, the commission shall give weight it
15 deems appropriate to all relevant facts and circumstances,
16 including..." and they list a number of items there. The
17 fifth item is the "feasibility of a user or a subsequent
18 user treating the water before a subsequent use;..."

19 Our reading on this is that this should be taken
20 into account whenever standards are set. You've got two
21 choices -- maybe more, but at least two choices -- when
22 you're talking about contamination of groundwater.

23 One is that you can clean groundwater up *in situ*
24 to a high standard.

25 The other is, if and when the water is ever

1 withdrawn for human potable use, you can treat the water at
2 that point.

3 They both achieve the same objective, which is to
4 reduce any risk or eliminate any risk to public health. We
5 submit that more emphasis needs to be placed on point-of-
6 use treatment. It achieves the same objectives and at far
7 less cost.

8 We're concerned about the level of resource
9 commitment that it takes to clean up *in situ* groundwater in
10 every case, to meet extremely stringent standards, to meet
11 potability standards in effect in the ground. So we would
12 submit the addition of this language here to clarify that
13 and provide an additional degree of emphasis on that issue.

14 This was discussed inter-committee meeting, not
15 in the context of this definition, but we had an overall
16 discussion on point-of-use treatment issues, and there was
17 no consensus by the committee. There was consensus between
18 some factions of the committee on the efficacy of treatment
19 at point of use, but no consensus on language.

20 So this is, indeed, an additional language change
21 beyond what the committee had suggested.

22 Our next proposed change deals with the rewording
23 of the remediation plan section, shown at the bottom of
24 page 7. This is Marathon's suggested wording change, and
25 we agree with this.

1 We deliberated on this particular section and
2 definition in committee, and my recollection and my notes
3 show that there were several proposed alternative ways of
4 phrasing the above definition. We didn't come to any
5 specific consensus on language.

6 However, going back and reviewing my notes on
7 committee, the proposed wording changes appear to achieve
8 what my perception was of the aims of the committee in
9 coming up with a definition on remediation plan and
10 specifying a remediation plan process of some sort.

11 So again, I would recommend that Marathon's
12 suggested wording be adopted.

13 Turning to Rule 19 on page 8 of my write-up,
14 Marathon's proposed change for alternative abatement
15 standards, I believe I misread their proposal. They are
16 saying add the underlined language at 19.B.(6)(b). I have
17 it inserted at (6)(a). I'm not real wedded to where it
18 goes in, but I do believe the addition of this language is
19 important.

20 Again, this specifically recognizes that point-
21 of-use treatment as an alternative, transport, fate and
22 risk assessment as a factor in making a decision on
23 abatement standards, and any other information that can be
24 brought to bear on the overall objective, which should be
25 reducing risk to public health and the environment, is good

1 and should be explicitly recognized in the regulations or
2 in the standard-setting process.

3 Again, I would urge that the adoption of this
4 addition be considered by the Commission.

5 I do have some discussion here on the point-of-
6 use concept issue again, and I have incorporated my
7 recollections from the committee's discussion. If other
8 committee members here recollect something different, I
9 would appreciate their input as well.

10 On the bottom of page 9, Marathon again has
11 proposed a change related to modification of abatement
12 standards. Mr. Rose has already addressed this, and we
13 agree.

14 Our big concern is, if we as regulated industry
15 make a substantial investment in control technology and
16 treatment technology to address groundwater contamination
17 issues at a site, that we're not confronted with a moving-
18 target problem. Many groundwater remediation projects,
19 where there's a substantial problem at least, take several
20 years to address, and the systems that can be designed and
21 installed to address these can be quite elaborate and
22 costly.

23 We agree that if there's a good reason for
24 changing the standards that you're shooting for, for
25 cleanup, that of course, those should be changed. But as

1 Mr. Rose has already mentioned, we feel that those should
2 not be changed arbitrarily, perhaps just because of an
3 after promulgated regulatory change, if there is no showing
4 that moving to a new standard would actually increase the
5 incremental benefit that you're getting from your cleanup
6 process.

7 We are concerned that heavy investments that are
8 made in groundwater treatment technology not be negated by
9 regulatory change and unilateral action by the Director of
10 the OCD.

11 We feel that to the addition of the provision
12 there that allows the Director to make a showing that a
13 more stringent standard is needed, even after a system is
14 up and running, allows for the possibility of modifying the
15 standards if absolutely necessary to do so, to address
16 risks to public health and the environment.

17 At the bottom of page 10, Marathon again has
18 proposed changes to Section 19.D.(1)(f) and (g), and these
19 both are exemptions from the abatement plan requirement.

20 The changes in (f) are shown as underlined. "The
21 Director", "or his designee" to be inserted; and also
22 inserting, as Mr. Rose has addressed, at the last line of
23 Section (f), which is shown on the top of page 11 in my
24 write-up, adding in the words, after "Administrative Order
25 on Consent", "or other agreement", again for parallelism

1 here.

2 The idea is, as I understand it, that if you are
3 proceeding under some pre-existing arrangement, whether
4 it's a formal settlement agreement or not, and you're
5 achieving the ultimate remedial objectives that have been
6 laid out in your plan, that you should be allowed to
7 continue on that and not, just because a new process has
8 now been promulgated, switch to that process.

9 That's the purpose for the exemptions, as I
10 understand it, so that if you're already proceeding
11 satisfactorily, you don't have to switch to a new process.

12 We think that these additions to Section (f) make
13 it plain that any kind of agreement where you have
14 satisfactorily identified remedial objectives and are
15 progressing satisfactorily towards meeting those objectives
16 ought to be subject to exemption.

17 In Section (g) the addition of the word "likely",
18 we agree that this is a good addition. You're going to be
19 making this determination in Section (g) on a prospective
20 basis. It would be difficult, if not impossible, to
21 absolutely guarantee at the onset that you're going to meet
22 the standards.

23 But if you have a plan of action, you're doing
24 some monitoring during the year-long process that still
25 keeps you within the exemption, and you're going the right

1 direction, you still ought to be able to avail yourself of
2 this exemption.

3 The ultimate objective, after all, is to obtain
4 cleanup to standards within a reasonable period of time,
5 and if whatever actions you're taking, pursuant to an
6 exemption or not, are achieving those objectives, it seems
7 to me that you ought to be able to avail yourself of that.

8 So we would recommend also the inclusion of the
9 word "likely", since this is a prospective showing that
10 you're making, and it would be difficult for you to
11 support, as an applicant, absolute guarantee that you're
12 going to meet those standards up front.

13 On page 12, Marathon has proposed changes in the
14 Public Notice and Participation sections, which have
15 already been discussed. I won't belabor the point, but
16 consistency is always nice when you're dealing with various
17 regulatory frameworks.

18 Another point that we wish to bring out is that
19 -- I believe it's Section 19.E -- Yes, if you would look on
20 page 14 of my write-up, Section 19.E allows you in some
21 cases as an applicant to submit a Stage 1 and Stage 2
22 abatement plan proposal together.

23 In other words, you wouldn't have to submit your
24 proposal for site characterization first, wait, and then
25 submit your remedial portion of the plan second in some

1 instances.

2 And this is a reflection of our own experience in
3 addressing groundwater contamination problems. In many
4 cases, these are relatively small problems. You're out
5 there with a backhoe, doing your site investigation, as it
6 were, at the same time that you're removing the source of
7 the problem, which typically resides in the vadose zone,
8 above the groundwater. During the course of your source
9 removal many times you discover that there has indeed been
10 a groundwater impact.

11 And we submit that it is useful to continue to be
12 able to submit a Phase 1 and Phase 2 abatement proposal
13 together at that point, and not have to say, Okay, we've
14 discovered a groundwater impact; we're going to want to
15 wait now and put it in a proposal to characterize the
16 nature and extent of this impact before we can proceed with
17 source removal.

18 It's again, a technique to expedite the cleanup
19 of these sites as quickly as possible and eliminate overly
20 elaborate processes when they don't do anything to further
21 the ultimate objective, which is to clean up both the
22 contamination that resides in the vadose zone that can be a
23 continuing source to the groundwater, and to address the
24 groundwater issues.

25 The clarification that I wanted to make was that

1 by fine-tuning the notice requirements under 19.G, that
2 we're not then eliminating the possibility and the types of
3 situations that I've just described of still submitting
4 your Stage 1 and Stage 2 abatement proposals together.

5 I would urge that we include the clarifying
6 language that I have on page 13, which just indicates if
7 you're submitting your Stage 1 and Stage 2 abatement plans
8 together, as is allowed currently under Section 19.E, that
9 these specific notice requirements apply.

10 In other words, you're basically fulfilling at
11 that point Stage 2 notice requirements, you're not then
12 forced to go back and do Stage 1 notice requirements before
13 you can proceed.

14 If there are other suggestions or clarifications
15 on how to accomplish this same end, that's my main concern,
16 I'm not wedded to these particular language additions. I
17 just want to make sure that it is clear that there is no
18 problem at this point with submitting Stage 1 and Stage 2
19 together.

20 On page 14, with 19.H, Marathon's proposal for
21 Approval or Notice of Deficiency of Submittals, striking
22 H(2), which is the response to the fact sheet, my
23 observation was the same as Marathon's, that this appears
24 to be a carryover from the WQCC regulations that specify a
25 different process, a somewhat different process.

1 And there is no fact-sheet requirement under the
2 Rule 19 notice requirements, and so, as Mr. Rose has
3 already addressed, I would propose that you strike
4 paragraph H(2). It doesn't seem to be needed. Or if it is
5 felt that it does seem to be needed, then we need to go
6 back and insert the requirement for a fact sheet at some
7 other point in the regulations. So it's an either/or
8 situation.

9 My recommendation, again, would be to strike
10 paragraph H(2) as not needed.

11 The last comment is Marathon's proposal to strike
12 all of Section 19.N. My observations are very similar to
13 Marathon's, is that this appears to be redundant, it
14 appears to be duplicative of the reporting and notification
15 requirements specified in Rule 116.

16 If it is not duplicative and those reporting and
17 notification requirements do, in fact, need to be beefed
18 up, the appropriate place to do it would be in Rule 116,
19 and not in Rule 19.

20 I agree with Marathon's concerns that having two
21 separate notification requirements and two separate rules
22 can be confusing, could require duplicative reporting, if
23 you're unsure in a specific case whether you fall under
24 Rule 19 or Rule 116.

25 And if it needs to be addressed in Rule 19 at

1 all, why don't we include it in Rule 116 and then just
2 cross-reference it in Rule 19, as far as an additional
3 release notification requirement, refer people back to Rule
4 116 and let it go at that, instead of including a free-
5 standing section here in Rule 19?

6 That concludes my specific comments. If there
7 are any questions...

8 CHAIRMAN LEMAY: Thank you, Ms. Ristau.

9 Questions?

10 Mr. Carroll?

11 EXAMINATION

12 BY MR. CARROLL:

13 Q. Ms. Ristau, my first question is on page 3 of
14 your exhibit --

15 A. Yes.

16 Q. -- at the first sentence in the second paragraph.
17 It states, "For example, groundwater contamination
18 occurring as a result of oil and gas industry activities
19 often is, based upon risk factors, a lesser threat to
20 public health and the environment than is groundwater
21 contamination occurring as a result of other types of
22 activities."

23 Is there some sort of scientific study? I'm not
24 familiar with the background for this statement.

25 A. This is, again, an observation that comes mainly

1 from our experience, and it's an observation related to the
2 cleanup of the wellhead pits under 7940.

3 Those again tend to be relatively small problems
4 at relatively remote locations where there aren't any
5 withdrawal points for drinking water. Nevertheless, we've
6 got a lot of sites that fall under that category.

7 And my concern here is that whatever process we
8 have is consistent with the level of problem that you have.
9 And this was the point that I was trying to make with that
10 write-up.

11 Q. So this is based upon PNM's observations, rather
12 than industrywide?

13 A. In general. There have been some studies, not
14 only industrywide but related to petroleum hydrocarbon
15 contamination in general. The Lawrence Livermore study,
16 for example, on overstatement of risks associated with
17 hydrocarbon contamination of groundwater, would be an
18 example of that. And I can get -- You're, I think, already
19 aware of that study. If you need an exact citation, I can
20 get it for you.

21 Q. Yeah, could we get a copy of that?

22 A. Sure.

23 Q. We'd find it very interesting.

24 A. Okay.

25 Q. Ms. Ristau, if you would turn to page 7, it looks

1 like you suggest that this point-of-use treatment language
2 be included in the definition of "hazard to public health".

3 It would seem to the Division that it's really
4 not part of any definition of hazard to health; it would be
5 more of a remedy. I mean, the hazard exists; how you take
6 care of it is another matter.

7 So do you agree that it shouldn't be in the
8 definition?

9 A. No, I would tend to disagree. Hazard itself is a
10 risk-based definition. By its nature it is. And I think
11 having some sort of acknowledgement that it's a no-harm,
12 no-fault type of situation --

13 If you've got a huge well with contamination out
14 there, nobody's ever going to withdraw the water, nobody's
15 ever going to use it, nobody's ever going to come in
16 contact with it, nor are any other components of the
17 environment, say wildlife, then there's basically no risk.
18 And you want to be defining that is a hazard to public
19 health at that point.

20 It's trying to include the notion of risk in your
21 hazard determination in the definition, that I was looking
22 for.

23 Q. So you consider feasibility of treatment as part
24 of the definition, rather than part of the remediation?

25 A. Well, I consider it part of both. I think it

1 would be appropriate to have it acknowledged in both
2 places.

3 Q. Ms. Ristau, further down -- I apologize, I was at
4 the last committee meeting in Albuquerque, and this point-
5 of-use language came up, and I don't see "point of use"
6 used in the statute cited. It says feasibility of a user
7 or subsequent user treating the water before subsequent
8 use. Now, where does point of use come in?

9 A. Okay, the feasibility -- Treatment by the user,
10 instead of by the polluter, is, in fact, the definition of
11 point-of-use treatments.

12 Q. But doesn't this language talk about subsequent
13 use? It looks like it doesn't apply to a primary use; it
14 looks like it would apply more to a waste-water treatment
15 remedy between the primary use and the subsequent use, so
16 point of use wouldn't apply as to the primary use.

17 A. Again, I think I would disagree, and when you're
18 in an abatement-type situation, I would agree if you were,
19 say, a discharger pursuant to -- discharging pursuant to a
20 discharge plan.

21 But if you are looking at an abatement situation
22 where the contamination has already gotten into
23 groundwater, it's not that you're authorizing somebody to
24 put it into groundwater, then you're looking at what is the
25 most expeditious way to achieve your objectives, which are,

1 according to the statute, protection of public health and
2 the environment, or elimination or minimization of hazard
3 to public health and the environment.

4 Then you're looking at feasibility of -- You can
5 do one of two things, or maybe several more things as well,
6 but two main things:

7 You can treat the water as it sits in the ground
8 and clean it up *in situ* so that if anybody comes along
9 later and withdraws that water, it's already cleaned.

10 Or you can wait and see if and when anybody ever
11 wants to withdraw that water and use it, they could apply
12 treatment at the wellhead, so to speak, before they use the
13 water or drink the water. And it achieves the same
14 objective, which is the reduction of risk to public health
15 and the environment.

16 Q. Well, I still have a problem reconciling this
17 language, "subsequent use", with your *in situ* -- or the
18 treatment of the water before it's used by the primary
19 user.

20 Do you see my problem with the language
21 "subsequent use" in what you're referring to as the point-
22 of-use language?

23 A. Let me do a little bit more thinking on that.
24 I've got -- This came up most recently, there's been a fair
25 amount of debate about it in the reauthorization of the

1 Safe Drinking Water Act, and let me see if I can find
2 something in there that will clear up that issue.

3 Q. Do you know of any place in the Water Quality Act
4 or the Water Quality Commission regulations that uses the
5 term "point of use"?

6 A. I'm not aware of any right now. I would have to
7 go back and --

8 Q. And that just -- in the committee discussions in
9 Albuquerque?

10 A. Yes.

11 Q. At your suggestion? I mean, that was your
12 definition for what you're describing as a point-of-use
13 treatment?

14 A. Yes, treatment by the subsequent user, as opposed
15 to treating it *in situ*, was --

16 Q. Yeah, the user point of use --

17 A. -- the discussion.

18 Q. -- rather than *in situ*?

19 A. Right.

20 Q. Okay. And then this language regarding
21 subsequent use, we're still going to have to reconcile
22 somewhat.

23 Wouldn't your addition to the remedy of hazard to
24 public health regarding your point-of-use language already
25 be taken care of in Marathon's suggestion in their

1 amendment to Section 19.B.(6)(b)?

2 A. Okay, and that's the one at -- on the -- on page
3 8? Is that the one that you're referring to? Page 8 of my
4 write-up?

5 Q. Right.

6 A. Yeah.

7 Q. "The petition may include an analysis of the
8 feasibility of point-of-use treatment..."

9 A. Yes, I believe it's addressed there. I don'
10 think it hurts to try to include this emphasis at several
11 points in the regulations, however, so that's why --

12 Q. Doesn't it just clutter things up to include it
13 in a number of places, rather than just one place?

14 A. Well, possibly. But I submit that since the
15 other issues are treated at several places in the
16 regulations, that it would be proposed to treat this at
17 several places in the regulations as well.

18 Q. Ms. Ristau, if you would turn to page 12 of your
19 exhibit, you heard my discussion with Mr. Rose regarding
20 the public comment regarding Stage 1?

21 A. Uh-huh.

22 Q. Is it your position that PNM does not believe
23 that public comment at the Stage 1 phase is in any way
24 helpful?

25 A. No, that's not my position at all. If you

1 explicitly have a Stage 1 and a Stage 2, I believe that
2 public comment can be helpful, and oftentimes is helpful.

3 What I was concerned about is that we were not
4 somehow undercutting the allowed approach of submitting the
5 Stage 1 and Stage 2 together in the public notice.

6 If you have public notice that requires you in
7 all cases to have public comment on Stage 1, but Section
8 19.E allows you to submit Stage 1 and Stage 2 together in
9 certain instances, I didn't want one contradicting the
10 other, that it would in effect make it so that you couldn't
11 submit Stage 1 and Stage 2 together, because you have to in
12 every case stop and wait for the notification and public
13 comment on Stage 1 before you can actually submit Stage 2.

14 That was my main concern, and there may be other
15 ways to reconcile this. That was my main concern.

16 Q. Yeah, I don't believe that it's the committee's
17 intent to require separate notices when Stage 1 and 2 can
18 be submitted together under 19.E. If that needs to be
19 cleared up, we need to --

20 A. Yeah.

21 Q. -- make it clear that --

22 A. That was --

23 Q. -- one notice would be sufficient for both if
24 they're submitted together.

25 A. Right, that was my main concern, that we

1 explicitly recognize that in some cases that they would be
2 submitted together. And at that point, then, the notice
3 that would be required would be what's required for Stage
4 2.

5 Q. Okay, and if the public comment -- If the Stage 1
6 and Stage 2 are submitted successively, and there is no
7 delay in the approval of Stage 1 plan, PNM does believe
8 that public comment at the Stage 1 phase would be
9 beneficial?

10 A. Yes, we do.

11 Q. And the last questions I have are regarding your
12 comments on page 15.

13 Did you hear the OCD's concerns regarding the
14 possible gap in the reporting of groundwater contamination
15 for authorized releases?

16 A. Yes, I did.

17 Q. Do you see the possibility of a gap existing?

18 A. I -- If I heard him right, I tend to agree with
19 Mr. Rose that possibly such a gap exists. But if it does
20 exist, it should be addressed in Rule 116, which is the
21 notification and reporting rule, rather than in 19, which
22 is the abatement and cleanup rule.

23 Q. I know the OCD just handed out their Exhibit
24 Number 2, but that is intended to include the 19.N
25 notification in Rule 116.

1 A. I guess I'm not following your question. You're
2 saying that in the case of point of use, that it would be
3 bound by the Water Quality Control Commission?

4 Q. Let me see if I can rephrase that.

5 If I heard you right, you quoted from the Water
6 Quality Act to support the view that, under the Water
7 Quality Act, point-of-use treatment is a viable abatement
8 strategy and has to be considered in the context of
9 regulations for abatement within the Water Quality Act.

10 Is it PNM's position that the Oil Conservation
11 Commission is bound by those requirements of the Water
12 Quality Act?

13 A. I would believe so, as to the extent that the OCC
14 has delegated or designated authorities to administer the
15 Water Quality Act, I would believe that that would be the
16 case, yes.

17 MR. SHUEY: No more questions.

18 CHAIRMAN LEMAY: Mr. Carroll, do you want to
19 comment on that?

20 MR. CARROLL: Yeah, I have a follow-up question.

21 FURTHER EXAMINATION

22 BY MR. CARROLL:

23 Q. It was my impression that PNM takes the position
24 that we don't have to follow the Water Quality Act, and we
25 can enact our own rules regarding cleanup of B.(21) and

1 B.(22) activities?

2 A. That is our position regarding B.(21) and B.(22).
3 I'm not saying that you don't have to follow the Water
4 Quality Act.

5 In the absence -- My understanding of the way
6 those sections work together is that in the absence of any
7 OCC-specific rules the WQCC process is the one that applies
8 as basically a default. Am I --

9 Q. But if we enact --

10 A. -- understanding that?

11 Q. Right, but if we enact our own rules, if we don't
12 have to follow the Water Quality --

13 A. You don't have to follow the Water Quality Act
14 administration that's set up and vested in the WQCC. In
15 other words the OCC's rules can differ from the WQCC's
16 rules.

17 My understanding is that we're still abiding by,
18 for example, the standards that are established under the
19 authorities of the Water Quality Act, that what we're doing
20 differently in Rule 19 is a different process for meeting
21 those standards. Is that --

22 Q. So the OCC can pick and choose?

23 A. I would think so, within the limits of what the
24 statutory and delegation -- or designation conditions are.

25 Q. And just because the WQCC can consider point of

1 use -- or subsequent use, whatever that language is -- in
2 enacting their own regulations, the OCC is not bound in
3 considering such; we just use -- The committee uses that
4 because it's included in the Water Quality Act; is that
5 correct?

6 A. Yes, and to show -- We tried to be parallel where
7 we can with the WQCC. Our regulations are already
8 promulgated to not have, you know, diametrically opposed
9 conditions or requirements, for example, to be consistent
10 wherever possible.

11 My understanding of the Committee's charge to
12 come up with Rule 19 suggestions is to stick with the WQCC
13 abatement regulations as already promulgated, to the extent
14 practicable, but to include different provisions where
15 necessary to accommodate specific industry and other
16 concerns that are under the purview of the OCC.

17 Is that a fair statement on what we're doing?

18 Q. Yeah, but the WQCC regulations didn't incorporate
19 any what you term point-of-use treatments or remedies. We
20 had to go to the statute to actually try to find language
21 that would justify point of use; isn't that correct?

22 A. It is true that the WQCC abatement regs do not
23 explicitly allow for it, nor do they explicitly forbid it,
24 either one. And during our discussions in the committee,
25 we thought that this was a useful concept to include and

1 reinforce in any Rule 19 standards or process-setting that
2 we were doing. And we're not -- we, we the committee, were
3 not precluded by the statute from including such language.
4 We're not required to, we're not precluded to.

5 And so our discussions centered around, would
6 this be a useful concept to explicitly include and
7 recognize in the formulation of Rule 19?

8 And the consensus, as I recall -- It wasn't
9 unanimous, but there was a fairly -- a large consensus
10 within the group that, yes, indeed, it would be good to
11 include those concepts in Rule 19.

12 Q. Even if the WQCC didn't include such in their
13 regulations?

14 A. Right, we have other things in here that are
15 inconsistent with what WQCC requires, and this would be one
16 that would fall in the same category. Because of the fine
17 tuning, we did try to meet Oil and Gas Act and industry
18 concerns specifically.

19 Q. So -- yeah, even if you simply tried to follow
20 the Water Quality Act and the WQCC regulations where we
21 could, in fact, the WQCC didn't adopt any type of point-of-
22 use treatment in their regs, but we're asking -- or PNM is
23 asking the OCC to adopt such?

24 A. Yes.

25 MR. CARROLL: That's all I have.

1 CHAIRMAN LEMAY: Additional questions of Ms.
2 Ristau?

3 Yes, sir?

4 EXAMINATION

5 BY MR. ROSE:

6 Q. Mr. Chairman, Ms. Ristau, to totally confuse the
7 matter on hazard to public health further, I want to draw
8 your attention to the definition which is on page 6 and 7
9 of your proposal.

10 A. Yes.

11 Q. It's my understanding, and correct me if I'm
12 wrong, that your proposed definition, up until the
13 insertion on page 7 at the bottom of that paragraph, is, in
14 fact, Water Quality Control Commission's definition of
15 hazard to public health?

16 A. Yes, with the exception of the addition of the
17 cross-reference there, that --

18 Q. Okay, let me draw your attention to the second
19 line on page 6, particularly the language about exceeding
20 "at the time and place of such use, one or more of the
21 numerical standards..."

22 Could you explain your understanding of where, in
23 fact, that determination would be made?

24 Could, in fact, this be construed to be at the
25 time and place of use, meaning at the tap, as opposed to *in*

1 *situ* in the groundwater, and thereby, in fact, specifically
2 provide for or allow consideration of point-of-use
3 treatment as you've defined the term?

4 A. Let me spend a moment here.

5 Q. It's on the bottom of page 6 here --

6 A. Okay.

7 Q. -- top of page 7.

8 A. Okay, I think there's an ambiguity in the
9 "exceeds at the time and place of use", whether that means
10 at the wellhead or before any treatment for potable use or
11 subsequent treatment, potable use.

12 Q. So it's possible that these -- that the
13 Commission, Water Quality Control Commission's definition,
14 in your understanding, could be construed to, in fact, now
15 allow for point-of-use treatment in consideration of the
16 definition of "hazard to public health"?

17 A. It could be construed that way, but the addition
18 of this language makes it explicit that it should be
19 construed this way.

20 MR. ROSE: I have no further questions of Ms.
21 Ristau.

22 CHAIRMAN LEMAY: Thank you, Mr. Rose.

23 Dr. Neeper, did you have a comment or a question?

24 DR. NEEPER: Yes, I'm Don Neeper, representing
25 New Mexico Citizens for Clean Air and Water. I have three

1 questions that arose during your testimony, and I wanted
2 just some clarification on what I thought I heard you say.

3 EXAMINATION

4 BY DR. NEEPER:

5 Q. You suggested that if groundwater were located in
6 a remote area where it was unlikely in your view that
7 someone would be using it, that therefore there was no risk
8 associated with this and the situation could, in fact, be
9 ignored or not cleaned up; is that correct?

10 A. Not necessarily ignored, but the level of
11 response and treatment and cleanup should be geared towards
12 the amount of risk that is presented.

13 Q. In other words, if you couldn't foresee a use or
14 if there were a remote location, you would suggest the
15 standard should be different, because the degree of cleanup
16 is pretty well defined by the standards if water is --

17 A. Well, the alternative abatement standards do
18 contemplate exactly that, and that is indeed a risk-based
19 determination.

20 Q. It's a question of philosophy. If we were to
21 look forward, say, from 50 to 75 or 100 years ago at all of
22 the arid land between Santa Fe and Albuquerque, I would
23 make the judgment at that time that nobody would ever use
24 that.

25 And so if we adopt this kind of philosophy, are

1 we not, in fact, projecting 100 years into the future as to
2 what the situation will be?

3 A. I don't believe so, because I believe the
4 language of the regulations talks about reasonably
5 foreseeable. And if it's reasonably foreseeable that it
6 would be used, then yes, then your risk assessment -- your
7 risk-based standard, then, is different than if it appears
8 that there is no foreseeable possibility, at least within
9 the time period when it would be expected to, say, clean
10 itself up through natural attenuation, physical/chemical
11 processes.

12 Q. I think that's legitimate. Thank you.

13 Regarding the point of use, you have suggested,
14 and I think correctly, that it's often much cheaper to
15 treat at point of use than to try to clean up, say, in --
16 However, didn't you also suggest that it should be often
17 the end-point user who should do this when it's done?

18 A. Not necessarily. Again, if you're looking at a
19 remedial situation, you as the person who's responsible for
20 doing the remediation perhaps would be the one that would
21 be doing the cleaning at the point of use or paying for it
22 at the point of use, potentially.

23 In some instances, if the end user is going to
24 have to treat the water anyway to meet drinking-water
25 standards because of a whole host of naturally occurring

1 constituents that are considered deleterious or undesirable
2 in drinking water, it seems to me that imposing, you know,
3 cleaning up of other substances first, when the water is
4 going to have to be treated anyway before it's drinkable,
5 is not a good allocation of resources and that the end
6 user, then, should address those issues as well.

7 Q. You will agree, however, that you are not ever
8 required to clean up beyond background?

9 A. Well, that's not exactly true, I don't believe,
10 for potable water sources.

11 Q. As a responsible party dealing with pollution
12 that you have generated, do the regulations not state that
13 you do not have to clean beyond background?

14 A. As a responsible party, responsible for
15 remediation --

16 Q. Remediation.

17 A. As, say, a purveyor of drinking water from a
18 public water source, you do indeed, and many times --

19 Q. Okay.

20 A. -- have to treat to below background levels.

21 Q. Yes, but we're talking here only about
22 responsible parties --

23 A. Yes.

24 Q. -- that's the only thing that these regulations
25 affect.

1 So it's your position that if the water is
2 already somewhat dirty, the responsible party should be
3 allowed to leave his dirt in there so that the point-of-use
4 user can clean that up, because he's going to have to clean
5 at the point of use anyway?

6 A. Well, that's not exactly -- That's an overly
7 simplistic statement of my position.

8 Again, based on risk factors, on the potential
9 for withdrawal for drinking water use or human use, that
10 may, in fact, be the determination. I'm not saying that it
11 would or should be the determination in every case.

12 Q. Right, and we can't cover every case but we try
13 to proceed what we can.

14 Now, I'll take one more projection on this point
15 of use. If it's 100 years in the future and you are no
16 longer in business but I'm the one who wishes to use the
17 water, that shifts all of the burden to me, does it not?

18 A. Well, if I'm no longer in business, the burden is
19 probably shifted to you in any case.

20 Q. Not if you clean it up the first time.

21 A. Well, that is again -- That gets into some very
22 interesting issues on how clean is clean. If you clean it
23 up to --

24 Q. -- statute --

25 A. -- to today's standards --

1 Q. Correct.

2 A. -- those might not be acceptable standards a
3 hundred years in the future, and you may have exactly the
4 same issue, and --

5 Q. Yes, you do what you can. But based on today's
6 standards, if you clean it up today, I don't have to
7 tomorrow.

8 But what I heard your testimony say was, often it
9 would be better if I were forced to clean it up tomorrow.

10 A. Well, again, I think that is -- I don't want to
11 split hairs over this. I think that is a misstatement.

12 What I'm saying is that the level of cleanup of
13 *in situ* water ought to be geared to the ultimate risk to
14 public health and the environment. And if there is no
15 risk-based need to clean it up to an extremely stringent
16 standard *in situ*, then it shouldn't be done. It's not a
17 good resource allocation.

18 We've got limited resources here as a society,
19 and we ought to be getting the most bang for the buck, so
20 to speak, on meeting the overall objective of protecting
21 public health and the environment.

22 Q. Okay. My third question had to do with your
23 submission of -- your question -- your testimony regarding
24 submission of Stage 1 and Stage 2 together. I'm in favor
25 of reducing paperwork whenever possible.

1 What I might have heard you say was that a
2 perceived difficulty with this could inhibit or prohibit
3 responsible party from doing an immediate cleanup?

4 A. Well, I'm --

5 Q. Did you suggest that?

6 A. I don't know that it would prohibit them from
7 doing an immediate cleanup, so much as it would slow the
8 progress of the cleanup ultimately.

9 Q. It's your feeling --

10 A. That was my concern.

11 Q. -- that the responsible party is intimidated or
12 otherwise discouraged from doing cleanup while the
13 paperwork is in progress?

14 A. Not so much discouraged; it's just that you
15 really would proceed at your own risk if you're going ahead
16 and doing the remediation before you have approval, you
17 know, for the site characterization. That was my concern.

18 Q. Okay.

19 A. And that concern might be legitimate in some
20 cases, and in others, big problems. I think it's
21 legitimate to stop, look and deal with site-
22 characterization issues more fully before you move on to
23 the remedial stage.

24 Relatively small problems where you're out there
25 with a backhoe doing source removal, and that's -- you

1 know, a source that's in the vadose zone, and that's when
2 you discover that you have a groundwater impact. I think
3 it's overkill, process overkill to then have to stop and
4 wait until you get a blessing, so to speak, on your site
5 characterization before you can continue with the source
6 removal and complete your remediation.

7 Q. That's the point I was addressing. You feel you
8 have to stop and wait, or you feel it's just a risk a
9 responsible party takes because he might not be using the
10 appropriate procedure?

11 A. It would be a risk.

12 DR. NEEPER: Just a risk, I would agree with
13 that. It's not prohibited.

14 CHAIRMAN LEMAY: Additional questions for Ms.
15 Ristau?

16 Commissioner Bailey?

17 COMMISSIONER BAILEY: No.

18 CHAIRMAN LEMAY: Thank you. Commissioner Weiss?

19 EXAMINATION

20 BY COMMISSIONER WEISS:

21 Q. I have a question about *in situ* remediation. I
22 guess that applies equally to where I see these gasoline
23 leaks in filling stations and such. How many *in situ*
24 remediations are done a year, or have been done, period?
25 Do you have a feel for that?

1 A. Boy, I don't. I could probably look those
2 numbers up. I don't have them at my fingertips.

3 Q. And the same thing in the oil field. On these
4 pits in, say, the San Juan Basin.

5 A. Uh-huh.

6 Q. I think that kind of information would be -- you
7 know, numbers rather than --

8 A. Well, let me give you an idea, again, based on
9 our experience, which may or may not be reflective of the
10 industry as a whole.

11 Right now we have an ongoing pit remediation
12 project under OCD Order R-7940-C. We have remediated at
13 this point, as far as cleaning up the contaminated soils, I
14 believe it's about 120 pits. I'm looking at Bill, because
15 we've submitted the information to him.

16 Of those, we have, I believe, 11 groundwater
17 contamination sites. So we're running at about 10 percent
18 of the soils remediation where you've had a spill or a
19 release or a release over time, where you also have a
20 groundwater impact.

21 And as far as the difficulty of cleaning up and
22 closing a site once you have groundwater impact, once you
23 have groundwater impact, you're into at least a year-long
24 process. Whereas, if it's just a soils-only issue, you're
25 talking in terms of probably 45 to 60 days to be able to

1 clean up and remediate the site.

2 And when you look at the amount of effort and
3 cost then associated with that, if -- or on the pits alone,
4 if you have -- I don't know how many pits there are
5 statewide. You all might remember from the studies that
6 you did on 7940 just in the northwest. 10,000 pits are
7 there, up there, that are subject --

8 MR. OLSON: Originally estimated around 15,000.

9 THE WITNESS: 15,000. So 10 percent of those are
10 groundwater sites. You're talking about 1500 sites where
11 groundwater contamination will need to be addressed at
12 some --

13 Q. (By Commissioner Weiss) Has there ever been a
14 successful groundwater remediation?

15 A. Well, again it depends on your definition of
16 success.

17 All of the sites that we have been addressing so
18 far, again, are relatively small, relatively remote. And
19 our preferred remediation technique, if you will, is remove
20 the source of the contamination, the spill that's residing
21 in the vadose zone that's contributing to the groundwater
22 contamination, and then monitor for a period of time and
23 let nature take its course on natural attenuation. So it's
24 not real aggressive after remediation.

25 On the other hand, you're still talking about

1 probably \$10,000 or so per site, where you have groundwater
2 impacts, by the time you do your investigation,
3 installation of monitoring wells, additional profiling
4 information that you need to put together, and monitoring
5 to see whether your attenuation is --

6 COMMISSIONER WEISS: Is there a comment over here
7 about how many have been remediated?

8 MR. OLSON: Yeah, Mr. Chairman, members of the
9 Commission, Bill Olson with the Oil Conservation Division,
10 and with the Division I'm responsible for doing all the
11 groundwater cleanup projects.

12 Currently we've got about 300 cases running right
13 now from groundwater contamination from unlined pits in the
14 San Juan Basin, and the majority of all these cases are
15 being remediated through *in situ*, by remediation, with
16 maybe a couple of exceptions.

17 And in these cases they're really being done as a
18 passive bioremediation with organisms already existing in
19 the ground, where the only thing that's really occurring is
20 that the responsible parties having to define extensive
21 contamination -- they may have to put in a few monitor
22 wells to determine the extent, and then they just monitor
23 it till it cleans itself up, essentially.

24 We have had two successful cases of this where
25 sites where folks had done a little bit more enhanced

1 remediation, they had excavated the pits and essentially
2 sprayed some nutrients in solution into the pits before
3 they backfilled them into the groundwater. And in those
4 cases we had groundwater cleaned up essentially in a
5 natural state, *in situ*, within about one year.

6 So it has been successful for cleanups in a lot
7 of cases, and the Division has been encouraging that as
8 kind of a low-cost alternative. It's been pretty much
9 accepted nationwide now at USC sites for enhanced -- A lot
10 of times you hear it talked about as intrinsic
11 bioremediation or enhanced -- not enhanced but natural
12 attenuation, where essentially you're just allowing that
13 for micro-organisms to degrade the hydrocarbons that are
14 already there.

15 But the Division has always taken the position
16 that the responsible party still has to define what the
17 extent of that contamination is, and then just monitor it
18 till it cleans up. So the only costs associated with
19 cleanup in most cases are the cost of installation of the
20 wells and some type of monitoring program that's negotiated
21 with the agency.

22 COMMISSIONER WEISS: The economics of that, how
23 does that compare with the pump-and-treat-type thing on the
24 surface where the end user, if he wants to do something
25 with the water --

1 MR. OLSON: Yeah, pump-and-treat can take a real
2 long period of time and cost --

3 COMMISSIONER WEISS: I think I used the wrong
4 terminology.

5 MR. OLSON: In terms of the economics, your pump-
6 and-treat would be way above costs of an enhanced --

7 COMMISSIONER WEISS: Well, let's just put it this
8 way: Say there's a shepherd out in the San Juan Basin
9 up on one of those mesas, and he drills a well, okay? And
10 it's got whatever it's got in it, oil, and he wants to
11 clean that up. I would guess that that would be -- and
12 it's a PNM well. I don't even know if you have wells.

13 THE WITNESS: No.

14 COMMISSIONER WEISS: But that would be their
15 responsibility to put something, a filter there, to take
16 the oil out for him. Is that the -- That's what I'm
17 talking about when I say at point of -- What did you call
18 it? Source?

19 THE WITNESS: Point-of-use treatment --

20 COMMISSIONER WEISS: Point-of-use treatment.

21 THE WITNESS: -- I think, is what you're talking
22 about.

23 MR. OLSON: Yeah, that's the -- The Division has
24 interpreted that, even to date, that if someone had a well
25 and it was contaminated, it would be the responsible

1 party's responsibility to treat that water. If, say, the
2 rancher had drilled a well and there was this -- you know,
3 not useful for his sheep or cattle or whatever at that
4 point, that's correct.

5 COMMISSIONER WEISS: Okay, is that less expensive
6 than monitoring these sites, these 300 sites that you have?

7 MR. OLSON: Well, obviously it's going to be
8 cheaper than doing some type of remediation, although the
9 technology that you're going to use if they have oil in
10 their well is going to be exactly the same as you would use
11 on a pump-and-treat site, essentially. You may have to put
12 on some type of an air stripper to strip out the volatiles,
13 as well as follow it with a carbon filter to polish it up
14 before they would use it. That's the potential. But the
15 technology would be the same.

16 But there would still have to be some mechanism
17 for monitoring the site over time, because in a lot of
18 these cases, what the responsible party is maintaining is
19 that the natural attenuation that's occurring in the
20 aquifer is their remediation method, and the Division
21 accepts that.

22 But that is a method for remediation, so that --
23 if things -- still needs to occur over time, is some type
24 of monitoring of the system to show that, you know, it's
25 not getting worse or it's not posing impacts on, say,

1 someone else.

2 COMMISSIONER WEISS: Well, my point is, I don't
3 think that's necessary unless somebody's going to use the
4 water.

5 MR. OLSON: Well, I guess then I might fall back
6 on the same position that Mr. Neeper is bringing up, is,
7 you have to look at projections of who's going to use that
8 water.

9 And the Division does consider that in their
10 applications, as whether or not there's a foreseeable
11 beneficial use of the water. There is cases where we've
12 had groundwater contamination cases from the unlined pits,
13 where we've had -- you know, there may be a small saturated
14 zone down there on top of a clay layer or shale or
15 something like that, that is contaminated.

16 But once they come in, they're trying to do the
17 delineation of the contamination, they try to pump some
18 water out of the monitor wells, and -- Well, things just
19 dry up.

20 Well, then the company can come back and propose
21 that that doesn't have a foreseeable beneficial use, and
22 therefore it's not required to be cleaned up by the agency.

23 But you're right. I mean, it goes back to what
24 is a foreseeable beneficial use, then, of that water.

25 COMMISSIONER WEISS: What's the longest time

1 frame that you can see for this natural remediation to take
2 place?

3 MR. OLSON: Oh, it could take many years.

4 COMMISSIONER WEISS: Yeah. Five?

5 MR. OLSON: Oh, it could take ten, twenty. It
6 depends on the size of the case and the nature of it.

7 Certainly most of the --

8 COMMISSIONER WEISS: Rather than the --

9 MR. OLSON: -- most of the --

10 COMMISSIONER WEISS: -- fifty or a hundred that
11 was hypothesized here a moment ago?

12 MR. OLSON: That's -- That could possibly happen.
13 It depends on -- I mean, the unique thing about a lot of
14 the cases up in the San Juan Basin, if the separators and
15 the equipment is operated properly, there's no free-phase
16 product there. And without a free-phase product the stuff
17 degrades really readily, because you don't have the
18 residual saturation of hydrocarbons in the soil slowly
19 going to keep bleeding stuff off.

20 So I think in the San Juan Basin it's worked
21 quite well.

22 But there are cases where -- If you have a large
23 case like some of our refineries, things like that, I can't
24 see it actually -- You know, honestly, I can't see our
25 refineries being cleaned up in my lifetime that we've got

1 now, and that's even true aggressive technology.

2 COMMISSIONER WEISS: Thank you.

3 CHAIRMAN LEMAY: Thank you, Mr. Olson.

4 Additional questions of the witness?

5 Let's see, I think I had one.

6 EXAMINATION

7 BY CHAIRMAN LEMAY:

8 Q. Only point of clarification on these hypothetical
9 situations.

10 Has -- The issue was brought up about the stop-
11 and-wait risk. I assume that if you're discovering some
12 contamination and your concern is that you have to back off
13 the backhoe, get some comments before you could clean --
14 Have you ever had that experience, or has the Division
15 always -- Have you ever heard of a case where they've not
16 allowed you to clean up contamination; they're waiting for
17 paperwork to follow?

18 A. Well, no, but I think there's another reason for
19 that, and that is that we're proceeding on these sites
20 under an approved groundwater management plan that
21 basically lays out the major situations that we think we
22 might run into and specifies what we'll do if we run into
23 situation A, situation B, situation C. And that
24 groundwater management plan was approved up front before we
25 started working on any of those sites.

1 The groundwater management plan is not entirely
2 equivalent to an abatement plan, but it has many of the
3 same elements and protections in it.

4 And that indeed has worked quite well for us, is
5 that -- And we don't, then, when we discover groundwater
6 contamination on a specific site, stop and provide public
7 notice at that point; we just proceed under our existing
8 groundwater management plan and keep on keeping on, and
9 talk with Bill, usually Bill, and figure out where we're
10 going to go next and define that, yes, we indeed think this
11 is situation A, and we've already pre-prescribed what we're
12 going to do in situation A; is that all right with you?
13 Generally he's always said yes, so far. And then we have
14 proceeded to play out the prescriptive remedies that we've
15 already laid out.

16 If we then had to stop, if this was an abatement-
17 plan scenario, once we discovered that groundwater impact,
18 provide notice to the OCD, wait for them to put out a
19 public notice and wait for them to then specifically
20 approve us to take the next step, it would indeed slow it
21 down. I don't think it would have any ultimate impact,
22 necessarily; it would just slow it down.

23 And it's very nice, especially on these smaller
24 sites, to have that prescriptive situation set up so that
25 you pretty much anticipate what you're going to run into,

1 yeah, we've run into it, and then you just run with it,
2 instead of having --

3 Q. I think you probably do that under the current
4 rules and regs.

5 My concern is that we can't address every
6 situation, but it's been my experience that there's never
7 been a contamination case that's been held up for
8 paperwork. I mean, if you want to go do something, clean
9 it up and we'll advertise it later. But --

10 A. Okay, well, and --

11 Q. -- we certainly encourage that type of --

12 A. Right.

13 Q. -- activity, and I didn't want to leave the
14 impression that our rules and regulations somehow
15 prohibited the cleanup of contamination.

16 A. No, no, and that wasn't our statement either.

17 We were just concerned that by imposing
18 additional explicit notification requirements that we
19 didn't, in fact, start holding up some of these clean up
20 projects, and --

21 Q. We never want to do that.

22 A. -- we would like to be able to go ahead as
23 quickly as we can.

24 CHAIRMAN LEMAY: I understand. Thank you.

25 Yes, Commissioner Bailey?

EXAMINATION

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BY COMMISSIONER BAILEY:

Q. Could you explain what a fact sheet is and what kind of effort is involved in putting one together?

A. Again, I don't have any personal experience with doing a fact sheet. Under the -- That comes from the WQCC abatement regs.

But that's a process, again, I think, that has been borrowed from some of the superfund site cleanups, and it's a mechanism for clearly and concisely stating what the issues are at a site, to elicit effective public comment and -- It's a technique, it's not the only technique, to elicit public comment.

And our concern was, in making the recommendation, we remove that section, is that either we need to explicitly allow for the fact-sheet process, which currently isn't allowed for under Rule 19, or strike the approval of the fact sheet, because under Rule 19, right now, we wouldn't be generating any fact sheet. So it's just a superfluous section, was the thrust of my comment and, I think, if I'm not misspeaking, Louis Rose's comment.

Q. It needed to be referred to earlier as one of the requirements if it was going to --

A. Yeah, if we see this is a beneficial way of getting the word out to the public for them to be able to

1 provide comment, then we should have a fact-sheet
2 requirement somewhere in Rule 19.

3 If we don't have a fact-sheet requirement then,
4 you know, then why have an approval process for something
5 that we don't accommodate or allow for in the rule?

6 COMMISSIONER BAILEY: Thank you.

7 CHAIRMAN LEMAY: Additional questions of the
8 witness?

9 If not, she may be excused.

10 Thank you very much for your testimony.

11 THE WITNESS: Thank you.

12 CHAIRMAN LEMAY: Let's take about a 15-minute
13 break, and then we'll come back.

14 That's -- My records show that's all that want to
15 give testimony. We can open up the record.

16 Chris, did you want to -- Do you have testimony?
17 Okay.

18 MR. SHUEY: Mr. Chairman, both Dr. Neeper and I
19 do.

20 CHAIRMAN LEMAY: Okay. Well, I had you initially
21 on there, and then when I opened the case I didn't see you,
22 so I -- Good, we'll have your testimony when we come back
23 after a 15-minute break.

24 MR. SHUEY: Took a while to get the kids to day
25 care.

1 CHAIRMAN LEMAY: I understand.

2 (Thereupon, a recess was taken at 11:07 a.m.)

3 (The following proceedings had at 11:28 a.m.)

4 CHAIRMAN LEMAY: Okay, we shall continue.

5 I think at this time, though, we've got
6 additional testimony by Dr. Neeper and Chris Shuey.

7 You haven't been sworn in, I don't think, so
8 would both of you please stand and raise your right hand?

9 (Thereupon, the witnesses were sworn.)

10 CHAIRMAN LEMAY: I think what we'll do, Chris, is
11 take the testimony separately, then questions and answers,
12 we'll combine them, because as I say, that's where we get
13 some of the informal discussion. So if you'd care to
14 begin, please begin.

15 CHRIS SHUEY,

16 the witness herein, after having been first duly sworn upon
17 his oath, testified as follows:

18 DIRECT TESTIMONY

19 BY MR. SHUEY: Thank you, Mr. Chairman. For the record, my
20 name is Chris Shuey, that's S-h-u-e-y.

21 I am the director of the community water waste
22 and toxics program at Southwest Research and Information
23 in Albuquerque. It's a community-oriented non-profit
24 educational and scientific organization. It's been in
25 existence since 1971, and I have been on the staff there

1 since 1981, and I've been involved in oilfield waste and
2 environmental issues since that time.

3 I was a member of the Rule 116 change committee,
4 and the purpose of my testimony today would be to provide
5 some perspective about my perspectives going into the
6 Committee and working on these issues and how some of the
7 experience I have in oilfield issues played into the
8 thought processes as we went through the proposed rules.

9 I wanted to discuss for you a little bit about
10 how public health principles are really an important
11 foundation for the rules before you today, and something
12 that I support. I want to briefly review the need for
13 these two rules and then to comment on the various proposed
14 changes that have been presented by Mr. Rose for Marathon
15 and the Division.

16 And then Dr. Neeper has some proposed changes
17 that we think will help to fill some of the slight holes
18 that exist in the rules today.

19 I want to be clear that I am testifying in strong
20 support for these -- for the amended Rule 116 and for the
21 new Rule 19 and urge your adoption of them, subject to some
22 of the changes.

23 And as a general matter, I think that the changes
24 that have been proposed, whether we necessarily agree with
25 them or not, are of a nature to clarify and approve the

1 rules before you, and they do not substantially affect
2 either the intent or the direction of the rules. And so I
3 don't perceive the need for any of the changes to go back
4 to the committee. I think that's -- You've already heard
5 that expressed today by a couple of the other witnesses.

6 I have a bachelor of university studies degree,
7 undergraduate degree, from the University of New Mexico.
8 I'm working on my master's degree in public health,
9 concentrating on environmental assessment and epidemiology
10 at this point.

11 I have -- I was appointed to the committee to
12 represent what I assume to be environmentalist interests.
13 I can't speak for any other organizations or -- I can
14 really only speak for myself. To the extent that some of
15 my experience in the oilfields in communities affected by
16 pollution are relevant, I'll be happy to report what those
17 experiences are and what I have heard -- the concerns
18 expressed to me. But I can't represent any other
19 organization, big or small.

20 I had, a long time ago, gotten involved in these
21 issues because, frankly, the state of environmental and
22 public health protection in terms of a regulatory program
23 in the State of New Mexico, back in 1981, was minimalist.
24 And I can -- And I'm always happy to report that 15, 16
25 years later, we've made great strides in improving both our

1 need for pollution prevention in the oilfields and for
2 improving our need to clean up the problems that we know we
3 already have.

4 We have over the years improved state regulations
5 in many important areas, ranging from the pit rule-makings,
6 the vulnerable-area rule-making back in the early to mid-
7 1980s. We studied produced water, I and others from
8 industry and the state, of the state agencies. We were all
9 out in the field collecting samples, and we have a very
10 good idea of what the chemistry of the substances are. We
11 know where the problems are, I think. We helped to improve
12 regulation of commercial and centralized facilities through
13 the Rule 711 committee a couple of years ago. We have --
14 The state has been forward-thinking in tackling the
15 oilfield NORM issue.

16 And we have now, I think, done a great service by
17 providing you a set of expanded rules and new rules that
18 will provide for the first time the OCD's distinct
19 authority to require corrective action for releases that
20 affect water and, in some cases, those that don't.

21 Now, these perspectives that I wanted to share
22 with you come from a background of working with people
23 first. The oil and gas wastes and by-products and the
24 materials themselves can and are often harmful to living
25 things, people, animals, plants, and to the natural

1 resources on which those things depend for surviving.

2 I have three short exhibits here which I've
3 already marked as Exhibits Shuey 1, 2 and 3. I'd be happy
4 to put a stamp on them, Mr. Chairman, if that's required.
5 Otherwise, I'll provide you with copies now.

6 The first exhibit is simply to -- and I have some
7 extra copies for the audience here -- is simply to refresh
8 our memories about the substances that are in oil -- the
9 constituents of oilfield wastes and materials, so that it's
10 not lost upon ourselves that we're dealing with some
11 potentially and, in many cases, actually harmful
12 substances, some of which are known human carcinogens, some
13 -- most of which are not.

14 But the point is that many have been already
15 found in groundwater, and this particular list I put
16 together in 1988, eight years ago, and I'm sure that as the
17 result of the investigations that have gone on today, we
18 could add other things to this list. And certainly we can
19 always add the components, the general chemistry components
20 of produced water, the salts that are -- can be as or even
21 more hazardous, especially to plant life, than some of the
22 hydrocarbons.

23 So there's really two ways of ensuring that these
24 substances don't harm people, or, if they have been
25 released, that we deal with them.

1 One is to prevent releases through spill-
2 prevention and -control measures, replacing aging equipment
3 that's prone to leaks and spills, recycling and reusing
4 solids and fluids to the extent that it's possible.

5 And the other is, once releases have taken place,
6 to promptly take corrective action.

7 If these things are done, we can substantially
8 reduce risks to people and risks to the environment.

9 As I said, I think that there's been steady
10 improvement made in these goals and objectives, and I think
11 that the industry has been successful, the state's been
12 successful. There are still areas of improvement, but
13 we're -- with the important thing to know about is that
14 we're about to close what really is one of the remaining
15 big gaps in the OCD's program to accomplish pollution
16 prevention and corrective action when releases take place.

17 I mentioned -- Prior to getting into why the rule
18 is needed, I mentioned that there's some public health
19 concepts that we can apply pretty readily to the rules at
20 hand and generally to our need to understand the need for
21 assessment of releases and their potential effects when
22 they do happen.

23 I'm handing out what I've marked as Shuey Exhibit
24 2, and again I have extra copies of them that I can share
25 with the audience.

1 This is called a biological impact pathway model.
2 And, Mr. Chairman, the word "model" is not to be construed
3 with numbers crunching; this is a conceptual framework into
4 which one can apply any number of different public health
5 or environmental problems.

6 The concepts underlying notification, reporting
7 of spills, leaks, releases, both one-time and chronic, and
8 taking action to address them, is all part of what we call
9 assessment. And if you begin over on the left side of the
10 boxes, we have to know what the sources are of contaminants
11 before we can determine if they have gotten into the
12 environment or gotten into somebody's water, affect
13 somebody's air space.

14 Once we figure out what the sources are -- and we
15 have to know what those sources are -- then we can attempt
16 to measure their presence.

17 Their presence is affected by a wide number of
18 physical conditions in the environment. And this
19 particular model was developed for indoor air quality
20 concerns. We can add to the list of factors addressing
21 fate and transport and groundwater by such attenuation
22 factors as biodegradation, absorption, volatilization, a
23 whole number of things.

24 The point is that without good assessment
25 information, we can't begin to make intelligent decisions

1 about what to do about problems, or intelligent guesses as
2 to what the consequences of releases of contamination will
3 be, whether those consequences are expressed as human
4 health effects, which is the last box, or effects on
5 economics, effects on the ecological resources, effects on
6 the environment as a whole.

7 Rule 116 was intended, and I think that we have
8 lived up to the intent, of ensuring that the state's
9 interest to make -- to know where releases have taken
10 place, so that we can intelligently respond to them, is an
11 important goal that I think that we've retained in the
12 proposed changes to the rule, and I don't think that there
13 was any dispute on the Committee as to the need to make
14 those changes in order to improve our assessment
15 capabilities.

16 Certainly, the Stage 1 component of the abatement
17 plan for releases that reach water or may with reasonable
18 probability reach water, are -- is another form of
19 critically important assessment. And I think that Dr.
20 Neeper will talk about some of the reasons, more detailed
21 reasons about why that is, in both his experience as a
22 regulated party and as a policy person for clean-water
23 issues.

24 Having said all of that, I wanted to go into a
25 little bit more detail about why I think that the rule is

1 needed, and I think that in terms of the statutory criteria
2 that the Commission has to consider adopting rules, we need
3 to have some indication on the record that this rule-making
4 is not undertaken because of a perceived need but an actual
5 need, and there's several of them.

6 As I already stated, I think that it's pretty
7 clear that OCD right now lacks clear regulatory authority
8 to require corrective action for releases. The historic
9 practice of the agency has been to base corrective actions
10 on either authorities under the Water Quality Act or on
11 some general provisions of both the Oil and Gas Act and the
12 OCD rules.

13 These rules, and especially Rule 116.D, which is
14 the actual corrective-action requirement, will establish
15 that regulatory authority clearly for the first time.

16 The Oil Conservation Commission and Division have
17 statutory authority in Section 70-2-12 B (15), (21) and
18 (22), to protect public health and the environment and
19 fresh water from a variety of activities in the oil fields,
20 disposition of produced water, the operation of various
21 facilities.

22 There's certainly ample evidence in the files of
23 the OCD to, I think, convince me and others that there has
24 been a problem with releases in this state and that there's
25 a need to have a unified and consistent approach to

1 correcting them.

2 The committee was provided, for instance, with a
3 printout of spill reports from the OCD for a period in the
4 early 1990s, 1991, 1992. I could be off a year. It was a
5 pretty thick document, and we were told to make sure that
6 we understood that it hadn't been approved, meaning that
7 there could have been inaccuracies in the entries to the
8 database. But the point was that there was a significant
9 record of releases.

10 This was on top of the record of releases what we
11 already knew about and, in fact, discussed in the context
12 of the EPA/IOGCC New Mexico state review, which I also
13 participated in.

14 At the time that the review was done back in
15 1994, we were -- the review team was provided with
16 information that there was roughly about 105 or so
17 contamination cases and that remediation was underway or
18 nearing completion or had been completed at about 60
19 percent of those -- in 60 percent of those cases.

20 I believe that those numbers are fairly higher
21 these days, in terms of the number of sites, simply because
22 of the pit closure and investigation requirements that were
23 built in to Rule -- Order 7940-C, back in 1992, 1993 and
24 1994.

25 So we could, I think, provide the Commission, if

1 necessary, with a more rigorous summary of this record.
2 I'm hoping that it's -- Suffice to say right now that the
3 record exists, and I find it compelling.

4 It's -- I think it's worthwhile to -- for the
5 purposes of the record and for the Commission's
6 understanding, to review some of the findings and
7 recommendations of the EPA/IOGCC peer review. And I'll
8 begin -- and I have a copy in front of me; I neglected to
9 provide copies of these pages, and I would at your request.
10 This document is well available in the public record, and
11 the OCD has numerous copies, but it might be worthwhile to
12 enter a copy into the record, because I am going to cite
13 from it.

14 On page 43, finding V.2. states, "Rule 116 is
15 undergoing internal review by OCD to determine if its
16 reporting requirements, including reportable quantities,
17 are protective of public health and the environment."

18 The follow-up recommendation was, "OCD should
19 adopt revised spill reporting requirements that are
20 protective of fresh water, public health and the
21 environment." I think we've done that.

22 Finding V.3. stated, "There are no Reportable
23 Quantities for 'water contaminants' required to be reported
24 under WQCC Regulations or for 'deleterious chemicals'
25 required to be reported under Rule 116."

1 The recommendation was that "the Review Team
2 recommends that OCD define Reportable Quantities for
3 substances other than crude oil, condensate and produced
4 water." I would note that one member of the review team
5 said that that wasn't necessary.

6 We didn't do exactly that in the revision to Rule
7 116. But we did, I think, the next best thing, which was
8 to make the judgment that whether it's crude oil, produced
9 water, condensate or any host of other chemicals that are
10 -- and substances in the oilfield, should they reach water,
11 that -- under any circumstances, that's a reportable
12 quantity, in any amount. That's consistent with federal
13 requirements, and that's consistent with the notion that
14 once contamination gets into water, it's very difficult to
15 clean up. You've already heard testimony from Toni Ristau
16 and some additional comments by Bill Olson that talked
17 about the range of remediation measures and their relative
18 costs.

19 Another finding and recommendation that's
20 applicable here was on page 44, and this was finding and
21 recommendation V.4. of the State Review Report. "Rule 116
22 does not specify the process by which the agency will
23 approve, modify, or deny a corrective-action plan submitted
24 by an operator within 10 days of a spill."

25 The recommendation was that "The Oil Conservation

1 Division should specify a process by which the Oil
2 Conservation Division approves, modifies or denies an
3 operator's corrective-action plan." I believe that we have
4 accomplished that recommendation in the revised Rule 116
5 and with the proposal of Rule 19.

6 Finding V.5. stated, "OCD corrective-action and
7 remediation standards are contained in OCD guidelines and
8 in references to WQCC Regulations. None of these standards
9 have been promulgated as rules by OCD or OCC."

10 The recommendation was that "OCD should
11 incorporate the remediation standards of its pit closure
12 guidelines and the groundwater numerical standards and
13 'toxic pollutant' narrative standards of the WQCC
14 regulations", and that "The standards should be applicable
15 not only to spills and accidental releases, but also to
16 chronic releases from E&P waste management facilities and
17 oil and gas facilities."

18 With regard to the incorporation of the narrative
19 and numerical standards in the WQCC regulations, we have
20 done that. That is precisely the approach of Rule 19.

21 The soil corrective -- The soil guidelines, as we
22 refer to them, remain the soil guidelines, as has already
23 been reported to the Commission. The committee did not get
24 around to revising those. It's our understanding that the
25 Division has that intent to do so.

1 Just to place that in context, that peer review
2 committee consisted of people from other states, other
3 state agency regulators, both on the oil and gas and the
4 environmental sides, representatives from industry and
5 representatives from the broadly defined environmental
6 community, and I think that during that time these were
7 important gaps that they found in the State's program, and
8 the whole purpose behind the EPA funding the IOGCC to do
9 these state reviews is to identify gaps that exist and to
10 help states close them and correct them.

11 We talked -- There was some talk earlier about
12 the need to achieve consistency in the OCD regulations,
13 versus those of the Water Quality Control Commission.
14 There's certainly the need to do this across jurisdictional
15 lines.

16 The involvement of Don Ellsworth from BLM was
17 real helpful in the Committee, such that I think we're
18 going to have now, at least in terms of reporting, a
19 consistency with the major federal agency involved in oil
20 and gas regulation.

21 There are a couple of, as you're aware,
22 differences between the abatement regulation approach that
23 the committee took for the OCD requirements and that --
24 that was taken during the WQCC's rule-making for its
25 abatement regulations, which I also participated in.

1 One large difference is the notion of being
2 exempted from abatement plans, if you can address a release
3 in a corrective-action sense within one year.

4 And the WQCC regulations, the exemption period is
5 180 days. That's six months. We felt that we could live
6 with a longer period in order to encourage expeditious
7 cleanup.

8 As you'll hear from Dr. Neeper, we're not
9 necessarily enamored with paper reports any more than
10 anybody else is, including that of industry. We do not,
11 however, want that one-year exemption -- or I should say,
12 probably, option, to remain out of an abatement plan
13 process, to encourage delay. We want it to be used to
14 encourage action. So we were willing to move that 180 days
15 up to 365.

16 I'm not comfortable, however, with providing much
17 leeway beyond one year. I believe that one of the Marathon
18 suggestions was to insert in Section 19.D.(1)(g) the word
19 "likely", that the remediation will likely be achieved
20 within one year.

21 We don't want to see one-year nonabatement plan
22 cleanups taking 18 months, two years, three years, without
23 an abatement plan. Thirteen months, twelve and a half
24 months, you know, nobody's going to blow the whistle on day
25 366. But the point is that that should be as firm as

1 possible.

2 Now, I have one more exhibit here, and I'll
3 provide that.

4 The intent of this was to clarify in my own mind
5 how the release notification and corrective action
6 requirements work, and so I've tried to put this into a
7 form of a flow chart. And I don't know if I was successful
8 or not, but we'll find out. This is something we really
9 needed to do in the Committee, and we never actually got
10 around to doing it.

11 And let me back up a little bit, to explain a
12 little bit about the formation of this concept of
13 reclamation -- remediation plan -- reclamation plan --
14 remediation plan, it should be.

15 We struggled, the committee struggled with what
16 to do, how to authorize corrective actions in this one-year
17 period if an operator availed themselves of the opportunity
18 for an exemption for that period, subject to OCD approval.

19 I was concerned that without some mechanism, that
20 there was -- it was very nebulous about how these quick
21 remediations would take place.

22 At the very last meeting, we came up with this
23 notion of the remediation plan, and we tried to define it.

24 Now, Dr. Neeper has some, I think, important
25 changes to the definition of "remediation plan", and I'll

1 let him talk about those. I tend to support those more
2 than the changes that Marathon proposed.

3 Either way, I think both are intended to make
4 clear the relationship of the remediation plan to the one-
5 year exemption in 19.D.(1)(g). Okay? But it might be
6 worth just going through this real quickly.

7 The key difference between a Rule 116 event and a
8 Rule 19 event, as I see it, is that Rule 116 events are
9 always unauthorized releases, whereas in Rule 19, that they
10 may in some cases have actually been authorized through
11 discharge plans.

12 Following along with the Rule 116, incorporating
13 the suggested revision by the Division of changing Category
14 1, 2 and 3 releases to major and minor, I tend to support
15 that, especially since they have rolled the natural gas
16 releases into that.

17 Under "Major Releases" you have both immediate
18 verbal notification within 24 hours of the release, and
19 then you have written follow-up within 15 days. And for
20 minor releases you have written only, and 15 days.

21 Either way, they go on to form C-141, and they go
22 to the district office in the area where the release
23 occurred. And there may be circumstances in which the
24 Division may request other information.

25 Now, then you get into, Well, what do you do

1 about it? And if you can assert that you can remediate the
2 problem, within one year -- and certainly the -- what we
3 call the small releases, small spills, can be dealt with in
4 much shorter periods of time.

5 And there may, in fact, as Mr. Olson said
6 earlier, be isolated groundwater contamination cases that
7 can be addressed within one year. You can do that under
8 the remediation plan. If you can't, or if the Division
9 determines that it's not likely that you can, then you have
10 to go into an abatement plan.

11 I don't think that any of us feel that immediate
12 actions taken by operators to control and to do some
13 correction of releases is at all barred by the -- an
14 eventual requirement to carry out the full corrective
15 action under an abatement plan. There was some statements
16 that, Well, we do that at our own risk.

17 I don't know of a situation -- and there may be,
18 but I'm not aware of a situation in which the Division has
19 held aggressive, quick action by operators against them
20 later on, if the facts and the circumstance have changed.
21 Maybe the actual corrective action measures eventually
22 change, but I don't think that responsible and quick action
23 has ever been thwarted.

24 Under Rule 19, the key difference, really, is
25 that the releases cause or may with reasonable probability

1 cause water pollution. There is, again, immediate verbal
2 notification within 24 hours and follow-up written
3 notification within 15 days.

4 Now, the difference here is that those go to the
5 OCD Environmental Bureau Chief, and there's no specified
6 reporting form on which that happens.

7 I believe that if what is now Rule 19.N, the
8 notification portion of Rule 19, is incorporated into Rule
9 116, such that the regulated community, the public, the
10 regulators, will all have one place to go for their
11 notification reporting requirements, that that can be
12 effectively done. I know the Division has a proposal to
13 accomplish that, Dr. Neeper has a proposal to accomplish
14 that, and I think they both do.

15 But we need to ensure that the differences that
16 exist in 19.N in regard to the reporting to the
17 Environmental Bureau Chief, the form of the reporting, the
18 actual written report, and the additional information
19 required to be submitted under a Rule 19.N -- or Rule 19
20 release ought to be incorporated into Rule 116 if we move
21 them all over there, so that we don't leave a gap, as Mr.
22 Carroll had been concerned in some of his cross-examination
23 earlier.

24 Under "Corrective Action", I think that -- Dr.
25 Neeper and I talked about how we thought this reclamation-

1 plan-versus-abatement-plan scenario would play out, and
2 really it boils down to the nature and extent of the
3 contamination problem, and probably less to what the
4 release affects, whether it affects the soils or it has the
5 proper ability to get to water.

6 Clearly a large, extensive contamination problem
7 is going to require some significant time to assess
8 accurately and to develop a corrective action and
9 remediation approach.

10 I think that Bob Menzie, in the first part of the
11 hearing, equated this process to a superfund remedial
12 investigation feasibility process.

13 The exemption, I think, therefore, applies to the
14 releases that don't necessitate that kind of extensive
15 investigation or that kind of extensive description of the
16 actual corrective actions to be taken.

17 And then finally, for both authorized and
18 unauthorized releases, corrective action could be taken
19 either under Rule 19 or under an OCD-approved discharge
20 plan. So there is some flexibility built there.

21 Again, my goal is to ensure that there are no
22 gaps, that this authority that we have tried to craft for
23 the Division is comprehensive, while remaining flexible,
24 without that flexibility encouraging delays, nor the
25 paperwork requirements causing unnecessary delays.

1 There are a few portions of the rule that I
2 wanted to comment on specifically. One was the natural gas
3 reporting requirement. In the committee, you may remember
4 that there was a non-unanimous opinion about the --
5 including or excluding natural gas volumes. I had to
6 abstain from that particular vote because I was kind of
7 conflicted by the arguments of both the industry
8 representatives and the agency representatives.

9 I certainly agree that the compelling interests
10 of the state and federal governments are to ensure that
11 there is some reporting of gas releases, because that's a
12 waste of the resource.

13 The industry, however, was concerned that you're
14 mixing resource-waste issues into what amounts to be an
15 environmental/public-health rule. The way that we cut the
16 difference initially was to say that you have to report a
17 gas release as -- because it could have a potential effect
18 in public health, especially hydrogen sulfide releases, but
19 that -- verbally. But that actually trying to measure
20 those volumes was more of a waste issue.

21 I understand that -- I think the parties probably
22 now are not uncomfortable with putting the gas volumes back
23 into Rule 116. I don't have any objection to that. I
24 would hate to have to have the Commission go through a
25 separate rule-making to create a new rule to put it

1 somewhere else. This might be a handy place to put it, and
2 I think there's compelling reasons why the State needs to
3 have that information. But again, it appeared to me to be
4 a conservation and waste of the resource concerned.

5 I remained, throughout the process and through
6 the last the meeting, concerned that the wording of Rule
7 116.D was -- would not necessarily allow -- or that there
8 would be debate over whether it would allow the Division to
9 require some form of corrective action, response, to
10 repeated releases at the same site of amounts that were
11 below the reporting thresholds. And you may remember that
12 the minimum reporting threshold is five barrels of fluids,
13 essentially, oil, produced water, or other chemicals.

14 Repeated releases of four barrels or four and a
15 half barrels or even two barrels at the same site, which
16 has occurred in this state, could eventually have a
17 cumulative effect. I was told that the wording of 116.D
18 could allow the Division to take some action, it was either
19 brought to the Division's attention or the Division
20 monitored the situation closely enough to know when sites
21 were having multiple releases.

22 Dr. Neeper has come up with a way to quantify
23 those cumulative effects, and I urge your thought and
24 consideration of his change. And he does it in the form of
25 tying multiple cumulative unreported releases to the 25-

1 barrel threshold.

2 I think that this is an additional control that
3 has the -- will probably have more philosophical effects
4 than it would -- than it has actual practical effects. I'm
5 trying to indicate to you that I'm aware that regulations
6 are seen both in their ideal world and in their practical
7 consequences and application.

8 We're not expecting the operators to record every
9 teaspoon or every drop of oil on the ground. That's not
10 the intent of this. The intent, however, is to ensure that
11 we build a notion that it's not okay to spill. Yesterday
12 morning, I cleaned up my kids' juice off the floor, and so
13 we at a very early age try to impress upon ourselves and
14 our children not to spill things, because it takes long and
15 it's cumbersome to clean them up.

16 A rule quantifying this notion of the cumulative
17 effect of multiple releases on the same site, I think,
18 would serve to help instill that pollution-prevention
19 notion in the minds of many operators. So I -- Again, I
20 urge you to give careful consideration to Dr. Neeper's
21 suggestions there.

22 I believe I've already addressed the need to
23 incorporate the different aspects of Rule 19.N into Rule
24 116, if that's the choice of the Committee.

25 I wanted to say a few things about the -- Ms.

1 Ristau's and PNM's point-of-use treatment provision.

2 I don't believe that -- I think that both --
3 There's problems with this from both a statutory
4 perspective and a protection-of-the-resource perspective.
5 There's two different things going on.

6 I don't believe that this Commission is bound by
7 requirements of the Water Quality Act in terms of adopting
8 regulations. You have your own requirements under the Oil
9 and Gas Act, factors that you have to apply when you adopt
10 regulations.

11 The ability to have point-of-use treatment is
12 preserved in these rules in the alternative standards-
13 section, where it may be necessary to provide potable water
14 to people whose water has been contaminated.

15 A classic example of that was in the Lee Acres
16 case up near Farmington, in which there were a number of
17 private wells affected by the plume, the combined plume
18 from both the landfill releases and the refinery releases,
19 a number of private wells in that community. There were
20 health-threatening concentrations of a variety of
21 contaminants.

22 The decision was made early on in that process to
23 extend the Bloomfield water lines in that community and get
24 people onto safe drinking water. That's appropriate.

25 But that did not replace the need to address the

1 existing contamination problem, and I do not believe it's
2 appropriate to confuse point of treatment with permanent
3 solutions. The statute clearly sets forth for the
4 Commission and the Division a responsibility to protect
5 fresh water. And as has been noted, fresh waters are those
6 defined by the State Engineer to be fresh, that is, less
7 than 10,000 milligrams per liter total dissolved solids.
8 These waters are useful not only today but for future
9 generations.

10 You asked, I think, Mr. Chairman, or perhaps
11 Commissioner Weiss, over what period of time can we foresee
12 these things? The Department -- In another regulatory
13 context, the Department of Energy has come up with a notion
14 that natural attenuation can in effect be a passive form of
15 corrective action if the achievement of standards is done
16 in 100 years. You know, that's a long time to allow
17 natural attenuation, but it does connote the idea that our
18 planning horizon for what is reasonably in the future can
19 extend out over a century. With growth being what it is,
20 we never know where groundwater is going to be used.

21 The other problem with point-of-use treatment as
22 a permanent solution is that it's an institutional control,
23 it will always require continuing operation and
24 maintenance. And to the extent that the responsible party
25 ceases to exist and there's no institution left to carry on

1 the point-of-use treatment, the responsibility will fall to
2 the people who have the problem, not to those who've caused
3 it, and that's simply not fair.

4 And really, and I think as a practical matter, I
5 don't believe that OCD ever substitutes point-of-use
6 treatment for actual, eventual *in situ* cleanup. Whatever
7 method is used, over whatever planning horizon, I'm not
8 aware of any particular case in which the ability to treat
9 the water as opposed to somehow clean it up, is the
10 permanent remedy.

11 I feel I have a -- I want to thank Bob Menzie and
12 Marathon for providing their changes to us ahead of time.
13 I'm awfully sorry that we couldn't get, necessarily, ours
14 or the ones that Dr. Neeper's going to propose to everybody
15 ahead of time. But I wanted to go down the list.

16 I don't have any objections to their changes,
17 items number 1 and 2, and this is -- this is the -- Well,
18 actually this is the letter from Lou Rose to the Commission
19 dated November 8th, with its attachment.

20 I've already stated in regard to item number 3,
21 the remediation-plan changes -- that I really prefer Dr.
22 Neeper's approach. And if I -- and again, for you to look
23 at that closely. I think it firms up some loose ends and
24 makes some specific relationships between that definition
25 and other applicable portions of the proposed regulation.

1 I have no problems with, under Rule 19 now, items
2 1, 2, 3, 4, 6, 7 -- Well, there's two number 7's, and I'd
3 like to talk about the second one. Or with items numbered
4 12, 13 or 14. And in terms of 14, strike 19.N, provided
5 that the special provisions of that are brought into Rule
6 116 such that there is no gaps, no gaps.

7 Regarding number -- the second number 7, the word
8 -- They propose to add the word "likely" to the abatement-
9 plan-exemption provision. And again, this seems to fuzz
10 the one year, and I really am cautious about that. I don't
11 -- I want that one year to be as close to one year as
12 reasonably possible. "Likely" is too vague for me.

13 Regarding Number 8, one of the changes that we
14 are proposing is -- or Dr. Neeper is proposing, is to allow
15 for public comment, not hearings, but public comment, on
16 Stage 1 abatement plans. There's a really good reason for
17 that. Now, that's the time when the investigation gets
18 done and where a lot of things happen that if it's not done
19 right -- and often someone in the public can see something
20 that maybe the regulators and the operators don't see, and
21 it's better to tackle it then than later on, after the plan
22 is already developed and approved.

23 Here, the industry proposes that you incorporate
24 in the requirement out of the Water Quality Control
25 Commission regulations that -- for the bureau chief in this

1 case to issue a news release to a Stage 1 plan.

2 I really don't have any objection to that. I
3 think that it's -- Informing the public and the news media
4 that abatement is being proposed is a way to get out
5 information. It's a way to demonstrate to the public that
6 things are happening in the oil fields to clean up problems
7 that have been created, so I really don't have any
8 objection to that. I'm sure that having said that, I'll
9 get a -- if this goes through, I'll get a call from Roger
10 and he'll want me to write his press release, so that's --
11 Okay, I can do that.

12 And in regard to items 9, 10 and 11, at this
13 point I have to say I can't agree to those, because when
14 you strike the Stage 1 mentions in the public-notice
15 provisions, then that eliminates the opportunity, as Dr.
16 Neeper will propose, to have public comment on our Stage 1
17 plan. That's not to say that once these various proposals
18 are dovetailed that we couldn't agree to meet halfway on
19 those.

20 And one final comment, then I will cease, and
21 that is that we have -- we've found that this notion of
22 administrative complete -- there is a number -- In Section
23 19.G and 19.H (1), there is introduced the notion of an
24 administratively complete plan, either Stage 1 or Stage 2.
25 This was not defined anywhere. And we felt pretty strongly

1 it needed to be defined since actions were being contingent
2 upon a -- an administratively complete. We assume that
3 that means that the plan submitted satisfies certain
4 requirements of Rule 19.E.(3) for Stage 1 plans, and
5 19.E.(4)(b) for Stage 2 plans.

6 There is, in the rules, specific materials and
7 information that have to be submitted to the Division for
8 both the Stage 1 and eventually for Stage 2 planning. And
9 so we figured that we'd key administratively complete,
10 which connotes a checklist, they have this, they have this,
11 they have this, and this is what they're minimally supposed
12 to have. We're not changing that at all, what those things
13 are. We're not giving anybody any additional authority to
14 change that list. But the public needs to have some
15 understanding of when the Division finds that something is
16 administratively complete, and right now we have no idea
17 when that will happen.

18 Mr. Chairman and members of the Commission, I
19 conclude by saying that a lot of hard work and disagreement
20 at some times, a lot of agreement, went into producing
21 these proposed rules that are before you.

22 Even committees composed of eight or nine people,
23 in the rush of things, to get things done, miss things, or
24 the clarity of what we have done is not so apparent after
25 you put it down for a while and you can go back and read it

1 again.

2 The value of having Dr. Neeper peripherally
3 involved in this process on my behalf and then having him
4 take a fresh look at this was to have someone who hadn't
5 been intimately involved question what had been done, and I
6 think that's important for you to hear.

7 But again, any of the changes that he proposed
8 are not fatal to the need to adopt the rules. They are
9 sound policy, and they will continue to move the program
10 forward, protect the public health and environment and
11 fresh water in this state for years to come.

12 Appreciate the opportunity to appear before you
13 today.

14 CHAIRMAN LEMAY: Thank you, Mr. Shuey.

15 Current plans are to -- I need to check with you
16 and Dr. Neeper on this -- is to take a break for lunch,
17 have Dr. Neeper's testimony and then have both of you,
18 maybe, questions, subject to questions. Is that all right
19 with you, Dr. Neeper?

20 All right, we shall adjourn till 1:30.

21 (Thereupon, a recess was taken at 12:20 p.m.)

22 (The following proceedings had at 1:35 p.m.)

23 CHAIRMAN LEMAY: Okay, we shall convene. There's
24 a -- We'll have a little business here before we go into
25 the continuation of the Rule 116 case.

1 We've got some dates here that the Commission
2 will be meeting in 1997, and I'd like to put those on the
3 record.

4 We will be having a Commission hearing date
5 December 12th, if there are any cases to hear. That's an
6 optional date. Right now we have it on the calendar, and
7 it will be available.

8 In January, 1997, we'll meet on the 16th,
9 February 13th, March 19th, April 10th, May 22nd and June
10 19th. So those will be the dates that the Commission will
11 have scheduled meetings.

12 And right now we shall continue with the Rule 116
13 case, and we now have Dr. Neeper, so it's...

14 DONALD NEEPER,
15 the witness herein, after having been first duly sworn upon
16 his oath, testified as follows:

17 DIRECT TESTIMONY

18 BY DR. NEEPER: Thank you, Mr. Chairman. I will state for
19 the record who I am. My name is Donald Neeper. The
20 address is 2708 Walnut Street in Los Alamos.

21 In front of you, in front of each Commissioner
22 and person at the dais, there are two exhibits, labeled
23 Exhibit 1 and Exhibit 2, and in front of you, Chairman
24 LeMay, there is a set of multiple copies with the official
25 stamp on them. The stamp covers up some of the text, so it

1 was easier -- I think it's in front of your right hand,
2 underneath your name plate.

3 CHAIRMAN LEMAY: Here they are, right here.

4 DR. NEEPER: I will utilize some of the
5 information in Exhibit 1 in my verbal testimony, but I'll
6 do my best to cut out as much as I can, preferring to
7 submit this as an exhibit so the information is in the
8 record, in case it's needed, but not to bore you
9 unnecessarily.

10 In terms of establishing myself as a qualified
11 technical witness, I did receive a doctorate in thermal
12 physical from the University of Wisconsin. I was employed
13 at the Los Alamos National Laboratory from 1968 to 1993,
14 with a brief interruption to do some teaching at a
15 university.

16 The only time the title "Doctor" has been used, I
17 think, is when I was teaching at the university, so you may
18 feel free to use "Mister", "Doctor" or my first name, as
19 you choose.

20 During my employment at the Laboratory, I worked
21 on various things that employed thermal physics, from
22 thermonuclear devices to the solar engineering of
23 buildings. During the last three years that I was at the
24 Laboratory, I was investigating a novel scheme for the
25 removal of volatile contaminants from subsurface plumes

1 such as you might find at a gasoline-station spill, a
2 chemical spill, or the kind of spills with which this
3 Commission is concerned.

4 As a result of some research I was doing part-
5 time, I wound up as the leader of a project to -- of an
6 environmental restoration project, which had as its charge
7 the cleanup of a fairly large area that contained
8 subsurface solvent plumes, buried wastes, chemical waste,
9 buried radioactive wastes, and probably some other things
10 of which we were dimly aware.

11 The job, then, was essentially equivalent to what
12 we refer to in this hearing as Stage 1 plan, only it was a
13 lot bigger. My budget during the last year I worked on
14 that was roughly \$3 million a year, and that was just
15 generating the plan and getting the work started.

16 I have therefore suffered -- and let me accent
17 the word "suffered" -- as a regulated entity. I know what
18 it means to be underneath the regulations. I have some
19 sympathy with that.

20 Since I officially took a retirement, an early
21 retirement in 1993, I have worked with -- actually two
22 private contractors; I'm now working with a second private
23 contractor -- in continuing the investigation of subsurface
24 air motion.

25 Essentially, my professional work is asking the

1 question, what can we do with -- by the movement of air
2 underground, and particularly by passive means? You've
3 heard passive means discussed today. I'm essentially
4 trying to ask the question, how far can we go with passive
5 means? How can we induce the air flow? How does the air
6 flow if we do induce it? And particularly, what do
7 barometric pressure fluctuations do regarding air flow
8 under the ground? I'm very hopeful that we'll be able to
9 make something out of this.

10 I represent a separate view here before this
11 group. I was not a member of the committee. I did sit in
12 as an observer at one meeting of the committee. Chris
13 Shuey has kept me informed, and I have occasionally
14 bombarded him with my views, so I have occasionally looked
15 at some of the correspondence of the committee but I
16 certainly didn't follow all the correspondence.

17 I'm emphasizing that what I'm stating here is my
18 own testimony. Chris Shuey referred to it very frequently.
19 He thinks he knows what my testimony is. He has seen some
20 preliminary copies of it. But the last copy faxed out both
21 to him and to Marathon I sent out last Wednesday. Things
22 have been changing, there were a lot of errors in that, and
23 so even Mr. Shuey has not seen what is actually before you
24 in terms of my suggested changes to some of the wording in
25 the proposed regulations.

1 Why am I appearing here? Unlike perhaps other
2 people, I am not paid, I'm here as a volunteer. I'm here
3 as a representative of a group called New Mexico Citizens
4 for Clean Air and Water. It's a statewide organization
5 dedicated to environmental protection. The group has been
6 in operation for more than 25 years. I regard it generally
7 as more of a technical group than many so-called
8 environmental groups.

9 I recognize that sometimes to wear the label
10 "environmentalist" can be wearing a very prejudicial label,
11 because there are some groups who will utilize
12 environmental regulation or environmental laws as a
13 mechanism for other political agendas.

14 That is not our agenda. Our agenda is almost
15 always technical, usually cooperative. We are quite proud
16 of the fact that we think we are fair to industry's
17 concerns and that we do contribute to environmental
18 progress.

19 I will give an example of that, rather than to
20 tell more stories that are on paper. It was a few months
21 ago that the New Mexico Environmental Department had a
22 question, really, of whether to enforce metals standards on
23 a gasoline spill, a service-station spill in Taos, where
24 the subsurface bacterial action had essentially depleted
25 the oxygen.

1 The responsible party had met the standards as
2 far as the petroleum contaminants go, but the lack of
3 oxygen had caused iron and manganese to dissolve into the
4 groundwater, and now you had a violation of the iron and
5 manganese standards, as a result of the efforts of a
6 responsible party to clean up.

7 One option which NMED was promoting was to go in
8 and write a blanket exemption from these standards. We
9 could see no progress in that.

10 Another option is to go in with an iron fist and
11 enforce the standards. That serves in this case almost no
12 purpose. You punish somebody who tried to do a good thing.

13 Third option we came up with, John McKay, myself,
14 our group's chairman and some others from NMED sitting
15 around the table in the room, was that we could postpone
16 enforcement of the standards, NMED could adopt
17 responsibility for the wells on the site, letting the
18 responsible party essentially get out of there, the
19 responsible party could pay NMED for current monitoring or
20 continuing monitoring, with the hopes that we would learn
21 something, so ten years from now we will know whether the
22 return of natural oxygen will force the metals back into
23 where they belong.

24 And if so, we wind up down the road with better
25 knowledge than we had, and hopefully we can promulgate this

1 kind of activity to other selected sites with other
2 responsible parties, and somewhere in the future we'll be
3 able to make rational decisions rather than just enforcing
4 standards. That is the way in which we prefer to work, in
5 cooperation whenever possible.

6 We are investing our efforts now in something
7 called trust. Trust doesn't mean that everybody agrees,
8 but it means that everybody gets the same information. By
9 the time you have an adversary proceeding, the objective is
10 to hide information, keep your information away from the
11 other parties.

12 If we're ever really going to make progress, it
13 has to be through trust and sharing of information. I
14 think that's part of what the committee did for this, and
15 that's what we would like to engender in the future, rather
16 than setting up more regulation, more paperwork, more
17 excuses under which people should hide things.

18 The question comes up, what is the need for the
19 current regulations? The previous mechanism of
20 environmental protection under OCD, as was visible to me,
21 was mostly involved in the -- I can't say the word for them
22 now -- guidelines, an informal system of specifying what
23 somebody should do. That had a lot of flexibility, and
24 that's good. It avoided a lot of bureaucracy, which is
25 good.

1 It did not provide for uniformity, which is bad.
2 Anytime you try to make a firm rule, of course, you have
3 one size fits all, and that almost never works; you just
4 have to live with it. If you have a totally flexible
5 system, you can have a situation in which some companies do
6 their best to clean up or to avoid spills, while other
7 companies are spilling at will, and that provides a real
8 economic bonus to those who don't do the right thing, and
9 that certainly was going on.

10 So I think the uniformity that these regulations
11 can provide is a good reason, a valid reason for adoption
12 of the regulations.

13 I have in the written material a discussion of
14 the vadose zone. I do not mean to lecture the Commission
15 on vadose zone hydrology. Members of the Commission may be
16 much more experienced in vadose zone hydrology than I.
17 However, I feel the Commission needs to base its decisions
18 based on the record, and so I inserted a discussion of the
19 vadose zone in the record.

20 Suffice it to say that there is water throughout
21 the vadose zone, even though it looks dry to us. The
22 driest tuff, volcanic tuff lying around near Los Alamos,
23 will be about 5-percent water by volume. And I mean the
24 liquid stuff; I don't mean chemical, water that's bound
25 chemically to something.

1 Soil in general runs 25- to 50-percent pore
2 space. In the pores and between the particles of soil,
3 water will gather by capillary forces, just like it will
4 pull up in a soda straw when you dip a soda straw in a
5 glass of water, only the spaces are very small so the
6 suction that pulls water can be very great in the ground.
7 Water therefore will move in all directions, up, down and
8 sideways.

9 If you do a little arithmetic on the suction that
10 we would characteristically find with our climate here,
11 where we have a dry climate, maybe as an example given by
12 our tuffs, which I'm familiar with, at a few percent water,
13 you might find from a suction equivalent, say, between 100
14 and 1000 feet of altitude lift of the water. That's the
15 degree of suction of that water in the vadose zone at that
16 point.

17 So the point I make here is that when you think
18 you are protecting water, you are not only protecting
19 either groundwater, which you can pump, or surface water
20 which you can splash in, which is kind of the letter of the
21 law, but you need to protect the water in the vadose zone,
22 because that moves in all directions, including toward
23 plant roots, down to the aquifer, and sideways. The drier
24 it is, the slower it moves. But it's there, and it does
25 move.

1 Before getting into the suggested changes I have
2 in the rules, I would like to discuss a few things I heard
3 this morning, testimony, issues that I think are before the
4 Commission. I sat this noon, then, and made up my
5 testimony, really.

6 The first issue that's out there that may be
7 confusing is this question of point of use. I looked back
8 in the regulations, and the regulations as proposed do
9 contain an extensive section on technical and feasibility
10 for cleanout.

11 That technical and feasibility also includes
12 provision for economic capability of the responsible party.
13 That's in there very deliberately. Our group is always
14 desirous of promoting economics as an issue in
15 environmental protection. You have to look at economics.

16 Our only caveat with that is, if we go into a
17 hearing or a court case with a responsible party, if
18 economics are the issue, we request, certainly, that the
19 responsible party's books be open and on the table. Let's
20 have the information. But economics are definitely an
21 issue.

22 And the current -- The rules as proposed
23 certainly allow for economics to be the issue. So I see
24 that point-of-use treatment is what you do when you have
25 technical infeasibility and it's covered in the rules. And

1 technical infeasibility can include the fact that it is
2 just too expensive to do some other treatment, but it is
3 not the first option that you consider.

4 A second issue that may be of confusion out there
5 is this question of the remediation plan versus the full-
6 scale abatement plan. We've heard discussion on that this
7 morning. I'm going to apply my interpretation.

8 The big question is, how do you achieve cleanup
9 with the minimal paperwork? Paperwork doesn't take one
10 molecule of contaminant out of the environment. So you
11 want to minimize paperwork. How do you get cleanup without
12 the paperwork, because you think you need paperwork to
13 enforce cleanup, because you don't yet fully trust
14 everybody? I look forward to the day when we do and when
15 we can.

16 In my view, a distinction was not arrived at here
17 by the committee; it was too difficult an issue in this
18 time to fully grasp. I support the regulations as
19 proposed, with some minor modifications. I would not want
20 this lack of distinction to endanger the regulations.
21 Let's try them out and see how things work.

22 But there's a missing distinction, and that
23 distinction is, what do you mean by abatement plan, what do
24 you mean by the remediation plan? Everybody talks about
25 big spill versus small spill, or one year versus some other

1 period of time. The distinction is unclear in the
2 regulations. That is, the Division can make a responsible
3 party do a full-scale abatement plan in less than a year.
4 It says in the proposed regulations that the responsible
5 party must have the permission of the Division to go the
6 route with the simpler plan.

7 On the other hand, a remediation plan might
8 extend far beyond the year, so as far as the regulations
9 are concerned. So there is no clear distinction. This is
10 the old wrestle with the question of, do we go under the
11 guidelines or do we have regulations? Regulations are firm
12 and difficult and inflexible. Guidelines are really
13 flexible, but they allow for a lot of things to happen that
14 people would rather not have happen.

15 That issue at some point could be settled. I
16 don't see how it could be perfectly settled without going
17 back and doing a rewrite of the regulations. I looked at
18 it and I thought, We have to go back and really do a
19 rewording here and make that intent clear.

20 And the intent right now is not clear. And both,
21 I think, people in the Division and people in the industry
22 would rather live with a little uncertainty and a little
23 flexibility and see how things go. I think this is an
24 issue that the Committee simply could not come to grips
25 with.

1 What is the distinction, really? The real
2 distinction is, you need an abatement plan when you have to
3 go out and discover the nature and the extent of
4 contamination. When you don't know what it is or where it
5 went, you have to go out and drill or do whatever else you
6 must do to find what it is and where it went. If you know
7 where it is and it went, in principle you shouldn't need an
8 abatement plan; all you need to do is go do it. You need
9 maybe a cleanup plan.

10 And that really is the distinction.
11 Functionally, it isn't a year or less than a year; it's
12 whether you know what's there or whether you don't know
13 what's there.

14 Writing that kind of language in the regulation,
15 I think, would be a real challenge. I couldn't do it in
16 two or three weeks, and I don't want to upset things by
17 trying it. But I wanted to try to explain to the
18 Commission what I see as the confusion that's going on and
19 where it comes from.

20 The implied purpose of the one-year exemption is
21 to allow flexibility. But it's not clear to me in this --
22 to a responsible party, which route is open to him. And
23 just whose judgment it is that rules on which route you go
24 is unclear. It seems to me it's the Division's route, that
25 the responsible party doesn't have a guaranteed year.

1 I take pride in the fact that it was my testimony
2 and the testimony of the Oil and Gas association,
3 independently, without collaboration, that got the 180 days
4 into the NMED regulations. It was originally written as 90
5 days. And both of us came in independently and said the
6 responsible party needs more time just to get in and clean
7 up, instead of writing paper.

8 I think a year is proper for this industry. This
9 is a more mature industry. These are people who are
10 accustomed to dealing with petroleum in the ground, unlike,
11 let's say, an owner of a dry-cleaning establishment who
12 could get perchloroethylene in the ground, and those other
13 regulations have to cover him. We have a different
14 industry here, and they can do a lot toward taking care of
15 their own problems.

16 So I think a year is quite adequate. It could be
17 defined as 13 months or some other time, but I think
18 there's work ahead of us to define what the real condition
19 is. The actual distinction is the nature and the extent of
20 contamination.

21 With that, I will go ahead into my actual
22 suggested changes and the wording in the rules. This will
23 be in front of you as Exhibit Number 2.

24 I have tried to take the exact wording in the
25 proposed Rule 116 and proposed Rule 19 and adjust it where

1 I could, but whether or not I liked it in many cases, I've
2 tried to preserve that to minimize confusion.

3 So what I attempt to show you here is the
4 original wording, which may be rearranged, but the original
5 words as best I can preserve them are shown in ordinary
6 text. Changes that I have suggested, including a change in
7 position, would be shown in the bold text.

8 The question of 19.N reporting requirements
9 versus Rule 116 reporting requirements was discussed by
10 several parties this morning. I regard 19.N as a very
11 confusing duplication to a responsible party. If you
12 didn't fully understand all of this, you came in reading
13 it, you wouldn't know if you're under Rule 116 or Rule
14 19.N.

15 I did my best, then, to offend nobody by
16 combining the two, totally, taking everything I could see
17 in 19.N and everything in 116 and putting them together, to
18 give you some suggested wording. Other parties suggested
19 that this morning. I don't think any of them gave you
20 suggested wording, but I did not see their papers.

21 I'll go down the changes. In addition, I made a
22 few changes, and I will go through those and why they are
23 important.

24 Under Rule 116.B, Roman numeral (ii), the wording
25 previously said, "will reach a water course". What we're

1 often trying to protect is groundwater. It seemed to have
2 an oversight that we didn't say groundwater, surface water
3 or water course. So I inserted those words in there.

4 And what you're seeing is the entire text. I'm
5 not showing red-line and blue-line situations; I'm showing
6 you an entire text that can be picked up and understood as
7 a body.

8 The section under (iii) is, "with reasonable
9 probability, may endanger public health, be detrimental to
10 water, cause an exceedence of the standards. That's 19.N
11 coming in. The other words, not in bold text, were in the
12 previous 116.B as proposed.

13 I then put the reporting requirements with each
14 section. A major release is defined, and then how you
15 report a major release is defined. A minor release is
16 defined and how you report a minor release is defined. It
17 being granted there is some duplication of language there,
18 but it's very clear to a reading party what he must do.
19 The reporting requirements simply combine 116 and the 19.N.

20 Under a minor release, it was previously defined
21 as the volume between 5 and 25 barrels. Now, as Chris
22 Shuey mentioned this morning, that doesn't take care of the
23 periodic repeated release of less than five barrels, which
24 certainly results in an environmental problem in some
25 cases.

1 Therefore, I have added the suggested wording, "a
2 volume that is more than 25 barrels of unreported
3 cumulative releases occurring within a common area of one
4 acre". There's nothing magic about one acre except that's
5 sort of the size of a drill pad. It fits the size of the
6 things that are out there.

7 I find that the simplest way to take care of
8 cumulative releases. We know that an operator in the field
9 can't count each barrel that's happened. But if an
10 operator, a responsible operator, has personnel working for
11 him, if you have this rule, the personnel can't say, We're
12 allowed to toss off two barrels, and they do it. This way,
13 the operator who wants to do well can tell his personnel,
14 No, we're not allowed to toss off anything, because we have
15 to report it if we get a saturated site here, if we get too
16 much on a site. So therefore, workers, you can't spill.

17 I'll proceed on to Rule 15.A.7, where I have
18 provided a slightly modified definition of the remediation
19 plan. Most of the wording is the direct copy, it shall
20 be -- for want of a better definition this time, it shall
21 address unauthorized releases that will be remedied within
22 one year.

23 The question is, who makes the estimate of one
24 year? And I think under the current regulation as written,
25 we have no way to state that. It's going to be an

1 uncertain aspect of the regulations.

2 I would prefer it to say, the responsible party
3 can have a blanket exemption for one year on his own word,
4 but then he's absolutely responsible to meet standards in
5 that year. With a lot of freedom goes a lot of
6 responsibility, and he chooses to take the risk if he wants
7 to. Under the current wording, without upsetting things,
8 we can't do that. So I leave in the wording of one year.

9 I did add in the next to the last line of the
10 bold type a description of monitoring that may be required
11 for compliance, because our one-year exemptions, as written
12 throughout the proposed regulation, neglected that you may
13 need monitoring to show that you've met the standards. We
14 had a potential conflict in the rules here. We said, You
15 do it in a year, and you're excused. And on the other hand
16 we said, You might have to monitor for eight quarters to
17 prove that you have cleaned up. So we had an inherent
18 disconnect in the regulations there.

19 You may wonder, why is monitoring for eight
20 quarters necessary once you have cleaned up? The flow of
21 air in the ground, which is often respon- -- the thing most
22 responsible for cleanup, particularly by bacterial action,
23 follows very small and particular channels throughout the
24 ground.

25 Flow of water does likewise, so that you can get

1 water that meets standards, and then you wait a while, and
2 the contaminant which is located in other areas will
3 gradually diffuse out and into those channels, and then you
4 will detect it again. The only way to believe that you
5 have cleaned up most of the contaminant is to wait a while
6 and see if it diffuses back out, either in the water or
7 air, whichever medium you're testing.

8 I have graphs showing now perhaps seven years of
9 subsurface pore gas monitoring, and the numbers bounce up
10 and down by 100 and 200 percent. You can see a gradual
11 decay over that period of time, but the number is bouncing
12 up and down, and we don't know if it's bad measuring
13 technique, if that is what's really going on in the pore
14 gas. There's a lot of uncertainty in this. And so some
15 period of time is necessary to show that you have met the
16 standards. Eight quarters are as good a number as any; you
17 have to pick a number. That's why the eight quarters is in
18 there.

19 I'll go on ahead to changes in Rule 19. Section
20 19.D.1(g) is dealing with this one-year exemption, and I
21 inserted the words "'except paragraph [sic] B.4' within one
22 year." That simply says you still have to prove that you
23 have cleaned up. The B.4 is the monitoring requirement.
24 This is eliminating that potential conflict in the
25 regulation.

1 In 19.G.2 I have provided a definition of
2 "administratively complete", simply because that term
3 appeared several times in the regulations, and it doesn't
4 help anybody to get into an argument over what it means.
5 You might as well state what it means. So I've defined it
6 as a document that satisfies the requirements that are
7 stated elsewhere within the regulations for each of a Stage
8 1 and a Stage 2 plan.

9 I then deal with how you handle the Stage 1 and
10 Stage 2 plans.

11 In the original wording, to me and to others I
12 talked to, in Section 19.G.2 it was not clear whether that
13 wording applied to both a Stage 1 and a Stage 2, or whether
14 it meant both together. We heard testimony this morning
15 saying, Gee, we really don't want a hearing triggered on a
16 Stage 1 plan, but this says a hearing would be triggered.

17 I interpreted this as saying a hearing wasn't
18 triggered on a Stage 1 plan or could not be, because the
19 wording says, after the Division determines that a Stage 1
20 and Stage 2 plans are complete, that to me meant both plans
21 are complete. So I rewrote the words, when a Stage 1 plan
22 is complete you can have comment, when a Stage 2 plan is
23 complete you can have comment or a hearing.

24 The time scales were confusing, because the
25 previous wording triggered the time for comment based on

1 when a plan became administratively complete. I tried to
2 make this uniform and base it on the time when the
3 publication occurs for comment, because that's the only
4 time the citizen has available to him.

5 So the time scale I set up is, within 15 days of
6 a plan being administratively complete, publication occurs,
7 by whomever it may. It's written here with the current
8 words, responsible party does publication.

9 The citizen or other persons then have 30 days
10 within which to respond, and the Director has a total of 60
11 days in this clock period within which he must reach a
12 decision. This compresses things, but at least the time
13 scale is established. It previously just was not
14 established.

15 In 19.G.2.(c), I have defined a little better
16 what the public notice should include. If the public
17 notice includes some estimates of the release or your best
18 description, then the public has something on which to
19 operate, whether or not they wish -- a basis upon which to
20 decide whether or not they wish to respond.

21 In paragraph 19.G.2.(e), I added wording looking
22 forward to the time when we can do this electronically. I
23 didn't want the regulations to be absolutely tied to paper,
24 so I added a permissive statement stating that if it's
25 available electronically, you can publish it if it's

1 available electronically.

2 In subparagraph (f) I outlined this time scale,
3 that is, that comments and questions will be accepted for
4 consideration if received by the Director within 30 days
5 after the publication of public notice. The key trigger,
6 as I explained before, is the date of publication.

7 What will be accepted as written comments on the
8 abatement plan and for a Stage 2 abatement plan -- we're
9 now making it explicit -- for a Stage 2 plan, one can make
10 a written request for a public hearing.

11 In 19.G.3 I make the language explicit: Any
12 person seeking to comment "on a Stage 1 abatement plan, or
13 to comment or request a...hearing on Stage 2" must file his
14 requests within 30 days of receipt of the public notice.

15 I added also, "within 30 days of receipt by the
16 Director of a proposed significant modification". It is
17 quite ordinary, I think, to make a large modification to an
18 abatement plan as you discover things. I think an
19 interested party should be able to comment in that.

20 I do not require that you do further publication;
21 the interested party has to keep up with progress on his
22 own initiative. But he should be allowed to comment if you
23 radically change the plan.

24 In the request for a public hearing I added some
25 wording, address in the requests for a public hearing, I

1 added some wording. Previously it stated, "A public
2 hearing shall be held if the Director determines that there
3 is significant public interest".

4 "Significant public interest" can often be
5 determined as a political term. How many people are
6 screaming? And if a lot of people are upset, that is a
7 valid reason for holding a hearing, even though it might
8 not be able to change anything.

9 But I find there is an even more valid reason,
10 and that is, if the request has technical merit, if the
11 person requesting the hearing has something to contribute
12 that for some reason he is unable to get through the system
13 in any other way, and the Director says, Yes, this is
14 technical argument, it could influence the discussion, it
15 could influence the decisions made. That's a valid reason,
16 I find, for holding a hearing.

17 The final things I have here:

18 19.L, there's a typographical error.

19 I suggest deletion of all of 19.N as redundant if
20 we put the language, the appropriate language, into Rule
21 116. 19.N. is the notification section.

22 And finally, in 19.H. I add the words, "The
23 Director shall, within 60 days of receiving an
24 'administratively complete Stage 1 abatement plan'...notify
25 the responsible person." This simply is keeping in time

1 with the clock that we set, and it's putting the burden on
2 the Director to respond in a timely fashion to the
3 responsible party. I know what it is to sit there forever,
4 not getting word back from the regulator, and it's a very
5 painful and expensive process.

6 There's one other element in this I did not bring
7 up in my verbal testimony as it went by. I'll back up and
8 go through it, with your kind permission, if I can find it.

9 Clear back on the first page, in 116.B, in the
10 reporting requirements, there was a very key word. The
11 prior wording was that "Notification of an unauthorized
12 release shall be made by the person operating or
13 controlling either the release or the location of the
14 release." That's the original wording.

15 Let me propose a scenario in which someone who's
16 hauling a truckload of condensate, and they turn over on a
17 county road. The county is controlling the location of
18 the release.

19 What we really mean, if we are straightforward
20 is, the person who controls the facility is the responsible
21 party, and "truck" is included in the definition of
22 "facility". That's the person, not the county, not the
23 landowner. It's the person who controls the equipment that
24 does the release. And it's a very significant change in
25 wording, and I can find no reason, no technical reason that

1 that kind of wording should be excluded.

2 With that, I would like to conclude my testimony.
3 Thank you for your forbearance. And I'll answer questions
4 such as anyone may have.

5 CHAIRMAN LEMAY: Are there any questions of Dr.
6 Neeper, or Chris Shuey for that matter? I think -- Weren't
7 you both going to take questions from the audience?

8 Mr. Rose?

9 MR. ROSE: In fact, they can answer them
10 together, jointly, however they wish to respond.

11 DR. NEEPER: We don't speak with the same voice.
12 It may look like we do. We argue.

13 MR. ROSE: I'll leave that up to your sound
14 discretion as to how you want to handle it.

15 MR. SHUEY: Yeah.

16 MR. ROSE: And actually, the questions are more
17 to Dr. Neeper than for Chris, but --

18 MR. SHUEY: That's fine.

19 MR. ROSE: -- but you can probably get in a few
20 things more. And it's more by way of clarification than
21 anything else.

22 EXAMINATION

23 BY MR. ROSE:

24 Q. I was looking particularly at the proposed change
25 to 116.B, which is on page 1 of Exhibit 2, particularly

1 B.1.(b)(ii), and you -- as I indicated -- as I understood
2 your testimony, you added the words "groundwater" or
3 "surface water". Those weren't contained in 19.N; is that
4 correct?

5 A. Those were -- No, those were not contained in
6 116.B or 19.N, I don't think.

7 Q. No, I looked, I couldn't find them.

8 A. Okay.

9 Q. I agree with you, I didn't think that they were
10 there.

11 And I guess what my question had to do with was
12 the relationship as you saw it between (ii) and (iii), and
13 I was wondering if there are situations that you could
14 envision where if (ii) wasn't triggered -- somehow that the
15 (iii) wouldn't be triggered by (ii), that is, you had
16 contamination reaching groundwater, that would require a
17 report -- I'm just trying to figure out what the necessity
18 of the bolded language in (iii) would be, given your
19 addition in (ii).

20 A. Right, the language -- the added language that I
21 have in bold in (iii) comes from 19.N. And you can say,
22 Why is that in there? I don't know why other people have it
23 in there; I can tell you why I have it in there.

24 Q. That's --

25 A. There's water in the vadose zone that is neither

1 groundwater nor surface water, but if you don't protect it,
2 you can windup with a problem in your surface water or
3 groundwater or your plants or somewhere else.

4 Q. In terms of your intention in terms of (iii),
5 what do you mean by "detrimental to water"?

6 A. You don't have standards that apply to that
7 water. And so this is another one of those fuzzy areas
8 where I think you can probably argue forever over what it
9 means.

10 What it does is really give you authority to
11 require cleanup in the vadose zone, rather than get into an
12 argument of, it hasn't hit groundwater yet and you can't
13 make me clean it up. Just let's avoid the argument; let's
14 get it cleaned up before it gets to the groundwater and
15 gets expensive.

16 Q. And would not that be taken care of -- And
17 following up on that, wouldn't that be taken care of by the
18 language in 116.D? Isn't that where the obligation to
19 clean up really rests?

20 A. Let's look at 116.D, which --

21 Q. It's more just --

22 A. -- is now --

23 Q. -- making sure that those --

24 A. -- in my proposed wording, 116.D is no longer
25 there; isn't that right?

1 Q. Well, I think you changed it --

2 A. Okay.

3 Q. I think you just changed the --

4 A. We re-numbered it to C. So 116.D is the
5 corrective action. It says, a responsible person must
6 complete Division-approved corrective for releases which
7 endanger public health or the environment.

8 Yeah, you might be able to take care of it under
9 there. I think you want to cover all the bases that you
10 can. There's always this question of water. I don't think
11 it will happen to anybody, perhaps, in this room, but there
12 are people who might like to argue that the entire basis of
13 all our deliberations is based entirely on water, and until
14 you've impacted either groundwater or surface water, you
15 have absolutely no basis for cleaning up -- for requiring
16 cleanup.

17 The more different ways you can state it,
18 probably, the better, as long as you don't add paperwork.
19 Neither of these requires somebody to write something they
20 didn't have to write anyway.

21 Q. Yeah, well, they may have to report, but they --

22 What about the second part of the "or cause
23 exceedence of standards"?

24 Wouldn't you expect that if it -- that you would
25 have to first reach groundwater or surface water to exceed

1 those standards, so that isn't that really taken care of by
2 (ii)?

3 A. Let's look at (ii). You're correct that you have
4 to reach groundwater or surface water to exceed standards,
5 because that's where you can measure, because you don't
6 have standards for the vadose zone, and that's a separate
7 argument, numerical standards for the vadose zone.

8 Q. Although there's a general standard, is there
9 not? Isn't 19.B.(1) that's referenced a general
10 standard --

11 A. What you have is the narrative standard, the
12 vadose zone shall not be in such a state as to allow
13 contamination of the groundwater, surface water.

14 Q. Okay, what about -- Let's look at B.3 in terms
15 of your minor releases. Is the language you added in
16 B.(3)(b) --

17 A. Right.

18 Q. -- cumulative?

19 A. The cumulative.

20 Q. Did you contemplate when you drafted this
21 language any time frame involved in terms of perhaps when
22 this cumulative amount would have occurred? Because as
23 it's now drafted there isn't any, and it looks like it
24 could happen over 24 hours, 48, 365 days, 10 years. And I
25 was curious if that's really what you contemplated, or if

1 you meant in addition to volume some kind of time
2 constraint in terms of this.

3 A. There is a time frame, but not a time constraint.
4 I think if it happens in 24 hours and you've exceeded 25
5 barrels, probably almost everyone would agree you've
6 triggered another reporting requirement somewhere else.
7 That's a major release.

8 So what we're looking for is a thing that you
9 can't regard as one event.

10 And now you're down to saying, What's an event?
11 Well, I can't define the outer limit of "event", but I can
12 certainly see that if I go out and lose about two barrels
13 every six months, there's no one event that's contaminating
14 the ground, we get a gradual buildup of contaminants in the
15 ground. And so I have a hard time seeing the outer limit.

16 You're saying -- Let me interpret some of your
17 words. You might be saying, Gee, we're going to hold a
18 responsible party responsible 100 years down the road for
19 stuff that went in the ground a teaspoonful at a time.
20 Like I say, don't think there's a danger of that, because
21 if that's the way it's working and if bioremediation is
22 working, you can't detect it. If you can't find it, nobody
23 is going to go out and hole his -- hold him responsible for
24 not reporting it. It's the ones that you can find, but
25 you've got no way in which to require somebody to clean

1 them up that are important.

2 Q. I guess I was more concerned about, as you
3 indicated, how this would be applied by an operator on
4 site, and in terms of quantification over time, if some of
5 these minor releases -- I'm curious as to what your
6 expectation is as to how the operator would quantify some
7 of these releases to determine when they exceeded these
8 thresholds, within what time period, and then their
9 obligation to report --

10 A. The operator will have a hard time quantifying
11 those, but he has a hard time quantifying the rest of
12 these. If somebody comes out there with a rifle and shoots
13 three holes in a condensate tank, the operator may or may
14 not know how much was in there. He's got to make his best
15 guess as to what happened. That can happen in any of these
16 cases. What we have here is something --

17 Let me say -- Let me draw a far analogy. It's
18 kind of analogous to a health and safety plan that you have
19 in many industrial situations, including environmental
20 restoration.. Why do you have a silly document? That
21 doesn't make anybody safe. You have that document so you
22 can go to your workers and say, You have to read this, and
23 you have to obey it whether you like it or not, whether it
24 interferes with what you think your job is today or not.
25 This is the way we do business. It's a pretty clear

1 statement, and it actually works in some cases in providing
2 a much safer environment.

3 That's what we're doing here. The truck operator
4 may not care whether he spills a bunch on the ground
5 connecting the hoses or whatever. So this gets the onus
6 off his boss for being a mean old man. The boss can come
7 down and say, We don't do business that way, because the
8 law doesn't let us do business that way. It enables the
9 boss to do the right thing without offending the employee,
10 and that's really important.

11 Q. Let's look at sub (4), and I guess the question
12 here is whether you really intended that minor releases be
13 subject to verbal notification.

14 My understanding of both -- that 116 drafted and
15 the OCD's proposed change to that rule didn't require
16 verbal reporting for minor releases.

17 A. I think -- Let me look at this right here but I
18 think I'm going to eat a large dish of crow, based on word
19 processing that occurred last midnight.

20 Q. All we're trying to do is make sure that's really
21 what you meant.

22 A. No, I'm trying to make the minor release go clear
23 back to where we were long ago into a category --

24 Q. -- three releases.

25 A. -- three releases --

1 Q. That's --

2 A. -- which is a written release in 15 days, am I
3 right?

4 Q. Written within C.2, which is 15 days, correct.

5 A. With the indulgence of the Committee, I should
6 like to strike my own words, the "by verbal notification
7 within 24 hours of discovery", up to "and", should be
8 reported by written notification on Division C-141.

9 Q. That's what I thought you intended.

10 A. That's what I intended, and I'm indebted.

11 Q. Let's turn --

12 A. And there's a second part. The verbal
13 notification definition got in there.

14 "The verbal notification shall contain the
15 information...presented on Form C-141, to the best of
16 the...person's knowledge."

17 Q. And then you've got --

18 A. And then verbal and written.

19 Q. Right.

20 A. It should say "The written notification shall be
21 made..." I apologize for that.

22 Q. No problem. Let's turn to remediation plan, and
23 I had some questions about that too. And as I understood,
24 and as I think I understood your testimony, you indicated
25 you saw the distinction between the two -- between a

1 remediation plan and an abatement plan is sort of -- in
2 some sense is a fuzzy concept, but in reality, an attempt
3 to deal with what some people have qualified as simple
4 spills or small spills to deal with, let's get on with the
5 business of getting those resolved.

6 A. It's an attempt to get off the back of industry.

7 Q. Okay. And as I understood the committee's
8 proposal that the remediation plan was available for both
9 groundwater remediation and soil cleanouts, where -- in
10 fact, in situations where soil was the only thing that was
11 being cleaned out, it looked to me like in your draft
12 proposal, say for example if you had a soil cleanup that
13 would take more than your "but which", wasn't expected to
14 impact water, that you couldn't use a remediation plan, and
15 an abatement plan would not be available.

16 I was kind of curious as to whether that, in
17 essence, was really what you intended, or whether you saw
18 the remediation plan, the one-year distinction, only really
19 applying to groundwater and surface water cleanups?

20 A. I didn't distinguish between whether it was
21 ground and surface water here. We're into an area, as I
22 explained, that I felt the Committee really was unable to
23 get its hands around. And so at this point we pick a
24 target and shoot at it and see if we can live with it. And
25 so I chose what I thought was the simplest of the languages

1 that were around. I did not have expectations of whether
2 it was going to reach groundwater or not.

3 And what I'd really prefer to do is say, if you
4 want to elect this option, what you do is your business.
5 Just get it cleaned up. If you get it cleaned up -- We
6 don't care how, or even how bad it was. If you get it
7 cleaned up, we'll get off your back.

8 That's the philosophy we'd like to follow. How
9 to put it into regulation is going to take a good bit more
10 thought.

11 The key thing that I have in there is the
12 monitoring. Monitoring may be required for compliance with
13 paragraph B.4. That was not in there before, and we have
14 potential conflict

15 Q. Well, in fact, let me walk you through the
16 current definition, and I think arguably it was -- have
17 been as clear as it ought to have been.

18 If you look at the committee's draft of the
19 "remediation plan" definition, which is on page 2 -- It's
20 an unnumbered paragraph; it's the third paragraph down.
21 Particularly -- I guess this is the third sentence: "The
22 plan may include appropriate information, including
23 assessment data", et cetera, couldn't the OCD construe the
24 term "appropriate information" to include monitoring or
25 whatever other kinds of investigation -- information which

1 would be necessary?

2 A. No, because this wording addresses the plan and
3 the information that's contained in the plan. But that's
4 not necessarily monitoring, And yet the clear wording
5 elsewhere in terms of standards is, to meet standards you
6 have to do the monitoring. So we have -- If this is
7 permissive and it doesn't call for monitoring, yet
8 somewhere else you're calling for monitoring, you've got to
9 disconnect --

10 Q. So it was just to make sure that somehow,
11 whatever means were appropriate to ensure that you got to
12 the goal, you ensured that you got to the goal?

13 A. You ensured that you really got to the goal. You
14 had to include monitoring by reference.

15 Q. The other question I had about the definition is,
16 in the committee's proposal there's a last sentence, it
17 says, The plan may include an alternative proposing no
18 action beyond the submittal of a spill report. I notice
19 that was deleted from your proposal. I was curious as to
20 whether or not that was an intentional deletion.

21 A. It's an intentional deletion. I don't think you
22 need to say it. I don't have any harm in saying it.

23 It seems to me since you start getting
24 prescriptive in regulation, suggesting really you ought to
25 do this, you just raise the possibility of future

1 arguments. We're all hoping that the plan can in a lot of
2 cases can be nothing more than the C-141 form.

3 Q. Okay, that's -- I wasn't sure, based on its
4 deletion from here, what exactly you meant by deleting
5 that.

6 A. You see, in definition it's a written document to
7 address these situations. And many situations, the C-141
8 form will address that.

9 Q. Okay, let's -- And then just another
10 clarification on your proposal in terms of Stage 1, and I'm
11 not sure that realistically, the way I read it, that it
12 accords with what you testified to, and I want to make sure
13 I understand the proposal.

14 As I understood your testimony, you walked
15 through the time frame and were concerned, and that's why
16 you proposed the change to 19.H.1, to make sure that all of
17 these time frames in terms of public notice, comment --

18 A. Yeah --

19 Q. -- and decision work.

20 A. -- in some cases we were triggering things that
21 couldn't possibly happen in time frames that couldn't
22 occur.

23 Q. And what I was looking at was your added language
24 in 19.H.1. My assumption was, you've added this in order
25 to ensure that the decision wouldn't be made until after

1 the Stage 1 was deemed administratively complete. And what
2 you've added here -- as I understand, you've added -- The
3 current proposal talks about receiving a Stage 1 --

4 A. Yes, the current -- receiving --

5 Q. -- and administratively complete Stage 1 --

6 A. So that you could have an ongoing discussion or
7 conflict over whether it's administratively complete, and
8 yet within 60 days he has to make his decision.

9 Q. And of course, under your proposal, there would
10 be public notice and the opportunity for input, so you want
11 to make sure that that 60 days accords with that too?

12 A. Yes.

13 Q. I understand that.

14 A. Yeah, it's a tight schedule. But if you go
15 through all the other language, the schedule sometimes
16 can't take place.

17 Q. And what I was concerned about wasn't so much
18 what I understood your proposal to mean as whether this
19 proposal actually does it. It was more in the context of
20 the word "receiving", and I'm not sure I'm quite sure I
21 understand when an administratively complete plan is
22 received.

23 Is that the date of initial receipt of the plan,
24 in which case these deadlines don't make a lot of sense?
25 Is that the date it's deemed complete?

1 A. That's the committee's language, which I've tried
2 minimally to change. I'll refer you to the committee on
3 that.

4 Q. Okay. Well, and I think perhaps it wasn't
5 contemplated in the committee either. But my sense is that
6 what you're really talking about is 60 days from the
7 completeness determination, not from the receipt of the
8 plan?

9 A. Well --

10 Q. Chris --

11 A. -- I'll tell you where my heart is. I think the
12 clock should start when the Director receives a plan that's
13 administratively complete, let's get going, let's not lose
14 time.

15 So I don't think there will be a big argument
16 over whether all the items that need to be there are there.
17 It's a checklist. You go down, are all these items here?
18 They're all here, the clock starts.

19 It's awfully easy to have something sit on
20 somebody's desk for a long time, and we don't want to do
21 that.

22 Q. So it's your contention, then, that what we're
23 dealing with should be a discrete date, at some point some-
24 -- everybody should know when a complete plan was --

25 A. When the clock started. That isn't really

1 spelled out.

2 Q. Okay.

3 A. And that's -- You can go to endless work trying
4 to do that. I did that.

5 Q. But that's the concept?

6 A. But it really comes down to when all the pieces
7 are there.

8 Q. And there's got to be -- so that everybody,
9 hopefully, can agree that there's a date on which all of
10 these processes start, or at least the clock starts and
11 we're all in agreement that --

12 A. Yeah, we haven't said in here that the Director
13 shall notify, I don't think, that the plan is complete.

14 But if all the parts are there, then I think the
15 burden is on the Director. He's going to say it wasn't
16 complete on the date it was laid on his desk. It's either
17 complete or he has to say it isn't.

18 MR. ROSE: I have no further questions, Mr.
19 Chairman.

20 CHAIRMAN LEMAY: Thank you, Mr. Rose.

21 Questions of the witness? Or witnesses?

22 Roger, you first, I guess.

23 EXAMINATION

24 BY MR. ANDERSON:

25 Q. Dr. Neeper, I just have one question on your

1 116.B.2. Now, you were -- In that you were attempting to
2 bring over the items that were contained in 19.N, over to
3 116?

4 A. Yes, that was the attempt.

5 Q. 19.N was a specific section dealing with
6 notification of the discovery of groundwater contamination,
7 regardless of the source of that contamination, whether it
8 was a planned or an unplanned release. And now that was
9 brought over directly from WQCC.

10 A. Uh-huh.

11 Q. In your proposed changes, do you see where it
12 allows for the notification of discovery of groundwater
13 contamination for planned releases or for authorized
14 releases?

15 A. I believed at the time that I worked this out
16 that those were covered. Let's see if I can find where I
17 think they are covered.

18 I'll have to agree, it doesn't look like it's
19 there. If you have an authorized release and you get
20 contamination, does this require reporting, is the
21 question? Does the wording that I have there require
22 reporting?

23 Q. That's correct, yes.

24 A. I think it has escaped me. I'll have to do
25 another rework. I think it could be included.

1 MR. ANDERSON: Thank you. I think Bill has a
2 couple of questions on technical terms.

3 CHAIRMAN LEMAY: Mr. Olson?

4 EXAMINATION

5 BY MR. OLSON:

6 Q. Mr. Neeper, I guess -- I just heard you being
7 questioned on that term "be detrimental to water". I guess
8 you took that right out of the -- I'm assuming you took
9 that right out of the definition of 19.N; you were just
10 trying to incorporate the language?

11 A. I was trying to -- I had promised you people that
12 at one time I would get 19.N and 116 together in a rule
13 that would fit on one page, that anybody could understand.
14 That was my goal, so --

15 Q. So you're just taking the language --

16 A. I was just taking the language.

17 Q. -- that's already in 19.N and approved by the
18 committee and incorporated it in --

19 A. That was my intent.

20 Q. Okay. And I guess on that term, I guess that --
21 I seem to get some idea that folks are worried about what
22 "detrimental to water" is and the reason for that term.

23 I guess -- Is it possible that there's other
24 things, such as glycols, methanols, other types of oilfield
25 chemicals, which could contaminate water, but for which

1 there is no standard currently in the WQCC standards?

2 That's probably a likely reason as to why that would be --
3 term would be in there, would be detrimental to water?

4 A. I can't give the reasons that other people use,
5 but certainly if you get glycol into the vadose zone,
6 you've got something that's detrimental to the water there.

7 Q. And that's true, there is no standard for glycol
8 in water?

9 A. There is no standard for ethylene glycol; there
10 is for propylene, I think. I should pass on that one.

11 Q. And then just one last question. I just want to
12 make sure I understand -- There was a lot of testimony this
13 morning --

14 A. There's drinking water standards for propylene.
15 That's it.

16 Q. There was a lot of testimony this morning, folks
17 were concerned about having a hearing on the Stage 1
18 abatement plan proposal, and as the language I think I saw
19 in here, are you actually looking at having a hearing on
20 Stage 1 abatement plan?

21 A. Under the language as I believe I have written
22 it, there is no way you can force the Director to have a
23 hearing on a Stage 1 plan; you can only make comment.

24 Q. So you make comments, and any potential for a
25 hearing would only be at the Stage 2 process?

1 So subsurface water is in the definition of
2 water. So that -- Unless you bend the language, that
3 includes the water in the vadose zone, and
4 characteristically, it may be 20-, as much 30-percent
5 water. In the dry rock it's 5-percent water.

6 The answer to your question, then, is, if we have
7 a spill of a contaminant into the vadose zone, do we
8 interpret the rule as saying that can threaten water?

9 That is correct, it can threaten water. We are
10 stuck with that. There is no way to get absolutely, I
11 think, a regulation of one size that fits all.

12 Potentially, you go out and spill in the vadose
13 zone, somebody can come up and say, You are threatening
14 water. As a practical matter, nobody in the OCD is going
15 to listen to you or go out for enforcement unless you are
16 doing something more significant.

17 If you try to take the other tack and say, Okay,
18 we'll define this, then, strictly in terms of groundwater,
19 the stuff you can pump -- groundwater is really defined --
20 if you can pump it, it's groundwater; if you can't pump it,
21 it's vadose-zone water.

22 You try to define your regulations strictly in
23 terms of that, and what you wind up with is a contaminated
24 vadose zone. And when you look forward into the future,
25 what results from a contaminated vadose zone is a very

1 uncomfortable future.

2 I deal with things that are resulted from
3 landfills. We like to put garbage in landfills, because
4 then it's out of sight. And what that is is a point source
5 of pollution to the vadose zone. And now, in our society,
6 we're discovering that that ultimately contaminates
7 groundwater in many cases.

8 So I can find no clean way to write this and be
9 perfect and say, When is it a spill and when is it
10 something that's so small that you don't pay attention to
11 it?

12 I think the committee has wrestled with that.
13 They wrestled with one barrel or five barrels or 25
14 barrels. In this case, you're safe most of the time
15 because your reporting requirements don't trigger until you
16 have a finite volume.

17 But yes, a spill in the vadose zone threatens
18 water in the vadose zone.

19 When it's so small as to be insignificant, I
20 can't see any practical reason for anyone trying to do
21 something with it. No court is going to listen to you,
22 this Commission isn't going to listen to you.

23 Think what would happen to my credibility if I
24 came in here making a big argument over a small spill
25 because of the principle that it impacted the water that's

1 in the vadose zone in some little area five square feet in
2 size. It wouldn't carry any weight here, and it won't
3 carry any weight anywhere else.

4 MR. CHAVEZ: Thank you, that's all.

5 CHAIRMAN LEMAY: Additional questions of the
6 witnesses?

7 Yes, Toni?

8 EXAMINATION

9 BY MS. RISTAU:

10 Q. Yes, Toni Ristau from PNM. I just have one point
11 of clarification again with Dr. Neeper.

12 On your 116.A(3) [sic] in your rewrite of the
13 minor release definition, in (b) where you're getting at
14 the cumulative concept that a number of small releases over
15 a relatively confined area over a period of time can get to
16 a point where they constitute a major problem, that's what
17 you're getting at here.

18 A. That's what we're getting at.

19 Q. On the "within a common area of one acre", do you
20 mean an acre that's under common control? Because I can
21 foresee a situation that we've been in, in the past, where
22 we're not the wellhead operator but we have gathering,
23 let's say, at wellhead, which is operated by somebody else.

24 There's releases that are caused by the operator
25 doing his thing, having to do with the operation of the

1 well and the extraction of the oil and gas. And there's
2 also releases, potentially, that we cause as a gathering
3 company, perhaps from dehydrators or separators or
4 something like that that's also at the wellhead.

5 We do not control that site, we're not the
6 operator of that site; we are the operators of a specific
7 piece of equipment. And what I can foresee here, then, is
8 this -- if you're drawing this one-acre boundary, then if
9 we're the ones, as the, say, the gathering system and that
10 release from that dehy is the one that takes it over the
11 top, so to speak, you're now at cumulative with 25 barrels
12 or more, how would you know that?

13 It gets to Louis Rose's issue here of, on a
14 practical basis, if you're an operator of all or a portion
15 of a site, how would you know when you've then triggered
16 the notification requirement? Could you give me an little
17 insight on something like that?

18 A. Let's look at the way in a literal sense that
19 it's written. You are responsible in all of the philosophy
20 of this regulation only for the releases that you make.
21 For instance, if you have commingled plumes, you don't have
22 to clean up, supposedly, the part of it that's due to
23 somebody else.

24 I would think that whoever's reading the
25 regulation would interpret this the same way. You could be

1 responsible only for those that you or your operation
2 released.

3 Now, yes, that's a sticky little point when you
4 have several operators operating on one site. Who released
5 how much? In principle, you could only know about the ones
6 you released, so you couldn't be held responsible for what
7 somebody else released on that site.

8 Q. Okay, so you would say, then, as a point of
9 clarification that it's within common control, within this
10 one acre --

11 A. The one acre is whether -- In the literal
12 interpretation here, the one acre is whether your operation
13 spilled a cumulative amount leading to 25 barrels, on the
14 ground in one area which you can draw a line around and
15 have that are be one acre.

16 Q. Okay, but you wouldn't propose that if we were
17 that operator and we spilled one and a half barrels, let's
18 say, and the other operator on that -- within that one-acre
19 area had already spilled 24, we wouldn't then be deemed as
20 the person that did that last; it would just be cumulative
21 25 barrels or more of releases that we caused that would
22 trigger that?

23 A. I can see -- In principle, you couldn't know
24 about the other operator's releases, so you couldn't be
25 held responsible for not reporting what he released.

1 Q. Okay.

2 A. If you knew about it, I think, and you were a
3 responsible operator, you would go ahead and report it so
4 somebody knows, because they can't hold you responsible for
5 cleaning up what you didn't cause.

6 Q. Okay.

7 A. This is this thing about not withholding
8 information that I started talking about earlier on. When
9 we achieve that degree of trust, we'll really have
10 something, and that's what --

11 Q. No, and I appreciate that point. The thing is,
12 I'm thinking about the poor schlep that's out there at the
13 site trying to determine whether or not I'm going to be in
14 trouble for not reporting here. And it gets to the point,
15 then, where you get into a situation where you have
16 reporting overkill, you're reporting absolutely everything.
17 And that can also be detrimental to getting on with
18 business as well.

19 We, in fact, ran into a situation with that
20 within the environment department, who doesn't have a *de*
21 *minimis* amount and said, Do you really want us to report
22 every time we break a hydraulic line and spill a few drops
23 of oil on the ground?

24 And we said, Well, the way the regulations are
25 written, yeah, you have to report that.

1 They said, Okay, fine. And then after we have
2 reported those very minor issues, which cumulatively, I
3 suppose, over a long period of time, could have become
4 important, they say, Get out of here, we don't want to hear
5 about those.

6 And -- But technically, I suppose, we would still
7 be in violation of the regulations if we chose not to
8 report.

9 What I'm saying is, I don't want a standard
10 established in regulation where you're technically in
11 violation, you know, even though you're still achieving the
12 objective of reporting everything that needs to be reported
13 in order to protect the environment or take corrective
14 action, if that's the purpose for the reporting.

15 A. I don't think with this language you can be
16 technically in violation until you have spilled 25 barrels.
17 That's an intent, try to keep away from the stuff that's
18 too small, and yet to give you a mechanism so that when you
19 get a site that's contaminated from multiple spills and
20 operations, somebody at least can report it, and mainly, as
21 I say, to establish the philosophy, we don't do business by
22 spilling.

23 Q. Yes, well, I -- and I understand that, and that's
24 a good point --

25 A. Try to take the onus off of you as a supervisor

1 so that your employees don't think that you're just being
2 nasty.

3 Q. Well, that is a good point, and our internal
4 policy is, if you have a doubt on whether it's reportable,
5 please report it. But we don't want to set that so low
6 that we're reporting even extremely trivial things. That
7 wastes our time, and the agency's time too, in keeping all
8 of that data and managing all that paperwork.

9 Along the same lines of managing paperwork, do
10 you have any comments on the gas releases, especially the
11 minor releases, on how beneficial you think that is, as far
12 as an environmental protection measure?

13 A. I have no comment on that. It's not my
14 language --

15 Q. Okay.

16 A. -- and I don't work in the natural gas area. I
17 haven't to date.

18 Q. Okay. One point of clarification that perhaps
19 somebody could give me, then, at some point is, if the
20 purpose of reporting minor releases is to prevent, you
21 know, cumulative damage over time, even though each
22 individual instance isn't important enough to trigger some
23 sort of corrective action, cleanup, then on the reporting
24 of minor releases of natural gas where there is no
25 requirement that I know of that you would ever have to take

1 corrective action related to those, why you would want to
2 report those.

3 Does this perhaps get into the area of where
4 we're generating lots and lots of data and lots and lots of
5 paper to no particular purpose? That's just something I'm
6 throwing out for perhaps discussion by the group or when
7 you're considering amending these reporting requirements to
8 include those minor volumes.

9 A. I've heard the committee discuss that. There are
10 various reasons that various members had, but it's not in
11 my purview.

12 CHAIRMAN LEMAY: Questions?

13 Commissioner -- Yes, Mr. Carroll?

14 MR. CARROLL: I just wanted clarification on the
15 minor releases of gas.

16 What we used for our standards is what is
17 required by the BLM for federal lands. So they're not --
18 industry is not reporting anything, at least on federal
19 lands, that they wouldn't be reporting to the BLM anyway.

20 THE WITNESS: Okay, good point of clarification.

21 CHAIRMAN LEMAY: Commissioner Weiss?

22 COMMISSIONER WEISS: Yeah, I'd like to hear your
23 comments from the two of you.

24 And Chris, you mentioned risk early on, reducing
25 the risk to people and the environment and such. And Dr.

1 Neeper, I never heard you use that word.

2 What's it mean? What is risk?

3 It seems to me that the risk associated with a
4 gasoline spill in Taos far exceeds the condensate spill or
5 a separator buildup over years down outside of Jal
6 someplace. I don't think those two situations should be
7 subject to the same rules, the same requirements here.

8 MR. SHUEY: Well, Mr. Chairman, Mr. Weiss, I
9 don't think that -- These abatement regulations being
10 discussed do not apply to underground storage tanks
11 regulated under separate state authorities adopted by the
12 Environmental Improvement Board and administered by the
13 Environment Department. So this doesn't apply to
14 underground storage tanks.

15 As for the relativity between the two effects, I
16 guess that I have to say that I don't necessarily agree
17 that underground-storage-tank leaks are always more risky,
18 always more detrimental than oilfield releases. Both have
19 wide ranges.

20 There are these proverbial small spills in the
21 oilfield, and there can be pinhole leaks in tanks that
22 release very small quantities. There can also be
23 catastrophic failures of both underground storage tanks and
24 gathering lines, storage tanks, a variety of point sources
25 in the oilfields. I'm hard pressed to say that one is more

1 or less risky than the other.

2 Virtually all releases end up having a site-
3 specific effect, okay. A gasoline underground-storage-tank
4 leak in a groundwater-vulnerable area is a significant
5 problem, as is a, say, leaking oilfield pit in a
6 groundwater-vulnerable area. Some of the same substances
7 are involved in both materials.

8 As it turns out, we generally handle -- "we"
9 meaning society and government and specifically the New
10 Mexico government, handles -- tries to handle these -- the
11 corrective actions associated with these different kinds of
12 releases toward the same goal of either, one, preventing
13 them in the first place or, two, making sure that if there
14 is a release that it's responded to and corrected as
15 quickly as possible.

16 A key difference under state law is that there
17 had been a fund set up to assist the owners and operators
18 of underground storage tanks in their remediation
19 activities. I don't -- That fund was not ever available to
20 the oilfields.

21 A quirk of how society has developed land,
22 virtually anywhere, is that underground storage tanks tend
23 to be along highways, roads, streets, where people
24 frequent. So I think that there was some feeling like
25 there were probably more people closer to where underground

1 storage tanks are than there are people in some cases next
2 to oilfield activities.

3 From a purely -- notion of democracy, though, you
4 can't necessarily say that the people in Taos deserve more
5 protection because there are more of them than the folks
6 near Jal simply because there's less of them.

7 COMMISSIONER WEISS: Let's say it's between Jal
8 and Wink.

9 MR. SHUEY: Jal and where?

10 COMMISSIONER WEISS: Wink. There's --

11 MR. SHUEY: Wink?

12 COMMISSIONER WEISS: -- nobody there.

13 (Laughter)

14 MR. SHUEY: If there was an underground storage
15 tank there along the road --

16 COMMISSIONER WEISS: I'm not talking about an
17 off-well fuel stock, just a dehydrator that worked off in a
18 -- monitoring wells throughout, up in the San Juan Basin.
19 It's -- You guys have not assessed the risk involved to
20 damaging the environment, at all, in any way, shape or
21 form.

22 There's an insurance industry in this country
23 that does a nice job of assessing risk. Why can't we do
24 that? Why can't we include that in our rules and
25 regulations, something along those lines?

1 DR. NEEPER: Are you asking me, Mr. Weiss?

2 COMMISSIONER WEISS: Both of you.

3 DR. NEEPER: I'll take a stab at it. I did a
4 little study of risk and people's perceptions of risk, and
5 that's not what we're discussing now, but you bring up a
6 very valid philosophical point.

7 The philosophy of risk is one thing, the question
8 of can we quantify it is another. And you say the
9 insurance industry quantifies it. That's because we have
10 fairly good statistics on how many people are dying. And
11 if you look at the statistics you will find that so many
12 people die in hospitals, you ought to outlaw hospitals.
13 That's a misinterpretation of the risk.

14 But the point here --

15 COMMISSIONER WEISS: There's 120 years of
16 oilfield history in this country.

17 DR. NEEPER: In this case we'll go back to the
18 oilfield industry, and it is a question of whether you
19 think the resource itself is worth protecting, rather than
20 whether you think somebody is there now or in what you can
21 see being there now.

22 I'll bring up a short story to illustrate the
23 point. I don't know if it will carry any weight with you.

24 I was lecturing in China, and the question put to
25 me through the interpreter from the group was, What do you

1 do in America with solar energy to provide boiling water?

2 I knew what they meant, but I played it kind of
3 straight and I said, We don't -- We provide hot water for
4 baths, but not boiling water, with solar energy systems in
5 the United States.

6 And they said, No, no, no, we mean, what do you
7 do to boil your drinking water? Where do you get your
8 drinking water?

9 So again through the interpreter I said, We take
10 it out of the tap and we drink it.

11 And this little -- It was translated and then
12 this little titter went around the room: ha-ha, ha-ha.
13 They all knew that I was lying, because nobody in that
14 society had ever heard of such a thing as drinking the
15 water without boiling it.

16 It's that kind of thing we're trying to stay away
17 from. We're trying to say, There's a resource that's worth
18 protecting, even if we don't release --

19 COMMISSIONER WEISS: My point is, there's a
20 hundred years of history to look at how the resource has
21 been protected in Pennsylvania, say, where they've been
22 producing oil for 120 years. All the water that was
23 produced with that oil, I think, was run down the ditch.

24 You know, so there's something you can go back
25 and look at and say, Now, look, this is what happened to

1 the environment under these conditions, and if we don't do
2 that, if we go on with the practices that they used in
3 Pennsylvania over the years, look what happened in
4 Pennsylvania.

5 I don't know what it is, I don't know the answer.
6 But I think those -- Analogy is a good tool, and I don't
7 ever hear that.

8 DR. NEEPER: Those studies would be good to do.
9 Risk studies are very expensive, and they usually lead down
10 into a kind of fairyland of extrapolation. I'm just
11 speaking --

12 COMMISSIONER WEISS: Do you think it's not
13 expensive to drill eight monitoring wells?

14 DR. NEEPER: Not nearly so expensive as to do a
15 risk assessment, a risk-and-fate assessment --

16 COMMISSIONER WEISS: How many pits did we hear in
17 the San Juan Basin? 11,000? Four per pit? You're talking
18 great deals of money.

19 MR. SHUEY: Well, I'm not so sure that the result
20 of the vulnerable-area order and the tightening of pit
21 requirements resulted in drilling of monitoring wells
22 around all 11,000 of those pits.

23 COMMISSIONER WEISS: Well, it hasn't, but I think
24 I heard that here, didn't I? Something about these
25 monitoring --

1 MR. SHUEY: There was a phased approach, and with
2 pits being located well outside of the alluvial river
3 valleys, receiving the least attention over the longest
4 period of time, because I remember it was like seven years.

5 So there was a notion of prioritizing, those
6 problems that appeared to be -- or those sites that
7 appeared to be more problematic, or had the potential to be
8 more problematic. We recognized that and had the support
9 of that.

10 I don't know that these rules contemplate -- and
11 I certainly had no intention of them causing operators to
12 put monitoring wells around dehy units because there was an
13 upset of a -- and, you know, a barrel was spilled on the
14 ground. That's clearly not the intent.

15 You know, the only time that monitoring is going
16 to be required is in the instance where either we need to
17 know how far the material has gone, or we need to determine
18 if it's gone somewhere. And I defer to the Division to
19 answer -- to give you some numbers about what that has
20 meant in practicality.

21 COMMISSIONER WEISS: Is that well understood by
22 all sides? I don't know.

23 MR. SHUEY: That's my understanding.

24 CHAIRMAN LEMAY: I see a lot of positive nods of
25 the head. I think it probably is, Commissioner. I don't

1 think there's a -- out there to put monitor wells around
2 every drop of oil that reaches the ground.

3 COMMISSIONER WEISS: Well, twenty-five barrels or
4 more, of course, but --

5 CHAIRMAN LEMAY: Or even 25-barrel spills.

6 As a practical matter, Roger, can -- do you want
7 to formally address that --

8 COMMISSIONER WEISS: I'd like to --

9 CHAIRMAN LEMAY: -- your 25-barrel spill? Does
10 that require -- Do you all require monitor wells around
11 that?

12 MR. ANDERSON: Not monitor wells. We may require
13 the responsible party to determine the extent of it, which
14 may be just auguring a hole somewhere may three or four
15 feet down to see how far it went.

16 About the only time we have monitor wells is if
17 there's groundwater contaminated. Just a spill itself
18 won't require monitor wells unless there's a reasonable
19 probability that we think groundwater is contaminated.

20 And one more thing I'd like to address on the
21 risk-based approach --

22 CHAIRMAN LEMAY: Right.

23 MR. ANDERSON: -- this rule -- That's what Rule
24 19 is, is a risk-based approach. That allows for risk
25 analysis, and the ability to apply for alternate standards

1 based on the risk analysis. And every one of those risk
2 analyses are going to be based on site-specific
3 information.

4 CHAIRMAN LEMAY: If you spill groundwater, are
5 you concerned about -- If there's no groundwater, do you
6 have a high degree of concern about the oil spill?

7 MR. SHUEY: No, not at all. If the groundwater
8 has not been impacted or will not with reasonable
9 probability be impacted in the foreseeable future, the
10 chances are the only thing you worry about is maybe surface
11 vegetation, and that's a -- you know, the land --
12 Obviously, the land owner is going to worry about that.

13 So if it's not going to get to groundwater, it's
14 not going to impact in the foreseeable future, usually,
15 public health.

16 Now, there -- I'm not saying that that's
17 concrete. There may be some instances where that's not
18 true. We take everything on a site-specific basis and look
19 at it on a site-specific basis.

20 But yes, we do put risk into it, risk analysis.
21 We've been doing that for 11, 12 years, looking at risk-
22 based analysis.

23 COMMISSIONER WEISS: Okay, I wasn't aware of
24 that. Thanks.

25 CHAIRMAN LEMAY: Commissioner Weiss, are you

1 still -- ?

2 COMMISSIONER WEISS: No, that was my concern. It
3 wasn't clear to me how this idea of risk entered into the
4 situation, but -- And I see that it has been addressed,
5 perhaps not formalized, but it is certainly considered.

6 Thank you.

7 CHAIRMAN LEMAY: Anything else?

8 COMMISSIONER WEISS: No, I have no other
9 questions.

10 CHAIRMAN LEMAY: Commissioner Bailey?

11 EXAMINATION

12 BY COMMISSIONER BAILEY:

13 Q. I'm working through your suggestion for 16.B --
14 not (i) -- (iii), "be detrimental to water", and you're
15 referring to the fact that vadose-zone water would be --
16 could be included in that added language?

17 A. (By Dr. Neeper) Well, when I read the definition
18 of water, I see that that's what the definition refers to,
19 or includes.

20 Q. Because vadose-zone water is universal, according
21 to your testimony earlier, does that take away the
22 distinction between major-release reporting and minor-
23 release reporting, so that all spills that affect vadose-
24 zone waters become major releases?

25 A. You're saying, Can you interpret this so that any

1 spill in the vadose zone is technically a major spill --

2 Q. Right.

3 A. -- a major release?

4 You can take that interpretation. Again, I think
5 whoever takes that interpretation is going to get into a
6 credibility stretch.

7 Q. I'm wondering the practical application of that
8 wording, when testing for these vadose-zone waters may be
9 next to impossible.

10 A. Usually, you can't. Now, there are special
11 circumstances and special things we do, but it's not the
12 kind of thing that the oil industry is concerned with. And
13 so standards are written there to groundwater and surface
14 water. You don't have a standard for vadose-zone water.
15 It's the fact that the water is there.

16 There seems to be a lot of concern with these
17 words, "be detrimental to water". I was really attempting
18 to combine the committee's 19.N and 116.B into one simple
19 place, to make it simple and easy without violating
20 anybody's language. So that language came through, and it
21 might be that questions on that exact term, "detrimental to
22 water", should be addressed to those who wrote exactly
23 those words. It's in bold here because I moved it from
24 somewhere else. But I simply retained the wording. I
25 don't feel it's bad, or I would have suggested striking it.

1 COMMISSIONER BAILEY: Thank you for that
2 clarification. That's all.

3 EXAMINATION

4 BY CHAIRMAN LEMAY:

5 Q. I've got one, a little bit off track, but I'd
6 just like your opinion on it, Dr. Neeper.

7 In your concerns over protecting the vadose zone,
8 what would be your reaction to a plan where there was
9 contamination of the vadose zone, but it was mitigated by
10 possibly bounding and capping it so that no head got out of
11 the vadose zone and no fluids, maybe, would penetrate that
12 vadose zone? Would you still consider that a high degree
13 of probability, that groundwater would be contaminated?.

14 A. Let me make a clarification. We're doing a
15 hypothetical exercise in which, were I the NMED, or OCD you
16 mean, would I consider capping and bounding?

17 Q. Well, you're an expert in the field. I just
18 wondered what your opinion on that --

19 A. It was my opinion --

20 Q. -- procedure would be.

21 A. This is done all the time. It's an accepted
22 remediation technique to limit the spread.

23 Q. I mean, you have quite a concern for the vadose
24 zone. I just wondered --

25 A. Yes.

1 Q. -- if this being --

2 A. Well, your contamination occupies only so much
3 part of it.

4 Q. Right.

5 A. If you can stop the spread, that's a legitimate
6 technique. So you can say, That's still the vadose zone in
7 there. Well, all right, it can also still be the community
8 dump. You have to have some practicality. There is this
9 volume of soil that's contaminated, we've isolated it.
10 That is an acceptable treatment. That removes that thing
11 called risk.

12 Q. Uh-huh.

13 A. If you've boxed it in so it isn't hurting
14 anything, who's to object?

15 CHAIRMAN LEMAY: Okay. That would be all I have.

16 Are there any other comments?

17 We're at the point now where they don't have to
18 be questions directed to either Don or Chris, but they can
19 just be general comments.

20 Rand, did you want to say -- Go ahead, Sam, yes?

21 Yeah, Small. Amerada -- You, Sam. Sam, hi. How are you?
22 Welcome to the hearing.

23 (Laughter)

24 MR. SMALL: I'm Sam Small, Amerada Hess. I also
25 served on the Rule 116 Committee. I had a question,

1 really, to direct at Roger --

2 CHAIRMAN LEMAY: Yes.

3 MR. SMALL: -- on the minor gas releases. I also
4 have a problem with major gas release, but I realize that
5 was in there before.

6 I'm particularly concerned with minor releases of
7 natural gas. There's really three questions I have. You
8 sort of answered one. The basis for your threshold limits.
9 They're -- BLM --

10 MR. ANDERSON: Correct.

11 MR. SMALL: -- do you know why the BLM picked
12 those limits?

13 MR. ANDERSON: I don't know about --

14 MR. SMALL: The BLM is not here.

15 MR. ANDERSON: Don's already left, so --

16 MR. SMALL: I think, from what I understand, the
17 BLM, they use the limits to -- you know, for royalty
18 purposes, waste, where gas is being vented or emitted, and
19 they collect royalty on it.

20 And that brings me to the next important
21 question: What's the OCD's purpose for gathering data on
22 releases between 50 and 500? Are you going to use that for
23 royalty? And shouldn't that be a Land Office issue if it
24 is a royalty issue, as opposed to OCD?

25 MR. ANDERSON: Let me defer to Frank, the

1 District Supervisor who actually uses this information.

2 MR. CHAVEZ: Okay, Sam, what -- I was also --
3 either participated in most of those committees -- Even
4 though I was not on the committee, I attended some of the
5 meetings. And if I wasn't there, somebody from my office
6 was, because we were very interested in a lot of the
7 enforcement issues and we -- within the District when we go
8 the district out of these rules, and this issue of gas
9 releases came up very interestingly.

10 The original rules, when they were discussed
11 before with the OCD -- we had discussed Rule 116 -- we
12 tried to cover two things. One was the environment and the
13 other was waste, waste of resources.

14 This committee, in my opinion, got really hung up
15 on environmental issues, and for some reason the waste
16 issue of the product was not of a big concern in a sense,
17 it was -- It really focused on the mediation and
18 contamination and this type of thing.

19 In the districts, we are concerned about the
20 waste issues of natural gas and crude oil. Natural gas is
21 a hard one to track because it doesn't stain. But we have
22 used this information in the past, especially in the
23 southeast, the communications that I've had with the other
24 supervisors, to look at areas where there may be either
25 problems with ageing systems which are allowing more and

1 more releases, where we as an agency can then go to the
2 operator and say, It appears to us that there are problems
3 in this area with these types of releases, and start
4 working with the operator to see if perhaps they need to
5 make some changes in their operation to prevent this waste.

6 In the southeast especially also, with the issues
7 of hydrogen sulfide gas, we want to keep track of where
8 there might be a habit -- not a habit necessarily, but
9 where there are areas of releases that would cause us
10 concern, not just for waste but with the hydrogen sulfide
11 gas that might be released, endangering human health, that
12 one. So yes, we've used that information at the OCD,
13 especially at the district level, for those reasons.

14 MR. SMALL: The health issues are really
15 addressed in the first part of Rule 116. It's proposed
16 in -- you know, in 116.B(b) -- could endanger public
17 health. I think your H₂S issue is already covered there,
18 without a volume specific.

19 The problem I have is a 50-MCF-a-day release, and
20 I'm coming from a production point of view. You know, I've
21 worked out there. To be honest with you, for someone to
22 define a five-barrel spill on the ground of oil is a very
23 difficult thing. You know, you can take a five-barrel
24 spill and put it out there, and you'll get everything from
25 ten barrels to one barrel on an estimate of what's spilled.

1 The gas release is gone. You know, you're going
2 to go out there, there's no staining on the ground. It's
3 going to be a very difficult number to quantify, and
4 particularly at a level of 50 MCF it is extremely difficult
5 to quantify.

6 And then the other issue I have is, how are you
7 going to enforce this? If an operator has a 50-MCF spill,
8 or release, you can come out there two hours later and
9 you're not going to know he had it. If I have a release,
10 my, you know, pumper and well vents 50 MCF of gas on me, by
11 the time I go out there I'm not going to know it's been
12 released either.

13 So as far as gathering data that's going to be
14 useful, you know, I just don't think you're going to get
15 the data put together like you want it.

16 CHAIRMAN LEMAY: Yeah, let me play devil's
17 advocate with you for a minute, Sam --

18 MR. SMALL: Sure.

19 CHAIRMAN LEMAY: -- as a practical point of view.

20 There could be the argument made on a -- I'm
21 sure, Commissioner Weiss would agree with me on this that,
22 you know, you have a greenhouse gas here that's probably
23 contributing to global warming in the event you have too
24 much of these releases --

25 (Laughter)

1 CHAIRMAN LEMAY: -- and that as a matter of
2 principle, that if you don't have a rule -- actually, some
3 kind of a rule that says, Thou shalt not vent gas, it's --
4 that they're -- we're not doing our part -- in other words,
5 if you're out there -- Let's use the argument, you're out
6 there, you've got a leak, you know you've got a small leak.
7 And yet you can tell your pumper that, Hey, we need to fix
8 this because, you know, the OCD's got a rule against
9 venting -- I mean, venting gas is one thing. But we have
10 to report this kind of thing; we don't want to do it. Fix
11 it.

12 So in a sense, although it's not truly
13 enforceable, I would agree with you, number one, that it
14 tends to be consistent with the federal requirement. I
15 think maybe Commissioner Bailey here might say that the
16 State would like to know too for royalty purposes. And
17 then you have this argument that if you're condoning it by
18 not having it reportable, in a sense you're condoning it,
19 although to administer it in a very practical sense may be
20 very, very difficult.

21 Do you have an alternative? Would you say just
22 forget about it, or --

23 MR. SMALL: Well, yeah, for the minor releases,
24 yes, sir. You know, like I said, I can live with the 500
25 because we've had that there before. It's something that -

1 - You know, you can back-calculate a 500-barrel -- or a
2 500-MCF release or leak from a well.

3 A 50 -- You know, what's the -- a 50, you know, a
4 75, 100, 150, that's going to be a difficult thing to
5 quantify, to put down, you know, that you're going to be
6 able to charge a royalty back, and that would be off the
7 state land again, not off the -- you know, the royalty
8 owner here, you have to deal with the individual royalty
9 owners on that, on private leases.

10 But you know, the greenhouse issue, I don't know
11 whether they've ever really established any set numbers for
12 greenhouse gas emissions. It's very -- You know, it's
13 ethane, methane. It's what? 80, 90 percent
14 methane/ethane.

15 It doesn't fall under Clean Air Act VOCs. That's
16 covered by ED; that's not an OCD responsibility.

17 So you know, like I said, I could live with it
18 being a major release. but I think from an operator's
19 point of view, the minor release is going to be extremely
20 difficult to deal with. I think the people that do submit
21 information to you, you know, it's going to be
22 questionable.

23 CHAIRMAN LEMAY: Is there a threshold that you
24 think -- you would recommend?

25 MR. SMALL: For what? For minor?

1 CHAIRMAN LEMAY: Gas.

2 MR. SMALL: For minor?

3 CHAIRMAN LEMAY: For reportable gas?

4 MR. SMALL: Well, I think you -- Like I said, I
5 could live with a 500 release, although I know there's
6 others in my industry that don't -- aren't comfortable with
7 that; they'd prefer to see a million. But I can live with
8 a 500.

9 But I just think it's a minor release. I don't
10 think we really need to be dealing with it, you know,
11 particularly, here. And I think if it comes down to a
12 royalty issue, I think that's something the State Land
13 Department needs to --

14 CHAIRMAN LEMAY: Well, let me kind of defer to
15 Commissioner Bailey on the state land issue.

16 COMMISSIONER BAILEY: Constantly this Commission
17 hears requests for consolidation of paperwork. The Land
18 Office constantly hears requests from operators to
19 consolidate paperwork with other agencies.

20 One of the major issues that was brought up in
21 the January Industry Speaks hearing was the fact that they
22 have to report this item to one agency, that item to one
23 agency, and another item to a third agency. Why not
24 consolidate and reduce paperwork and reporting requirements
25 by having a reporting form and a rule that's acceptable to

1 all three agencies? This is one way that we can deal with
2 these requests, that we don't have these conflicting or
3 these never-ending paperwork exercises. By consolidating
4 the one reporting, we can all share that information --

5 MR. SMALL: I agree with that --

6 COMMISSIONER BAILEY: -- and that does --

7 MR. SMALL: -- for the major spill. Like I said,
8 I had no problem with those reports.

9 It is more paper flowing if you drop down to a
10 50-MCF leak. 50 MCF is two bucks a day. One-eighth royal-
11 -- or two dollar an MCF, that's \$100 per 50-MCF release,
12 and you're going to get one-eighth of that as royalty. And
13 you pay for processing and paper on a 50-MCF spill, I don't
14 know --

15 COMMISSIONER BAILEY: Well --

16 MR. SMALL: I would submit the 500 becomes a
17 reasonable number, and we will be submitting the paper on a
18 500 MCF release, and we use the OCD form.

19 Has the State Land Office ever used those numbers
20 to come back and try to collect royalty?

21 COMMISSIONER BAILEY: Yes, we do. We look for
22 every dollar for the beneficiaries that we can, because our
23 responsibility is not Land Office, our responsibility is to
24 the school kids, to the hospitals, to the 22 beneficiaries
25 that we manage the trust lands for.

1 So yes, we look for every way that we can have
2 absolute productive resources for those beneficiaries.

3 And --

4 MR. SMALL: See, I can't recall ever being billed
5 at Amerada for, you know, a report --

6 COMMISSIONER BAILEY: We do have a very active
7 spill-reporting auditing, so that we do collect on those
8 royalties.

9 And with the Land Office with their percentage of
10 production, with the federal government with their
11 production percentage, it's not that much of an additional
12 burden to have that as part of this rule change, rather
13 than having three different rules, because the percentage
14 is --

15 COMMISSIONER WEISS: How do you tell the
16 difference between a 10-MCF leak and a 50-MCF leak?

17 MR. SMALL: Sir?

18 COMMISSIONER WEISS: How do you tell the
19 difference between a 10-MCF release -- or just a 10-cubic-
20 foot release and 50,000 cubic feet?

21 MR. SMALL: Just pick a number out of the air. I
22 would venture to guess that most people that were dealing
23 with a 50-MCF spill would probably under-report the release
24 because it's too close to call.

25 You know, when we report our releases of gas,

1 normally what you do is, if you had a ruptured line to a
2 gas well or a -- you know, some problem that triggered
3 venting the gas off it, well, we know how much the well
4 produces a day, and if we can give some kind of figure for
5 how long that release has occurred, we can back-calculate a
6 volume of gas that's been emitted through that spill.

7 When you're talking, you know, a pop-off valve
8 going off and kicking gas to the atmosphere, there's nobody
9 out there. And first off, you don't know how long it's
10 been, you know. You know it's going to be a small number
11 for any given period of time, for an hour or so. But
12 cumulatively over a 24-hour period, you could exceed the
13 MCF. It's just a very hard number to quantify.

14 Like I said, the 500 is easier to work with.
15 And, you know, my recommendation would certainly be to go
16 ahead and keep that as major reporting. But I think I
17 would drop the minor reporting gas releases.

18 COMMISSIONER WEISS: That's a real number, 500
19 MCF or thereabouts?

20 MR. SMALL: You know, it's a number that's
21 significant enough to deal with.

22 And another -- You know, I can't speak for
23 everybody in the industry, but I know Amerada Hess, you
24 know, obviously we don't want to be venting gas. That's
25 money out of our income statement. So at two dollars an

1 MCF of gas, we want to be selling it, we don't want to be
2 venting it. So, you know, the incentive to fix the leaks
3 is there from an economics point of view.

4 CHAIRMAN LEMAY: Okay, any other issues out there
5 you want to discuss? It's open forum.

6 MR. CARROLL: Yes, the Division has a comment on
7 Mr. Small's proposal, and that is, you know, best guess is
8 better than no guess. And enforcement would be tough. We
9 just rely on the trust that the industry would report and
10 make their best guess as to the gas release.

11 COMMISSIONER WEISS: Are you saying, then,
12 there's no cutoff point?

13 MR. CARROLL: It would be 50, and if they
14 estimate it's less than 50, there's no way for us to check
15 it.

16 CHAIRMAN LEMAY: Best guess better than no guess,
17 huh?

18 COMMISSIONER WEISS: I don't agree with that at
19 all.

20 CHAIRMAN LEMAY: Toni?

21 MS. RISTAU: I just had an observation on all
22 this. Listening to Dr. Neeper's presentation of getting
23 out this cumulative problem when you're talking about
24 liquid releases, isn't this almost similar, that
25 cumulatively if you have a lot of these small releases,

1 they amount to something?

2 Maybe instead of -- If this really is an issue
3 and really does need to be reported, maybe instead of
4 reporting it on an instance-by-instance basis when you have
5 50, that you would report quarterly or semi-annually, or
6 once a year give an estimate of cumulatively what all these
7 small releases have come to, something like that, to avoid
8 the need to push constant tons of paper back and forth on
9 these small, relatively insignificant releases on an
10 individual basis. Just a --

11 DR. NEEPER: In the sense -- I'd like to --

12 MS. RISTAU: -- to get any of the information.

13 DR. NEEPER: I'd like to respond to that.

14 CHAIRMAN LEMAY: Go ahead, Dr. Neeper.

15 DR. NEEPER: In the sense of environmental
16 protection, it doesn't make sense to do an annual tally,
17 let's say, we lost five here and four there and whatnot,
18 because it's where it was lost. It's only in terms of the
19 liquids, if you lost it all in one spot, that you've got a
20 potential for some kind of damage.

21 And so it's that one acre that you're talking
22 about, as opposed to what was lost in many different
23 places.

24 CHAIRMAN LEMAY: Okay, anything else? Any
25 statements in the case?

1 We'll keep the record open for two weeks. Is
2 that enough for you to get some comments in? You know, the
3 Commission would especially benefit by comments concerning,
4 maybe, "point-of-use" language, "likely", "monitoring", use
5 of the word "facility".

6 I think -- I've heard everyone say, and I should
7 compliment the committee on this, that there was almost
8 universal support for the regulations and proposals, and
9 then the caveat was with minor modifications.

10 So I think -- You know, I think everyone that's
11 come up here supports the regulations. And again, I want
12 to commend the committee on doing a fine job.

13 Do you have anything to say, Commissioner Weiss,
14 as a windup or -- ?

15 COMMISSIONER WEISS: I still don't understand how
16 risk enters into the Committee's decisions except that
17 they're not quantified. I do understand that. Maybe
18 that's worth looking into.

19 CHAIRMAN LEMAY: Commissioner Bailey, do you want
20 to have any final comments on the -- ?

21 COMMISSIONER BAILEY: No, I'm fine.

22 CHAIRMAN LEMAY: Anyone else have anything to
23 say?

24 MR. SHUEY: May I --

25 CHAIRMAN LEMAY: Yes, go ahead, Chris.

1 MR. SHUEY: Mr. Chairman, just a point of
2 clarification. The record would be left open for two weeks
3 for additional comments or clarification on the record as
4 it is now, including these points that you've just
5 enunciated.

6 I -- Typically, that does not allow for the
7 present -- for the submittal of any new information that
8 wasn't already talked about.

9 CHAIRMAN LEMAY: Well, it's weighed accordingly.
10 What we do is leave the record open for additional
11 comments. The reason for that is for any -- People that
12 aren't here can comment on the record.

13 Some of the presentation here today was not
14 available to a lot of people for comment and it's not part
15 of the public record, so it would be nice to have committee
16 members maybe comment on the modifications or some of the
17 controversial points, so that I think the Commission has
18 got a pretty good concept, the basis of which is the
19 committee work.

20 Now, what we're looking about is fine-tuning this
21 and fine-tuning it where there are some suggested changes.
22 We'd like to have a comment on those changes. There hasn't
23 been really an opportunity for that.

24 MR. SHUEY: That's well understood. I'm
25 specifically thinking about Mr. Weiss's concerns. The only

1 way to try to address those in any level of quantification
2 is a fairly significant effort of looking at existing files
3 and information that may be in the Environmental Bureau's
4 office. That's really substantially new information and it
5 would take a substantial effort to make -- to do that.

6 I want to be responsive, but I don't want to
7 violate any rule either.

8 CHAIRMAN LEMAY: Well, maybe I need Commissioner
9 Weiss to expand a little on it.

10 COMMISSIONER WEISS: Well, I agree with your
11 point exactly. Since it's not included, I don't see -- You
12 can't do anything in two weeks. I just don't see how you
13 can. I don't understand why it wasn't included. To me
14 it's very important.

15 MR. MENZIE: As a committee member -- I'm Bob
16 Menzie --

17 CHAIRMAN LEMAY: Bob?

18 MR. MENZIE: -- with Marathon. I can just
19 address that point. We tried to do that.

20 The problem that we came up with, just to let
21 everyone know -- and I think -- if you don't agree,
22 committee members, let me know.

23 We have people from the northwest in the
24 Farmington area, which has a different set of
25 characteristics, if you will, in order to determine risk

1 than in the southeast, and we thought it would be a whole
2 'nother process to respond to trying to establish a risk
3 for statewide, so we elected to just try to address what we
4 thought our charge was, which was to change the reporting
5 requirements.

6 COMMISSIONER WEISS: Which you've done. Maybe
7 we'll leave this for next time.

8 (Laughter)

9 MR. SHUEY: Thank you, sir.

10 CHAIRMAN LEMAY: Anything else out there?

11 Does that satisfy your -- what the comment period
12 is going to pertain to?

13 Obviously, we're not going to -- Commissioner
14 Weiss, I second his viewpoint. I mean, there may be some
15 issues here that don't lend themselves to resolution with
16 this rule, that -- Certainly risk assessment is a broad
17 enough category. We could spend weeks on that one.

18 COMMISSIONER BAILEY: And point of use also.

19 CHAIRMAN LEMAY: And point of --

20 COMMISSIONER WEISS: How long --

21 CHAIRMAN LEMAY: -- yeah, right, point of use is
22 another one that I'm not sure you want to get into.

23 COMMISSIONER WEISS: How long did it take the
24 pipeline people to -- the regulators and the pipeline
25 industry to accept the fact that there's a difference in

1 the thickness of the pipe you need in downtown Dallas
2 between what you need out by Wink? Does anybody know?
3 They've accepted that now, though, so there's a precedent
4 for this kind of thing.

5 CHAIRMAN LEMAY: Bob, do you want to --

6 MR. MENZIE: Well, I was just going to say that
7 Tom Kellahin isn't here to defend himself, but he talked
8 about a Phase 3, and I don't know whether the OCD will go
9 on with a Phase 3 to try to develop soil guidelines, but it
10 really addresses risk completely. That's all that's going
11 to be about.

12 And I would just ask that at some point the OCD
13 make sure that they incorporate risk when they go and
14 address the oil guidelines, if they do that.

15 CHAIRMAN LEMAY: On that point, could I ask you
16 something, because you're a committee member?

17 Did the committee at all make any recommendations
18 as to a subsequent committee project? Exactly what you
19 said addressing risk -- or at least the -- what we call our
20 guidelines, our remediation guidelines?

21 MR. MENZIE: Well, I might get myself in trouble
22 with Roger, but we did discuss it. We were -- I think, in
23 Tom Kellahin's statement to the Commission it describes
24 that we would be willing to go on and do that, although I'm
25 not sure from talking to other committee members whether or

1 not everyone's interested in doing that. So it's in your
2 hands.

3 CHAIRMAN LEMAY: That was left as an open issue?

4 MR. MENZIE: It's an open issue for you to decide
5 what you would like us to do with that.

6 CHAIRMAN LEMAY: We've talked about that in
7 general, but let my fellow Commissioners understand where
8 we're going.

9 This was an open-ended assignment, so to speak.
10 You closed it off, I think, at a very good point because
11 you reached agreement at that point by carrying it further.

12 There's two ways to do it.

13 You could have carried further in committee,
14 which would be -- you'd still be working with it; it would
15 be two years rather than one.

16 The other thing would be whether -- and I've
17 talked with Tom on this, whether -- appoint a committee to
18 come -- like a finite -- and you've handled it well, a
19 finite proposal here dealing with bringing the WQCC regs
20 over, the abatement regs over, as well as cleaning up Rule
21 116 and then leaving this as another assignment possibly.

22 MR. MENZIE: We tried to -- Many people felt that
23 just revising the Rule 116 would be enough for the public
24 and the Commission and all of us to be able to absorb, and
25 so we went a step farther by proposing new -- 19, and we

1 thought, well, going with the guidelines even farther than
2 that might be too much for this particular rule-making.

3 Plus, from -- Already you can tell, just from
4 this afternoon, addressing issues such as "detrimental to
5 water" and whether "water" means the water in the vadose
6 zone or not, that will come with the soil guideline rule-
7 making, I think.

8 CHAIRMAN LEMAY: Willie? Cover it?

9 MR. OLSON: No, I just -- I think, addressing
10 what Mr. Weiss was asking for about some of the risks
11 and -- I think that's -- you know, it's a big thing we come
12 up with, with all the sites. Every site, essentially, that
13 we've worked on, or at least that I've worked on in terms
14 of cleanup, they're all different.

15 And it goes exactly to what you were saying,
16 there's a different cleanup that you're probably going to
17 do in the Jal -- or out by -- you know, between Jal and
18 Wink than you're going to be doing, say, in the middle of
19 Farmington or the middle of Hobbs.

20 And that comes into -- that factors into every
21 decision that the Division has ever done. We heavily look
22 at the risks associated with the site in terms of cleanup.

23 A lot of times it may be like the Chairman was
24 saying about capping a site. That may have been the action
25 at a site, was some type of investigation, maybe just look

1 at what vertical extent was and say, Well, it doesn't pose
2 any threats to anybody.

3 So we cap it and go on, and the company has the
4 -- you know, the knowledge, or they know that they still
5 have a liability if there's something in the future, but
6 that at this point in time there's no risk, so therefore
7 there's no more done with the site.

8 In Farmington, there's been -- you know, I mean,
9 one of our members, Buddy Shaw probably could have told you
10 about some of the ones he's next to houses and residential
11 areas where he's done some pretty extensive work on some of
12 those. But at the same time, on areas that he's had that
13 are not in the river valleys or next to people's homes, his
14 cleanup level has been a lot different than has been, say,
15 in the Farmington area, next to someone's home.

16 So it is factored into all the decisions that
17 have gone on to date, since I've been around for the last
18 ten years with the Division.

19 And it is -- It's a very valid concern,
20 especially for the economics. We're trying to get the most
21 bang for the buck in terms of folks cleaning up what's
22 really more of a threat.

23 But there are certain things that need to be done
24 at other sites, but it may be a lot lesser level of cleanup
25 and monitoring than the high-risk sites.

1 Similar to your analogy with, you know, pipe and
2 that. Very similar.

3 CHAIRMAN LEMAY: Okay, anything else?

4 I want to thank everyone for their contribution.

5 We'll leave the record open for two weeks and
6 take the case under advisement.

7 (Thereupon, these proceedings were concluded at
8 3:30 p.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 November 22nd, 1996.


 STEVEN T. BRENNER
 CCR No. 7

My commission expires: October 14, 1998