

STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION
No. WQCC-08-13(R)

IN THE MATTER OF THE TRIENNIAL REVIEW
OF STANDARDS FOR INTERSTATE
AND INTRASTATE SURFACE WATERS,
20.6.4. NMAC

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that on the 10th day of December,
2009, this matter came on for continued hearing before
MS. FELICIA ORTH, Hearing Officer, at the State Capitol
Building, 490 Old Santa Fe Trail, Room 309, Santa Fe,
New Mexico, at the hour of 9:07.

VOLUME 3

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1 MS. ORTH: Let's prepare to begin this
2 morning.

3 A noisy crowd, I know. Let's prepare to begin
4 this morning, please.

5 If Amigos Bravos would come up here to the
6 table, and, Ms. Anderson, if you would take a seat next
7 to Commissioner Vigil.

8 While they're arranging themselves, let me say
9 that we are on day three of the triennial review. We've
10 made excellent progress, moving faster really than we
11 expected.

12 So we'll hear from Amigos Bravos this morning.

13 Then we may or may not hear from Ms. Greenwald
14 and Ms. Weinstock. I will ask them next.

15 And then Mr. Harwood has agreed to present
16 Buckman Direct Diversion's presentation next.

17 And then tomorrow morning, because we had made
18 an assurance based on flight constraints, we'll hear
19 from Freeport-McMoRan.

20 And then both today and tomorrow I will be
21 here in this room, regardless of how long we go, to
22 accept any public comment that is here to be given,
23 because public -- the public comment periods have been
24 published. So we'll be here.

25 I do expect this to be a short day, and I

1 certainly expect tomorrow to be a very short day, just
2 for your information. And I'm sorry if you've traveled.
3 I hope you have other things to do in Santa Fe that
4 being the case.

5 MR. GOLDSTEIN: Spend money.

6 MS. ORTH: Yeah, spend money.

7 So with that --

8 MS. KRAPFL: Please.

9 MS. ORTH: -- is there any reason not to
10 launch into the Amigos Bravos presentation?

11 No?

12 All right. Thank you.

13 Ms. Anderson, if you would.

14 MS. ANDERSON: Thank you.

15 And good morning to the Commission and Madam
16 Hearing Officer.

17 By way of introduction, my name is Megan
18 Anderson, and I'm representing Amigos Bravos, Friends of
19 Wild Rivers.

20 Amigos Bravos is a statewide river
21 conservation organization with a mission to restore and
22 protect the rivers of New Mexico and ensure that those
23 rivers provide a reliable source of clean water to the
24 communities and farmers that depend on them, as well as
25 a safe place to swim, fish and go boating.

1 Amigos Bravos has been participating in the
2 triennial process since the first scoping meetings in
3 2007, and we wish to thank the Department for its work
4 in putting together those public meetings throughout
5 this process.

6 As you know from the proposal and test that
7 we've already submitted, Amigos Bravos supports many of
8 the Department's proposals and also has offered several
9 of its own proposals for changes to the water quality
10 standards. I won't go through those, as you're familiar
11 with them, but I did want to ask a few questions of our
12 witnesses on surrebuttal.

13 I also want to note that we had some changes
14 to our proposed changes that we submitted in a
15 modification to proposed changes. I believe the
16 Commission received copies of that yesterday. And I
17 e-mailed copies to all the other parties, as well as I
18 have hard copies here if anybody needs a copy of that
19 change.

20 So first I'd like to ask that those
21 modifications be submitted into the record, if there's
22 no objection.

23 MS. ORTH: They've been filed.

24 MS. ANDERSON: Okay. Thank you.

25 The -- just to give a brief summary of some of

1 those changes, and I do mean brief, most of them are
2 just typographical things or changes that we've
3 withdrawn.

4 The one that's of note is our mixing zones
5 proposal, and in particular of notice in there is that
6 we've just added that mixing zones shall not impair
7 overall ecological and biological integrity of water
8 quality standards and that the standards cannot
9 reasonably be -- excuse me -- I'm saying that a little
10 bit wrong -- and the mixing zones may be authorized only
11 if water quality standards cannot reasonably be complied
12 with at the point discharge.

13 So changing the language of this a little bit
14 for reasonable standard.

15 I want to note that we have five witnesses
16 today for surrebuttal and cross-examination, and our
17 first witness, Dr. Makhijani, will be presenting on
18 radionuclides, and then I plan to call the other four of
19 our witnesses as a panel to answer questions, because
20 they're addressing similar issues in our proposal, if
21 that's acceptable to the Commission.

22 MS. ORTH: That will be fine.

23 MS. ANDERSON: Okay.

24 MS. ORTH: Has Dr. Makhijani been sworn?

25

1 ARJUN MAKHIJANI, PhD

2 having been first duly sworn or affirmed, was
3 examined and testified as follows:

4 DIRECT EXAMINATION

5 BY MS. ANDERSON:

6 Q. Dr. Makhijani, can you please state your full
7 name for the record for us, please?

8 A. My name is Arjun Makhijani.

9 Q. Thank you.

10 Can you state your position and your
11 affiliation?

12 A. I'm president of the Institute for Energy and
13 Environmental Research, which is located in Tacoma Park,
14 Maryland.

15 Q. And does your previously filed testimony and
16 your resume capture that testimony and spell out your
17 experience to speak as an expert in these proceedings?

18 A. Yes.

19 Q. Thank you.

20 Have you filed testimony and -- filed
21 testimony as well as exhibits with the Commission in
22 these proceedings?

23 A. Yeah. I filed testimony and rebuttal
24 testimony. I can't remember if there were exhibits,
25 actually. They're not on my screen on my computer.

1 Q. That's --

2 A. Did I file exhibits?

3 Q. I believe so.

4 A. Okay. I don't remember.

5 Q. Fair enough.

6 A. It was --

7 Q. Do you --

8 A. -- a while back.

9 Q. Do you endorse your previously filed testimony
10 or have any changes to that testimony?

11 A. I -- yes, I do. I just -- there's just one
12 sort of typographical proofreading error on page 5 of my
13 testimony, line 3 from the bottom. It's obvious it
14 should refer to Rocky Flats, but it refers to Los
15 Alamos.

16 So that sentence should read, "However, these
17 radionuclides were present in only trace quantities at
18 Rocky Flats and would not be expected," et cetera.

19 So instead of "LANL" at that point, it should
20 be -- read "Rocky Flats," on page 5. Otherwise, it's
21 fine.

22 Q. Thank you.

23 So I just want to ask you a couple questions
24 on surrebuttal, and then we'll open it up for
25 cross-examination.

1 The first one was -- in NMED's testimony on
2 rebuttal, they stated that one of the reasons for using
3 the ten to the negative five standards instead of ten to
4 the negative six standards that Amigos Bravos has
5 proposed is that it's just Department practice to do
6 that.

7 Can you comment on that rebuttal?

8 A. Yeah. I found this not to be a substantial
9 reason to continue with ten to the minus five, as I said
10 in my rebuttal, that policy inertia is not a reason much
11 less a rebuttal to the arguments I presented in my
12 testimony.

13 Specifically, the NMED itself in proposing
14 these changes has referred to the fact that Colorado --
15 what happened for the surface waters in regard to
16 plutonium and ordinary radionuclides at Colorado is one
17 of the motivations for NMED to propose this.

18 And secondly, NMED is proposing these changes
19 because the waters in question are going to be used by a
20 much larger section of the public as drinking water, and
21 that particular drinking water item is to be added to
22 the regulation.

23 And so there's every reason to review the risk
24 standard and not continue to use an old risk standard
25 just because it has always been used, because the

1 current situation is that these waters are not going to
2 be used in the way they've always been used, but they're
3 going to be used by a substantial fraction of the New
4 Mexico population, including, in this city, for drinking
5 water, for bathing, for cooking. So children are going
6 to drink it.

7 And so I believe in these circumstances the
8 ten to the minus six risk level is very important to
9 adopt and that the ten to the minus five should be
10 reviewed.

11 Moreover, to make it quite parallel to what
12 the federal government itself agreed during the cleanup
13 of Rocky Flats was that the surface water -- not just
14 drinking water, but surface water runoff from Rocky
15 Flats should have an annual running average of .15
16 picocuries per liter of plutonium, and for -- and 500
17 picocuries per liter of tritium.

18 And I didn't see that the NMED provided any
19 substantial reason for at once appealing to Colorado
20 for -- as one of the reasons for change, but then
21 increasing the risk factor by a factor of ten for New
22 Mexico.

23 Q. Let me clarify.

24 At Rocky Flats, they use -- or Colorado
25 standards -- excuse me -- they use a ten to the negative

1 six risk factor.

2 Is that --

3 A. Yeah. It's not -- it's not statewide and for
4 all radionuclides. It's very similar to here, where a
5 change has been proposed specifically for waters that
6 could be affected by man-made radionuclides that are --
7 that are traceable to Los Alamos.

8 So completely in parallel to what happened in
9 Colorado, the federal government agreed that surface
10 water runoff during the cleanup and all the, you know,
11 discharges from the site that were expected -- that
12 surface water runoff from Rocky Flats should be
13 regulated so that risk level would be ten to the minus
14 six, even though nobody was drinking that water.

15 The drinking water reservoirs are actually
16 downstream of that runoff and were protected to an even
17 more stringent level for plutonium and americium.

18 Q. The other thing that the Department addressed
19 in their rebuttal of our proposal had to do with our
20 proposals for neptunium and for a TRU standard.

21 Can you address both of those and --

22 A. Yeah.

23 Q. -- response?

24 A. I didn't -- I didn't find neptunium. I don't
25 know what exactly is the reason for neptunium having

1 been omitted. There is very clear evidence that
2 neptunium is present in the runoff from Los Alamos.
3 I've had here in my computer, and I'd be happy to
4 provide this for the record, a research that's just
5 recently in preparing for this.

6 For example, storm water runoff from Los
7 Alamos in -- on July 9th, 2000, was measured at 27
8 picocuries per liter, no uncertainties provided, but on
9 July -- also on that date -- I can't read the whole
10 date, but also in the same month and the same year,
11 there's a measurement of 20.2 picocuries per liter with
12 an uncertainty of 4.9 picocuries per liter.

13 So clearly a positive -- positive detect
14 hugely above any potential fallout levels, and so it is
15 clearly attributable to Los Alamos, well above the
16 criteria proposed for the other comparable radionuclides.

17 Neptunium, just for the record, is, in terms
18 of risk per unit radiation ingested, fairly comparable
19 to plutonium, little bit lower risk per unit of
20 radiation, but it has the same type of alpha radiation,
21 and it is a transuranic radionuclide.

22 So I believe neptunium should be there in that
23 list, along the lines as I said in my testimony.

24 Q. And for the TRU criteria that was proposed?

25 A. Yeah. The two -- there are two different ways

1 in which one could regulate the collection of
2 alpha-emitting radionuclides. A simpler way to do it
3 would be to set a common limit for all alpha-emitting
4 transuranic radionuclides, because they present similar
5 risks, not exactly the same risks per unit ingested, but
6 similar risk.

7 It might make the measurement and compliance
8 assessment -- although this is not exactly a compliance
9 issue, I understand, but at least a measurement
10 reporting and assessment a little bit easier.

11 But if we're going to go strictly according to
12 a ten to the minus risk level, then a separate level
13 should be set for each radionuclide, and I personally am
14 indifferent to which NMED adopts so long as there is a
15 list that's reasonably complete that corresponds to the
16 radionuclides of concern, that are attributable to Los
17 Alamos.

18 And so I think a broader transuranic standard
19 would be -- would be good, but I -- NMED has argued that
20 .15 would not exactly correspond to a constant risk
21 level for all radionuclides, and I'm sympathetic to that
22 argument. They can adopt different numbers for
23 different radionuclides. But the list should be
24 complete. That's the most important thing.

25 Q. Thank you very much.

1 And now I'll let others cross.

2 MS. ORTH: Thank you, Ms. Anderson.

3 Mr. Ames, do you have questions of
4 Dr. Makhijani?

5 MR. AMES: Yes, I have a few, Ms. Orth.

6 Thank you.

7 CROSS EXAMINATION

8 BY MR. AMES:

9 Q. Good morning, Dr. Makhijani.

10 A. Good morning.

11 Q. I just had a couple questions for you
12 regarding your testimony about the Department's practice
13 of using ten to the minus five as the risk level for
14 radionuclides.

15 If I understand correctly, you said it was not
16 appropriate for the Department to use ten to the minus
17 five; is that correct?

18 A. I don't believe I said not appropriate. I
19 mean, obviously, risk levels are a policy matter, and I
20 recognize that New Mexico has been using ten to the
21 minus five.

22 What I've said is in this specific context, in
23 terms of health criteria for Rio Grande waters that --
24 whose uses are planned to be expanded to drinking water,
25 it's appropriate to revisit that ten to the minus five

1 risk level. And I believe that it's appropriate to
2 adopt ten to the minus six for the reasons that I
3 stated.

4 Specifically, I -- I don't see any reason why
5 the people of New Mexico who are going to use this Rio
6 Grande water should be less protected than the people of
7 Colorado who are protected by the federal government.
8 And these are not even standards that you'd be enforcing
9 on Los Alamos and so on. These are -- these are just
10 health criteria for the public to know what is going on.

11 In Colorado, they adopted them as standards
12 for runoff from -- from Rocky Flats. So I don't see why
13 NMED is proposing a lower level of protection for the
14 people of New Mexico.

15 Q. So you understand that it's a policy matter,
16 the choice between ten to the minus five or ten to the
17 minus six is the appropriate risk level.

18 A. Oh, yes. Ten -- yes. Obviously, a risk level
19 is a policy matter, and all I'm pointing out that as a
20 policy matter the federal government already decided
21 that radionuclides associated with Rocky Flats should be
22 regulated, you know, in terms of the operation and
23 cleanup of Rocky Flats with a ten to the minus six risk
24 level, and as a policy matter -- and I've grown old and
25 bald studying policy issues so I feel I can -- I can

1 comment on this -- that New Mexico -- New Mexicans
2 should be protected similarly to the people of Colorado.

3 And where -- and especially as NMED is not
4 proposing statewide health criteria. NMED is proposing
5 criteria in this section for radionuclides that are
6 man-made, clearly associated with Los Alamos. And I
7 note that Los Alamos -- as NMED has noted, Los Alamos
8 doesn't dispute that these radionuclides are associated
9 with Los Alamos. They clearly are.

10 And so in this context, I believe that this
11 ten to the minus five risk level should be revisited for
12 this narrow, specific thing. I'm not -- I'm not studied
13 enough in the overall, you know, chemicals and all the
14 other risk issues that are -- that New Mexico may use
15 ten to the minus five. But in this particular context,
16 I just don't see the justification for continuing with
17 ten to the minus five.

18 I'm not saying that you should change it for
19 everything, but I don't see how you can argue with the
20 people of New Mexico that they should be less protected
21 than the people of Colorado.

22 Q. You're aware the Department doesn't set policy
23 in this matter, it's the Commission that sets the policy
24 on the risk level, correct?

25 A. Well, yes. And I -- I think that the

1 Commission should revisit this and -- and NMED should --
2 should set its health criteria according to the ten to
3 the minus six risk level. And I suggested that in my
4 testimony, and I don't know if the Board has deliberated
5 this since seeing my testimony, but I would hope that it
6 has.

7 Q. And you're aware that the Commission in the
8 past has used ten to the minus five as the risk level
9 for toxic pollutants, for instance?

10 A. Yes, I am.

11 Q. So are you aware of any instance where this
12 Commission has set a risk level of ten to the minus six
13 for any pollutant under the water quality statutes?

14 A. I haven't researched it extensively, but I
15 would accept your word that -- if you're implying that
16 it has not.

17 Q. And one last question, Dr. Makhijani.

18 You were referring to something on your
19 computer regarding neptunium?

20 A. Yes.

21 Q. I'm not really clear what that was.

22 Could you say for the record what document you
23 are referencing?

24 A. Yeah. I'd be happy to supply it for the
25 record.

1 These are data that are being put up by RACER,
2 the contractor to Los Alamos that collects and presents
3 data to the public, of measurements made both by LANL
4 and by the State of New Mexico on -- on radionuclides
5 associated with Los Alamos and groundwater measurements,
6 storm water measurements and so on.

7 So I looked at several of these to see if --
8 since we are arguing largely in parallel with Colorado
9 and the fact that radionuclides should be attributable
10 to Los Alamos for these tighter health criteria that are
11 being proposed, I wanted to make sure that there were
12 measurements of neptunium that were elevated that could
13 be demonstrated to be associated with Los Alamos.

14 And so I researched this in preparation for
15 this, and they clearly are. And I believe that it's
16 very strong grounds for neptunium to be included.

17 And I would be happy to supply this for the
18 record.

19 Q. And as far as you know, that information is
20 not currently in Amigos Bravos' filings?

21 A. I'm -- I don't believe it is.

22 Q. Okay.

23 If you would provide a copy to your counsel --

24 A. Yes. I will do that.

25 Q. -- so we can all get copies. Thank you.

1 A. Yes. I will do that.

2 MR. AMES: Nothing further. Thank you.

3 MS. ORTH: Thank you, Mr. Ames.

4 Is Mr. Butzier here?

5 Oh, ma'am.

6 MS. EVANS: Peabody Energy has no questions.

7 MS. ORTH: Thank you.

8 For LANS, Mr. Kendrick?

9 MR. KENDRICK: LANS has no questions.

10 MS. ORTH: All right.

11 Ms. McCaleb, does San Juan have questions?

12 MS. MC CALEB: No questions.

13 MS. ORTH: All right.

14 Let's see.

15 Mr. Rose?

16 MR. ROSE: No questions.

17 MS. ORTH: Is Mr. Trujillo here?

18 No.

19 Ms. Greenwald?

20 MS. GREENWALD: Yes.

21 CROSS EXAMINATION

22 BY MS. GREENWALD:

23 Q. Good morning.

24 A. Good morning.

25 Q. Dr. Makhijani, on what information do you base

1 the fact that we need more protective standards than the
2 current EPA standards for drinking water and that the
3 New Mexico Environment Department should adopt more
4 protective -- more protective standards than they are
5 proposing in order to give us a knowledge base on what
6 is happening in the river below Los Alamos?

7 A. Well, this is a rather complicated, technical
8 question, but I -- I just briefly say that I already
9 discussed the question of risk levels, and the health
10 criteria just are a direct result of what risk level you
11 adopt.

12 As you know, in the specific case of plutonium
13 and transuranic radionuclides, if one looks to the
14 drinking water standards and a 4 millirem that is
15 adopted for man-made radionuclides, at least as I read
16 the standard -- and we have had some argument with EPA
17 about this -- but that plutonium standards should be
18 tightened by -- from 15 picocuries per liter to .15
19 picocuries per liter, which corresponds to the ten to
20 the minus six level.

21 But in this context, Ms. Greenwald, I would
22 just say that my focus here is on the policy question of
23 what standards -- what risk level should be adopted, and
24 a very consistent picture emerges, you know, depending
25 on whether you adopt ten to the minus five or ten to the

1 minus six. And I've argued very strongly, as I just did
2 in my testimony, that the correct risk level to adopt is
3 ten to the minus six.

4 And it hasn't to do more generally with
5 federal standards or more generally with state standards
6 or more generally with what happened in Colorado, it has
7 really to do with the specific radionuclides coming from
8 Los Alamos and what should be done to protect these
9 specific sections of the river. That's -- that's really
10 the context of my testimony.

11 Q. I have read some of your work, and in your
12 work, it -- it states that the EPA standards are -- this
13 is my understanding as a layperson -- that the EPA
14 standards promulgated in the 1970s did not have the
15 benefit of more recent scientific investigations into
16 the effect of radiation on the fetus of the unborn
17 child.

18 Is that correct?

19 A. Well, this is kind of far afield from where I
20 am. It's not part of my testimony and rebuttal
21 testimony. These are, you know, effects on the fetus.
22 Noncancer effects are not part of the current federal
23 regulatory scheme. All risks are calculated within the
24 current federal regulatory scheme. My testimony is
25 focused entirely on cancer morbidity risk.

1 So I would really like to confine my testimony
2 to what I came prepared here to talk about.

3 Q. So your preparation centered around risks to
4 the public from -- in relationship to irradiation
5 effects.

6 A. Well, Ms. Greenwald, you know, I've done a lot
7 of work in many different areas of radiation. All I'm
8 saying is that in this context I think, as I just
9 testified, there's a policy question as to what risk
10 level New Mexico's going to adopt for protection of
11 these specific segments of the Rio Grande and associated
12 waters in relation to pollutants from Los Alamos, and I
13 think there's a very strong argument to be made that it
14 should be ten to the minus six rather than the more
15 normal ten to the minus five that is used in New Mexico,
16 and I'd just like to leave it at that.

17 I think -- I think the other questions
18 regarding fetal protection and -- there are many, many
19 other associated issues on which we work. They're much
20 broader, they're quite outside the scope of what I
21 understand this proceeding to be. And so I -- I think
22 this -- I just rather speak more narrowly and stay
23 focused on this in terms of the testimony that I've
24 offered.

25 Thank you.

1 MS. GREENWALD: Okay. Thank you.

2 MS. ORTH: Thank you, Ms. Greenwald.

3 Do we have Mr. Smith or Elephant Butte?

4 I don't see him.

5 Mr. Larson, do you have questions?

6 MR. LARSON: No questions, Madam Hearing

7 Officer.

8 MS. ORTH: And Mr. Harwood?

9 MR. HARWOOD: No questions. Thank you.

10 MS. ORTH: All right.

11 Do you have any follow-up, Ms. Anderson?

12 MS. ANDERSON: I have one follow-up.

13 MS. ORTH: All right.

14 REDIRECT EXAMINATION

15 BY MS. ANDERSON:

16 Q. Dr. Makhijani, Mr. Ames noted that -- or asked
17 you that this is a policy question; is that correct? Of
18 the ten to the minus five or ten to the minus six?

19 A. Yes.

20 Q. So this Commission has the authority to
21 revisit that policy and adopt the more stringent limits
22 of ten to the minus six level?

23 A. Yes, obviously. And Mr. Ames said that, you
24 know, the water board sets that policy, and if it did,
25 that NMED has actually said if you adopt ten to the

1 minus six, that the number -- the arithmetic is fairly
2 straightforward. You just have to tighten everything by
3 a factor of ten.

4 MS. ANDERSON: Great. Thank you very much for
5 your testimony.

6 MS. ORTH: All right.

7 Commissioners, do you have questions of
8 Dr. Makhijani?

9 EXAMINATION BY THE COMMISSION

10 MS. ORTH: Commissioner Hutchinson.

11 MR. HUTCHINSON: When we're using a ten to the
12 minus five risk, the calculation that's used is based on
13 the 70 years and the water intake of two liters per day.

14 How does that fit in with your recommendation
15 of a ten to the minus six? I mean, are -- do we have
16 anybody that's consuming two liters a day of river water
17 downstream from LANL?

18 MR. MAKHIJANI: No. I mean, two liters per
19 day is a notional conservative amount that is used, and
20 actually it used to be used for reference man, and now
21 it's sort of for drinking water.

22 However, it's not as nonconservative as it
23 seems, because here currently we are setting a risk
24 level only based on drinking water, Mr. Hutchinson. But
25 actually the water could be used for irrigation, and

1 then you have radionuclides in plants, and we're not
2 taking those risks into our count.

3 So there are a number of associated risks
4 with -- with water being polluted with -- with anything,
5 and if you only focus your standards based on drinking
6 water, I think it's appropriate to have a conservative
7 amount or a slightly greater amount than you would
8 normally be ingesting as a factor to take into account
9 all the risks that you're not including.

10 So while you're literally quite right, of
11 course, babies don't drink two liters of water, there's
12 even difference between men and women, at least in the
13 factor books. But I think it's appropriate to do this
14 in order to take into account other risk factors that
15 are not included.

16 MR. HUTCHINSON: I think that's all.

17 MS. ORTH: Other Commission questions?

18 Other Commission questions?

19 Questions from anyone else?

20 No?

21 Thank you very much, Mr. -- Dr. Makhijani.

22 MR. MAKHIJANI: Thank you.

23 Call your panel.

24 You can reconfigure that table if you'd like.

25

1 ERIK SCHLENKER-GOODRICH, RACHEL CONN,
2 MICHAEL JENSEN and JOHN KLINGEL
3 having been first duly sworn or affirmed, were
4 examined and testified as follows:

5 MS. ORTH: Please.

6 MS. ANDERSON: Thank you.

7 DIRECT EXAMINATION

8 BY MS. ANDERSON:

9 MS. ANDERSON: If you can all please just
10 introduce yourselves and state your affiliation for the
11 record?

12 MR. SCHLENKER-GOODRICH: My name is Erik
13 Schlenker-Goodrich. I'm an attorney with the Western
14 Environmental Law Center in Taos, New Mexico, and also
15 director of our southwest office.

16 MS. CONN: My name is Rachel Conn. I'm the
17 clean water circuit rider and policy analyst for Amigos
18 Bravos.

19 MR. JENSEN: My name is Michael Jensen. I'm
20 responsible for grants and communications with Amigos
21 Bravos.

22 MR. KLINGEL: My name is Jon Klingel. I'm a
23 wildlife biologist and on the Board of Amigos Bravos.

24 MS. ANDERSON: If you can each answer this
25 question. Does your previously filed testimony and your

1 resume attached to that testimony spell out your
2 experience to speak as an expert in these proceedings?

3 MR. SCHLENKER-GOODRICH: Yes, it does.

4 MS. CONN: Yes, it does.

5 MR. JENSEN: Yes.

6 MR. KLINGEL: Yes.

7 MS. ANDERSON: And have you filed previous
8 testimony and exhibits with the Commission that you're
9 now -- endorse and adopt?

10 MR. SCHLENKER-GOODRICH: Yes, as per our
11 modifications and our proposal that was submitted
12 yesterday or the day before.

13 MS. CONN: Yes.

14 MS. ANDERSON: Thank you.

15 MR. JENSEN: Yes.

16 MR. KLINGEL: Yes.

17 MS. ANDERSON: Thank you.

18 Mr. Schlenker-Goodrich, can you please comment
19 on Freeport's change in its rebuttal testimony from a
20 proposal to adopt a variance standard to a temporary
21 standards -- standard?

22 MR. SCHLENKER-GOODRICH: Yeah. As noted,
23 Amigos Bravos has concerns with Freeport -- Freeport's
24 proposal for a variance, and in their rebuttal testimony
25 indicated that they were trying to reframe their

1 proposal from one for a variance to a temporary
2 standard.

3 We remain very concerned about this proposal.
4 However, we would note that it is our understanding that
5 Freeport is going to withdraw that proposal, but they
6 have not yet done that. So I'll let them speak for
7 themselves.

8 But we're not going to provide any further
9 testimony at this time under that assumption, and under
10 the assumption that the Department is going to have a
11 public process to discuss the idea of a temporary
12 site-specific standard instead of a variance procedure.
13 We sort of think they're one and the same, but we're
14 more than happy to discuss that with both Freeport and
15 with the Department in a further proceeding.

16 And we would reserve our right if Freeport
17 does not withdraw its proposal to provide further
18 argument on that point.

19 MS. ANDERSON: And I'd just like to note again
20 for the record that Amigos Bravos with those caveats
21 does reserve its right to rebuttal of Freeport's
22 proposal in this proceeding and potentially in a future
23 proceeding that may be held on that question.

24 Mr. Schlenker-Goodrich, following up on the
25 use attainability analysis discussions that have been

1 had in this proceeding and in NMED's rebuttal testimony,
2 NMED sets forth several reasons on page 21 of that
3 testimony why the Department thinks that its proposal
4 does not grant NMED more authority than is allowed by
5 the Water Quality Act.

6 Can you comment on NMED's reasoning and if you
7 find that persuasive?

8 MR. SCHLENKER-GOODRICH: Yes. I do not find
9 their position persuasive. And the key here with use
10 attainability analysis is that Amigos Bravos believes
11 that the Commission needs to reserve to itself the
12 authority to change the standards that are applied to
13 particular water bodies. Under the Department's current
14 proposal, the Department could go through, apply the
15 hydrology protocol.

16 And what I would emphasize here is that we
17 appreciate the Department's testimony and their position
18 that the use attainability analysis will be complete,
19 that it won't just be a hydrology protocol, that will
20 determine whether or not the water is an ephemeral water
21 or an intermittent water. But if they do determine that
22 it's ephemeral water, they will do further analysis to
23 determine what uses are, in fact, attainable.

24 The concern that we have -- the primary
25 concern that we have is that the way that the

1 Department's proposal is structured is that the
2 Department, once it goes through that UAA process,
3 submits it to the EPA for approval, and including with
4 public participation -- that once they get that
5 technical approval, then that water body will
6 automatically be classified under Section 97 of the
7 water quality standards.

8 Now, what this does, in our perspective, is
9 circumvent the Commission's responsibility to actually
10 approve that transfer of the water body to the
11 Section 97 bin. And what we believe needs to happen is
12 that the Commission needs to reserve the authority to
13 approve that transfer before it happens.

14 Now, what the Department asserts is that,
15 well, of course, the Commission can look at that change
16 of the water body to the Section 97 bin at some point in
17 the future when the Department petitions the Commission
18 to change that classification.

19 But during that time period, the water body
20 will actually have lower protections, water quality
21 protections, and we don't believe that it's appropriate
22 or even legal under the Water Quality Act for the
23 Department to make that decision even with EPA approval
24 and even with public participation, because it's a
25 responsibility reserved to the Commission itself.

1 MS. ANDERSON: Thank you.

2 Also following up on an issue that NMED
3 responded to in their surrebuttal, they addressed our
4 proposal for compliance schedules.

5 Can you comment on their surrebuttal testimony
6 and compliance schedules?

7 MR. SCHLENKER-GOODRICH: Yeah. With their
8 surrebuttal testimony -- I mean, let me emphasize that I
9 think we're sympathetic to the idea that it's difficult
10 to come into compliance with water quality standards,
11 and that we don't want to suddenly create a situation
12 where dischargers are under an onerous obligation to
13 move mountains to come into compliance.

14 What we've proposed is to have a three-year
15 compliance sort of period once the standards are changed
16 for that discharger to come into compliance. And after
17 we reviewed the Department's surrebuttal testimony, you
18 know, we are increasingly sympathetic to that, and what
19 we would like to do is modify our proposal for
20 compliance schedules to sort of account for that.

21 Now, I'm not under the impression that it will
22 fully account for the Department's concerns, and I'll
23 get the proposal in a second, but we will make this
24 modification which we think allows dischargers a little
25 bit more leeway to come into compliance with water

1 quality standards.

2 And what I would emphasize in making our
3 proposal is the idea that in the Clean Water Act, in
4 Section 101(a)(1) -- you know, the idea -- the goal of
5 the Clean Water Act was to entirely eliminate discharges
6 of pollutants to water bodies by 1985.

7 Now, of course, we're -- it's 2009 now, and we
8 sort of laugh about how the standard seems totally
9 impractical, impossible, but, you know, the reality is
10 water quality is a very important matter, and it isn't a
11 laughing matter. And so what we want to do is ensure
12 that compliance schedules are not open-ended, but have
13 some sort of boundary upon which a discharger will come
14 into compliance with standards.

15 And so the modification to our proposal, and
16 this is a modification to 20.6.4.12J, which I think is
17 going to be renumbered I, and our change to this is in
18 regard to the three-year compliance schedule period, and
19 this is in the -- let me count the sentences.

20 It's in the third sentence, where our
21 modification, our proposal starts, "In these instances."
22 And we say, "In these instances, compliance schedules
23 may be included in NPDES permits at the time of permit
24 renewal or modification and shall be written to require
25 compliance at the earliest practicable time, but no

1 longer than 3 years after new standards have been
2 adopted."

3 Now, our modification is going to go directly
4 at the end of that sentence, and it will read, "Or
5 within one year of the date of permit renewal or
6 modification, whichever is greater."

7 Practically what does this mean?

8 So let's take an example. If you get a permit
9 in 2010, and the -- the standards are changed in, say,
10 2014, the Commission changes those standards in 2014,
11 under our position, you -- original position, you would
12 have -- I'm sorry. I'm getting -- I'm getting the dates
13 mixed up.

14 What this would basically do is allow even
15 when a permit is changed or renewed, you automatically
16 have at least one year to come into compliance with it.
17 So that if a standard was changed three years prior to
18 the permit renewal, say in that example -- here's my
19 example. I'm getting the years mixed up.

20 If it was changed in 2012, and your permit was
21 renewed in 2015, you wouldn't have to automatically
22 comply with the water quality standards. You would at
23 least have one year within which to come into
24 compliance.

25 And so we think that that's a reasonable

1 modification and puts an appropriate boundary on the
2 time period to come into compliance with standards that
3 we don't find is unreasonable. And we're obviously
4 willing to talk with the Department more if there are
5 more pragmatic considerations.

6 But the current problem with compliance
7 schedules is that they're open-ended. It's sort of you
8 can get into this endless loop of trying to come into
9 compliance with water quality standards and actually
10 never come into compliance.

11 So we want to put appropriate boundaries on
12 that. Just like everybody here is subject to deadlines
13 every day, we think that compliance schedules should
14 also have clear deadlines.

15 MS. CONN: I would like to add to -- to that
16 testimony, that in the example that
17 Mr. Schlenker-Goodrich just gave, that it would be --
18 actually they would have four years to the -- from the
19 point of the standards being changed to get into -- to
20 start thinking about how to change the facility
21 operations to come into compliance.

22 It's only just that -- and they had at least
23 one year of -- since the permit is modified, but it
24 would be a total of four years since the standards were
25 changed and that there would be that notification.

1 And in addition, I'd like to add that our
2 proposal still is that we don't think that compliance
3 schedules are appropriate at all, really, under the
4 Clean Water Act, and that's our initial proposal, is
5 to -- our first proposal, is to completely eliminate
6 compliance schedules, and then this is our alternate
7 proposal, realizing that the Commission may want to --
8 may not want to take as large a step as completely
9 eliminating compliance schedules.

10 MR. SCHLENKER-GOODRICH: Yeah. And just I'd
11 add Rachel is correct on that, and what I would
12 emphasize here is that once a standard is changed, say,
13 in 2012, in the prior example, they're under notice that
14 there are new water quality standards, and by imposing a
15 deadline, as we've requested, what you're doing is
16 encouraging that discharger to start working with the
17 Department and with EPA immediately to bring their
18 facilities into compliance.

19 Right now there's sort of a disincentive to
20 actually go talk to either EPA or the Department until
21 four -- or three years later, after this Commission
22 would change that standard, to really start talking with
23 EPA and the Department, and to then, at that point,
24 well, oh, now we're getting our permit renewed, how do
25 we come into compliance with the standard that was

1 promulgated three years prior.

2 So we want to put some impetus on actually
3 coming into compliance with standards as soon as
4 possible.

5 MS. CONN: And as we noted in our testimony,
6 under the current standards, there could be a situation
7 where there's eight years from the point of a changed
8 standard to the point that those are being complied with
9 in a permit. And we think that that is unreasonable and
10 too long.

11 MS. ANDERSON: Thank you, both.

12 Just one more -- couple of questions for you,
13 Ms. Conn, on NMED's response to Amigos Bravos' concern
14 regarding Section 128 waters, the waters at Los Alamos
15 that are subject to the limited aquatic life use.

16 We heard yesterday from the Department and in
17 its rebuttal testimony to our proposal that there was a
18 UAA conducted on those segments, but that UAA was not
19 put out for public comment.

20 Do you believe that this renders the UAA
21 invalid?

22 MS. CONN: Yes, I do believe that this renders
23 the UAA invalid. The regulations -- EPA regulations
24 specifically require that there be an opportunity for
25 public comment when a use is being downgraded. Those

1 are found at 131.10(e), in EPA regulations.

2 And this -- this was not, as far as I know,
3 and the Department yesterday seemed to indicate that it
4 wasn't, put out for public comment, this UAA for Segment
5 128 and 126.

6 MS. ANDERSON: So when did you first hear
7 about this new reg?

8 MS. CONN: In the Department's testimony and
9 during this triennial review process was the first time
10 I even knew that this UAA existed.

11 MS. ANDERSON: And you follow these things
12 pretty regularly, otherwise if you received notice, you
13 would have commented?

14 MS. CONN: I try to follow things pretty
15 regularly, especially when it has to deal with both
16 water quality standards and Los Alamos National
17 Laboratories, since we work on various issues regarding
18 water quality related to the lab.

19 MS. ANDERSON: And what is your assessment of
20 the UAA, having had a chance to review it now?

21 MS. CONN: It -- I don't understand that --
22 the UAA at all, how it can come to the conclusion that
23 it does, which is to downgrade aquatic life at -- in
24 both intermittent and ephemeral waters on Los Alamos
25 property from aquatic life to limited aquatic life.

1 And as you'll note in our standards, all other
2 intermittent waters in -- in the state have aquatic life
3 protections. These are the only intermittent waters
4 that I know of in the state that have limited aquatic
5 life protections.

6 And the study that this UAA -- UAA was based
7 on, which we have incorporated into our -- our
8 submittals as Exhibit 3, which is a US Fish and Wildlife
9 Service study, which they specifically examined for
10 intermittent streams on Los Alamos property, they --
11 their recommendations in that study is to upgrade the
12 standards from aquatic life to cold water aquatic life.

13 So the UAA takes -- as their main -- as the
14 main scientific backing of the UAA, they take the US
15 Fish and Wildlife Service study that makes a
16 recommendation in complete opposition to what the UAA
17 does, which is downgrade.

18 In addition, one main justification that the
19 Department uses in the UAA for there not being aquatic
20 life use that -- for there only being a limited aquatic
21 life use is that there are no fish present in the
22 stream, yet the study -- the US Fish and Wildlife
23 Service study says that there -- while they didn't
24 observe fish in these intermittent streams, they did
25 find that there was quality and habitat that was

1 suitable for fish.

2 And this makes the use attainable. And the
3 Clean Water Act clearly states that -- I'm sorry. This
4 makes the use existing. Even though there weren't fish
5 actually there, if the quality exists to support the
6 use, it is an existing use, and therefore it is
7 protected as an existing use and can't be downgraded.

8 And in addition, EPA guidance also says that
9 water quality should be -- this is Water Quality
10 Standards Handbook at section 4.4.2, that water quality
11 should be such that it results in no mortality and no
12 significant growth or reproductive impairment of
13 resident species. Any lower water quality below this
14 full level of protection is not allowed.

15 The fact that sport or commercial fish are not
16 present does not mean that the water may not be
17 supporting an aquatic life protection function. An
18 existing aquatic community composed entirely of
19 invertebrates or plants such as may be found in a
20 pristine alpine tributary stream should still be
21 protected, whether or not such stream supports a
22 fishery.

23 And as I mentioned, the US Fish and Wildlife
24 Service says that -- that the habitat and the quality
25 exists for a fishery. And -- and that makes it an

1 existing use. And at -- in EPA regulations 131.10(h),
2 the EPA outlines that states may not remove designated
3 uses if they are existing uses.

4 And again, to get at my point -- at my point
5 where I was saying that if it -- the quality exists, it
6 is considered an existing use, that definition of
7 existing use provided by the EPA is found at 40 CFR
8 131.3, which says that an existing use is a use for
9 which the necessary quality has been attained, whether
10 or not the use is being made.

11 MS. ANDERSON: Thank you very much.

12 MR. KLINGEL: Can I add something to that?

13 MS. ANDERSON: Oh, sure.

14 MR. KLINGEL: In addition, that UAA lists 12
15 streams as part of Segment 128. The Fish and Wildlife
16 Service studied -- the only information they provided at
17 all in the UAA was only on four streams. And all four
18 of those are up on the Pajarito Plateau, which prevents
19 fish from coming up from the river into those segments.

20 However, there are three streams that are on
21 LANL that are part of that segment that connect to the
22 river. And there's absolutely no information. Are
23 there fish using those streams? Are there other aquatic
24 life using those streams? Nothing mentioned.

25 MS. ANDERSON: Thank you.

1 MS. ORTH: Thank you.

2 Ms. Anderson, you may want to take that seat
3 there to sit with your panel.

4 MS. ANDERSON: All right. Thank you.

5 MS. ORTH: We've got some great lawyers, but
6 they might slip up and ask an objectionable question.

7 Mr. Ames.

8 MR. AMES: Thank you, Ms. Orth.

9 CROSS EXAMINATION

10 BY MR. AMES:

11 MR. AMES: Good morning.

12 MS. CONN: Good morning.

13 MR. SCHLENKER-GOODRICH: Good morning.

14 MR. AMES: I just have a few questions for you
15 all about your testimony on ephemeral waters compliance
16 schedules primarily.

17 Do you understand that ephemeral waters under
18 the current water quality standards are subject to
19 primary contact and aquatic life uses?

20 MR. KLINGEL: Subject to -- say again?

21 MR. AMES: Do you understand that under the
22 current standards, that ephemeral waters are subject to
23 primary contact and aquatic life uses?

24 MS. CONN: I could --

25 MR. KLINGEL: Go ahead.

1 MS. CONN: I'd like to address that.

2 Yes, if you dig. I think that it's confusing,
3 because, in fact, such Segment 98 is labeled
4 intermittent waters, and so I think it's very confusing
5 to the public to figure out what currently ephemeral
6 waters are being protected as.

7 I understand further in that definition it
8 says all nonclassified, nonperennial waters in the
9 state, but I think it's very confusing that that's
10 listed under the intermittent segment of 98.

11 So I -- while I agree that if you dig far
12 enough you can make the case, but that nonperennial,
13 ephemeral waters are protected by aquatic life and
14 primary contact, I don't think it's clear, because it
15 falls under the segment called intermittent.

16 MR. AMES: Well, confusion aside, I'm not
17 really suggesting that we need to make a case. You're
18 agreeing that they -- these ephemeral waters are
19 protected currently by the primary contact and aquatic
20 life uses.

21 MS. CONN: I -- well, I guess I wouldn't --
22 I -- reading it, I would think so, but I don't know if
23 legally -- if you have -- under the heading of
24 intermittent, and then you have nonperennial listed
25 underneath that, if that would just apply to

1 intermittent waters or whether it would also apply to
2 ephemeral waters.

3 I would say from my reading it, as, you know,
4 an expert in these matters and knowing to look closely
5 into each segment, I would -- I would -- I would
6 probably assume, yes, they are. But I -- in terms of --
7 I haven't looked at the legal setting for if you have it
8 under a category called intermittent, whether you can
9 then be applying protections to ephemeral waters and
10 they are -- an intermittent heading.

11 MR. AMES: Okay.

12 So I'll take the answer as yes; is that
13 correct?

14 MS. CONN: Correct.

15 MR. AMES: Thanks.

16 And is it true, also, that the -- these
17 ephemeral waters cannot -- that the Commission -- let me
18 rephrase that.

19 Isn't it true that these uses apply until
20 changed pursuant to a UAA?

21 MS. CONN: Yes.

22 MR. AMES: And do you understand the
23 Department's process to be expedited, but to also
24 require a UAA before these uses for ephemeral waters can
25 be changed?

1 MS. CONN: Yes. And we very much appreciate
2 that -- that that clarity was made yesterday --

3 MR. AMES: Okay.

4 MS. CONN: -- that a UAA -- a hydrology
5 protocol is not considered a UAA.

6 MR. AMES: Now, Mr. Schlenker-Goodrich said
7 that the uses would be automatically reclassified under
8 97 when the Department goes through the expedited
9 process.

10 Isn't it true, though, that the Department,
11 after going through the -- this complete UAA process,
12 would only list them on the web, under the Department's
13 proposal?

14 MR. SCHLENKER-GOODRICH: I think that's true,
15 but I think there's some confusion in how the process is
16 actually structured, whether or not that if they were
17 classified -- my understanding actually is that they
18 go -- would go -- once the Department lists them on the
19 website, once it then gets technical approval by EPA,
20 then it will be classified and managed under Section 97.

21 It would be put into -- I think you refer to
22 it as a bin, that it would be put into that bin, and
23 then, quote, unquote, periodically the Department would
24 then petition the Commission to formally put that
25 listing in the water quality standards.

1 And during that time period, once it goes
2 through the whole process the Department lays out, once
3 EPA grants that technical approval, the water quality
4 standards that would actually be applied to that would
5 be the Section 97 standards. So there would, in fact,
6 be a de facto downgrade even if the Commission --
7 pending the point that the Commission formally listed
8 under the standards.

9 MR. AMES: So you agree the Commission would
10 have the final approval of the listing of the water
11 under Section 97.

12 MR. SCHLENKER-GOODRICH: Yeah. We've never
13 disputed that. The concerns that we have are twofold.

14 Number one, that there is this time period,
15 this limbo period where the Commission doesn't have the
16 opportunity to review what the Department has done and
17 EPA's approval of that and that the Commission actually
18 has a responsibility to make that decision before the
19 water quality standards can actually be downgraded for
20 those particular segments.

21 So there's this area, this sort of limbo
22 period where the water body will be managed under weaker
23 standards that the Commission would not be able to
24 review.

25 And then the periodic element to the sort

1 of -- they would periodically come to the Commission to
2 list those waters is very open-ended, and testimony
3 yesterday by the Department indicated that it will be
4 done by the next triennial review. Well, if that were
5 the case, it should be written explicitly into the
6 provision.

7 And even if it was a -- written specifically
8 into the provision, we nonetheless -- again, our
9 position is the Commission needs to approve any
10 downgrading of uses before it's applied.

11 MR. AMES: So the Department testified
12 yesterday -- the day before yesterday that it would
13 periodically appear before the Commission with any
14 waters that are -- need to be relisted under Section 97,
15 correct?

16 MR. SCHLENKER-GOODRICH: Correct.

17 MR. AMES: And it said periodically means at
18 least no later than the triennial review, correct?

19 MR. SCHLENKER-GOODRICH: That's -- that was
20 only indicated to us in testimony. It's not clear from
21 the face of the language itself.

22 MR. AMES: But it's clear from the testimony
23 that those hearings would occur much more frequently
24 than triennial, correct?

25 MR. SCHLENKER-GOODRICH: Theoretically, that's

1 a possibility.

2 MR. AMES: Okay.

3 Let's talk about compliance schedules briefly.

4 Can you give me an example of an NPDES permit
5 issued in the State of New Mexico with a compliance
6 schedule that violates EPA regulations?

7 MR. SCHLENKER-GOODRICH: No. We did not do a
8 review of New Mexico permits. Our testimony lists a
9 study in California that reviewed NPDES permits and
10 indicated that there were unacceptably long compliance
11 schedules. But we don't have any evidence -- we didn't
12 review the permits for New Mexico.

13 MR. AMES: Okay.

14 Now, in your testimony today,
15 Mr. Schlenker-Goodrich, you've proposed new language
16 regarding the length of time for a compliance schedule.

17 If I understand correctly, the source would
18 have to be in compliance within one year of permit
19 renewal; is that correct?

20 MR. SCHLENKER-GOODRICH: Sort of. They would
21 have at -- whichever is greater, either three years or
22 within one year. So if the standard was changed --
23 let's take the example -- for math purposes, it's easier
24 in my brain -- you get a permit in 2010 and the renewal
25 or modification would then be in 2015. If the -- if the

1 standard was changed in 2014, you would have until 2017
2 to actually come into compliance. So you'd have two
3 years after your permit renewal or modification to come
4 into compliance with the water quality standard.

5 So it's whichever is greater. You would have
6 at least one year from the point of your permit renewal
7 or modification.

8 MR. AMES: Okay.

9 And I think you testified that adding this one
10 year provision would be reasonable.

11 Did you evaluate compliance schedules and
12 NPDES permits to make that determination?

13 MR. SCHLENKER-GOODRICH: No. I think from our
14 perspective it's less a technical matter and more a
15 matter of policy, of setting appropriate boundaries on
16 the time period to come into compliance. And again, we
17 refer back to the Clean Water Act in Section 101(a)
18 where it says that, you know, the goal is to eliminate
19 discharges entirely by 1985.

20 That was -- that was a basic policy
21 determination by Congress. And with the provisions for
22 compliance schedules that New Mexico has, and EPA's
23 provisions for allowing compliance standards and
24 appropriate circumstances, we think it's reasonable.

25 You're sort of weakening already a goal of the

1 Clean Water Act, and to put that boundary on the
2 compliance schedule, we think, as a matter of policy, is
3 appropriate. We don't view it necessarily as a
4 technical matter.

5 MR. AMES: Would extensions be available?

6 MR. SCHLENKER-GOODRICH: Under our proposal,
7 no. You know, and we've batted around the idea of
8 whether or not to have -- to build in an extension. And
9 I think -- and I can't speak for Amigos Bravos, but, you
10 know, personally, I would be open to the idea, but I
11 think any exception would have to be -- there would have
12 to be parameters put on that.

13 And in short, you know, the idea here is --
14 and when you look at compliance schedules in the context
15 of other provisions like mixing zones, there are --
16 there are concerns that we are building in multiple
17 loopholes into our ability to conform to water quality
18 standards and -- with compliance schedules and with
19 mixing zones.

20 But let me -- because your question is on
21 compliance schedules. You know, we don't want to
22 have -- we don't want to grant compliance schedules as a
23 matter of course. From our perspective, we want to put
24 some burden on the discharger to demonstrate why they
25 should get a compliance schedule in the first place.

1 And there's sort of general language about,
2 well, on a case-by-case basis we'll take a look at this
3 or we'll look at it when appropriate, which is EPA's
4 sort of language on this. And we want to start making
5 it less open-ended and put some what we view as very
6 reasonable policy limits on the grant of compliance
7 schedules.

8 MR. AMES: So your whole idea here for
9 compliance schedules seems to be a bit in flux. You've
10 said that you are proposing this from a policy
11 perspective, you didn't take technical matters into
12 consideration, you're open to new ideas, you have new
13 language now, and you also testified that you'd be
14 willing to talk to the Department some more regarding
15 its pragmatic concerns.

16 In light of all that, why not simply withdraw
17 your proposal for further discussion?

18 MR. SCHLENKER-GOODRICH: Well, I think it's,
19 you know, our proposal on the table, and I was speaking
20 more personally on this, and I stated that very clearly,
21 on the idea of the exception, and we batted -- we batted
22 around the idea in the car today.

23 But our proposal right now is very clear that
24 we want this three-year limitation with that one-year
25 modification built in as per the language, whichever is

1 greater. So that is a formal proposal that we have
2 before the Commission, and I -- we do not intend to
3 withdraw it.

4 MR. AMES: Thank you. Nothing further.

5 MS. ORTH: Thank you, Mr. Ames.

6 Peabody Energy?

7 MS. EVANS: No questions.

8 MS. ORTH: LANS?

9 MR. KENDRICK: No questions.

10 MS. ORTH: San Juan Water Commission?

11 MS. MC CALEB: No questions.

12 MS. ORTH: Chevron Mining?

13 MR. ROSE: No questions.

14 MS. ORTH: Dairy Producers?

15 No one here.

16 Ms. Greenwald?

17 MS. GREENWALD: No questions.

18 MS. ORTH: Freeport-McMoRan? Mr. Larson?

19 MR. LARSON: No questions.

20 MS. ORTH: No?

21 And Mr. Harwood.

22 MR. HARWOOD: No questions.

23 MS. ORTH: There you are. All right.

24 Commissioners, do you have questions of the

25 Amigos Bravos panel?

1 EXAMINATION BY THE COMMISSION

2 MS. ORTH: Commissioner Hutchinson.

3 MR. HUTCHINSON: I think I heard the answer to
4 this, but I want to make sure. And this is concerning
5 the compliance schedules.

6 Did you -- and I guess I'll pass this to
7 Mr. Schlenker --

8 MR. SCHLENKER-GOODRICH: Schlenker-Goodrich.

9 MR. HUTCHINSON: Schlenker.

10 Did you say that you did not review permits to
11 determine the length of time the permit holders came
12 into compliance?

13 MR. SCHLENKER-GOODRICH: I didn't personally,
14 not for New Mexico. Our evidence relies on a study in
15 California that looked at NPDES permits issued in
16 California, and indicated that there were unacceptably
17 long compliance schedules and suggested that putting
18 some boundaries on them was appropriate.

19 MR. HUTCHINSON: Did anybody else on the
20 panel?

21 MS. CONN: No. But I do believe that we heard
22 yesterday from the Department that compliance schedules
23 were a matter of course that were -- that part of the
24 process that were issued to dischargers.

25 MR. HUTCHINSON: Okay.

1 MS. CONN: And for an example -- let me
2 clarify that.

3 I did not do -- we did not do an extensive
4 study on all compliance schedules in New Mexico, though
5 we do have experience on a specific compliance schedule
6 having to do with a permit renewal at Los Alamos
7 National Laboratory where there have been standards in
8 place for -- since the last triennial review, and there
9 still -- there's a draft permit at play right now for
10 the lab, and there is a three-year compliance schedule
11 that will presumably go into play at the time that the
12 permit is finally finalized, which is -- in that case,
13 it will have a compliance schedule that will potentially
14 be greater than eight years in that case, greater than
15 eight years since the time that the standards were
16 changed.

17 MR. HUTCHINSON: Would your suggestion change
18 that?

19 MS. CONN: Yes.

20 MR. HUTCHINSON: So the -- the compliance --
21 the compliance schedule language that you're saying here
22 would come into effect regardless of whether or not an
23 actual permit was issued? Is that what you're saying?

24 MS. CONN: Compliance schedules are only
25 relevant with a permit in relation to an NPDES permit.

1 MR. HUTCHINSON: Okay.

2 So the -- even if we had your language
3 adopted, the example that you're giving wouldn't -- it
4 wouldn't change the length of time that we've been
5 looking at.

6 MS. CONN: I think it would change it by two
7 years, because the permit would go -- the language with
8 the modification that Mr. Schlenker-Goodrich included in
9 his response to Mr. Ames is that it would be one year
10 from the time of permit -- it would be either three
11 years from the time of -- the standards are changed, and
12 we've already far exceeded that -- those three years in
13 terms of the last -- the standards that were changed
14 during the last triennial review, and -- or one year
15 from the time of the permit renewal.

16 And so you would have whichever is greater.
17 And in this case, it would be the one year from the time
18 of permit renewal, which would be a greater time,
19 because presumably that would be -- all the time since
20 the last triennial review, which is arguably getting up
21 to four -- four years now, plus another year. So it
22 would be five years.

23 MR. SCHLENKER-GOODRICH: And, Commissioner
24 Hutchinson, I think in direct response to your question,
25 this would not -- and maybe this was your question, and

1 correct me if I'm wrong -- it wouldn't require us to
2 suddenly go back and rewrite every single compliance
3 schedule for every single permit that's out there. By
4 promulgating a new standard as we recommend it, it would
5 only apply to future permits, final decisions on permits
6 by -- well, at this point, by EPA for NPDES permits.

7 So it wouldn't require suddenly everybody to
8 start moving immediately. It would only pertain to
9 future permit renewal or modifications with compliance
10 standards -- compliance schedules that are built into
11 those new permit renewal or modifications.

12 MR. HUTCHINSON: Okay.

13 So what -- what you're going back to is in
14 your original testimony talking about the pragmatic
15 aspects that are applied now. What you're saying is you
16 want to eliminate any of those pragmatic delays, let's
17 say.

18 MR. SCHLENKER-GOODRICH: No. I mean, I think
19 the compliant -- the very basis for having a compliance
20 schedule is only as per the current standard on a
21 case-by-case basis or as EPA considers it when
22 appropriate. And so that builds in certain pragmatic
23 considerations.

24 What this would do -- it can only be allowed
25 in pragmatic considerations in a sense. And our view is

1 that there's a presumption that you pretty much
2 shouldn't have a compliance schedule unless you
3 demonstrate a need to have a compliance schedule. And
4 so what we're suggesting is let's put a time boundary on
5 how long that compliance schedule should be put in
6 place.

7 And we think that the way our proposal is
8 phrased is -- sort of puts a very hard boundary of
9 either three years from the point that the standard is
10 issued or one year after the permit renewal or
11 modification. And that I will concede is -- we view it
12 as more a matter of policy and doesn't necessarily
13 respond to all the considerations of the discharger
14 themselves.

15 One thing I would emphasize on that point is
16 that EPA's own regulations for compliance schedules --
17 and this is 40 CFR 122.47 -- already provides that a
18 compliance -- attaining compliance would require issued
19 or revised less than three years before recommencement
20 of a discharge.

21 And what this language means is that if you
22 get a permit in 2010, and then the Commission here
23 changes the standards at some point between 2010 and
24 2012, and then they come back for a permit renewal in
25 2015, the standard being changed between 2010 and 2012

1 does not provide a basis for getting a compliance
2 schedule. Legally they can't get a compliance schedule.
3 In fact, they've been under notice for more than three
4 years that a standard has been changed.

5 So what we view our proposal is sort of the
6 flip side of that same coin. And EPA's policy basically
7 says, look, you're under notice of a water quality
8 standard, you got to come into compliance pretty quickly
9 on this, and they put a hard boundary on what that
10 window actually is when that compliance schedule is
11 permissible, only within three years of your permit
12 renewal or modification.

13 We're proposing to essentially flip that to
14 the other side to say, well, when you get that, you have
15 three years to actually come into compliance with that
16 standard. And ours is actually more lenient because we
17 add in that one year buffer on top of that. So you
18 don't have to suddenly come in as of the specific date
19 of your permit renewal or modification.

20 So it's a flip side of EPA's existing policy,
21 and slightly more lenient.

22 MS. CONN: Though I would -- I would note that
23 it doesn't necessarily -- it isn't necessarily more
24 lenient than -- than --

25 MR. SCHLENKER-GOODRICH: Lenient temporally, I

1 guess.

2 MS. CONN: Yeah.

3 Though I would also like to note that
4 currently I think that the way that the compliance
5 schedules are applied, and I don't think the language in
6 the current standards is clear enough to incorporate the
7 citation that Mr. Schlenker-Goodrich just mentioned from
8 the EPA -- I think that the way that the standards are
9 currently applied -- there are -- there are compliance
10 schedules that are issued for -- within that two-year
11 period, and I think that our language actually gets the
12 State of New Mexico more in line with EPA regulation
13 than what is currently in place.

14 MR. HUTCHINSON: Okay.

15 I'm kind of looking at some possible
16 unintended consequences here. If we adopt your
17 suggested language, and we're coming up on our next
18 triennial review, or someone petitions for a standard
19 change, we're essentially commanded in New Mexico's
20 Water Quality Act to adopt certain pragmatic positions.

21 In other words, we're told to, in making these
22 standards, we shall give weight it deems appropriate to
23 the facts and circumstances, including use and value of
24 the water for the water supplies, propagation of fish
25 and wildlife, recreation purposes and agricultural,

1 industrial and other purposes.

2 So if we had this language in place, and we
3 were looking at adopting a standard that was going to
4 alter a number of permits, we would have to stop and
5 give considerable pause, given our charge under the
6 Water Quality Act, as to whether or not we were going to
7 alter those standards.

8 Would you find that acceptable?

9 MS. CONN: I'm not sure I understand your
10 question.

11 Could you --

12 MR. HUTCHINSON: Okay.

13 If -- if we're looking at altering a
14 standard --

15 MS. CONN: Yes.

16 MR. HUTCHINSON: -- that your language
17 triggers a compliance order under --

18 MS. CONN: Um-hum.

19 MR. HUTCHINSON: -- then we're going to have
20 to consider that impact given our charge under the Water
21 Quality Act.

22 Would that be acceptable to you if we said,
23 well, you know, we really can't alter this standard
24 right now, because we don't see that the permit holders
25 are going to be able to come into compliance within a

1 three-year period?

2 MR. SCHLENKER-GOODRICH: Well, I think at that
3 time they would have the opportunity to provide evidence
4 that they wouldn't come in. So there would be a public
5 process or change in that standard where they could make
6 that case that they pragmatically would not be able to
7 comply.

8 And you're correct that the Commission has the
9 discretion to account for those pragmatic circumstances.

10 What I would say is those pragmatic
11 circumstances, as I understand the language, are to be
12 taken into consideration, but they don't undermine
13 this -- the primary thrust of both the Clean Water Act
14 and the Water Quality Act to restore and maintain water
15 quality.

16 So that's the sort of primary objective of the
17 Commission, but taking into consideration pragmatic
18 circumstances. So the Commission, you know, doesn't
19 have to act unreasonably or too rigidly.

20 So what I would say is that the Commission
21 does have the authority to take into account those
22 pragmatic considerations and, at the time any standard
23 was proposed for a change, could actually account for
24 those pragmatic considerations in whatever standard it
25 was re-evaluating.

1 MS. CONN: And I think it's very reasonable to
2 have three and potentially four years to come in
3 compliance -- compliance with the new standard. I think
4 that that is reasonable to expect.

5 MR. SCHLENKER-GOODRICH: And that actually
6 provides a good example of how this would work
7 functionally, in that if a standard was changed and a
8 particular discharger was like, wow, we're not going to
9 be able to comply with this, then it could clearly come
10 to the Commission, make that case to the Commission, and
11 then the Commission could take that into account and
12 perhaps build that into the standard itself.

13 So -- and again, this goes to the idea that
14 we're not asking all the existing permits to be modified
15 at this time. It's only future permit renewals and
16 modifications. So what -- in a sense, what we're doing
17 is we're closing the door to unacceptably long
18 compliance schedules, but as per your question, we're
19 also retaining -- the Commission is retaining its own
20 flexibility to consider these issues.

21 MR. HUTCHINSON: Okay.

22 I think I have another one here, but I'm
23 missing it, I guess.

24 I'll just hold on for a second.

25 MS. ORTH: Commissioner Bland.

1 MR. BLAND: On that point that Commissioner
2 Hutchinson was just talking about, I think it's really
3 important that the Water Quality Commission consider the
4 effects of regulations that it adopts and how practical
5 they are to implement, and also to weigh in with that,
6 which is one of the considerations -- but also weigh
7 within that the level of concern that currently exists
8 regarding, for example, the proposal that you're making
9 right now.

10 And I just say that as preface to a question
11 I'm going to ask you.

12 You've testified that you haven't looked into
13 the issues associated with New Mexico compliance with --
14 with what you might consider unreasonably long
15 compliance schedules, but you did mention one particular
16 case where you thought that this could go for an
17 unreasonably long time, in your words.

18 Do you know of other cases, as well, where
19 this is currently a problem?

20 I mean, this has been in effect -- this
21 program's been in effect for decades now, and I'm trying
22 to get a sense of the magnitude of the problem as you
23 see it.

24 MS. CONN: Well, I think that -- that our
25 position is that we think the compliance schedules at

1 all are a problem, and us providing this alternative
2 language is our attempt to try to take into
3 consideration that -- the needs of dischargers in the
4 state.

5 So I would say that it's already us bending
6 over backwards in terms of where we think the water
7 quality standards should be and, in fact, what we
8 believe is a truer interpretation of the Clean Water
9 Act, regardless of what EPA regulations allow or don't
10 allow.

11 So -- and I forgot the second part of your
12 question.

13 MR. SCHLENKER-GOODRICH: Well, what --

14 MR. BLAND: The main question was are there
15 other cases you know of over the last many years where
16 this has been a real issue, in terms of the length of
17 time to come into compliance.

18 MS. CONN: Well, I think it's a real issue
19 that as a matter of course any permit gets three --
20 basically gets three years of compliance to -- as a
21 matter of course, that it -- it's a common practice
22 that -- as we heard from the testimony yesterday from
23 the Department, that it's just as part of issuing a
24 permit.

25 So I think that it's widespread -- it's a

1 widespread problem across the state, that all permits
2 get these compliance schedules and -- and without
3 looking to see if they're really necessary. Maybe in
4 some cases there could be facilities that are getting
5 compliance schedules that already have the technology in
6 place to meet the lower standards, but they -- they
7 don't have to meet them until the three years
8 compliance.

9 MR. SCHLENKER-GOODRICH: And what I would say,
10 and not to be too rhetorical on this, is there are a lot
11 of permits in the State of New Mexico and NPDES permits,
12 and to undertake that kind of evaluation would be
13 incredibly labor intensive, and not to sort of whine too
14 much, but it's very difficult for nonprofit
15 organizations to do that.

16 And that's sort of why we view this as sort of
17 a core policy matter, and for looking -- let's try to
18 alleviate these problems that may arise in the NPDES
19 permit process in advance.

20 And to do that, that provides the public some
21 assurances, especially a public that doesn't have the
22 ability to engage in a very technical NPDES permitting
23 process. Most people don't even know what an NPDES
24 permit is, and I bet if you even surveyed this room,
25 most people wouldn't even know what the acronym actually

1 stands for, or there would be several people who
2 wouldn't know that.

3 So we view this as sort of a core policy
4 matter to address -- these are -- and we concede that
5 with the exception of the example Ms. Conn provided,
6 that these are sort of theoretical, but at the same
7 time, it's very easy to close these potential loopholes
8 and to nip them in the bud now.

9 And as Commissioner -- and based on
10 Commissioner Hutchinson's question, the Commissioner
11 nonetheless -- the Commission nonetheless retains its
12 authority to take into account pragmatic considerations.

13 But right now the way the policy is, it's
14 open-ended, it's incredibly difficult to track
15 compliance schedules, whether they're being issued
16 appropriately or not, whether there are proper
17 boundaries put on them, whether the discharger is
18 actually demonstrating why they need a compliance
19 schedule, and why they couldn't simply impose proper
20 controls now to come into compliance.

21 So because it's so difficult for us to kind of
22 take apart every compliance schedule that's out there,
23 and whether or not particular -- like we have sympathy
24 for, say, a small discharger, small municipal discharger
25 like a wastewater treatment facility, but there are

1 large facilities that this could be very easily complied
2 with.

3 And so, you know, it's just -- pragmatically,
4 it's very difficult, from our perspective, to do that
5 sort of exhaustive review.

6 MR. BLAND: I guess based upon lack of
7 additional information, I remain concerned about the
8 level of work that would be required by the Department
9 to comply with this particular kind of modification that
10 you're suggesting, especially considering it doesn't
11 seem to have much in the way of provisions for taking
12 into consideration certain individual circumstances.
13 Obviously, the circumstances that this will cover are
14 extremely broad across the state.

15 And that will be one of the things I will look
16 at in considering this.

17 MS. CONN: Well, I think just to note -- was
18 that a question or no?

19 MR. BLAND: No.

20 MS. CONN: No.

21 MS. ORTH: Other Commission questions?

22 MR. HUTCHINSON: But that was my question that
23 I was fishing for earlier.

24 MS. ORTH: That's great. That's great.

25 MR. HUTCHINSON: You know, I mean, did you

1 give consideration to the -- to the Department's burden
2 that this would create?

3 I mean, a lot of times the compliance that
4 we're talking about or -- is -- the compliance schedule
5 is based upon the Department's ability to actually have
6 this occur, you know, have them come into compliance.

7 MS. CONN: Well, I think that the EPA is the
8 one that is writing the permits for -- for the state.
9 So there -- it's EPA -- it would actually be more of a
10 burden potentially on EPA in terms of figuring out -- it
11 would just be a matter of course of figuring out the
12 length of time of the compliance schedule. I don't
13 see -- I actually don't see that a burden on the
14 Department, in this case.

15 MR. HUTCHINSON: Okay.

16 MS. CONN: Could you clarify what --

17 MR. HUTCHINSON: Well, I guess a burden on EPA
18 at this point, then. You know --

19 MS. CONN: They're already writing compliance
20 schedules into their permits. So I guess the added
21 burden would be to just keep track of when the water
22 quality standards have been changed in the state and
23 make sure that the compliance schedule fits that -- that
24 time frame.

25 MR. HUTCHINSON: Right.

1 And who -- who -- who's required to ensure
2 compliance?

3 MR. SCHLENKER-GOODRICH: Well, the EPA itself
4 presumptively when they're issuing an NPDES permit is
5 ensuring compliance with water quality standards, and
6 then the state, the Department, through the 401
7 certification process, will review that permit to
8 determine whether it's in compliance with water quality
9 standards itself.

10 Here there's really no additional burden. And
11 in fact, you could make the argument, that's a very good
12 argument, that the very idea of having compliance
13 schedules imposes a very severe burden on the regulatory
14 agencies, because instead of having it clear you must
15 comply with water quality standards at the point you get
16 your permit, we're building in this whole loophole
17 process where both regulatory agencies, EPA and NMED,
18 have to say are they actually complying with their
19 compliance schedule, what is a reasonable time to comply
20 with that.

21 Now, as I understand the Commission's
22 position, they -- you want to ensure pragmatic
23 considerations are taken into account for the discharger
24 themselves.

25 Well, that's appropriate, but I think here it

1 actually provides some clarity and that -- you know, we
2 sort of have two policy vehicles in place. We have
3 water quality standards, and we have an NPDES permitting
4 process. And under the water quality standards, by
5 providing for compliance schedules, you're providing to
6 EPA, who issues the NPDES permit, what is the State of
7 New Mexico's position on compliance standards.

8 So under our proposal, or even under the
9 existing provision, all the state is doing is providing
10 EPA with guidance on how we want compliance schedules to
11 look.

12 So I don't necessarily see it being any more
13 burden on the regulatory agencies. It's just providing
14 clarity about what are the precise boundaries on those
15 compliance schedules, should they be open-ended where we
16 allow for, you know, very, very, very particularized
17 determinations, which is within the Commission's
18 discretion to impose, or do we want to put some more
19 hard and fast boundaries on those compliance schedules,
20 which, frankly, provides more clarity and provides both
21 the public and the regulators a little bit easier time
22 figuring out what a compliance -- each particular
23 compliance schedule should look like.

24 MR. HUTCHINSON: Now, we got your -- I guess
25 this is the modification to the proposed changes

1 yesterday. So I've been going through this, but I'm
2 trying to listen to your testimony, as well, but is
3 there some changes that are on the fly, so to speak.

4 So under the definition for human-made causes,
5 you're -- you're withdrawing that.

6 MR. SCHLENKER-GOODRICH: Correct.

7 MR. HUTCHINSON: But it says here you are
8 maintaining a proposal under natural background.

9 MR. SCHLENKER-GOODRICH: Correct. And that's
10 the Department's existing proposal, and it would
11 basically just provide climate changes as an example.

12 MR. HUTCHINSON: Okay.

13 MR. SCHLENKER-GOODRICH: And I would just note
14 that the Department itself has indicated in its
15 testimony that it does not consider climate change part
16 of the natural background.

17 So it's more of an informational purpose. It
18 doesn't impose any sorts of substantive requirement.

19 MR. HUTCHINSON: All right. Hmm.

20 I -- okay.

21 In -- in a lot of the written testimony, there
22 were citations referring to the anthropogenic sources
23 of -- of climate change.

24 Are you prepared to answer any questions on
25 those?

1 MR. SCHLENKER-GOODRICH: Depends on the
2 question.

3 MR. HUTCHINSON: Oh, okay.
4 Did you review all of those?

5 MR. SCHLENKER-GOODRICH: I'm sorry. All of
6 what?

7 MR. HUTCHINSON: All of the -- the cited
8 studies?

9 MR. SCHLENKER-GOODRICH: In our testimony?

10 MR. HUTCHINSON: Yes.

11 MR. SCHLENKER-GOODRICH: Yes. I've read all
12 of them.

13 MR. HUTCHINSON: Okay.

14 And your background in -- and you've -- your
15 qualifications to analyze those?

16 MR. SCHLENKER-GOODRICH: You know, I'm
17 obviously an attorney, I have a -- my attorney degree is
18 in environmental and natural resources law, and I also
19 have a bachelor's in science from Cornell University
20 where I specifically studied natural resources. So that
21 was biological sciences. No PhD or master's, but my
22 bachelor's is specifically hard science.

23 MR. HUTCHINSON: Anybody else on the panel
24 want to address that?

25 MR. SCHLENKER-GOODRICH: Yeah. The other

1 thing I would note, at least in particular to New
2 Mexico, it's more -- it's not a question of the science
3 necessarily. It's more simply a policy question.

4 The Governor, through executive order, has
5 acknowledged anthropogenic climate change. So it's not
6 necessarily a scientific issue so much as it is just a
7 matter of policy, at least in terms of the Governor's
8 office and state agencies, that climate change is real
9 and needs to be addressed.

10 And in fact, many of the studies that we've
11 referenced have been prepared by New Mexico State
12 agencies, in particular the State Engineer's Office, on
13 water issues.

14 MR. HUTCHINSON: Okay.

15 So whenever we're including this as a natural
16 background -- or part of the natural background
17 definition -- give me some examples of -- of what --
18 what this is going to affect. I mean, what kind of
19 changes are we looking at as far as the Commission or
20 the Department or the other constituent agencies?

21 When we -- when we're examining the water
22 quality of a stream, how are we to determine whether or
23 not we have a climate change issue in that stream, based
24 on all these studies that you're citing here?

25 MR. SCHLENKER-GOODRICH: I think it's a very

1 site-specific evaluation, you know. For example, when
2 the Department is going through its own assessment --
3 applying its own assessment protocols to particular
4 stream segments, then that could be taken into account
5 to determine whether -- what is the vector of impact on
6 that particular water body.

7 And so it would be to the discretion of the
8 agency -- to the Department to determine whether or not
9 a climate change was, in fact, a part of the problem in
10 that water quality body.

11 And the substantive effect, for example, is
12 that when you remove -- in EPA's regulations, in 40 CFR
13 131.10, subsection (g), when you're removing a
14 designated use, when it's a human-caused condition
15 versus natural background, there are consequences to how
16 you -- how you would remove that particular use.

17 So that's where this sort of substantive
18 implication will come into place. You know, how do you
19 review -- I'm sorry. How do you remove a designated use
20 and whether or not it's appropriate. You would have to
21 apply the proper EPA regulation.

22 And in that situation, for climate change, say
23 climate change was determined to say -- prevent
24 attainment of a particular use, warranting removal of
25 that designated use, you would have to go under

1 Section 131.10(g), subpart (3).

2 MR. HUTCHINSON: Okay.

3 So if --

4 MR. SCHLENKER-GOODRICH: It's sort of a
5 categorization issue.

6 And let me emphasize, too, that, you know,
7 we're not making very -- we're not intending to make
8 very significant substantive changes to how water
9 quality standards are interpreted or applied.

10 I think the basic thrust of our argument on
11 climate change is that it's a very critical issue that
12 we will caution the Commission to take into account
13 because it's going to become a very significant issue in
14 the coming decades, and the more the Commission can act
15 with foresight on this issue, and moving slowly by first
16 just acknowledging that human-caused climate change can
17 be a problem, that's sort of a first step to addressing
18 the problem.

19 So our proposal is very modest, is not
20 intended to make significant substantive changes. It's
21 simply to put the issue on the Commission's radar screen
22 and on the Department's radar screen so that it's -- as
23 it's going through assessment protocols, figuring out
24 how to restore and maintain water quality, that this is
25 accounted for in the decision-making process.

1 MR. HUTCHINSON: I suppose one of the -- one
2 of the things that -- that could occur -- or one of the
3 more logical things would be a temperature exceedance in
4 a stream segment.

5 How would the Department or a constituent
6 agency determine what factor or what percentage of the
7 factor climate change was in that? You could have
8 canopy cover, you could have stream flow, you could have
9 a number of things that are going to affect that
10 temperature. How could you calculate the human cause
11 side of that?

12 MR. SCHLENKER-GOODRICH: This is what -- this
13 is a question that's -- that's well beyond my expertise,
14 but what I would say is that the Department already
15 accounts for very complicated scientific questions.

16 For example, in the Department's testimony,
17 they talked about how wildfires, while, you know, you
18 assume that it's naturally occurring, could actually be
19 caused by anthropogenic vectors of impacts that created
20 the circumstances giving rise to that wildfire. Now,
21 that's obviously a very complicated, scientific
22 question, but that's already a sort of a process that's
23 built into the Department's -- how they take a look at
24 these types of problems.

25 So climate change is just -- is just another

1 facet of that very complicated determination. I would
2 not -- admittedly, it's a very complicated
3 determination, but all ecological factors like that are
4 very complicated, and this is simply to ensure that this
5 is taken into account in that process.

6 MR. HUTCHINSON: Okay.

7 MR. KLINGEL: Could I comment on that?

8 Nowadays with the HoboCams -- that may be a
9 brand name -- but the temperature recorders that record
10 temperature, long-term, that, I think, the Department is
11 probably using lots of them in the streams around the
12 state -- you would have significant data from not just
13 one stream, but from many streams around the state,
14 different elevations, and you should be able to tease
15 out what is happening from a climate change versus
16 caused by some other factor.

17 MR. HUTCHINSON: I rather doubt that, but --

18 MS. ORTH: Mr. Hutchinson, do you have other
19 questions?

20 MR. HUTCHINSON: Yeah, I do.

21 I -- you know, I think -- I think that
22 including this in here is -- although it looks
23 innocuous, it looks like a slight policy shift, and it's
24 just a recognition of the potential. I think we're
25 looking at something that, you know, when we're talking

1 about natural background, we need to be examining things
2 that we can actually measure and quantify.

3 I don't know that we can -- we can really do
4 that with this, and that's what I'm trying to get from
5 the questioning.

6 MS. ORTH: Okay.

7 But do you --

8 MR. HUTCHINSON: So I think --

9 MS. ORTH: -- have other questions?

10 MR. HUTCHINSON: I think that we're -- I think
11 that I've had enough answers to questions to --

12 MS. ORTH: All right.

13 MR. HUTCHINSON: -- to determine that. So
14 I'll -- I'll move on.

15 MS. ORTH: All right.

16 MR. HUTCHINSON: Thank you.

17 MS. ORTH: All right.

18 Commissioner Goldstein.

19 MR. GOLDSTEIN: I just have a brief question.

20 Back on the compliance schedules, there was a
21 question about whether or not the impact on the
22 regulator had been considered, either EPA or NMED.

23 Has the impact on municipalities been
24 considered?

25 The vast majority of the NPDES permits are for

1 municipal dischargers.

2 MS. CONN: I -- I think I mentioned that --
3 that, in fact, the whole reason for our alternative
4 proposal is -- was in consideration of the dischargers.

5 MR. GOLDSTEIN: In -- in --

6 MS. CONN: If you look at our proposal, we --
7 first, our -- our preference -- our preferred proposal
8 is to completely eliminate compliance schedules. We
9 think that there is -- there is a lot of -- a case to be
10 made that the Clean Water Act doesn't allow compliance
11 schedules.

12 And while we realize that the EPA --

13 MR. GOLDSTEIN: I understand that, but my
14 question is not -- of course, it would impact
15 municipalities.

16 MS. CONN: Right.

17 MR. GOLDSTEIN: My question is the financial
18 impact on municipalities at the plant.

19 Has that been considered?

20 MS. CONN: Well, again, I said that that is
21 why -- the impact to municipalities is why we propose
22 this alternative, which allows that -- that basically
23 allows compliance schedules in the interest of
24 municipalities and dischargers in New Mexico.

25 MR. GOLDSTEIN: Okay. Thanks.

1 MS. ORTH: Commissioner Jones.

2 MR. JONES: This goes back to the climate
3 change reference here.

4 How would you determine a separation between
5 the nonanthropogenic and the anthropogenic effects? I
6 mean, how would the division -- or Commission be able to
7 make that distinction for this consideration for natural
8 background?

9 Because you -- earlier you stated how
10 complicated this subject is, but you're asking us to
11 make that determination.

12 How -- how would that be applied?

13 MR. SCHLENKER-GOODRICH: Well, I -- the
14 Department is already figuring out -- by definition, by
15 having this definition, they're already going to be
16 determining that. And they're already obligated under
17 the Clean Water Act and EPA's regulations to make a
18 distinction between human-caused conditions and natural
19 background conditions.

20 So it's something that's already built into
21 the framework of the Clean Water Act and EPA's
22 regulations. And so implicitly there are -- they're
23 obligated to do this anyway, with regard to climate
24 change.

25 And the Department's testimony -- and forgive

1 me, I don't have the specific references -- discusses a
2 variety of situations, like wildfires or stream
3 degradation, where they have to figure out and parse
4 what is caused by natural background versus what is
5 caused by anthropogenic sources of impact.

6 So they're already doing that sort of process,
7 and they're already actually under that obligation. And
8 you can make a good argument that they're already under
9 that obligation for climate change. And so this isn't
10 creating some sort of new substantive process. They
11 already have these processes in place.

12 I, frankly, am not very familiar with them.

13 MR. JONES: I guess what I'm hearing you say,
14 though, is that they're considering things already, but
15 they're -- climate change is such a broad spectrum term
16 that's not really clearly defined in a sense that you
17 could relate what percent -- as Commissioner Hutchinson
18 was trying to get at, what percent impact did that have
19 on that anthropogenic activity.

20 So -- but you're asking us to make that
21 consideration. So it's -- if they're already doing it,
22 why should we include it, to make a distinction on
23 something that's not clearly defined?

24 MR. SCHLENKER-GOODRICH: Well, they're already
25 subject to the obligation, but that doesn't necessarily

1 mean that they're specifically accounting for climate
2 change. And that's what our suggestion is, is to make
3 sure that the Department, as it's going through those
4 decision-making processes and assessments, is, in fact,
5 accounting for climate change. So there isn't this
6 blind spot in those assessments.

7 So for example, in the context of wildfires,
8 is that wildfire caused by natural conditions, just a
9 normal drought, or is it caused by human-caused impacts,
10 which may include climate change?

11 So how precisely this would -- this type of
12 assessment would occur is a very site-specific sort of
13 determination, and all we're trying to do is to make
14 sure that when the Department is addressing these
15 factors, and figuring out what is caused by natural
16 background conditions and what is caused by human
17 sources, that they account for climate change.

18 That's going to be at the discretion of the
19 Department to figure out. We don't presume to step on
20 that authority.

21 MR. JONES: But you're making the assumption
22 it's one or the other from your scenario. It couldn't
23 be a combination of what we're alluding to, which we
24 can't make that assessment of what percent had an
25 impact.

1 So I still don't understand how we're supposed
2 to apply this --

3 MS. CONN: Well --

4 MR. JONES: -- when there's varying factors,
5 that it's a combination of activities that may create a
6 certain condition that is undefined.

7 MS. CONN: Well --

8 MR. JONES: And it's not black and white, it's
9 very, very gray.

10 MS. CONN: Well, right now the Department is
11 already working in a lot of grays, and so --

12 MR. JONES: Oh, yeah, absolutely.

13 MS. CONN: Nonpoint source pollution. You
14 know, when you look at the TMDLs for nonpoint source
15 pollution, it's very difficult to -- to pinpoint exactly
16 where that nonpoint source pollution -- what percentage
17 is coming from land use, what percentage is coming from,
18 you know, septic tanks or, you know, what is -- what's
19 the cause.

20 Already we work in -- what I'm saying is that
21 this isn't -- wouldn't be new, this wouldn't be a new
22 uncertainty. They already work in these uncertainties.
23 And this would be another factor to take into
24 consideration.

25 MR. JONES: Well, based upon your proposal,

1 are you recommending that only anthropogenic activities
2 have -- impact climate change?

3 Because you list it as outside of the scope of
4 the nonanthropogenic.

5 MR. SCHLENKER-GOODRICH: I think our -- and
6 correct me -- or forgive me if I'm wrong, but I think
7 our core proposal was anthropogenic climate change.
8 It's not clear in the regulation, but in our testimony,
9 we talk about anthropogenic climate change.

10 MR. JONES: Okay.

11 Once again, who makes -- how is that
12 determined? I mean --

13 MS. CONN: Well, if --

14 MR. JONES: It's not a practical -- this is
15 directly related or -- yeah.

16 MR. SCHLENKER-GOODRICH: I think what we're
17 saying --

18 MS. CONN: I have a specific example.

19 MR. SCHLENKER-GOODRICH: Go for it.

20 MS. CONN: That if you -- for example, one of
21 the concerns that Amigos Bravos has is that uses will be
22 downgraded on -- the reason for -- for wanting to have
23 the Commission start to think about climate change and
24 how it's going to impact our water quality in the future
25 is that we see the potential to have a stream that has

1 historically been perennial be subject to increased
2 temperatures from climate change and become intermittent
3 and then in practice -- or to dry up at certain times of
4 the year, and therefore could potentially get weaker
5 standards, all due to the human -- human cause, which --
6 of climate change.

7 And so this -- this was an attempt to try --
8 to get at ways of protecting those historic waters,
9 those perennial waters. I mean, it -- ultimately, we
10 could have weak protections for all waters in the state
11 if -- if -- and even the Rio Grande goes dry during some
12 years.

13 MR. JONES: So with that scenario in mind, if
14 there was reduced precipitation or a hotter summer that
15 facilitated this to occur, what -- how would we apply
16 this climate change to --

17 MS. CONN: Well, I --

18 MR. JONES: -- to anthropogenic activity?

19 MS. CONN: I think very clearly you look at
20 trends, you know, historic trends, that if you have a
21 stream that no other factor has changed, and all of a
22 sudden you have a stream that is -- that is going dry in
23 parts as the average temperature increases -- I think
24 that you -- that that's a very good method for
25 determining that it's -- that the impact to the stream

1 is, in fact, from climate change.

2 MR. JONES: Well, climate change could be
3 nonanthropogenic or --

4 MS. CONN: Anthropogenic climate change. And
5 you're right. Perhaps it would be clear, and perhaps
6 we'll consider this in our postsubmittal.

7 MR. JONES: So the following year it changes,
8 it goes back -- I mean, how -- once again, how do you
9 apply that?

10 MR. SCHLENKER-GOODRICH: Well, that's a --

11 MR. JONES: That's what I'm getting at.
12 There's so many variables to be considered.

13 How do you apply just the anthropogenic aspect
14 to separate that out --

15 MR. SCHLENKER-GOODRICH: Well, the --

16 MR. JONES: -- from the non --

17 MR. SCHLENKER-GOODRICH: As Ms. Conn was
18 mentioning, that there's a definite distinction in
19 climate change from year to year, variation in weather
20 patterns, and long-term trends and changes in climactic
21 patterns, and that the science that is coming online --
22 and much of the science that is -- that we've submitted
23 with our testimony as exhibits is demonstrating that
24 much of the change is actually anthropogenic.

25 So for example, the Department could look at

1 that State Engineer's report about how the climate
2 change is affecting flow conditions and then balance
3 that, you know, in that admittedly gray area. Any
4 situation is scientifically complex to figure out.
5 They're already doing this kind of balancing.

6 And what we're not suggesting is to impose
7 specific requirements that would say this is always
8 climate change -- anthropogenic climate change. What
9 we're saying is account for anthropogenic climate change
10 as a potential human-caused vector of impact to a
11 particular water body, and let's make sure that we then
12 start accounting for that in our -- in our processes and
13 decisions to try to restore and maintain water quality.

14 If you don't account for anthropogenic climate
15 change, you're creating a huge blind spot on water
16 quality standards, especially when you take into account
17 that the impacts are not merely year-to-year-type
18 variations.

19 So if the Rio Grande goes dry next year, you
20 know, we're not saying that's caused by climate change.
21 But if it's dry for 10, 15 years straight, and a
22 scientist demonstrates that, hey, this is because of
23 anthropogenic climate change, then that's a clear
24 human-caused condition.

25 And the Department could take that into

1 account in figuring out what to do to then restore,
2 maintain water quality, whether designated uses have to
3 be removed, whether uses are attainable. Of course,
4 it's a complex factor. Let's build it in, let's make
5 sure we're actually acknowledging it.

6 And the science on that point is coming online
7 where you can determine whether or not the cause is
8 anthropogenic climate change or whether just natural
9 background climactic conditions and shifts.

10 MS. ORTH: Are you done?

11 MR. JONES: Yeah.

12 MS. ORTH: All right.

13 Commissioner Hutchinson.

14 MR. HUTCHINSON: But, you know, what we're
15 really talking about here is -- is not -- we're just
16 talking about adapting to changes that occur. We're not
17 talking -- you know, I mean, we're -- we're putting this
18 into a -- a regulatory climate -- pardon the pun -- but
19 it's -- we're really just -- we're -- all we're doing
20 with our water quality standards over time is adapting
21 to whatever the conditions are that we're being dealt.

22 I don't know that this is going to be
23 beneficial in doing that. I -- I think that if the Rio
24 Grande were to start going dry for a 10-year period -- I
25 don't know that we're going to be worrying too much

1 about water quality. We're going to be in much other
2 serious straits. There's going to be some other
3 things happening that are going to be far more serious,
4 but --

5 MS. ORTH: Do you have other questions of this
6 panel?

7 MR. HUTCHINSON: I -- yeah. I guess I do, but
8 not on climate change, unless there's anybody else that
9 has --

10 MS. ORTH: Is there anyone else?

11 Commissioner Dominguez.

12 MR. DOMINGUEZ: Not to beat a dead horse, but
13 you referenced the Governor's executive order earlier
14 when you first referenced climate change, and in your
15 proposed revision here, if I remember correctly as part
16 of the Climate Change Advisory Group, this proposed
17 modification here, did you bring that before that
18 advisory group for their concurrence or input?

19 MR. SCHLENKER-GOODRICH: No.

20 MR. DOMINGUEZ: Okay.

21 MR. SCHLENKER-GOODRICH: I believe they
22 wrapped up their work in 2006. I could be wrong on the
23 specific date. And I think there's an advisory council
24 that's now -- persists, but I'm not -- I'm not
25 specifically aware.

1 MR. DOMINGUEZ: Okay. Thank you.

2 That's all.

3 MS. ORTH: All right. Thank you.

4 Other Commissioners with questions of the
5 Amigos Bravos panel?

6 Before I go back to Commissioner Hutchinson.

7 Yes? All right.

8 MR. HUTCHINSON: No.

9 MS. ORTH: No. All right.

10 Are there others with questions of the Amigos
11 Bravos panel?

12 Commissioner Glass.

13 MR. GLASS: Sorry to be late, but going back
14 to the compliance schedule question, I'd just like to
15 know if Amigos Bravos visited with the Municipal League,
16 any individual municipalities or the Construction
17 Programs Bureau in NMED regarding the impact of your
18 proposal?

19 MS. CONN: No.

20 MR. GLASS: Simple question, simple answer.

21 MS. ORTH: Thank you.

22 Commissioner Lewis.

23 MR. LEWIS: Back to the climate change on --
24 I'm just -- I mean, I think at this -- and, you know, at
25 this juncture in the state of science, I mean, I think

1 it's -- this is a well known issue, and, I mean, the
2 data are in, the climate is changing. I guess I'm just
3 back to what is the -- I guess I'm having -- I'm still
4 struggling with the utility of this, where it is, for
5 many of the reasons that were brought before -- brought
6 up before.

7 But specifically, how do you see this -- so
8 let's just take a marginal stream now, that's marginally
9 hanging onto high quality cold water fishery as an
10 example. And let's presume that as the science
11 indicates, that we're going to be warming up so that
12 stream is going to be threatened, that cold water --
13 that being a viable cold water fishery is being
14 threatened.

15 So what are we -- I mean, what is the actual
16 utility of having this in here?

17 I think the science behind these
18 investigations is clearly going to take into account the
19 factors that may contribute to that stream no longer
20 functioning as a cold water fishery, but -- but I -- in
21 terms of the utility of this here, I just don't see
22 where that adds -- I mean, what do we actually do with
23 that?

24 If -- if you're saying that that's a
25 human-caused factor, and in all likelihood, a good

1 portion of it is, in my opinion, the warming, that is,
2 then what's the utility, then, of holding on to the cold
3 water fishery standards?

4 I mean, this is getting back to what Howard is
5 bringing up.

6 MS. CONN: Yeah. I mean, I think that is very
7 clearly a goal of the Clean Water Act, to maintain and
8 protect water quality. Just because the problem is so
9 big doesn't excuse us from addressing it in our
10 standards and calling -- and calling it what it is.

11 MR. LEWIS: Calling it --

12 MS. CONN: That we have an impacted stream due
13 to human-made causes.

14 It's difficult -- I mean, it's one of the
15 heartbreaking problems that -- connected to climate
16 change is that it has a -- huge repercussions across
17 our -- many different areas, including water quality,
18 and we should call an impaired stream that is impaired
19 because of -- of water -- of climate change what it is,
20 impaired.

21 MR. SCHLENKER-GOODRICH: And I think from a
22 pragmatic perspective, our proposal is actually supposed
23 to be -- we've had a lot of questions on this -- is
24 supposed to be very, very modest. It's simply to
25 provide an acknowledgment that this is a very serious

1 issue, that we need to account for protecting water
2 quality, not just on sort of a three-year by three-year
3 as we look at triennial review, but let's think
4 long-term, ten, fifteen years down the line.

5 And pragmatically, in your example, maybe this
6 allows a way for us to attract restoration funds to that
7 particular stream, and maybe there's a way we could
8 plant along those stretches, and Amigos Bravos, for
9 example, has done work -- and a lot of groups have done
10 work in the Valle Vidal, for example, where we bring
11 Clean Water Act restoration funds to play in a
12 particular area.

13 Well, by acknowledging climate change, we can
14 target those areas that may be most vulnerable to
15 climate change for restoration activities.

16 And so by acknowledging it in the standards,
17 we can actually direct funds to those particular areas
18 where there's a cold water fishery that we may be able
19 to save if 10 years in advance of the point we think
20 that climate change may cause temperatures to increase
21 dramatically and devastate that cold water fishery --
22 maybe there are activities we could do to put in
23 exclosures or restore stream banks or whatever to
24 restore water quality that gives that water body some
25 resiliency to withstand those temperature changes.

1 You cool it down so much that it counteracts
2 the effect of climate change.

3 And that's kind of the intent behind our
4 proposal, is to be very modest, to make this a part of
5 the thought process that the Department goes through in
6 thinking about water quality protection, that
7 dischargers think about in thinking about their -- what
8 kind of effluent limits need to be put in place, what
9 kind of technologies need to be put into place, what
10 they can do to protect the -- the assimilative capacity
11 of that particular water body.

12 Maybe for a municipal discharger there's a
13 good way -- that depends -- for their cooling systems
14 depends on cool water for whatever process that they're
15 doing. Maybe they want to plant vegetation along the
16 stream banks 10 years -- to prevent an impact from
17 climate change 10 years in advance.

18 So we just think that this is sort of a common
19 sense way to start building this into our thinking on
20 water quality protection. It's not supposed to create
21 onerous burdens or complicated processes or substantive
22 requirements, just acknowledge the problem.

23 MR. LEWIS: Yes. But I think -- I mean, do
24 you not think that that's already in the thought process
25 of research and science that's going on, and we're

1 doing -- and Environment Department does, say, a stream
2 survey or a -- I mean, I think that's already happening,
3 is my opinion on that. And I think it's -- this just
4 confuses the issue by putting it here.

5 And I guess -- and the final point is that I
6 think it's really got to have some temporal constraints
7 on it for the issues that Brad was bringing up and
8 Howard was bringing up, is it's so ambiguous now that --
9 I mean, you're talking about man-made global climate
10 change, which is really a decadal sort of time frame
11 that we're -- do we need to be embracing for that, and
12 to ferret out -- to make sure we get out these
13 year-to-year variabilities -- year-to-year variability.

14 I think it's difficult now, the way it's
15 worded now. It's just too, as I said, ambiguous, in my
16 opinion.

17 And I was wondering what you thought about
18 that.

19 MS. ORTH: Do you have anything to add to what
20 you've already said?

21 MR. SCHLENKER-GOODRICH: No.

22 MS. ORTH: All right.

23 MR. HUTCHINSON: I do have --

24 MS. ORTH: Commissioner Hutchinson.

25 MR. HUTCHINSON: -- one more question.

1 I asked -- I asked Mr. Schlenker-Goodrich if
2 he had reviewed the -- the exhibits that they presented
3 to support this change.

4 Did anybody else on the panel review those
5 exhibits?

6 MS. CONN: I have reviewed some of them in the
7 course of my work but --

8 MR. HUTCHINSON: And your --

9 MS. CONN: -- not all of them.

10 MR. HUTCHINSON: And your qualifications to
11 interpret those and -- and -- and determine their
12 validity?

13 MS. CONN: Well, I didn't include it in my
14 testimony, but I'm --

15 MR. HUTCHINSON: Okay.

16 MS. CONN: -- but I'm just responding to your
17 question that I have actually read them --

18 MR. HUTCHINSON: Okay.

19 MS. CONN: -- for the broader context of my
20 work.

21 MR. HUTCHINSON: Anybody else on the panel?

22 MR. JENSEN: I've read some of them, as well.

23 MR. HUTCHINSON: Okay.

24 And your qualifications for determining their
25 validity?

1 But you didn't testify on that.

2 MR. JENSEN: No. I don't testify on it
3 either, but, you know, the people who are writing these,
4 you know, are well qualified. I trust them.

5 MR. HUTCHINSON: Okay. All right.

6 So all of the testimony here on the exhibits
7 would indicate that -- that nobody really possesses the
8 qualifications for interpreting them and qualifying
9 those studies as being valid.

10 MS. ORTH: I don't think that that is what
11 they said.

12 MR. HUTCHINSON: Okay.

13 MS. ORTH: I believe Mr. Schlenker-Goodrich
14 spoke to his biological sciences bachelor's degree --

15 MR. HUTCHINSON: Right.

16 MS. ORTH: -- and I believe the qualifications
17 of the other panelists are evident on the face --

18 MR. HUTCHINSON: Right.

19 MS. ORTH: -- of their submittals.

20 MR. HUTCHINSON: But he's the only one who
21 actually reviewed them and put them into his testimony.

22 MS. ORTH: Two of the others --

23 MR. HUTCHINSON: Two.

24 MS. ORTH: -- said that they reviewed some of
25 them.

1 MR. HUTCHINSON: Right. They reviewed them
2 but not part of their testimony.

3 MR. SCHLENKER-GOODRICH: That's right.
4 Testimony on global warming --

5 MS. ORTH: Right.

6 MR. SCHLENKER-GOODRICH: -- was my testimony.

7 MS. ORTH: Right.

8 MR. HUTCHINSON: Right.

9 And so that's it.

10 MS. ORTH: All right.

11 Other questions before we excuse the panel?

12 MS. ANDERSON: Could I -- Madam Hearing
13 Officer?

14 MS. ORTH: I'm sorry. Ms. Anderson.

15 MS. ANDERSON: I just wanted to ask a couple
16 questions on redirect. So --

17 MS. ORTH: All right.

18 I'm going to go to Mr. Ames first.

19 MS. ANDERSON: Certainly. Thank you.

20 MS. ORTH: Mr. Ames.

21 MR. AMES: I just have a couple additional
22 questions, if I might.

23 MS. ORTH: If you would.

24 MR. AMES: Thank you.

25

1 FURTHER CROSS EXAMINATION

2 BY MR. AMES:

3 Q. I just want to follow up on a couple questions
4 that were asked by the Commissioners.5 Commissioner Lewis asked what was the utility
6 of adding the climate change reference to the definition
7 of natural background.8 And I understood the panel, I believe, might
9 have been Mr. Schlenker-Goodrich, to testify earlier
10 that the objective was to account for climate change in
11 natural background; is that correct?12 MR. SCHLENKER-GOODRICH: Correct, to determine
13 whether it was part of the natural background or not.14 MR. AMES: You also acknowledge the difficulty
15 of accounting for climate change in that analysis,
16 correct?

17 MR. SCHLENKER-GOODRICH: Yes.

18 MR. AMES: Now, you're aware that the
19 definition of natural background primarily plays in the
20 determination of site-specific criteria within the
21 Department's proposal, correct?

22 MR. SCHLENKER-GOODRICH: Yes.

23 MR. AMES: So the Department has proposed that
24 the Commission can adopt site-specific criteria, but in
25 doing so must first determine what the natural

1 background is for the water at issue, correct?

2 MR. SCHLENKER-GOODRICH: Yes.

3 MR. AMES: Doesn't adding climate change as a
4 specific reference create the possibility that someone
5 will argue that the Department's failure to specifically
6 quantify the climate change impact precludes the
7 Commission from adopting site-specific criteria for that
8 water body?

9 MR. SCHLENKER-GOODRICH: Very complicated
10 question.

11 Could you -- could you say that again?

12 MR. AMES: Wouldn't a person, perhaps one who
13 opposes site-specific criteria, argue to the Commission
14 that the Commission cannot adopt a site-specific
15 criteria being proposed because the specific impact of
16 climate change on that water body has not been
17 quantified?

18 MR. SCHLENKER-GOODRICH: If the Department
19 completely excluded climate change from its evaluation,
20 potentially, yes. I think that's already an existing
21 argument that they could make, because already under the
22 definition of natural background -- and if I understand
23 the Department's testimony correctly, they already sort
24 of view that as a possibility, that climate change could
25 be an issue that's at play.

1 So even under the Department's current
2 proposal, that could theoretically be an argument.

3 MR. AMES: Theoretically be an argument,
4 but --

5 MR. SCHLENKER-GOODRICH: Yeah, under either
6 our proposal or the Department's proposal.

7 MR. AMES: But your proposal makes it
8 explicit.

9 MR. SCHLENKER-GOODRICH: Provides it as an
10 example of -- in natural background of what could be
11 part of the natural background or not part of the
12 natural background.

13 MR. AMES: And you testified earlier, however,
14 that you had not intended to reference climate change to
15 be a substantive requirement.

16 MR. SCHLENKER-GOODRICH: Yeah. Well, it
17 doesn't change -- it doesn't provide any substantive
18 change to the Department's existing proposal.

19 MR. AMES: But that contradicts what you just
20 said before, which by -- which was that the explicit
21 reference creates an obligation to make a demonstration.

22 MR. SCHLENKER-GOODRICH: Well, my
23 understanding is that the department's position is that
24 climate change can be part -- or not part of the natural
25 background that could be a anthropogenic source. So

1 as -- my understanding of the Department's testimony is
2 that that's already a requirement.

3 So I don't view it as inconsistent. I view it
4 more as listing it as an example of what could be
5 something that's not part of the natural background.

6 MR. AMES: Okay. I'll accept that.

7 I have a couple other questions.

8 MR. SCHLENKER-GOODRICH: Essentially I view
9 them as consistent. We're not trying to expand -- we're
10 not trying to change the sort of substantive contours of
11 the Department's current proposal. We're just trying to
12 put in an informational example that we felt was
13 consistent with -- actually with the Department's
14 testimony.

15 MR. AMES: Well, don't you agree that making
16 it explicit creates a -- an obligation on the face of
17 the definition?

18 MR. SCHLENKER-GOODRICH: Yes.

19 MR. AMES: Let's talk about compliance
20 schedules.

21 Commissioner Bland asked -- or noted that the
22 NPDES program has been -- excuse me -- Commissioner
23 Bland noted that the NPDES program has been in place for
24 decades.

25 But I still haven't heard Amigos Bravos

1 identify a single compliance order that poses a problem
2 in the State of New Mexico.

3 MS. CONN: Well, I think that we referred to
4 the one up at Los Alamos as a -- as an example.

5 MR. AMES: Okay.

6 So that's the sole example at this point?

7 MS. CONN: Yes, that we're presenting.

8 MR. AMES: Okay.

9 Commissioner Goldstein noted that most
10 dischargers in the State of New Mexico are
11 municipalities.

12 Can you tell us how long it takes a
13 municipality to obtain funding to expand a wastewater
14 treatment facility, on average in the State of New
15 Mexico?

16 MS. CONN: No. I do not have those numbers.

17 MR. AMES: How about how long it takes for
18 that -- for municipalities in New Mexico on average to
19 go through the engineering process to do an expansion of
20 a wastewater treatment facility?

21 MS. CONN: I don't have an average.

22 MR. AMES: How about the length of time it
23 takes to construct such a facility?

24 MS. CONN: Don't have an average on that as --
25 either.

1 MR. AMES: And finally, the length of time to
2 ramp up that facility and determine its effectiveness in
3 meeting a water quality-based effluent limit?

4 MS. CONN: Don't have -- have that average
5 except for my experience with -- I'll just say no. I
6 don't have that -- I don't have your specific
7 question -- I don't have an answer.

8 MR. JENSEN: Could I give an example of the
9 new drinking water facility built and now in operation
10 by a water utility, Albuquerque Bernalillo County Water
11 Utility Authority?

12 MR. AMES: Sure.

13 MR. JENSEN: Which I believe took, from when
14 they first announced it until when it went into
15 operation, only three years, including fourteen months
16 of pilot plant testing.

17 MR. AMES: So your example is in that example
18 it took them a minimum of three years to get it up and
19 running.

20 MR. JENSEN: Well, I don't know if that
21 constitutes a minimum or a standard amount of time or
22 not. I'm just saying that's -- to my knowledge, that's
23 the time it took them --

24 MR. AMES: Okay.

25 MR. JENSEN: -- for a large facility --

1 MS. CONN: Brand new facility.

2 MR. JENSEN: -- to build a complete facility
3 and a pilot facility.

4 MR. AMES: How about obtaining the funding,
5 Mr. Jensen? How long did it take them to get the
6 funding?

7 MR. JENSEN: That I don't know. I know that
8 the funding that's going to make some significant
9 upgrades to the south side water reclamation plant is at
10 least in part coming from recovery funds, but took less
11 than a year to arrive.

12 MR. AMES: Well, Buckman has an NPDES permit.
13 How long has that project been in process?
14 Okay.

15 If I understood correctly, some of the
16 testimony in response to the Commission was that the
17 Department -- or actually the EPA, which issues NPDES
18 permits for the State of New Mexico, grants compliance
19 schedules as a matter of course and, if I understood
20 correctly, gives compliance schedules to sources that
21 already have the technology available to meet the
22 applicable standard.

23 MS. CONN: That was my interpretation --

24 MR. AMES: Did I misunderstand?

25 MS. CONN: -- of Mr. Saums' testimony

1 yesterday, that it was a part of the matter of course
2 of -- of writing permits.

3 MR. AMES: So you're --

4 MS. CONN: And every permit that I've reviewed
5 has had -- excuse me. I'm sorry.

6 MS. ORTH: Let him ask the question.

7 MS. CONN: Oh.

8 MR. AMES: I think I jumped in on Ms. Conn. I
9 apologize.

10 Did you want to finish what you were saying?

11 MS. CONN: Every permit that I've reviewed has
12 had a compliance schedule. So it seems to be a pretty
13 common practice.

14 MR. AMES: Okay.

15 So can you tell us if any of those permits
16 that you reviewed involve a source that already has the
17 technology to meet the standard that the compliance
18 schedule is directed to and is simply not using that
19 technology?

20 MS. CONN: No. I said theoretic -- in my
21 response, I said theoretically.

22 MR. AMES: Okay.

23 So -- but your testimony primarily is based
24 off your understanding of what Mr. Saums said yesterday,
25 not your own personal knowledge; is that correct?

1 MS. CONN: Yeah, and my experience with
2 compliance schedules, a typical component of NPDES
3 permits in the state.

4 MR. AMES: Typical components of NPDES permits
5 in the State of New Mexico.

6 MS. CONN: Yes.

7 MR. AMES: So you all have reviewed NPDES
8 permits in the State of New Mexico to evaluate their
9 compliance schedules; is that correct?

10 MS. CONN: We have -- I have reviewed and --
11 as a part of my job, a context of my job, I've reviewed
12 NPDES permits in the state.

13 MR. AMES: Okay.

14 But in none of those did you find any problems
15 with the compliance schedule, then; is that correct?

16 MS. CONN: No. We always have a problem with
17 the compliance schedules, because we think that it's --

18 MR. AMES: So your --

19 MS. CONN: -- that it's inappropriate, that
20 it's not protective of the standards.

21 MR. AMES: So your objection to the compliance
22 schedules is theoretical, not practical; is that
23 correct?

24 MS. CONN: Well, it becomes practical when
25 it's in an actual permit.

1 MR. AMES: Okay. All right. You -- okay.

2 I had heard -- I guess we'll stay on that
3 point for one moment, and then I'll be done.

4 Your problem is -- with compliance schedules
5 is theoretical except to the extent that they exist, and
6 then they become practical; is that right?

7 MS. CONN: Rephrase that again.

8 MR. AMES: Your problem with compliance
9 schedules is theoretical, you don't like them, and you
10 like -- don't like them because you believe they have an
11 adverse impact on a stream, because they -- just because
12 they exist; is that correct?

13 MS. CONN: Well, I did provide one example
14 which is very practical and -- in terms of the Los
15 Alamos permit.

16 MR. AMES: Okay.

17 MS. CONN: So --

18 MR. SCHLENKER-GOODRICH: What I would say in
19 response is I think that's your character -- maybe I
20 said that, but it may be your characterization of sort
21 of overall what our proposal is.

22 MR. AMES: Yes.

23 MR. SCHLENKER-GOODRICH: I think our problem
24 is twofold.

25 Number one, legally whether or not a

1 compliance schedule is even permissible under the Clean
2 Water Act, and I understand that there is -- you know,
3 while your position is that, well, if we have a problem
4 with that, we go to EPA, and I think that's expressly
5 one of the reasons we're building in that argument here,
6 because EPA is going to have to review these standards
7 eventually.

8 So we have a baseline legal problem with the
9 existence of compliance schedules, period.

10 Putting that aside, the second concern is
11 pragmatic, that if a compliance schedule is actually
12 built in, that, from our perspective, it's too
13 open-ended. And so what we've done is recommended sort
14 of bookends on how to build a compliance schedule into a
15 permit.

16 And from my testimony, it's sort of the flip
17 side of the EPA regulation at 40 CFR 122.47 when they
18 say a three-year period for the standards. Let's build
19 in something to actually come into compliance with that.

20 So if you have notice within past three years
21 of a standard, you have to come into compliance at the
22 point of permit renewal or modification, but if that
23 standard comes into existence within three years of your
24 permit renewal or compliance, let's build in something
25 that allows for that compliance schedule to have a

1 definitive endpoint.

2 MR. AMES: But in book-ending compliance
3 schedules, as you say, you didn't take into account any
4 pragmatic issues really, like economics and technical
5 feasibility, correct?

6 MR. SCHLENKER-GOODRICH: Our pragmatic focus
7 was on water quality and preserving water quality.

8 MR. AMES: You didn't take into account any of
9 the economic or technical issues for the dischargers
10 themselves, correct?

11 MR. SCHLENKER-GOODRICH: Correct.

12 MR. AMES: Okay. Nothing further. Thank you.

13 MS. ORTH: All right. Thank you.

14 Ms. Anderson, you said you had some follow-up.

15 MS. ANDERSON: Yes. Thank you.

16 REDIRECT EXAMINATION

17 BY MS. ANDERSON:

18 MS. ANDERSON: First, just because we're on
19 the issue of compliance schedules,
20 Mr. Schlenker-Goodrich, in your testimony, you indicate
21 that there is case law in the Supreme Court that shows
22 that compliance schedules are legal under the Clean
23 Water Act; is that right?

24 MR. SCHLENKER-GOODRICH: Correct. That's in
25 my opening testimony, in my direct testimony.

1 MS. ANDERSON: And EPA's interpretation has
2 been that they can only use compliance schedules if
3 states allow for them. So if the state doesn't allow
4 for them, EPA under that case law would find that they
5 could not put a compliance schedule in an NPDES permit.

6 MR. SCHLENKER-GOODRICH: I'm sorry. Could you
7 state that question again?

8 MS. ANDERSON: Sure. I'm sorry.

9 EPA has -- as you stated in your technical
10 testimony, EPA has noted that they cannot use compliance
11 schedules, then, unless the state allows for them,
12 that's their interpretation of their authority to allow
13 a compliance schedule in an NPDES permit?

14 MR. SCHLENKER-GOODRICH: I -- basically, it's
15 an option. The EPA's position is that it's an option
16 for the Commission.

17 MS. ANDERSON: So our -- so it's important for
18 a state to set those parameters, as you've just
19 discussed, on the boundaries of the compliance schedule
20 for EPA.

21 MR. SCHLENKER-GOODRICH: Precisely. That EPA
22 basically says that there is this -- you have an option
23 for compliance schedules, but they -- it's the
24 Commission's obligation to determine what that
25 compliance schedule actually looks like, what the

1 standard for providing for compliance schedules looks
2 like.

3 MS. ANDERSON: Thank you.

4 And Mr. Ames, in his previous questioning,
5 asked some questions of you, Ms. Conn, about the
6 definition of ephemeral in the standards as it is now.
7 And I just wanted to clarify.

8 When you look at the Section 97, which is
9 entitled Ephemeral, does that include all ephemeral
10 waters?

11 MS. CONN: No. It does -- presently it
12 doesn't include any.

13 MS. ANDERSON: So if you're a member of the
14 public, and you're going to look at the standards to
15 find the uses for ephemeral waters, would you be
16 confused?

17 MS. CONN: Yes, very.

18 MS. ANDERSON: And where else would you need
19 to look to find the standards for ephemeral waters?
20 What is that section?

21 MS. CONN: Intermittent.

22 MS. ANDERSON: So you'd have to look at both
23 ephemeral and intermittent to find standards for
24 ephemeral waters?

25 MS. CONN: Correct.

1 MS. ANDERSON: Okay. Thank you.

2 And the final question I had was this
3 discussion that Mr. Ames asked you about the -- the
4 Department's authority -- or in their proposal their
5 ability to list -- or to treat waters as ephemeral,
6 unclassified waters under Section 97, before the
7 Commission has had a chance to approve them, and they
8 said that at most that would be -- they would bring that
9 to the Commission at each triennial review.

10 But theoretically, does that -- how long could
11 the Department then treat waters as ephemeral waters
12 before the Commission had a chance to review that?
13 Between each triennial review?

14 MS. CONN: I think it's almost been five now
15 years since the last triennial review was finalized.
16 2004? I could be wrong, but it's been over three years.

17 MS. ANDERSON: So the Department could treat
18 those waters with the downgraded uses for several years
19 before the Commission had a chance to approve them.

20 MS. CONN: Correct.

21 MS. ANDERSON: Thank you very much. That's
22 all I had.

23 MS. ORTH: All right. Thank you,
24 Ms. Anderson.

25 Are there other questions of the panel?

1 And I'm not forgetting about you,
2 Mr. Hutchinson.

3 Are there other questions of the panel before
4 we close the questioning?

5 FURTHER EXAMINATION BY THE COMMISSION

6 MS. ORTH: Commissioner Glass.

7 MR. GLASS: Madam Hearing Officer, yes. I
8 have a follow-up on Mr. Ames' recross, or whatever we're
9 calling that. Cross, recross and double-cross.

10 Has Amigos Bravos identified any other states
11 in the nation where compliance schedules are prohibited
12 and evaluated the effectiveness of that prohibition?

13 MR. SCHLENKER-GOODRICH: I haven't looked at
14 other states personally.

15 MR. GLASS: E-mails?

16 MS. CONN: No.

17 MS. ORTH: Okay.

18 MS. CONN: I don't have that.

19 MS. ORTH: All right.

20 Any other questions?

21 All right. I see no hands.

22 Ms. Anderson, I'd like to formally accept
23 Exhibits 1 through 28, which were attached to your
24 direct packet, and, of course, the witness statements
25 which weren't marked separately, which were attached

1 both to direct and to your rebuttal packet.

2 Do I hear objections to Exhibits 1 through 28
3 or the witness statements?

4 Hearing none, they're admitted.

5 (Exhibits Amigos Bravos 1 through 28 and five
6 witness statements admitted into evidence.)

7 MS. ORTH: And Commissioner Hutchinson has --
8 has a request of the -- of the parties for their
9 posthearing submittals.

10 Commissioner.

11 MR. HUTCHINSON: This goes to -- and where did
12 I write my note -- I guess I don't have it.

13 This is under the powers of the Commission,
14 and this is specifically addressed to the standards for
15 the radionuclides.

16 I've not -- I'm not sure that -- that we can
17 call these standards. I don't know if we can call these
18 criteria. That -- and so it raises a question for me.

19 Do -- do we, as a Commission, actually have
20 the authority to create sort of a nonstandard or a
21 noncriteria, being that our charge in this area is --
22 okay. Let -- it keeps jumping to the wrong place here.
23 I want to be in D.

24 This is 74 -- 74-6-4.C, and this says we shall
25 adopt a water quality standards -- I'm not going to read

1 through the whole thing, but I --

2 MS. ORTH: Okay.

3 MR. HUTCHINSON: -- I'm particularly looking
4 at the standard shall include a narrative -- include
5 narrative standards and as appropriate the designated
6 uses of the waters and the water quality criteria
7 necessary to protect such uses.

8 We're being asked to create a standard and
9 criteria for -- which are not aimed at protecting use.

10 Can we do that?

11 MS. ORTH: All right. Any party who would
12 like to address that in their posthearing submittals is
13 invited to do so, and the Commission will be having that
14 discussion with its -- with its counsel during its
15 deliberations.

16 MR. SCHLENKER-GOODRICH: I'm sorry. As a
17 point of clarification, what section was that?
18 74-6-4 --

19 MR. HUTCHINSON: 74-6-4.C. 74-6-4.C.

20 MR. AMES: Actually, Commissioner Hutchinson,
21 it's now D.

22 MR. HUTCHINSON: Okay.

23 MS. ORTH: D as in dog.

24 MR. HUTCHINSON: Dog, okay. Yeah. D.

25 MR. SCHLENKER-GOODRICH: And my understanding,

1 as just a point of clarification, as well, is that
2 this -- this was a question, Commissioner Hutchinson,
3 that you've raised elsewhere during these proceedings;
4 is that correct? Or is this --

5 MR. HUTCHINSON: No. It's a question that I
6 have that has come up in considering whether or not we
7 can adopt the radionuclides.

8 MS. ORTH: So is that -- it's not a question
9 for this panel.

10 MR. SCHLENKER-GOODRICH: I understand.

11 MR. HUTCHINSON: It's not a question for the
12 panel. It's a question of interpreting our powers under
13 the statute.

14 MR. SCHLENKER-GOODRICH: I just wanted to make
15 sure there was sort of a single question that all the
16 parties would be able to respond to.

17 Okay. Thank you.

18 MS. ORTH: That's it.

19 Anything before we break for ten minutes?

20 No?

21 Thank you all very much.

22 MS. ANDERSON: Thank you.

23 (Proceedings in recess from 11:18 a.m. to
24 11:31 a.m.)

25 MS. ORTH: Let's come back from the break,

1 please.

2 Ms. Greenwald, would you come to the table?

3 MS. WORTHINGTON: Recess is over. Get your
4 books out.

5 MS. ORTH: Ms. Greenwald, would you come to
6 the table, please?

7 And Ms. Weinstock.

8 Commissioners, you find on your spot the
9 document referred to by Mr. Rose yesterday for Chevron
10 Mining. It's marked as Exhibit F. A through E had
11 already been admitted.

12 Do I hear objections from the other parties on
13 the admittance of Exhibit F?

14 Hearing none, it's admitted.

15 (Exhibit Chevron Mining, Inc., F admitted into
16 evidence.)

17 MS. ORTH: We turn now to Agua es Vida Action
18 Team and CARD, Citizens for Alternatives to Radioactive
19 Dumping. We have Ms. Greenwald and Ms. Weinstock in
20 front of us.

21 If you would swear them.

22

23

24

25

1 LESLEY WEINSTOCK and JANET GREENWALD
2 having been first duly sworn or affirmed, were
3 examined and testified as follows:

4 DIRECT TESTIMONY OF LESLEY WEINSTOCK

5 MS. WEINSTOCK: I'll go first.

6 Okay. My name is Lesley Weinstock. I'm a
7 physician assistant and co-coordinator of Agua es Vida
8 Action Team, otherwise known as AVAT. And we are a
9 citizen watchdog group in Albuquerque concerned about
10 the San Juan-Chama diversion which soon will be
11 supplying 90 percent of our tap water.

12 And we have many concerns about emerging
13 contaminants, including but not limited to the
14 radiological contaminants, bromate, other disinfection
15 byproducts, industrial chemicals, pharmaceuticals,
16 herbicides and perchlorate.

17 We support the positions of Dr. Arjun
18 Makhijani, CARD and Amigos Bravos as stated in our
19 letter. We also support the updates made by Amigos
20 Bravos.

21 Based on the original intent of the EPA
22 regulations, current science and the Institute for
23 Energy and Environmental Research, the standards for the
24 alpha-emitting, long-lived transuranic radionuclides
25 should be, we believe, .15 picocuries per liter, or ten

1 to the minus six.

2 This is also supported by Governor Richardson
3 and the Albuquerque Bernalillo County Water Utility
4 Authority and Colorado State.

5 We're also concerned about tritium, since, to
6 my knowledge, it's not being monitored in the
7 Albuquerque San Juan-Chama Drinking Water Project. And
8 tritium cannot be filtered out by any means. And we
9 believe the tritium standard should be changed from the
10 20,000 picocuries per liter to 40 picocuries per liter.
11 400. I'm sorry. 400 picocuries per liter.

12 Both Colorado and California have adopted this
13 more protective standard for tritium.

14 We also appreciate the state Surface Water
15 Quality Bureau's steps towards the more protective
16 standards for the alpha-emitting transuranic
17 radionuclides, and we encourage them to reconsider
18 adopting the more protective standard to the 1 -- the
19 .15.

20 Thank you.

21 MS. ORTH: Thank you, Ms. Weinstock.

22 Will you be cross-examined together or
23 separately?

24 MS. WEINSTOCK: Together.

25 MS. GREENWALD: Together.

1 MS. ORTH: All right.

2 Ms. Greenwald.

3 DIRECT TESTIMONY OF JANET GREENWALD

4 MS. GREENWALD: Good afternoon.

5 I'm Janet Greenwald, representing Citizens for
6 Alternatives to Radioactive Dumping.

7 We support the position of Arjun Makhijani and
8 Amigos Bravos that standards for long-lived,
9 alpha-emitting radionuclides in the upper Rio Grande
10 should be held to .15 picocuries per liter, a figure
11 that is upheld by a number of scientific experts who
12 contend that the young child and the fetus are not
13 safeguarded by less protective standards.

14 We support the state's Surface Water Bureau in
15 taking the step of raising the standards for long-lived,
16 alpha-emitting radionuclides in the upper Rio Grande to
17 1.5 picocuries per liter. We believe that this move
18 will be a reference point that could be used in
19 relationship to public accessible monitoring and the
20 consideration of appropriate filtering systems for Rio
21 Grande-based drinking water systems.

22 We are also hopeful that these standards will
23 help LANL and -- in that cleanup of the canyons, which
24 we believe are the generators of much of the
25 radionuclide burden of the Rio Grande, have never been a

1 high cleanup priority for laboratories.

2 Thank you for your consideration.

3 MS. ORTH: Thank you, Ms. Greenwald.

4 Mr. Ames, do you have questions?

5 MR. AMES: The Department doesn't have any
6 questions. Thank you.

7 MS. ORTH: Ms. Evans?

8 MS. EVANS: No questions.

9 MS. ORTH: Let's see.

10 Mr. Kendrick?

11 MR. KENDRICK: No questions.

12 MS. ORTH: Ms. McCaleb?

13 MS. MC CALEB: No questions.

14 MS. ORTH: Ms. Anderson?

15 MS. ANDERSON: No questions.

16 MS. ORTH: Mr. Rose?

17 MR. ROSE: No questions.

18 MS. ORTH: I don't see Mr. Trujillo.

19 Or Mr. Smith.

20 Mr. Larson?

21 MR. LARSON: No questions.

22 MS. ORTH: And Mr. Harwood.

23 MR. HARWOOD: No questions.

24 MS. ORTH: There you are.

25 Commissioners, do you have questions of

1 Ms. Weinstock or Ms. Greenwald?

2 Anyone else have questions based on their
3 statements?

4 No.

5 Thank you all very much.

6 We'll turn now to Buckman Direct Diversion
7 Board.

8 Mr. Harwood is here with his witnesses.

9 MR. HARWOOD: Thank you, Madam Hearing
10 Examiner -- or Hearing Officer, I suppose is the better
11 phrase.

12 May I begin?

13 MS. ORTH: Yes.

14 MR. HARWOOD: Thank you.

15 First, I'd like to thank you and the
16 Commission for giving us the opportunity to speak today.

17 My name is Kyle Harwood. Along with Nancy
18 Long, who is an attorney with the firm of Long, Pound &
19 Komer here in Santa Fe, we represent the Buckman Direct
20 Diversion Board, and helped them accomplish the mission
21 that the City and County of Santa Fe have asked the
22 Board, through a Joint Powers Agreement, to design and
23 procure, own and operate the Rio Grande diversion
24 facility for the Santa Fe community here.

25 And we appreciate the opportunity. This is

1 our first appearance in the triennial review, and we've
2 enjoyed our experience, and we would like to thank both
3 NMED staff as well as Counselor Ames for cooperating
4 with us in any issues that we're going to discuss here
5 shortly.

6 I would like to introduce Mr. Rick
7 Carpenter -- he is the Buckman Direct Diversion project
8 manager -- and have him endorse his previously filed
9 direct and rebuttal testimony.

10 MS. ORTH: Okay.

11 Swear them in, please.

12 RICK CARPENTER and ROBERT GALLEGOS
13 having been first duly sworn or affirmed, were
14 examined and testified as follows:

15 DIRECT EXAMINATION

16 BY MR. HARWOOD:

17 MR. HARWOOD: Seated to the right of
18 Mr. Carpenter is Mr. Gallegos, who we presented in a
19 surrebuttal filing that we made last week, on the 3rd.
20 And Mr. Gallegos' resume is attached to that filing.

21 So I'd ask you, Madam Hearing Officer, to take
22 note of that filing and also of his resume thereto.

23 MS. ORTH: All right.

24 Are there objections to the admission of the
25 exhibits from any of the parties?

1 Hearing none, they're admitted. Thank you.

2 (Exhibits Buckman Direct Diversion Board
3 Carpenter A, B, B-1 through B-4 and Gallegos A
4 admitted into evidence.)

5 MR. HARWOOD: Thank you.

6 In the interest of efficiency, we'd like to
7 present this testimony in a brief question-and-answer
8 format. I don't believe our presentation would take
9 very long. Obviously, the cross that follows may.

10 But I'd like to begin by asking Mr. Carpenter
11 to briefly describe his job duties as project manager.

12 MR. CARPENTER: Thank you.

13 I am the project manager for the Buckman
14 Direct Diversion Board. I answer directly to the board.
15 By the way, the board is an entity comprised by the City
16 of Santa Fe and County of Santa Fe officials to oversee
17 the implementation of the Buckman Direct Diversion
18 project. I have been in this capacity since July
19 of 2002.

20 My duties have included the planning,
21 permitting, oversight of procurement, design,
22 construction and eventually start-up of the project.

23 MR. HARWOOD: Could you provide for the
24 Commission just one or two sentences about the status of
25 the project today?

1 MR. CARPENTER: Yes. It's a \$216 million
2 project. We have spent a little over 60 percent of that
3 in construction so far, a little over halfway through
4 construction. We're on schedule and on budget so far,
5 with implementation set for early 2011.

6 MR. HARWOOD: Okay. Thank you.

7 Mr. Gallegos, could you briefly describe for
8 the Commission your role with the project?

9 MR. GALLEGOS: I currently serve as the City
10 of Santa Fe public utilities department's environmental
11 compliance officer. I provide technical support to the
12 BDD in terms of environmental compliance issues.

13 MR. HARWOOD: Okay. Thank you.

14 Excuse me.

15 Mr. Carpenter, can you provide the Commission
16 with a description of why the BDD Board has identified
17 rads as an issue of concern and why the Board is
18 supporting the criteria proposed by the Department?

19 MR. CARPENTER: Yes. I'd be happy to do that.

20 Source water protection is a predominant
21 concern for the Buckman Direct Diversion Board. Being
22 able to characterize and understand these constituents
23 of concern in the segment of the Rio Grande is a
24 significant public concern. It's, obviously, a concern
25 for the rate payers, having invested \$216 million in the

1 project. It's also a concern for the City of Santa Fe
2 and Santa Fe County public water utilities.

3 Therefore, the board has promised transparency
4 and disclosure on this topic, and the board supports the
5 designation, therefore, of this segment of the Rio
6 Grande as a permanent water supply source and also
7 radiological criteria proposed by the Environment
8 Department for purposes of disclosure and monitoring.

9 In my opinion, this is permissible. It's
10 based on sound, credible science and, most importantly,
11 is in the public interest.

12 MR. HARWOOD: Thank you, Mr. Carpenter.

13 Mr. Gallegos, could you speak for a minute
14 about how constituents such as these are an issue for
15 the project?

16 MR. GALLEGOS: When the BDD goes online, it
17 will be considered under both state and federal
18 regulations as a public water supply system. As such,
19 it's subject to numerous drinking water standards,
20 finished drinking water standards, including the many --
21 including many radionuclides, some of which are -- are
22 covered under this criteria.

23 MR. HARWOOD: Great. Thank you.

24 And could you just distinguish for a minute
25 for us the difference between the Safe Drinking Water

1 Act regulations and our -- the board's focus on source
2 water protection?

3 MR. GALLEGOS: Federal Safe Drinking Water Act
4 gives EPA the authority to adopt regulations governing
5 public drinking water. These are finished drinking
6 water standards. The criteria, as I understand them,
7 are meant to protect -- as proposed are meant to protect
8 the designated use of for public water supply and, in
9 our estimation, are -- are for source water protection
10 purposes.

11 MR. HARWOOD: Thank you.

12 Mr. Gallegos, could you also speak to whether
13 these criteria have a credible scientific basis, please?

14 MR. GALLEGOS: With respect to the scientific
15 basis, the Department used federal guidance 13 as a
16 basis for determining the levels, and this -- you know,
17 NMED employs experts to look at these issues. We find
18 these to be acceptable -- an acceptable way to
19 determine -- determine the risk -- the risk levels
20 associated with this criteria.

21 MR. HARWOOD: Thank you.

22 Mr. Carpenter, in your opinion, do these
23 criteria for public disclosure monitoring purposes
24 conflict in theory or in practice with any other local,
25 state or federal regulatory agencies?

1 MR. CARPENTER: No. I'm not aware of any
2 conflicts.

3 MR. HARWOOD: Mr. Gallegos, same question,
4 please?

5 MR. GALLEGOS: I'm not aware of any conflicts.

6 MR. HARWOOD: Very good. Thank you.

7 Mr. Carpenter, could you speak to -- speak for
8 a minute to the operational importance of monitoring and
9 publicly disclosing the presence and concentrations of
10 these constituents, please?

11 MR. CARPENTER: Yes. As I mentioned before,
12 public disclosure and transparency is very important to
13 the Buckman Direct Diversion Board public confidence and
14 is a very costly, very complicated project, is
15 imperative to avoid any constraints or challenges to
16 maintaining that public confidence, is -- is a challenge
17 for us, as well as the very real challenges of the
18 expense involved with maintaining that public
19 confidence, sampling, monitoring, treating the water.

20 Also, if -- if the project is not able to
21 operate all the times that we would like for it to, what
22 you have is a functional equivalent of a stranded asset,
23 which the board is very cognizant of, as well.

24 So there are operational concerns as well as
25 public interest and public confidence concerns.

1 MR. HARWOOD: Very good.

2 And, Mr. Gallegos, could you speak for a
3 minute about the barriers that the BDD Board has
4 identified in its -- in its public outreach materials to
5 give the public confidence that source water protection
6 is what -- in conjunction with other barriers will give
7 the public confidence that the water that is ultimately
8 delivered to them will be of sufficient quality?

9 MR. GALLEGOS: The board has identified a
10 multi-barrier approach to protecting -- protecting --
11 ultimately protecting the water that gets received by
12 the citizens of Santa Fe and Santa Fe County. This
13 includes source water protection, proper -- proper
14 treatment of -- of the raw water, proper monitoring of
15 both source waters and raw water -- source water and
16 finished drinking water -- excuse me -- and proper --
17 finally, proper disinfection and distribution of the
18 water supply.

19 MR. HARWOOD: Very good. Thank you.

20 We'll take note of the fact that the lab
21 yesterday withdrew their opposition to this proposed
22 criteria, and we thank them for that. We're encouraged
23 by that action.

24 And I believe that concludes our presentation.

25 MS. ORTH: Thank you.

1 Mr. Harwood, I'd like to be specific about the
2 exhibits admitted. They would include Carpenter A, B
3 and B-1 through B-4 --

4 MR. HARWOOD: Yes, ma'am.

5 MS. ORTH: -- and Gallegos A.

6 MR. HARWOOD: That's right.

7 And I think it probably goes without saying
8 that we're withdrawing Mr. Gaume as a surrebuttal expert
9 since he's not back yet and unneeded.

10 MS. ORTH: All right. Thank you.

11 And for the Commission's benefit, Mr. Harwood
12 was going to present Mr. Gaume, but Mr. Gaume is
13 completely unavailable until next week.

14 So, Mr. Ames, do you have questions of the BDD
15 panel?

16 MR. AMES: I have no questions, Ms. Orth.
17 Thank you.

18 MS. ORTH: All right.

19 Ms. Evans?

20 MS. EVANS: No questions.

21 MS. ORTH: Mr. Kendrick?

22 MR. KENDRICK: No questions.

23 MS. ORTH: Ms. McCaleb?

24 MS. MC CALEB: No questions.

25 MS. ORTH: Ms. Anderson?

1 MS. ANDERSON: No questions.

2 MS. ORTH: Mr. Rose?

3 MR. ROSE: No questions.

4 MS. ORTH: I don't see Mr. Trujillo.

5 Ms. Greenwald or Ms. Weinstock?

6 MS. GREENWALD: No.

7 MS. WEINSTOCK: No.

8 MS. ORTH: Mr. Larson?

9 MR. LARSON: No questions.

10 MS. ORTH: All right.

11 Commissioners, do you have questions of the
12 Buckman panel?

13 EXAMINATION BY THE COMMISSION

14 MS. ORTH: Oh, Mr. Goldstein.

15 MR. GOLDSTEIN: Thank you.

16 Will the panel -- will the board be submitting
17 comments in response to Commissioner Hutchinson's offer
18 for folks to make argument on the rad issue?

19 MR. HARWOOD: Yes. As I understand
20 Commissioner Hutchinson's question, it goes to whether
21 this criteria as proposed fits within this Commission's
22 authority, and we look forward to answering that
23 question.

24 MR. GOLDSTEIN: Good. Thank you.

25 MS. ORTH: All right. Thank you.

1 Other Commission questions?

2 MR. GLASS: Well, a follow-up to that, Madam
3 Hearing Officer.

4 Have you -- have you reviewed Michael
5 Saladen's rebuttal testimony?

6 MR. HARWOOD: The testimony that's been
7 withdrawn?

8 MR. GLASS: Was it withdrawn, or was it
9 just -- was Saladen's withdrawn?

10 MS. ORTH: Right. It's not offered.

11 MR. GLASS: Okay. Not offered.

12 MS. ORTH: Yeah.

13 MR. GLASS: Okay.

14 Then I withdraw the question.

15 MR. HARWOOD: The answer is yes.

16 MR. GLASS: I'm sure you have, but I won't go
17 any further into it because it's been --

18 MS. ORTH: Stranded.

19 MR. GLASS: -- stranded.

20 Commissioner Krapfl, did you have a question?

21 MS. KRAPFL: No.

22 MS. ORTH: No. All right.

23 Other questions?

24 Oh. Ms. --

25 MS. RODRIGUEZ: Rodriguez.

1 MS. ORTH: -- Rodriguez.

2 CROSS EXAMINATION

3 BY MS. RODRIGUEZ:

4 MS. RODRIGUEZ: I had a question about how you
5 would --

6 MS. ORTH: Would you come up to the dais.

7 MS. RODRIGUEZ: It's pretty simple, this first
8 one anyway.

9 How do you inform the public in Santa Fe about
10 what you're doing? You say you have had transparency.
11 I mean, it sounds great, but how do you do that?

12 MR. CARPENTER: If I may answer that.

13 Through a variety of methods. The Buckman
14 Direct Diversion Board has an open public meeting once a
15 month. The agenda for that is publicized, the packets
16 are made available to interested parties. So the public
17 is available to avail itself through that venue to board
18 business.

19 The Board also has a very good, informative
20 website that the public can access. Bddproject.org is
21 the web address, and it's extremely comprehensive.

22 The Board has retained the services of a
23 public information -- public relations firm called
24 Cooney Watson and Associates out of Albuquerque.

25 They're pretty well funded, and they have a variety of

1 outreach and community information programs that are
2 ongoing.

3 MS. RODRIGUEZ: Okay.

4 And because I --

5 MS. ORTH: No commentary.

6 MS. RODRIGUEZ: Yeah, right. I -- I'm holding
7 my tongue.

8 What about the free newspapers around town and
9 on public access or anything, or on commercials on the
10 regular TV where people see it?

11 MR. CARPENTER: Yes. We routinely issue press
12 releases via the three newspapers in town. We make
13 ourselves available routinely to inquiry by reporters
14 that work for those newspapers. We're in the news a
15 lot.

16 We are invited from time to time to make
17 presentations on the local radio station here, KSFR, and
18 I'm invited by city water staff from time to time as a
19 presenter on their regular water talk radio show.

20 So we think we do a pretty good job of getting
21 out there in the public and making ourselves available.

22 We've also done, to date, several public
23 meetings, one of which was a very comprehensive town
24 hall, and we may hold future town halls if the
25 opportunity or the need presents itself.

1 MS. RODRIGUEZ: So you feel that the public
2 has been well informed and that they do attend when you
3 have these meetings, when you have a large group of the
4 public coming in?

5 MR. CARPENTER: The town hall that I
6 referenced -- the town hall that I referenced had a
7 pretty good turnout. I think we had about 80 people. A
8 little bit more than half were not staff, they were
9 members of the public. We've had some that weren't so
10 well attended. It just depends.

11 The board has also retained the services of an
12 independent peer reviewer that is funded through a grant
13 from DOE, and that peer reviewer will -- they're just on
14 board recently, but is scheduled as part of their scope
15 of work to hold several public meetings on the issue of
16 radiologicals and the science associated with that.

17 MS. RODRIGUEZ: All right.

18 And so in terms of the Buckman project --
19 water project, this -- could you -- is this the well?
20 When they talk about the Buckman well that had -- they
21 found radionuclides down in Albuquerque as we hear
22 about? Is this what we're talking about?

23 MR. CARPENTER: No. No, it is not.
24 Unfortunately, both projects are named Buckman.

25 MS. RODRIGUEZ: Right.

1 MR. CARPENTER: The wells project was Buckman
2 Supplemental Wells 10 through 13. Those are the
3 groundwater wells. This is the Buckman Direct Diversion
4 project, which will divert water from the surface of the
5 Rio Grande, treat it and deliver it into the drinking
6 water system. So it's a surface diversion drinking
7 water project.

8 MS. RODRIGUEZ: All right.

9 Is there any relationship between the -- the
10 Chama diversion that Albuquerque has paid for, is
11 planning to put online next year?

12 MR. CARPENTER: The relationship is that both
13 Albuquerque and the Buckman Direct Diversion Board,
14 comprised of the city and county, are member agencies in
15 the San Juan-Chama project. About 60 percent of the
16 water that this project will divert and treat is San
17 Juan-Chama project water.

18 MS. RODRIGUEZ: So you're saying that
19 60 percent of the water that will eventually go into
20 Albuquerque will be treated?

21 MR. CARPENTER: No. This project doesn't have
22 anything to do with Albuquerque's San Juan-Chama
23 project, completely separate. This Buckman Direct
24 Diversion project will use -- of total water that it
25 will treat, about 60 percent of it is derived from the

1 San Juan-Chama diversion project in Colorado. That's
2 the project that diverts water just above the border and
3 delivers it down to the member agencies here.

4 There are several member agencies.
5 Albuquerque is one of them. And they are -- are also
6 using San Juan-Chama water to divert and treat.

7 MS. RODRIGUEZ: So the water coming from the
8 San Juan-Chama that goes into Albuquerque -- goes into
9 the Rio Grande that Albuquerque will be using is not
10 treated?

11 MR. CARPENTER: Oh, no. Albuquerque will
12 treat their water, as well. They've got a fairly robust
13 water treatment process. So it -- you can't just divert
14 the raw water. They'll have to treat it.

15 MS. ORTH: Ma'am, do you have questions about
16 the issues that we're talking about today?

17 I mean, you --

18 MS. RODRIGUEZ: Well, he's talking about
19 Buckman, and I wasn't clear, because he's right, there
20 is some confusion. I didn't know about that, and I just
21 wanted to know the relationship from what Buckman is
22 doing with the water.

23 So that's it.

24 MS. ORTH: All right.

25 MS. RODRIGUEZ: Thank you very much.

1 MS. ORTH: Thank you.

2 Other questions?

3 Other questions?

4 Commissioner Hutchinson.

5 FURTHER EXAMINATION BY THE COMMISSION

6 MR. HUTCHINSON: The -- the Buckman Diversion
7 project was aware of the potential for these
8 radionuclides prior to initiating any engineering
9 studies or construction funding or anything like that,
10 correct?

11 MR. CARPENTER: That is correct.

12 MR. HUTCHINSON: And -- and did they pose
13 any -- or did they pose a -- they obviously didn't pose
14 a significant enough threat to abandon the concept.

15 MR. CARPENTER: That is correct.

16 MR. HUTCHINSON: And I did -- I keep hearing
17 the proposed standards and criteria characterized -- or
18 hear them characterized as standards and criteria, but
19 they are really -- and then hear them characterized as
20 informational.

21 Does the fact that they're informational
22 change the way that you designed and intend to operate
23 the facilities?

24 MR. CARPENTER: That they will inform us and
25 the public through monitoring and disclosure is

1 important to us. It helps us to better plan and
2 characterize the raw water that we're dealing with.

3 It doesn't change at this point the way that
4 we have designed or foresee operating the project, going
5 forward.

6 MR. HARWOOD: I think it's also fair to say,
7 Commissioner Hutchinson, that you only hear us refer to
8 them as criteria.

9 MR. HUTCHINSON: Okay.

10 And I appreciated Dr. Makhijani's statement.
11 I appreciate now knowing where my aging and baldness
12 comes from.

13 And thank you.

14 MS. ORTH: Thank you.

15 Other questions?

16 Other questions?

17 Anything else at all before we excuse the
18 Buckman panel?

19 No?

20 Thank you very much, gentlemen.

21 MR. HARWOOD: Thank you.

22 MS. ORTH: All right. This brings us to the
23 point I thought we would be at. We're here in the
24 middle of the day.

25 I will be here for public comment around the

1 lunch hour, be back in the room by 12:30, and I'll stay
2 until a little bit after the lunch hour in case there's
3 public comment.

4 But we are done for the day for the technical
5 case, because we have just one party left to hear from,
6 that's Freeport-McMoRan. They're flying witnesses in
7 from out of state, and they -- those witnesses will not
8 be available until tomorrow morning.

9 So let's break for the day, unless you'd like
10 to come back for public comment.

11 Thank you.

12 We'll reconvene at 9 o'clock in the morning.

13 (Proceedings adjourned at 12:00 p.m. to
14 12:35 p.m.)

15 MS. ORTH: So good afternoon.

16 We'll go back on the record here at 12:35 to
17 accept nontechnical public comment.

18 We have Mr. Bacon, I think --

19 MR. BACON: My name is David Bacon.

20 MS. ORTH: -- in front of us.

21 We're going to swear you in first.

22

23

24

25

1 DAVID BACON

2 having been first duly sworn or affirmed, was
3 examined and testified as follows:

4 DIRECT TESTIMONY

5 THE REPORTER: Would you spell your name,
6 please?

7 MR. BACON: David B-A-C-O-N, Bacon.

8 THE REPORTER: Thank you.

9 MR. BACON: I listened to some of the
10 proceedings yesterday, and I've been thinking a lot
11 about the fact that it's split into technical and
12 nontechnical.

13 It seems to be a very arbitrary division,
14 since we're all, technically, essentially experts at
15 water. If we weren't, we wouldn't be here. If my renal
16 system had failed, I wouldn't be here testifying,
17 because it couldn't absorb water, it couldn't utilize it
18 as a nutrient.

19 And that goes with every living thing on this
20 planet and in this state. We're all experts at water.
21 It's what we depend on, and it's what we know how to use
22 from the time we're born until the time we die.

23 The lawyer from the labs was an expert only on
24 how aluminum is taken up by the body at certain pH
25 levels. He's not an expert in aluminum toxicology at

1 all. We are. It's our bodies that are experts at that.
2 It's our bodies that live and die with that overload of
3 toxicology within our water. It isn't experts that tell
4 our bodies what to do. It's the body and the
5 relationship to water.

6 So I testified earlier at the Oil Conservation
7 Division, and I had a case that I think we could all
8 understand. If I came upon someone -- I live on a well.
9 If I came down to my well house and found a guy had
10 taken the top off the well and was pouring gasoline in
11 it, I'd do everything in my power to stop that. I'd use
12 fists, rocks, sticks, stones, a truck, a gun.

13 But I wouldn't want to do that. What I would
14 want to do is stop him and call the sheriff, because I
15 don't really believe in vigilante justice.

16 If the sheriff then came and said, "Mr. Bacon,
17 we can't stop this man from polluting your well, we have
18 no jurisdiction over this," I'd be left with a hell of a
19 decision at that point.

20 And it feels to me like that's the decision
21 we're left with. It feels to me like the polluters are
22 the experts, they're the technical people who say that
23 you don't have any jurisdiction in these certain areas,
24 and that we, as people who depend on our water for life,
25 are simply left on the sidelines.

1 And I don't know where to go with that.

2 I think it's the decision -- or it's a state
3 of affairs that's really right now essential to figure
4 out. Mexico's in the middle of one of the most severe
5 droughts in its history. Four million farmers are off
6 the land right now, and that's southern Mexico. Texas
7 the same, 67 counties are in an exceptional drought.

8 A billion people on this planet don't have
9 enough water to drink, and yet we, as a state, cannot
10 assemble or cohesively organize ourselves to protect our
11 water. We're listening to the guy that's pulled the cap
12 off the well and is pouring gasoline down it.

13 And the last thing I'll say is that in the Oil
14 Conservation Division hearings, I got to hear Dr. Theo
15 Colborn, the leading expert in endocrine disruptors,
16 leading expert in this country. She has identified
17 chemicals back to the level of the body as the expert.
18 Dr. Colborn has identified chemicals that are in our
19 water that are dangerous for the very fact that our body
20 doesn't recognize them. That's the danger.

21 When our body recognizes a major onslaught of
22 these chemicals, it can sort of react in a -- in a
23 defensive way. When they sneak in under the body's
24 radar is when you're really in trouble, and it's when
25 your endocrine system goes down. And the endocrine

1 disruptors are affecting every mammal now in this
2 country.

3 So I know I'm throwing it on your laps, but I
4 think that if we cannot coherently organize ourselves as
5 a state to protect our water, then we're in big, big
6 trouble.

7 And that's as best I could do for the truth.

8 Thank you very much.

9 MS. ORTH: Thank you, Mr. Bacon.

10 MR. BACON: Thank you.

11 MS. ORTH: Do Commissioners Vigil, Dominguez,
12 Lewis, Glass or Hutchinson have a question?

13 EXAMINATION BY THE COMMISSION

14 MR. HUTCHINSON: I guess I -- I do.

15 You know, we -- we wrestle with the same thing
16 on the Commission. I don't know if you heard I've got
17 four items to be deliberated on as to whether or not we
18 possess certain powers, going to your jurisdiction
19 question.

20 MR. BACON: No, I didn't, Howard, and I'm
21 sorry I didn't. I couldn't stay.

22 MR. HUTCHINSON: And our jurisdiction is
23 determined by the legislature.

24 MR. BACON: Um-hum.

25 MR. HUTCHINSON: And it is -- it's a

1 limiting -- it's a limiting of that jurisdiction.

2 Have you presented these concerns to the
3 legislature?

4 MR. BACON: I have a history of presenting my
5 concerns to the legislature, and it's a -- it's a fairly
6 losing endeavor. I'm just hoping that maybe you will.
7 I'm hoping that maybe someone can begin this discussion
8 so that we can organize ourselves in a little more
9 coherent way around protecting our water.

10 MR. HUTCHINSON: Do you have -- do -- do you
11 yourself and -- and others that you work with -- have
12 you been identifying those arenas where this limiting of
13 jurisdiction is creating these problems? Have you got
14 those lists or -- or --

15 MR. BACON: Um-hum. I have some.

16 MR. HUTCHINSON: Uh-huh.

17 MR. BACON: I certainly don't have all.

18 MR. HUTCHINSON: I don't know. I would
19 appreciate getting that information.

20 MR. BACON: Okay.

21 MR. HUTCHINSON: And I don't know -- you know,
22 the -- as far as the standards -- or as far as the
23 hearing that we're addressing here, I don't know that
24 it's really applicable to our standards here, but at
25 some point, especially if we determine that we lack

1 jurisdiction, and I think it would be appropriate for
2 this Commission to communicate that to the -- to the
3 legislature, or at least to the Governor's office.

4 So I would like to see that, if it's nothing
5 more than a personal communication to me.

6 MR. BACON: That would be fine. Sure. I'll
7 find out how to deliver that.

8 MR. HUTCHINSON: Okay. Thank you.

9 MR. BACON: Yeah.

10 MS. ORTH: All right.

11 Other questions?

12 MR. LEWIS: Yeah, sure.

13 So, Mr. Bacon, you're -- I mean, you brought
14 up endocrine disruptors. So I'm presuming this is one
15 of the areas that you're hoping that there would be some
16 more initiative and leadership shown in terms of
17 manning -- managing us. I -- presumably you're -- it's
18 primarily pharmaceuticals that are getting into water
19 supplies? Is that one of the issues that you're
20 concerned with and --

21 MR. BACON: Fracking fluid contains over 70
22 major endocrine disruptors. So it's an ongoing --
23 endocrine disruptors run the gamut, and they're not just
24 pharmaceuticals. They come mainly from hydrocarbons.
25 So it's just one thing I bring up.

1 The other thing that I saw yesterday is
2 specific testimony tends to be very, very limited in its
3 scope and doesn't address synergy, and it's where
4 endocrine disruptors have a synergistic effect, and I
5 don't know how to begin to bring that under state
6 jurisdiction, the synergistic effect.

7 It's a -- it's a testimony and a level of
8 expertise that is extremely complex, I understand. But
9 I think the synergistic effects are where you have the
10 main damage to -- to life. So --

11 MR. LEWIS: And many unknowns there, and many
12 of those --

13 MR. BACON: Many unknowns, you bet. Of
14 course, of course. Yeah.

15 I just bring up endocrine disruptors because
16 they are part of the state's monetary creation right
17 now. They're an underpinning of where we're getting our
18 money from.

19 And the -- Howard's point, when you address
20 the legislature, you don't always address them very
21 successfully if a lot of money is coming down from the
22 other side of that address.

23 But when I think about the future of the
24 state, and it includes seriously polluted water sources,
25 the future doesn't look good to me. That's really

1 basically what I'm bringing up here. And there's --
2 there's many areas within that -- radionuclides are one,
3 endocrine disruptors are another level.

4 So, again, this is nontechnical testimony.

5 MR. LEWIS: Of course.

6 MR. BACON: And I appreciate that fact.

7 MR. LEWIS: And another concern you --

8 MR. HUTCHINSON: On that point?

9 MR. LEWIS: Well -- no. Go ahead.

10 On endocrine disruptors?

11 MR. HUTCHINSON: Yeah.

12 I was just wondering -- have you considered
13 putting together technical testimony and -- and actually
14 bringing it to the Commission?

15 MR. BACON: I don't -- I don't have background
16 for --

17 MR. HUTCHINSON: I'm talking about, you know,
18 getting the people who --

19 MR. BACON: I -- I would be happy to
20 communicate with Dr. Colborn and see if she will send
21 something pertinent. I'm sure she has something
22 pertinent. She's worked on the oil and gas issue in
23 Colorado at a very high level. So I would be happy to
24 do that.

25 MR. HUTCHINSON: And you're aware that our

1 regulations allow for petitioning for standards change
2 at any time. It's not just triennial review. So --

3 MR. BACON: Right. Okay.

4 MR. HUTCHINSON: If you want to bring that
5 issue forward.

6 MR. BACON: That's a very good point, and I'll
7 be happy to do it.

8 MR. HUTCHINSON: Thank you.

9 MR. LEWIS: And then I was going to follow --
10 I guess, another point that I seem -- that I believe you
11 touched on was -- maybe I'm putting -- maybe I'm putting
12 words in your mouth, maybe not. Let me know.

13 But that maybe what we're hearing in these
14 hearings is primarily testimony from the regulated
15 entities themselves that have -- obviously have motives
16 that may not mesh with the intent of the -- at least the
17 overt intent -- statutory intent of what we're supposed
18 to do here, and how -- maybe you thought a bit about
19 that.

20 So do you have ideas as to how one balances
21 out input on -- how does one do a better job of engaging
22 non -- I mean, I guess, entities that have a direct
23 monetary benefit from regulatory changes that one might
24 propose?

25 MR. BACON: It's a great question, and I think

1 that -- I think the answer lies somewhere in a
2 synergistic answer, that clean water should, in my
3 estimation, and I don't think I'm alone in that, take
4 precedence over particular economic or specialized
5 interests. It's a -- it's a comments. It's something
6 that we all need for life.

7 And that regulations to protect it should be
8 at least -- at very least follow a -- a prudence
9 principle, you know, a -- if there are questions, I
10 think it should come down on the side of pure water
11 rather than on the side of economic harm to any entity.

12 And I think it should also come under -- and
13 with Howard sitting there, I don't know if this is a
14 progressive, liberal or conservative point of view. I
15 think it should come under more sovereignty of the state
16 to protect water rather than less. Kind of a -- it's
17 kind of a scary position, I understand, to take. The
18 state doesn't always do well with its sovereignty.

19 But I think that if -- if we can't coherently
20 regulate our waters in a -- in a way that is sovereign,
21 then we're -- you know, we're losing in -- we're losing
22 the -- the future reality of the survivability and
23 sustainability of New Mexico.

24 So while I've sort of thrown the ball in your
25 guys' lap, I think that -- and I will happily respond

1 with what I can respond with, but I think it's a larger
2 question of urging the legislature or urging the
3 Governor, urging more precautionary principles and
4 sovereignty and right to not just regulate, but prohibit
5 certain things from entering the water supply in New
6 Mexico.

7 And it's -- again, that's something that no
8 one can just snap their fingers and create. That's a --
9 that's a long process. But I think if something came
10 from this Commission on that issue to the legislature,
11 that it has a chance at being listened to and, you know,
12 assimilated. So -- it's complex, I understand that. It
13 isn't simple.

14 And yet the issue -- or the -- the little
15 story I made up, I think, everyone relates to. It isn't
16 complex. It's very direct. There's nothing indirect
17 about water, or nonbasic about water. So --

18 MS. ORTH: Okay.

19 Other questions?

20 No?

21 All right. Thank you very much.

22 MR. BACON: Thank you for listening.

23 MR. LEWIS: Thanks for coming in.

24 MS. ORTH: Ma'am, are you here to give public
25 comment?

1 MS. HANSEN: I am.

2 MS. ORTH: Mr. Bacon, you're leaving your
3 jacket.

4 MR. LEWIS: He won't forget it for long.

5 MS. HANSEN: It's cold out there.

6 MR. BACON: Thank you.

7 MS. ORTH: Tell us your name.

8 MS. HANSEN: Hi. Good afternoon.

9 My name is Anna Hansen.

10 MS. ORTH: You're going to be sworn in.

11 ANNA HANSEN

12 having been first duly sworn or affirmed, was
13 examined and testified as follows:

14 DIRECT TESTIMONY

15 THE REPORTER: Would you spell your name for
16 me, please?

17 MS. HANSEN: Anna, A-N-N-A, Hansen,
18 H-A-N-S-E-N.

19 Resident of New Mexico for 37 years. I have a
20 long-standing concern about this issue. I was the chair
21 of Concerned Citizens for Nuclear Safety from 1999 until
22 2005.

23 And during that time, there was the Cerro
24 Grande fire, and during that time, I organized the large
25 conference that was held at the Eldorado, where 450

1 people attended who were quite concerned about the water
2 running down the mountain after the Cerro Grande fire.

3 At that time, our Governor was Secretary of
4 Energy, and he sent many people to participate. So this
5 conference was not just a conference with, you know, the
6 people on the -- on one side speaking, but it was people
7 from the federal government, from the lab and from all
8 walks of -- all the entities that were concerned about
9 the water and what happened during the Cerro Grande
10 fire.

11 So from that time was when Concerned Citizens
12 for Nuclear Safety really started concentrating on the
13 water issues, because that was such an important issue
14 to all of us. And with the fire, it increased the
15 runoff quite substantially.

16 I'm not a scientist, so I can't give exact
17 percentage of amounts of the runoff, but it was
18 substantial, that -- the amount of radionuclides and
19 perchlor- -- I never can say that word -- perchlorate
20 and all the chemicals from the weapons industry that are
21 running down into the Rio Grande.

22 I believe that James Graft wrote a book in the
23 '80s called Plutonium in the Rio Grande. Plutonium has
24 been in the Rio Grande for quite some time. And even
25 though it is extremely heavy metal and does sink to the

1 bottom, it is still in the Rio Grande, and it has been
2 scientifically proven that it is in the Rio Grande.

3 One of the things that was said at the
4 conference that was quite shocking to me was that one of
5 the scientists referred to plutonium as a
6 natural-occurring substance, and we all know that
7 plutonium did not exist before 1940. So I don't
8 consider it a natural-occurring substance.

9 But I really am here because the water quality
10 of New Mexico is so important to all of us, and without
11 clean water and without the protection of the public,
12 which is your responsibility to protect, which I
13 completely recognize as also a public servant -- I
14 served on the state Board of Acupuncture for the past
15 six years. So I know protection of the public is
16 extremely important, and the water quality of New Mexico
17 is extremely important.

18 And even though we are a very small state,
19 with low population, that does not mean that we are
20 not -- we should not be protected. And I do feel that
21 the native people in this community are largely impacted
22 by also the water in the Rio Grande.

23 So I'm here to urge you to please have more
24 protective standards for radionuclides. I -- I feel
25 that the City of Santa Fe, the County of Santa Fe is

1 about to build this diversion plant that is right down
2 from where the runoff is from Los Alamos, and it's
3 really imperative that -- you know, that building the
4 diversion plant is protected from the radionuclides and
5 the chemicals.

6 I believe that the mission of the lab could be
7 changed. I believe that weapons should no longer be
8 made there. We all know what happened at Rocky Flats.
9 We know what's happened with other weapon industries,
10 and especially, you know, nuclear weapons industry, that
11 there are so many chemicals that are now in -- in the
12 environment, in the air, you know.

13 So I just want to support all -- what Amigos
14 Bravos has been doing in leading the effort, along with
15 Dr. Arjun Makhijani to challenge the public policy. We
16 believe that the proposed standards should be more
17 protective of human health.

18 We support the radionuclear standards being
19 based on the risk of one person in one million dying of
20 cancer from a lifetime exposure. A number of people who
21 may die of cancer results in lower concentrations of
22 radioactive contaminants in the Rio Grande, therefore --
23 therefore, protecting public health.

24 And NMED has not opposed this more protective
25 public policy of one in a million. And so I want to

1 also support that.

2 I know for myself, you know, I -- I take
3 thyroid, and I feel like the radionuclides in the air
4 have something to do with have -- me having to take
5 thyroid medicine. My dog also has to take it, which I
6 find exactly is exposed to the same thing, and I don't
7 know where it comes from. That's just my own ideas.

8 But I feel like we are heavily exposed here to
9 high concentration of contaminants, and I just really
10 want you to think about that.

11 I also apologize for not being here sooner,
12 but the snowstorm --

13 MS. ORTH: This is timely.

14 MS. HANSEN: -- you know, did prevent me from
15 being here.

16 But I'm really appreciative of you all being
17 here, listening to our testimony, and being concerned
18 and aware of these issues.

19 MS. ORTH: Thank you, Ms. Hansen.

20 Commissioners, do you have questions of
21 Ms. Hansen?

22 No?

23 No?

24 Thank you very much.

25 MS. HANSEN: Thank you.

1 MR. LEWIS: Thanks for coming in.

2 MS. HANSEN: Thank you.

3 MS. ORTH: We'll wait a few more minutes in
4 case someone comes in.

5 (Proceedings in recess from 12:59 p.m. to
6 1:04 p.m.)

7 MS. ORTH: It's a little bit after 1:00 p.m.
8 We have no other members of the public coming to give
9 public comment.

10 We will reconvene for the technical case at
11 9 o'clock tomorrow morning.

12 Thank you, all.

13 (Proceedings adjourned at 1:04 p.m.)

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1 STATE OF NEW MEXICO)
2) ss.
3 COUNTY OF BERNALILLO)
4
5

6 I, CHERYL ARREGUIN, the officer before whom the
7 foregoing proceeding was taken, do hereby certify that
8 the witnesses whose testimony appears in the foregoing
9 transcript were duly sworn or affirmed; that I
10 personally recorded the testimony by machine shorthand;
11 that said transcript is a true record of the testimony
12 given by said witnesses; that I am neither attorney nor
13 counsel for, nor related to or employed by any of the
14 parties to the action in which this proceeding is taken,
15 and that I am not a relative or employee of any attorney
16 or counsel employed by the parties hereto or financially
17 interested in the action.

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