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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## I N D E X

<table>
<thead>
<tr>
<th>Page</th>
<th>Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>ARJUN MAKHIJANI, PhD</td>
</tr>
<tr>
<td>2</td>
<td>Direct Examination by Ms. Anderson 527</td>
</tr>
<tr>
<td>3</td>
<td>Cross Examination by Mr. Ames 534</td>
</tr>
<tr>
<td>4</td>
<td>Cross Examination by Ms. Greenwald 539</td>
</tr>
<tr>
<td>5</td>
<td>Redirect Examination by Ms. Anderson 543</td>
</tr>
<tr>
<td>6</td>
<td>Examination by the Commission 544</td>
</tr>
<tr>
<td>7</td>
<td>ERIK SCHLENKER-GOODRICH, RACHEL CONN,</td>
</tr>
<tr>
<td>8</td>
<td>MICHAEL JENSEN and JOHN KLINGEL</td>
</tr>
<tr>
<td>9</td>
<td>Direct Examination by Ms. Anderson 546</td>
</tr>
<tr>
<td>10</td>
<td>Cross Examination by Mr. Ames 561</td>
</tr>
<tr>
<td>11</td>
<td>Examination by the Commission 572</td>
</tr>
<tr>
<td>12</td>
<td>Further Cross Examination by Mr. Ames 618</td>
</tr>
<tr>
<td>13</td>
<td>Redirect Examination by Ms. Anderson 629</td>
</tr>
<tr>
<td>14</td>
<td>Further Examination by the Commission 633</td>
</tr>
<tr>
<td>15</td>
<td>LESLEY WEINSTOCK and JANET GREENWALD</td>
</tr>
<tr>
<td>16</td>
<td>Direct Testimony of Lesley Weinstock 638</td>
</tr>
<tr>
<td>17</td>
<td>Direct Testimony of Janet Greenwald 640</td>
</tr>
<tr>
<td>18</td>
<td>RICK CARPENTER and ROBERT GALLEGOS</td>
</tr>
<tr>
<td>19</td>
<td>Direct Examination by Mr. Harwood 643</td>
</tr>
<tr>
<td>20</td>
<td>Examination by the Commission 651</td>
</tr>
<tr>
<td>21</td>
<td>Cross Examination by Ms. Rodriguez 653</td>
</tr>
<tr>
<td>22</td>
<td>Further Examination by the Commission 658</td>
</tr>
<tr>
<td></td>
<td>I N D E X (Continued)</td>
</tr>
<tr>
<td>---</td>
<td>----------------------</td>
</tr>
<tr>
<td>2</td>
<td>PAGE</td>
</tr>
<tr>
<td>3</td>
<td>5. DAVID BACON</td>
</tr>
<tr>
<td>4</td>
<td>Direct Testimony</td>
</tr>
<tr>
<td>5</td>
<td>Examination by the Commission</td>
</tr>
<tr>
<td>6</td>
<td>6. ANNA HANSEN</td>
</tr>
<tr>
<td>7</td>
<td>Direct Testimony</td>
</tr>
<tr>
<td></td>
<td>E X H I B I T S</td>
</tr>
<tr>
<td>---</td>
<td>-------------------------</td>
</tr>
<tr>
<td>3</td>
<td>AMIGOS BRAVOS:</td>
</tr>
<tr>
<td>4</td>
<td>1. Photographs</td>
</tr>
<tr>
<td>5</td>
<td>2. US Fish &amp; Wildlife Service</td>
</tr>
<tr>
<td>6</td>
<td>Presentation</td>
</tr>
<tr>
<td>7</td>
<td>3. A Water Quality Assessment of Four Intermittent Streams in Los Alamos</td>
</tr>
<tr>
<td>9</td>
<td>County, New Mexico</td>
</tr>
<tr>
<td>10</td>
<td>4. Potential Effects of Climate Change on New Mexico</td>
</tr>
<tr>
<td>12</td>
<td>5. The Impact of Climate Change on New Mexico's Water Supply and Ability to Manage Water Resources</td>
</tr>
<tr>
<td>15</td>
<td>6. Climate Change and Its Implications for New Mexico's Water Resources and Economic Opportunities</td>
</tr>
<tr>
<td>20</td>
<td>8. The Effects of Climate Change on Agriculture, Land Resources, Water Resources, and Biodiversity in the United States</td>
</tr>
<tr>
<td>24</td>
<td>9. Human-induced changes in the hydrology of the western United States</td>
</tr>
</tbody>
</table>
EXHIBITS (Continued)

AMIGOS BRAVOS (Continued):

10. California Permit Quality Review for Compliance Schedules

11. Extant Vertebrates of New Mexico, excluding fish

12. NM Extant Vertebrates, excluding fish, which use Arroyo Riparian Habitat

13. Arroyo Riparian Habitat TES taxa

14. Arroyo Riparian Habitat species: endemic to NM; game; cultural significance to Pueblo Tribes

15. NM Extant Vertebrates, excluding fish, which use EPHEMERAL WATERS HABITAT

16. New Mexican Vertebrates, excluding fish which use ephemeral waters

17. Ephemeral Waters Habitat taxa: NM endemic; game; cultural significance to Pueblo Tribes

18. Species reported from Playa Lakes in Playa Lakes region (incomplete)
EXHIBITS (Continued)

AMIGOS BRAVOS (Continued):

19. Water Quality Monitoring Project - Sample Analysis Results & Relevant New Mexico Surface Quality Standards 634

20. Middle Rio Grande Bosque Initiative - Water Quality Monitoring Results - March 2009 Sampling 634

21. Drugs in US Waters - A series of articles from the Internet 634

22. Pharmaceutically Active Compounds in Residential and Hospital Effluent, Municipal Wastewater, and the Rio Grande in Albuquerque, New Mexico 634

23. Presence of Pharmaceutically-Active Compounds in the Rio Grande and Riparian Groundwater 634


25. Middle Rio Grande Bosque Initiative - Emerging Science on Possible PPCP Impacts on Human Health 634

26. Origins and Fate of PPCPs in the Environment - US EPA 634
EXHIBITS (Continued)

AMIGOS BRAVOS (Continued):


28. H. R. 1549: To amend the Federal Food, Drug, and Cosmetic Act to preserve the effectiveness of medically important antibiotics used in the treatment of human and animal diseases

Witness Statement for Rachel Conn
Witness Statement for Michael Jensen
Witness Statement for Jon Klingel
Witness Statement for Arjun Makhijani
Witness Statement for Erik Schlenker-Goodrich

CHEVRON MINING, INC.:

F. CMI Proposed Standards Updates
E X H I B I T S (Continued)

AMIGOS BRAVOS (Continued):

BUCKMAN DIRECT DIVERSION BOARD:

Carpenter A. Resume of Rick R. Carpenter 644

Carpenter B. Direct Technical Testimony of Rick R. Carpenter 644

Carpenter B-1. Buckman Direct Diversion Project map and The Role of the BDD Project 644

Carpenter B-2. Buckman Direct Diversion Project and the San Juan-Chama Project map and The San Juan-Chama Diversion Project and How It Relates to the BDD 644

Carpenter B-3. Distribution of LANL Contaminants Along the Rio Grande 644

Carpenter B-4. Memorandum, July 6, 2009, to Buckman Direct Diversion Board from Norm Gaume and Rick Carpenter 644

Gallegos A. Resume of Robert M. Gallegos 644
MS. ORTH: Let's prepare to begin this morning.

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

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

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

So we'll hear from Amigos Bravos this morning.

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

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

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

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

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

MR. GOLDSTEIN:    Spend money.
MS. ORTH:       Yeah, spend money.
So with that --
MS. KRAPFL:    Please.
MS. ORTH:     -- is there any reason not to
launch into the Amigos Bravos presentation?
No?
All right. Thank you.
Ms. Anderson, if you would.
MS. ANDERSON:    Thank you.
And good morning to the Commission and Madam
Hearing Officer.
By way of introduction, my name is Megan
Anderson, and I'm representing Amigos Bravos, Friends of
Wild Rivers.
Amigos Bravos is a statewide river
conservation organization with a mission to restore and
protect the rivers of New Mexico and ensure that those
rivers provide a reliable source of clean water to the
communities and farmers that depend on them, as well as
a safe place to swim, fish and go boating.
Amigos Bravos has been participating in the triennial process since the first scoping meetings in 2007, and we wish to thank the Department for its work in putting together those public meetings throughout this process.

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

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

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

MS. ORTH: They've been filed.

MS. ANDERSON: Okay. Thank you.

The -- just to give a brief summary of some of
those changes, and I do mean brief, most of them are just typographical things or changes that we've withdrawn.

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

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

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

MS. ORTH: That will be fine.

MS. ANDERSON: Okay.

MS. ORTH: Has Dr. Makhijani been sworn?
ARJUN MAKHIJANI, PhD
having been first duly sworn or affirmed, was
examined and testified as follows:

DIRECT EXAMINATION

BY MS. ANDERSON:

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

A. My name is Arjun Makhijani.

Q. Thank you.

Can you state your position and your
affiliation?

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

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

A. Yes.

Q. Thank you.

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

A. Yeah. I filed testimony and rebuttal
testimony. I can't remember if there were exhibits,
actually. They're not on my screen on my computer.
Q. That's --

A. Did I file exhibits?

Q. I believe so.

A. Okay. I don't remember.

Q. Fair enough.

A. It was --

Q. Do you --

A. -- a while back.

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

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

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

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

Q. Thank you.

So I just want to ask you a couple questions on surrebuttal, and then we'll open it up for cross-examination.
The first one was -- in NMED's testimony on rebuttal, they stated that one of the reasons for using the ten to the negative five standards instead of ten to the negative six standards that Amigos Bravos has proposed is that it's just Department practice to do that.

Can you comment on that rebuttal?

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

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

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

And so there's every reason to review the risk standard and not continue to use an old risk standard just because it has always been used, because the
current situation is that these waters are not going to
be used in the way they've always been used, but they're
going to be used by a substantial fraction of the New
Mexico population, including, in this city, for drinking
water, for bathing, for cooking. So children are going
to drink it.

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

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

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

Q. Let me clarify.

At Rocky Flats, they use -- or Colorado
standards -- excuse me -- they use a ten to the negative
six risk factor.

Is that --

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

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

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

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

Can you address both of those and --

A. Yeah.

Q. -- response?

A. I didn't -- I didn't find neptunium. I don't know what exactly is the reason for neptunium having
been omitted. There is very clear evidence that neptunium is present in the runoff from Los Alamos. I've had here in my computer, and I'd be happy to provide this for the record, a research that's just recently in preparing for this.

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

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

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

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

Q. And for the TRU criteria that was proposed?
A. Yeah. The two -- there are two different ways
in which one could regulate the collection of alpha-emitting radionuclides. A simpler way to do it would be to set a common limit for all alpha-emitting transuranic radionuclides, because they present similar risks, not exactly the same risks per unit ingested, but similar risk.

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

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

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

Q. Thank you very much.
And now I'll let others cross.

MS. ORTH: Thank you, Ms. Anderson.

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

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

Thank you.

CROSS EXAMINATION

BY MR. AMES:

Q. Good morning, Dr. Makhijani.

A. Good morning.

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

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

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

What I've said is in this specific context, in terms of health criteria for Rio Grande waters that -- whose uses are planned to be expanded to drinking water, it's appropriate to revisit that ten to the minus five
risk level. And I believe that it's appropriate to
adopt ten to the minus six for the reasons that I
stated.

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

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

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

A. Oh, yes. Ten -- yes. Obviously, a risk level
is a policy matter, and all I'm pointing out that as a
policy matter the federal government already decided
that radionuclides associated with Rocky Flats should be
regulated, you know, in terms of the operation and
cleanup of Rocky Flats with a ten to the minus six risk
level, and as a policy matter -- and I've grown old and
bald studying policy issues so I feel I can -- I can
comment on this -- that New Mexico -- New Mexicans should be protected similarly to the people of Colorado.

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

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

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

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

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

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

A. Yes, I am.

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

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

Q. And one last question, Dr. Makhijani. You were referring to something on your computer regarding neptunium?

A. Yes.

Q. I'm not really clear what that was. Could you say for the record what document you are referencing?

A. Yeah. I'd be happy to supply it for the record.
These are data that are being put up by RACER, the contractor to Los Alamos that collects and presents data to the public, of measurements made both by LANL and by the State of New Mexico on -- on radionuclides associated with Los Alamos and groundwater measurements, storm water measurements and so on.

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

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

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

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

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

Q. Okay.

If you would provide a copy to your counsel --

A. Yes. I will do that.

Q. -- so we can all get copies. Thank you.
A. Yes. I will do that.

MR. AMES: Nothing further. Thank you.

MS. ORTH: Thank you, Mr. Ames.

Is Mr. Butzier here?

Oh, ma'am.

MS. EVANS: Peabody Energy has no questions.

MS. ORTH: Thank you.

For LANS, Mr. Kendrick?

MR. KENDRICK: LANS has no questions.

MS. ORTH: All right.

Ms. McCaleb, does San Juan have questions?

MS. MC CALEB: No questions.

MS. ORTH: All right.

Let's see.

Mr. Rose?

MR. ROSE: No questions.

MS. ORTH: Is Mr. Trujillo here?

No.

Ms. Greenwald?

MS. GREENWALD: Yes.

CROSS EXAMINATION

BY MS. GREENWALD:

Q. Good morning.

A. Good morning.

Q. Dr. Makhijani, on what information do you base
the fact that we need more protective standards than the
current EPA standards for drinking water and that the
New Mexico Environment Department should adopt more
protective -- more protective standards than they are
proposing in order to give us a knowledge base on what
is happening in the river below Los Alamos?

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

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

But in this context, Ms. Greenwald, I would
just say that my focus here is on the policy question of
what standards -- what risk level should be adopted, and
a very consistent picture emerges, you know, depending
on whether you adopt ten to the minus five or ten to the
minus six. And I've argued very strongly, as I just did in my testimony, that the correct risk level to adopt is ten to the minus six.

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

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

A. Well, this is kind of far afield from where I am. It's not part of my testimony and rebuttal testimony. These are, you know, effects on the fetus. Noncancer effects are not part of the current federal regulatory scheme. All risks are calculated within the current federal regulatory scheme. My testimony is focused entirely on cancer morbidity risk.
So I would really like to confine my testimony to what I came prepared here to talk about.

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

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

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

Thank you.
MS. GREENWALD: Okay. Thank you.

MS. ORTH: Thank you, Ms. Greenwald.

Do we have Mr. Smith or Elephant Butte?

I don't see him.

Mr. Larson, do you have questions?

MR. LARSON: No questions, Madam Hearing Officer.

MS. ORTH: And Mr. Harwood?

MR. HARWOOD: No questions. Thank you.

MS. ORTH: All right.

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

MS. ANDERSON: I have one follow-up.

MS. ORTH: All right.

REDIRECT EXAMINATION

BY MS. ANDERSON:

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

A. Yes.

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

A. Yes, obviously. And Mr. Ames said that, you know, the water board sets that policy, and if it did, that NMED has actually said if you adopt ten to the
minus six, that the number -- the arithmetic is fairly straightforward. You just have to tighten everything by a factor of ten.

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

MS. ORTH: All right.

Commissioners, do you have questions of Dr. Makhijani?

EXAMINATION BY THE COMMISSION

MS. ORTH: Commissioner Hutchinson.

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

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

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

However, it's not as nonconservative as it seems, because here currently we are setting a risk level only based on drinking water, Mr. Hutchinson. But actually the water could be used for irrigation, and
then you have radionuclides in plants, and we're not
taking those risks into our count.

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

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

MR. HUTCHINSON: I think that's all.

MS. ORTH: Other Commission questions?

Other Commission questions?

Questions from anyone else?

No?

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

MR. MAKHIJANI: Thank you.

Call your panel.

You can reconfigure that table if you'd like.
ERIK SCHLENKER-GOODRICH, RACHEL CONN,
MICHAEL JENSEN and JOHN KLINIGEL
having been first duly sworn or affirmed, were
examined and testified as follows:
MS. ORTH: Please.
MS. ANDERSON: Thank you.
DIRECT EXAMINATION
BY MS. ANDERSON:
MS. ANDERSON: If you can all please just
introduce yourselves and state your affiliation for the
record?
MR. SCHLENKER-GOODRICH: My name is Erik
Schlenker-Goodrich. I'm an attorney with the Western
Environmental Law Center in Taos, New Mexico, and also
director of our southwest office.
MS. CONN: My name is Rachel Conn. I'm the
clean water circuit rider and policy analyst for Amigos
Bravos.
MR. JENSEN: My name is Michael Jensen. I'm
responsible for grants and communications with Amigos
Bravos.
MR. KLINIGEL: My name is Jon Klingel. I'm a
wildlife biologist and on the Board of Amigos Bravos.
MS. ANDERSON: If you can each answer this
question. Does your previously filed testimony and your
resume attached to that testimony spell out your experience to speak as an expert in these proceedings?

MR. SCHLENKER-GOODRICH: Yes, it does.
MS. CONN: Yes, it does.
MR. JENSEN: Yes.
MR. KLINGEL: Yes.
MS. ANDERSON: And have you filed previous testimony and exhibits with the Commission that you're now -- endorse and adopt?

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

MS. CONN: Yes.
MS. ANDERSON: Thank you.
MR. JENSEN: Yes.
MR. KLINGEL: Yes.
MS. ANDERSON: Thank you.

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

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

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

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

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

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

Mr. Schlenker-Goodrich, following up on the use attainability analysis discussions that have been
had in this proceeding and in NMED's rebuttal testimony, NMED sets forth several reasons on page 21 of that testimony why the Department thinks that its proposal does not grant NMED more authority than is allowed by the Water Quality Act.

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

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

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

The concern that we have -- the primary concern that we have is that the way that the
Department's proposal is structured is that the Department, once it goes through that UAA process, submits it to the EPA for approval, and including with public participation -- that once they get that technical approval, then that water body will automatically be classified under Section 97 of the water quality standards.

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

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

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

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

Can you comment on their surrebuttal testimony and compliance schedules?

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

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

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

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

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

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

It's in the third sentence, where our modification, our proposal starts, "In these instances." And we say, "In these instances, compliance schedules may be included in NPDES permits at the time of permit renewal or modification and shall be written to require compliance at the earliest practicable time, but no
longer than 3 years after new standards have been adopted."

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

Practically what does this mean? So let's take an example. If you get a permit in 2010, and the -- the standards are changed in, say, 2014, the Commission changes those standards in 2014, under our position, you -- original position, you would have -- I'm sorry. I'm getting -- I'm getting the dates mixed up.

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

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

And so we think that that's a reasonable
modification and puts an appropriate boundary on the
time period to come into compliance with standards that
we don't find is unreasonable. And we're obviously
willing to talk with the Department more if there are
more pragmatic considerations.

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

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

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

It's only just that -- and they had at least
one year of -- since the permit is modified, but it
would be a total of four years since the standards were
changed and that there would be that notification.
And in addition, I'd like to add that our proposal still is that we don't think that compliance schedules are appropriate at all, really, under the Clean Water Act, and that's our initial proposal, is to -- our first proposal, is to completely eliminate compliance schedules, and then this is our alternate proposal, realizing that the Commission may want to -- may not want to take as large a step as completely eliminating compliance schedules.

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

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

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

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

MS. ANDERSON: Thank you, both.

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

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

Do you believe that this renders the UAA invalid?

MS. CONN: Yes, I do believe that this renders the UAA invalid. The regulations -- EPA regulations specifically require that there be an opportunity for public comment when a use is being downgraded. Those
are found at 131.10(e), in EPA regulations.

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

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

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

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

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

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

MS. CONN: It -- I don't understand that -- the UAA at all, how it can come to the conclusion that it does, which is to downgrade aquatic life at -- in both intermittent and ephemeral waters on Los Alamos property from aquatic life to limited aquatic life.
And as you'll note in our standards, all other intermittent waters in -- in the state have aquatic life protections. These are the only intermittent waters that I know of in the state that have limited aquatic life protections.

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

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

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

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

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

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

And as I mentioned, the US Fish and Wildlife Service says that -- that the habitat and the quality exists for a fishery. And -- and that makes it an
existing use. And at -- in EPA regulations 131.10(h), the EPA outlines that states may not remove designated uses if they are existing uses.

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

MS. ANDERSON: Thank you very much.

MR. KLINGEL: Can I add something to that?

MS. ANDERSON: Oh, sure.

MR. KLINGEL: In addition, that UAA lists 12 streams as part of Segment 128. The Fish and Wildlife Service studied -- the only information they provided at all in the UAA was only on four streams. And all four of those are up on the Pajarito Plateau, which prevents fish from coming up from the river into those segments. However, there are three streams that are on LANL that are part of that segment that connect to the river. And there's absolutely no information. Are there fish using those streams? Are there other aquatic life using those streams? Nothing mentioned.

MS. ANDERSON: Thank you.
MS. ORTH: Thank you.

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

MS. ANDERSON: All right. Thank you.

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

Mr. Ames.

MR. AMES: Thank you, Ms. Orth.

CROSS EXAMINATION

BY MR. AMES:

MR. AMES: Good morning.

MS. CONN: Good morning.

MR. SCHLENKER-GOODRICH: Good morning.

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

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

MR. KLINGEL: Subject to -- say again?

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

MS. CONN: I could --

MR. KLINGEL: Go ahead.
MS. CONN: I'd like to address that.

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

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

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

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

MS. CONN: I -- well, I guess I wouldn't -- I -- reading it, I would think so, but I don't know if legally -- if you have -- under the heading of intermittent, and then you have nonperennial listed underneath that, if that would just apply to
1 intermittent waters or whether it would also apply to
ephemeral waters.

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

3 MR. AMES:  Okay.

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

5 MS. CONN:  Correct.

6 MR. AMES:  Thanks.

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

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

9 MS. CONN:  Yes.

10 MR. AMES:  And do you understand the
Department's process to be expedited, but to also
require a UAA before these uses for ephemeral waters can
be changed?
MS. CONN: Yes. And we very much appreciate that -- that that clarity was made yesterday --

MR. AMES: Okay.

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

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

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

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

It would be put into -- I think you refer to it as a bin, that it would be put into that bin, and then, quote, unquote, periodically the Department would then petition the Commission to formally put that listing in the water quality standards.
And during that time period, once it goes through the whole process the Department lays out, once EPA grants that technical approval, the water quality standards that would actually be applied to that would be the Section 97 standards. So there would, in fact, be a de facto downgrade even if the Commission — pending the point that the Commission formally listed under the standards.

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

MR. SCHLENKER-GOODRICH: Yeah. We've never disputed that. The concerns that we have are twofold. Number one, that there is this time period, this limbo period where the Commission doesn't have the opportunity to review what the Department has done and EPA's approval of that and that the Commission actually has a responsibility to make that decision before the water quality standards can actually be downgraded for those particular segments.

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

And then the periodic element to the sort
of -- they would periodically come to the Commission to list those waters is very open-ended, and testimony yesterday by the Department indicated that it will be done by the next triennial review. Well, if that were the case, it should be written explicitly into the provision.

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

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

MR. SCHLENKER-GOODRICH: Correct.

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

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

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

MR. SCHLENKER-GOODRICH: Theoretically, that's
MR. AMES: Okay.

Let's talk about compliance schedules briefly.

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

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

MR. AMES: Okay.

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

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

MR. SCHLENKER-GOODRICH: Sort of. They would have at — whichever is greater, either three years or within one year. So if the standard was changed — let's take the example — for math purposes, it's easier in my brain — you get a permit in 2010 and the renewal or modification would then be in 2015. If the — if the
standard was changed in 2014, you would have until 2017
to actually come into compliance. So you'd have two
years after your permit renewal or modification to come
into compliance with the water quality standard.

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

MR. AMES: Okay.

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

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

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

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

You're sort of weakening already a goal of the
Clean Water Act, and to put that boundary on the compliance schedule, we think, as a matter of policy, is appropriate. We don't view it necessarily as a technical matter.

MR. AMES: Would extensions be available?

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

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

But let me -- because your question is on compliance schedules. You know, we don't want to have -- we don't want to grant compliance schedules as a matter of course. From our perspective, we want to put some burden on the discharger to demonstrate why they should get a compliance schedule in the first place.
And there's sort of general language about,
well, on a case-by-case basis we'll take a look at this
or we'll look at it when appropriate, which is EPA's
sort of language on this. And we want to start making
it less open-ended and put some what we view as very
reasonable policy limits on the grant of compliance
schedules.

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

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

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

But our proposal right now is very clear that
we want this three-year limitation with that one-year
modification built in as per the language, whichever is
greater. So that is a formal proposal that we have
before the Commission, and I -- we do not intend to
withdraw it.

MR. AMES: Thank you. Nothing further.
MS. ORTH: Thank you, Mr. Ames.

Peabody Energy?
MS. EVANS: No questions.

MS. ORTH: LANS?
MR. KENDRICK: No questions.

MS. ORTH: San Juan Water Commission?
MS. MC CALEB: No questions.

MS. ORTH: Chevron Mining?
MR. ROSE: No questions.

MS. ORTH: Dairy Producers?
No one here.

Ms. Greenwald?
MS. GREENWALD: No questions.

MS. ORTH: Freeport-McMoRan? Mr. Larson?
MR. LARSON: No questions.

MS. ORTH: No?
And Mr. Harwood.

MR. HARWOOD: No questions.

MS. ORTH: There you are. All right.
Commissioners, do you have questions of the
Amigos Bravos panel?
EXAMINATION BY THE COMMISSION

MS. ORTH: Commissioner Hutchinson.

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

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

MR. SCHLENKER-GOODRICH: Schlenker-Goodrich.

MR. HUTCHINSON: Schlenker.

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

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

MR. HUTCHINSON: Did anybody else on the panel?

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

MR. HUTCHINSON: Okay.
MS. CONN: And for an example -- let me clarify that.

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

MR. HUTCHINSON: Would your suggestion change that?

MS. CONN: Yes.

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

MS. CONN: Compliance schedules are only relevant with a permit in relation to an NPDES permit.
MR. HUTCHINSON: Okay.

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

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

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

MR. SCHLENKER-GOODRICH: And, Commissioner Hutchinson, I think in direct response to your question, this would not -- and maybe this was your question, and
correct me if I'm wrong -- it wouldn't require us to
suddenly go back and rewrite every single compliance
schedule for every single permit that's out there. By
promulgating a new standard as we recommend it, it would
only apply to future permits, final decisions on permits
by -- well, at this point, by EPA for NPDES permits.

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

MR. HUTCHINSON: Okay.

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

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

What this would do -- it can only be allowed
in pragmatic considerations in a sense. And our view is
that there's a presumption that you pretty much shouldn't have a compliance schedule unless you demonstrate a need to have a compliance schedule. And so what we're suggesting is let's put a time boundary on how long that compliance schedule should be put in place.

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

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

And what this language means is that if you get a permit in 2010, and then the Commission here changes the standards at some point between 2010 and 2012, and then they come back for a permit renewal in 2015, the standard being changed between 2010 and 2012
does not provide a basis for getting a compliance schedule. Legally they can't get a compliance schedule. In fact, they've been under notice for more than three years that a standard has been changed.

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

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

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

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

MR. SCHLENKER-GOODRICH: Lenient temporally, I
guess.

MS. CONN: Yeah.

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

MR. HUTCHINSON: Okay.

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

In other words, we're told to, in making these standards, we shall give weight it deems appropriate to the facts and circumstances, including use and value of the water for the water supplies, propagation of fish 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
three-year period?

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

And you're correct that the Commission has the discretion to account for those pragmatic circumstances. What I would say is those pragmatic circumstances, as I understand the language, are to be taken into consideration, but they don't undermine this -- the primary thrust of both the Clean Water Act and the Water Quality Act to restore and maintain water quality.

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

So what I would say is that the Commission does have the authority to take into account those pragmatic considerations and, at the time any standard was proposed for a change, could actually account for those pragmatic considerations in whatever standard it was re-evaluating.
MS. CONN: And I think it's very reasonable to have three and potentially four years to come in compliance -- compliance with the new standard. I think that that is reasonable to expect.

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

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

MR. HUTCHINSON: Okay.

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

I'll just hold on for a second.

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

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

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

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

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

MS. CONN: Well, I think that -- that our position is that we think the compliance schedules at
all are a problem, and us providing this alternative language is our attempt to try to take into consideration that -- the needs of dischargers in the state.

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

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

MR. SCHLENKER-GOODRICH: Well, what --

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

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

So I think that it's widespread -- it's a
widespread problem across the state, that all permits
get these compliance schedules and -- and without
looking to see if they're really necessary. Maybe in
some cases there could be facilities that are getting
compliance schedules that already have the technology in
place to meet the lower standards, but they -- they
don't have to meet them until the three years
compliance.

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

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

And to do that, that provides the public some
assurances, especially a public that doesn't have the
ability to engage in a very technical NPDES permitting
process. Most people don't even know what an NPDES
permit is, and I bet if you even surveyed this room,
most people wouldn't even know what the acronym actually
stands for, or there would be several people who wouldn't know that.

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

And as Commissioner -- and based on Commissioner Hutchinson's question, the Commissioner nonetheless -- the Commission nonetheless retains its authority to take into account pragmatic considerations. But right now the way the policy is, it's open-ended, it's incredibly difficult to track compliance schedules, whether they're being issued appropriately or not, whether there are proper boundaries put on them, whether the discharger is actually demonstrating why they need a compliance schedule, and why they couldn't simply impose proper controls now to come into compliance.

So because it's so difficult for us to kind of take apart every compliance schedule that's out there, and whether or not particular -- like we have sympathy for, say, a small discharger, small municipal discharger like a wastewater treatment facility, but there are
large facilities that this could be very easily complied
with.

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

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

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

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

MR. BLAND: No.

MS. CONN: No.

MS. ORTH: Other Commission questions?

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

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

MR. HUTCHINSON: You know, I mean, did you
give consideration to the -- to the Department's burden that this would create?

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

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

MR. HUTCHINSON: Okay.

MS. CONN: Could you clarify what --

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

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

MR. HUTCHINSON: Right.
And who -- who -- who's required to ensure compliance?

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

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

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

Well, that's appropriate, but I think here it
actually provides some clarity and that -- you know, we sort of have two policy vehicles in place. We have water quality standards, and we have an NPDES permitting process. And under the water quality standards, by providing for compliance schedules, you're providing to EPA, who issues the NPDES permit, what is the State of New Mexico's position on compliance standards.

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

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

MR. HUTCHINSON: Now, we got your -- I guess this is the modification to the proposed changes
yesterday. So I've been going through this, but I'm trying to listen to your testimony, as well, but is there some changes that are on the fly, so to speak. So under the definition for human-made causes, you're -- you're withdrawing that.

MR. SCHLENKER-GOODRICH: Correct.

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

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

MR. HUTCHINSON: Okay.

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

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

MR. HUTCHINSON: All right. Hmm.

I -- okay.

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

Are you prepared to answer any questions on those?
MR. SCHLENKER-GOODRICH: Depends on the question.

MR. HUTCHINSON: Oh, okay.

Did you review all of those?

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

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

MR. SCHLENKER-GOODRICH: In our testimony?

MR. HUTCHINSON: Yes.

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

MR. HUTCHINSON: Okay.

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

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

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

MR. SCHLENKER-GOODRICH: Yeah. The other
thing I would note, at least in particular to New Mexico, it's more -- it's not a question of the science necessarily. It's more simply a policy question.

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

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

    MR. HUTCHINSON: Okay.

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

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

    MR. SCHLENKER-GOODRICH: I think it's a very
site-specific evaluation, you know. For example, when the Department is going through its own assessment -- applying its own assessment protocols to particular stream segments, then that could be taken into account to determine whether -- what is the vector of impact on that particular water body.

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

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

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

And in that situation, for climate change, say climate change was determined to say -- prevent attainment of a particular use, warranting removal of that designated use, you would have to go under
Section 131.10(g), subpart (3).

MR. HUTCHINSON: Okay.

So if --

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

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

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

So our proposal is very modest, is not intended to make significant substantive changes. It's simply to put the issue on the Commission's radar screen and on the Department's radar screen so that it's -- as it's going through assessment protocols, figuring out how to restore and maintain water quality, that this is accounted for in the decision-making process.
MR. HUTCHINSON: I suppose one of the -- one of the things that -- that could occur -- or one of the more logical things would be a temperature exceedance in a stream segment.

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

MR. SCHLENKER-GOODRICH: This is what -- this is a question that's -- that's well beyond my expertise, but what I would say is that the Department already accounts for very complicated scientific questions. For example, in the Department's testimony, they talked about how wildfires, while, you know, you assume that it's naturally occurring, could actually be caused by anthropogenic vectors of impacts that created the circumstances giving rise to that wildfire. Now, that's obviously a very complicated, scientific question, but that's already a sort of a process that's built into the Department's -- how they take a look at these types of problems.

So climate change is just -- is just another
facet of that very complicated determination. I would not -- admittedly, it's a very complicated determination, but all ecological factors like that are very complicated, and this is simply to ensure that this is taken into account in that process.

MR. HUTCHINSON: Okay.

MR. KLINGEL: Could I comment on that? Nowadays with the HoboCams -- that may be a brand name -- but the temperature recorders that record temperature, long-term, that, I think, the Department is probably using lots of them in the streams around the state -- you would have significant data from not just one stream, but from many streams around the state, different elevations, and you should be able to tease out what is happening from a climate change versus caused by some other factor.

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

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

MR. HUTCHINSON: Yeah, I do.

I -- you know, I think -- I think that including this in here is -- although it looks innocuous, it looks like a slight policy shift, and it's just a recognition of the potential. I think we're looking at something that, you know, when we're talking
about natural background, we need to be examining things that we can actually measure and quantify.

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

MS. ORTH: Okay.

But do you --

MR. HUTCHINSON: So I think --

MS. ORTH: -- have other questions?

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

MS. ORTH: All right.

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

MS. ORTH: All right.

MR. HUTCHINSON: Thank you.

MS. ORTH: All right.

Commissioner Goldstein.

MR. GOLDSTEIN: I just have a brief question.

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

Has the impact on municipalities been considered?

The vast majority of the NPDES permits are for...
municipal dischargers.

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

MR. GOLDSTEIN: In -- in --

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

And while we realize that the EPA --

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

MS. CONN: Right.

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

Has that been considered?

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

MR. GOLDSTEIN: Okay. Thanks.
MS. ORTH: Commissioner Jones.

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

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

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

How -- how would that be applied?

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

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

And the Department's testimony -- and forgive
me, I don't have the specific references -- discusses a variety of situations, like wildfires or stream degradation, where they have to figure out and parse what is caused by natural background versus what is caused by anthropogenic sources of impact.

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

I, frankly, am not very familiar with them.

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

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

MR. SCHLENKER-GOODRICH: Well, they're already subject to the obligation, but that doesn't necessarily
mean that they're specifically accounting for climate
change. And that's what our suggestion is, is to make
sure that the Department, as it's going through those
decision-making processes and assessments, is, in fact,
accounting for climate change. So there isn't this
blind spot in those assessments.

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

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

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

MR. JONES: But you're making the assumption
it's one or the other from your scenario. It couldn't
be a combination of what we're alluding to, which we
can't make that assessment of what percent had an
impact.
So I still don't understand how we're supposed to apply this --

MS. CONN: Well --

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

MS. CONN: Well --

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

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

MR. JONES: Oh, yeah, absolutely.

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

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

MR. JONES: Well, based upon your proposal,
are you recommending that only anthropogenic activities have -- impact climate change?
Because you list it as outside of the scope of the nonanthropogenic.

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

MR. JONES: Okay.

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

MS. CONN: Well, if --

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

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

MS. CONN: I have a specific example.

MR. SCHLENKER-GOODRICH: Go for it.

MS. CONN: That if you -- for example, one of the concerns that Amigos Bravos has is that uses will be downgraded on -- the reason for -- for wanting to have the Commission start to think about climate change and how it's going to impact our water quality in the future is that we see the potential to have a stream that has
historically been perennial be subject to increased
temperatures from climate change and become intermittent
and then in practice -- or to dry up at certain times of
the year, and therefore could potentially get weaker
standards, all due to the human -- human cause, which --
of climate change.

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

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

MS. CONN: Well, I --

MR. JONES: -- to anthropogenic activity?

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

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

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

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

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

MR. JONES: That's what I'm getting at. There's so many variables to be considered. How do you apply just the anthropogenic aspect to separate that out --

MR. SCHLENKER-GOODRICH: Well, the --

MR. JONES: -- from the non --

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

So for example, the Department could look at
that State Engineer's report about how the climate change is affecting flow conditions and then balance that, you know, in that admittedly gray area. Any situation is scientifically complex to figure out. They're already doing this kind of balancing.

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

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

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

And the Department could take that into
account in figuring out what to do to then restore, maintain water quality, whether designated uses have to be removed, whether uses are attainable. Of course, it's a complex factor. Let's build it in, let's make sure we're actually acknowledging it.

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

MS. ORTH: Are you done?
MR. JONES: Yeah.
MS. ORTH: All right.
Commissioner Hutchinson.

MR. HUTCHINSON: But, you know, what we're really talking about here is -- is not -- we're just talking about adapting to changes that occur. We're not talking -- you know, I mean, we're -- we're putting this into a -- a regulatory climate -- pardon the pun -- but it's -- we're really just -- we're -- all we're doing with our water quality standards over time is adapting to whatever the conditions are that we're being dealt. I don't know that this is going to be beneficial in doing that. I -- I think that if the Rio Grande were to start going dry for a 10-year period -- I don't know that we're going to be worrying too much
about water quality. We're going to be in much other
serious straits. There's going to be some other
things happening that are going to be far more serious,
but --

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

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

MS. ORTH: Is there anyone else?

Commissioner Dominguez.

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

MR. SCHLENKER-GOODRICH: No.

MR. DOMINGUEZ: Okay.

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

That's all.

MS. ORTH: All right. Thank you.

Other Commissioners with questions of the Amigos Bravos panel?

Before I go back to Commissioner Hutchinson.

Yes? All right.

MR. HUTCHINSON: No.

MS. ORTH: No. All right.

Are there others with questions of the Amigos Bravos panel?

Commissioner Glass.

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

MS. CONN: No.

MR. GLASS: Simple question, simple answer.

MS. ORTH: Thank you.

Commissioner Lewis.

MR. LEWIS: Back to the climate change on -- I'm just -- I mean, I think at this -- and, you know, at this juncture in the state of science, I mean, I think
it's -- this is a well known issue, and, I mean, the
data are in, the climate is changing. I guess I'm just
back to what is the -- I guess I'm having -- I'm still
struggling with the utility of this, where it is, for
many of the reasons that were brought before -- brought
up before.

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

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

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

If -- if you're saying that that's a
human-caused factor, and in all likelihood, a good
portion of it is, in my opinion, the warming, that is, then what's the utility, then, of holding on to the cold water fishery standards?

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

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

MR. LEWIS: Calling it --

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

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

MR. SCHLENKER-GOODRICH: And I think from a pragmatic perspective, our proposal is actually supposed to be -- we've had a lot of questions on this -- is supposed to be very, very modest. It's simply to provide an acknowledgment that this is a very serious
issue, that we need to account for protecting water quality, not just on sort of a three-year by three-year as we look at triennial review, but let's think long-term, ten, fifteen years down the line.

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

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

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

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

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

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

MR. LEWIS: Yes. But I think -- I mean, do you not think that that's already in the thought process of research and science that's going on, and we're
doing -- and Environment Department does, say, a stream survey or a -- I mean, I think that's already happening, is my opinion on that. And I think it's -- this just confuses the issue by putting it here.

And I guess -- and the final point is that I think it's really got to have some temporal constraints on it for the issues that Brad was bringing up and Howard was bringing up, is it's so ambiguous now that -- I mean, you're talking about man-made global climate change, which is really a decadal sort of time frame that we're -- do we need to be embracing for that, and to ferret out -- to make sure we get out these year-to-year variabilities -- year-to-year variability. I think it's difficult now, the way it's worded now. It's just too, as I said, ambiguous, in my opinion.

And I was wondering what you thought about that.

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

MR. SCHLENKER-GOODRICH: No.

MS. ORTH: All right.

MR. HUTCHINSON: I do have --

MS. ORTH: Commissioner Hutchinson.

MR. HUTCHINSON: -- one more question.
I asked -- I asked Mr. Schlenker-Goodrich if he had reviewed the -- the exhibits that they presented to support this change. Did anybody else on the panel review those exhibits?

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

MR. HUTCHINSON: And your --

MS. CONN: -- not all of them.

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

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

MR. HUTCHINSON: Okay.

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

MR. HUTCHINSON: Okay.

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

MR. HUTCHINSON: Anybody else on the panel?

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

MR. HUTCHINSON: Okay.

And your qualifications for determining their validity?
But you didn't testify on that.

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

MR. HUTCHINSON: Okay. All right.

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

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

MR. HUTCHINSON: Okay.

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

MR. HUTCHINSON: Right.

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

MR. HUTCHINSON: Right.

MS. ORTH: -- of their submittals.

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

MS. ORTH: Two of the others --

MR. HUTCHINSON: Two.

MS. ORTH: -- said that they reviewed some of them.
MR. HUTCHINSON: Right. They reviewed them but not part of their testimony.

MR. SCHLENKER-GOODRICH: That's right.

Testimony on global warming --

MS. ORTH: Right.

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

MS. ORTH: Right.

MR. HUTCHINSON: Right.

And so that's it.

MS. ORTH: All right.

Other questions before we excuse the panel?

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

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

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

MS. ORTH: All right.

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

MS. ANDERSON: Certainly. Thank you.

MS. ORTH: Mr. Ames.

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

MS. ORTH: If you would.

MR. AMES: Thank you.
FURTHER CROSS EXAMINATION

BY MR. AMES:

Q. I just want to follow up on a couple questions that were asked by the Commissioners.

Commissioner Lewis asked what was the utility of adding the climate change reference to the definition of natural background.

And I understood the panel, I believe, might have been Mr. Schlenker-Goodrich, to testify earlier that the objective was to account for climate change in natural background; is that correct?

MR. SCHLENKER-GOODRICH: Correct, to determine whether it was part of the natural background or not.

MR. AMES: You also acknowledge the difficulty of accounting for climate change in that analysis, correct?

MR. SCHLENKER-GOODRICH: Yes.

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

MR. SCHLENKER-GOODRICH: Yes.

MR. AMES: So the Department has proposed that the Commission can adopt site-specific criteria, but in doing so must first determine what the natural
background is for the water at issue, correct?

MR. SCHLENKER-GOODRICH: Yes.

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

MR. SCHLENKER-GOODRICH: Very complicated question.

Could you -- could you say that again?

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

MR. SCHLENKER-GOODRICH: If the Department completely excluded climate change from its evaluation, potentially, yes. I think that's already an existing argument that they could make, because already under the definition of natural background -- and if I understand the Department's testimony correctly, they already sort of view that as a possibility, that climate change could be an issue that's at play.
So even under the Department's current proposal, that could theoretically be an argument.

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

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

MR. AMES: But your proposal makes it explicit.

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

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

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

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

MR. SCHLENKER-GOODRICH: Well, my understanding is that the department's position is that climate change can be part -- or not part of the natural background that could be a anthropogenic source. So
as -- my understanding of the Department's testimony is that that's already a requirement.

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

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

I have a couple other questions.

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

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

MR. SCHLENKER-GOODRICH: Yes.

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

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

But I still haven't heard Amigos Bravos
identify a single compliance order that poses a problem in the State of New Mexico.

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

MR. AMES: Okay.

So that's the sole example at this point?

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

MR. AMES: Okay.

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

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

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

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

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

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

MS. CONN: Don't have an average on that as -- either.
MR. AMES: And finally, the length of time to ramp up that facility and determine its effectiveness in meeting a water quality-based effluent limit?

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

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

MR. AMES: Sure.

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

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

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

MR. AMES: Okay.

MR. JENSEN: -- for a large facility --
MS. CONN: Brand new facility.

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

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

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

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

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

MS. CONN: That was my interpretation --

MR. AMES: Did I misunderstand?

MS. CONN: -- of Mr. Saums' testimony
yesterday, that it was a part of the matter of course
of -- of writing permits.

MR. AMES: So you're --

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

MS. ORTH: Let him ask the question.

MS. CONN: Oh.

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

Did you want to finish what you were saying?

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

MR. AMES: Okay.

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

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

MR. AMES: Okay.

So -- but your testimony primarily is based
off your understanding of what Mr. Saums said yesterday,
not your own personal knowledge; is that correct?
MS. CONN: Yeah, and my experience with compliance schedules, a typical component of NPDES permits in the state.

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

MS. CONN: Yes.

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

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

MR. AMES: Okay.

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

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

MR. AMES: So your --

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

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

MS. CONN: Well, it becomes practical when it's in an actual permit.
MR. AMES: Okay. All right. You -- okay.

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

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

MS. CONN: Rephrase that again.

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

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

MR. AMES: Okay.

MS. CONN: So --

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

MR. AMES: Yes.

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

Number one, legally whether or not a
compliance schedule is even permissible under the Clean
Water Act, and I understand that there is -- you know,
while your position is that, well, if we have a problem
with that, we go to EPA, and I think that's expressly
one of the reasons we're building in that argument here,
because EPA is going to have to review these standards
eventually.

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

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

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

So if you have notice within past three years
of a standard, you have to come into compliance at the
point of permit renewal or modification, but if that
standard comes into existence within three years of your
permit renewal or compliance, let's build in something
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.
MS. ANDERSON: And EPA's interpretation has been that they can only use compliance schedules if states allow for them. So if the state doesn't allow for them, EPA under that case law would find that they could not put a compliance schedule in an NPDES permit.

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

MS. ANDERSON: Sure. I'm sorry.

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

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

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

MR. SCHLENKER-GOODRICH: Precisely. That EPA basically says that there is this -- you have an option for compliance schedules, but they -- it's the Commission's obligation to determine what that 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.
MS. ANDERSON: Okay. Thank you.
And the final question I had was this discussion that Mr. Ames asked you about the -- the Department's authority -- or in their proposal their ability to list -- or to treat waters as ephemeral, unclassified waters under Section 97, before the Commission has had a chance to approve them, and they said that at most that would be -- they would bring that to the Commission at each triennial review.

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

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

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

MS. CONN: Correct.

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

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

Are there other questions of the panel?
And I'm not forgetting about you, Mr. Hutchinson.

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

FURTHER EXAMINATION BY THE COMMISSION

MS. ORTH: Commissioner Glass.

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

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

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

MR. GLASS: E-mails?

MS. CONN: No.

MS. ORTH: Okay.

MS. CONN: I don't have that.

MS. ORTH: All right.

Any other questions?

All right. I see no hands.

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

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

Hearing none, they're admitted.

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

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

Commissioner.

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

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

I've not -- I'm not sure that -- that we can call these standards. I don't know if we can call these criteria. That -- and so it raises a question for me. Do -- do we, as a Commission, actually have the authority to create sort of a nonstandard or a noncriteria, being that our charge in this area is -- okay. Let -- it keeps jumping to the wrong place here.

I want to be in D.

This is 74 -- 74-6-4.C, and this says we shall adopt a water quality standards -- I'm not going to read
through the whole thing, but I --

MS. ORTH: Okay.

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

We're being asked to create a standard and
criteria for -- which are not aimed at protecting use.
Can we do that?

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

MR. SCHLENKER-GOODRICH: I'm sorry. As a
point of clarification, what section was that?

MR. HUTCHINSON: 74-6-4.

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

MR. HUTCHINSON: Okay.

MS. ORTH: D as in dog.

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

MR. SCHLENKER-GOODRICH: And my understanding,
as just a point of clarification, as well, is that this -- this was a question, Commissioner Hutchinson, that you've raised elsewhere during these proceedings; is that correct? Or is this --

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

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

MR. SCHLENKER-GOODRICH: I understand.

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

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

Okay. Thank you.

MS. ORTH: That's it.

Anything before we break for ten minutes?

No?

Thank you all very much.

MS. ANDERSON: Thank you.

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

MS. ORTH: Let's come back from the break,
Ms. Greenwald, would you come to the table?

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

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

And Ms. Weinstock.

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

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

Hearing none, it's admitted.

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

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

If you would swear them.
LESLEY WEINSTOCK and JANET GREENWALD

having been first duly sworn or affirmed, were

examined and testified as follows:

DIRECT TESTIMONY OF LESLEY WEINSTOCK

MS. WEINSTOCK: I'll go first.

Okay. My name is Lesley Weinstock. I'm a

physician assistant and co-coordinator of Agua es Vida

Action Team, otherwise known as AVAT. And we are a
citizen watchdog group in Albuquerque concerned about
the San Juan-Chama diversion which soon will be
supplying 90 percent of our tap water.

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

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

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

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

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

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

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

Thank you.

MS. ORTH: Thank you, Ms. Weinstock.

Will you be cross-examined together or separately?

MS. WEINSTOCK: Together.

MS. GREENWALD: Together.
MS. ORTH: All right.

Ms. Greenwald.

DIRECT TESTIMONY OF JANET GREENWALD

MS. GREENWALD: Good afternoon.

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

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

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

We are also hopeful that these standards will help LANL and -- in that cleanup of the canyons, which we believe are the generators of much of the 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
Ms. Weinstock or Ms. Greenwald?

Anyone else have questions based on their statements?

No.

Thank you all very much.

We'll turn now to Buckman Direct Diversion Board.

Mr. Harwood is here with his witnesses.

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

May I begin?

MS. ORTH: Yes.

MR. HARWOOD: Thank you.

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

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

And we appreciate the opportunity. This is
our first appearance in the triennial review, and we've enjoyed our experience, and we would like to thank both NMED staff as well as Counselor Ames for cooperating with us in any issues that we're going to discuss here shortly.

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

MS. ORTH: Okay.

Swear them in, please.

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

DIRECT EXAMINATION

BY MR. HARWOOD:

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

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

MS. ORTH: All right.

Are there objections to the admission of the exhibits from any of the parties?
Hearing none, they're admitted. Thank you.

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

MR. HARWOOD: Thank you.

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

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

MR. CARPENTER: Thank you.

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

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

MR. HARWOOD: Could you provide for the Commission just one or two sentences about the status of the project today?
MR. CARPENTER: Yes. It's a $216 million project. We have spent a little over 60 percent of that in construction so far, a little over halfway through construction. We're on schedule and on budget so far, with implementation set for early 2011.

MR. HARWOOD: Okay. Thank you.

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

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

MR. HARWOOD: Okay. Thank you.

Excuse me.

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

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

Source water protection is a predominant concern for the Buckman Direct Diversion Board. Being able to characterize and understand these constituents of concern in the segment of the Rio Grande is a significant public concern. It's, obviously, a concern for the rate payers, having invested $216 million in the
project. It's also a concern for the City of Santa Fe and Santa Fe County public water utilities.

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

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

MR. HARWOOD: Thank you, Mr. Carpenter.

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

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

MR. HARWOOD: Great. Thank you.

And could you just distinguish for a minute for us the difference between the Safe Drinking Water
MR. GALLEGOS: Federal Safe Drinking Water Act gives EPA the authority to adopt regulations governing public drinking water. These are finished drinking water standards. The criteria, as I understand them, are meant to protect -- as proposed are meant to protect the designated use of for public water supply and, in our estimation, are -- are for source water protection purposes.

MR. HARWOOD: Thank you.

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

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

MR. HARWOOD: Thank you.

Mr. Carpenter, in your opinion, do these criteria for public disclosure monitoring purposes conflict in theory or in practice with any other local, state or federal regulatory agencies?
MR. CARPENTER: No. I'm not aware of any conflicts.

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

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

MR. HARWOOD: Very good. Thank you.

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

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

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

So there are operational concerns as well as public interest and public confidence concerns.
MR. HARWOOD: Very good.

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

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

MR. HARWOOD: Very good. Thank you.

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

And I believe that concludes our presentation.

MS. ORTH: Thank you.
Mr. Harwood, I'd like to be specific about the exhibits admitted. They would include Carpenter A, B and B-1 through B-4 --

MR. HARWOOD: Yes, ma'am.

MS. ORTH: -- and Gallegos A.

MR. HARWOOD: That's right.

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

MS. ORTH: All right. Thank you.

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

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

MR. AMES: I have no questions, Ms. Orth.

Thank you.

MS. ORTH: All right.

Ms. Evans?

MS. EVANS: No questions.

MS. ORTH: Mr. Kendrick?

MR. KENDRICK: No questions.

MS. ORTH: Ms. McCaleb?

MS. MC CALEB: No questions.

MS. ORTH: Ms. Anderson?
MS. ANDERSON: No questions.

MS. ORTH: Mr. Rose?

MR. ROSE: No questions.

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

Ms. Greenwald or Ms. Weinstock?

MS. GREENWALD: No.

MS. WEINSTOCK: No.

MS. ORTH: Mr. Larson?

MR. LARSON: No questions.

MS. ORTH: All right.

Commissioners, do you have questions of the Buckman panel?

EXAMINATION BY THE COMMISSION

MS. ORTH: Oh, Mr. Goldstein.

MR. GOLDSTEIN: Thank you.

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

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

MR. GOLDSTEIN: Good. Thank you.

MS. ORTH: All right. Thank you.
Other Commission questions?

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

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

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

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

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

MR. GLASS: Okay. Not offered.

MS. ORTH: Yeah.

MR. GLASS: Okay.

Then I withdraw the question.

MR. HARWOOD: The answer is yes.

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

MS. ORTH: Stranded.

MR. GLASS: -- stranded.

Commissioner Krapfl, did you have a question?

MS. KRAPFL: No.

MS. ORTH: No. All right.

Other questions?

Oh. Ms. --

MS. RODRIGUEZ: Rodriguez.
CROSS EXAMINATION

BY MS. RODRIGUEZ:

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

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

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

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

MR. CARPENTER: If I may answer that.

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

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

The Board has retained the services of a public information -- public relations firm called Cooney Watson and Associates out of Albuquerque. They're pretty well funded, and they have a variety of
outreach and community information programs that are ongoing.

MS. RODRIGUEZ: Okay.

And because I --

MS. ORTH: No commentary.

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

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

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

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

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

We've also done, to date, several public meetings, one of which was a very comprehensive town hall, and we may hold future town halls if the opportunity or the need presents itself.
MS. RODRIGUEZ: So you feel that the public has been well informed and that they do attend when you have these meetings, when you have a large group of the public coming in?

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

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

MS. RODRIGUEZ: All right.

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

MR. CARPENTER: No. No, it is not.

Unfortunately, both projects are named Buckman.

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

MS. RODRIGUEZ: All right.

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

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

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

MR. CARPENTER: No. This project doesn't have anything to do with Albuquerque's San Juan-Chama project, completely separate. This Buckman Direct Diversion project will use -- of total water that it will treat, about 60 percent of it is derived from the
San Juan-Chama diversion project in Colorado. That's the project that diverts water just above the border and delivers it down to the member agencies here. There are several member agencies. Albuquerque is one of them. And they are -- are also using San Juan-Chama water to divert and treat.

Ms. Rodriguez: So the water coming from the San Juan-Chama that goes into Albuquerque -- goes into the Rio Grande that Albuquerque will be using is not treated?

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

Ms. Orth: Ma'am, do you have questions about the issues that we're talking about today?

I mean, you --

Ms. Rodriguez: Well, he's talking about Buckman, and I wasn't clear, because he's right, there is some confusion. I didn't know about that, and I just wanted to know the relationship from what Buckman is doing with the water.

So that's it.

Ms. Orth: All right.

Ms. Rodriguez: Thank you very much.
MS. ORTH: Thank you.

Other questions?

Other questions?

Commissioner Hutchinson.

FURTHER EXAMINATION BY THE COMMISSION

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

MR. CARPENTER: That is correct.

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

MR. CARPENTER: That is correct.

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

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

MR. CARPENTER: That they will inform us and the public through monitoring and disclosure is
important to us. It helps us to better plan and characterize the raw water that we're dealing with. It doesn't change at this point the way that we have designed or foresee operating the project, going forward.

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

MR. HUTCHINSON: Okay.

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

And thank you.

MS. ORTH: Thank you.

Other questions?

Other questions?

Anything else at all before we excuse the Buckman panel?

No?

Thank you very much, gentlemen.

MR. HARWOOD: Thank you.

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

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

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

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

Thank you.

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

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

MS. ORTH: So good afternoon.

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

We have Mr. Bacon, I think --

MR. BACON: My name is David Bacon.

MS. ORTH: -- in front of us.

We're going to swear you in first.
DAVID BACON

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

DIRECT TESTIMONY

THE REPORTER: Would you spell your name, please?

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

THE REPORTER: Thank you.

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

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

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

The lawyer from the labs was an expert only on how aluminum is taken up by the body at certain pH levels. He's not an expert in aluminum toxicology at
all. We are. It's our bodies that are experts at that. It's our bodies that live and die with that overload of toxicology within our water. It isn't experts that tell our bodies what to do. It's the body and the relationship to water.

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

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

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

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

I think it's the decision -- or it's a state of affairs that's really right now essential to figure out. Mexico's in the middle of one of the most severe droughts in its history. Four million farmers are off the land right now, and that's southern Mexico. Texas the same, 67 counties are in an exceptional drought.

A billion people on this planet don't have enough water to drink, and yet we, as a state, cannot assemble or cohesively organize ourselves to protect our water. We're listening to the guy that's pulled the cap off the well and is pouring gasoline down it.

And the last thing I'll say is that in the Oil Conservation Division hearings, I got to hear Dr. Theo Colborn, the leading expert in endocrine disruptors, leading expert in this country. She has identified chemicals back to the level of the body as the expert. Dr. Colborn has identified chemicals that are in our water that are dangerous for the very fact that our body doesn't recognize them. That's the danger.

When our body recognizes a major onslaught of these chemicals, it can sort of react in a -- in a defensive way. When they sneak in under the body's radar is when you're really in trouble, and it's when your endocrine system goes down. And the endocrine
disruptors are affecting every mammal now in this

country.

So I know I'm throwing it on your laps, but I
think that if we cannot coherently organize ourselves as
a state to protect our water, then we're in big, big
trouble.

And that's as best I could do for the truth.

Thank you very much.

MS. ORTH: Thank you, Mr. Bacon.

MR. BACON: Thank you.

MS. ORTH: Do Commissioners Vigil, Dominguez, Lewis, Glass or Hutchinson have a question?

EXAMINATION BY THE COMMISSION

MR. HUTCHINSON: I guess I -- I do.

You know, we -- we wrestle with the same thing

on the Commission. I don't know if you heard I've got
four items to be deliberated on as to whether or not we
possess certain powers, going to your jurisdiction
question.

MR. BACON: No, I didn't, Howard, and I'm

sorry I didn't. I couldn't stay.

MR. HUTCHINSON: And our jurisdiction is
determined by the legislature.

MR. BACON: Um-hum.

MR. HUTCHINSON: And it is -- it's a
limiting -- it's a limiting of that jurisdiction.

Have you presented these concerns to the legislature?

MR. BACON: I have a history of presenting my concerns to the legislature, and it's a -- it's a fairly losing endeavor. I'm just hoping that maybe you will. I'm hoping that maybe someone can begin this discussion so that we can organize ourselves in a little more coherent way around protecting our water.

MR. HUTCHINSON: Do you have -- do -- do you yourself and -- and others that you work with -- have you been identifying those arenas where this limiting of jurisdiction is creating these problems? Have you got those lists or -- or --

MR. BACON: Um-hum. I have some.

MR. HUTCHINSON: Uh-huh.

MR. BACON: I certainly don't have all.

MR. HUTCHINSON: I don't know. I would appreciate getting that information.

MR. BACON: Okay.

MR. HUTCHINSON: And I don't know -- you know, the -- as far as the standards -- or as far as the hearing that we're addressing here, I don't know that it's really applicable to our standards here, but at some point, especially if we determine that we lack
jurisdiction, and I think it would be appropriate for this Commission to communicate that to the -- to the legislature, or at least to the Governor's office. So I would like to see that, if it's nothing more than a personal communication to me.

MR. BACON: That would be fine. Sure. I'll find out how to deliver that.

MR. HUTCHINSON: Okay. Thank you.

MR. BACON: Yeah.

MS. ORTH: All right.

Other questions?

MR. LEWIS: Yeah, sure.

So, Mr. Bacon, you're -- I mean, you brought up endocrine disruptors. So I'm presuming this is one of the areas that you're hoping that there would be some more initiative and leadership shown in terms of managing -- managing us. I -- presumably you're -- it's primarily pharmaceuticals that are getting into water supplies? Is that one of the issues that you're concerned with and --

MR. BACON: Fracking fluid contains over 70 major endocrine disruptors. So it's an ongoing -- endocrine disruptors run the gamut, and they're not just pharmaceuticals. They come mainly from hydrocarbons.

So it's just one thing I bring up.
The other thing that I saw yesterday is specific testimony tends to be very, very limited in its scope and doesn't address synergy, and it's where endocrine disruptors have a synergistic effect, and I don't know how to begin to bring that under state jurisdiction, the synergistic effect.

It's a -- it's a testimony and a level of expertise that is extremely complex, I understand. But I think the synergistic effects are where you have the main damage to -- to life. So --

MR. LEWIS: And many unknowns there, and many of those --

MR. BACON: Many unknowns, you bet. Of course, of course. Yeah.

I just bring up endocrine disruptors because they are part of the state's monetary creation right now. They're an underpinning of where we're getting our money from.

And the -- Howard's point, when you address the legislature, you don't always address them very successfully if a lot of money is coming down from the other side of that address.

But when I think about the future of the state, and it includes seriously polluted water sources, the future doesn't look good to me. That's really
basically what I'm bringing up here. And there's -- there's many areas within that -- radionuclides are one, endocrine disruptors are another level.

So, again, this is nontechnical testimony.

MR. LEWIS: Of course.

MR. BACON: And I appreciate that fact.

MR. LEWIS: And another concern you --

MR. HUTCHINSON: On that point?

MR. LEWIS: Well -- no. Go ahead. On endocrine disruptors?

MR. HUTCHINSON: Yeah.

I was just wondering -- have you considered putting together technical testimony and -- and actually bringing it to the Commission?

MR. BACON: I don't -- I don't have background for --

MR. HUTCHINSON: I'm talking about, you know, getting the people who --

MR. BACON: I -- I would be happy to communicate with Dr. Colborn and see if she will send something pertinent. I'm sure she has something pertinent. She's worked on the oil and gas issue in Colorado at a very high level. So I would be happy to do that.

MR. HUTCHINSON: And you're aware that our
regulations allow for petitioning for standards change at any time. It's not just triennial review. So --

MR. BACON: Right. Okay.

MR. HUTCHINSON: If you want to bring that issue forward.

MR. BACON: That's a very good point, and I'll be happy to do it.

MR. HUTCHINSON: Thank you.

MR. LEWIS: And then I was going to follow -- I guess, another point that I seem -- that I believe you touched on was -- maybe I'm putting -- maybe I'm putting words in your mouth, maybe not. Let me know.

But that maybe what we're hearing in these hearings is primarily testimony from the regulated entities themselves that have -- obviously have motives that may not mesh with the intent of the -- at least the overt intent -- statutory intent of what we're supposed to do here, and how -- maybe you thought a bit about that.

So do you have ideas as to how one balances out input on -- how does one do a better job of engaging non -- I mean, I guess, entities that have a direct monetary benefit from regulatory changes that one might propose?

MR. BACON: It's a great question, and I think
that -- I think the answer lies somewhere in a synergistic answer, that clean water should, in my estimation, and I don't think I'm alone in that, take precedence over particular economic or specialized interests. It's a -- it's a comments. It's something that we all need for life.

And that regulations to protect it should be at least -- at very least follow a -- a prudence principle, you know, a -- if there are questions, I think it should come down on the side of pure water rather than on the side of economic harm to any entity.

And I think it should also come under -- and with Howard sitting there, I don't know if this is a progressive, liberal or conservative point of view. I think it should come under more sovereignty of the state to protect water rather than less. Kind of a -- it's kind of a scary position, I understand, to take. The state doesn't always do well with its sovereignty.

But I think that if -- if we can't coherently regulate our waters in a -- in a way that is sovereign, then we're -- you know, we're losing in -- we're losing the -- the future reality of the survivability and sustainability of New Mexico.

So while I've sort of thrown the ball in your guys' lap, I think that -- and I will happily respond
with what I can respond with, but I think it's a larger question of urging the legislature or urging the Governor, urging more precautionary principles and sovereignty and right to not just regulate, but prohibit certain things from entering the water supply in New Mexico.

And it's -- again, that's something that no one can just snap their fingers and create. That's a -- that's a long process. But I think if something came from this Commission on that issue to the legislature, that it has a chance at being listened to and, you know, assimilated. So -- it's complex, I understand that. It isn't simple.

And yet the issue -- or the -- the little story I made up, I think, everyone relates to. It isn't complex. It's very direct. There's nothing indirect about water, or nonbasic about water. So --

MS. ORTH: Okay.

Other questions?

No?

All right. Thank you very much.

MR. BACON: Thank you for listening.

MR. LEWIS: Thanks for coming in.

MS. ORTH: Ma'am, are you here to give public 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
people attended who were quite concerned about the water running down the mountain after the Cerro Grande fire.

At that time, our Governor was Secretary of Energy, and he sent many people to participate. So this conference was not just a conference with, you know, the people on the -- on one side speaking, but it was people from the federal government, from the lab and from all walks of -- all the entities that were concerned about the water and what happened during the Cerro Grande fire.

So from that time was when Concerned Citizens for Nuclear Safety really started concentrating on the water issues, because that was such an important issue to all of us. And with the fire, it increased the runoff quite substantially.

I'm not a scientist, so I can't give exact percentage of amounts of the runoff, but it was substantial, that -- the amount of radionuclides and perchlor- -- I never can say that word -- perchlorate and all the chemicals from the weapons industry that are running down into the Rio Grande.

I believe that James Graft wrote a book in the '80s called Plutonium in the Rio Grande. Plutonium has been in the Rio Grande for quite some time. And even though it is extremely heavy metal and does sink to the
bottom, it is still in the Rio Grande, and it has been scientifically proven that it is in the Rio Grande.

One of the things that was said at the conference that was quite shocking to me was that one of the scientists referred to plutonium as a natural-occurring substance, and we all know that plutonium did not exist before 1940. So I don't consider it a natural-occurring substance.

But I really am here because the water quality of New Mexico is so important to all of us, and without clean water and without the protection of the public, which is your responsibility to protect, which I completely recognize as also a public servant -- I served on the state Board of Acupuncture for the past six years. So I know protection of the public is extremely important, and the water quality of New Mexico is extremely important.

And even though we are a very small state, with low population, that does not mean that we are not -- we should not be protected. And I do feel that the native people in this community are largely impacted by also the water in the Rio Grande.

So I'm here to urge you to please have more protective standards for radionuclides. I -- I feel that the City of Santa Fe, the County of Santa Fe is
about to build this diversion plant that is right down from where the runoff is from Los Alamos, and it's really imperative that -- you know, that building the diversion plant is protected from the radionuclides and the chemicals.

I believe that the mission of the lab could be changed. I believe that weapons should no longer be made there. We all know what happened at Rocky Flats. We know what's happened with other weapon industries, and especially, you know, nuclear weapons industry, that there are so many chemicals that are now in -- in the environment, in the air, you know.

So I just want to support all -- what Amigos Bravos has been doing in leading the effort, along with Dr. Arjun Makhijani to challenge the public policy. We believe that the proposed standards should be more protective of human health.

We support the radionuclear standards being based on the risk of one person in one million dying of cancer from a lifetime exposure. A number of people who may die of cancer results in lower concentrations of radioactive contaminants in the Rio Grande, therefore -- therefore, protecting public health.

And NMED has not opposed this more protective public policy of one in a million. And so I want to
I also support that.

I know for myself, you know, I -- I take thyroid, and I feel like the radionuclides in the air have something to do with me having to take thyroid medicine. My dog also has to take it, which I find exactly is exposed to the same thing, and I don't know where it comes from. That's just my own ideas.

But I feel like we are heavily exposed here to high concentration of contaminants, and I just really want you to think about that.

I also apologize for not being here sooner, but the snowstorm --

MS. ORTH: This is timely.

MS. HANSEN: -- you know, did prevent me from being here.

But I'm really appreciative of you all being here, listening to our testimony, and being concerned and aware of these issues.

MS. ORTH: Thank you, Ms. Hansen.

Commissioners, do you have questions of Ms. Hansen?

No?

No?

Thank you very much.

MS. HANSEN: Thank you.
MR. LEWIS: Thanks for coming in.

MS. HANSEN: Thank you.

MS. ORTH: We'll wait a few more minutes in case someone comes in.

(Proceedings in recess from 12:59 p.m. to 1:04 p.m.)

MS. ORTH: It's a little bit after 1:00 p.m. We have no other members of the public coming to give public comment.

We will reconvene for the technical case at 9 o'clock tomorrow morning.

Thank you, all.

(Proceedings adjourned at 1:04 p.m.)
STATE OF NEW MEXICO  )
                       ) ss.
COUNTY OF BERNALILLO  )

I, CHERYL ARREGUIN, the officer before whom the foregoing proceeding was taken, do hereby certify that the witnesses whose testimony appears in the foregoing transcript were duly sworn or affirmed; that I personally recorded the testimony by machine shorthand; that said transcript is a true record of the testimony given by said witnesses; that I am neither attorney nor counsel for, nor related to or employed by any of the parties to the action in which this proceeding is taken, and that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

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