

UST POLICY COMMISSION MEETING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Phoenix, Arizona

April 17, 2002

9:12 o'clock a.m.

UST POLICY COMMISSION

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Certified Court Reporter

Certificate No. 50020

1 THE MEETING OF THE UST POLICY COMMISSION held on
2 April 17, 2002, at 9:12 o'clock a.m., at the Arizona
3 Department of Environmental Quality, 3033 North Central
4 Avenue, Room 1709, Phoenix, Arizona, in the presence of:
5

Michael Denby, Vice Chairman

6 Roger Beal

Ian Bingham

7 Elijah Cardon

Theresa Foster

8 Harold Gill

Karen Holloway

9 Nancy Jamison

10 ABSENT MEMBERS:

11 Michael O'Hara, Chairman

Myron Smith

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1 Phoenix, Arizona

2 April 17, 2002

3 9:12 o'clock a.m.

4 P R O C E E D I N G S

5 MR. DENBY: I would like to call to order
6 the meeting of the Underground Storage Tank Policy
7 Commission and start with an acknowledgment that Mike
8 O'Hara, the chairman, will not be here today and Mike
9 Denby, vice chairman, will be sitting in for Mike O'Hara.

10 First thing we need to do is start with a
11 roll call and then debate the question about a quorum and
12 what that really means, whether it means we can discuss
13 anything or whether it means we got to close up shop.

14 Just do a roll call down starting at the far
15 end.

16 MR. GILL: Hal Gill here.

17 MS. FOSTER: Theresa Foster, here.

18 MR. BINGHAM: Ian Bingham.

19 MR. BEAL: Roger Beal.

20 MR. DENBY: Mike Denby.

21 MS. HOLLOWAY: Karen Holloway.

22 MR. DENBY: Which brings us to a total of
23 six, and my recollection is that we have a quorum of
24 seven. So the debate becomes now whether we sit and talk
25 as the Policy Commission or whether as a quorum we don't

1 have the ability to talk as a Policy Commission. How
2 about that for an opening topic?

3 MR. GILL: I remember we before had
4 discussions where we had a meeting where we didn't have a
5 quorum. We just couldn't vote.

6 MS. FOSTER: That's my recollection, too,
7 that we cannot do any official voting unless a quorum is
8 present but we can continue with less than a quorum.

9 MR. DENBY: Any input from the Attorney
10 General's Office?

11 MS. PASHKOWSKI: I am not the board's
12 attorney, fortunately.

13 MR. DENBY: But you're affiliated with them.

14 MS. PASHKOWSKI: Ms. Woodall may be
15 available for phone, if you'd --

16 MR. DENBY: It is, like, the world's biggest
17 agenda and the world's smallest meeting. Maybe that's a
18 good thing. We need to make the agenda really big and no
19 one will come.

20 Well, I guess by general consensus of the
21 Commission, do you guys want to continue, walk through the
22 agenda as we have it, talk about what's there, leaving
23 voting issues aside until and unless somebody else walks
24 in and joins us?

25 MS. HOLLOWAY: It seems that there is really

1 not a whole lot of productivity out of a meeting, if you
2 talk -- have a big discussion because you are going to
3 have to repeat -- I mean, if it is something that you are
4 perhaps going to vote on, you are going to have to repeat
5 that discussion at a meeting where there is a quorum if
6 you want to take action. So I don't know. Unless you
7 just had, like, a call to the public and see if any other
8 issues for the next meeting come up.

9 MR. DENBY: Any thoughts or comments on
10 that? I know we have some -- I notice we have some people
11 on here. John Pearce is scheduled to speak. I'm sure he
12 would be very interested to see an empty room when he
13 shows up.

14 Thoughts? We have one no and a couple of nods
15 of the head yes.

16 MS. FOSTER: I think we should continue. If
17 we keep this agenda and add more stuff to it next month,
18 we are going to be here all day.

19 MR. BEAL: Get ready.

20 MR. GILL: I agree.

21 MR. DENBY: Okay.

22 MS. HOLLOWAY: I'll just let you know, I'm
23 not going to be here next month.

24 MR. DENBY: Better get your input now.

25 MS. HOLLOWAY: I'm just saying, if you want

1 me to continue to take notes, someone needs to take notes
2 for short executive minutes. I'll be out of town.

3 MR. DENBY: Okay. Well, let's -- unless
4 there is a -- seems to be a little bit of a voice on each
5 side of this issue. Why don't we just begin to walk
6 through some of these issues.

7 MR. BEAL: We're safe.

8 MR. DENBY: Here comes number seven.

9 You have now validated us, Elijah. We have a
10 quorum.

11 MR. CARDON: Sorry I'm late.

12 MR. DENBY: No problem.

13 Okay. Let the record reflect that Elijah Cardon
14 has joined us which brings us to a total of seven, which
15 meets the quorum recommendations -- or requirements.

16 So let's just begin to walk through the agenda
17 then. Administrative issues, approval of minutes from the
18 March meeting. Any comments, corrections, concerns?

19 MR. BINGHAM: One minor correction. Page 9,
20 line 4, Ms. Holloway would "make" available within three
21 business days as opposed to "take," so "take" to "make."

22 MS. HOLLOWAY: I can't hear you.

23 MR. DENBY: Changing "take" to "make" on
24 page 4, line 9.

25 MS. HOLLOWAY: Is that on her transcribed

1 thing? Okay.

2 MR. BINGHAM: Yes.

3 MR. DENBY: Any other changes or comments?

4 MR. BEAL: Did we have summary minutes
5 dispensed?

6 MR. DENBY: I did not see any.

7 MR. BINGHAM: I didn't see any.

8 MR. DENBY: Did we have summary minutes?

9 MS. HOLLOWAY: I didn't bring them with me,
10 but I had e-mailed them to ADEQ and Michael.

11 MR. GILL: We didn't get them.

12 MR. DENBY: I have not seen him.

13 MR. BEAL: I didn't get them. I would like
14 to have that.

15 MR. DENBY: Al Johnson ran away. No, there
16 he is. Did you get a copy of those?

17 MR. JOHNSON: I received a copy, and I know
18 Mike received a copy as well. And that's about the extent
19 of it.

20 MR. DENBY: Will you make those available?

21 MR. JOHNSON: I know DEQ did not forward
22 them on to anybody.

23 MR. BEAL: Is there a reason for that?

24 MR. JOHNSON: There was no specific reason
25 that DEQ did not forward them on.

1 MR. DENBY: Okay. If you could forward
2 those on, the ones you have, and if you get them in the
3 future, presuming you don't have --

4 MS. HOLLOWAY: The reason I don't send them
5 to everybody is I wanted to give the courtesy to the
6 chairman if he saw any major corrections before and let
7 him forward them on. There was a misunderstanding. But
8 that's the way I usually do it.

9 MR. JOHNSON: I will talk to Mike and make
10 sure we coordinate on that in the future to ensure those
11 minutes go out.

12 MR. DENBY: Do we have a motion for -- to
13 accept these minutes?

14 MR. CARDON: I'll move that we accept them.

15 MR. DENBY: Second?

16 MR. GILL: I'll second.

17 MR. DENBY: All those in favor. Those
18 opposed. So moved.

19 Call to the public -- I'm sorry. Back that up.
20 Discussion on how the minutes should be recorded. Looks
21 like there is only two methods today. I guess somebody
22 didn't bring a tape recorder because I don't have one. So
23 we're only doing transcription and Karen.

24 MR. GILL: In reviewing the minutes from
25 last meeting, the -- I thought that what we had agreed on,

1 especially after Patricia went and found -- got the budget
2 information, because that was the question that was on the
3 table, as soon as they found that information, I thought
4 we had -- the outcome was that Karen was going to do the
5 summary minutes to make it in the three days and -- so we
6 would have that to review. And then we would at the same
7 time have the court recorder, and we wouldn't necessarily
8 need the three-day extra cost. That we would -- that way
9 we would have the detail to go back, if we need to.
10 That's what I thought.

11 MR. DENBY: Well, this is the third time
12 it's been on the agenda, as far as I can remember. And
13 since we have seven people here to vote, we just need to
14 make a decision. This is kind of ridiculous.

15 Any other points?

16 MR. CARDON: Mr. Chairman, did we then
17 determine that there was funding for the taking of the
18 minutes of this body?

19 MR. DENBY: That was my understanding. And
20 we can probably get confirmation from Patricia that there
21 is. Funding for the minutes?

22 MS. NOWACK: There is funding for taking
23 minutes.

24 MR. DENBY: Funding is not an issue then,
25 doesn't sound like it. Question becomes, I guess, more of

1 an -- I guess Roger was the champion of the original
2 unemployment act.

3 MR. CARDON: Is the chair prepared for a
4 motion?

5 MR. GILL: We can't vote on anything. It's
6 not on the agenda.

7 MR. BINGHAM: Yeah, it is.

8 MR. GILL: If that was the case, we could
9 vote on anything there. I thought it had to be down at
10 the end.

11 MR. BINGHAM: That's why the line was put up
12 here, to give you an option.

13 MR. JOHNSON: It gives you a general
14 availability.

15 MR. GILL: I thought we had to have it on
16 the agenda to be able to vote on it; otherwise, we can
17 vote on anything on here.

18 MR. DENBY: I will take responsibility and
19 say that it is in the agenda. It's Item 2 in the agenda.
20 And if somebody had a concern, they should have been here.
21 It is the third time it's been on the agenda. They have
22 had plenty of notice of this issue.

23 MS. FOSTER: The paragraph preceding that
24 says, "The Commission may discuss, deliberate, or vote on
25 any items listed on the agenda."

1 MR. GILL: Hasn't that always been in there?

2 MR. BINGHAM: No.

3 MR. GILL: That language?

4 MR. BINGHAM: That was added probably about
5 five months ago.

6 But I have a question.

7 MR. JOHNSON: That's a question for Laurie.

8 MR. BINGHAM: When this discussion came up,
9 the summary minutes being prepared by Karen, if she is not
10 here, who's going to do it?

11 MR. DENBY: You mean if we choose that as
12 the method?

13 MR. BINGHAM: Well, my understanding, that
14 was our preferred. We do the court and hers. Hers is
15 what makes the three-day time period. The backup is the
16 court reporter's minutes. If she is absent, who is going
17 to do it?

18 MR. DENBY: Good question. I guess, can the
19 court reporter make a three-day turnaround?

20 MR. BINGHAM: Something to think about.

21 MR. DENBY: Off the record.

22 (Whereupon, an off-the-record discussion was
23 held.)

24 MR. DENBY: If we have a tape recording of
25 it, we've already met the three-day requirement because it

1 is in the record as something that somebody can listen to.
2 Doesn't have to be transcribed is my understanding. So if
3 we do have a tape-recorded version of what's going on,
4 which sounds like we are starting to have one right now,
5 recording of the meeting, I think the three-day piece
6 would be covered.

7 MR. CARDON: Mr. Chairman.

8 MR. DENBY: Elijah.

9 MR. CARDON: Mr. Chairman, I would like to
10 move that we continue with the minutes -- the court
11 reporter minutes, that we continue with a tape recording,
12 and that we encourage the summary of the minutes by Karen
13 Holloway. Excuse me.

14 MR. DENBY: Do we have a second to that
15 motion then?

16 MR. GILL: I'll second it.

17 MR. DENBY: Is there any further discussion
18 on the motion as it's been presented? Anybody have any
19 problem with this? No?

20 Okay. Let's move to a vote on it then. All
21 those in favor of the motion as stated by Elijah Cardon,
22 please signify by saying aye. All those opposed. The
23 ayes have it. We have a trio of recording devices. Now
24 we can compare them against one another if there would be
25 any questions.

1 MS. HOLLOWAY: Hopefully.

2 MR. DENBY: Okay.

3 MR. GILL: Mr. Chairman.

4 MR. DENBY: Yes.

5 MR. GILL: I think it needs to be made clear
6 because I didn't realize that -- and I didn't remember us
7 discussing this being added up there, which I don't have
8 any problem with. But if everybody out there doesn't
9 realize there can be a vote on any issue in every meeting,
10 that needs to be made real clear because in the past,
11 we -- it had to be in the body of the agenda that there
12 was going to be a vote on that particular issue. And
13 people could very well miss issues because they are not
14 aware of the language change.

15 MR. DENBY: I agree that people need to be
16 aware of it. I also agree that it is effective and useful
17 to have it there because as far as I'm concerned, if it is
18 listed on the agenda and you have an interest in it one
19 way or another, you should be here if your interest is
20 worthy of representation. Or you should seek to have the
21 issue held over until you can be there because as far as
22 I'm concerned, if it is on the agenda, it is votable. It
23 is an issue for discussion.

24 MR. GILL: It saves time, I agree. That's
25 one of the things that was putting things off over and

1 over again.

2 MR. DENBY: Since we have three methods of
3 transcription, they are bound to figure it out sooner or
4 later that that sentence has been added to our header
5 there.

6 Technical subcommittee updates, Hal.

7 MR. GILL: Okay. I'll just start with 3A,
8 which is a general update on the UST corrective action
9 rule and the guidance document status. And I'll just
10 defer to Ian on where the corrective action rule is and
11 get the rest of it.

12 MR. BINGHAM: As the letter that was sent to
13 the Commission members a week ago stated, we had to
14 renote the rules. The comment period ends the 30th of
15 April. And that was as a result of a statutory
16 requirement that the rules actually be approved by GRRRC
17 one year after proposal, and we missed that deadline as we
18 backed it up to deal with the guidance document issue.

19 So we had to renote so that once we were
20 completed with the guidance document, we can move forward
21 and have this thing approved by GRRRC. And, again, no
22 substantial changes. It's the same rule package that this
23 body unanimously approved in April of 2000.

24 MR. GILL: I had some questions forwarded to
25 me. Who does -- Who do the commenters comment to? Who

1 would they send it to?

2 MR. BINGHAM: The agency. They can send
3 it -- the letter, they can address it to me, Joe
4 Drosendahl.

5 MR. GILL: Either way, it will get where it
6 has to go?

7 MR. BINGHAM: Yeah.

8 MR. GILL: I had some questions about
9 responses to comments because many of the people that had
10 commented in the past have not received any responses.
11 And I don't know what constitutes a valid comment as far
12 as getting a response or -- Because I remember the same
13 thing happened to me years in the past, that I never
14 received anything.

15 MR. DENBY: If I can step in. In the
16 rule-making process, comments are responded to on the
17 concise explanatory statement. They will show up in the
18 CES as part of -- That's where your response will come.
19 And the agency will respond to all legitimate comments, I
20 will say. I don't think that's their verbiage of it.

21 If you ask them why is the room white, they are
22 not going to answer that in regards to the UST rule. But
23 if it is about the UST rules, they will answer the
24 question. And they will group them accordingly as well.
25 So you may not see your exact question. It will be

1 grouped as a general question.

2 MR. CARDON: Mr. Chairman.

3 MR. DENBY: Yes.

4 MR. CARDON: A question of Ian. Ian, is it
5 your understanding that the guidance -- and if I'm not
6 using the correct terminology, please help me, but that
7 the guidance document will be fully heard by input and
8 have input from the public to coincide with the
9 resubmittal or with the final submittal of the rules
10 package? Am I understanding you correctly on what you
11 mentioned just a minute ago?

12 MR. BINGHAM: The commitment the agency made
13 is that the rule package will not be heard by GRRC seeking
14 approval by the Governor's Regulatory Review Commission
15 until this body has had an opportunity to comment and make
16 a recommendation to the Department on the guidance
17 document.

18 MR. CARDON: And that would include the
19 coordination -- or the actual completion of the guidance
20 document?

21 MR. BINGHAM: Exactly.

22 MR. CARDON: Thank you.

23 MR. GILL: Along those lines, just as an
24 update on the guidance document, we had a meeting last
25 Friday. We're probably nearing the one section that we

1 have not -- had not reviewed at all. We're nearing
2 completion of that. That's Section 6 on RBCA.

3 And, hopefully, the meeting this Friday from
4 nine to noon in 1706, I think, will be -- we should
5 hopefully finish Section 6. And some questions came up
6 last time because it was the understanding of the
7 regulated community that there was -- for instance,
8 Section 7 had not been -- the rewrite had not been
9 reviewed yet. So there was some questions and concerns on
10 DEQ's part about when was this going to Ian, which I can
11 understand because it has been going on for a while.

12 What I -- in talking with Joe Drosendahl and
13 also talking with some of the stakeholders, what I had
14 agreed to do was -- and as I looked back through my
15 comments of the document that was handed out to all of the
16 Policy Commission members, I, indeed, had a number of
17 comments. But when I looked at them, they weren't earth
18 shaking; and it doesn't have to be an absolute perfect
19 document.

20 But there are certain issues that I felt had to
21 be addressed. There was some issues that other people --
22 different issues that they felt really needed -- there
23 needed to be some dialogue. So what I proposed to Joe
24 Drosendahl is that I would provide him this next meeting a
25 list of the issues that we really feel have to be

1 addressed and some dialogue entered into before we can
2 bring it to the Policy Commission.

3 And from looking through what I -- And I
4 finished the review of what I believe is the last rewrite,
5 which was the document that you received. I finished that
6 review yesterday. And personally myself, I do not have
7 that many major issues, but we do believe that they need
8 to be addressed.

9 So I'll bring that list, and I'll ask for other
10 people that are reviewing the document to give me any
11 issues that they just have to have discussion on. And
12 we'll present that to Joe because their concern was they
13 didn't see any light at the end of the tunnel. And I can
14 understand that. And I believe we can show them that
15 there is, indeed, light. So I'll provide that in this
16 Friday's meeting.

17 And, again, the meeting is nine to noon in 1706,
18 which is right next door. So please show up anyone that's
19 interested.

20 MR. DENBY: Now, that was bullet -- the
21 first bullet?

22 MR. GILL: That was the first bullet. That
23 was the guidance document status.

24 MR. DENBY: You mean Subsection A. What's
25 "document development and schedule of upcoming events"?

1 MR. GILL: That's what I was asking, the
2 status of both the corrective action rule and the guidance
3 document, what is the status of each, and then the comment
4 deadline. And that was already given by Ian.

5 MR. DENBY: So we are on to concerns with
6 the corrective action rules, presentation of concerns
7 regarding corrective action rules and review of letter
8 from John Pearce to ADEQ.

9 MR. GILL: Everybody should have that
10 letter. Unfortunately, he's not here to present his
11 concerns. A couple of them are itemized there below that
12 dash.

13 MR. DENBY: So LUST numbers, policy on
14 reopening LUST sites and discussion of MTBE. I admit I
15 did see John's letter, but I did not print it out and I do
16 not remember what it said. So I'm guessing it contains
17 these three pieces, namely?

18 MR. GILL: And a general concern about
19 the -- the corrective action rules were -- we had numerous
20 meetings, probably hundreds of hours, going through the
21 corrective action rules and basically taking out all the
22 detail that is not being -- going into the guidance
23 document. But this -- the corrective action rule was
24 negotiated with a different DEQ basically, a different
25 group of people.

1 And since that time, there has been huge changes
2 as far as -- that have created numerous things such as the
3 backlog and that kind of stuff that we feel -- that's what
4 the essence of John's letter is, that he feels that we
5 have real concerns with the rule, with the issues, and the
6 policies that are being put forth now. And that was
7 his -- I think, his main concern that he was hearing from
8 the owner-operators.

9 That's the general statement he was making in
10 the letter. And then these were some individual issues
11 that are put forth here. We are wondering where that's
12 going to be because it is brought up again in the policy
13 section, too, those three items.

14 MR. DENBY: I'm trying to understand this,
15 the corrective action rules versus the guidance. The
16 guidance is what Ian was just talking about as still being
17 out there, what you were talking about as still being
18 negotiated. The rules were something we voted on a while
19 back, and they are the ones that are now held up at GRRC
20 or held up to get to GRRC.

21 The change in -- I'm guessing John's letter -- I
22 guess I'm somewhat uncomfortable discussing John's letter
23 if he is not here to support it. It sounds like we have
24 somebody's impressions of what the letter says. If they
25 are concerned about management turnover affecting the

1 corrective action rule, I guess I don't understand how
2 management is going to affect the rule. They may affect
3 guidance, they may affect policy, but how they affect a
4 rule if a rule is something that's already been approved.

5 MR. CARDON: Mr. Chairman.

6 MR. DENBY: Yes.

7 MR. CARDON: One possible course of action
8 we may want to consider is simply bypassing this -- the
9 question of John's letter. And he sometimes comes at a
10 later time.

11 MR. DENBY: Okay. That's fine by me, if we
12 just want to bump that to later in the agenda. And if he
13 shows up, we can discuss it then.

14 MR. GILL: That's fine.

15 MR. DENBY: Why don't we do that. That
16 takes out the bullet points there as well. So we are down
17 to B; is that correct?

18 MS. HOLLOWAY: Yes, yes.

19 MR. GILL: Yes.

20 MR. DENBY: So Subsection B, discussion on
21 ADEQ UST State Assurance Fund, status of stakeholder
22 Claims Review Unit meetings. I'm guessing that's
23 something for Ian to answer.

24 MR. BINGHAM: Yeah, I guess so. We have
25 started, DEQ, that being Shannon Davis, director of waste

1 programs division, Bob Rocha, director of administrative
2 services division, Patricia Nowack, and myself are meeting
3 with a group of stakeholders to discuss concerns and
4 issues being raised by the stakeholder community. We've
5 had several meetings dating back to -- I think they
6 started early part of December. And the last one we held
7 was mid March. We have not yet scheduled a second meeting
8 following up on that -- I think it was March 17th, if I am
9 not mistaken, or March 19th.

10 MS. NOWACK: 19th.

11 MR. BINGHAM: March 19th. We have not
12 scheduled another one as yet. And I know Bob and Shannon
13 have had communications in trying to get another time from
14 their schedules to then contact the stakeholder community
15 for another meeting discussing these issues.

16 MR. DENBY: Latest statistics on CRU/SAF
17 application backlog.

18 MR. BINGHAM: All right. Well, after
19 another painful exercise both from Patricia's staff and my
20 staff in trying to get this latest -- Do we want to go
21 with what we did in the past or get to the percentages
22 because we've expanded again for this month?

23 Backlog --

24 MR. DENBY: However you want to do it.

25 MR. BINGHAM: We met internally to come up

1 with a uniform definition of the term "backlog," which I
2 think we discussed before, which again is applications
3 filed with the Department for which we have not issued an
4 interim decision within 90 days of receipt, which is -- If
5 you read the 49-1091 statute that grants appeals after 90
6 days of receipt, if we have not issued that interim
7 determination, that application is subject to an appeal.

8 So for the three types of applications that we
9 have direct pay preapprovals and reimbursements, as of
10 Monday, we have one direct-pay application for which an
11 interim determination had not gone; and that application
12 has been here greater than 90 days. And for the record,
13 that was originally submitted as a reimbursement and then
14 later changed to a direct pay. Preapproval, there is 15.
15 And reimbursement, there is 517.

16 MS. NOWACK: Greater than 90 days?

17 MR. BINGHAM: Greater than 90 days.

18 MR. GILL: How many was that, 517?

19 MR. BINGHAM: 517 of reimbursement.

20 These numbers have been reconciled between our
21 section and Patricia Nowack's group. So there is no
22 longer two sets of numbers going out.

23 MR. DENBY: I don't know if the bullets on
24 the agenda could be answered here, percentage of appeals
25 are for SAF claims. I think somebody left an "are" in.

1 Percentage of appeals for SAF claims, SAF work plans, site
2 characterization reports, and corrective action plans,
3 your numbers aren't broken down into those categories?

4 MR. BINGHAM: We made attempts to try to
5 answer those as best we can. Unfortunately, our system is
6 not state of the art and relates all kinds of things. And
7 I know Patricia had at least two staffs spending a day and
8 a half trying to get this. I had three people spending a
9 day to do our best in answering that question.

10 What we attempted to do was go back looking at
11 what percentage of interim determinations had appealed --
12 or had been appealed. And from our research, it looked
13 like about 40 percent of SAF applications had been
14 appealed of which about half of those were involving the
15 1054(c) issue, "conform" issue. The remaining was,
16 like -- or remaining 20 percent were for technical and/or
17 financial reasons that those things were appealed.

18 In terms of settled in favor and not in favor,
19 whatever, we don't track based on favors. We resolve
20 appeals.

21 MR. DENBY: You don't have a win-loss
22 column?

23 MR. BINGHAM: So I don't know how -- what
24 people are looking for there, but that is not how we do
25 business. And I hope this Commission is not asking us to

1 start making this thing personal, it's in your favor, it's
2 in our favor. If there is an issue, we resolve the issue.
3 That's what the appeal process from our point of view is
4 all about. So ...

5 MR. DENBY: As a note to the record there,
6 the Office of Administrative Hearings does keep track of
7 decisions. And they have a statistic as to agency
8 opinions upheld and whatnot, which can be useful to the
9 regulated community to try to figure that out, sort of
10 back dooring it. But it doesn't necessarily mean that the
11 owner-operator -- that it was in the owner-operator's
12 favor because it depends on which the way the appeal comes
13 to OAH as to what the decision is and how it's going to be
14 put on their statistics.

15 Patricia, did you have a comment?

16 MS. NOWACK: I think it's important to note
17 the time frame that Ian's discussing the numbers for. We
18 used a 14-month period. And that's an average over that
19 period of time.

20 The other thing you said is formal appeals.
21 We've only gone to two formal appeals in the last year.
22 So I don't know that that --

23 MR. DENBY: So it is 50/50, win one, lose
24 one?

25 MR. BINGHAM: It is either a zero or 100.

1 MR. DENBY: Pretty easy statistic.

2 MR. CARDON: Mr. Chairman.

3 MR. DENBY: Yes.

4 MR. CARDON: Did I understand correctly that
5 the 40 percent figure that was referred to, really we
6 don't have percentages broken down into these next four
7 categories?

8 MR. BINGHAM: No, no. This is just a
9 general overall what's been coming in.

10 MR. DENBY: My personal reaction to this --
11 I will say this is the first time -- I saw the agenda the
12 other day. I'm not aware of what caused the agenda to be
13 created necessarily. But I would be concerned that the
14 agency is spending cumulatively four days worth of
15 man-hours trying to figure out percentages of appeals in
16 order to get the Commission some information when those
17 people should be busy working on reimbursements or direct
18 pays or whatever it is. That's just my personal comment.

19 MR. BEAL: Yeah, I don't know the question
20 either. But it seems to me that the summary input would
21 be what kinds of appeals -- or for what reasons were the
22 appeals being made. And that might be the bottom goal,
23 what works.

24 MR. BINGHAM: Appeals come for all kinds of
25 different reasons. Some people use appeals as a means of

1 getting facility meetings. Some people use appeals as a
2 means of extending the time to respond to deficiencies.
3 They'll even state in their appeal, We don't disagree,
4 we'll provide it. And then there is some that are
5 legitimate disputes and disagreements between the agency
6 and a combination of all three.

7 And to actually go through to get that level of
8 detail would be a file-by-file review. And if we are
9 going to start tracking it, then -- as we are doing
10 appeals, then each case manager or SAF is going to have to
11 sit there and create all these different categories. And,
12 again, that's just a labor-intensive process for really a
13 resource-strapped program to begin with. What are we
14 after? Because appeals can -- in one sense can tell you
15 something and in another tells you absolutely nothing
16 because you don't know what the motivation is behind the
17 appeal.

18 MR. BEAL: It is not one particular area
19 that's generated the requests or more than --

20 MR BINGHAM: The one that stood out is for
21 what we've gotten, especially in the last six months,
22 better than 50 percent was over the "conform" issue, the
23 one that this Commission has dealt with and we had
24 statutory change to address does it conform to the
25 preapproval. I mean, that was one that was easily taken

1 out. The others are all over the board.

2 MR. BEAL: I think that's the kind of
3 information that could have come from this and just as
4 good as the numbers that would have taken a long time to
5 get.

6 MR. DENBY: I'm not sure where this came
7 from. I would just express concern that you're diluting
8 agency resources for statistical reasons, but I'm not sure
9 what the statistics do us.

10 MS. FOSTER: Mr. Chairman.

11 MR. DENBY: Yes.

12 MS. FOSTER: I would recommend that this
13 committee, if we are going to look appeals, only look at
14 the formal appeals and not the informal appeals because a
15 lot of us have gone through informal appeals and
16 resolution has been made very quickly on them.

17 And if there is only the two formal appeals in
18 the last year, I think that would be adequate to look at
19 just those appeals. I would much rather have the four man
20 days used for looking at reimbursement applications since
21 they are backlogged 517. And, plus, there could be a
22 two-year delay in anyone picking up an application.

23 MR. DENBY: I agree.

24 Any other discussion on B? Any comments from
25 the public on B?

1 MR. KELLEY: Yes, sir.

2 MR. DENBY: State your name for the record,
3 please.

4 MR. KELLEY: My name is Dan Kelley. To
5 respond to your concerns -- And I think it is the same
6 issue that Ms. Foster raised about why are we wasting this
7 valuable resource deriving these statistics. I think that
8 even though the Department didn't provide us the
9 statistics on the appeal rate for site characterization
10 reports and corrective action plans, the fact that the
11 Department has a 40 percent appeal rate on SAF
12 applications should sound a huge bell with this Commission
13 that this process is not working. Forty percent, four out
14 of every ten that come in the door, are being appealed.
15 Is that an operating system? Is that a functioning
16 system?

17 That right there, that data, is the power to
18 manage the problem. That's why we need the data, so we
19 know how to manage the problem. So the data in and of
20 itself does have value. And then after that, the data in
21 and of itself does tell us and it should tell us that 40
22 percent of the claims that are coming in are being
23 appealed. That is a very significant issue. And I think
24 that's the responsibility of this Commission to deal with
25 those kinds of issues.

1 Please don't discount the request for this data.
2 And then please don't just turn a blind eye to the fact
3 that 40 percent of the claims coming in are being
4 appealed. That is what the regulated community is crying
5 out to this Commission about.

6 MR. BINGHAM: I would like to add, of that
7 40, half of them is over one issue that has been resolved
8 legislatively. I'll leave it at that.

9 MR. DENBY: I guess I would have a question
10 about what does "appeal" mean when we talk -- As Theresa
11 just mentioned, there are only two formal appeals out of
12 the 40 percent that have been appealed. Twenty percent
13 apparently of that are nonconform questions. To me that
14 shows one of two things. Either the Department is an
15 800-pound gorilla, when you appeal, you don't go anywhere
16 so your informal appeal dies and you don't even take it to
17 formal. Or the opposite happens in that you work some
18 sort of resolution with the Department. And that proves
19 that that 20 percent that are being appealed, only two of
20 those went to the mat, went to the final arbiter at OAH.

21 MR. BINGHAM: Your latter is the correct
22 one. We are resolving these things.

23 MR. DENBY: Patricia.

24 MS. NOWACK: Mr. Chairman, thank you. I
25 just want to clarify two went to hearing. There were more

1 than two formal appeals filed. I just wanted to make it
2 clear that I wasn't misleading anyone in that fact. Only
3 two went all the way to hearing. But there were more than
4 two formal appeals filed. They were settled or dismissed
5 during the informal settlement conference period. Thanks.

6 MR. DENBY: Go ahead.

7 MR. KELLEY: Can I please follow up,
8 Mr. Chairman?

9 MR. DENBY: Certainly.

10 MR. KELLEY: I think that there has been a
11 grand white-washing going on here. Forty percent of the
12 work product is in dispute. I ask every one of you that
13 does your job if 40 percent of your work product was being
14 disputed by your client or your boss, how long would you
15 have your job? Forty percent of their work product is
16 being disputed.

17 I don't care if it has to be -- goes to a formal
18 appeal. The fact that we can't get consensus on 40
19 percent of the work product is unacceptable in any
20 industry, in any productive atmosphere. That is the
21 problem. That is the problem. And to discount and to
22 say, well, only half of those are one issue and only half
23 of them are another issue, then all we start doing is a
24 shell game and sweeping things under the carpet.

25 That is why we need the statistics: What is the

1 big picture? How many SAF claims are being appealed?
2 What is the Department's win rate, which you know OAH is
3 maintaining those records. So those things are what the
4 stakeholders are asking this body to please look at and
5 give some direction to the Department to help manage this
6 program. To just say that, well, only 20 percent of them
7 are over some issue and 20 percent are over another issue,
8 then we just start sweeping this stuff under the carpet.
9 We need to look at the big picture. We need not to lose
10 the forest.

11 MR. DENBY: Elijah.

12 MR. CARDON: Mr. Chairman, one suggestion
13 could possibly be that rather than approach this from the
14 standpoint of the Department and doing some kind of
15 statistical analysis, if there seemed to be a
16 persuasive -- a pervasive concern among the regulated
17 community, there could be a general concern of -- brought
18 before the committee for our consideration. And what I'm
19 saying is not just the 40 percent but applications or
20 appeals fall in this general category. If that could be
21 identified by the regulated community and brought before
22 the Commission, maybe that would be something that we
23 could judiciously consider, as a suggestion.

24 MR. BINGHAM: I would like to respond to
25 that.

1 MR. DENBY: Certainly.

2 MR. BINGHAM: This program cannot be
3 generalized. There are too many site-specific situations
4 that go on that cause some of the decisions that are made.
5 And as I look at even some of the items later on the
6 agenda, many of these are currently under appeal that is
7 being represented as a new philosophy or a new policy or
8 whatever.

9 To actually get the discussion that Mr. Cardon
10 is talking about, you've got to get into the specifics of
11 the case, and that is not what this body is here for. And
12 when we look at some of these things, it really -- these
13 are, like, one or two sites that people are blowing up
14 into huge problems.

15 And I have been involved in this program for ten
16 years. And I'm sorry, it is about time for some honesty.
17 Much of this, I am sorry, from my point of view is really
18 intended to derail this program, get us bogged down in
19 minutia and really small things making representative to
20 be bigger issues than they actually are to prevent us from
21 moving forward.

22 I mean, again, people play a game with the
23 appeal system, a big game with the appeal system. If
24 people legitimately just appealed decisions that they
25 disagreed with, we could move forward. But when I know

1 people do it just to get a meeting or they do it just to
2 buy some additional time to respond, you can't separate
3 those out.

4 MR. CARDON: Mr. Chairman.

5 MR. DENBY: Elijah.

6 MR. CARDON: I can concur completely with
7 Ian's observation that this Commission is not for the
8 review of individual applications. However, I would
9 repeat that if there were some general concern that did
10 exist in the regulated community, that that general
11 concern would be appropriate to be considered by this
12 group.

13 MR. DENBY: Yeah. I would like to -- I
14 don't think there is anything for us to really do under B
15 except, as we have, sort of flesh out some of the concerns
16 the Commission has about what we are asking ADEQ to do.

17 I would reiterate unless there is -- I mean, to
18 me to respond to some of the public comments, to me,
19 20 percent of the issues being linked to the 1054(c)
20 issue, which is apparently being addressed in legislation,
21 that to me is -- it's concerning to me that there was
22 20 percent of the appeals locked up in that one issue. If
23 that one issue is going away, that leaves 20 percent of
24 the appeals -- or 20 percent of the actions being
25 appealed, which is an 80 percent approval rate to start

1 with as -- It doesn't stink to me of a problem.

2 However, if there is something that's going on
3 that is a problem that can be discussed as a general
4 problem to the Commission, we would be glad to talk about
5 it. I am concerned that we are going to require the
6 Department to spend too much time statistically analyzing
7 their program. We know they are short staffed. At which
8 point in time you are going to run into questions as to
9 where do we use these resource? Do we use them to create
10 statistics, which will then only create more statistics
11 because there will be more appeals and more problems
12 because we don't have the people to actually get to the
13 review of the documents. It is sort of a
14 self-perpetuating cycle there.

15 So I would be concerned that if we go asking
16 them to do these things that they -- if we do ask them to
17 do it, that we do it on a very precise basis, that we have
18 a focus for it, and that we are not just wasting man-hours
19 within the Department.

20 Roger.

21 MR. BEAL: I don't know if I can go this far
22 or not, but I am sure going to try. Rather than trying to
23 ask the Department to come up with information to show
24 that things aren't quite right, is there a way possible
25 that we could ask the consultants to give a summary of

1 areas that they continually have repeated problems with in
2 completing the work on any subject and bring it to us?
3 And then we can say -- we can look at their concerns
4 because I sort of feel as though we are being driven by
5 questions such as this to solve a problem that's not that
6 identified. The people -- rather than ask the questions
7 and hope that numbers come up to show the problem, we can
8 ask what the problem really is and then examine why they
9 might be having it.

10 MR. DENBY: The only concern I would have
11 with that would be the question of specifics. And when
12 you are asking for appeal specifics, which would be
13 consultants, what are you having appealed on a regular
14 basis, you are getting into the raw area of individual
15 questions.

16 MR. BEAL: I'm not asking for appeal
17 information. I think that the appeal question goes to the
18 problem, but it is not identifying the problem. The
19 problem is not appeals. The problem is something that the
20 appeals are going to illustrate.

21 And I would rather ask what the problem is or
22 where there's trouble getting things accomplished and then
23 go from that right from the get-go, what we are talking
24 about, rather than trying to have a database built up to
25 illustrate this is why the system doesn't work. If a

1 consultant would like to present us with information, I
2 would sure be interested in looking at it anyhow.

3 MR. DENBY: Theresa.

4 MS. FOSTER: I have a problem with the
5 comment the program doesn't work. If we have 40 percent
6 of all applications appealed and only two go into a formal
7 appeal process where they are before an appointed judge,
8 to me the system is working wonderfully. And if it was
9 truly a problem, then I would expect to see more people in
10 this -- at this meeting, more owners and operators
11 complaining about the program.

12 And I'm seeing familiar faces month after month.
13 I'm not seeing owners and operators complaining that the
14 issues have not been addressed and corrected. I think DEQ
15 is doing a wonderful job making sure people have a chance
16 to voice their opinion and it is being resolved.

17 MR. DENBY: I would just like to comment
18 that I agree in part with what you say, Theresa. But my
19 other side of that is the quiet voice is not always
20 represented in statistics. And if there is a pervasive
21 thing going on out there and it hits one person for his
22 one issue but it's small enough it doesn't bother them and
23 it moves on but it is hitting all these people, you are
24 not going to see them. If I was an owner-operator and had
25 one small issue, I probably wouldn't have the time to be

1 down here.

2 But the question is: Is every owner-operator
3 having that same small issue and they are all making that
4 unilateral decision not to come down here? So I do
5 think -- if there is a focus and a reason, then statistics
6 and getting the Department to create the statistics -- or
7 to show us the statistics is a good idea. However, I
8 would caution that unless it is focused, you are wasting a
9 lot of man-hours that could be used otherwise by the
10 Department.

11 MR. GILL: Mr. Chairman.

12 MR. DENBY: Yes.

13 MR. GILL: I have one response to Theresa's
14 comment. Also, I think the point that many of the
15 owner-operators and the consultants are making is that the
16 40 percent shouldn't have been there in the first place,
17 not whether two went to formal. I mean, we spend as a
18 group in the state probably thousands of hours, which
19 costs lots of money, responding to issues such as the ones
20 that are going to be coming up later. That's the issue,
21 the regulated public doesn't think we should have to be
22 responding to these.

23 And, granted, we can -- for every point that we
24 can make and every example we can give, DEQ can give
25 examples of people that are turning in an appeal to get a

1 meeting. And we agree, that happened. But what we're
2 trying to bring to the table and what owner-operators have
3 come to me and to other consultants trying to bring to the
4 table are the examples of we don't think this is an issue
5 that we should have to respond to over and over and over
6 and over again. That's what the 40 percent is.

7 Again, we don't care about the two that went to
8 formal because most of them are resolved, but we don't
9 think we should have to be in there on these same issues
10 over and over again. So it is -- the 40 percent is the
11 issue, not the two going to formal. So I have to disagree
12 that they are doing a wonderful job. We shouldn't be
13 doing 40 percent. Ten percent would be a wonderful job.

14 MR. CARDON: Mr. Chairman, there seems to be
15 a general consensus, at least I perceive that there could
16 possibly be a general consensus, of opinion here
17 concerning the comments that have been made by members of
18 the board which lead to the suggestion that if there is a
19 recurring general kind of difficulty that consultants are
20 experiencing in their interaction with the Department,
21 that it could be brought before this group specifically
22 and dealt with.

23 MR. DENBY: Let me go out and put one -- I
24 just wanted to let the record reflect that Nancy Jamison
25 has joined us and she has been here for about ten minutes.

1 And I apologize for that, Nancy, for not
2 acknowledging that.

3 MS. JAMISON: Thank you, Mr. Chairman.

4 MR. DENBY: One last piece following up on
5 Elijah's is I think the 1054(c) issue was exactly one of
6 those issues. As I understand it, the 1054(c) issue
7 became a broad enough issue that it touched enough people
8 in the area that it became a front-row or front-burner
9 issue. It was brought to the Department. It was brought
10 in front of the Policy Commission at the same time. It
11 was discussed and, from what I understand, is being
12 resolved legislatively. That's exactly the type of thing
13 I would like to see.

14 And that is an issue, perhaps, where the
15 consultants could get together and come up with the sort
16 of broad-scope issues of here is a universal piece that's
17 being touched on more than one place.

18 Patricia.

19 MS. NOWACK: I have a suggestion, and I am
20 going to step right out and say it. I think it would be
21 more beneficial if the Department could gather that
22 information. For instance, we use certain denial codes
23 for denying costs on a claim. And it is very easy for us
24 to do a report on appealed issues and list the denial
25 codes that are associated with those denials.

1 We could do an analysis to see if the same kinds
2 of issues continually come up. And then maybe at a UST
3 conference or SAF application seminar or some public forum
4 use that information to note to people these are common
5 denials and here's the way to resolve them or just note
6 that those are things that need to be worked out
7 legislatively or by rule or by public information. So I'm
8 suggesting the Department take the ball instead of the
9 consultants taking the ball.

10 MR. DENBY: I don't want to dissuade the
11 consultants from taking the ball as well. I think
12 producing a top-ten list would be great, if that's sort of
13 what you are proposing. I think that would be a great
14 thing to put before the Commission. I would be interested
15 in seeing that.

16 MS. JAMISON: Mr. Chairman.

17 MR. DENBY: John.

18 MR. PEARCE: John Pearce. I think that's a
19 great idea, what Patricia mentioned. I was thinking the
20 same thing.

21 Couple of comments. I have practiced in this
22 area for probably 12 years now and done appeals since
23 there was an appeal system. And I've found that there has
24 been definitely an increase in appeals in the last couple
25 years, and many of the appeals are on similar issues.

1 If we could have a process where the public was
2 better advised about what kinds of measures that
3 owner-operators could take to avoid having problems with
4 their submittals before the submittal was made, i.e., a
5 denial code top-ten list would be a great example of that,
6 it may minimize the number of appeals.

7 Minimize the number of appeals would be a good
8 idea for all concerned because it would free up time for
9 the Department to do other things, to minimize the
10 complaints from the owner-operators about having to go to
11 appeals. And it is just a communication issue from the
12 Department to the owner-operators and back again to help
13 minimize up front the number of occasions where there is
14 just disagreement.

15 Now, having said that, the system for appeal
16 resolution is working actually quite well. It results in
17 matters being resolved in a mutually satisfactory manner
18 almost every occasion without it going to OAH. There are
19 lots of formal appeals, though, which as Patricia points
20 out, this is an extension of the appeal process beyond the
21 formal stage. And if it is something more than that, it
22 is unfortunate we have that many occasions as we do where
23 it goes to a formal appeal process before it is resolved.
24 In other words, it is resolved on the courthouse steps,
25 so to speak, of the administrative law judges at OAH.

1 If there is a way, again, to expedite the
2 resolution of these matters, we can save a lot of time and
3 money as well. Again, I think that's what we are talking
4 about in trying to get the word from the Department about
5 how it is handling submittals so people can learn from
6 that, not from the appeals process, but before they submit
7 something, which is obviously something the Department
8 strives to do with stakeholder outreach efforts and so
9 forth. If emphasis could be put on that, I think that
10 would be very helpful, maybe more so than trying to
11 generate statistics.

12 But certainly maybe that's part of the process
13 in outreach is to do some statistical work on, look,
14 here's ten things that we're seeing pop up that comprise
15 85 percent of the denials. Owner-operators,
16 representatives, people learn from it. Let's work
17 together on this to make sure we don't have to have these
18 meetings.

19 The other thing I was going to say, I really
20 haven't had too many occasions where appeals have been
21 filed just to get a meeting. In fact, I can't think of
22 any. On every occasion I have been involved in an
23 informal appeal or whether it goes to formal appeal or
24 not, there is always something that is of value to the
25 appeal. And I can't remember an occasion where the

1 owner-operator hasn't either walked away educated about
2 the reasons behind the Department's denial or rejection of
3 a document and that enables the owner-operator to submit
4 something that's appropriate or the Department learns
5 something and gives the owner-operator something that they
6 had asked for.

7 So I don't think that's that big of a problem.
8 Again, it is just the communication issue to hopefully
9 avoid the number of appeals. That just takes so much time
10 from everybody involved. So I am all in favor of what
11 Patricia is talking about if it is not too much trouble.

12 MR. DENBY: Nancy, you had a comment.

13 MS. JAMISON: Thank you, Mr. Chairman. In
14 the short time that I have been here this morning, I have
15 heard several good comments. And I certainly second your
16 statement that we should be cautious about requiring the
17 Department to spend a lot of its time in statistic
18 gathering. And I also generally agree, I think, with
19 Ms. Foster's assessment of the process.

20 It strikes me that if these same things keep
21 coming up over and over again, it could be that the
22 Department hasn't learned what it might have from past
23 history or that consultants haven't learned what they
24 might have from past history or that these are the kinds
25 of thorny issues that just require some more specific

1 interaction on a case-by-case basis.

2 This isn't a rubber-stamping process. And I
3 think any time you have a program like this where there is
4 a lot of money being doled out and people are, of course,
5 concerned about being repaid for the work that they do and
6 getting value for their customers, there are going to be
7 these tensions. And so everybody needs to work to try to
8 make the process work as well as possible. But I don't
9 think it will ever work without any appeals.

10 MR. DENBY: I would like to move back to
11 Agenda Item 3A, subset there, now that Mr. Pearce has
12 arrived. We had skipped over this part of the agenda,
13 bumped it to later. We'll take it up now before we get to
14 Subsection C.

15 We had begun to try to discuss what your letter
16 said, but we decided we would wait for you to discuss what
17 your letter said since we didn't want to paraphrase what
18 your letter said. If you would like to ...

19 MR. PEARCE: Sure. John Pearce. And this
20 is on the topic of the letter I sent to the Department
21 February 18 of this year on the corrective action rules.
22 It is not my intent or anybody else's intent to derail the
23 corrective action rules. Nor is it -- do I have any kind
24 of specific problem with most of what's in the corrective
25 action rules. I understand where they are coming from. I

1 understand the need for them. I think the regulated
2 community understands the need for them in the fact that
3 we all want to get them done.

4 The big problem I have with the rules in my
5 experience is when something goes into rule and it is as
6 detailed as the substance of these corrective action
7 rules, it creates a whole new paradigm on strict adherence
8 to what is in the rule. And because it is rule, it is
9 law. And that is something different from what you would
10 find in the guidance document, what you would find in a
11 policy document, what you would find in anything other
12 than a rule or statute. A rule is law, and there are
13 issues about strict compliance with the law that I think
14 the Department is going to feel compelled to require.

15 Now, having said that, and in recognition of the
16 fact that the corrective action rules have cradled the
17 grave, a highly detailed set of requirements, beginning
18 with release reporting and ending with RBCA and site
19 closure, I think the Department has quite properly taken
20 its time to meet with the regulated community on numerous
21 occasions to make sure those rules are the best possible
22 rules they can be.

23 The rules do have some additional requirements
24 that have not been seen in the program before. There is a
25 report that we are going to see required from now on at

1 sites that people aren't accustomed to submitting. There is
2 detail listed in the rules that will have to accompany
3 every submittal that -- I won't say hasn't been inherent
4 in the Code of Federal Regulations and in some policy
5 documents but now it is in the rule. And, again, I don't
6 know that the owner-operators are going to have any choice
7 other than to make sure that every box is checked and
8 every T is crossed, make sure that every component of the
9 submittals is satisfied because the rule now calls for it.

10 My question has always been: Is the Department
11 satisfied that the public is going to be aware of what's
12 required? Is the Department ready to regulate under this
13 set of very detailed rules? And does the Department have
14 any concerns about the time it's going to take it to
15 review every submittal to make sure that it complies that
16 all the detail in the rules is present in the document?
17 Are these all things the Department is really ready to do?
18 Because it seems to me the Department is going to have to
19 do that.

20 My second concern is: Will there be a component
21 of flexibility in the rules to recognize that not every
22 site is going to require every single report, every single
23 submittal, and every single detail within every single
24 submittal that the rules seem to call for so that there is
25 some flexibility in the process? Or is the Department

1 going to feel compelled to regulate with these rules on a
2 by-the-letter basis so that there is a stringency in the
3 process that we maybe haven't seen before in the program?

4 That's one set of concerns. Maybe I should stop
5 there before I go into some more specific issues. But
6 we -- Let me summarize by saying we have never seen a set
7 of rules in the program like this since the preapproval
8 rules back five, six years ago with respect to the level
9 of detail in them. And these are even more detailed than
10 the preapproval rules.

11 MR. DENBY: These -- Let me clarify one
12 thing for my own comment. And that is, these are the
13 rules that we've already had before the Commission and
14 we've talked about after numerous -- I think there were
15 several meetings we talked about the rules. And there was
16 actually some break-outs at one of the meetings and then
17 we came back in and we came to some conclusion on them.

18 Are there new things that have happened to the
19 rules since then, or is this just sort of a reexamination
20 of the rule?

21 MR. PEARCE: That's a good question. The
22 rules have -- I'm not sure there is anything new in the
23 rules except that we have learned since the rules were
24 reviewed and approved by the Policy Commission that it
25 seems to at least some members of the regulated community

1 that there is a heightened scrutiny being given by the
2 Department to work by the letter of what may be in statute
3 and what is in some instances in policy so that -- I sense
4 a diminishment of flexibility within the program on the
5 requirements that the program feels is necessary to get
6 something approved by the Department. And that heightened
7 my concern about how the Department is going to regulate
8 under these rules which are so very detailed. That's one
9 thing.

10 The second thing that's come up is it was always
11 understood and still is that the rules go hand in glove
12 with guidance documents that have been underway for quite
13 some time now and are reaching completion. There are
14 issues about whether the rules can be correctly
15 implemented without all the guidance documents being
16 intact and completed as well. And there are some issues
17 about whether some of the gaps have been filled adequately
18 so far by the guidance documents on issues like RBCA,
19 closure criteria, MTBE, and release assignments. Those
20 are examples.

21 So those are issues that cause me to go ahead
22 and send the letter back in February. And I still think
23 those issues are right for discussion right now.

24 MR. DENBY: Would it be better to
25 characterize this as a concern about the interpretational

1 policies of the Department versus concerns about what
2 we've already agreed upon. I guess I would have a problem
3 trying to go back as the Commission and say, By the way,
4 Jackie -- Director Schafer, we actually second-guess the
5 rules now and we are having more problems with them. Or
6 should this be something we put into the channel of
7 concern about how management and UST business works, I
8 guess?

9 MR. PEARCE: I think it's more of the second
10 thing that you said. At this point, what I'm looking for
11 is some warm and fuzzy assurances from the Department that
12 it is going to implement these rules -- these extensive
13 detailed rules in a manner that's reasonable so that sites
14 that don't require or shouldn't require reports A through
15 Z and instead only require reports A through M are handled
16 in that manner; so that when a site that requires a
17 report -- report A that has detail requirements 1 through
18 10 in the rules and only detail requirements 1 through 5
19 make sense under the site circumstances, that the
20 Department feels they can handle the submittal in that
21 manner rather than calling for details 6 through 10 as
22 well. That's what I'm talking about.

23 Will there be flexibility in the implementation
24 of the rules, or will the Department feel like it has to
25 act like robots and run down the lengthy checklists that

1 are within the rules themselves and say, no, this
2 submittal is deficient because it doesn't have this
3 particular aspect of what the rule calls for when I think
4 the intent of the rule was to go ahead and cast all the
5 requirements that might apply in the rule as a menu rather
6 than a full-scale requirement. That's what I --

7 MR. DENBY: I will direct the warm and fuzzy
8 UST manager to respond to that question.

9 MR. BINGHAM: I'm not sure your wife would
10 appreciate that.

11 The concern about the Department making sure
12 everything that's in the rule is submitted to the
13 Department -- is submitted, I'm not quite sure exactly
14 where that's coming from. These rules are designed to
15 address what needs to take place at a site. If in
16 investigating a site something is determined not to be
17 applicable, if the Department is not made aware of that,
18 what are we supposed to do? Just assume?

19 So what we've asked and we have put in the
20 guidance document, if something doesn't apply -- And I'll
21 use the obvious. If groundwater hasn't been impacted,
22 yes, there is all kinds of discussions of what you have to
23 do for groundwater. But when the Department is made aware
24 that groundwater has not been impacted, the Department is
25 not going to ask for all of the information associated

1 with groundwater. So in this scenario, if we have 1
2 through 10 spelled out and only 1 through 5 is applicable,
3 some statement to the Department saying 6 through 10 are
4 not applicable is what we need.

5 Now, in terms of flexibility, the flexibility is
6 also built into the rules. Under a site characterization
7 report, on a corrective action plan, under LUST case
8 closure, all three areas -- and those are the three of the
9 major milestones within this program -- it says, "The
10 Department shall approve the SCR, shall approve the CAP,
11 shall approve LUST case closure if all the requirements in
12 the previous subparagraphs are met or" -- and this is
13 key -- "the Department has sufficient information to make
14 an informed decision."

15 The flexibility is already in rule. So in many
16 cases, we may have enough and not even require an SCR
17 submitted because we have enough to know the site is
18 defined. So to continue going on -- The flexibility is
19 there. And what often happens is information is there,
20 the Department just doesn't know about it. We cannot read
21 an owner-operator's or a consultant's mind, so, therefore,
22 we have to ask a question.

23 But it does no one any good just to sit there
24 and take, Here is my checklist, here is the report, and I
25 don't even care what the report says. That is not what

1 this thing is all about. And a new manager comes in, I
2 can't see how that manager could even take that approach,
3 one, how'd they survive and, two, get anywhere with it,
4 because the moment you go into an appeal, if that's all
5 you got, you lose. We have no basis.

6 So these concerns, while I hear them, I don't
7 think they are legitimate. To the question are we
8 prepared, yes, we are. And we have been prepared to
9 implement these rules -- I don't know. I have been
10 involved personally going on nine years.

11 MR. DENBY: Are these things that are
12 falling out of the guidance -- are they falling through
13 gaps in the guidance document discussions?

14 MR. BINGHAM: No, they are not. They are
15 not. These are not new concerns. And these have been
16 beaten to death, beaten to decomposition.

17 MR. PEARCE: If I can respond to that. I
18 will give you an example of why the concern is raised,
19 though I appreciate Mr. Bingham's comments. And I think
20 that's kind of what I was looking for in voicing the
21 concern, is a point of clarification that, for example,
22 the Department can always default to a, yeah, this is
23 enough information decision as opposed to, gosh, you know,
24 line items 1 through 4 in the corrective action rules just
25 aren't met here in the submittal. So the Department can

1 say, well, we understand that 1 through 4 doesn't make a
2 lot of sense here. So we'll bless the submittal anyway.
3 That's the kind of thing I wanted to hear.

4 One reason I raise it is under the preapproval
5 rule, the Department -- Well, the Department has recently
6 read the preapproval rule to require strict adherence with
7 every single requirement, every single element of the
8 preapproval rule before a preapproval can be accepted by
9 the Department. And that got me thinking, got some other
10 people thinking, gee, if that's the way the Department is
11 going to read the preapproval rule, then are we at risk of
12 having the corrective action rule read the same way.

13 Now, of course, we've had some discussions with
14 the Department recently where the Department issued a
15 letter saying we are not going to require every single
16 thing in the preapproval rule be submitted in a
17 preapproval as long as we have that information already.
18 So that's the kind of comforting thought that one can take
19 forward from this.

20 But the second issue, kind of a segue into the
21 specifics, again, the guidance documents do fill gaps in
22 the rules. That's always been understood; and that was
23 part of the Policy Commission's blessing of the rules, is
24 that the guidance document be completed to the reasonable
25 satisfaction of stakeholders. And there has been a lot of

1 work put into that. I don't mean to diminish that.

2 I would like to ask the Policy Commission to
3 discuss maybe with me and with other members here of the
4 audience whether those guidance documents are done,
5 whether the Department feels comfortable that it can
6 implement the rules in light of the status of the guidance
7 documents, especially on the issues that I raised about
8 MTBE, about reopening sites, about assigning release
9 numbers, and on RBCA. Those are some big-ticket issues.

10 Indeed, the corrective action rules were
11 definitely intended to address RBCA closure. That's one
12 of their main purposes per statute. And MTBE, we were
13 supposed to see that in guidance; and as I understand it,
14 we haven't seen that in guidance yet. And that's a big
15 issue as well to many members of the regulated community.
16 So I wanted to know where we are with those issues.

17 MR. BINGHAM: The MTBE in guidance was an
18 oversight. Actually, we thought it had gone out in the
19 packet that went to everybody. And per a comment when we
20 went through, that was just an oversight as we talked
21 about remove all references to narrative AWQS and then put
22 the need in guidance. That was just a clerical oversight
23 on our part.

24 Reopening of LUST sites relative to MTBE, I've
25 stated this I don't know how many times. It is not the

1 intention or the desire for us to go and open sites that
2 have been closed because of MTBE. The need for a policy
3 statement, there is none because it is not something --
4 why do we want to develop a process for doing something
5 that we have no intention of doing. That's a waste of
6 time.

7 If a scenario or situation comes up when we have
8 to reopen a site, then that's based on site conditions.
9 The owner-operator has their due process because that is a
10 decision that impacts their rights as an appealable agency
11 action to question whether or not the Department has
12 sufficient justification to open that site. But there
13 could be a multitude of reasons that would warrant the
14 Department to even make an evaluation leading to whether
15 it actually makes a decision to reopen it.

16 And probably the key is: Has somebody been
17 impacted? Are we getting complaints that somebody's
18 drinking water source, for example, has been impacted and
19 it appears that a closed LUST site didn't address that?
20 That's a very site-specific situation. There is no need
21 for a policy because my recollection from Jean Calhoun
22 through Phil, through Amanda, now through me have been
23 making this statement now for years. And this agency has
24 not done that.

25 We didn't -- when arsenic levels dropped, the

1 agency didn't go and reopen every site statewide just
2 because the arsenic levels dropped. That's not what we
3 do. We can't do that. And if you go nationwide, that is
4 not what is done. It is a nonissue.

5 MR. BERG: Mr. Chairman, my name is Alan
6 Berg. I am not an owner-operator. I am not a consultant.
7 I am an interested party because our company, KCB
8 Properties, predominantly buys gasoline stations that have
9 been closed and are no longer operating. Although I am
10 sitting next to Mr. Pearce, he and I are not affiliated in
11 any way. Don't even know each other. We have very
12 similar concerns.

13 MR. PEARCE: If you'd like, I can move over
14 here.

15 MR. BERG: I think I wanted to broaden the
16 discussion is my point in standing here. I am concerned
17 about the MTBE issue. I'm also concerned about open and
18 closed LUST sites. I think that's a real issue.

19 I deal with property owners and prospective
20 property owners as a sole thing that I do in my business.
21 And the issue of MTBE has come up, and KCB is up at the
22 LUST site looking at files all the time. So I am
23 concerned that this is a broader issue that does need to
24 be addressed.

25 And if you could indulge me for one quick

1 illustration. I looked at a site recently that was first
2 reported in 1993 as a LUST site. About three-quarters
3 ago, MTBE started showing up on the quarterly monitoring
4 as the only target chemical that was of concern of the
5 agency. I'm sure the owner-operator or the consultant
6 didn't start sampling MTBE because they were interested in
7 it. Possibly but not likely.

8 So I am concerned that because of the
9 uncertainty with the determination of MTBE nationwide that
10 this will cause our potential property owners to either
11 walk away from a site or, if possible, purchase insurance
12 that may have little value with some false impression that
13 they are actually getting some indemnification or
14 protection against further action by the agency. No
15 reflection on the agency that has to do what it has to do
16 to move the process along.

17 But I have been involved -- in full disclosure,
18 in 1988 I worked for the State Fire Marshall's office here
19 in Arizona in the underground storage tank program and
20 have been a consultant pretty much the last several years
21 until I got into the purchasing side of the equation. And
22 we've gone through the infancy, the adolescence, and we
23 are reaching middle age in this program. And there has
24 been a lot of uncertainty and a lot of coming and goings
25 with the program. And there is a lot of unresolved issues

1 that this gentleman was speaking to that I have concerns
2 about also.

3 And I have attended the last three meetings and
4 was kind of watching the dynamics of that. I see that
5 there is a very narrow prospective being brought to this,
6 and I just wanted to add my voice to the discussion.

7 MR. DENBY: Thank you.

8 MR. KELLEY: Chairman, can I chime in?

9 MR. DENBY: Surely.

10 MR. KELLEY: To back up Mr. Bingham and
11 Mr. Berg and Mr. Pearce's response, the stakeholder
12 concern on this issue is not do we believe the Department
13 wants to go and reopen a bunch of closed LUST sites for
14 MTBE or any other chemical of concern. The
15 trimethylbenzenes are going to be the next one coming down
16 the bend. That is not our concern.

17 Our concern is this: When you have to do that,
18 when you are compelled to do that, what will be the
19 process? Will I get a new LUST number? Do I have to
20 piggyback on my old LUST number? That is the absolute and
21 only concern. Not that you don't have the right, not that
22 you don't want to do it. None of that. That's not the
23 concern.

24 The concern is what is the process when the
25 Department has to do it? And Mr. Berg's point is dead on.

1 He is a perfect example. He buys a closed LUST site. The
2 City of Phoenix installs a groundwater supply well across
3 the street, which they have the authority to do at any
4 given time. They start sucking on that groundwater and
5 they pull MTBE. They trace it back to Mr. Berg's closed
6 LUST site. The DEQ is then compelled to reopen Mr. Berg's
7 closed LUST site.

8 Speak freely. Joe, are you saying that's not
9 going to happen? This is -- this is the issue. What
10 happens when DEQ is compelled to and what is the process?
11 Let's speak freely.

12 MR. BINGHAM: I don't know if that's a
13 policy decision.

14 MR. KELLEY: That's what we are saying.

15 MR. BINGHAM: If there is a leak, there is a
16 leak. You don't establish a new LUST number on a
17 reopening. It is still the leak. It is still what was
18 there in existence. I mean, I don't know what policy
19 statement there is.

20 MR. KELLEY: Mr. Chairman, that is the
21 point. That is what the regulated community wants to do.
22 We want to have a voice. We don't want to have that
23 unilateral interpretation by the Department. We are
24 making rules. This is part of the rule-making process.
25 These are legitimate concerns which have been expressed

1 ad infinitum in the rule-making process, which have not
2 been properly addressed in the CES, the concise
3 explanatory statement, which have not been addressed in
4 the concise explanatory statement.

5 MR. DENBY: There hasn't been a concise
6 explanatory statement, has there?

7 MR. KELLEY: There was the first time.
8 There is not one right now. There is not a CES with the
9 rule package that was just submitted.

10 MR. DROSENDAHL: There doesn't need to be.

11 MR. KELLEY: There needs to be because there
12 was comments submitted in response to the last submittal.
13 But that's a separate issue.

14 MR. DENBY: Yeah, that's a separate issue.

15 I don't want to get the -- put the Department on
16 the record today as to where they are going to stand on
17 this issue. I think it is important -- I agree it is an
18 important issue. I see your distinction, and I'd agree
19 that --

20 MR. BINGHAM: I don't mind giving you our
21 stance.

22 MR. DENBY: -- there is a distinction
23 between what will happen if they do decide to open it
24 versus what will cause them to reopen it. I think the
25 cause to reopen, I can understand Ian's point. And that's

1 a very delicate issue.

2 But the question of, okay, now that it is
3 reopened, where do we go, it could be as simple as, yeah,
4 you are back in the OAH process. It could be a 1, 2, 3
5 sort of response. I don't want to put that -- I don't
6 want to put the Department on the spot to answer that now
7 because I'm sure that their answer probably isn't
8 homogenous yet because they haven't talked about it,
9 unless they have.

10 MR. BINGHAM: A release is a release. No,
11 we have. A release is a release. You don't create a new
12 number for an old release. You don't. I mean, there
13 is -- You don't.

14 MR. DENBY: That sounds like one of the
15 issues. The other issue would be: Do you fall under the
16 OAH process? Where are you in the process of doing that?

17 MR. BINGHAM: You reopen a site. That is an
18 appealable -- We have discussed this. It is an appealable
19 agency action. We know that. You are determining the
20 rights and obligations of somebody.

21 MR. GILL: But you are dealing with
22 something that was not regulated before. In other words,
23 when you opened the original LUST site, MTBE was not
24 regulated. We didn't even investigate it. We didn't
25 clean it up. We didn't install or design systems to clean

1 it up. Now, all of a sudden, it is regulated. We have to
2 change everything, the way it is investigated, the way it
3 is cleaned up.

4 That's why the regulated public is saying that
5 this was not regulated before, so all of a sudden now it
6 is regulated, you have to follow the same numbers -- the
7 same LUST number.

8 MR. BINGHAM: It is the same release. It
9 was a constituent of the same release.

10 MR. GILL: That's the issue.

11 MR. KELLEY: Mr. Chairman, please. The
12 worst-case scenario -- Now I'm taking Hal's comment and
13 Mr. Berg's comment. Mr. Berg has bought this property, a
14 closed LUST site. The infrastructure for remediation is
15 removed, it's gone. I have spent very near the cap of my
16 SAF coverage to get that site closed.

17 Now the state is compelled to reopen that site.
18 There is not enough money in that LUST number allocation
19 of SAF coverage to pay for me to install a new
20 infrastructure in that site and undertake new remediation
21 efforts. That is the problem right there.

22 And I understand what Mr. Bingham is saying.
23 His point is valid. A LUST number is a LUST number right
24 now because we don't have rules governing this issue. We
25 are writing those rules. Let's have this issue

1 incorporated in these rules.

2 MR. BINGHAM: We have a statute. This is
3 not a rule issue. This is a statutory issue. The
4 assumption is: Do you automatically have to do
5 remediation, or can you do some kind of wellhead
6 treatment? Are there other means of dealing with it? I
7 mean, we are creating a false paranoia. I mean, I don't
8 know any other way of saying it. We are creating a false
9 paranoia.

10 MR. DENBY: I don't see a resolution right
11 here. But I will put in my comment once again, that as a
12 practicing attorney when that does -- when that notice
13 comes across the desk that, By the way, your site is being
14 reopened for whatever factual reasons caused it to be
15 reopened, I think it is incumbent on the Department to be
16 able to give a process, whether it is a one-line process,
17 whether it is a two-line process, or whether it is a
18 ten-page process. I think there needs to be something
19 there for the owner-operator to be able to look at and
20 say, okay, this is how it's going to be handled. This is
21 where -- this is the queue that I have been put in and
22 here are my remedies. I think that's important. That's
23 what I see out of this.

24 MR. CARDON: Mr. Chairman.

25 MR. DENBY: Elijah.

1 MR. CARDON: As an owner-operator and
2 representing a group of owner-operators, it is my general
3 understanding that the State Assurance Fund program has
4 been established and is specifically directed towards the
5 cleanup of specific items that are currently incorporated
6 in statute. If I'm wrong on that, then I will certainly
7 stand corrected.

8 It does seem that this body would eventually
9 have before it the question of whether or not MTBE should
10 be included or other substances should be included and
11 would have before it the possibility of making
12 recommendations in all of these areas. It does seem that
13 we have not had the opportunity of addressing that before
14 this body.

15 MR. DENBY: I don't think this body has the
16 ability to do anything more than make a recommendation,
17 obviously. But the decision to regulate MTBE, I think, is
18 well beyond our capacities. How the Department regulates
19 MTBE, I think, is something that we can certainly comment
20 on. But the question of can they regulate this is well
21 beyond us as the agency's statutory directive.

22 My question is -- And I think the issue of will
23 you assign new LUST numbers and all that, that's not what
24 I'm after. What I'm after is the process for sort of the
25 appeal rights and what happens when you reopen this site

1 from an ownership standpoint.

2 MR. BINGHAM: Title 41.

3 MR. DENBY: If that's all it is, Ian, that's
4 all it is. But that would be my concern. That's the one
5 thing I can see. That's just my solo voice here.

6 MR. CARDON: I would like to go on record as
7 saying that this -- that this body has not addressed the
8 question. You have made the comment, Mr. Chairman, that
9 it is beyond the point of if it should be regulated.

10 I'm simply suggesting that this body has not
11 addressed the question, if it should regulate it, MTBE,
12 that is, or other substances which are currently not
13 regulated or how they should be regulated. And those are
14 questions that should come before this body. And I would
15 like to have that as an official part of the record.

16 MR. DENBY: Any other comments? I don't
17 think we resolved anything there.

18 MR. KELLEY: Are we going to finish the
19 other items in 3A, or was this the end of 3A when you ask
20 "other comments"?

21 MR. DENBY: I think it is the end of 3A. We
22 talked about MTBE, and we talked about some of the other
23 elements on this unless you think there is something more
24 in there that's worthy of discussion.

25 MR. KELLEY: If I might please, then. The

1 second bullet.

2 MR. DENBY: Reopening?

3 MR. KELLEY: The second dash, the issue of
4 assigning release numbers and how release numbers are
5 assigned goes hand in hand with this issue of what happens
6 when you reopen. But they are distinct issues. And the
7 stakeholder concern here and what's been expressed
8 multiple times to the Department in written comments on
9 this rule package is that there is nothing in the rule
10 package that tells us how LUST numbers are assigned.

11 So the rule package, as Mr. Bingham
12 characterized, shows us how we move through the program,
13 shows where the milestones are, and how you reach and move
14 past those milestones in the program. And the final
15 milestone being how I get LUST case closure. But what the
16 rule package is missing entirely is how do I get sucked
17 into the program. What is the determining factor that
18 makes me come into the program and defines the extent of
19 my obligation under this program.

20 MR. BINGHAM: I disagree wholeheartedly.
21 The rule clearly, as does the guidance document, discusses
22 what steps you go through to confirm a release from an
23 underground storage tank. How we do our numbering is an
24 administrative process.

25 I mean, we are going to a new filing system.

1 We've had to change our numbering scheme once from 4715
2 point whatever to a new scheme. It is not inconceivable
3 we'll have to change our numbering assignment scheme
4 again.

5 How we put a number to a confirmed release is an
6 administrative process and does not belong in rule. What
7 belongs in rule is -- and the statute even starts
8 specifying, as the rule does, as does the guidance
9 document, if there is contamination at a site, a suspected
10 release, that's the very first item addressed in the
11 statutory definition of "suspected." And the rule
12 dictates what steps you go through to confirm a suspected
13 release that is then reportable to the agency of a
14 confirmed release.

15 How we assign a number is an administrative
16 process, and that has been the response we have given. So
17 I take strong exception to any statement that this rule or
18 the statute does not say how you get into this process.

19 MR. GILL: Mr. Chairman, the issue is -- And
20 I agree it tells you how to get into it, but the issue is
21 the actual release locations. That's what the number
22 refers to. The LUST number refers to a release location
23 of a confirmed release. And what we were told at the very
24 beginning of the meetings for the guidance document is
25 that the DEQ was working on a policy for assigning release

1 locations and, therefore, LUST numbers. We have yet to
2 see that.

3 We don't -- And where the problem is, okay, if
4 you just follow the rule -- Okay. I'm in the program. I
5 have got a confirmed release. As far as I'm concerned, I
6 have three confirmed releases because I have sampled here,
7 here, and here. And you go ahead with your program. All
8 of a sudden, here comes a letter from DEQ. Right now they
9 are not even sending them out. You get a letter from DEQ
10 that says you've got one LUST number. You have
11 investigated three release areas.

12 There has been a lot of controversy over the
13 last I don't know how many years on what DEQ constitutes
14 as a confirmed release and what the owner-operator is
15 saying is a confirmed release based on their sampling.
16 That's what we are asking for. Okay, we can get into a
17 program. But how do we investigate? And what do we
18 investigate? And what is ultimately going to be assigned
19 LUST numbers?

20 MR. BINGHAM: We have started drafting a
21 policy, actually initiated by me not even the
22 stakeholders, to do this. We simply have not had time to
23 finish it. I have not had time to move forward on it. I
24 mean, it is that simple.

25 MR. DENBY: Let me see if I can focus this

1 then. Release locations, release numbers to me, is just
2 another word for money, that the more locations you have,
3 the more money you have available to you because each one
4 has a 500,000 cap with the additional, if you're
5 conforming with 1052, I think it is, to get to the
6 million. That's obviously a huge piece that can play a
7 big role, so obviously people are interested in that.

8 MR. BINGHAM: I don't --

9 MR. DENBY: The Department is in the process
10 of putting together a policy that describes how they will
11 put together these numbers, how they will dole out the
12 numbers, I guess.

13 MR. BINGHAM: Yep.

14 MR. DENBY: Is there any stakeholder process
15 going on with that, or is it internal only?

16 MR. BINGHAM: It is going to come through
17 the technical subcommittee as all policies.

18 MR. DENBY: Do we have any forecast on that?
19 Obviously, you are a busy man.

20 MR. BINGHAM: When we can put to rest the
21 rules and the guidance documents to allow us to go
22 complete it, yes. I mean, each time we get more and more
23 pushed back, everything else gets pushed back. We are
24 rehashing things over and over again. We are not allowed
25 to move forward. Allow us to move forward, you will get

1 these things.

2 MR. KELLEY: Mr. Chairman, could I finish
3 then, please?

4 MR. DENBY: Finish? If you have another
5 comment, you are welcome to make it.

6 MR. KELLEY: Yes. The point that I believe
7 is trying to be conveyed in this agenda and this agenda
8 item, and which I will make a request at a later point, is
9 this Commission approved corrective action rules with the
10 understanding that those corrective action rules would be
11 married to a set of guidance documents so we would have a
12 seamless set of instructions of how to move through this
13 program.

14 How LUST numbers are assigned, the location of
15 releases is fundamental to that seamless set of
16 instructions. We do not have that. It is not in the
17 guidance document. It is not in the guidance document.
18 It is not in the rule package. Therefore, I don't believe
19 that the approval of this Commission of the rules is valid
20 if the commitments of the Department are not being
21 honored. And the approval of this Commission was based
22 upon those commitments by the Department. Do you follow
23 what I'm saying?

24 MR. BINGHAM: I am going to make a comment,
25 and I'm going to defer to Joe.

1 MR. DENBY: I follow what you are saying.

2 MR. BINGHAM: This policy assignment was
3 something I initiated long after this process, so don't
4 tie them together, all right? Do not. Don't now take
5 something I initiated as another good step forward and
6 then bridge that as us breaking our commitment because I
7 will not accept it. Now --

8 MR. KELLEY: Don't you make that statement,
9 Mr. Bingham.

10 MR. DENBY: Wait.

11 MR. BINGHAM: I'll pass the floor to Joe
12 because I know you had a comment.

13 MR. DENBY: Do you have a comment, Joe?

14 MR. DROSENDAHL: Yeah. The federal
15 regulations, the state statutes all require the
16 owner-operator to report the release and the release
17 location to DEQ. So it is the owner-operator that has the
18 power of saying where the release occurred. They report
19 that to the Department.

20 Yes, we do review that and we say, yes, we
21 agree; no, we don't agree. If we disagree, we do a
22 determination which is one of the informal appeal
23 decisions. So right there is the process. The process
24 starts with the owner-operator. They report the release
25 to us. We don't report the release to the owner-operator.

1 So, yes, there is disagreements on the location,
2 the number, and everything. But it starts with the
3 owner-operators, and it does have definitely informal
4 appeal rights.

5 MR. DENBY: The one comment I would like to
6 say is I disagree with Mr. Kelley's assertion they are
7 linked. I believe that the guidance document and the
8 corrective action rules are definitely linked. But in my
9 mind, as I said before, release numbers equal money which
10 to me equals SAF.

11 If I'm going through a corrective action,
12 release points don't matter to me unless I am seeking
13 reimbursement for those. So to the extent that they are
14 necessarily directly married to the guidance document
15 which is directly married to corrective action rules, I'm
16 not convinced of that.

17 I do think that is a policy that the Department
18 should take a review of or draft. I think it is an
19 important piece because obviously the money is a big part
20 of what drives this program. But I'm not sure that makes
21 the corrective action rules themselves invalid.

22 MR. GILL: Mr. Chairman, unfortunately, it
23 has come down to money. That's -- We had these issues
24 even before the SAF going on board. And where the problem
25 is that when you've got -- A tank pit is a simple --

1 typically is relatively simple. You may have releases at
2 both ends. But you could possibly investigate those with
3 one LUST number in the middle. It is not the best way to
4 do it, but it is possible.

5 When you've got a pump island that is 30 feet
6 long or 40 or 50 feet long and has two, four, six eight
7 different pump locations on it and when you do line
8 replacements or whatever and you find releases all along
9 there, this is where going to money has caused problems
10 because we are being assigned one or two LUST numbers for
11 a 60-foot link thing.

12 And how do you investigate where the release
13 really was when -- And I agree they are trying -- We don't
14 want to assign LUST numbers to every number because it
15 ends up being \$3 million. But how are we to investigate
16 where the release truly was? I mean, we'll drill all over
17 and then all of a sudden right at the bottom of our
18 boring, we get a hit which we know wasn't from the one we
19 were drilling because we got nothing on the way down.
20 We're, obviously, intercepting a plume from another pump
21 island that we weren't allowed to investigate because
22 there was no LUST number.

23 That's where we are running into problems.
24 That's why we are asking for what is a process that we can
25 use when we turn in a tank-pull report or whatever report

1 that shows these hits. Per the statute, those are
2 confirmed releases and are supposed to have been
3 investigated. Where do we go from there? That's where we
4 are running into problems.

5 MR. DENBY: I think that's what the policy
6 hopefully will address.

7 MR. BINGHAM: It is under development.

8 MR. DENBY: Did you have a comment, John?

9 MR. PEARCE: Yeah. To the point of whether
10 this is purely financial, I understand that's probably
11 primarily the concern. But I think when there is multiple
12 releases at -- or multiple potential releases at a
13 location, it does create some issues with more substantive
14 requirements. For example, if you have to submit a series
15 of reports regarding each release including the initial
16 24-hour report, 14-day report, maybe an abatement-type
17 report that we see now, there is some issues there about
18 whether and when you have to dice up reporting obligations
19 of that initial nature at a location.

20 Also, I don't know if that extends it, I don't
21 think it does, to a site characterization-type report. I
22 think a site characterization report would cover all
23 releases at a facility. My point is there may be some
24 reporting obligations that track the establishment of
25 releases above and beyond purely financial issues. That

1 gets me back to, I guess, whether that's a valid concern
2 whether I am missing something there from the Department.

3 MR. BINGHAM: I'm not sure I understood. I
4 thought that was a statement. I didn't know that would
5 turn into a question.

6 MS. JAMISON: Mr. Chairman, could we perhaps
7 ask Mr. Pearce to speak up a bit and take a break very
8 shortly.

9 MR. DENBY: I would like to resolve this. I
10 think as soon as John finishes and maybe there is a
11 response, maybe, hopefully, we will resolve this item and
12 move on.

13 MR. PEARCE: Let's say you have a location
14 with lots of different release points that are suspected
15 to exist. And the owner-operator isn't clear on whether
16 there is supposed to be some sort of reporting conducted
17 for each and every one of those releases or not because
18 the owner-operator is not clear on whether the Department
19 is going to consider it to be a separate release or not.

20 That's why it might be important to have a
21 clear -- a clear process set up before the Department has
22 in rule all the requirements to report releases about what
23 it is that constitutes a release so the owner-operator
24 knows, all right, this is a separate -- this is going to
25 be considered by the Department to be a separate release.

1 And I've got to submit a 24-hour or 14-day report or, no,
2 there isn't enough here to suggest this is going to be a
3 separate release. I don't need to worry about submitting
4 separate reports. Is this an extension of an already
5 established release?

6 MR. BINGHAM: You already have a statutory
7 obligation, actually a federal obligation, to notify under
8 federal laws the implementing agency of anything that
9 causes you to believe there has been an environmental
10 impact from it. So I'm not quite sure what kind of answer
11 you are looking for.

12 MR. PEARCE: I still am not getting the
13 message across. The bottom line is you already have a
14 release noted and reported at the facility. You find an
15 additional pocket of contamination somewhere on the
16 facility. You don't know for sure if it is coming from
17 the same source, the same part of the tank system, as what
18 you already know about. What do you do? Are you supposed
19 to report that as a separate release? Are you supposed to
20 just include that information as part of your site
21 investigation under the first noted release or what?
22 Those are the kinds of issues I could see popping up and
23 creating issues under the rules now that there's rules
24 about compliance.

25 MR. BINGHAM: Again, I think your statute is

1 what takes precedent there, not the rule we drafted. And
2 that to me would sound like at a bare minimum a suspected
3 release until you can actually determine is it a part of
4 what you are originally investigating or is that, indeed,
5 something new. I think your federal law and your statutes
6 already speak to it. The federal law and the statute
7 already speaks to that situation. Our rule is not going
8 to do anything to change it one way or the other.

9 MR. PEARCE: But is the guidance that you
10 are putting together kind of a, I guess, take-off from the
11 well-known Quinn Thacker guidance on multiple releases at
12 a facility? It seems to me that that adds a certain level
13 of detail and construction on what the Department's
14 thoughts are on, okay, what constitutes a separate release
15 as opposed to a preexisting release.

16 MR. BINGHAM: We are going to attempt to
17 address it. If we don't, stakeholders will have comments
18 if we have not addressed that sufficiently. What is being
19 drafted and is heading for more revisions, I think, goes
20 to the heart of that and, actually, even more to what
21 Mr. Gill was talking about.

22 MR. PEARCE: What you are saying is it is
23 basically going to track the law that's already on the
24 books, the CFR.

25 MR. BINGHAM: Yes, yes. That and also the

1 preamble to the CFR was actually used in drafting it.

2 MR. DENBY: What Ian has told us then is
3 that the release policy is somewhat under drafting now and
4 will be made available to the public for comment.

5 MR. BINGHAM: Yeah.

6 MR. DENBY: Okay. All right. I would like
7 to take a break at this point in time. And it is -- I've
8 got 11:00 o'clock. So about a 15-minute break.

9 (Whereupon, a recess was taken from 11:00
10 o'clock a.m. to 11:16 o'clock a.m.)

11 MR. DENBY: Let's get back on the record
12 here and get to the rest of this agenda. We have
13 addressed 1, 2, 3A, B. We are on to C.

14 MR. GILL: Mr. Chairman, can I make one more
15 comment on the very last issue that we were discussing?
16 It's important because I'm being told by other consultants
17 that they are being told by DEQ that they cannot assign a
18 LUST number because the policy is being written.

19 MS. HOLLOWAY: Because the policy is what?

20 MR. GILL: The policy for assigning LUST
21 numbers is still being written, so that's putting the
22 process on hold. So what do we -- that's what DEQ was
23 telling us.

24 MR. BINGHAM: That was not a direction given
25 by me. See, that would be nice information to call, I

1 don't know, the section manager and maybe ask him a
2 question as opposed to bringing it to the Policy
3 Commission. But that is not -- that has not been a
4 direction given by the manager of that program.

5 MR. GILL: But, see, that's really the
6 reason I bring it up here. We need to hear is that the
7 policy or --

8 MR. BINGHAM: Or you ask me and I find out
9 if it was a miscommunication, is that truly what the staff
10 member said.

11 MR. DENBY: Is that presently the policy of
12 the Department, Ian?

13 MR. BINGHAM: No, it is not.

14 MR. DENBY: Okay, thank you.

15 Subsection C.

16 Does that answer it, Hal?

17 MR. GILL: No, that's fine.

18 MR. DENBY: Discussion on letter on review
19 of ADEQ SAF, CRU, and UST policies -- boy, how many
20 acronyms can we put in a letter? -- sent to Consultant
21 Representative Hal Gill. Copy provided to Commission
22 members for review.

23 MR. GILL: I just handed it out again.

24 MR. DENBY: What is this? Who is this? It
25 says a letter but it is not signed by anybody.

1 MR. GILL: It was sent to me not as a
2 letter. It was e-mailed to me as the consultants'
3 representative and asked me to put it on the agenda for
4 the Policy Commission. And, basically, it brings up the
5 issues that I brought up probably last July when we
6 were -- and it addresses all -- it basically sets up
7 Letter D, too, because the issue is that -- what we are
8 being told are policies, we need to determine if they are
9 substantive policies, then they meet certain criteria.

10 And that's what this basically spells out. And
11 I can -- you know, everyone was supposedly -- or was
12 supposed to have read this because it has been out now for
13 a month because this was on -- came on the last agenda as
14 well. Basically, it's all statutes.

15 MR. DENBY: I guess that's what I'm -- it
16 just seems to be a recitation of the statutes.

17 MR. GILL: Mm-hmm.

18 MR. DENBY: What is the -- I mean, what's
19 the point of it? Subsequent policy statements, correct?
20 Rule policy, I can't verify that these are cited correctly
21 but it looks like the same language. What is the thrust
22 of this document?

23 MR. GILL: I can have the gentleman that
24 sent it to me address the questions, if you want.

25 MR. DENBY: If the author would like to be

1 revealed. Doesn't have to be revealed. I'm not trying to
2 push that. I am just trying to see what the point is.

3 MR. BECK: Brian Beck. This is actually a
4 multi-joint effort. But we continue to get things,
5 statements, from the Department saying that this is a
6 policy item, do this. And we have gone back continuously
7 and said, I want a written copy of this so I know exactly
8 what you are talking about because we have had statements
9 made, This is a policy for this and there is a policy for
10 that. And it is completely conflicting what we have been
11 told previously.

12 And these affect the SAF applications, these
13 affect work plans, right on down the line. If they are
14 going to use the word "policy," "guidance," whatever, we
15 want to see it in writing so we know what it is so we can
16 address those particular issues, not just to have
17 something verbally pulled out of the air. We have had
18 several different letters back from different people at
19 the Department saying, Oh, yes, we operate under policies.
20 We've requested copies of those policies. We have been
21 refused.

22 MR. DENBY: Okay. So it is basically a
23 request for substantive policy statements from the
24 Department for things they claim are policy, not rule?

25 MR. BECK: That is correct.

1 MR. DENBY: It is a broad-scope issue. I
2 have no problem with this Commission looking at policies.
3 It's part of its purpose as the Policy Commission. It is
4 not even an acronym. So to the extent that there are
5 policies in question, I would love to see what the
6 policies in question are. Either, A, there is something
7 written that we don't think has been formally approved as
8 a substantive policy statement that comes through here or,
9 B, there is being implemented by the Department, whether
10 verbal or written, something that is being called a policy
11 that is not actually written so that anybody can see it
12 tangibly or understand it. I don't know where to go with
13 that besides to ask the Department to submit their
14 policies to the Commission for review.

15 I would hesitate in one respect, and that is
16 line level people don't know the distinction between
17 policies, substantive policy statements, guidance, rules,
18 statutes. And to the extent that line level people are
19 mentioning things may be policy may not be a direct
20 indication it is a substantive policy statement. But it
21 is clearly an indication that it is not a rule to me. So
22 that would beg the question of what is it.

23 Discussions, recommendations from the Commission
24 on this issue?

25 MR. GILL: One thing that I -- Again, the

1 key issue, just as you just mentioned, is whether it is a
2 substantive policy statement. And I've tried to bring up
3 several times a discussion of what truly is a substantive
4 policy statement. And I think DEQ -- the different issues
5 in there, the way Mike put those on the agenda, is: Is it
6 a general UST policy or guideline that affects the
7 substantive rights of owners and operators and other
8 regulated parties?

9 That's what we have been -- the people that have
10 been having problems, owner-operators and consultants, the
11 concerns we've had is that when it is an issue that
12 affects all owner-operators, then to us that is a
13 substantive policy. And if that is the case, where is it
14 written? Why hasn't it come before the Policy Commission?

15 MR. DENBY: I'll add one more piece which I
16 have said numerous times over the several years I have
17 been on this Commission. And that is, be careful what you
18 ask for. Policies are good. Substantive policy, as a
19 digression, is a defined term but hugely indefinable.
20 Nobody can really distinguish what that means, especially
21 when compared with the definition of "rule."

22 But at the same time, be careful what you wish
23 for because when it becomes a policy, it is written down.
24 It is approved. It goes through a long process. The
25 agency signs off on it. Once the agency has signed off on

1 it, they no longer get the ability, to quote an earlier
2 phrase, to be warm and fuzzy. They are once again sort of
3 pushed into a corner to react.

4 But at the same time, there are plenty of times
5 when the agency can do things that are not in policy that
6 vary to the point that it frustrates the regulated
7 community; and I can understand that. So it is a
8 double-edged sword.

9 MS. JAMISON: Mr. Chairman, if there are
10 occasions where the term "policy" is being used loosely,
11 that may be part of the -- part of the reason for this
12 concern. And if someone believes that there is an issue
13 that is deserving of the development of a new substantive
14 policy statement, such person can make that request in
15 writing to the director and it can be looked at.

16 MR. DENBY: Roger.

17 MR. BEAL: I think so. Once again, I'm not
18 sure that we are talking about policy because we don't
19 know what it is that we are guiding. But we obviously are
20 talking about a problem. And I wish, you know, if your
21 group can give examples to Ian of areas that have been
22 problematic, then maybe some of it can be handled
23 in house, if that's the case. Yeah.

24 MR. BECK: Brian Beck again. Roger, I
25 actually provided to the Commission here back in, I think

1 it was, November, I provided a three-page listing of
2 policies and stuff that we were being told is policies by
3 the agency on effective -- that affected applications,
4 that affected work plans in a lot of different areas. So
5 that has been provided.

6 I also prepared an October 2001 letter followed
7 up by a November 2001 letter. One went to Ms. Schafer,
8 one went to Shannon. And we basically have got back
9 nothing.

10 MR. BINGHAM: Excuse me.

11 MS. JAMISON: Do we have copies of that
12 letter?

13 MR. BINGHAM: We did respond in writing. As
14 a matter of fact, you and I had a phone conversation where
15 I asked you to give me examples to support your
16 generalized statements to which you did not. And there
17 was a written response addressing those three letters to
18 you. I'm going to stop there.

19 MR. BECK: I will provide copies of those
20 letters including the responses back and the reresponse
21 back asking for the information they said that they had.

22 MR. DENBY: Okay. I think that would be
23 good to see. I think to the extent that there are
24 policies out there that need to be reviewed, bring them
25 on. I think that's a good thing to do.

1 You think there is specific policies out there
2 that are being implemented that are substantive policy
3 statements. We have every ability to look at what is
4 already a substantive policy statement and make comments
5 on it as well as far as I can tell. So to the extent
6 there are policy statements out there that you think are
7 questionable, I would be glad to look at them.

8 John.

9 MR. PEARCE: Just to add to that, I think
10 the same should apply to the Department. If the
11 Department is interpreting a rule or a statute or a
12 requirement that it feels applies to how it processes
13 submittals and finds that it's going to be doing that in a
14 way that is different from how it's been doing it in the
15 past on something other than a case-specific basis, I
16 think it would be appropriate for the Department to
17 advertise that it is doing so through this Commission or
18 in a stakeholder meeting in a timely manner so that it's
19 doing -- so that the fact of how it's handling these kinds
20 of issues is made known to owner-operators in a way where
21 they can take notice of it and react.

22 And that would hopefully head off some of the
23 appeals, and some of the misunderstandings that may exist
24 between the Department and owner-operators about how to do
25 things to the Department's satisfaction. So if there is a

1 way that the Department could maybe take advantage of this
2 forum, to submit to this forum notification on pay, you
3 know what, we've decided we are going to interpret this
4 provision thus and so or that we are going to require this
5 and that, that would certainly be, I think, an appropriate
6 process for the Department to follow for this Policy
7 Commission.

8 And I think that's actually quite consistent
9 with what the Department is supposed to do under the
10 legislation under which this Policy Commission was
11 created. Am I correct that's something that the
12 Department does strive to do?

13 MR. BINGHAM: That's a very valid -- and
14 point well taken. And I think probably we have not done
15 as good a job as we ought to have.

16 MR. PEARCE: We don't want to beat you up on
17 it. I think if you can start doing that, that would be
18 quite helpful.

19 MR. BINGHAM: Point well taken.

20 MR. DENBY: Any other comments?

21 Moving on to Subsection D then.

22 Patricia has a comment.

23 MS. NOWACK: I just want to make a comment.
24 Ian basically replied to Brian's comment about how the
25 Department addressed those issues. But as a matter of

1 fact, both Ian's staff and my staff spent a significant
2 number of hours trying to do research to address Brian's
3 concerns in those letters, as I recall. And they were
4 very vague accusations, the Department did this or did
5 that or made a policy or procedure to change something.

6 And we actually spent many, many hours pulling
7 all applications regarding any of his sites trying to find
8 out exactly what he was talking about. And we were unable
9 to determine what the real issue was, what the real
10 problem is. And I would just suggest if Mr. Beck is going
11 to present more information to the Policy Commission and
12 more information to the Department asking for information,
13 that, number one, he communicates clearly to the
14 Department what is the issue so that we can address it.

15 And the vagueness is very problematic for us and
16 very time consuming. To make a direct point so that we
17 can research it and find out is absolutely acceptable to
18 us. But to give us something vague that we have to spend
19 hours and hours of research is unproductive as we've
20 discussed previously in this meeting.

21 MR. DENBY: Okay. Any more comments on
22 that?

23 On to Subsection D, discuss ADEQ SAF, CRU, and
24 general UST policies. Isn't that just what we did? A
25 copy of the letter from John Pearce dated 2-20-02 provided

1 to Commission members, example discussion items. How do
2 we want to handle these? Any particular way people would
3 like to handle these or have John begin with a discussion
4 of his letter?

5 MR. BINGHAM: I can do this very quickly.
6 One, these are not substantial policies. Two, most of
7 these first few bullets are currently under appeal, and I
8 think it is incompletely inappropriate to have this
9 Commission talk about appealed items without adjudicating
10 it. And that's not the purpose of this body.

11 These are not policies or general guidelines,
12 especially the first one. That's a rule requirement. So
13 to ask us to make a policy to violate the rule, come on.

14 MR. GILL: I will comment. First off, these
15 may be under appeal; but I have had in the last five years
16 the first bullet applied to my work plans numerous times.
17 So it isn't a site-specific issue. Every one on here has
18 happened and was brought forth to me by numerous
19 consultants. They are happening all the time, so they are
20 substantive.

21 MR. BINGHAM: Then my thing is -- Again, I
22 believe I'm the manager of this section. When have you
23 given me a list, especially since I have taken over, of
24 these to ask me what direction came from me?

25 MR. DENBY: If I could try and focus this a

1 little bit. Just in responding to the first one, is it a
2 general UST policy that ADEQ does not approve
3 contingencies in work plans? Regardless of appeals, that
4 sounds like a simple question. It sounds like you have a
5 simple answer for it.

6 MR. BINGHAM: R18-12-607.01(I)(4) requires
7 contingency in SAF preapproval work plans.

8 MR. DENBY: Okay. So it is not a UST policy
9 then. It is a UST rule.

10 MR. BINGHAM: Yeah.

11 MR. GILL: We agree because I wrote the
12 exact same thing down here, (I)(4). But why do we get
13 case managers denying contingencies?

14 MR. BINGHAM: Then call me and tell me
15 somebody on my staff violated the statute.

16 MR. GILL: Well --

17 MR. BINGHAM: Well, what? We are wasting a
18 body and public bodies for something that has never even
19 come to me. Is that what this Commission -- What am I
20 for? You know my number. You have called me before.
21 We've had meetings.

22 MR. GILL: Because nothing has happened in
23 the past. This happens all the time, and that's why we
24 are asking is it a policy.

25 MR. BINGHAM: No, it is not.

1 MR. GILL: People are coming to me saying,
2 This is happening to me. Is this a new policy? So the
3 case managers need to be told that per --

4 MR. BINGHAM: Show me.

5 MR. GILL: --18-12-607.01(I)(4) you can't
6 deny these contingencies.

7 MR. BINGHAM: You show me where we're
8 saying -- Now, if the contingencies aren't appropriate,
9 that's a different issue, okay? I mean, write a
10 contingency that World War III breaks out, no, we are not
11 going to approve that.

12 MS. JAMISON: Mr. Chairman, as a matter of
13 process, have these bullet points been submitted to the
14 appropriate department managers for comment?

15 MR. DENBY: Certainly sounds like they
16 haven't.

17 MS. JAMISON: It seems to me we need some
18 background on these issues, if we are to properly address
19 them in any event.

20 MR. DENBY: I guess I would back this up a
21 step. I appreciate your comments. Back this up a step
22 and see if we can generalize this into a broader topic as
23 Mr. Pearce did earlier with his earlier letter and see if
24 this is something we can address as a broader topic or if
25 this is a bullet-point topic.

1 If it is a bullet-point topic, then we -- I
2 think we have to be cautious of several things. One is,
3 what are we asking? And the second is, as Ian referenced,
4 and I'm concerned about, are these appealed issues that
5 are out there now and are we going to be making some sort
6 of comment on appeal -- on an issue that's in the appeal
7 process? I am not sure if John wants to answer now or no.

8 MR. PEARCE: I think that the thrust of my
9 letter was probably already expressed in the context of
10 the desire to have the Department issue to the Policy
11 Commission and/or the stakeholders its policies that it is
12 newly adopting. And I would interpret policies to be
13 processes that involve the substantive rights as opposed
14 to incidental practices of the UST stakeholders at large.

15 And I think what was done in this agenda was
16 several examples of things perceived to be policies that
17 are not previously well-known or recognized that have
18 sprung up. And the question is are these general
19 practices the Department is undertaking at this time so
20 that we can learn from those.

21 My letter addressed another issue that really is
22 a nonpoint primarily. I'm not sure why -- I probably
23 should have looked at this agenda and pointed out that
24 that letter was primarily directed to some efficiency
25 issues about whether the Department would consider doing

1 some restructuring internally to help promote timely
2 processing of submittals.

3 MR. DENBY: So can we then handle the "is
4 it" categories -- actually, I guess "when is" categories
5 with the general response or a general discussion -- I
6 think we've already talked about policies to the extent
7 that there is a policy out there in question or there is
8 concerns about actions that are policies. Those are
9 certainly issues that we can talk about. I don't want to
10 get into specifics if there are specifics in here that
11 give the Department concern about appeals, if we getting
12 too close to the bone on some of these direct statements
13 and each of these bullet points.

14 But to the extent the Department is doing new
15 policies or new interpretations in guidance, I think Ian
16 just described a minute ago that they were not as up to
17 speed as they should be on informing the public of that.
18 I would question how much of these bullets are also the
19 result of communication gaps, it sounds like. I don't
20 know where those communication gaps really are coming, but
21 it sounds like there may be some communication gaps.

22 MR. CARDON: Mr. Chairman.

23 MR. DENBY: You got LUST numbers in there as
24 well again.

25 MR. CARDON: If I were in the Department and

1 this type of itemization were made for review and appeared
2 on an agenda such as today, I would appreciate the
3 opportunity to simply take whatever time was necessary. I
4 mean, I'm not talking about today -- you know, next
5 meeting or whatever, if it is not apparent, and just
6 simply respond or choose not to respond.

7 I mean, why not give -- why not give the
8 Department a chance to respond in a logical, normal
9 fashion? If the Department has not had time to review
10 these bullets, they certainly should have time to review
11 the bullets. And I would like to hear a response or an
12 election not to respond, I mean, one or the other.

13 MR. DENBY: I guess I just don't understand.
14 A lot of these -- This is a general policy that the
15 Department does not do something or that the Department
16 does something. I question why we are asking those
17 things.

18 If there is a specific issue, it sounds like a
19 specific issue may be an appeal issue that is going on at
20 which point in time my response would be what good does
21 this question do an appeal because an appeal is going to
22 go beyond the question of is it a general policy. It is
23 going to go to the question of whether the Department has
24 the authority to do what they're doing. I mean, if the
25 Department wishes to respond to these things, that's fine

1 by me. They are the ones with the potential appeal issue
2 I noted.

3 MR. GILL: Mr. Chairman, the reason they are
4 worded that way is that in every one of these examples, we
5 have multiple examples of it happening. And so -- again,
6 back to whether it is substantive policy or not, if it is
7 happening over and over again, is this, indeed, a policy?
8 And if you look, these particular issues affect -- if they
9 affect every owner-operator, that's substantive. Why
10 hasn't it come in front of the Policy Commission?

11 If it is a training issue, then something needs
12 to be done about the training. But these keep happening.
13 I mean, the second bullet, I had that happen to me
14 probably five years ago, and then I was just sent another
15 one just recently. This occurs all the time. We've gone
16 back and forth like a seesaw on the site characterization
17 report. What's the policy now?

18 MR. CARDON: Mr. Chairman.

19 MR. DENBY: Yes.

20 MR. CARDON: It would appear that these
21 bullets have some general point of interest. They are of
22 general interest to a broad cross-section of the regulated
23 public. And this is a Policy Commission. And I'm -- Why
24 not just let the policy -- why not let the Department
25 respond, I mean, in some normal, logical fashion. It is

1 not a case of defending. It is not a case of justifying.
2 It is not a case of negativism. It is just a case of,
3 hey, this is what our current policy is. I would sure
4 like to hear it.

5 MR. DENBY: As I said before, to the extent
6 the Department feels that it's -- it would like to respond
7 to these, that's fine. But to the extent that -- even if
8 these are general issues -- if these are specifically
9 appealed issues, even if they have a general
10 applicability, I have concern about the Commission taking
11 a position on these if it is going to affect the appeal,
12 if it is an ongoing appeal issue. If it is a broader
13 scope issue that is not on appeal, I have no problem with
14 talking about them.

15 But I don't want to be trying to -- I don't want
16 the Commission to be used as a sway one way or another in
17 the appeal process regardless of whether this is --
18 everybody else's already been through it or not. But to
19 the extent the Department wants to respond to these or
20 feels that it can, I would open the floor to the
21 Department to respond or to not respond.

22 MR. BINGHAM: First bullet, no. Second
23 bullet, no. Third bullet, matter of circumstances that I
24 discussed at this Commission based on backlog and
25 resources. Third bullet, no.

1 Fourth bullet, I don't even know what this is
2 all about in terms of why is DEQ picking a specific
3 location. Owner-operator does not hire DEQ.
4 Owner-operator hires a consultant. So I'm not even sure
5 where this is going for us to be picking the exact
6 location and taking a can of spray paint and go spray a
7 spot and do a well here, no. We are not hired by the
8 owner-operator to do that. So I don't know where that's
9 going.

10 MTBE, covered. LUST number, covered. We are
11 not doing a policy on reopening. And the last two
12 bullets, I don't even know what the last one is even
13 asking.

14 MR. GILL: They made mistakes, it looks like
15 from what was sent to me.

16 MR. DENBY: Any discussion from the
17 Commission? He answered your question.

18 MR. CARDON: I really appreciated that, Ian.
19 And, seriously, thank you very much. My only problem is I
20 couldn't write fast enough. It was a no, no.

21 MS. FOSTER: We have it covered in three
22 different notes.

23 MR. CARDON: Pardon me?

24 MS. FOSTER: We have it covered in three
25 different minutes of this meeting.

1 MR. DENBY: You can do the tape version or
2 the transcript.

3 MR. DENBY: I was going to make sure the
4 Commissioners didn't have any questions before I opened it
5 up to the public.

6 Okay. Brian.

7 MR. BECK: Brian Beck again. These
8 are questions that are posted here. And the ones that
9 were in my letters that ADEQ never called me on, spent all
10 the enormous amount of time researching, they are
11 generalized questions or generalized policies that relate
12 not only to myself but many other people. In fact, half
13 the questions in my October letter that were put in there
14 came from other consultants that they had similar problems
15 on. We had a discussion about those issues and things.

16 We are being told it is policy. Therefore, we
17 have to do this type of thing. If we had the policy in
18 front of us that was consistent, we would put the work
19 plans together, we can put all that stuff together in a
20 consistent fashion. We don't have to go back and fight
21 with the agency continually. That's what we are asking
22 for. Let's see a policy. You say it is a policy. Let's
23 see it in writing.

24 And then the other thing is, this is the Policy
25 Commission. If you go through Item C, it says up there

1 that you guys are supposed to review policies. So it
2 needs to come before the board. You guys need to look at
3 it. You need to review it. You need to discuss it. You
4 need to approve it before it is implemented.

5 MR. DENBY: I agree. You're submitting --
6 you are going to resubmit your November and all the other
7 correspondence? We can look at that. Okay.

8 To the extent that there are policies out there
9 that the Department has or they're intending on making, I
10 definitely think they need to be before the Commission,
11 obviously UST policies. I don't want to review water
12 policies.

13 Any other comments on D?

14 MR. GILL: I guess the only other comment I
15 had is the first problem that I see is the very first
16 thing that Ian said, is none of these are substantive
17 policies so they never deem these as policies that would
18 have to come in front of the Commission. That's where the
19 problem has been all along. We've been trying to figure
20 out a way to define which one of these issues are
21 substantive.

22 The only way to figure it out is when it is
23 affecting a huge swath of owner-operators. That's got to
24 be substantive policy. But until the owner-operators,
25 consultants, and DEQ agree that this is a substantive

1 policy, we are never going to see these policies written
2 down. So we are -- The written-down policy is good for
3 the owner-operator, consultants, as well as DEQ because
4 that's the biggest problem we've had for 13 years I have
5 been working in this state, is inconsistency.

6 And if there was a written-down policy, then
7 maybe both sides can look at it and then we would know
8 what to do and DEQ would know whether or not we had done
9 it right.

10 MR. DENBY: Okay. Well, I will offer this
11 up. "Substantive policies" is a very difficult term to
12 define. The only group that I know that has defined the
13 term "substantive policy statement," and they defined it
14 in actions, not in subdefinition, is GRRRC. And to the
15 extent that there is something going on that is a
16 policy -- that you think is a policy or that is a rule or
17 questions about either of those, GRRRC has an appeal
18 process where you can take it before GRRRC.

19 They recently struck down a Department of Health
20 Services, I believe it was, AHCCCS policy that was
21 supposed to be a rule, I guess, or something. So they
22 have taken action. They have actually done something. So
23 to the extent we are missing it or we are not able to
24 address it here for some reason, there is always that
25 avenue of actual appeal to GRRRC. They take it very

1 seriously, the definition of "substantive policy
2 statement."

3 Any other comments on Subsection D?

4 Call to the public. I think is the general call
5 to the public. No, this is just call to the public on
6 that.

7 Move on to Number 4 then, ADEQ updates. We have
8 seven minutes left on my clock before we've got to close
9 this up. So it is actually a good time.

10 ADEQ updates, cost ceiling stakeholder meetings.
11 Patricia.

12 MS. NOWACK: Thank you, Mr. Vice Chair.
13 They are -- there were three meetings held by the cost
14 ceilings so far externally. There have been several
15 internally. The next meeting scheduled for cost ceilings
16 is with the consultants. And, obviously, anybody is able
17 to attend. But it's consultant activities that we are
18 going to look at now. It is scheduled for May 14th at
19 nine a.m. in Room 1710. And there will be notice going
20 out about that this week.

21 Shall I continue, or is there questions on that?

22 MR. BECK: What was the time frame?

23 MS. NOWACK: It is -- the next meeting is on
24 May 14th at nine a.m. in Room -- Conference Room 1710.

25 MR. BECK: Thank you.

1 MS. NOWACK: We did receive quite a few
2 comments from the previous meetings that we had, and we
3 are working on those issues.

4 And, B, the new SAF application development
5 meetings, we did hold one meeting. We had healthy
6 conversations in that meeting and good ideas, good
7 discussions. There were no written comments received
8 after the meeting as requested. Therefore, we are going
9 to continue with the application development as we
10 discussed in those meetings. And we expect for it to be
11 out before we move to the new building. Obviously, if we
12 come across some issues, it may be delayed. But that's
13 the plan.

14 And that's all I have, unless there is any
15 questions.

16 MR. KELLEY: Mr. Chairman.

17 MR. DENBY: Leave it behind when you move to
18 the new building, is that the idea?

19 MR. KELLEY: Patricia, did you say we were
20 going to have more meetings on the application, or you're
21 just going to get the application out?

22 MS. NOWACK: We will continue to work on the
23 draft application. We probably will send the draft
24 applications to people for comments before we implement
25 it. And then after we have that process, we will have a

1 training seminar to explain to anyone interested the new
2 application as we've done in the past, common
3 deficiencies, common problems with an application.

4 MR. KELLEY: When is your move supposed to
5 happen?

6 MS. NOWACK: June 1st, July 1st?

7 MR. BINGHAM: Different parts of the agency
8 are moving different times. The move itself starts the
9 last week in June scheduled through July. Our floor is,
10 what, the 9th through the -- whatever that Friday is.

11 MR. KELLEY: When should we go on vacation?

12 MR. BINGHAM: Right now would be a good
13 time.

14 MR. KELLEY: True, true. Any specific time?

15 MR. BINGHAM: You don't want an answer to
16 that one.

17 MR. DENBY: Discussion of agenda items for
18 next month's meeting. I have two things on it from our
19 meeting today. One is the top-ten appeals if Patricia can
20 pull that by next month's meeting. Is that doable?

21 MS. NOWACK: I'll let my area know.

22 MR. DENBY: The other is Mr. Beck's November
23 letter and the responses to that, responses, replies, and
24 subreplies.

25 MR. JOHNSON: I have another one. And that

1 is, with summer coming up, considering the move, we may
2 want to -- Generally in the summer, the Policy Commission
3 will take a break for one month and not meet on one month.
4 I would suggest if you are going to do that, do it in
5 July. You may want to talk about that.

6 Also, since we are going to be moving in June,
7 we may not have these rooms available because of the move.
8 We probably will want to look for another venue for that.
9 So these are some administrative things that we'll be
10 taking a look at.

11 MR. DENBY: General call to the public.

12 MR. KELLEY: Thank you.

13 MR. DENBY: We should put a general call to
14 Dan Kelley is what we should put.

15 MR. KELLEY: Mr. Chairman, for the next
16 meeting when we entertain the top-ten denials prepared by
17 Patricia, would the Policy Commission also entertain the
18 list that you discussed about this is what the regulated
19 community is seeing, this is our version of the top ten?

20 MR. DENBY: Sure, sure. If there is
21 something along those lines, that would be fine.

22 MR. KELLEY: Thank you.

23 MS. NOWACK: The reason that I don't think
24 it's a valid issue or concern for a consultant to bring up
25 his top-ten appeal issues, maybe that's a problem with

1 just that consultant or just the way that consultant does
2 business or just the way that consultant fills out an
3 application form or provides information to the
4 Department.

5 I think it is much more significant to the body
6 of stakeholders if we look at overall denial issues and
7 where those things continue to come up. And I will be
8 perfectly honest when I provide the information. So I
9 don't think there is a question about that.

10 MR. DENBY: I think that it's -- it behooves
11 us to at least open it up to the consultants to have their
12 piece. Whether they are apples and bananas and they don't
13 match up, that's fine. But I think to the extent that
14 they have additional information, it is worth looking at.

15 I think your information will certainly be more
16 full scope because you will get the people who don't have
17 the representation here, but that doesn't mean that's not
18 going to have -- If they want to reveal they continually
19 get denied for one thing, maybe it's something they don't
20 want to reveal.

21 MR. GILL: Mr. Chairman, just to answer
22 Patricia's concerns, I had already discussed and had
23 comments from other consultants that we would convene a
24 meeting of consultants where we talked together and come
25 up with these same concerns. In other words, so we

1 wouldn't be consultants sending in a bunch of notices, we
2 would list the top ten, or whatever you want to call it,
3 that would be the same issue.

4 MS. NOWACK: Okay.

5 MR. BEAL: Can we expand that to just if
6 there is general recurring problems that the consultants
7 in their meeting come up with, can you list those, too,
8 not just things that have gone to appeal? There doesn't
9 have to be an appeal to be a problem.

10 MR. DENBY: I would --

11 MR. BINGHAM: Start with something we can
12 chew.

13 MR. DENBY: -- suggest bite off what we can
14 chew. Otherwise we will just get bogged down like we did
15 in Subsection D, in all honesty.

16 Any other comments from the public?

17 Announcement, next meeting is scheduled for
18 May 15th, 2002.

19 And if that's it, we'll adjourn.

20 (Whereupon, the proceedings adjourned at
21 11:58 o'clock a.m.)

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1 COUNTY OF MARICOPA)
) SS.

2 STATE OF ARIZONA)

3

4 I, JENNIFER SCHUCK, Certified Court
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