

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

APPLICATION OF OIL CONSERVATION DIVISION
TO ADOPT 19.15.27 NMAC AND D19.15.28
NMAC, AND TO AMEND 19.15.7 NMAC,
19.15.18 NMAC, AND 19.15.19 NMAC;
STATEWIDE

CASE NO. 21528

REPORTER'S VIRTUAL TRANSCRIPT OF PROCEEDINGS

DAY 5

January 8, 2021

8:30 a.m.

Hearing Officer Felicia Orth

Chairwoman Sandoval

Commissioner Engler

Commissioner Kessler

REPORTED BY: PAUL BACA, CCR #112
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1 Attorneys Present:
 2 Eric Ames EMNRD
 3 Michael Feldewert NMOGA
 4 Adam Rankin NMOGA
 5 Ari Biernoff Commission of Public Lands and others
 6 Tannis Fox Climate Advocates and others
 7 Elizabeth Paranhos Environmental Defense Fund
 8 Chris Moander AG Office
 9 Sally Malave AG Office
 10 David Baake AG Office

11

12 Also Present:
 13 Dylan Rose-Coss Tech Support
 14 John Garcia Tech Support
 15 Florene Davidson OCC Support

16

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1 HEARING OFFICER ORTH: Good morning,
2 everyone.

3 My name is Felicia Orth, I'm the hearing
4 officer appointed by the Oil Conservation Division
5 to conduct a hearing in this matter of the
6 application of the New Mexico Oil Conservation
7 Division, to consider proposed rules to regulate the
8 venting and flaring of natural gas from oil and
9 natural gas production and gathering facilities.

10 The case was docketed as 21528.

11 We are on our fifth day. We are beginning
12 at 8:00 this morning with a statement from Adella
13 Begaye.

14 At 8:30 we will break into the technical
15 case briefly, to take one public comment.

16 And then we will, somewhere in there,
17 resume with the technical testimony of NMOGA's first
18 witness, Mr. Smitherman.

19 So I see Ms. Begaye. Ms. Begaye, would
20 you please raise your right hand?

21 (Witness sworn.)

22 HEARING OFFICER ORTH: Thank you. And
23 please spell your last name.

24 THE WITNESS: B-E-G-A-Y-E.

25 CHAIRWOMAN SANDOVAL: Ms. Fox, whenever

1 you ready.

2 MS. FOX: Thank you, Madam Hearing
3 Officer. And thank you to counsel and everybody who
4 is allowing for Ms. Begaye to testify out of order.

5 ADELLA BEGAYE,
6 after having been first duly sworn under oath,
7 was questioned and testified as follows:

8 EXAMINATION

9 BY MS. FOX:

10 Q. Can you please state your name?

11 A. Adella Begaye.

12 Q. And, Ms. Begaye is Climate Advocates'
13 Exhibit 225 an accurate copy of your resume?

14 A. Yes.

15 Q. And you prepared a statement to provide to
16 the commission today, correct?

17 A. Yes.

18 Q. And would you please proceed with that
19 statement?

20 A. Yes.

21 Commissioners, thank you for allowing me
22 the opportunity to present to you today.

23 I was raised on the Navajo Nation. I
24 reside in Arizona, 2 miles from the New Mexico
25 border near the Four Corners area.

1 My community is at the base of the Chuska
2 mountains. This is my ancestral homeland. I am an
3 enrolled member of the Navajo Nation.

4 I have a bachelor's degree in science -- a
5 bachelor's of science degree in nursing and
6 community health education, and certificates in
7 public health and health administration.

8 During my career I was a health educator,
9 nurse -- registered nurse, and public health
10 administrator. I retired in August of 2016 as the
11 director of public health nursing, Indian Health
12 Service, from the central agency of the Navajo
13 Nation.

14 I have been an active advocate for public
15 health and environmental and social justice for
16 40 years.

17 I am a founding member of Dine CARE, which
18 has been in existence since 1988.

19 For the last 11 years I have served as the
20 president of Dine CARE's board. Dine CARE is an all
21 Navajo organization comprised of grassroots
22 community members active on Navajo land, including
23 the Four Corners region of New Mexico, Arizona, and
24 Utah.

25 Dine CARE advocates for our traditional

1 teachings by protecting and providing a voice for
2 all life within and beyond our Four Corners sacred
3 mountain -- our four sacred mountains.

4 Dine CARE has been actively involved in
5 public and legal processes related to the regulation
6 and management of oil and gas operations in the
7 San Juan Basin, including submitting comments on
8 leases and resource management plans that overlap
9 the Navajo Nation's eastern agency and Chaco culture
10 and national historic park.

11 Several Dine CARE members live in the
12 Navajo eastern communities that are directly harmed
13 by oil and gas leasing and development.

14 Dine CARE members continue to practice
15 traditional and cultural and spiritual teachings and
16 practices that reference significant surface rights.

17 Dine CARE history describes the place our
18 people first emerged into this world.

19 Dine CARE is located in eastern Navajo
20 land adjacent to current eastern Navajo communities.

21 Continuing to increase oil and gas
22 operation and pollution harms these sacred and
23 spiritually significant sites of the Navajo people
24 and our traditionally practicing members.

25 Since the 1920s, for 100 years, the Navajo

1 people have been affected by oil, by fossil fuel
2 development. Unfortunately, we have not become a
3 monetarily wealthy nation, despite the intense
4 resource extraction that has occurred, nor are there
5 many Navajo entrepreneurs or Navajo-owned
6 businesses. Instead, the reality is that we are
7 left with polluted air, water, and desecrated land.

8 In addition, Navajo people suffer ill
9 effects, infirmities and co morbidities that are
10 significantly associated with industry pollution.

11 In my volunteering with Dine CARE, I've
12 witnessed and experienced the mixed pollution that
13 is present from oil and gas operation in the Four
14 Corners, San Juan Basin, and Eastern Navajo Agency.

15 Over the last several years, when I spent
16 time in the eastern Navajo communities of Counselor,
17 Libroke, and Ojo Encino, I've experienced strong
18 odors from wells in the area. I've experienced
19 headaches, sore throat, nausea, and have felt ill
20 while visiting only for a short time in these
21 communities heavily impacted by oil and gas
22 operations.

23 It is concerning that Navajo and other
24 communities must endure these conditions daily. I
25 am concerned about the long-term impacts it could

1 have on public health.

2 I submit testimony in support of
3 strengthening the proposed OCD natural gas --
4 natural gas waste rule. I hope to see the rule
5 strengthened by improving capturing methane during
6 completion and recompletion.

7 The rule should include denying new
8 drilling permits to operators that are out of
9 compliance.

10 Also, they are crucial. The rule should
11 include requiring immediate public notice when
12 health and safety is at risk.

13 The strengthening of the rule will make a
14 significant difference in improved public health for
15 the region. Without a strengthened rule it will not
16 maximize the benefits to our communities and public
17 health.

18 Methane is a major constituent of oil and
19 gas and is categorized as a health threat, both for
20 its toxicity and its contribution to the can climate
21 crisis, which all impacts the health of our people
22 and planet.

23 In 2014 many residents of the Four Corners
24 region became aware of these dangers when an
25 alarming satellite imaging was published and showed

1 a strong methane hot spot over the Four Corners
2 region.

3 There are now a number of scientific
4 findings that describe the various human health
5 impacts that result during the different stages of
6 oil and gas development.

7 Hydraulic fracturing releases many
8 dangerous and toxic substances like methane into the
9 environment.

10 Some of these toxic substances include
11 benzene, formaldehyde, tagaline, hydrogen sulfide
12 ethylbenzene, xylene, methyl chloride, petroleum
13 distillate, particulate matter and volatile organic
14 compounds, and many more.

15 Benzene is implicated in causing several
16 diseases in the brain and nervous system.

17 Formaldehyde is a known carcinogen?

18 Tagaline is linked to mental disabilities
19 that inhibit normal growth in children. Tagaline is
20 also linked to organ system damage in the liver as
21 well as the immune and reproductive system.

22 BOCs and PM contribute to respiratory and
23 circulatory system damage, which can result in
24 asthma, COPD, heart attack, stroke, and can lead to
25 early death.

1 Securing the Navajo Nations' health means
2 stopping harmful waste and air pollutants that are
3 intentionally flared into our air when methane is
4 released, including benzene and formaldehyde.

5 Recent studies have indicated that living
6 near flaring -- living near flaring from oil and gas
7 during pregnancy may contribute to preterm births.
8 Preterm children are often born with immature lungs
9 and can develop respiratory and cardiac problems
10 later in life.

11 Other studies have found that living close
12 to active and high-producing wells are linked to low
13 birth weights and small gestational age of children.

14 These effects cannot be separated from the
15 presence of many of the BOCs and formaldehyde, which
16 are found at wellheads.

17 These studies are growing in literature of
18 health implications of oil and gas development.

19 Furthermore, ozone pollution associated
20 with methane emission poses a serious public health
21 threat and disproportionately impacts Native
22 Americans that live within San Juan County, where
23 about 22,000 live within half a mile of a well site.

24 Health disparities exist among the Native
25 American population in comparison to the US general

1 population. There are a number of factors like
2 poverty, limited access to specialty care,
3 environmental challenges, and high levels of indoor
4 and outdoor air pollution exacerbates asthma rates.

5 Approximately 13 percent of American
6 Indian Alaska native children have asthma, as
7 compared with 8.6 percent of children in the US
8 general population.

9 Children and elderly population, as well
10 as those with immune deficiencies, are most
11 acceptable to the complications from degraded air
12 quality resulting from air pollutants present.

13 44 percent of the Navajo population are
14 children younger than 19 years old.

15 Fracking has severely impacted eastern
16 Navajo communities that make up the checkerboard
17 region in New Mexico.

18 After years of voicing concerns about
19 sudden and unusual health problems experienced by
20 Navajo community members who live near numerous oil
21 and gas wells, a health impact assessment was
22 conducted earlier in the areas of Counselor,
23 Torreon, and Ojo Encino, that reported the following
24 highest reported symptoms.

25 Greater than 90 percent reported sinus

1 problems with discharge, obstruction, and pain and
2 irritated sore throat.

3 80 percent reported cough, headache,
4 itching and burning of eyes, joint pain, fatigue.

5 Greater than 70 percent reported
6 nosebleeds and wheezing.

7 Greater than 60 percent reported shortness
8 of breath.

9 42 percent reported itching or skin rash.

10 Furthermore, the Center for Disease
11 Control warns that people with underlying health
12 conditions are most at risk for serious
13 complications and adverse outcomes from COVID-19.

14 To date, the Navajo Nation has suffered
15 one of the highest exposure and death rates from
16 COVID-19.

17 The Navajo Nation government does not have
18 adequate policy, regulation, or enforcement
19 authority to protect our airshed, land, and water of
20 oil and gas pollution that often comes from the
21 venting and flaring of natural gas as well as leaks.

22 Oil and gas pollution does not stop at
23 tribal, state, or national borders. We all breathe
24 the same air, drink the same water, depend on the
25 same climate, and have the same dreams for our

1 children and grandchildren.

2 We all need to do more to limit waste and
3 pollution from oil and gas development and clean up
4 our air.

5 The most effective method to reduce waste
6 and pollution, prevent toxic expose, and improve
7 public health is to track and reduce emissions at
8 the source. The emissions should be contained on
9 all pollutant oil and gas equipment, including
10 wellheads, tanks, compressors, and pipeline valves.

11 A strong comprehensive methane rule is
12 critical for climate and environmental justice for
13 the Navajo Nation and for all New Mexicans.

14 The Oil Conservation Commission has the
15 responsibility to take into account a positive
16 public health outcome that could develop from a
17 strengthening rule.

18 Again, thank you, Commissioners, for the
19 opportunity to come before you today.

20 **Q. Thank you very much, Ms. Begaye.**

21 **Ms. Begaye, for your testimony, you relied**
22 **on a number of public health articles, correct?**

23 **A. Yes.**

24 **Q. And are those articles set forth in**
25 **Climate Advocates' Exhibits 27 through 32?**

1 A. Yes.

2 MS. FOX: Madam Hearing Officer, I would
3 like to move admission of Client Advocates' Exhibits
4 26 through 32.

5 HEARING OFFICER ORTH: 26 or 27?

6 MS. FOX: 26 is her resume, so it's 26
7 through 32.

8 HEARING OFFICER ORTH: Thank you.

9 Let me pause a moment in the event there
10 are objections.

11 Exhibits 26 through 32 are admitted.
12 Thank you.

13 (Exhibits admitted, 26 - 32.)

14 MS. FOX: Thank you, Madam Hearing
15 Officer.

16 Ms. Begaye stands for cross-examination.

17 HEARING OFFICER ORTH: All right. Thank
18 you.

19 Mr. Ames, do you have questions of
20 Ms. Begaye?

21 MR. AMES: Madam Hearing Officer, OCD
22 appreciates Ms. Begaye's statement, and we have no
23 questions for her at this time. Thank you.

24 HEARING OFFICER ORTH: Thank you.

25 Mr. Feldewert or -- excuse me.

1 Mr. Rankin?

2 MR. RANKIN: Good morning, Madam Chair.

3 Adam Rankin appearing on behalf of NMOGA
4 this morning. I'm sorry I was having difficulties.
5 I don't know if you have already called for
6 appearances.

7 But no questions on behalf of NMOGA for
8 Ms. Begaye.

9 HEARING OFFICER ORTH: Thank you.

10 Is Mr.- -- I do see Mr. Biernoff with us.

11 Mr. Biernoff do, you have questions of
12 Ms. Begaye?

13 MR. BIERNOFF: Good morning, Madam Hearing
14 Officer. I do not.

15 HEARING OFFICER ORTH: Okay. Thank you.
16 Ms. Paranhos?

17 MS. PARANHOS: Good morning, Madam Hearing
18 Officer. I have no questions.

19 HEARING OFFICER ORTH: Okay. Thank you.

20 We have Commissioner Jordan Kessler with
21 us this morning.

22 Commissioner Kessler, do you have
23 questions?

24 COMMISSIONER KESSLER: I do not. Thank
25 you.

1 HEARING OFFICER ORTH: Thank you.

2 And, Madam Chair?

3 CHAIRWOMAN SANDOVAL: I don't either.

4 Thank you for your time this morning, Ms. Begaye.

5 THE WITNESS: Thank you.

6 HEARING OFFICER ORTH: Thank you very
7 much, Ms. Begaye.

8 THE WITNESS: Thank you.

9 HEARING OFFICER ORTH: So let's go back to
10 Mr. Rankin entering his appearance for the benefit
11 of the transcript.

12 Mr. Rankin, if you would, please.

13 MR. RANKIN: Good morning, Madam Chair.

14 Adam Rankin here from Holland and Hart,
15 appearing along with my partner, Mr. Feldewert,
16 appearing on behalf of NMOGA.

17 HEARING OFFICER ORTH: Thank you.

18 Are there any other preliminary matters we
19 can address?

20 Let me see. We do have one public
21 commenter, who signed up for the 8:30 time slot, who
22 may not yet be with us. His name is Duane Yazzie.

23 Baylen, can you tell me whether Mr. Yazzie
24 is on the line.

25 MR. LAMKIN: I do not see him.

1 HEARING OFFICER ORTH: Mr. Yazzie, are you
2 with us as a call in -- as a caller, I should say.

3 All right. Well, we have eight minutes --
4 seven minutes. Madam Chair, what do you think? We
5 could go to Mr. Smitherman for about ten minutes
6 and, then I could call on Mr. Yazzie again, or we
7 can take a 7-minute break and see if he joins us.

8 CHAIRWOMAN SANDOVAL: Mr. Rankin, is there
9 something you think you can cover in ten minutes, or
10 start to cover, and get to a good stop?

11 MR. RANKIN: I would need to consult with
12 Mr. Feldewert, since he's conducting the direct.

13 I don't know that it's all that effective
14 to get started at this time with probably
15 five minutes of testimony before being interrupted.

16 So my suggestion, Madam Chair, that we
17 just take a break for a few minutes until public
18 comment is complete and we can resume.

19 CHAIRWOMAN SANDOVAL: Okay. Why don't we
20 take -- come back at 8:30. We do have public
21 comments -- we just have one, Ms. Orth?

22 HEARING OFFICER ORTH: Yes, Mr. Yazzie.

23 CHAIRWOMAN SANDOVAL: Okay. So,
24 Mr. Rankin, there's a good chance that you will be
25 starting right around 8:30, if not a minute or two,

1 after.

2 MR. RANKIN: We'll be prepared.

3 (A recess was taken from 8:24 a.m. to 8:30
4 a.m.)

5 HEARING OFFICER ORTH: Mr. Lamkin, do we
6 have Mr. Yazzie on the line?

7 MR. LAMKIN: I don't see his name in the
8 attendees, Madam Hearing Officer.

9 HEARING OFFICER ORTH: All right.
10 Everyone calling in is unmuted at the moment.

11 Mr. Yazzie, are you on the line?

12 Duane Yazzie?

13 No?

14 All right.

15 Certainly, Mr. Lamkin, in the event
16 Mr. Yazzie presents himself later in a subsequent
17 public comment session, of which we have two every
18 day, do let me know and I will call on him for his
19 comment.

20 MR. LAMKIN: Certainly.

21 HEARING OFFICER ORTH: Thank you.

22 So, Mr. Feldewert or Mr. Rankin, if you
23 would please bring Mr. Smitherman onto the screen.

24 MR. FELDEWERT: Certainly, Madam Hearing
25 Officer.

1 Mr. Smitherman is on the screen now.

2 If I could I have the ability to present
3 sharing my screen?

4 JOHN SMITHERMAN,
5 after having been first previously sworn under oath,
6 was questioned and testified as follows:

7 CONTINUED EXAMINATION

8 BY MR. FELDEWERT:

9 Q. You should be able to see, Mr. Smitherman.
10 You see where we had marked NMOGA
11 Exhibit C9. This is where we left off yesterday.
12 Do you see that?

13 A. Yes, sir, I see that.

14 Q. This is a circumstance where NMOGA has
15 suggested that the commission define venting in a
16 fashion almost identical to Colorado. I think the
17 only difference is we took out some language that
18 would not be applicable in New Mexico.

19 A. Actually, the language is the same.

20 Q. Okay. There is one clause, though.
21 If I look under the left-hand side,
22 Subpart A, there is a reference to a regulation that
23 would not apply in New Mexico.

24 Right, Mr. Smitherman?

25 A. Well, that's true. This was changed to

1 refer to New's Mexico agency.

2 Q. Okay. All right.

3 A. That's correct.

4 Q. With this in mind, I want to keep this up.
5 But I want you, Mr. Smitherman, and I would like the
6 commissioners to turn to page 16 of NMOGA Exhibit A,
7 which contains our proposed modifications to
8 Part 27.

9 And let me know when you're there,
10 Mr. Smitherman.

11 A. I'm there.

12 Q. Okay. Now this is the Subpart G, which is
13 titled by the division as reporting of vented or
14 flared gas, Mr. Smitherman. Okay?

15 A. I see that.

16 Q. And, Mr. Smitherman, is this important
17 for -- when it comes to determining the -- and
18 reporting for gas capture?

19 A. Absolutely. It's essential.

20 Q. Okay. And this is the -- the reporting
21 categories that come into play when operators are
22 determining and calculating our gas capture
23 percentage?

24 A. That is correct.

25 Q. I want to now, then, turn to a couple of

1 pages in. Let's go over to page 18 and look at
2 27.8G2.

3 A. I'm there.

4 Q. Now, Mr. Smitherman, we see some changes
5 to the language in the introductory paragraph.

6 But I want to talk first -- or I want to
7 talk now about the reporting categories --

8 A. Okay.

9 Q. -- under G2.

10 Would you explain to the commission what
11 NMOGA has done, or suggested be done, to the
12 reporting categories under G2?

13 A. Certainly. I guess the first thing to
14 talk about is NMOGA is suggesting that we add a
15 category.

16 If you'll look on page 20 of that same
17 exhibit, you'll see, in Subpart G, the division had
18 not included volumes from what we call a delineation
19 of well. They are now calling it an exploratory
20 well.

21 That was not included, and we suggested
22 that that be added, so that those volumes are
23 included.

24 Q. Mr. Smitherman, the volume that would be
25 vented or flared from what's now -- now being

1 **exploratory well, are those volumes that can be**
2 **accurately measured?**

3 A. Well, certainly, some of them. The
4 high-pressure sources from those delineation, or
5 exploratory wells, exploration wells, can be
6 accurately measured and should be reported.

7 Q. Okay. All right.

8 Then when it comes to the categories that
9 the division had listed here, we heard the testimony
10 earlier how they had removed certain categories
11 because they could not be accurately measured.

12 Were you here for that testimony?

13 A. I was.

14 Q. Yeah. Or that they could not be estimated
15 with any reliable method for production accounting
16 reporting?

17 A. That's correct.

18 Q. Or they involved circumstances where you
19 were not dealing with waste?

20 A. That's correct as well.

21 Q. Okay. Did -- did NMOGA take a look at
22 these categories, apply that same rationale, and
23 suggest the removal of certain categories?

24 A. Yes. NMOGA has taken a look at all of
25 these categories that were suggested by the division

1 and have struck all of those that fall in the
2 category of -- basically, can't be accurately
3 estimated or measured for production accounting
4 purposes.

5 Now, that leaves all of those
6 high-pressure sources that can be accurately and
7 reliably measured and are appropriate for reporting
8 of production accounting purposes.

9 Q. Because that's what's involved here,
10 right? Not emissions, but production accounting?

11 A. That's correct. We're talking about, in
12 essence, those volumes that, if we were to vent or
13 flare, would typically be considered waste.

14 Q. Okay.

15 A. With some exceptions, of course.

16 Q. Okay. And the exclusions include, for
17 example, pneumatic devices that we see on the screen
18 that Colorado had removed from the definition of
19 venting?

20 A. That's correct. We would recommend the
21 same thing.

22 Q. Okay. And the removal of, for example
23 uncontrolled storage tanks as a reporting category?

24 A. That's correct. Again, low volumes, very
25 difficult, if not impossible, to give you any kind

1 of accurate measurement or estimate for production
2 accounting purposes.

3 Q. All right. And I believe, if I tallied it
4 up, the division -- or we suggest the division
5 remove five of the categories?

6 A. I'll rely on your memory there.

7 Q. Okay. But it's is at the bottom of
8 page 18, continuing over to page 919, right?

9 A. Yes.

10 Q. Okay. Now as I move over to page 20,
11 NMOGA has also proposed to strike the category of
12 "other."

13 Do you see that on page 20?

14 A. I do. That's the sixth category that we'd
15 like to strike.

16 Q. Okay. And what's the purpose of that?

17 A. Well, again, as we looked at the
18 categories here, and we also, if you will, took a
19 look at the real world out there, and tried to
20 understand, once we've identified all of these
21 categories that are going to be reported, because
22 they do have -- we do have the ability to measure or
23 estimate them with accuracy, we could think of no
24 other source that would fit that criteria.

25 So we saw no reason for the "other"

1 category.

2 Q. Okay. And does the removal of this also
3 have the benefit of providing certainty with respect
4 to the -- and transparency of the reporting?

5 A. Absolutely.

6 Q. So this forces operators to categorize the
7 volumes that are released that can be accurately
8 measured or estimated into one of these other
9 categories?

10 A. That's correct. In fact, you heard
11 testimony yesterday where one of the division
12 witnesses talked about, in essence, the current
13 system and how the "other" category leaves them, I
14 guess, less than informed.

15 So you can see that their own testimony
16 shores up that same concept that we see for removing
17 it, is actually going to create clarity for the
18 division.

19 Q. And this would require operators to report
20 under categories --

21 A. That's correct.

22 Q. -- the volume that are vented and flared,
23 right?

24 A. Correct.

25 Q. That can be measured or estimated with

1 reliability for production accounting reports?

2 A. That's correct.

3 Q. All right. Now, I want to move to a
4 different topic. I want to go backwards a little
5 bit in our Exhibit A and go to page 8.

6 And we would be under 27.8D5.

7 Well, first, it would be D, which is on
8 page 8.

9 And, Mr. Smitherman, now we're on the
10 topic of when an operator can vent or flare natural
11 gas during drilling operations. Okay?

12 A. That's correct.

13 Q. And if we move to the next page, page 9 of
14 27 on Exhibit A, that's -- yeah, page 9.

15 A. Yeah. You said -- I'm sorry. You said
16 drilling operations.

17 D on page 8 refers to production
18 operations.

19 Q. Thank you. You're right.

20 Then if I move in that category, the next
21 page, page 9, we're under Subpart 5.

22 A. Yes, I see that.

23 Q. Now this subpart, Mr. Smitherman, is
24 similar to what we will call Part 28, applying to
25 upstream. Part 28.8B, as in boy, 3.

1 **Right, Mr. Smitherman?**

2 A. Correct.

3 **Q. Okay. And you'll see in here that NMOGA**
4 **has proposed to add, as a category, of authorized**
5 **releases due to emission components such as valves,**
6 **flanges, and connectors under what we would call**
7 **Subpart H.**

8 **Do you see that?**

9 A. I do see that.

10 **Q. Do we have the same change in Part 28?**

11 A. Yes, sir.

12 **Q. Okay. What's the reason for that?**

13 A. Well, as we talked about a little bit
14 yesterday, these flanges, valves, connectors, can
15 have small releases. And as we talked about
16 yesterday, the NMED actually looks at these through
17 their inspection program.

18 These -- these components are normal,
19 routine components, and they do have small releases
20 that are very, very low. But -- when operating
21 properly.

22 And it just does not seem to make, quite
23 frankly, any sense to me or NMOGA -- to NMOGA, that
24 those known small releases would not be authorized
25 under this section.

1 Q. And are those release that an operator can
2 control?

3 A. Absolutely. Well, no. I mean, other than
4 inspect them, and you may replace one that has
5 malfunctioned in some way.

6 But no, you can't control them on a
7 day-to-day basis.

8 Q. Okay. Now when you look up on the screen,
9 I have NMOGA Exhibit C9.

10 Up on the screen, Mr. Smitherman?

11 A. Yes. Yes.

12 Q. Okay. If you take a look at that, under
13 both the Colorado definition of venting, and then
14 what we propose also G312as a definition, there is a
15 second bullet point that references unintentional
16 leaks that are not the result of inadequate
17 equipment design.

18 Do you see that?

19 A. I do see that.

20 Q. Okay. Both of those -- or that
21 circumstance would not -- is not venting, as
22 normally understood by operators.

23 Correct, Mr. Smitherman?

24 A. Yes, that's true. And clearly, is not
25 venting under Colorado's definition.

1 Q. Okay. And when they talk about
2 unintentional leaks that are not the result of
3 inadequate equipment design, are they talking about
4 these valves, flanges, and connector that you just
5 addressed?

6 A. Yes.

7 Q. Okay. All right.

8 Now, I want to start moving through the
9 rule in a more orderly fashion.

10 Move out of the definitions, and I would
11 like to move to NMOGA's proposed changes to
12 Part 27.8, which is on page 6 of our proposed
13 modifications.

14 A. Yes.

15 Q. Now, Mr. Smitherman, have you looked at
16 all at NMOGA's prehearing statement?

17 A. I have.

18 Q. Okay. I want to bring a portion,
19 Mr. Smitherman, of that prehearing statement up on
20 the screen for you, to make it -- so you don't have
21 to flip to it, at page 4.

22 A. Okay.

23 Q. Do you see that NMOGA has identified, in
24 here on page 4, the definition of surface waste?

25 A. Yes, sir.

1 **Q. Okay. When NMOGA proposed modifications**
2 **to Part 27.8A, were they designed to conform with**
3 **that definition of surface waste?**

4 A. That's exactly what we did.

5 **Q. Okay. And as part of that, NMOGA proposed**
6 **to strike the last clause of what the division had**
7 **suggested in 27.8A dealing with the flaring over**
8 **venting.**

9 **Do you see that?**

10 A. That's correct. I do see that. That's
11 correct.

12 **Q. What's the purpose of that?**

13 A. Well, the difference between combusting a
14 released volume of gas for purposes of venting that
15 same release volume of gas has nothing to do with
16 waste.

17 **Q. Okay. Is there another reason why that**
18 **was proposed to be stricken?**

19 A. Well, that certainly falls within the
20 jurisdiction of the NMED and not the OCD.

21 We certainly think that the OCD and the
22 NMED can coordinate together and craft comprehensive
23 rules.

24 But this concept really falls outside the
25 jurisdiction of the OCD.

1 **Q. Would this lead to the New Mexico**
2 **environment department the decision of when flaring**
3 **over venting should occur?**

4 A. I'm sorry. State that again.

5 MR. AMES: Objection, leading question.

6 Counsel can direct the witness to specific
7 provisions he needs to talk about and paraphrase it,
8 but he can't put words in the mouth of the witness.

9 HEARING OFFICER ORTH: Mr. Feldewert,
10 would you restate your question, please?

11 MR. FELDEWERT: Certainly.

12 **Q. (By Mr. Feldewert) Mr. Smitherman, is**
13 **there another reason that NMOGA suggested that this**
14 **clause be excluded?**

15 A. Well, due to conflict and lack of clarity
16 between these two jurisdictions.

17 **Q. When you say the two jurisdictions,**
18 **between whom?**

19 A. Between NMED and the OCD.

20 **Q. Okay. All right.**

21 **And as you understand it, is that one of**
22 **the goals of enacting these rules?**

23 A. That's -- that is exactly their goal. In
24 fact, they stated that publicly.

25 **Q. Do you have our exhibit book in front of**

1 **you?**

2 A. I do.

3 **Q. Would you turn to what has been marked as**
4 **NMOGA Exhibit M3?**

5 A. I have that.

6 **Q. Okay. And is that -- would you describe**
7 **this for us?**

8 A. This is a press release from in the
9 environment department. I'm looking for the date
10 here. July 20, 2020.

11 **Q. And what's important in this press release**
12 **that relates to what you just talked about?**

13 A. Well, it, in essence, states that the --
14 I'll just read it, the short phrase here.

15 "NMED, the energy, minerals, and natural
16 resources department, which also released draft
17 rules today, worked closely together throughout the
18 process to ensure the draft rules are complimentary
19 and do not result in redundant or conflicting
20 requirements."

21 **Q. Okay. Now, I would like you to -- let's**
22 **move forward, then, on page 7 of NMOGA's Exhibit A.**
23 **Okay?**

24 A. I'm there.

25 **Q. And we see that NMOGA, under**

1 **Section 27.8A1, which relates to drilling**
2 **operations, has proposed a language change?**

3 A. Yes.

4 **Q. Would you please describe that and explain**
5 **why?**

6 A. Certainly. We've suggested that you
7 strike the term "technically feasible" here and
8 replace that with "reasonably practicable."

9 And the reason we did that is,
10 "technically feasible" is a very, very low bar, and
11 it -- it has no sideboards on it. Quite frankly,
12 it's technically feasible to get to the moon, but
13 it's not very practical.

14 We thought that the term reasonably
15 practical fit this situation much better. You've
16 got -- as other witnesses have talked about, you've
17 got the possibility of very small volumes of natural
18 gas being emitted from cutting, basically.

19 And we didn't want these rules to imply
20 that extraordinary efforts or experimental
21 technologies or things like that, that needed --
22 even that you would consider best practices, be
23 applied everywhere.

24 We thought that reasonably practical,
25 using industry best practices, much more clearly fit

1 the situation.

2 Q. Okay. Now, I'd like to move to NMOGA's
3 proposed change to Subpart B2 on Exhibit A, page 7.

4 A. Yes.

5 Q. There's two changes here, essentially.
6 Right, Mr. Smitherman?

7 A. Yes, sir.

8 Q. Okay. Would you please explain why the
9 NMOGA suggested adding the phrase "unless otherwise
10 approved by the division"?

11 A. Well, there -- typically, these players on
12 drilling operations are attached to drilling rigs
13 themselves. And we want the flexibility to be able
14 to go to the division and, in essence, talk to them
15 about particular circumstances.

16 You see the word "surface hole" here.
17 That surface hole is, quite frankly, not -- not very
18 clear.

19 You could have a surface hole of a well
20 that hasn't even been finished drilling yet.

21 You could have surface pipes set. You
22 could have had a well that was drilled and not
23 completed.

24 There could be circumstances where this
25 rule, as read in black and white, simply don't

1 apply. And we'd like the ability to talk to the
2 division about those circumstances.

3 **Q. Now, what's the purpose for removing the**
4 **requirement for enclosed flares at this time?**

5 A. Yes. If -- if there are circumstances --
6 and I think witnesses have already talked about this
7 too. If we've got a well control issue, you -- you
8 may want to flare the gas. That may be the
9 appropriate step.

10 And if you do, don't forget, you've got
11 people at all of these locations, all of these
12 drilling rigs, 24 hours a day. And if you enclose
13 the flare you cannot see the flame.

14 And from a safety standpoint, those people
15 on that rig want to know, visually -- I think they
16 also -- maybe you want to be able to see it, you
17 want to hear it, you want to feel it. You want to
18 know that the flare is going, if that's the choice
19 that they make, to flare it.

20 **Q. If we move to Subpart B3, NMOGA.**

21 CHAIRWOMAN SANDOVAL: Sorry,
22 Mr. Feldewert. Can I just interrupt real quick?

23 Would it be possible for you, for the
24 division, to actually update the slides on the
25 screen? Because we are jumping quite -- all over.

1 It would be helpful if that was actually followed on
2 the screen.

3 Is that possible?

4 MR. FELDEWERT: I can certainly try to do
5 that, Madam Chair. We've been on page 7 of NMOGA
6 Exhibit A. It would be that white notebook, Madam
7 Chair.

8 CHAIRWOMAN SANDOVAL: I've got it right
9 here.

10 MR. FELDEWERT: Okay. All right. So you
11 have that in front of you, right?

12 CHAIRWOMAN SANDOVAL: Yes.

13 MR. FELDEWERT: Would you like me to put
14 it up on the screen?

15 CHAIRWOMAN SANDOVAL: That would be
16 helpful.

17 MR. FELDEWERT: Okay. Certainly.

18 A. If you wouldn't mind, Mr. Feldewert, I'd
19 would like to supplement my answer on B2.

20 **Q. (By Mr. Feldewert) Yeah. Let me get it**
21 **up on the screen here first.**

22 A. Certainly.

23 MR. FELDEWERT: Can you see that, Madam
24 Chair?

25 CHAIRWOMAN SANDOVAL: Yes, thank you. You

1 have a lot of documents out there.

2 Q. (By Mr. Feldewert) Mr. Smitherman, while
3 I'm doing this, why don't you supplement your
4 answer?

5 A. Certainly. The other reason that we
6 struck "enclosed" is that enclosed flares any flare,
7 but enclosed flares, have a limited operating range.

8 And if you're talking about a drilling
9 operation and you've got the possibility of having a
10 well control problem, you don't know how to design
11 that flare. You don't know what the rates are going
12 to be.

13 So the enclosed flares are more limited in
14 their range, and we would prefer not to have those
15 limitations, since we can't necessarily design it
16 properly.

17 Q. Thank you.

18 MR. FELDEWERT: Now, Madam Chair, I'm
19 hoping you can see this now. I believe I have the
20 right page up.

21 CHAIRWOMAN SANDOVAL: Yes, I got it.

22 MR. FELDEWERT: Great.

23 Q. (By Mr. Feldewert) So, Mr. Smitherman, I
24 want you to talk about NMOGA's proposed change to
25 Subpart B3.

1 And I believe you've talked before about
2 striking similar terms, like here, "substantial"?

3 A. That's correct.

4 Q. Why is that, likewise, improvable here?

5 A. Well, again, it's a subjective term. And
6 we really don't think that the subjectivity fits
7 here.

8 When you're talking about an adverse
9 impact on safety, public health, and the
10 environment, we think that that should just be left
11 without the subjectivity of the word "substantial."

12 Q. Okay. Then I want to now move to the
13 discussion of Subpart C.

14 And I want to take a look at the
15 division's Exhibit 2A, and I am going to move down
16 to 27.8C.

17 And I believe I have it up on the screen.

18 A. Okay.

19 Q. Mr. Smitherman, C1 addresses the period of
20 time known as initial flowback?

21 A. That's correct.

22 Q. Would you discuss what occurs during
23 initial flowback, the time that is involved, and why
24 gas should be vented?

25 A. Certainly. And you've heard some of the

1 same testimony yesterday, but I'll try -- so I'll
2 try to be a little bit brief.

3 When a well is -- especially an oil
4 well -- is completed, hydraulically fractured, when
5 you're talking about an oil well, you're using large
6 volumes of water -- mostly produced water, by the
7 way.

8 And -- but once that -- all of those frac
9 stages are completed and the plugs are drilled out,
10 the very first thing that you do, then, is to flow
11 those frac fluids.

12 And with those frac fluids you get solids.
13 You get debris, you get plug debris, you get
14 profits, you get solids that don't have any place --
15 that can't be processed by your normal production
16 facilities.

17 Plus, you want to encourage the well to
18 flow. You want to have the lowest back pressure, if
19 you will, on that well, to be able to start the flow
20 quickly.

21 Now, you may want to limit the rates later
22 for different purposes. But to start with, you
23 really want to have very, very little back pressure
24 on the well.

25 And so during that phase, you're basically

1 flowing back to your frac tanks, and doing whatever
2 you need to do to handle those volumes that are
3 coming back.

4 And quite frankly, the first phase for
5 some time -- it's different for every well -- all
6 you have coming back is water, and perhaps some
7 debris.

8 At some point you'll start getting some
9 hydrocarbons to the surface. A little oil, you'll
10 flash some gas, and you'll have some gas coming to
11 the surface.

12 But as Mr. Bolander talked about, it's not
13 steady. You get sludge, you have maybe even some
14 contaminants in that gas. There's just not enough
15 gas, and you can't put enough back pressure on the
16 well for a separator to function, to -- it's not
17 feasibly -- it's not technically feasible.

18 And by the way, that term fits here, using
19 technically feasible for a separator to function,
20 not to the point where you need a separator.

21 So you're basically flowing those fluids
22 back to your frac tanks and disposing of them
23 properly.

24 And so at that period of time, there's --
25 no set time. But it typically does not take a very,

1 very long time for the well to start flowing in
2 enough hydrocarbons, and that you can put enough
3 back pressure on the well for a separator to
4 function.

5 And once that happens, once you reach that
6 point in the completion process, you've left the
7 initial flow backstage and moved into the separation
8 flowback stage.

9 Now, all during that time that you're in
10 the initial flowback stage, all of your fluids are
11 going basically to your frac tanks. And you're
12 capturing your water, you're capturing your oil.

13 But the gas that is coming back is
14 erratic, it's low pressure, it's too small to
15 measure in many cases. So it is being --

16 **Q. You said -- and is that for long period of**
17 **time, Mr. Smitherman, or a short period of time,**
18 **when you're talking about this gas that results from**
19 **the initial flowback?**

20 **A.** It's typically a short period of time. In
21 fact in some wells, especially gas wells that we're
22 completing in New Mexico at the time, it basically
23 is instantaneous. You almost go straight into a
24 separation flowback phase. The initial flowback
25 phase is relatively very short.

1 Q. But either --

2 A. Either way. The initial flowback period
3 is a relatively short period of time.

4 Q. And you agree with the division's
5 witnesses that the gas that is involved during that
6 short period of time is not salable?

7 A. It's not salable for a number of reasons.

8 Q. Okay. And have you already talked about
9 those reasons?

10 A. Not all of them. It's also -- the gases
11 are basically at atmospheric pressure, so virtually
12 impossible -- and certainly infeasible -- to capture
13 those gases that can be contaminated, as I said
14 before.

15 And quite frankly, they are erratic in
16 their flow. It's just really technically infeasible
17 to do so.

18 Q. So do you agree with the division that the
19 use- -- that using the demarcation point, as when it
20 is technically feasible to put a separator in place,
21 is that appropriate?

22 A. Yes.

23 Q. Okay. Then would you discuss -- now we
24 move into C2. And you'll see that the division has
25 added "from the separation equipment" at the end.

1 **Do you think that is appropriate?**

2 A. We do.

3 **Q. Would you explain what occurs during this**
4 **phase and why that's appropriate?**

5 A. Certainly. And I'll even refer back to
6 testimony we've heard earlier in the week.

7 As you're bringing these fluids to the
8 surface, and as Mr. Bolander said, fluids include
9 gases and liquids -- and, quite frankly, solids
10 also, even during the separation phase.

11 The -- the liquids that are being sent to
12 storage, if you will, to whatever your frac tanks or
13 whatever tanks that you're putting those liquids, in
14 can still emit a little bit of natural gas.

15 The cutting, the flow, or -- or excuse
16 me -- the solids that come back as you pull them out
17 of the separator, can emit a small amount of natural
18 gas.

19 And so what we wanted to do -- and we
20 don't think we're in conflict with the division. We
21 think this is simply adding clarity -- is, we're
22 making sure that this rule points to, and it's clear
23 it points to -- the gases that are coming from the
24 separation equipment. Basically, the gas outlet of
25 the separation equipment.

1 Q. And this phrase "from the separator," is
2 that consistent with Quado A, that we talked about
3 yesterday?

4 A. I believe so, yes.

5 Q. Okay. Does it also, then, include
6 completions that would not involve hydraulic
7 fraction?

8 A. That's true. Quado only addresses wells
9 that are hydraulically fractured. And this rule
10 would apply to all wells.

11 Q. Now when I looked at the division's
12 proposed modifications up on the screen, which is on
13 page 3 of their Exhibit 2A.

14 We move into C3, and you'll see that they
15 have made some changes to the section dealing with
16 gas that does not meet pipeline specifications
17 during the completion operations.

18 Would you --

19 A. That is correct.

20 Q. Do you agree with these changes,
21 Mr. Smitherman?

22 A. I do. I think that they have made it much
23 more clear and much more comprehensive. Properly
24 so.

25 Q. So when you look at what the -- now, this

1 is a slight change to the rules that had been
2 governing -- governing operators since, as
3 Mr. Powell said, around since 1970, right?

4 A. Correct.

5 Q. Okay. Does -- in your opinion, is what we
6 see here under Subpart C, does that follow what has
7 become general practice for most operators?

8 A. It has, both in the northwest part of the
9 state or anyplace that gas wells are being drilled
10 and completed.

11 And in the southeast, anyplace that oil
12 wells are being drilled and completed.

13 Q. And is it -- during this time frame, is it
14 correct that gas is -- most likely would not -- does
15 not meet pipeline specs for a period of time?

16 A. Certainly. There's some -- some of our --
17 basically well completion, that it takes a bit of
18 time before the gas meets pipeline specs.

19 And I guess I'll just leave it at that.
20 Yes.

21 Q. Okay. And before I leave this section, or
22 this topic, there is one change that NMOGA has
23 proposed to the division's language, Mr. Smitherman,
24 that we don't see up here. And that is under
25 Subpart B, 3B.

1 It says the operator analyzes the natural
2 gas samples twice per week.

3 A. Yes.

4 Q. What has NMOGA suggested as the frequency
5 here and why?

6 A. We have suggested that the minimum be once
7 per week. And really, the reason is -- now, let's
8 remember the gases that are being produced are
9 valuable to the operator. And they want -- the
10 operator wants to get those gases to sale as quickly
11 as the operator can.

12 And so in essence, they may -- they may
13 sample much more than that.

14 But they also may recognize the pattern
15 of -- of counting the time it takes to get to the
16 point where they are really going to get gas to the
17 surface, have gas available that meets pipeline
18 specs.

19 And so the point to concentrate their --
20 in essence, the sampling time is around the time we
21 believe that you're going to get a pipeline quality
22 gas.

23 Now, the division wants to put a minimum
24 on there. We think that that's okay. But there
25 really doesn't need to be any more than a minimum of

1 once a week, because the operators are probably
2 going to do it more often when it's getting to the
3 point that the gas should be pipeline quality.

4 Q. And do you think it's appropriate not to,
5 for example, identify specific components when you
6 are dealing with whether gas meets pipeline
7 specifications?

8 A. I do. Whenever you list something, you
9 may leave something out. And clearly, when the
10 division started off, they did not include some of
11 the -- the contaminants that might cause gases to
12 not meet pipeline specs.

13 There are actually other specifications
14 that exist that aren't listed even on the division's
15 updated version.

16 And so -- plus, we don't know what the
17 future is going to bring, you know. I know that
18 CO2, I think, was not included at the beginning.
19 Quite frankly, our company fracked gas wells with
20 CO2 and with combinations of CO2 and nitrogen.

21 So that's certainly in our history, and it
22 could be in our future.

23 So not knowing what's going to come in the
24 future, it would be better to have a more
25 universal, if you would, exception for gases that

1 don't meet pipeline spec.

2 Q. And the division has done that here in
3 Subpart C3.

4 Correct, Mr. Smitherman?

5 A. That's correct. They have.

6 Q. Okay. And the other -- these reference to
7 pipeline specs occur in different portions of the
8 rule.

9 Right, Mr. Smitherman?

10 A. They do. They do. They're not
11 consistent, though.

12 Q. I want to stay on that subject. Okay?
13 I want to go ahead --

14 HEARING OFFICER ORTH: Mr. Feldewert, I'm
15 sorry to interrupt you and Mr. Smitherman.

16 We do have Mr. Yazzie on the line, and so
17 I'd like to, if you don't mind, make a two-minute
18 interruption from Mr. Smitherman's testimony to take
19 that comment.

20 MR. FELDEWERT: Certainly.

21 HEARING OFFICER ORTH: Thank you so much.

22 Mr. Yazzie, I believe you have joined us.
23 Can you hear me?

24 MR. YAZZIE: Yes.

25 HEARING OFFICER ORTH: Terrific. I can

1 hear you, as well.

2 If you would, please, we would like to
3 hear your comments.

4 MR. YAZZIE: My name is Mr. Yazzie, of
5 Shiprock. I'm in the western sector of the --
6 Oil and gas development of unregulated
7 release of methane, particularly by the polluting
8 operation, is a potent cause of the common crisis.
9 This is killing the planet.

10 I understand that there was a methane
11 release such that it could leak from every home in
12 New Mexico every year. This is near
13 incomprehensible. What that translates to in
14 dollars and cents must be astounding.

15 This is truly irresponsible for the oil
16 and gas industry to allow this. Because you need to
17 look at other ways of keeping the eyeball on the
18 bottom line of the bank.

19 On the other side of the equation is life.
20 Should dollars and the economy overshadow the life
21 of all living things on this planet? The life of
22 our grandchildren into the future?

23 The deep importance and seriousness of
24 these issues brings out, often, emotions.

25 I am angered at energy developers for

1 destabilizing the life of the earth, and of the
2 politicians and bureaucrats who allow this.

3 Even so, on behalf of all of our
4 grandchildren, I respectfully respect that
5 amendments be made to strengthen the rules to reduce
6 the methane pollution.

7 Our best option is to stop the release of
8 methane, again scaling back on oil and gas
9 development, and transition to cleaner energy.

10 I leave you with one thought.

11 What will our future grandchildren say
12 about our climate, the destruction of our
13 environment, or will they thank us for helping to
14 save their planet and their home?

15 Thank you.

16 HEARING OFFICER ORTH: Thank you very
17 much, Mr. Yazzie, for your comments.

18 Let's see. Mr. Feldewert and
19 Mr. Smitherman, if you would rejoin us.

20 MR. FELDEWERT: I think we are back.

21 HEARING OFFICER ORTH: Okay. Thank you so
22 much for indulging us there for a moment.

23 CONTINUED EXAMINATION

24 BY MR. FELDEWERT:

25 Q. Mr. Smitherman, we were talking about

1 **pipeline specifications in the division's change to**
2 **Subpart 27.8C3.**

3 **We also see a reference to pipeline**
4 **specifications, as we move to the division's rule,**
5 **down in Subpart D. It used to be 5, now it's 4.**

6 **So I'm moving to page 4 of their proposed**
7 **modifications.**

8 **And you will see, in Subpart D5 -- or I'm**
9 **sorry -- what is now D4, little K.**

10 **We see another reference to gas meeting**
11 **pipeline specifications, correct?**

12 A. That is correct.

13 Q. **Okay.**

14 COMMISSIONER KESSLER: I apologize. I
15 hate to interrupt.

16 Could you put that up on your screen?

17 MR. FELDEWERT: Thank you, Commissioner
18 Kessler. I meant to do that, and I forgot to bring
19 it up.

20 I believe it's up now.

21 Q. **(By Mr. Feldewert) And, Mr. Smitherman,**
22 **you will see again that the division has stricken**
23 **any reference to specific impurities?**

24 A. Yes.

25 Q. **And again, do you think that is**

1 **appropriate?**

2 A. Absolutely.

3 Q. Okay. Now, we go down to Subpart G, which
4 **is the reporting section in the division's proposed**
5 **changes. And we see down in G2, which is the**
6 **monthly reporting, G2H, which is on page 6 of their**
7 **proposed changes.**

8 A. I see that.

9 Q. And now all of a sudden we see that they
10 **have approached it a little differently, right?**
11 **They have identified specific impurities in H1 and**
12 **H2?**

13 A. Correct. They identified nitrogen,
14 hydrogen sulfide, or carbon dioxide only.

15 Q. And first off, in your opinion is that
16 **appropriate, to list specific impurities again?**

17 A. No, for the same reasons I said before.
18 We -- quite frankly, we don't know -- number one, it
19 doesn't identify all possible contaminants or ways
20 that the pipelines meet the pipeline specifications,
21 even today. We certainly don't know what other
22 constituents may be used in the future.

23 Q. And then there's also been -- we heard the
24 **testimony when there was a discussion about the**
25 **division's decision here, after publishing this**

1 rule, to treat oxygen differently from nitrogen,
2 H2S, and CO2, when it comes to calculating the gas
3 captured.

4 A. Yes, I heard that testimony from,
5 basically, several witnesses.

6 Q. Okay. First off, when you look at oxygen,
7 okay, and you look at the -- you have --
8 Mr. Smitherman, you have knowledge about pipeline
9 specifications for oxygen?

10 A. I do.

11 Q. And how are those specifications? I mean,
12 are they strict? Lenient?

13 A. They are very, very stringent. I think
14 you could probably characterize them, in general, to
15 be somewhere between zero and ten parts per million,
16 as opposed to other constituents are typically in
17 the whole percentages, and sometimes up to
18 three to four percent.

19 Q. Now is there, in your -- Mr. Smitherman,
20 can you discuss whether or not it is appropriate for
21 the division to treat oxygen separately, and more
22 importantly, essentially penalize operators if there
23 is -- if the gas fails to meet pipeline specs for
24 reasons of oxygen content?

25 A. No. And I could understand maybe where

1 they're coming from.

2 But the reality is that prudent operators
3 can get oxygen in their -- in their gas when doing
4 things that are normal, routine, and expected.

5 It's not something that is only associated
6 with some kind of a poor operator or poor
7 maintenance. That can happen, and we understand
8 that the division may be sensitive to that.

9 But that is -- it's painting everyone with
10 a broad brush that indicates that any oxygen is
11 always going to be there because the operator was a
12 bad operator.

13 **Q. And as written, Mr. Smitherman, is it your**
14 **understanding this rule will count the flaring, as a**
15 **result of oxygen in the gas stream, against**
16 **operators when it comes to gas capture?**

17 A. It will count against operators regardless
18 of how that oxygen got into the gas and why it's
19 being flared.

20 **Q. Okay. Would you turn to what has been**
21 **marked as NMOGA Exhibit C18 in the black notebook?**

22 A. Yes.

23 **Q. And would you please explain to the**
24 **commissioners why oxygen can get introduced into the**
25 **gas stream and not meet pipeline -- not meet**

1 **pipeline specifications?**

2 A. Well, there are several reasons. I won't
3 go through all of them.

4 But this slide intends to try to explain
5 three of those possibilities. And we may talk on
6 another one as we move through the rest of the
7 testimony today.

8 But specifically, we're talking about
9 commissioning your equipment. We're talking about
10 nitrogen lift, which is kind of a temporary gas
11 lift, and we're talking about foam air well
12 interventions.

13 And we'll talk about each one of those
14 separately, if you don't mind.

15 **Q. Which one do you want to start with?**

16 A. Let's start at the top. What the heck.

17 **Q. Okay.**

18 A. Commissioning equipment. We've heard a
19 lot about that conversation so far in this week.

20 And the concept here is that there is a
21 safety issue when commissioning your equipment.

22 Whether that new equipment is being put
23 into an existing operation as an cell, or whether
24 you're completely building something brand-new.

25 Mixing natural gas and oxygen, which is in

1 the air, of course, can create an unsafe explosive
2 environment.

3 Oxygen is also -- if you will, we already
4 talked about the natural gas gathering system is
5 very, very sensitive to any kind of oxygen in the
6 gases that we send to them.

7 So both the upstream and the midstream
8 take care in being able to purge their equipment
9 before it's used. That's the commission process.

10 So you may start off with the natural gas
11 pipeline, for example. The pipeline may be full of
12 air. So you, first of all, empty that, purge that
13 pipeline with water, and typically do a hydrostatic
14 pressure test on it, making sure it's got good
15 integrity. And then you push that water out of
16 there, typically, with nitrogen.

17 Now that nitrogen typically, or many
18 times, is not from liquid nitrogen. But it could be
19 generated through molecular cell; basically, a
20 membrane system that creates enough nitrogen and a
21 small amount of oxygen that you avoid an unsafe
22 condition and explosive standpoint.

23 These membrane units could still leave 1
24 or 2 percent oxygen in that gas, but it's low enough
25 that it's not going to create an explosive

1 environment.

2 So you move all of that gas, that nitrogen
3 gas through, to push the water out. And then you
4 start pushing -- basically, using the system. You
5 put natural gas in the system to, in essence, purge
6 that nitrogen and oxygen out of the system.

7 And all the time that you're doing that,
8 of course, you've got almost all nitrogen and a
9 little bit of oxygen in it. You don't want to set
10 natural gas process into play, so all of that gas is
11 being -- I want to call it flared -- being sent to a
12 flare that's not flammable.

13 And you want to do that until you've
14 gotten to the point that you've gotten as much of
15 the nitrogen out as you can, and you start to get
16 natural gas.

17 So that whole process is -- and quite
18 frankly, even if you've gotten the nitrogen down to
19 the point where it is in pipeline specs, because it
20 may be several percent, we still may have enough
21 oxygen in the system that doesn't meet pipeline
22 specs. And so you still may be flaring that gas
23 until you finally get to the point that you've got
24 your oxygen content down low enough that it meets
25 specifications.

1 **Q. In essence, Mr. Smitherman, I think you**
2 **testified that there's a difference between pipeline**
3 **specs for nitrogen and oxygen, right?**

4 A. That's true.

5 **Q. Which is more lenient?**

6 A. Typically -- there are several different
7 areas of the state, and they have got different, if
8 you will, specifications for nitrogen. But
9 typically, nitrogen has a much more lenient content
10 specification. It can be at 3 or 4 percent. In
11 some areas it can be up to 10 or 15 percent, as long
12 as the situation allows that.

13 Oxygen, I mean, I've actually had gas that
14 had been rejected and we're trying to get it back
15 into the sales line. And we took a test, and it had
16 80 parts per billion, and we still couldn't put it
17 down the line. I'm talking about very, very
18 stringent specifications on oxygen.

19 **Q. And so, Mr. Smitherman, is there a period**
20 **of time after this commissioning, when the gas is**
21 **either vented or flared solely because of the oxygen**
22 **content?**

23 A. Yes.

24 **Q. Okay. And as the rule is currently**
25 **drafted here, as we see up on the screen, that**

1 venting or flaring as a result of the oxygen content
2 would count against the operators. In a sense, they
3 would be penalized, correct?

4 A. That's correct. And these are not poor,
5 shoddy operations.

6 Q. Okay. Now in the next example I think you
7 have on here, do you want to go to nitrogen lift?

8 A. Well, let's jump to foam air. Because I
9 think once we do that, it will be easier to talk
10 about nitrogen lift from a conceptual standpoint.

11 Q. Okay. Then talk about that.

12 Why does this activity result in the
13 introduction of oxygen into the gas stream without
14 the fault of the operator?

15 A. Let me -- let me start off by explaining
16 what foam air is. It's just like it sounds. It's a
17 mixture, typically, of air and water in a foam, to
18 create a low-density fluid that you can use to
19 establish circulation on a well that, perhaps,
20 reservoir pressure is somewhat depleted.

21 If you've got a well that has been
22 producing for a while and the reservoir pressure has
23 declined, it's -- it can be difficult, if not
24 impossible, to establish circulation with even --
25 with the normal liquids, which is water.

1 You pump the water down and it just goes
2 into the reservoir. You're not able to circulate
3 any debris or any other type of things that you want
4 to bring out of the well to the surface with water.

5 So you use a -- this light fluid. It's a
6 low density, it's got a viscosity to it with the
7 foam that you can lift solids. So that's the
8 important part of this.

9 And the thing is, if you are doing a
10 cleanout, if you will, a well intervention using
11 foam air, you could think about the ideal -- let's
12 just talk about the ideal situation, where you're
13 actually pumping fluid down -- this foam down the
14 work stream, down tubing, and going out the end of
15 the tubing and coming back up the annulus. And
16 conditions that you're establishing in an ideal
17 world, you could have a viable circulating pressure
18 exactly equal to the reservoir pressure.

19 So there's no flow of foam into the
20 reservoir and there's no flow of reservoir fluids
21 into the well.

22 Now, that's ideal. Ideal actually never
23 happens.

24 So you're really going to be in one phase
25 or the other. You're either going to be

1 underbalanced, which means the bottom of the
2 circulating pressure is lower than the reservoir
3 pressure; and, therefore, you're going to have
4 reservoir fluids flowing into the well and combine
5 with those foams and moving up the wellbore to the
6 surface, or you're going to be overbalanced, which
7 means you're going to have foam basically going into
8 the reservoir.

9 Q. Mr. Smitherman, can you explain -- can you
10 walk us through some additional slides and explain
11 the circumstance where there's going to be entry
12 into the reservoir from this foam air intervention?

13 A. Yes, certainly. Let's start with C19,
14 please.

15 Q. Okay.

16 A. Now C19 is, in essence, a wellbore
17 diagram. Actually, it's a real well in New Mexico
18 that tries to describe for you in pictorial form
19 this ideal balance condition.

20 And the way I've drawn this, I've got very
21 small little -- what I call the work stream, the
22 middle of the well, that is in the well down to just
23 above where the curve starts.

24 And I'm showing you -- I'm trying to show
25 you -- that you can have foam being pumped down the

1 work stream and foam coming up the back side.

2 And the blue that's down below that in the
3 well, the horizontal wellbore, depicts the fluid.
4 We pumped water into this well before we started
5 working on it, so it would stay nonproductive.

6 And because of the ideal conditions, where
7 there was no flow, that kill fluid stays right where
8 you put it before you started the job.

9 Again, ideal, really never happens.

10 So let's move to 20.

11 Q. Hold on. Before you leave that slide.

12 So this is an actual wellbore diagram,
13 right?

14 A. It is.

15 Q. And this is a circumstance now, where
16 we're attempting to clean out this -- this
17 particular wellbore?

18 A. It is. In fact, you see the word "fill"
19 with a question mark on it?

20 Q. Yeah.

21 A. This particular job, we don't know if
22 there was fill in the well. We later found out
23 there was. And we wanted to clean out this
24 wellbore. This well had been producing for some
25 time, and we were unable to establish circulation

1 with water.

2 And by the way, we're going to see more
3 and more of this as we move into wells that start to
4 age on these horizontal wells.

5 So I do believe that this is going to
6 become -- first of all, it's already common. But I
7 think it's going to become even more common in the
8 future.

9 **Q. And just to be clear, that area where you**
10 **show "fill," question mark, that's the stuff that**
11 **you're trying to get out with -- now, with the foam**
12 **air intervention?**

13 **A.** That's correct. This well was
14 underperforming, and we felt like that perhaps maybe
15 the formation had heat in it a little bit, and maybe
16 we had a formation where we had some problem that
17 came in, maybe some other debris that affected the
18 flow of the well.

19 So we decided to do this intervention to
20 clean that -- those solids out.

21 **Q. Okay. And why don't you take us to the**
22 **next slide and explain what happens.**

23 **A.** And so I've described to you already the
24 fact that you're really going to be either in the
25 underbalanced mode or overbalanced mode.

1 So I'm going to show you, in essence in
2 pictorial form, what an underbalanced situation will
3 be.

4 Now here, I have depicted that work stream
5 all the way into where it's starting to encounter
6 the fill. So it's all the way into the bottom,
7 basically, of the well.

8 **Q. And for the record, Mr. Smitherman, you're**
9 **on NMOGA Exhibit C20?**

10 A. That's correct. Thank you for reminding
11 me.

12 **Q. Go ahead.**

13 A. So here, if you're underbalanced, you're
14 pumping foam down the work stream and bringing foam
15 back up the annulus. But since you're
16 underbalanced, you're getting well fluids flowing
17 into the wellbore.

18 So as you basically get returns from this
19 well, you're not only getting the foam that you've
20 pumped in, in a different form, though, it's being
21 mixed with the water and oil and gas from the well,
22 and that's not good.

23 There are several reasons for that not --
24 to be not ideal, not the least of which is crude oil
25 has basically an adverse reaction with the foamers

1 that we use, that are available.

2 And in essence, crude oil kills the foam.

3 So the very quality -- the qualities that you're
4 looking for in the foam, of having the viscosity to
5 lift this -- these solids and this debris, gets
6 damaged by the influx of crude oil. So you would
7 like to avoid that when you can.

8 So let's move to C21.

9 This diagram depicts the same well with a
10 slightly different set of conditions.

11 We've been able to achieve a circulating
12 pressure that's higher than reservoir pressure, and
13 somewhat higher than reservoir pressure. And so you
14 don't get any influx from the reservoir.

15 The foam then stays in its pristine,
16 unaltered form, and retains its viscosity, its foam
17 viscosity to the surface, to lift that debris.

18 Now the result of this, you see these four
19 little arrows, the black arrows, that indicate that
20 you're actually, in essence, injecting some of the
21 foam into the reservoir.

22 So you -- by achieving the conditions that
23 you want to achieve and are optimum for this job,
24 you're actually pumping that foam into the
25 reservoir.

1 Now, that foam contains oxygen. You could
2 use straight air to create that foam, which clearly
3 has oxygen in it, or you could use a nitrogen
4 generator, which we do.

5 But again, that nitrogen generator only
6 reduces the oxygen in that nitrogen down to
7 something around 1 or 2 percent. It's still way
8 over pipeline specifications.

9 So when you ultimately turn this well back
10 on, it's going to take some time before the
11 reservoir fluids basically clear themselves of the
12 oxygen that you've put in here, because you need it
13 to, by necessity.

14 And it doesn't happen systemwide. You
15 don't pump in the first fluids and the first fluids
16 get pumped back out. It takes a while for the
17 oxygen and nitrogen to reduce down to pipeline
18 specifications.

19 **Q. So, Mr. Smitherman, you indicated that**
20 **what we see here in C21 is the preferred scenario**
21 **when you're trying to clean the fill out of these**
22 **wellbores?**

23 **A. Yes. For a variety of reasons, at least**
24 **one of them which I've just described.**

25 **Q. Okay. And this results, then, in a**

1 circumstance for a period of time where the gas will
2 be out of pipeline specs due to the oxygen content?

3 A. Correct.

4 Q. Okay. And in that circumstance, under the
5 way the division's rule was crafted, that
6 out-of-spec gas that would flare would count against
7 an operator and they would be penalized for that?

8 A. That's correct. The operator can have
9 exemplary operations, and they still will be
10 penalized.

11 Q. And what is important here,
12 Mr. Smitherman, and I want to make sure it's clear,
13 is this type of operation that you've just
14 described, is that what a prudent operator would do
15 to attempt to get this fill out under these
16 circumstances?

17 A. Yes. That's very common. In fact, it's
18 going to become more common.

19 Q. In your opinion, is that a necessary
20 aspect of the process to get this fill out?

21 A. It is. You really don't have a choice but
22 to use low-density fluids to do this, and basically
23 for the life of this well.

24 Because once you get to the reservoir
25 pressure completion that it requires, it's always

1 going to require this.

2 Q. Okay. All right.

3 And then the other -- I think we go back
4 to NMOGA Exhibit C18.

5 I believe we have another example where
6 there is, as a result of normal and necessary
7 operations, oxygen gets introduced into the gas
8 stream for a period of time?

9 A. Yes. Nitrogen lift. You've already
10 seen -- and this is a little bit -- it's a different
11 circumstance, so I want to make sure that you
12 clearly understand -- that while underbalanced
13 conditions during well cleanout, or foam cleanout,
14 is not the preferred option, when you're trying to
15 gas lift a well, in this case nitrogen lift a well,
16 which is kind of a temporary gas lift, you are
17 intentionally creating an underbalanced situation so
18 that the well will flow.

19 We have no intention of cleaning, we have
20 no need for the foam, we have no need for the
21 viscosity of that foam. You're simply trying to
22 achieve an underbalanced condition to allow the well
23 to flow.

24 And in doing so, you're pumping nitrogen,
25 typically from a nitrogen generator, and typically

1 they don't get to 100 percent nitrogen. You still
2 have oxygen, and you are cleaning the well for some
3 period of time. There's no set time that you're
4 going to be doing this.

5 But you're either testing the well or
6 trying to take it out, clean it out. And maybe
7 after stimulation, set a Delaware well. The
8 Delaware wells typically are not as high a reservoir
9 pressure as some of the other ones. And you need to
10 clean them off with something like this to be able
11 to clean them up.

12 And so that nitrogen is going to retain
13 oxygen and create a situation where you're out of
14 spec, again, for oxygen.

15 And there are others. We'll talk about at
16 least one other as we go through our testimony later
17 today.

18 **Q. Anything else under this particular**
19 **subject?**

20 **A. No, sir.**

21 **Q. Mr. Smitherman, let me ask you this.**

22 **In your opinion and your experience, do**
23 **operators have an incentive to get gas to pipeline**
24 **specifications as quickly as possible?**

25 **A. Absolutely. I can go back to that**

1 instance that I was talking about earlier. We were
2 pretty highly irritated that they wouldn't take 80
3 parts per billion, because we were having to flare
4 gas that would have brought revenue to our company.

5 We want to sell the gas because that's --
6 in essence, that's what we're here for.

7 Q. When I looked at the division's proposal
8 here to separate oxygen out from other impurities
9 and treat it differently for gas capture purposes,
10 is there any technical justification for that?

11 A. No. I think you paint it with too broad a
12 brush.

13 Q. Okay. So as -- does -- has NMOGA proposed
14 that the division modify the language to match what
15 it did up here in Subpart D5K?

16 A. Yes. Basically, you're asking for
17 out-of-spec gas to be reported and basically treated
18 the same.

19 Q. Okay. And the end result of NMOGA's
20 change will still mean, Mr. Smitherman, that
21 operators will even be reporting the volumes of gas
22 vented and flared as a result of being out of spec?

23 A. Absolutely.

24 Q. Okay. Then I want to take a look -- go
25 back up here to the -- where we were. And that was

1 **Subpart D, dealing with drilling operations.**

2 **And do you see here the division has**
3 **proposed to strike D1?**

4 A. You said drilling operations. D is
5 production operations. And yes, I do see that.

6 Q. I did that again. I keep doing that. I
7 apologize. Yes, thank you.

8 **So I'm on page 3 of NMOGA's exhibit -- I'm**
9 **sorry -- OCD's Exhibit 2A.**

10 A. Yes.

11 Q. And the division has proposed, with their
12 modifications, to strike out D1, which was in the
13 rule that they had published for consideration.

14 A. That's correct.

15 Q. Does NMOGA have concerns about that?

16 A. We do. We see some real concerns about
17 the possibility of conflicts then arising, if the
18 OCD rule does not recognize areas where the NMED has
19 expressed their authority.

20 Q. Okay. And we then see that the division
21 did make a change here to Subpart D, D2, which is
22 now D1 --

23 A. Correct.

24 Q. -- dealing with emergencies or
25 malfunctions?

1 A. Yes.

2 Q. Okay. And is -- in your opinion, is that
3 appropriate? And if so, explain why.

4 A. Certainly. It is appropriate. We had
5 suggested that, in essence, the definitions of
6 emergency and malfunction were sufficient, and that
7 trying to describe that again here could only create
8 conflict and lack of clarity.

9 And so we suggested, and they have
10 accepted, the idea that they could simply use the
11 words "emergency or malfunction" here, without this,
12 maybe, kind of an attempt to redefine.

13 Because there always can be conflicts if
14 we put -- try to define the same thing in two
15 different places using different words.

16 Q. Okay. As we move down here to -- it used
17 to be D3. This is the section addressing liquids
18 unloading?

19 A. Yes.

20 Q. Okay. Are you familiar with what occurs
21 during liquids unloading?

22 A. I am.

23 Q. Okay. You'll see that the division has
24 language in here in Subpart 3 that talks about -- in
25 Subpart 3B -- that an operator should take all

1 **reasonable action. And we see that both in the**
2 **second clause, or line, and in the second and third**
3 **line of Subpart B3.**

4 **Is there a concern about having the word**
5 **"all" in there?**

6 A. There is. I mean there's only three
7 letters, but "all" is a big word. You know, we
8 wanted -- we don't think that we're being -- we
9 think we're trying to define the same thing that the
10 division is intending.

11 When you put "all" there, is that all
12 possible things every time? Is that all things that
13 have ever been thought of?

14 It just -- it opens up a little bit of
15 mischief, if you will, in the interpretation of the
16 rule.

17 And when you say "takes reasonable
18 actions," or "takes reasonable actions to minimize
19 venting," that seems to be sufficient and clear.

20 When you put the word "all" there, it
21 creates an uncertainty that we would prefer this
22 rule not have.

23 **Q. And when you leave the phrase "take**
24 **reasonable actions," Mr. Smitherman, are you**
25 **familiar with the concept of a prudent operator?**

1 A. Yes, sir.

2 Q. Okay. And would that phrase "reasonable
3 action," does that incorporate, in your opinion,
4 what you understand a prudent operator should be
5 doing?

6 A. It does. It's a good way to describe it,
7 reasonable.

8 Q. Now in this Subpart B, there's a
9 requirement that the operator remain on site during
10 this activity.

11 Has NMOGA proposed a change to the phrase
12 "present on site?"

13 A. Yes. We have proposed adding "present on
14 site or in close proximity" until the end of
15 unloading.

16 And we did that -- I guess you are going
17 to ask me why, aren't you?

18 Q. You are on it. Go ahead.

19 A. The reason we did that is because in some
20 certain circumstances it makes practical sense to
21 allow a lease operator to stay in close proximity,
22 especially when they're trying to bring on several
23 wells at once.

24 If you get an entire field shut down, or a
25 central compressor station affects many wells and

1 that lease operator is trying to bring many wells
2 back on, it's a little bit of a dance, if you will,
3 to try to get those wells back on and producing
4 enough to keep feeding the compressor and allowing a
5 lease operator, when they are able to, to, in
6 certain circumstances, to stay in close proximity of
7 wells. It allows them to be more efficient in
8 getting these wells returned to production.

9 **Q. Is it your understanding that the phrase**
10 **"on site or in close proximity," that that is -- is**
11 **that a phrase that you've seen before, or does**
12 **that -- does that phrase have a common**
13 **understanding, "on site or in close proximity"?**

14 A. I think it has a common understanding.
15 But we're not talking about, you know, driving to
16 the next county. You're in close proximity. You --
17 any person -- let's go back to the reasonable
18 person.

19 Any reasonable person could say you're
20 really not in close proximity if you're a couple of
21 hours away.

22 It is hard to define exactly what that is,
23 but I think a reasonable person could -- we could
24 agree on what that is.

25 **Q. And you retain the phrase "present on**

1 **site" and just adding "or in close proximity,"**
2 **right?**

3 A. That's correct. They certainly can remain
4 on site, and in fact many times, will.

5 Q. In your opinion, would that give the field
6 operators the flexibility they need to first deal
7 with circumstances where there are multiple wells
8 that you're trying to bring back online?

9 A. Yes. As I described it earlier as a
10 dance. These operators -- this is not -- you don't
11 wake up this day not knowing anything about their
12 wells. They do have some sense as to how long it
13 takes to unload them.

14 And so they optimize their operations to
15 try to get flowback going and keep enough flow going
16 in the compressor to keep it actually running.

17 You start a compressor up, and then you
18 don't have enough gas going to it, it's going to go
19 down, or low suction pressure. It saves itself. It
20 protects itself that way.

21 So you have to be able to get gas going to
22 it to be able to keep the compressor running.

23 Q. In your opinion, will this language
24 adjustment proposed by NMOGA also meet the goal, the
25 mutual goal of preventing unnecessary or excessive

1 **surface loss?**

2 A. Yes, we believe so.

3 Q. Okay. Now, we see down here that the
4 **division has proposed a change to what used to be**
5 **Subparagraph 4 and is now 3.**

6 So I'm on NMOGA --

7 A. Yes.

8 Q. I'm on the OCD Exhibit 2A --

9 A. Yes. I've got it now.

10 Q. -- page 3, Subpart D4.

11 Now, the division still had delineation
12 **well in here. You would agree that exploratory well**
13 **is an equally good descriptive term?**

14 A. Yes. We understand that they were going
15 to change that to make them consistent across this
16 rule. That's certainly acceptable to NMOGA.

17 Q. Would you explain why it's appropriate to
18 **have an authorized venting and flaring time period**
19 **for these types of wells?**

20 A. I will. In fact, I think it was
21 Mr. Bolander who gave a nice description of this.

22 If an operator has an area that they would
23 like to explore and does not have the infrastructure
24 there, you've got no gas takeaway pipeline, you've
25 got no oil pipeline, perhaps no water pipeline,

1 you're going to want to test that area, drill a
2 well, complete it, and see what it's going to do.

3 You can do a whole lot to try to
4 understand what you expect the well to do, but
5 you've got to drill the well to actually prove it.

6 And so drilling the well, completing it,
7 and producing it for long enough to know really what
8 the well is going to do, is essential before you
9 have to commit all the capital that's required to,
10 in essence, develop that area.

11 And again, Mr. Bolander did a very nice
12 job, I think, of describing the fact that these
13 wells come on at high rates, typically, and very
14 high decline rates to start with, and it takes a
15 while before you -- the well settles down to its
16 natural decline, I think is the words he used, to be
17 able to predict estimated recovery and then
18 understand the economics of development and whether
19 this area is of a high enough quality reservoir to
20 justify that type of capital expenditure.

21 **Q. And you're dealing with, Mr. Smitherman,**
22 **two different, sometimes independent, operations,**
23 **right? The upstream portion and the midstream**
24 **portion, in making these determinations?**

25 **A. That's correct. You know, you've got**

1 to -- if you want to build a gas pipeline, someone
2 is going to have to build it. You either have to
3 build it yourself, as an upstream operator, which
4 can be done, and is done sometimes. Or you're going
5 to bring in a third-party gas catcher.

6 Either way the operator is typically
7 responsible for, in essence, the capital expenditure
8 of that gas gathering being made.

9 So it's important -- or it's essential --
10 for the upstream operator, and sometimes the
11 midstream operator, to get a good understanding of
12 what the reservoir qualities are before they commit
13 the capital.

14 So it's a very nice thing that the
15 division -- it's a very realistic thing that the
16 division has done by adding this period of time that
17 you can flare gas from this -- vent or flare the
18 gases from this exploratory well, exploration well,
19 to be able to reach out to the areas that are not
20 developed today, but may be valuable with the
21 industry and the state in the future.

22 **Q. Mr. Smitherman, I would like to move to**
23 **the division's change in subpart -- it used to be**
24 **D5. It's now D4.**

25 **A. Yes.**

1 Q. And I'm looking at their change to
2 Subpart C, as in Cindy.

3 And I see that they proposed to strike the
4 word "schedule" before "repair and maintenance."

5 In your opinion, is that appropriate? And
6 if so, why?

7 A. We do believe it's appropriate. In
8 essence, by striking that, you're incentivizing
9 operators to do repair work regardless of whether
10 they're scheduled or not.

11 Sometimes the lease operator goes to a
12 location and sees something that is not a true
13 malfunction, but it could be soon. It gives you an
14 indication that some piece of equipment is in --
15 may be on the verge of failing. And it would be
16 inappropriate, from a practical standpoint and an
17 emission standpoint, to not deal with that right
18 away.

19 And so by taking the word "schedule" out
20 of this, we kind of remove a perverse incentive and
21 allow those operators to address that quickly.

22 Q. Okay. I want to move now into -- these,
23 of course, are authorized venting and flaring
24 circumstances.

25 Right, Mr. Smitherman?

1 A. Yes, during production operations.

2 Q. Okay. And I see that the division, on
3 page 4 of their Exhibit 2A, has added some
4 additional language and equipment.

5 Are you -- have you reviewed that?

6 A. I have.

7 Q. And are there similar -- do we find
8 similar language and similar descriptions in the
9 midstream portion, 28.8B3?

10 A. Yes.

11 Q. Okay. All right.

12 Let's just stay here with Exhibit 2A.

13 First, we see that the division has added
14 the phrase "normal operations of dehydration units
15 and AMIEE treatment units."

16 Did we -- did they have, initially, that
17 similar description in Part 28, when they published
18 the rule?

19 A. Most of them. The division had included
20 "normal operations of dehydration units," to my
21 memory. And we suggested adding "AMIEE treatment
22 units," because they're very similar.

23 But part of the problem that we saw is
24 once you start listing equipment, there can be an
25 implication that a piece of equipment that's not

1 listed is somehow left out of this particular
2 provision.

3 And so while maybe not exhaustive, we
4 wanted to make sure that this list was more
5 complete, so that it was a little more clear.

6 And we suggested adding the AMIEE
7 treatment units to Rule 28, as I recall, and we
8 added this entire section to Rule 27.

9 Why do we do that? Well, as is typical
10 that these dehydration units and AMIEE treatment
11 units are used by midstream companies, the
12 upstreamers also use them. Many times you have some
13 time that dehydration units are required.

14 So we saw no reason that these -- these
15 particular pieces of equipment would be in one rule
16 and not the other.

17 **Q. And these only relate to normal operation**
18 **of this equipment.**

19 **Right, Mr. Smitherman?**

20 **A. That is correct.**

21 **Q. Then we see that the division has added**
22 **here, in Subpart G, the normal operations of**
23 **compressors, compressor engines, and turbines.**

24 **Why is that appropriate?**

25 **A. Well, again in Rule 28, you'll notice that**

1 that list was normal operations of compressors,
2 compressor engines, and did not have turbines.

3 And turbine compressors are also used in
4 New Mexico. And again, just to be sure that somehow
5 those are not to be included in this rule, we added
6 turbines in Rule 28, and then added all of these
7 items in Rule 27 because, quite frankly, upstream
8 operations use compressors and compressor engines
9 and, perhaps, turbines themselves.

10 **Q. And we see that the division, in**
11 **Subpart E, has added some language dealing with**
12 **thief hatches.**

13 **Do you see that?**

14 A. I do.

15 **Q. Okay. And would you -- is that change by**
16 **the division appropriate?**

17 A. It is. It was unclear, and I think the
18 division recognized that their wording was unclear.
19 It simply defines what they mean. You can't
20 measure, in essence -- you can't even route gases
21 emitted from a thief hatch to -- to a control
22 device, if you will.

23 So we wanted to make sure that -- to make
24 it clear that we're talking about a thief hatch
25 that's located in a tank that's routed to a control

1 device.

2 The thief hatch itself is not routed. A
3 loading tank is. So that's the first part.

4 The second part, we prefer to use the word
5 "properly closed," and they have accepted that. Or
6 from -- or let me get this right -- or it is not
7 properly closed or maintained on an established
8 schedule.

9 In essence, we think that these changes
10 make it more clear.

11 **Q. And the division also then added the**
12 **commission of pipelines that we see in other**
13 **equipment down there in Subpart L?**

14 A. That's correct.

15 **Q. And is that applicable both for upstream**
16 **and midstream, Mr. Smitherman?**

17 A. It is. Both of these two sectors
18 commission their equipment and pipelines.

19 **Q. And why is that appropriate to add?**

20 A. Well, we're talking about what is allowed
21 to vent and flare. And so it would be inappropriate
22 for the division not to recognize that commissioning
23 is -- venting and flare of gas, that that's normal.
24 It's routine; and, in fact, necessary for the safe
25 operations of both upstream and midstream.

1 So this should be allowed.

2 **Q. And in your experience, Mr. Smitherman,**
3 **can the -- can that -- can the gas be captured and**
4 **put to a sales line when you're conducting these**
5 **types of activities?**

6 A. No, typically not, for several reasons.
7 We've already talked about those.

8 **Q. Okay. And so in your opinion, do the**
9 **operations that are listed here constitute**
10 **unnecessary or excessive surface loss without**
11 **beneficial use?**

12 A. No. These are all necessary, and
13 typically not excessive, even in relevant
14 operations. These are expected.

15 **Q. And the only normal operation that is**
16 **missing here, I think you explained it before, is**
17 **the emissions from flanges, valves, et cetera,**
18 **right?**

19 A. That's correct.

20 **Q. Okay.**

21 A. That we suggested; it was not accepted.

22 MR. FELDEWERT: Madam Hearing Officer, I'm
23 at a -- we'll be moving to a new topic. I don't
24 know what time you want to take a break. I see that
25 it's 10:00.

1 MS. ORTH: You read my mind. Thank you,
2 Mr. Feldewert.

3 Let's take 15 minutes, please, and return
4 shortly before 10:15. Thank you.

5 (A recess was taken from 9:59 a.m. to
6 10:14 a.m.)

7 HEARING OFFICER ORTH: Whenever you're
8 ready, Mr. Feldewert.

9 MR. FELDEWERT: Thank you, Madam Hearing
10 Officer.

11 Q. (By Mr. Feldewert) Mr. Smitherman, I want
12 to now take a look at the OCD Exhibit 2A. And I'm
13 at page 4, under Subpart E, 27.8E, dealing with
14 performance standards.

15 Now this, Mr. Smitherman, is an upstream
16 issue, a Part 27 issue, correct?

17 A. That's correct.

18 Q. All right. We see that the division has
19 proposed some changes to Subpart E1.

20 Do we generally support those changes?

21 A. Generally.

22 Q. What's the caveat?

23 A. The caveat is that we had suggested
24 striking the term "maximum" and using the term
25 "anticipated" in the context of operator shall

1 design completion and production and separation
2 equipment and storage tanks for what we would like
3 to suggest is proper anticipated throughput of
4 pressure to minimize waste.

5 The difference is -- and kind of think
6 about this. Any facility engineer is going to
7 certainly have conversations within their company as
8 to what their anticipated flow is for a particular
9 facility. They're going to design that facility
10 for -- to optimize, if you will, production and
11 minimize waste. That's going to be something that
12 they will do already. And certainly, this rule will
13 be consistent with that.

14 Well, the concept of maximum, it starts
15 introducing some, if you will, lack of clarity for
16 that. What do they mean by maximum? Maximum -- is
17 it the area? Is it maximum they've ever seen? Is
18 it -- is this something they Monday morning
19 quarterback? You didn't know what the maximum was
20 going to be, and maybe they drilled wells that were
21 better than they expected?

22 And so it really puts an undue burden, if
23 you will, on a design engineer to even know what
24 that basically means.

25 It's much more clear, that if you simply

1 use the term "anticipated throughput," that that's
2 what you -- that's what you expect these design
3 engineers to do, is to anticipate throughput, in
4 essence, to minimize waste.

5 **Q. What is the problem with leaving designing**
6 **facilities to handle maximum?**

7 A. Well, as I said, maximum is a term that
8 starts becoming unclear. Again, what is the
9 maximum? Is it the maximum from another facility
10 nearby? Is it the maximum from an area? It
11 introduces a lack of clarity that is unnecessary.

12 **Q. Is there -- Mr. Smitherman, have you seen**
13 **circumstances where the facilities were overbuilt?**

14 A. Certainly. In fact, quite frankly, if you
15 leave maximum in there, you almost have to
16 overbuild. You almost have to say, Well, golly, I
17 can't be wrong. You know, is there any possibility
18 that this term is going to be used in a different
19 way? I have to overbuild the facility in order to
20 comply with this. It really is inappropriate.

21 Using anticipated volumes is really the
22 right way to do it, because you're going to use your
23 anticipated volumes to design facilities that
24 minimize waste.

25 **Q. Now, the division has proposed some**

1 **changes to the language in Subpart E2?**

2 A. Yes.

3 **Q. Does that address NMOGA's concerns here,**
4 **Mr. Smitherman?**

5 A. Not all of them.

6 **Q. Is there a reason why the equipment should**
7 **not have automatic gauging systems in these**
8 **circumstances?**

9 A. Exactly. And the automatic gauging
10 systems may be appropriate in some places. They are
11 certainly not appropriate in others.

12 They may -- in most cases they are not
13 going to minimize waste at all. So we don't see the
14 reason for having those.

15 You've got circumstances right now where
16 we've got purchasers that, in essence, won't accept
17 automatic tank gauging as custody transfer. So they
18 have to open the hatches to be able to gauge the
19 tanks to understand the volumes that were sold.

20 **Q. So do they require manual tank gauging?**
21 **Is that the opposite of automatic?**

22 A. Yes. The difference is you have to open
23 up the thief hatch to manually gauge the tank. So
24 whatever you thought you were basically
25 accomplishing by leaving the thief hatch closed and

1 using an automatic tank gauge, you really -- that
2 purchaser has to go out there and open that thief
3 hatch up and manually look at the tank.

4 Q. You mentioned that there are some
5 transporters that don't allow automatic tank gauges.

6 A. That's true. They require a manual
7 gauging.

8 Q. Is there reasons for that?

9 A. Well, I don't want to read their minds.
10 But certainly, it seems that the purchasers are much
11 more confident in a system -- the system that
12 they're comfortable with and have seen works for
13 them. And manual gauging is a very, very tried and
14 true methodology. We've been using them now for
15 decades.

16 Q. And does switching to -- from one -- does
17 mandating an automatic gauging system assist in the
18 prevention of unnecessary or incessant surface loss?

19 A. We don't believe it does a whole lot in
20 that regard, no.

21 Q. Okay. Now the division, as we move into
22 Subpart D3, where we're dealing with designs for
23 flare stacks, we see down in 3B that they have made
24 some changes?

25 A. Yes.

1 **Q. Okay. I see some insertion of commas.**

2 A. Yes.

3 **Q. And is that appropriate?**

4 A. Yes. That's just a point of clarity, if
5 you will. We just wanted to make sure that the
6 sentence was interpreted properly.

7 Don't forget we had -- what did someone
8 say? -- a large and robust team.

9 When we had differences of opinion as to
10 what a sentence meant, we thought we ought to
11 address that. And we suggested that the grammar be
12 changed just a little bit, the punctuation be
13 changed a little bit to make it more clear.

14 **Q. Is this -- this language that the division**
15 **has put in here in 3B, does NMOGA think that it's**
16 **appropriate to have this type of transition?**

17 A. Are you talking about the 18 months?

18 **Q. No, I'm talking about the -- 3B says a**
19 **flare stack installed before June 1, 2021, shall be**
20 **retrofitted with, and then there's some examples.**

21 A. Yes. There are three examples. And we
22 wanted to make sure that it was clear that those
23 were three distinct options.

24 An automatic igniter, a continuous pilot,
25 or technology that alerts the operator that flare --

1 our suggestion -- may have malfunctioned by a
2 particular date.

3 Now, I think they left the word "has" --
4 well, they've accepted that. That's a good thing,
5 because it may have malfunctioned, you need to then
6 respond to check.

7 **Q. Will this language allow for, you know,**
8 **emerging technologies and moving away from manal**
9 **ignition?**

10 A. It does. We appreciate the fact that the
11 division has recognized that we don't necessarily
12 know all the technologies that are going to be
13 available. And so this allows for that to deploy
14 when it's appropriate.

15 **Q. Now, I believe the Climate Advocates had**
16 **proposed changes that would mandate automatic**
17 **igniters.**

18 **Are you aware of that change,**
19 **Mr. Smitherman?**

20 A. I am.

21 **Q. Do you agree with the division that it**
22 **would not be appropriate to -- to mandate and limit**
23 **the options to just automatic igniters for flares?**

24 A. I do. I think the division is correct.

25 MS. FOX: Madam Hearing Officer?

1 HEARING OFFICER ORTH: Ms. Fox?

2 MS. FOX: Just a clarification,
3 Mr. Feldewert. We don't mind this rebuttal coming
4 in now. We just don't want it repeated during your
5 rebuttal case.

6 HEARING OFFICER ORTH: All right.

7 Mr. Feldewert, would you like to clarify
8 your intentions there?

9 MR. FELDEWERT: I guess I don't understand
10 the question.

11 MS. FOX: It's not an objection. It's a
12 clarification. I'm just noting that this is
13 rebuttal testimony, and just making sure that we --
14 we just -- you know, given the time limits here,
15 just making sure that it won't be repeated during
16 rebuttal. That's all.

17 MR. FELDEWERT: I'm just trying to be as
18 efficient as possible.

19 MS. FOX: That's why I'm not objecting.

20 HEARING OFFICER ORTH: Right. Yeah. No
21 objections there, Mr. Feldewert, just a
22 clarification that this is when you are effectively
23 rebutting or addressing something that would not
24 have otherwise come in to Mr. Smitherman's direct,
25 but is coming in now, because you are on the topic,

1 and Mr. Smitherman is on the screen.

2 I think it is more efficient, actually.

3 MR. FELDEWERT: I was going to say, I
4 guess I'm wondering, does that mean I'm not supposed
5 to do this?

6 HEARING OFFICER ORTH: I think it's a
7 great idea myself. It's just that Ms. Fox is
8 clarifying that then we won't hear this exact same
9 testimony again when we start a round of rebuttal.
10 That is all.

11 MR. FELDEWERT: Hopefully we won't have to
12 start a round of rebuttal, but let's see how that
13 plays out. Okay?

14 HEARING OFFICER ORTH: Okay. I think
15 we're on the same page.

16 Thank you. Please continue.

17 Q. (By Mr. Feldewert) So I'm trying to
18 remember where we were, Mr. Smitherman.

19 Essentially, as I understand it, in your
20 opinion and your experience, should the commission
21 require operators to always use automatic igniters?

22 A. No. We believe the commission has
23 properly allowed automatic igniters, continuous
24 pilots, and the opportunity for other technologies
25 that are acceptable.

1 Q. Okay.

2 A. I should say effective instead of
3 acceptable.

4 Q. I believe the division has introduced an
5 Exhibit 4B that addresses what is reflected in
6 Subpart 3E3C here, we see on the screen?

7 A. Yes.

8 Q. Dealing with low-flow gas facilities and
9 wells?

10 A. Yes.

11 Q. And does NMOGA support what the division
12 has proposed under their Exhibit 4B?

13 A. We do. We think that that language
14 properly puts the focus on, in essence, gas
15 production, and recognizes that some pure gas
16 wells -- predominantly, gas wells that are producing
17 60 MCF or less are basically financially challenged.
18 And that's giving them a bit of an extension of
19 time -- not an exemption, but an extension of
20 time -- to apply these rules as appropriate.

21 Q. Now, we see a change here made by the
22 division to Subpart E4, striking "located at a well,
23 but after," and inserting "constructed after."

24 Does that make sense to you,
25 Mr. Smitherman?

1 A. Yes. That's a much, much clearer way and
2 much more appropriate way to require this -- this
3 action.

4 Q. And we see that the division added a last
5 clause to approach the division about an exception,
6 as needed, to the 100-foot requirement.

7 Does that make sense to you,
8 Mr. Smitherman, based on your experience?

9 A. It does. And I suspect that those
10 exceptions are going to be relatively rare.

11 But there are circumstances where it might
12 apply. And the division has to agree that the
13 circumstances are reasonable, when those exceptions
14 are given.

15 Q. I want to go down to -- now I believe as
16 we move into A5, we're dealing with AVO frequencies.

17 Right, Mr. Smitherman?

18 A. That's correct.

19 Q. Now, the division has -- or I'm sorry --
20 NMOGA has proposed a change to Subparagraph 5 here,
21 and I don't think we necessarily have to go to it.
22 It's on page 13 of 27 under NMOGA's Exhibit A.

23 A. I see that.

24 Q. And we've made a reference to -- that this
25 would not apply to sites where AVOs are required by

1 **the NMED.**

2 **Did I characterize that correctly?**

3 A. You did. And basically, it talks about
4 the fact that the NMED is, or can, require AVO
5 inspections.

6 And we want to make sure that there's not
7 conflict between what the OCD requires and what the
8 NMED requires, and that there's coherence, if you
9 will, between those two rules.

10 And so we had suggested that, in
11 essence -- in essence, that the OCD rules would
12 align with the NMED rules.

13 **Q. And we proposed again, on page 13 of 27,**
14 **as an additional sentence to Section 5.**

15 For formatting reasons, it could also be
16 an introductory clause, correct?

17 A. It could, absolutely.

18 **Q. Okay. Now, you see the division made a**
19 **change to Subpart 5A Roman numeral I?**

20 A. I see that, yes.

21 **Q. And there's been -- were you here for the**
22 **testimony as to why that was done?**

23 A. Yes.

24 **Q. And do you agree that it's appropriate to**
25 **add "externally"?**

1 A. I do. I think it was unclear, as -- we
2 wanted to make it clear that when you're doing an
3 AVO, you were simply observing equipment and did not
4 have any responsibility, or any obligation, to open
5 up the equipment or somehow disassemble some
6 equipment specifically looking for broken, damaged
7 seals and gaskets.

8 That was the thing that was uncertain to
9 us. We're perfectly happy with an external
10 inspection, AVO inspection, of even broken, damaged
11 seals and gaskets. That's fine.

12 Q. Now the only thing I want to add to that,
13 **Mr. Smitherman, is, as I understand it -- and**
14 **correct me if I'm wrong.**

15 **Was there some confusion about that point**
16 **when this language was initially examined by NMOGA's**
17 **operators?**

18 A. Well, there was lots of confusion. There
19 was some serious consternation that we were going to
20 have to actually open things up and actually add
21 emissions to inspect these.

22 We thought that was not appropriate. And
23 so we appreciate the clarification by the division.

24 Q. **Now, I'm going to switch gears here.**

25 **Now, I want to bring up NMOGA's proposed**

1 **modifications. And I'm going to stay in Part 27 and**
2 **move to page 13 of NMOGA's modifications on their**
3 **Exhibit A.**

4 A. I'm there.

5 Q. I'm trying to get there.

6 Okay. So NMOGA has suggested a few
7 **modifications to the other aspects of this --**
8 **these -- this AVO inspection provision.**

9 And you'll see that, in Subpart Roman
10 **numeral 3, under 5A, we see that NMOGA has suggested**
11 **inserting hydrocarbon odors.**

12 Do you see that?

13 A. I do see that.

14 Q. Okay. What's the -- what's the basis for
15 **that?**

16 A. Well, these AVOs are, in essence, looking
17 for places where we are leaking, or emitting
18 hydrocarbons that should not be emitted.

19 That's the purpose of this rule. The
20 focus is on waste of natural gas.

21 And so when you're looking for, I guess,
22 unusual -- let's see what it says -- smelling of
23 unusual or strong odors, you're really looking for
24 unusual and strong hydrocarbon odor. You are not
25 looking for unusual, strong odors of some production

1 chemical that might be stored nearby or some other
2 things going on.

3 You're really looking at hydrocarbon
4 odors. When you open it up to just odors, there's
5 an implication that you're looking for residue
6 nuisance. Nuisance is really inappropriate for this
7 rule.

8 Q. Okay. And NMOGA has proposed some changes
9 to the frequencies associated with the various
10 facilities that we see listed here in Subparts B and
11 C on page 13 of 27.

12 A. That's correct.

13 Q. Okay. Now, there's -- were you present
14 for the division's testimony, where they indicated
15 that they don't intend to have a form for these
16 inspections?

17 A. I did hear that.

18 Q. It would be more of a checklist of
19 whatever the operator wanted -- thought would be
20 appropriate, to make sure it was accomplished.

21 Right, Mr. Smitherman?

22 A. That was their testimony, yes.

23 Q. Okay. Would you explain the issues
24 associated with frequencies that go beyond just the
25 document that you're using?

1 A. Certainly. The witnesses that describe
2 this described it as almost -- an almost effortless
3 process, an effortless add to a normal lease
4 operator's duties. It was described that, in
5 essence, the lease operator is doing this every day
6 themselves anyway.

7 And that's, for the most part, true. The
8 things that a lease operator is doing is looking
9 around. I think we're -- you first called it pumper
10 101. But they are looking to make sure that things
11 aren't going wrong.

12 And so the fact that they are looking
13 around -- excuse me -- the fact that they are
14 conducting an official AVO may not make a big
15 difference into the actual work. It may change. In
16 fact, I know one of the witnesses, I think, said
17 that perhaps another agency might put out a
18 checklist for that. So we'll kind of stay tuned on
19 that part.

20 But for -- for -- just under this rule
21 here, the looking around and putting, yes, I -- or
22 no, I didn't smell anything. No, I didn't hear
23 anything. No, I didn't see anything, I think,
24 really is just the tip of the iceberg.

25 The big deal, quite frankly, the

1 administrative word for AVOs is what goes on on
2 site. The training, it's the ongoing training of
3 our -- of our lease operators, because lease
4 operators tend to be relatively tenured employees
5 that tend to move into other positions. So you've
6 got an ongoing training process that is necessary.

7 You have got an administrative process
8 that doesn't have anything to do with the lease
9 operator, in one sense. You've got to have someone,
10 and perhaps hire someone, to take all of this
11 paperwork that the lease operator is bringing, check
12 it to make sure it's right, check it to make sure
13 that we're complete on all the sites that need to
14 have AVOs. Do quality control checks on that,
15 perhaps, and then back out to the field because they
16 didn't do it right.

17 And then you've got the administrative
18 burden of indexing, storing all those documents for
19 retrieval. If you have documents that you intend to
20 stick into a big old bucket, you've got to put it in
21 the system where you can retrieve it, because you
22 may need it to know, and the agency may need to see
23 it. So there is a burden that goes with that.

24 It's fine to do that. We don't suggest
25 not to do it. We're just suggesting that the

1 difference between -- the difference in
2 effectiveness of these AVOs is not going to be
3 materially different if they are conducted to actual
4 official AVOs.

5 But all the paperwork and all the
6 administrative process is going to be basically just
7 as effective for preventing waste on a monthly basis
8 as it is on a weekly basis in this case, and the
9 administrative burden is dramatically reduced.

10 Q. You mentioned monthly. We see that -- if
11 we look at the change -- we don't need to go there.
12 But NMOGA made a change in Part 28 to change the
13 frequency for gathering systems from weekly to
14 monthly.

15 Right, Mr. Smitherman?

16 A. That's correct.

17 Q. And NMOGA's --

18 A. Upstream operations also, too,
19 Mr. Feldewert. You had just said gathering systems.

20 Q. If we look at page 13, NMOGA's made
21 similar changes from weekly to monthly in Part 27?

22 A. That's correct.

23 Q. Okay. Now based on your experience,
24 Mr. Smitherman, you're familiar with these AVO
25 inspections, right?

1 A. I am.

2 Q. Okay. Once you do the first formal AVO
3 inspection, do you get substantial benefit from
4 subsequent AVO inspections?

5 A. I have not seen that. I have not seen
6 that you get a substantial benefit from
7 subsequent -- as long as they're done in a
8 reasonable time frame. And we certainly believe a
9 monthly time frame, in this particular case, is
10 reasonable. And other time frames should be -- I'll
11 call it -- right sized for the situation.

12 Q. Okay. All right.

13 Then I want to move to the measurement
14 sections of these rules. Okay?

15 A. Certainly.

16 Q. And I'm going to switch over to what the
17 division has proposed here. And so now we're moving
18 into Part 27.8F, which is the upstream version.

19 And then the equivalent is version -- for
20 midstream -- is 28.8E.

21 A. I see both of those.

22 Q. Do we see, as we go -- basically, are
23 there similar changes proposed by the division for
24 both the upstream version and the midstream version?

25 A. Yes, sir.

1 Q. Okay. So let's just focus on the upstream
2 version at this point, which is 27.8F, as in Frank.

3 A. Thank you.

4 Q. And the first change we see that the
5 division has proposed is that the operator shall
6 measure or estimate. And I think there was some
7 testimony on that.

8 Do you agree that this is appropriate?

9 A. I do. It's already been established
10 elsewhere in the rules that estimations are
11 acceptable. And so making that -- putting these
12 words "estimate" here is -- it clarifies the rule
13 properly.

14 Q. Now Subpart F2, the division has proposed
15 some language change here.

16 What was the -- what do you understand the
17 purpose behind this proposed language change from
18 the division?

19 A. Well, of course not reading their minds,
20 but it sure seems that they want to ensure that
21 sufficient measurement equipment is installed in
22 these production facilities to be able to measure
23 where measurements can be done. And so that's how I
24 read this.

25 I think the language can be improved, but

1 I think that's their purpose.

2 Q. Okay. Do we have a witness that's going
3 to talk about that further?

4 A. Absolutely.

5 Q. Okay. What was the big concern here,
6 Mr. Smitherman, under the initial language, with
7 respect to the location of the measurement
8 equipment?

9 A. Well, there's kind of two major concerns,
10 that I recall in our discussions.

11 One, the original language was said to put
12 measurement equipment on flow lines. And flow lines
13 is -- I'll call it a term of art in the upstream
14 business -- where that's typically thought of as the
15 piping that goes between the wellhead and the
16 production facility.

17 And so those lines, that we typically call
18 flow lines, contain oil, gas, and water. And it
19 would be inappropriate to try to put, in our view,
20 measurement equipment on a flow line.

21 Now, I know that you've got piping within
22 a facility that things are flowing through. So I
23 can see the purpose -- or see, maybe, the
24 understanding that someone would call that a flow
25 line. But it's not readily understood by the

1 industry that way. So we -- we really wanted to try
2 to clarify that.

3 Q. Okay.

4 A. The second part -- hold on a second -- was
5 that there are -- in essence, there are places in
6 existing facilities that are very, very difficult,
7 if not basically impossible, and at an enormous
8 expense, to retrofit and put measurement equipment
9 in. And so that's in there as well.

10 Q. Now when we get into Subpart F3, the
11 division has made a change where they are now
12 referencing the API manual, petroleum measurement
13 standards, Chapter 14.10.

14 A. I see that.

15 Q. Okay. Is that an appropriate change, in
16 your opinion, based on your experience?

17 A. I do. I think that's appropriate. We
18 appreciate the division accepting that language.
19 And I'm not the measurement expert, so I hope you
20 don't get me into that, Mr. Feldewert.

21 Q. Okay. We'll save that for another
22 witness, then.

23 Then I believe we're down here in
24 Subpart F5?

25 A. Yes.

1 **Q. And the division has added low flow to the**
2 **language here.**

3 **Do you agree that is appropriate?**

4 A. Yes. Low flow rate or low pressure.
5 Those are both appropriate for that.

6 **Q. And two separate concepts, right?**

7 A. That's right. It could have a very low
8 flow rate, like in -- and relatively -- what I would
9 call not low pressure. And that's a difficult thing
10 to measure.

11 And you can have low pressure flow, which
12 also is very, very difficult to measure.

13 So that's when it would be appropriate in
14 those cases.

15 **Q. Now NMOGA had proposed to add to this**
16 **language a reference to low flow or low pressure**
17 **venting and flaring, and then to also add "or during**
18 **drilling operations."**

19 **Are you familiar with that?**

20 A. Yes.

21 **Q. Okay. What was the purpose of the**
22 **suggestion to add "or during drilling operations"?**

23 A. Well, we touched on this briefly in the
24 section on drilling operations, where you've got --
25 I'll call it three -- two major areas of

1 possibilities, where you could have low flow or low
2 pressure.

3 And the idea that during some operations
4 you actually have gases that are being separated
5 from the mud system and work very well with
6 pressures.

7 But we also have situations where you may
8 have a well control problem, and that certainly
9 could be considered low pressure. But in those
10 cases those fluids would be very, very hard, if not
11 impossible, to measure accurately. Because many
12 times you're talking about a Phase 4 flow or Phase 5
13 flow.

14 So we wanted to make sure, from a
15 practical standpoint, that those emissions you
16 would -- would be able to be estimated.

17 It wasn't clear what the division's
18 wanting. And so we would suggest they add "during
19 drilling operations" as well.

20 Q. Okay. So I want to switch now,
21 Mr. Smitherman. I want to stay in this section, and
22 I want to move to NMOGA's modifications, because I
23 think it would be easier to run through the
24 remaining portions here.

25 A. Thank you.

1 Q. We see F5, on page 15 of NMOGA's
2 Exhibit A. There's the language you were talking
3 about "or during drilling operations"?

4 A. That's correct.

5 Q. Okay. On this same page of NMOGA's
6 Exhibit A, NMOGA has proposed to add "all beneficial
7 use gas may be determined through estimation."

8 A. Yes.

9 Q. Was that -- is that a similar change that
10 NMOGA has proposed through Part 28.8E?

11 A. Yes.

12 Q. What's the purpose behind referencing
13 the -- the fact that beneficial use gas may be
14 determined through estimation?

15 A. Typically beneficial use gas is gas, for
16 example, that is firing a burner on the heater
17 treat- -- or line heater or some other type of
18 process equipment.

19 And the gas rates are low there. They're
20 very, very hard, if not impossible, to measure with
21 any accuracy. And quite frankly, the manufacturing
22 data is -- is useful in order to give good estimates
23 for those volumes.

24 So we thought that that would be an
25 appropriate add, to make sure that it was recognized

1 that those volumes could be estimated.

2 **Q. Does that follow the BLM practice?**

3 A. It does. And industry practice, quite
4 frankly.

5 **Q. Then when we move further into NMOGA's**
6 **modifications to this section, I realize the**
7 **paragraph numbers have changed.**

8 What was -- what was Paragraph 6, and is
9 now 7, there's an addition that NMOGA made to
10 reference Paragraph 2 of this.

11 **What's the purpose behind that?**

12 A. This refers back to wells that -- that are
13 flowing low rates and are -- in essence, I think the
14 division witnesses have called them stripper wells.
15 I think that how -- I prefer low flow -- low gas
16 flow wells -- that they recognize that those wells
17 have -- that the operator should be able to estimate
18 volumes from those wells instead of adding expensive
19 measurement equipment.

20 **Q. So essentially, this clarifies when this**
21 **would apply, right?**

22 A. That's correct.

23 **Q. Okay. All right.**

24 And then there's a change that NMOGA has
25 proposed down here at the bottom.

1 A. And may I supplement that -- supplement
2 that answer, Mr. Feldewert?

3 **Q. Yes, sure.**

4 A. I didn't read the rest of the wording on
5 the page.

6 And in essence, this also allows us to use
7 the tried and true GOR with, in essence, methodology
8 that we did hear other witnesses talk about earlier
9 this week in their estimations.

10 **Q. Now let me ask you then about that,**
11 **Mr. Smitherman.**

12 **Are you familiar with the GOR tests?**

13 A. I am.

14 **Q. And have they been utilized for an**
15 **extensive period of time by operators in the**
16 **industry?**

17 A. The best that I know, as long as I've been
18 in the industry.

19 **Q. And in your opinion, is that a good**
20 **methodology for estimating production where it**
21 **cannot be measured?**

22 A. Yes, it is. It's a very, very reliable
23 technique. We appreciate the division recognizing
24 that.

25 **Q. And in fact, there are division rules on**

1 **how GOR testing is to be done.**

2 **Right, Mr. Smitherman?**

3 A. That's true. That's correct. In fact,
4 they are required, if I recall correctly.

5 **Q. Now the change that we see here towards**
6 **the bottom of this page in subpart -- it used to be**
7 **7, it's now 8, with NMOGA's addition of beneficial**
8 **use gas.**

9 **What is the purpose of this introductory**
10 **clause to Part 8, which addresses when the division**
11 **may invoke the right to ask the operator to change**
12 **its methods?**

13 A. Again, you are referring to NMOGA's?

14 **Q. NMOGA's proposed change.**

15 A. Certainly.

16 **Q. So the last paragraph in Subpart F.**

17 A. Yes, our Subpart 8. Our suggested
18 Subpart 8?

19 **Q. Yes.**

20 A. This is -- in essence, it recognizes that
21 the division has the ability and should have the
22 ability to look at an operator's setup and decide
23 whether or not that operator has, in essence, done
24 what they should, done what is sufficient in being
25 able to estimate volumes correctly.

1 And it is a process, if you will, for the
2 division and the operator to have a conversation
3 about that and come to some agreement as to what the
4 right methodologies would be or, perhaps, having to
5 add some measurement equipment, if that's the
6 decision the division finds.

7 **Q. So, Mr. Smitherman, when I look -- when I**
8 **look at this, all it does is ask that the division**
9 **give notice to the operator that they think there**
10 **should be a request or change in the measurement or**
11 **the estimation of it, right?**

12 A. Yes.

13 **Q. And then give an operator at least a**
14 **reason for why they think that way?**

15 A. Certainly. They -- I would expect the
16 division, who would want the revision -- and not
17 that this division would do this. But this rule is
18 going to be in place for a long time. We would not
19 want to have a division just decide to call up
20 someone and say, We want to look at your
21 measurements.

22 Well, let's have a reason that you think
23 that this is inappropriate. Do we want to do a full
24 inspection? Do you want to pull data or analytics
25 that would indicate that there is something wrong

1 here?

2 Q. And would that -- would that allow,
3 Mr. Smitherman, the opportunity for the operator,
4 then, to decide whether that change should be made,
5 or if they disagree, they could seek a hearing?

6 A. Exactly. It's a conversation. It's a
7 process that we think is fair to both the division
8 and the operator that the reason -- that there be a
9 conversation. If there's an agreement, that's where
10 it ends. If there's a disagreement, you can go to a
11 hearing for third-party relief, so you can hear from
12 both sides.

13 Q. All right. Then I want to move into
14 Subpart G.

15 In 27.8, is the report of vented or flared
16 gas. We've addressed some of this, but I want to
17 address some of the remaining proposed changes.

18 A. Certainly, sir.

19 Q. And this is comparable to upstream
20 Section 28.8F, as in Frank.

21 Right, Mr. Smitherman?

22 A. Correct. That's correct, yes.

23 Q. And has NMOGA proposed similar changes to
24 both provisions to the comparable paragraphs?

25 A. We have.

1 Q. Now, the first change that NMOGA has
2 proposed we see here in G1A.

3 Actually, there's two changes there,
4 right?

5 A. That's correct.

6 Q. Okay. Would you explain the basis for
7 both changes?

8 A. Certainly. Let's start with the first
9 one.

10 Not auth- -- basically, our words would
11 say that is not authorized by the NMED, the US EPA,
12 or a tribal authority, with Clean Air Act
13 delegation.

14 The purpose of this is, again to try to
15 prevent a conflict, a duplication, an overlap of
16 authorities, if you will, from those agencies and
17 the NMED.

18 We think it's very important that those
19 agencies, if you will, stay within their operational
20 lanes. It's actually what we've heard some of the
21 division witnesses testify to. And by adding this
22 language it makes it clear that that will occur.

23 And the second part, this -- for the
24 single event, it makes it clear that a site can have
25 maybe two events in a day and one of them may be

1 smaller than 50, and the other event may be smaller
2 than 50. But combined between the two, maybe 52
3 MCF.

4 And so we wanted to make it clear that
5 each event stood on its own.

6 Q. So this would, for example, not then
7 require notice of a release in excess of 50 MCF
8 under C 129, where those releases are regulated and
9 authorized by other agencies, correct?

10 A. That's correct.

11 Q. Okay. Now the other change that we see
12 here in Subpart G1A that NMOGA has proposed, is
13 added language "not only from the single event,"
14 which you've already discussed.

15 But you look under G1A Roman numeral I, we
16 see adding the phrase "with information available."

17 A. I see that.

18 Q. Then you see a similar change in Sub G2,
19 or G Roman numeral 2?

20 A. Yes.

21 Q. Until we get to the final form in G Roman
22 numeral 3?

23 A. I see all of it.

24 Q. Mr. Smitherman, you understand that this
25 is -- section here deals with reporting of releases,

1 **and then a sequence of reporting based upon the time**
2 **frames involved, correct?**

3 A. That's correct.

4 Q. Okay. What is the purpose of adding the
5 **phrase "information available" at each of these**
6 **stages until you get to the final report?**

7 A. Well, in fact, I think even one of the
8 division's witnesses touched on this.

9 You -- you may have an event that begins,
10 and you've got -- an operator has an obligation to
11 report the fact that that venting or flaring event
12 that's unusual has begun. And that would be
13 required in a particular time frame on the C 129.

14 Well, the thing is, it may not -- the
15 operator may not have all the information that they
16 need to describe that at the time that they sent in
17 those forms.

18 But by the time you send in the final
19 form, that operator should have the opportunity --
20 or should have the obligation -- to give you --
21 well, certainly, as complete of information as they
22 have at the time it began, but more complete
23 information.

24 So it recognizes the reality that you may
25 not know everything when you file your initial

1 C 129, that you will ultimately put in for the
2 division's knowledge and records on your final 129.

3 Q. This does not at all change the fact that
4 if you're submitting the final form you provide all
5 of the required information?

6 A. Indeed.

7 Q. Okay. And --

8 A. It essentially recognizes --

9 Q. Excuse me.

10 A. It essentially recognizes that the
11 operator may or may not know everything on that,
12 when they file their first form, that they will
13 ultimately know when they file their final.

14 Q. Okay. All right.

15 So now we move into G1 Subpart E. And I'm
16 on page 17 of NMOGA's proposed modifications.

17 So now we're talking about the same
18 release events. And now we're talking about what is
19 reported during a venting or flaring gas event.

20 Mr. Smitherman, is that right?

21 A. That's correct.

22 Q. Okay. And the first change NMOGA has
23 proposed is that in the final form it provides a
24 representative analysis of a vented or flared
25 natural gas?

1 A. Yes.

2 Q. And you were -- were you here -- the
3 testimony, I believe it was Mr. Powell, that
4 indicated that the division might see a
5 compositional analysis?

6 A. I saw that.

7 Q. Do we have any concerns about that?

8 A. No. Quite frankly, I see the word
9 "analysis," and I think compositional analysis.
10 So there is no difference to me, in my
11 knowledge.

12 Q. Nonetheless, does NMOGA think it's
13 important to have the word "representative" either
14 in front of compositional analysis or in front of
15 analysis?

16 A. We do. It makes a difference. You know,
17 there's kind of several aspects to this.

18 You talk about analysis of -- you see the
19 words "analysis of vented or flared natural gas."

20 The implication to me, to NMOGA, is when
21 you say you want an analysis of the vented gas, that
22 is of the gas that has been vented.

23 Well, that's virtually impossible to do.

24 It also -- the possibility of getting a
25 sample of the gas that's flared, very difficult, if

1 not impossible to do.

2 But what we're suggesting is -- and
3 there's another issue besides just the physical
4 difficulty of obtaining those samples to get
5 analyzed -- is the time frames.

6 If you are dealing with something that you
7 need to focus on, minimizing that venting or flaring
8 event, you really want to be focused on that.

9 And quite frankly, the operators have
10 analysis and can get analysis of the gases that are
11 going through their facilities to give the division
12 a representative analysis of what that gas was.

13 And so that's what we're suggesting. It's
14 both a practical matter from the standpoint of being
15 able to capture a sample that's actually the gases
16 of the venting and the flaring, but also a focus
17 during the time that this venting and flaring event
18 was occurring.

19 So let us be able to give you good,
20 reliable data on what we best can estimate was the
21 gases that were being vented or flared using
22 representative samples of -- to do so.

23 **Q. You mentioned the physical aspect of**
24 **trying to get a sample while flaring, for example,**
25 **is going -- or venting is going on.**

1 A. Yes.

2 Q. Is there a safety issue that arises if
3 operators read this as requiring them to go out and
4 get an actual sample of the vented gas or the flared
5 gas at the time that it -- and at the point where
6 it's occurring?

7 A. It's not a practicality issue; it's
8 definitely a safety issue of sending someone into
9 that area to capture a sample.

10 Q. And in your opinion, will requiring
11 operators to get a representative analysis, or even
12 getting a representative compositional analysis,
13 meet the intent of the division in understanding --
14 timely understanding what is being vented or flared?

15 A. We believe so. We believe that this
16 really is a more practical way to get the data that
17 they need.

18 Q. Okay. Then we have some substantial
19 changes down here in Subpart 27.8G1B Roman
20 numeral 7?

21 A. Yes.

22 Q. On page 17 of NMOGA's Exhibit 2A.

23 First off, Mr. Smitherman, is this just an
24 upstream change, Part 27 change?

25 A. I've got to say, I don't recall. I want

1 to be sure that I answer that properly.

2 Q. I'm going to help you out and represent
3 that it is.

4 A. I'm going to help you out and believe you.
5 So yes, it's just upstream.

6 Q. Okay. And in this particular section now,
7 NMOGA is proposing to add various categories for
8 reporting -- the initial reporting under the C 129?

9 A. Yes.

10 Q. And do those categories match what NMOGA
11 has proposed be reported under Subpart G2?

12 A. They do. In fact, that adds, we believe,
13 clarity to what the division will receive from
14 operators.

15 If you have these categories, these
16 reasonable high-pressure categories that you can
17 have a -- can measure accurately enough for
18 production accounting purposes, it seems that the
19 operator can categorize those venting or flaring
20 events that they are submitting on the C 129 the
21 same way. And that would give, in essence, clarity
22 to the division as to the character of these
23 emissions -- these releases, excuse me.

24 Q. Now when I first looked at this, it took
25 me a while to figure it out, so I think it's

1 **important to understand the context here.**

2 **G -- the section we're in now is the C 129**
3 **reporting.**

4 **Right, Mr. Smitherman?**

5 A. Yes.

6 **Q. And that occurs at the time that -- or**
7 **certainly after the time -- that the initial event**
8 **occurred?**

9 MR. AMES: Objection. Counsel is
10 testifying now. He should be asking non-leading
11 questions of the witness.

12 HEARING OFFICER ORTH: Yes.

13 Mr. Feldewert, if you would dial back the
14 leading nature of your question.

15 Mr. Smitherman is an expert, but it's been
16 continuing.

17 **Q. (By Mr. Feldewert) Mr. Smitherman, when**
18 **you look at the structure of this rule -- and we are**
19 **in Subpart G1 -- what does this relate to?**

20 A. Well, G1 -- you know, actually I mentioned
21 this in my opening remarks, that we're intending to
22 make modifications to this rule that streamline and
23 enhance the episodic -- the reporting of episodic
24 releases.

25 And that's what this is. We're talking

1 about things that are not, if you will, normal,
2 routine, every day, every minute of every day.

3 These are episodes that are going to be
4 reported that have different thresholds. If it's
5 less than 50 MCF per day, it's not reported as an
6 episodic event.

7 If it's greater -- or equal to or greater
8 than 50 but less than 500, it's reported with the
9 certain requirements.

10 If it's over 500 MCF it's reported with
11 other requirements.

12 So if these -- these episodes are all
13 going to be reported, not only are they ultimately
14 going to get involved in monthly reporting, but
15 we've been talking about these episodic events that
16 are reported in C 129.

17 Q. Let me interrupt you here.

18 You mentioned what -- we see here in G1B
19 is taken from the categories in G2?

20 A. Correct.

21 Q. That NMOGA has proposed as the categories
22 where you can measure or estimate?

23 A. That's correct.

24 Q. Okay. What's the -- we're in G2.

25 What's the reporting under that? Is that

1 **the episodic reporting or the monthly?**

2 A. That's monthly reporting.

3 **Q. All right. So then now that we had that**
4 **background, what is the efficiency of reporting**
5 **under these categories at the time that the event**
6 **occurs?**

7 A. Well, it makes clarity -- creates clarity
8 for both the operator and the division. If you
9 categorize these episodic releases the same way that
10 you're going to categorize the monthly reporting,
11 then one simply flows clearly from one type of event
12 to the other monthly reporting concept.

13 There isn't any need to describe something
14 that you just -- where a -- what might have happened
15 for the division to kind of figure out what category
16 to put that in.

17 We're telling you, the division, through
18 this reporting process that -- for example, if it
19 was an emergency, and that volume is going to end up
20 with certain limitations in the category in the
21 monthly reporting under emergency.

22 So it seems to me that it is a way to make
23 things much more clear and to categorize things for
24 both the benefit of the operator and the benefit of
25 the division.

1 Q. Does this also, then, have the benefit of
2 being able to eliminate an unnecessary form for
3 upstream operators?

4 A. Yes. It took me a while to remember that.

5 The concept is that NMOGA is going to
6 suggest enhancing the C 115 form to -- to supply all
7 the information that the division, in essence, would
8 need to regulate this -- this part of our industry.

9 And it would, therefore, not need an
10 additional form to C- -- the suggested C 115B that
11 we haven't seen yet, but has been suggested.

12 Q. I want to move down to the bottom of
13 page 17 of NMOGA's Exhibit A.

14 A. Yes.

15 Q. We see what NMOGA seeks to strike "and
16 certify" in this particular paragraph?

17 A. That's correct.

18 Q. Is there a similar change in corresponding
19 Part 28 at subparagraph F1C?

20 A. Yes.

21 Q. Okay. Now, explain what is being sought
22 under these paragraphs and why NMOGA has proposed to
23 strike "and certify" in these -- this type of
24 paragraph.

25 A. Certainly. When operators file reports

1 and file forms, they typically do so with a
2 certification. In fact, the forms typically include
3 the certification language. And the operators are
4 fine with that. NMOGA is fine with that.

5 The problem here is that the division's
6 request that the operator shall provide additional
7 information by some specified date.

8 And that additional information may not be
9 something that the operator can certify. Quite
10 frankly, we certainly don't even know what it's
11 going to be, with the words in this page. And I'm
12 sure that the operators will do their best to give
13 the information to the division that they need.

14 But to claim, if you will, that an
15 operator can certify something before they even know
16 what it is seems inappropriate.

17 **Q. Mr. Smitherman, does that have particular**
18 **relevance if the additional information being sought**
19 **was from a third party?**

20 A. Absolutely. In fact, I'm sure that that
21 may come up very often.

22 **Q. You know, it -- would you agree that -- is**
23 **it difficult to certify, as the information that you**
24 **obtained from a third party?**

25 A. I guess it's possible, but it sure seems

1 very difficult. And certainly, the operator doesn't
2 have the authority to require that third party to
3 give them certifiable information. And in fact,
4 maybe not even have the opportunity to -- if you
5 will -- audit where that information came from.

6 So we may be relying on information, and
7 we'd be happy to pass that on to the division.

8 But claiming we could certify that is
9 inappropriate.

10 Q. Now, I move to the next page. It would be
11 18 of 27 of NMOGA Exhibit A.

12 And we see a change to Subpart 27.8G1D, as
13 in David?

14 A. Yes.

15 Q. And I'll represent to you, Mr. Smitherman,
16 that NMOGA has made a similar change in
17 corresponding Part 28 in F1D, as in David.

18 Were you here yesterday when Mr. Powell
19 discussed the intent of the form C 129?

20 A. Yes.

21 Q. And were you here when he testified that
22 the intent is to use a C 129 in lieu of a C 141 for
23 gas releases?

24 A. Yes.

25 Q. And when you look at this provision as

1 **drafted by the division, and when NMOGA looked at**
2 **it, was it unclear to operators whether they were**
3 **going to be required to file a C 129 under this rule**
4 **for gas release, and then file a duplicative form**
5 **C 141 for that same gas release under existing**
6 **Rule 29?**

7 A. Yes. There was a lot of concern about
8 that. You know, we certainly recognize the need to
9 file this information. And I, quite frankly,
10 believe that that Rule 29 needs to have some
11 corrections to it, to allow what that earlier
12 witness basically said, is that the C 129 would be
13 used for gas releases and the C 141 for liquid
14 releases.

15 I don't recall him saying that the
16 division was planning on making that change, but it
17 seems inconsistent.

18 If that's what the witness represents that
19 these forms are going to be used for, then we do
20 need to try to make sure that we don't have, I
21 guess, rules that are at cross-purposes with each
22 other.

23 Q. **And for the record, when you look at the**
24 **reference in NMOGA's proposed change here to**
25 **19.15.29, that's an existing rule.**

1 **Right, Mr. Smitherman?**

2 A. That's correct.

3 **Q. And the C 141 is a form that's filed under**
4 **that existing rule?**

5 A. That's correct.

6 **Q. And the C 129 is a form that's going to be**
7 **filed under this proposed rule?**

8 A. Yes. That's what we understand is being
9 proposed.

10 **Q. And what -- and is the intent of NMOGA's**
11 **change here to make it clear that you don't --**

12 MR. AMES: Objection, leading. Objection,
13 leading.

14 **Q. (By Mr. Feldewert) Mr Smitherman, how**
15 **would you propose we take care of this proposed**
16 **change?**

17 A. The objective is to try to clarify the
18 regulatory certainty that a -- that a C 129 will be
19 used for the gas releases, that C 141 will be used
20 for liquid releases, and that these rules will not
21 have conflicting requirements.

22 **Q. Okay. All right.**

23 **Then I want to move to NMOGA's change**
24 **here -- changes here to Subpart G2, which is the**
25 **monthly reporting.**

1 Now the changes that we see here,
2 **Mr. Smitherman, are they similar changes to the**
3 **Part 28 rules under F2?**

4 A. Yes, sir. That's correct.

5 Q. Okay. Can you -- before we get into this,
6 can you explain the purpose of the changes that we
7 see to this introductory clause in Subpart 2?

8 A. Certainly. There is a -- in essence, a
9 transition that's being contemplated here.

10 And the division recognizes, and NMOGA
11 recognizes, that there are requirements that need to
12 be phased in.

13 And in essence, this makes it clear, first
14 of all, that the quarterly reports are going to
15 conform to what people typically think are the
16 quarters -- July, August, September being the third
17 quarter; October, November, December being the
18 fourth quarter.

19 The original language didn't have that.
20 It started in June, which seemed a little odd. It
21 was, in essence, if reported quarterly, then you're
22 leaving December out.

23 So part of that was simply aligning it
24 with kind of normal expectations of quarterly
25 reports.

1 We also put in dates for when those
2 quarterly reports would be due, which conforms with
3 the division's requirement now that production
4 reports be due -- I think the term is 45 days, the
5 second month after production.

6 So we tried to be consistent with the
7 current requirements of the division to set up that
8 timing.

9 That's the first one. I think that's what
10 you are referring to, sir.

11 **Q. Then I see some changes to the second**
12 **sentence, and I see a reference to a form C 115.**

13 **Do you see that?**

14 A. Yes.

15 **Q. What's the purpose of this change?**

16 A. Well, the current production -- monthly
17 production is currently reported on a C 115, and
18 that's been in place for a long, long time.

19 And the proposition here, I guess, is what
20 I am trying to get to here, with the right word to
21 use, is that the C 115, since it's a monthly report,
22 would not start until January of 2022.

23 But we want to make it clear that these
24 reports report volumes in these categories. As we
25 suggested, it would be reported on a quarterly basis

1 in 2021, the second half of 2021.

2 We haven't seen it yet, but we hopefully
3 will see it. And once we get past that transition
4 period we'll start reporting on a monthly basis, and
5 we suggest on this enhanced C 115 form.

6 **Q. So I see that NMOGA has, for example,**
7 **stricken the reference to a form C 115B and replaced**
8 **it with a form C 115?**

9 A. That's correct. We believe that the
10 C 115B will be unnecessary if you accept the
11 modifications from NMOGA and focus on those
12 categories of vented or flared gas that can be
13 estimated or measured with reasonable accuracy for
14 production accounting purposes.

15 And so there's no need to have a second
16 Form 115B. We can simply report this on our normal,
17 already established C 115, with some modifications
18 to our systems to do so. I'm not going to say
19 that's a trivial matter.

20 But certainly, being able to enhance the
21 C 115 seems like a more reasonable expectation than
22 having, yet, a second form to the upstream side.

23 **Q. Would this C- -- and this would be for**
24 **upstream operators?**

25 A. That's correct.

1 Q. Okay. Now, NMOGA has not proposed using a
2 C 115 for midstream operators.

3 Right, Mr. Smitherman?

4 A. That's correct.

5 Q. Why is that?

6 A. Well, currently, midstream operators don't
7 report monthly reports to the division at all. I'm
8 going to say at all. That's probably -- but as I
9 said earlier, "all" is a pretty big word.

10 But they don't report these -- these
11 volumes to the division.

12 So the division, if they come up with a
13 new form, we're happy for it to be named a 115B, so
14 that it could be used by the midstream sector.

15 Q. So they can --

16 A. It might be different. Quite frankly, it
17 would be different than the content that's reported
18 on the upstream C 115. So it would make good sense
19 that you would name it differently and, perhaps,
20 have a different form.

21 Q. Okay. Now, you mentioned the challenges
22 associated with getting to the point where the
23 production accounting systems can be adjusted for
24 upstream operators to address the detail that's
25 going to be required under this Subpart 2?

1 A. Yes.

2 Q. I see that the division -- or NMOGA has
3 proposed to add the language -- and I believe in the
4 second sentence. In the opening provision it says
5 "unless otherwise approved by the division beginning
6 January of 2022."

7 A. That's correct.

8 Q. What's the purpose of that change?

9 A. I -- it's certainly not clear in the
10 proposal from the division that there's a
11 recognition of how difficult that this process of
12 changing our production accounting systems really
13 is.

14 It may take more time to even
15 accomplish -- maybe even manually -- getting these
16 reports in to the division.

17 And we would like the opportunity to at
18 least come talk to the division about that -- that
19 challenge, should it come up.

20 Q. Okay. Okay.

21 Then we move into the reporting categories
22 that the division had proposed.

23 And these -- this is the area where we
24 have -- NMOGA has proposed to remove five of the
25 proposed reporting categories.

1 Right, Mr. Smitherman?

2 A. That is correct.

3 Q. And if we see, this is where, also, NMOGA
4 then added a reporting category for what we call a
5 delineation well, that would now be called an
6 exploratory well?

7 A. That's correct.

8 Q. Okay. What I want to do -- and what we
9 have not done yet is, I want to take advantage of
10 your expertise and experience here.

11 And I want you to walk us through,
12 starting with the removal of the activities in what
13 the division had put as Subpart D, and explain
14 why -- explain what's involved with those activities
15 and why it should not be a reporting category here
16 in G2 for purposes of addressing the gas capture
17 obligations.

18 A. Certainly. I'd be happy to do so.

19 Let's start with routine downhole
20 maintenance, including operations of workover rigs,
21 swabbing rigs, coil tubing units, and similar
22 specialty equipment.

23 Let's start with workovers.

24 When you're doing a workover on a well,
25 the very first thing that you typically do is kill

1 the well. That means pumping in enough fluids,
2 typically produced -- fresh water, to stop the well
3 from producing anything. Because you're then going
4 to take off the wellhead and replace it with a
5 blowout preventer that is really there for the
6 safety, if you need it.

7 But for the most part, most of the time
8 that you're working on a well, those blowout
9 preventers are wide open, and so the well is wide
10 open, and you've got people standing right there
11 next to, or back above the well itself.

12 So you want to make sure that that well is
13 dead. It's not producing anything.

14 So first of all, you kill it with the
15 water, the produced water.

16 And if something happens and the well
17 starts slapping on and starts producing a little bit
18 of something, then you'll start seeing -- hearing or
19 seeing or feeling some kind of flow from the well.

20 Well, you're going to kill the well again.

21 Let's think about the physics of this.
22 When you pump in water to that well the first time,
23 the second time, the third time, as long as you have
24 to do so, that water is going to basically fall down
25 piston-like through that well, wellbore, to the

1 point where it's down at the bottom of the well and
2 creates a hydrostatic -- sufficient hydrostatic
3 pressure to overwhelm the formation, keep the well
4 from flowing.

5 When you do that, first of all, water
6 falls down piston-like. Well, what does it pull
7 behind it? It pulls air into the wellbore.

8 So quite frankly, the first thing that you
9 get, if the well starts trying to produce, is air.
10 Okay? You've got an opportunity to recognize that
11 you've got a little bit of an imbalanced situation,
12 so we can come and bring more water into the well
13 again.

14 Well, that's going to put -- first of all,
15 it's going to push the air that was already in the
16 wellbore further down and it's going to bring more
17 air into the wellbore.

18 So you've got the ability to keep your
19 crew safe by keeping the well killed.

20 But you also, at the same time, are
21 introducing air into the wellbore and, perhaps, air
22 into the reservoir as you kill it.

23 So you've got your workover finished,
24 you're going to try to rig back up, and you're going
25 to try to put the well back on production.

1 The first thing that comes out of the
2 well, probably, is going to be contaminated with
3 air, or maybe all air.

4 So what you want to do is, you want to get
5 the well producing. So you want to have the minimum
6 back pressure possible, so you may be flowing it to
7 an open tank.

8 You may be swabbing the well, which
9 basically is helping lift the fluids out of the
10 well, to get the well going again.

11 And as soon as the well gets going again,
12 you want to put it down the line so that you can
13 sell your product. You can have oil, gas, and
14 water, perhaps, coming from the wellbore.

15 So we -- and also natural gas emitted
16 during the workover process are either de minimus or
17 almost nonexistent. But they're certainly not --
18 they wouldn't meet pipeline specifications, because
19 of the fact that you're using water to kill the well
20 that pulls air in it.

21 So it's two things.

22 Number one, the emissions, because of that
23 wellbore -- that workover bore are very, very low
24 and not waste, even if they did have hydrocarbons in
25 it.

1 And number two, you've actually introduced
2 another place where you can get oxygen in the
3 reservoir itself. So --

4 **Q. Stop right there, Mr. Smitherman.**

5 **You talked about the emissions that may**
6 **occur here.**

7 **Is that a type of emission that you can**
8 **measure?**

9 A. It would be virtually impossible to
10 measure the hydrocarbon volume, both because it's a
11 low pressure at the time that you're working on the
12 well, and it's -- quite frankly, you don't know
13 whether it's air or gas.

14 **Q. Okay. What about the other activities**
15 **listed here?**

16 A. Coil tubing units. Coil tubing units are,
17 in essence, a -- it's -- it's pipe that is malleable
18 enough that it can be actually rolled up on a spool.
19 That's why they call it coil tubing.

20 And you bring a unit out that has -- this
21 big truck unit that has this coil on it, and you run
22 this -- this pipe into the well. It straightens it
23 back out, runs it into the well, so you can either
24 drill something out, you can circulate something
25 out. You can do things with the coil downhole by

1 pumping something through it.

2 You can pump water, you can pump gas, you
3 can pump hydrogen. And so you're going to get, in
4 essence, flows back to the surface that you are
5 taking to, typically, an open tank.

6 Atmospheric pressure, unsteady flow, like
7 Mr. Bolander talked about slow flow, that would be
8 appropriate here.

9 And so from that standpoint, you're not
10 going to have any gases that you really can capture.
11 So it's not waste.

12 Number two, you can't measure or even
13 estimate it with any accuracy.

14 **Q. What about -- do we need to cover swabbing**
15 **leaks, or is that similar?**

16 A. I think it's -- it's similar, in the sense
17 that you've got to -- what you're doing is you're
18 trying to, in essence, pull the liquids out of the
19 well using a wireline conveyed device. This is --
20 this is kind of what are called chevron cups that
21 are on the end of the wire line that you run into
22 the well. And as you pull up, the cups open up and
23 ride along the inside diameter of the tubing itself,
24 so that you can lift liquids out.

25 And the concept is, you're trying to

1 remove the liquids from that well so that that well
2 can start flowing on its own, perhaps. Or you're
3 swabbing back fluids that you would like to get out
4 of the reservoir quickly.

5 So you've got an acid job, and you'd like
6 to bring those acid -- spin acid pullups out of the
7 well quickly.

8 But all of that is being done into an
9 open-top tank. It's all being released at the
10 surface. The gases are atmospheric pressure.
11 They're not steady. Many times they're contaminated
12 with things that are not normal natural gas.

13 So it would be inappropriate to try to
14 even estimate what kind of volumes they would be.

15 **Q. So if you move on to liquids unloading.**

16 A. Liquids unloading is a very
17 well-established methodology for management of gas
18 pumps.

19 I think we've already heard a little bit
20 about manual liquid unloading from others.

21 I'll delve into it a little bit, just to
22 make sure we all understand what this is.

23 Gas wells typically start off with enough
24 flow, enough velocity, that they actually bring
25 whatever liquids are in the flow to the surface.

1 There is virtually no gas well that I've ever been
2 around that doesn't produce some liquids.

3 Those liquids could be liquids in the
4 reservoir, like water -- basically, produced
5 saltwater, or they could be liquids that condense
6 out of the gas as you change pressure and
7 temperature.

8 But virtually every gas well has some
9 liquids associated with it.

10 And as long as the velocity, upward
11 velocity of the gas is sufficient, then those
12 droplets of water are simply blown out of the well
13 just through the velocity of the gas.

14 But at some point in the well's life the
15 reservoir pressure declines, the well's production
16 declines, and the well is no longer capable of
17 producing at a rate that gives you a sufficient
18 velocity to lift those liquids, and they start
19 building up in the wellbore.

20 And as you build up liquids in the
21 wellbore, you're building up hydrostatic pressure in
22 the reservoir; and, therefore, causing the reservoir
23 to have more back pressure; and, therefore, less
24 flow rate.

25 And at some point you need to get those

1 liquids out of the well.

2 There are many techniques that can be used
3 to deliquesfy gas flow. In fact, there's two
4 textbooks on that subject.

5 And the operator basically optimizes which
6 of those techniques is appropriate for a particular
7 well based on whatever parameters are used in that
8 decision.

9 And so one of the techniques is simply
10 doing what they call a manual liquid unloading,
11 which is reducing the surface back pressure on the
12 well to allow the well to flow at a higher velocity
13 and lift those liquids to the surface naturally.

14 Once those liquids have been lifted to the
15 surface naturally, the well is put, in essence, back
16 through the regular production stream, back against
17 the back pressure of the gathering system, and
18 restored to production.

19 If you didn't do that, we would be leaving
20 reserves in the well, which would be wasting money
21 also.

22 So those volumes come to the surface, and
23 they are very difficult, if not impossible, to -- to
24 measure with any accuracy. You're taking them
25 through a -- typically a tank. And that tank starts

1 off being simply full of air.

2 So you don't -- first of all, you can try
3 to measure the gases that come out of the tank. You
4 don't know -- let's back up.

5 You can't measure the gases before they
6 get to the tank, because that's gases and liquids.
7 So that defeats the purpose of trying to use a gas
8 meter.

9 If you try to measure those gases after
10 the tank, you've got the possibility -- the reality,
11 that some of that gas is going to be air. Air is a
12 gas too. Right?

13 So that makes it very, very difficult to
14 measure or even estimate. And it certainly is gas
15 that cannot be captured for sale. It's certainly
16 contaminated with air, and it's too low of a
17 pressure to capture. It makes it pretty --
18 basically unfeasible to do so.

19 **Q. And I think you touched on this a little**
20 **bit. Now the next category that NMOGA has proposed**
21 **to exclude is uncontrolled storage tanks. So it**
22 **would be emissions, I guess, from uncontrolled**
23 **storage tanks.**

24 **What are these, Mr. Smitherman, and why**
25 **are they -- is it not appropriate to have this as a**

1 **reporting category in a production accounting**
2 **provision?**

3 A. Well, start off by saying that we -- the
4 emissions from uncontrolled storage tanks are not
5 waste. They're not excessive. They're not --
6 they're necessary.

7 We've used the term "into the line."

8 As you produce oil and take that oil
9 through separators at lower and lower pressures, oil
10 evolves gas out of it. It's like opening up a
11 bottle of soda and seeing that -- wait a second.
12 There weren't any bubbles in that bottle before I
13 opened it up, and all of a sudden there's bubbles,
14 and where did that come from?

15 Well, the carbon dioxide in that soda
16 bottle was dissolved in the soda. When you drop the
17 pressure by opening the bottle up, it evolved carbon
18 dioxide out of that liquid.

19 It's a similar -- not exact -- but a
20 similar process when you produce oil. Oil has in
21 it, with reservoir temperature and pressure,
22 components that, once you get to the surface, they
23 no longer want to stay in solution, and so they will
24 flash.

25 That's where you -- you've have heard the

1 term "flash." And as you drop oil different -- to
2 lower and lower pressures, you will flash off
3 additional gas.

4 And if you've got an uncontrolled storage
5 tank, you've got it uncontrolled because the NMED
6 has decided that the amount of emissions coming from
7 that tank do not meet the thresholds that they've
8 decided for the air emissions control.

9 You have, perhaps, already put vapor
10 recover, some kind of a process equipment in place
11 that takes the last bit of flash gas off after you
12 flash from your lower -- maybe I'll call it the
13 lowest pressure separator, and are sending those --
14 those liquids in flash gases to a storage tank.

15 If you've removed those vapors at lower
16 low-pressure gas, using some kind of equipment like
17 a vapor recovery unit, then by the time that oil
18 gets to the tank we have removed everything that you
19 can economically remove.

20 So it's -- it's not capturable. It's not
21 waste. It's recognized by the NMED as below their
22 thresholds. And it's, first of all, not appropriate
23 to -- to measure.

24 But then you've also got the physical
25 challenge of actually trying to measure something

1 that starts off with a few ounces above atmospheric
2 pressure. And that's an enormous -- basically
3 impossible, in my view -- challenge.

4 So it can't be measured. It's not waste.
5 And so we're suggesting that that be eliminated.

6 Q. What about the next category that NMOGA
7 has proposed to -- well before we get to that,
8 Mr. Smitherman, I'm looking at subpart -- what's
9 Subpart G in NMOGA's proposal. It's Subpart D, as
10 in David, on page 19.

11 It's talking about insufficient
12 availability or capacity in a natural gas gathering
13 system.

14 There's a phrase --

15 A. I'm sorry. Which section are you
16 referring me to? I'm sorry.

17 Q. It would be Subpart D in the middle of
18 page 19.

19 A. I got you. Thank you.

20 Q. And I didn't want to skip over this. You
21 see there's a suggestion to remove a phrase in that
22 particular subparagraph.

23 What's the purpose there?

24 A. We've suggested striking the phrase
25 "separation phase of completion operations."

1 And that focuses this reporting category
2 on any time that an operator is flaring or venting
3 gas because of insufficient availability or capacity
4 in a natural gas gathering system during production
5 operations.

6 I think that maybe that's kind of a street
7 term for routine flaring, if you will.

8 And so the -- the separation phase of
9 completion operations are treated differently, by
10 regulation.

11 And the production operations are when you
12 can actually have gas going to your production
13 facilities, the definition that -- I might be
14 comfortable with my memory -- is basically when an
15 operator, when -- when production is steady and the
16 flow of crude oil, water, and gas can be sent
17 through the production operations, so that you can
18 actually sell the gas.

19 So in essence, it's the time -- it's the
20 time frame of a well when the actual natural gas
21 gathering system capacity would even be relevant.

22 **Q. Again, I see in the sub- -- in this**
23 **subparagraph here, which I think the division has as**
24 **H, we have as E, that dealt with gas not suitable**
25 **for pipeline specs?**

1 Is that correct, Mr. Smitherman?

2 A. That's correct.

3 Q. We've already discussed this, correct?

4 A. We have.

5 Q. Okay. And this is where the division has
6 it split out between oxygen and other impurities?

7 A. That's correct. We talked about that a
8 lot.

9 Q. And this language change that we proposed
10 would eliminate those distinctions as well as
11 eliminating the reference to specific contaminants?

12 A. That's correct.

13 Q. Okay. Then let's move to Subpart I. This
14 involves a reference to pneumatic controllers and
15 pumps.

16 Why has NMOGA proposed that this category
17 should likewise be removed for reporting purposes
18 when it comes to production accounting?

19 A. Well, there's a couple of reasons that
20 we've suggested this.

21 I guess the first is that it's necessary
22 and not excessive to use gas for pneumatic devices
23 and pumps. So that seems to meet the definition of
24 waste. So first of all, it is not waste.

25 Number two, these emissions cannot be

1 measured with any reasonable accuracy for production
2 accounting purposes. I know that there is reported
3 ways to estimate them. But quite frankly, the
4 factors -- the emissions factors that take into
5 account the number of devices out there, and you
6 multiply it by a factor.

7 The studies that I've seen put factors
8 that are -- that there's a reliable range of what --
9 what factor is appropriate to use or what is
10 accurate to use. So basically, there isn't a factor
11 that's right.

12 This is basically, as I'd referred to
13 before, it's basically bad data. And so we really
14 think it's inappropriate to try to report for
15 production accounting purposes, basically.

16 **Q. Okay. And then as we move through here --**

17 HEARING OFFICER ORTH: Mr. Feldewert?

18 MR. FELDEWERT: Yes, ma'am.

19 HEARING OFFICER ORTH: I'm sorry to
20 interrupt.

21 Would you be able to estimate how much
22 longer Mr. Smitherman will be testifying?

23 MR. FELDEWERT: I think we have probably
24 another -- I'm guessing another hour and a half,
25 maybe two. I'm trying to be as efficient as I can.

1 HEARING OFFICER ORTH: Okay. I appreciate
2 that.

3 I noted he was noticed up for three and a
4 half hours. That's why I am asking. And he's --
5 he's done that. I understand you are including some
6 testimony that would otherwise be rebuttal, and I
7 agree with you that that's more efficient.

8 All right. I have a hard stop today
9 between noon and 12:30. So if you would spend the
10 next 16 minutes or so, and then we'll make a hard
11 stop at noon.

12 MR. FELDEWERT: Yes. I think I'm going to
13 be at a stopping point here, I'm thinking in about
14 ten minutes.

15 HEARING OFFICER ORTH: All right. Thank
16 you.

17 MR. FELDEWERT: Thank you.

18 CHAIRWOMAN SANDOVAL: I just have a quick
19 question.

20 Has there been that much rebuttal? I
21 mean, I think we talked about it maybe once or
22 twice. So it sounds like we're still going to have
23 a decent amount of rebuttal time, correct?

24 MR. FELDEWERT: Madam Chair --

25 CHAIRWOMAN SANDOVAL: I was thinking out

1 loud here.

2 MR. FELDEWERT: -- I didn't quite
3 understand your question.

4 CHAIRWOMAN SANDOVAL: You -- so I think it
5 was talked about earlier that you're doing some of
6 the rebuttal stuff here. But I think it's only
7 been, like, once or twice.

8 So are you still estimating that you're
9 going to have to put this witness on for rebuttal?

10 MR. FELDEWERT: No. I'm talking about
11 with respect to his direct testimony that we've
12 prepared for the commission here today. I think
13 we've got about another hour and a half or
14 two hours.

15 CHAIRWOMAN SANDOVAL: Right. My question
16 is: Are you expecting to still have to put him on
17 for rebuttal?

18 MR. FELDEWERT: Well, that would depend
19 upon what we see from other parties. I can't make
20 that decision now, and I don't think anyone can make
21 that decision.

22 MR. BAAKE: Madam Hearing Officer, I think
23 we're going to have to object to this.

24 NMOGA has estimated they're going to put
25 on 13 and a half hours, and this -- and their first

1 witness is going to go an hour and a half beyond
2 that. We're going to be at the end of the hearing
3 with what's gone on.

4 I think that there are -- certainly, NMOGA
5 should be allowed to decide how they're going to
6 allocate their time, but there should be a hard stop
7 for their direct testimony.

8 HEARING OFFICER ORTH: Mr. Feldewert?

9 MR. FELDEWERT: Well, first off, there
10 was -- we are on Friday. We didn't start until
11 yesterday, number one.

12 Number two, as you can imagine, as the
13 regulated entities, we have the need to explain our
14 proposed modifications to the rule, and I'm trying
15 to do it in an efficient fashion.

16 I've been instructed not to lead, so I'm
17 doing this as efficiently as possible.

18 Number three, there has been no discussion
19 of any hard stop by anyone.

20 And number four, we don't even know if
21 there is going to be a problem. We still have a
22 week of testimony to go. And you know -- yes, we're
23 on our first witness. But this witness is taking us
24 through the entire rule. That takes time and it has
25 to be done.

1 HEARING OFFICER ORTH: All right. Thank
2 you, Mr. Feldewert.

3 And thank you, Mr. Baake.

4 If you would, please, Mr. Feldewert, take
5 us through the next ten minutes and then we'll take
6 a lunch break.

7 MR. FELDEWERT: Thank you.

8 Q. (By Mr. Feldewert) Mr. Smitherman, we
9 then look at page 19 towards the bottom. And
10 there's a category dealing with improperly closed
11 and maintained thief hatches.

12 Do you see that?

13 A. I do see that.

14 Q. Okay. That is a category that NMOGA has
15 proposed to remove in this section dealing with
16 production accounting reporting.

17 Can you explain why?

18 A. Certainly. First of all, let me describe
19 what a thief hatch is.

20 Any storage tank that we're using in the
21 oil and gas industry has an access point, if you
22 will, at the top of the tank. And we call that
23 access point a thief hatch. We call it that because
24 you can actually take samples of the fluid that is
25 in there, and they call that thieving the tank. So

1 that gives you access to be able to see that.

2 The thief hatch itself is not just a cap.

3 It's a little more sophisticated than that. It's --
4 it has actually built into it a device, if you will,
5 that allows for pressure relief. It allows for
6 vacuum relief, to protect the integrity of the tank
7 itself.

8 And so when you close that thief hatch,
9 you want that thief hatch to be a gas tight seal.
10 And that thief hatch, basically, a very -- I want to
11 call it pretty high-tech material, gaskets, that are
12 used to effect that seal.

13 And so that thief hatch, when properly
14 seated and working properly, will not emit any gas
15 unless there was an over pressure or under pressure
16 event. Which actually, we use the thief hatch as
17 kind of the second line of defense. We typically
18 have another type of pressure vacuum relief system
19 that is tied to the entire tank battery.

20 So when you look at this language here and
21 they say improperly closed or maintained thief hatch
22 that is routed to a flare or control device. In
23 essence, we don't want gases coming out of that
24 thief hatch.

25 But just imagine if you had a thief hatch

1 that would maybe not close properly, or maybe that
2 gasket was not maintained properly and was leaking a
3 little bit, how in the world would anybody measure
4 or even estimate the gases that are coming out of
5 that tank?

6 It is really an impossibility.

7 And so from that standpoint, we thought
8 that was -- really, makes no sense. It's
9 inappropriate, I'll put it that way. It's a little
10 more polite term -- inappropriate to ask for
11 operators to try to report those volumes from that
12 situation.

13 Q. Mr. Smitherman, I want to move to a slide
14 here that we saw earlier yesterday, or the day
15 before, from the division's exhibits.

16 And I'm on -- I'm trying to get to
17 slide 83.

18 Sorry, I'm on the wrong one. I need to
19 revise.

20 Division's Exhibit 4A, which is a revised
21 exhibit.

22 And I'm at the slide that they've marked
23 as exhibit -- or Slide 83 in Exhibit 4A.

24 Can you see that now on the screen,
25 Mr. Smitherman?

1 A. I can.

2 Q. Okay. And these -- this slide relates to
3 27.8G2, which is the exact category we're in now,
4 correct?

5 A. That's correct.

6 Q. And this slide was utilized by the
7 division to explain why they removed certain
8 reporting categories that had been initially listed
9 or considered under G2?

10 A. That is correct.

11 Q. And they've indicated in here, as I look
12 at this, that they removed categories for production
13 accounting reporting that, for example, involved
14 volumes that were too small to measure?

15 A. Correct.

16 Q. And I see here, under the Brady headline,
17 that they've moved categories that involved releases
18 that would not be considered waste?

19 A. Correct. Both too small to measure and
20 not considered waste, in that particular case.

21 Q. Okay. And when it came to -- I'm sorry --
22 when it came to pneumatics, they pointed out that it
23 was proper to delete it as a reporting category for
24 production accounting because there was no credible
25 method of estimation.

1 A. That's correct. And I agree with that.

2 Q. Okay. Now, I want you to apply those same
3 criteria to the five reporting categories that you
4 just went through. Okay?

5 My question to you is: In your opinion,
6 do these same reasons likewise warrant the exclusion
7 of these five reporting categories that you just
8 went through?

9 A. Exactly right. We see, really, no
10 difference in those -- in the application of those
11 criteria to the sources that the division has said
12 are not worthy, if you will, of categorizing reports
13 in those same five that we just talked about.
14 There's really no difference in that criteria.

15 Q. And when we look at the -- NMOGA's
16 remaining change to this section, we'll see at the
17 bottom of the page after adding, of course,
18 delineation, that was added, Mr. Smitherman, because
19 you can measure or reasonably estimate those
20 volumes, right?

21 A. Certainly.

22 MR. AMES: That's a leading question.

23 HEARING OFFICER ORTH: Mr. Feldewert,
24 please watch that.

25 MR. FELDEWERT: Okay.

1 Q. (By Mr. Feldewert) When we get down here
2 to the bottom, Subpart L, NMOGA has proposed to
3 delete "other not described above."

4 Do you see that, Mr. Smitherman?

5 A. I do.

6 Q. Okay. Is -- does -- do the categories
7 described above, to your knowledge, identify the
8 categories of emissions that constitute waste that
9 could -- that can be estimated, reasonably
10 estimated, or measured?

11 A. Yes. That's exactly why we categorized
12 them that way, and why we suggested those reporting
13 categories exist.

14 Q. Okay. Can you see any other -- can you
15 see any purpose to have another clause here that has
16 no criteria to it?

17 A. No. In fact, we see nothing but confusion
18 with that category that exists. I mean, we -- we
19 thought -- as I've talked about before, we've got a
20 lot of experts on our team. We could not come up
21 with another source that met the criteria of being
22 able to be measured or estimated with any reasonable
23 accuracy for production accounting that would
24 fall -- that would need another category to -- to
25 cover.

1 Those have been adequately covered by the
2 categories that were suggested.

3 **Q. And would this category of "other" serve**
4 **any purpose if it's intended to try to include**
5 **volumes or estimates of volumes that cannot be**
6 **measured or reasonably estimated?**

7 MR. AMES: Objection, asked and answered
8 over and over again.

9 MR. FELDEWERT: No, sir, it's not.

10 HEARING OFFICER ORTH: Mr. Feldewert, we
11 need to watch that as well, to avoid repetition.

12 MR. FELDEWERT: Okay.

13 **Q. (By Mr. Feldewert) Mr. Smitherman, do you**
14 **see any purpose to -- in having a category in**
15 **Subpart G2 that could potentially include activities**
16 **or devices where the releases could not be**
17 **accurately measured?**

18 A. We've already talked about -- we've talked
19 about -- we've talked about why we've taken --
20 suggested that these categories that are too -- that
21 can't be measured or estimated with any accuracy out
22 of the reporting system.

23 And by, in essence, taking those -- any of
24 those categories or all of those categories and
25 putting them under "other" simply adds up a

1 summation of a lot of categories that cannot be
2 measured or estimated with any accuracy, so you
3 simply get a bigger number of bad data.

4 **Q. In your opinion, would that serve any**
5 **purpose in a provision like this that seeks to**
6 **address production accounting purposes?**

7 A. No. Again, as I said in my opening
8 remarks, bad data is inappropriate for enforcement.
9 It's also -- it's inappropriate for policy
10 development.

11 And this, if it was used to report data
12 that's bad, it would fit that description. It would
13 be bad data and inappropriate for use.

14 MR. FELDEWERT: Madam Hearing Officer, I
15 think this might be a good spot to stop, because we
16 would be moving on to a different topic.

17 HEARING OFFICER ORTH: All right. As
18 indicated, we will break now for lunch. It will be
19 a short lunch break. We will reconvene at 12:30.

20 And if you would, please, Mr. Feldewert,
21 just -- in Mr. Smitherman's upcoming testimony, to
22 assure that he will not be repeating himself.

23 Thank you.

24 (A recess was taken from 11:58 a.m. to
25 12:34 p.m.)

1 HEARING OFFICER ORTH: Thank you so much.
2 Whenever you're ready, Mr. Feldewert and
3 Mr. Smitherman.

4 MR. FELDEWERT: Thank you.

5 Q. (By Mr. Feldewert) Mr. Smitherman, I
6 think we were now moving into Subpart G3 of
7 Part 27.8 in NMOGA's modifications on page 20 of 27.

8 Are you there, sir?

9 A. I am.

10 Q. Now, let's first talk about this change to
11 the opening clause.

12 Am I correct that the only difference
13 between what we had proposed here and what the
14 division has likewise proposed as changes is that
15 they continue to reference the C 115B? And we, as
16 you've mentioned, are suggesting that the reporting
17 be done under C 115, the existing form?

18 A. Yes. That's the only substantive
19 difference between these two.

20 Q. Okay. But we do have some substantive
21 differences now, when we get down to the method of
22 calculating lost natural gas, at least in terms of
23 the language.

24 Is that correct, Mr Smitherman?

25 A. Yes. The language kind of, in essence,

1 points to a slightly different process.

2 **Q. Would you explain the purpose of**
3 **NMOGA's -- first off, why NMOGA made these changes,**
4 **and then the purpose -- or what they serve to do?**

5 A. The -- yes. Maybe the purpose is the way
6 to start with that.

7 The purpose is it creates clarity and
8 certainty -- regulatory certainty in how this
9 process would work.

10 And we feel like the way to do that, the
11 way to do that -- best way to do that is to, in
12 essence, craft a definition and a process for
13 calculating lost gas.

14 And once you've identified and calculated
15 that volume of lost gas, you would subtract that
16 volume of lost gas from the produced gas, and then
17 divide that remainder by the produced gas to get a
18 percentage of gas capture. Because it would take
19 produced gas minus the lost gas that's clearly the
20 captured gas.

21 **Q. Did NMOGA operators find the methodology**
22 **proposed by the division to be confusing?**

23 A. Yes. And again, we have quite a few
24 people -- and when we get different interpretations
25 of the same words on the page, we get little red

1 flags that rise up.

2 And so we really tried to do our best to
3 craft a way to convey this clearly, simply, and
4 effectively.

5 And we tied these to the same reporting
6 categories that we just talked about in the earlier
7 sections.

8 Q. And if you look up NMOGA's Exhibit 3A, we
9 have the language that addresses those reporting
10 categories that you just discussed, right?

11 A. Correct.

12 Q. And then for purposes of clarity, we
13 actually have a formula in the rule?

14 A. Exactly. We felt that by using words,
15 it -- it can be difficult. There's two other
16 possibilities. One is an example.

17 In this case we could use a formula. We
18 felt like a formula would be sufficient to clearly
19 and concisely convey the meaning of this.

20 Q. Okay. And then in 3B, we likewise have
21 language and then the formula listed?

22 A. That's correct. In -- in 3B we talk
23 about, in essence, how to calculate the produced
24 gas. In fact, I give an example. In my example, I
25 give a formula of produced gas, which is --

1 **Q. And --**

2 A. Go ahead.

3 **Q. And how -- and the categories that we have**
4 **here in identifying the lost gas on a monthly**
5 **volumetric and percentage basis, are those**
6 **categories that count against your gas capture?**

7 A. They do. These are the categories we just
8 talked about that -- that operators can have the
9 ability to, with some accuracy, either measure or
10 estimate these volumes. They're going to be
11 reported on through the normal process monthly, from
12 the C 115B.

13 And so you would take those same
14 categories and add those categories up that count
15 against an operator, and that would be the lost gas.

16 **Q. Okay. And then that is then utilized in**
17 **the process under 3B to determine your percentage?**

18 A. That is correct.

19 **Q. To get your volume under 3A?**

20 A. Correct. You get your lost gas volume
21 under 3A. And as I kind of walked through
22 prematurely, you take the produced gas minus the
23 lost gas. That's your captured gas. You divide
24 that by the original volume of produced gas and you
25 multiply by 100, you get the percentage of gas

1 captured.

2 MR. BAAKE: Objection, Madam Hearing
3 Officer.

4 This is all very repetitive. We've heard
5 this about the formula four times now.

6 HEARING OFFICER ORTH: All right. Was
7 that you, Mr. Baake?

8 (Discussion off the record.)

9 HEARING OFFICER ORTH: Some of this has
10 become repetitive, and I would encourage you to move
11 along.

12 Let's see. Back to you, Mr. Feldewert.
13 And again, we have a long way to go and a lot of
14 witnesses, as you know. And so I'll just encourage
15 you to move more expeditiously through
16 Mr. Smitherman's testimony.

17 MR. FELDEWERT: I certainly want to do
18 that.

19 I also want to say for the record, and I
20 think it's fairly important that the record clearly
21 reflects what NMOGA is trying to do here.

22 And so I don't think it's been repetitive,
23 number one. Every time we have an interruption like
24 this it delays it even further.

25 Number two, we didn't start until 3:40

1 yesterday, and people are already complaining. And
2 I don't quite understand why, and they're doing it
3 in a fashion that is making it more difficult to get
4 through this expeditiously. Okay?

5 Q. (By Mr. Feldewert) Mr. Smitherman, in
6 your opinion, does the process that NMOGA put in
7 place here, is it -- does it conform with the goals
8 that you understand the division is attempting to
9 meet with this -- these calculations for a gas
10 capture percentage?

11 A. I believe so. We actually looked at their
12 proposal and theorized that we are, in essence,
13 putting the same concept forward with a lot more
14 clarity.

15 Q. In your opinion, is -- was this -- is this
16 language and the formulas that are here, is it put
17 forth in a fashion that's understandable by
18 operators in New Mexico?

19 A. Yes. I think this is a much clearer way
20 to convey this message to everyone, including
21 operators.

22 Q. And is -- the components here, do they
23 comprise activities and events in which operators in
24 New Mexico can provide actual, reliable data?

25 A. Yes. That was our intent.

1 **Q. Okay. Now, I move to subpart --**

2 CHAIRWOMAN SANDOVAL: Mr. Feldewert, I do
3 hate to interrupt you again. And I will own this
4 two-minute interruption here.

5 But can you put the -- can you share your
6 screen again? That would be helpful.

7 MR. FELDEWERT: Madam Chair, I apologize.
8 I thought I was. And to be honest with you, I
9 missed that when we came back. Thank you for
10 pointing that out.

11 CHAIRWOMAN SANDOVAL: Thanks.

12 **Q. (By Mr. Feldewert) So for the record, we**
13 **were talking, Mr. Smitherman, about the language**
14 **that we see on page 20 of NMOGA's Exhibit 2A, which**
15 **I have up here on the screen.**

16 A. I see that.

17 **Q. And is that what we were talking about?**

18 A. That is correct.

19 **Q. And this is the language from which you**
20 **provided your opinions and testimony?**

21 A. Yes, it is. I appreciate you clarifying
22 that.

23 **Q. And for the record, there is a similar**
24 **change, is there not, Mr. Smitherman, in**
25 **Part 28.8F3?**

1 A. That's correct.

2 Q. Okay. Now, I want to move to the next
3 subpart here, G4.

4 And this is the provision under which the
5 division is suggesting that an operator shall report
6 vented and flared natural gas on a volumetric and
7 percentage basis to all royalty owners in mineral
8 state being produced by the well on a monthly basis?

9 A. I see that.

10 Q. Mr. Smitherman, first, could you -- are
11 you familiar, as a result of your 40 years of
12 experience, with royalty interest burdens that
13 impact a working interest owner?

14 A. Yes. I've got some familiarity with that,
15 certainly.

16 Q. And I'm going to represent to you that the
17 definition of royalty owners of the division's rules
18 include a subset called overriding royalty interest
19 owners.

20 Are you familiar with those?

21 A. I certainly am.

22 Q. Are those interests that are created by
23 contract?

24 A. They are. They're carved out of the
25 working interest.

1 **Q. And those are matters of contract between**
2 **the working interest owner and those holding those**
3 **fractional interests.**

4 **Correct, Mr. Smitherman?**

5 A. That's correct.

6 **Q. All right. Have those, given the age of**
7 **the Permian Basin, and to some extent the San Juan**
8 **Basin, have those mineral interests, over time,**
9 **become very fractionated?**

10 A. They have. The list of overrides --
11 royalty owners and override royalty owners in any of
12 the wells that we deal with in the northwest or the
13 southeast can be very, very long with very, very
14 small interests.

15 **Q. When you say "small," how small?**

16 A. Well, you can have zero-point and maybe
17 three or four or five zeroes before you finally get
18 to an entity.

19 **Q. So far less than one percent?**

20 A. Oh, gosh. I'm sure that many of the
21 override royalty owners would love to have
22 one percent, even a tenth of a percent.

23 But many of them are much, much smaller
24 fractions of that.

25 **Q. And when you put together a spacing unit**

1 **for purposes of drilling a well, part of that**
2 **process, Mr. Smitherman, is you reaggregate**
3 **interests that are held by working interest owners,**
4 **correct?**

5 A. That's true. Basically, you're combining
6 multiple leases that can be owned by different
7 interest owners.

8 Q. And then those working interest owners,
9 either by way of contract or by way of a pooling
10 order issued by the division, an operator is
11 designated for that spacing?

12 MR. AMES: Objection, leading questions.
13 I'm all in favor of moving this along. I'm now
14 objecting and saying that Mr. Feldewert's
15 examination -- but this is going over the top.

16 It's fine to have leading questions to set
17 the stage. What we're doing here is, counsel
18 essentially is testifying, and the witness simply
19 affirming what counsel is saying.

20 HEARING OFFICER ORTH: Mr. Feldewert, that
21 does seem to be a pattern.

22 And, Mr. Baca, that was Mr. Ames speaking.

23 If you would, again please watch that
24 particular pattern.

25 Q. **(By Mr. Feldewert) Mr. Smitherman, how**

1 **does someone become an operator of a spacing unit?**

2 A. The operator is designated either by the
3 division or by contract, by agreement between the
4 parties.

5 **Q. When you say "agreement between the**
6 **parties," between what parties?**

7 A. Between the other working interest owners
8 that have their interest pool in a particular unit.
9 And sometimes those units are put together
10 voluntarily and sometimes they're not.

11 **Q. How large have these units become in**
12 **New Mexico as a result of horizontal drilling?**

13 A. They've gotten very, very large. I mean,
14 I'll call it the old days, before we drilled
15 horizontal wells, you could -- it would be very
16 typical to find a 40-acre spacing unit.

17 Now, you may be talking about 3 miles'
18 worth of 40-acres. I mean, it's thousands of acres.

19 **Q. Okay, thousands of acres.**

20 **And within those thousands of acres, there**
21 **may be numerous individual working interest owners?**

22 A. I've never seen one put together that
23 didn't have multiple, and quite frankly, a lot of
24 interest owners.

25 **Q. Okay. And when you bring together these**

1 **working interest owners, do each of these working**
2 **interest owners have individual royalty or**
3 **overriding royalty interest owners with their**
4 **interest?**

5 A. Certainly. Each working interest owner
6 will have their own -- in essence, their own leases.
7 And their leases will have an obligation to pay
8 royalty owners for -- overriding royalty owners
9 within those leases.

10 So that's -- that's an obligation that
11 that particular working interest owner has to
12 maintain their leases.

13 Q. Okay. And so when you begin to aggregate
14 these working interests to their associated royalty
15 interest owners, and you get to a spacing unit or a
16 well, what's the -- what numbers are you seeing in
17 terms of the overriding royalty and overriding
18 royalty interest, individual interest, that can be
19 involved?

20 A. Well, to the degree you know them, there
21 can be hundreds of separate interests in these
22 royalties and overriding royalties.

23 Q. Okay. You said to the extent you know
24 them.

25 Why did you say that?

1 A. Well, an oper- -- a working interest owner
2 that is part -- is brought into a spacing unit,
3 again, has their own royalty and overriding royalty
4 owners that they have an obligation to.

5 And when a spacing unit is put together,
6 or other types of units are put together, sometimes
7 the working interest owners of the nonoperating
8 working interest owners will retain the obligation
9 and the -- I guess the obligation to pay their
10 royalty and overriding royalty interest owners. And
11 they do that partly because they want to make sure
12 that those interests are being paid. It's to their
13 interest and advantage to make sure that they
14 somehow are not being dropped and being paid by the
15 operating working interest owner.

16 **Q. So in that circumstance, Mr. Smitherman,**
17 **would the operator, which is the subject of**
18 **Subparagraph 4, have contact information for all of**
19 **the royalty and overriding royalty interest owners**
20 **reflected here in Paragraph 4?**

21 A. No. In fact, it's typical, and probably
22 more typical, that the operating working interest
23 owner will not have contact information of all
24 royalty and overriding royalty interest owners in
25 the spacing unit.

1 Q. Okay.

2 A. The larger they get, the more that's true.

3 Q. Now, is there also circumstances where the
4 working interest that has these burdened royalty and
5 overriding royalty interest owners, because of time,
6 does not have contact information for them?

7 A. That's absolutely correct.

8 Q. Doesn't have an address?

9 A. No. Don't have addresses, don't have
10 names. In fact, many times these interest owners
11 are not on record.

12 MR. AMES: Objection, Your Honor. We went
13 over this for about 15 minutes. They don't have the
14 addresses.

15 HEARING OFFICER ORTH: All right.

16 Mr. Feldewert, would you move on from
17 there, please?

18 MR. FELDEWERT: I would say we have not
19 covered this yet, because this is a circumstance
20 where the working owners themselves do not have
21 addresses because of circumstances over time.

22 It's different than the fact that the
23 operators would not have contact information,
24 because they don't have a contractual relationship
25 with these royalty and overriding interest owners.

1 Two different points.

2 HEARING OFFICER ORTH: All right. Thank
3 you for that clarification.

4 Please go ahead.

5 Q. (By Mr. Feldewert) Now, Mr. Smitherman,
6 if you looked at the division records, would you --
7 would it surprise you to find that in these pooling
8 cases you will see a notice of publication directed
9 by name to individuals, estates, Mrs. Jones or a
10 Mr. Jones, for example?

11 A. Certainly. There's all kinds of NMEs in
12 this. And as you said before, they have become
13 fractionalized through ownership and contractual
14 private agreements and selling off pieces of it.

15 It's very, very complicated.

16 Q. And, Mr. Smitherman, as a result, does an
17 operator have monthly mailings to all of the royalty
18 and overriding royalty interest owners in a
19 particular spacing unit?

20 A. Well, no, for two reasons.

21 Number one, as we've already established,
22 sometimes the operator doesn't even have knowledge
23 of some of the royalty and overriding royalty
24 interest owners who are being paid by overriding
25 interest owners who are not operators.

1 But the second is, there is an absolute, I
2 guess pattern, industry practice, that's supported
3 by law in various states, that the operator doesn't
4 have to contact that working interest -- let me
5 start over.

6 The working interest owner, the operator,
7 does not have to contact each royalty or overriding
8 royalty interest owner every month. They have
9 gotten minimums of the amount of money that they're
10 supposed to pay, that if you don't meet those
11 minimums, they can accumulate those amounts for some
12 period of time until they reach minimum.

13 I think in Texas it is \$100, or by the end
14 of the year.

15 So there are many, many of those royalty
16 owners and overriding royalty interest owners that
17 are not contacted on a monthly basis, and some are
18 contacted only annually.

19 **Q. And the reporting to royalty owners and**
20 **overrides, Mr. Smitherman, is that governed by the**
21 **contracts between them?**

22 A. It is.

23 **Q. And also, as you mentioned, governed by**
24 **certain laws across these states?**

25 A. It does. I am not familiar with the

1 New Mexico law on this. I live in Texas, so I'm
2 more familiar with those laws.

3 But I know that each -- each state has
4 laws that govern how those working interest owners
5 pay their royalty owners.

6 And they're given some flexibility for,
7 basically, the administrative work. And sometimes
8 they'll be sending out a check for a penny. And so
9 it doesn't make a lot of sense to cause an operator
10 to go through that process and spend that kind of
11 expense to send someone a check for a penny.

12 And so they've taken a practical measure
13 to it; and, therefore, many, many of these
14 communications between working -- a working interest
15 owner or operator and royalty owners are not
16 monthly.

17 **Q. So, Mr. Smitherman, does -- based on your**
18 **experience, your 40 years of experience in the oil**
19 **and gas industry, does an operator of a spacing unit**
20 **have the information necessary to send this kind of**
21 **a report to all --**

22 **MR. BAAKE:** Objection, Your Honor. This
23 is the fifth time he has asked this question.

24 **MR. FELDEWERT:** It's a different question.

25 **HEARING OFFICER ORTH:** He hasn't finished

1 the question yet, Mr. Baake.

2 I need to hear the whole question.

3 Go ahead, Mr. Feldewert.

4 Q. (By Mr. Feldewert) Mr. Smitherman, based
5 on your 40 years of experience with the oil and gas
6 industry, does an operator of a spacing unit have
7 the information to contact, on a monthly basis, all
8 of the royalty and overriding royalty interest
9 owners that potentially exist in the -- in the
10 spacing unit?

11 A. Not only do they not have the contact
12 information to contact every such owner on a monthly
13 basis, they don't even have the contact just to
14 contact them on an annual basis.

15 They simply don't have the contact
16 information.

17 Q. Okay. All right.

18 Now, I want to move on to Subparagraph G5.

19 Hold on a second. I am going to switch
20 over to the division's proposed rule in Exhibit 2A.

21 And we get to G5, here in their 2A. And
22 we see that the division struck that, right?

23 A. Yes.

24 Q. Okay. But they moved it to page 9. So
25 I'm going to go to page 9 of their Exhibit 2A. And

1 **it deals with third-party verification.**

2 A. What page is that on, sir?

3 Q. **Page 9 of exhibit -- of OCD Exhibit 2A. I**
4 **believe it's 27.9C.**

5 **Are you there?**

6 A. I am.

7 Q. **Okay. And has NMOGA reviewed this**
8 **third-party verification provision?**

9 A. We have reviewed this.

10 Q. **And do you think this is an appropriate**
11 **and a fair way to address this effort?**

12 A. We do. Again, I've talked about this
13 earlier. It's -- it's a process that allows for
14 there to be some reason for the division to reach
15 out. And there is an opportunity for a conversation
16 between the operator and the division to address
17 what the division might perceive would be a problem.

18 And if there's not an agreement at that
19 point, the division can require a third-party
20 verification of certain data that they are still
21 uncertain about.

22 And there is, basically, protections from
23 both the division to compel, there's protections for
24 the operator to make their case, both informally to
25 the division and then formally through a hearing.

1 Q. Okay. I'm going to go back to NMOGA's
2 proposed modifications.

3 And we go to the next subparagraph, which
4 is G6. And we see there is a proposed obligation
5 that upon the New Mexico environmental department's
6 request, the operator shall promptly provide a copy
7 of any form filed pursuant to this rule.

8 Do you see that?

9 A. I do see that.

10 Q. Okay. Why has NMOGA proposed to strike
11 that provision?

12 A. Well, I guess our first reaction was it
13 did seem odd for an NMED requirement to be included
14 in an OCD ruling.

15 It would seem that the -- if the NMED
16 wants this information, they would either ask for it
17 or put it in their rule that gives them the right to
18 do so, or the process to do so.

19 Second, there are no sideboards on this at
20 all. It just seems completely open ended which, I
21 think, is inappropriate.

22 And it also seems that, at least some of
23 the information that they may be requesting, can be
24 available to the NMED straight through OCD's
25 website.

1 So for all of those reasons, we thought it
2 was just inappropriate.

3 **Q. So, Mr. Smitherman, when you say available**
4 **on the website, you're talking about -- and I'm**
5 **using the language here -- a copy of any form filed,**
6 **that would be on the website?**

7 A. Yes. It would be available through the
8 OCD's electronic means. And I think they're getting
9 better and better over the years with that, and I
10 commend them for that.

11 **Q. Okay. I then want to move to**
12 **Section 27.9, which is the natural gas capture**
13 **requirements.**

14 A. Certainly, sir.

15 **Q. What was the -- as I look at NMOGA's**
16 **proposed change to 27.9A, what's the purpose of**
17 **these -- these additions and removals?**

18 A. The first ones are for clarity. I want to
19 talk about the operator shall reduce the annual
20 volume.

21 And actually, January 1st of 2022, we
22 believe the more proper way to say that is they are
23 going to begin to reduce the annual volume of vented
24 and flared gas.

25 So we thought that was a clarification

1 that was appropriate.

2 **Q. Now for the record, when you say "begin to**
3 **reduce," what are you referencing there?**

4 A. They're talking about the natural gas
5 capture performance, really. So the -- the division
6 is putting requirements in place that will cause the
7 industry to reduce their lost gas -- I'll go back to
8 that terminology -- and increase, therefore, their
9 gas capturing percentage of wherever they are now to
10 at least 98 percent by the end of 2026.

11 So that process will begin on January 1.
12 And that's why we thought that small change would be
13 warranted.

14 **Q. Okay. What's the next change here?**

15 A. The second talks about -- again, this is
16 for clarification. I don't think there's a lot of
17 controversy here.

18 But the original language talked about it
19 monthly going in, starting in 2021. And I think
20 it's been made clear already that 2021, the data
21 that's going to be filed quarterly. And so, in
22 essence, this is to kind of give a transition period
23 to start filing monthly starting in January of 2022.

24 So that's really just a clarification.
25 And that's not only the text in red that's been

1 added, but it's also the strikeouts that you see
2 following that.

3 It also mentions the idea that the
4 division had referred to the C 115B form that we are
5 anticipating that, with our streamlined and more
6 efficient process, that we'll continue to rely on
7 the historical -- historically used C 115.

8 The next change --

9 **Q. Go ahead.**

10 A. The next change is simply for clarity.
11 The operator shall increase their annual percentage
12 of natural gas captured. It just didn't seem
13 specific enough, or we wanted to make this -- this
14 rule very clear.

15 And the final one -- I think this may be
16 the only substantive one -- is we don't know --
17 number one, the division doesn't know, and industry
18 doesn't know, what type of challenges we're going to
19 run up against in trying to meet this nation-leading
20 98 percent gas capture.

21 And so we wanted to make sure it was
22 explicit in this rule that when unintended
23 consequences or unusual circumstances were
24 encountered, that an operator that had those
25 difficulties would have the ability to come to the

1 division to explain the situation and seek relief.

2 Q. Okay. Then I want to move on, then, to --
3 let's see.

4 I believe that we want to address the
5 division's proposed change in this provision. So
6 I'm going to -- again, at Part 27.9. Okay.

7 First off, one thing I forgot to point
8 out, Mr. Smitherman.

9 The changes you just talked about that
10 NMOGA has proposed, there are similar changes also
11 found in Part 28, at 28.10A, correct?

12 A. You said 28.10 or 28.8?

13 Q. I believe it's the gas captured portion.
14 It would be 28.10A.

15 A. Okay.

16 Q. I just don't want that to get lost.

17 A. Yes. That's true. I stand corrected.

18 Q. And the same reasons apply,
19 Mr. Smitherman?

20 A. Yes, sir.

21 Q. Okay. All right.

22 Now, we are moving here to Part 27.9A.
23 And we're going down here to some changes, some
24 substantial changes that the division has made to
25 the Subsections 27.9A3 and A4. Okay?

1 A. Yes.

2 Q. I want you to first talk about -- let's
3 address A3.

4 Does -- do you think A3 is appropriate
5 here as the -- as the industry moves through this
6 transition over the next five years?

7 A. Certainly. I think if we're talking about
8 the same thing here -- I'm sorry. I'm looking at
9 NMOGA's.

10 Q. I apologize. So for the record, I'm on
11 the division's Exhibit 2A. I'm on page 7, and I'm
12 at 27.9A3.

13 A. Yes. I am with you now. I'm sorry about
14 that. Sorry.

15 Q. Okay.

16 A. So, yes. The reality is that the rule did
17 stay the same. It keeps moving along. And
18 operators can acquire or divest of different
19 assets, whether they're upstream assets or midstream
20 assets.

21 Let's talk about upstream assets here.

22 The division has suggested, if you will,
23 that if an operator acquires one or more wells in --
24 somewhere in New Mexico, that that operator needs to
25 come to the division and talk to them about what the

1 resulting -- what the gas capture requirement for
2 that operator will be going forward.

3 You could imagine that even -- let's
4 imagine ourselves past this five-year transition
5 period, to where it's nice and easy and steady and
6 everyone's met the requirement of 98 percent.

7 Even so, an operator that's meeting that
8 98 percent gas capture requirement might have assets
9 that are less -- performing below 98 and some assets
10 that are performing above 98.

11 So if an operator acquires some assets
12 that were performing below a 98 percent gas capture,
13 it could cause that operator, the entire operator
14 performance, to drop below 98 percent.

15 And so we need to be able to come to the
16 division and work out, what's the appropriate -- how
17 do I appropriately address that? Is there a time
18 frame necessary? Is there -- how can we get
19 everybody up to 98 percent, even after this
20 divestiture or acquisition.

21 **Q. Now, Mr. Smitherman, the Climate Advocates**
22 **have proposed a change to this section.**

23 **Have you examined that?**

24 A. I have.

25 **Q. Okay. And what's the concerns that you**

1 **see with their approach to this particular**
2 **provision?**

3 A. I need to get to it, please.

4 Well, there's a couple of problems.

5 Number one, it does not address the issue
6 that I just described, which is there can be a --
7 there can be a necessary transition period that the
8 division would be able to assess or agree to. So
9 that's a practical matter.

10 But the other problem is simply reading
11 the rule, their suggested modification. It's
12 unclear, quite frankly, as to whether they're
13 talking about the gas capture requirement that the
14 acquiring operator had or the divesting operator had
15 on the same asset.

16 So this is -- it is both unclear, and does
17 not really address the practicalities that the
18 division has addressed in their wording.

19 Q. Okay. I want to move, then, to NMOGA's
20 **proposed changes to 27.9B, which is on page 22 of**
21 **NMOGA Exhibit A.**

22 A. I'm there.

23 Q. And I believe we have similar changes to
24 **the corresponding provision in Part 28, at 28.10B.**

25 **Mr. Smitherman, do you see that?**

1 A. I see that.

2 **Q. All right. Would you please explain the**
3 **purpose of this -- NMOGA's proposed change here to**
4 **Subpart B?**

5 A. There are a couple of changes here.

6 One, we talk about the timing. That's a
7 fairly innocuous change here that we have suggested.

8 The 15th of the month would be -- the 15th
9 of February would be the normal time that December's
10 production would be required. Actually, I'm
11 thinking maybe the 14th.

12 But the concept is you've got a certain
13 period of time to get your production accounting
14 done. And we thought it would be helpful and
15 necessary, perhaps, for the operator to have a
16 little more time to finish the rest of the
17 calculations for the gas capture requirements.

18 You may recall there are some
19 opportunities for -- or some instances that may
20 arise that suggest that the division must approve of
21 certain issues. And so determining if -- not only
22 time for that process to evolve -- not a whole lot
23 of time.

24 But we're trying to give a little time for
25 as much clarity as possible so we can reduce the

1 number of, basically, refilings that would be
2 necessary.

3 Q. Mr. Smitherman, are you talking about the
4 change from February 15 to February 28?

5 A. Yes, sir.

6 Q. Okay.

7 A. And also, by the way, I think there was
8 something -- scribner's error -- that talked about
9 beginning in 2022. It really ought to be 2023.

10 Q. In the first sentence, the first opening
11 clause here?

12 A. No. If it -- it's right there, where we
13 talk about February 28 each year beginning in 2023.

14 Q. I see. I see. Okay. All right.

15 A. That's a necessary change.

16 The other part, basically, is referring
17 back to the calculation methodology that we had
18 given earlier in this -- this proposed rule that
19 calculates the lost gas, that calculates produced
20 gas; and, therefore, you come up with a calculation
21 as to what your annual gas capture -- excuse me.
22 Forget all of that. I'm off base. I'm going to
23 start over.

24 It does refer to the words up here in the
25 top part of B, some of the letters and wording of

1 that, that the -- first of all, you're going to be
2 calculating your gas capture percentage on a
3 reporting area basis, not statewide.

4 And you're going to be doing so through a
5 process of deducting for the total volume of natural
6 gas produced, the gas that was lost, that I just
7 referred to, minus -- and basically, you're going to
8 get credit for any credits that you get from your
9 lower process, and dividing that by the total
10 production.

11 Well, the other part -- so that basically
12 just says -- it implies, if you will, begs for
13 clarity to provide a formula, which is what we have
14 done below. Annual gas capture is produced gas
15 minus the difference between lost gas, minus ALARM
16 credits, all of that divided by produced gas total.

17 And of course, multiply by a hundred, and
18 you get a percentage. But that's the concept.

19 **Q. So by providing this formula, does it**
20 **allow, then, for the commission to exclude the**
21 **language that we see here in B1 and B2?**

22 A. That's correct. That's -- in essence,
23 we've already taken care of defining those in that
24 earlier section we've already talked about. And so
25 you don't need to have the verbiage in 1 and 2.

1 It's all been captured in this simple formula.

2 Q. So you don't need to, for example, go back
3 and look at Subparagraphs A of -- Paragraph 2 of G
4 or Subparagraph H of Paragraph 2 of G and all of
5 that type of confusing language?

6 A. Right. All of that has been accomplished.

7 MR. AMES: Objection, asked and answered.

8 HEARING OFFICER ORTH: Was that you,
9 Mr. Ames?

10 MR. AMES: It was, Ms. Orth.

11 HEARING OFFICER ORTH: Okay. Thank you.

12 Mr. Feldewert, if you would move through
13 this without summarizing, please.

14 Q. (By Mr. Feldewert) Does that allow you to
15 exclude this language down here, Mr. Smitherman, in
16 B1 and B2?

17 A. It does. It relies on our work that we
18 did in earlier sections, and also the formula that
19 you see right in front of you here.

20 Q. Okay. Now as we move through the rule
21 here, we get down here to the remaining paragraphs
22 of Subpart B, 27.9B.

23 The remaining paragraphs essentially,
24 Mr. Smitherman, deal with the ALARM credits.

25 Is that correct?

1 A. That's correct.

2 Q. And there's a comparable provision in
3 Part 28 at Subparagraph 10B3?

4 A. That's correct.

5 Q. And has NMOGA proposed similar changes to
6 these -- each of these ALARM paragraphs?

7 A. We have.

8 Q. Okay. All right.

9 I see that the first changes they've --
10 that NMOGA suggests eliminating a reference to form
11 C 141, in what used to be Subparagraph 3C.

12 A. Yes, that's correct.

13 Q. Okay.

14 A. And as we talked about before, since this
15 is a gas waste rule and we're going to be using
16 hopefully, as proposed, the C 129 as our episodic
17 gas communications form that we'll be reporting
18 from, we won't need the C 141.

19 So there's no reason for having it in this
20 rule.

21 Q. In sub- -- again, page 22 here of NMOGA's
22 Exhibit A in subparagraph -- excuse me.

23 The initial Subparagraph D has been
24 deleted. That, I think, had an incorrect citation
25 to it. I think the division even removed this,

1 **didn't they?**

2 A. Yes. In fact, I kind of view this as a
3 scribner's error, and that they seem to agree.

4 Q. Okay. And then when we get down here to
5 **what's actual Subpart D Roman numeral 1, why did**
6 **NMOGA suggest changing from twice per year to once**
7 **per year dealing with this aerial methane**
8 **monitoring?**

9 A. This is a -- this is a voluntary program.
10 It's -- it can be very effective. We want to
11 encourage operators to use this. It's a little bit
12 like the AVO concept, where you find things once,
13 and then the next time you take an inspection like
14 this, you don't find as much.

15 And so to try to encourage more operators
16 to use this technology and make it cost effective
17 for them, we thought that requiring it only once a
18 year we would probably end up with more operators
19 actually using this.

20 Q. Okay. So that moves us down, then, to the
21 **third-party verification in Subparagraph C, we've**
22 **already talked about.**

23 So that brings us to the natural gas
24 **management in 27.9D, as in David, Mr. Smitherman?**

25 A. Yes. Let me ask, perhaps, one thing.

1 Were you going to address 27.9A4 at a
2 different time?

3 Q. 27.9A4? That -- I think the division
4 covered that, did they not?

5 A. They did. We agree with that.

6 Q. Okay. All right. All right.
7 So we're down here at 27.9D1?

8 A. Yes.

9 Q. Okay. Now, do -- hold on a second.
10 Okay. This looks like an area where I
11 need to go to the division's change. Okay?

12 A. Okay.

13 Q. I'm on the OCD's Exhibit 2A, page 9, in
14 the natural gas management plan.

15 A. I see that.

16 Q. In Subpart D1, the division added two
17 additional requirements since they published this
18 rule.

19 Do you see that, Mr. Smitherman?

20 A. I do, in Subsections D and E.

21 Q. Okay. Does the division -- pardon me.

22 Does NMOGA have any problem with what's
23 set out in the new subparagraph D1D, as in David?

24 A. I guess our response is we don't see much
25 value in this. It seems to me to be a -- somewhat

1 of a -- I'm going to say an exercise and expenditure
2 of effort for no particular gain in -- on reducing
3 waste, to describe operational best practices that
4 would be used to minimize venting and flaring.

5 The rule clearly states out what our
6 objectives are.

7 And it clearly also states that in this
8 very section, that the importance of making sure
9 that you've got 100 percent gas takeaway whenever
10 you have a new well.

11 So we just don't see it that -- the value
12 of adding this -- this particular phrase.

13 **Q. Okay. What about new -- since the rule**
14 **was published, the division's proposal to add the**
15 **requirement in D1E, as in Edward?**

16 A. Yes. And that's maybe what I just said on
17 D, but perhaps on steroids.

18 The concept here that an operator would
19 somehow send in either how -- you know, what's their
20 process for designing separation equipment and
21 sizing it to maximize gas capture, or the actual
22 calculations, seems to be a big stretch, if you
23 will.

24 Is the division going to look at this and
25 come back and say that they disagree with our

1 engineering calculations?

2 Is the engineering calculations even
3 required?

4 Is this going to be more of a concept
5 thing?

6 It's very unclear. I think it doesn't add
7 anything, quite frankly. Once again, the operator's
8 obligation to build proper -- properly designed
9 facilities has already been addressed in this rule
10 in the earlier section that we talked about earlier
11 today.

12 So we don't see the addition of this E as
13 anything to help reduce waste.

14 **Q. Okay. So I want -- I want to make sure**
15 **that's clear.**

16 **When you say that the size of the**
17 **separator is already addressed by another provision,**
18 **are you talking about 27.8E1? And we'll go to that,**
19 **performance standards, on page 4 of the OCD's**
20 **Exhibit 2A?**

21 A. Exactly. E1. We're talking about E1. We
22 talked about that the operator shall design
23 completion, production, separation equipment and
24 storage tanks for -- in our words -- anticipated
25 throughput, to minimize -- the division's words --

1 to minimize waste. I think our words are slightly
2 different.

3 But the concept is, it's already been
4 established in this section.

5 Q. And if an operator doesn't meet this
6 provision, they would be in violation of the rule.

7 Correct, Mr. Smitherman?

8 A. That's correct. So that's the way it's
9 addressed again twice, differently here.

10 Q. Okay. All right.

11 Now as we move, then, into D2, we get into
12 the circumstance where an operator is required to
13 submit a more detailed gas management plan, correct?

14 A. That's correct.

15 Q. Okay. As the language here proposed by
16 the division, does it accurately now identify what
17 is intended as the applicable gas captured
18 requirement?

19 A. Yes, and there's -- I guess it should be
20 clear that there's two categories, if you will, an
21 operator may fall into. An operator who is in
22 compliance with their gas capture requirements, and
23 those operators that are not in compliance with
24 their gas capture requirements.

25 And there's a different obligation for

1 those two different categories of operator. And
2 this D2 section clarifies what -- what the division
3 refers to when they say "out of compliance."

4 It's a little tricky, and they -- I think
5 that the commission has done a very nice job of
6 outlining it in words here in D2.

7 Q. Okay. When this rule first came out
8 without these changes, was there a lot of confusion
9 among NMOGA operators when this was applicable and
10 what was -- what to look to?

11 A. Absolutely. It was -- you could kind of
12 see, maybe, what the division intended. But how it
13 would actually apply was very, very unclear.

14 We suggested some language, and I think
15 even the division approved that language, and we
16 came to a very, very clear way to describe this. In
17 fact, I've got an exhibit that may help us walk
18 through that.

19 Q. All right. Let's do that, just so we
20 understand it.

21 But for the record, I want you to turn to
22 what has been marked as NMOGA Exhibit C22.

23 MR. FELDEWERT: So I'm going to leave this
24 up on the screen, Madam Chair, just because this is
25 what we're talking about. And we're moving to the

1 notebook. And it will be NMOGA Exhibit C22.

2 Q. (By Mr. Feldewert) Are you there,
3 Mr. Smitherman?

4 A. I am.

5 Q. Okay. Would you please -- it looks like
6 this is an introductory slide that references the
7 paragraph that we're in now, correct?

8 A. That's correct. That's just an
9 introduction. We can skip to the next slide.

10 Q. Okay. So we're now on Exhibit C23?

11 A. C23. And as you can see, the very fact
12 that we needed an exhibit to explain this and give
13 you some insight as to how -- maybe how tricky the
14 wording was to -- to define when an operator is out
15 of compliance.

16 Because this out of compliance can pop up
17 any month during a year, and that's -- that's
18 critical to understand that.

19 The concept, generally speaking -- I'm
20 going to call it "any time backsliders."

21 In essence, an operator, when looking at
22 their performance cumulatively through the year that
23 they're in, they need to look and see what their gas
24 capture performance has been and compare that to the
25 prior year's either established baseline or the

1 prior year's actual gas -- actual requirement. And
2 that's what this table tries to do.

3 As you can see, near the top it says
4 example of gas capture compliance, assuming a
5 theoretical baseline capture of 78 percent.

6 Using 78 percent, the math kind of works
7 out easy.

8 When you take an actual baseline capture
9 of 78 percent, you take the loss rate, which is 100,
10 minus 78 that's 22.

11 Using this formula, the operator has to
12 improve by that loss rate minus 2 percentage points,
13 which is equal to 20 percent equally, linearly
14 across five years, which means that each year the
15 operator has to improve by 4 percentage points.

16 So in year 2021, as you can see on the
17 table, the compliance target by the end of that
18 year, there isn't one. This is the year that you're
19 establishing a baseline.

20 So the next year, 2022, the compliance
21 target for that property for that year, that
22 operator, is 82 percent, because they have to
23 improve by 4 percentage points.

24 But any time in that year, if they drop
25 below the last -- their baseline, they are out of

1 compliance.

2 And that certainly can happen. You get a
3 tough January or February, you got some serious
4 snowstorms and ice storms that cause some additional
5 flaring, an operator can fall out of compliance.

6 And then division's -- this D2 -- apply to
7 that operator until cumulatively through that same
8 year they are back in excess of 78 percent.

9 And that same concept follows year after
10 year as the best capture requirements go from 82 all
11 the way to 98 percent over five years.

12 So in any particular year -- say 2025,
13 while that operator is working towards 94 percent,
14 he can't drop below 90, which was last year's
15 capture requirement, or they are out of compliance.
16 They need to raise their hand and fess up, or they
17 need to use this more explicit, longer, more
18 information gas measure plan any time they fall out
19 of compliance.

20 Q. Thank you, Mr. Smitherman.

21 Let's now back up on the division's
22 proposed modifications in 2A to Part 27.

23 And we see here that the division has
24 proposed a change to Subpart 2B Roman numeral 3,
25 dealing with a map.

1 **Do you see that?**

2 A. That is correct.

3 **Q. Does -- do you agree with this change and**
4 **why?**

5 A. I do. I do agree with this change, and I
6 think we heard this from one of the earlier
7 witnesses, I think perhaps Mr. Bolander, that there
8 really isn't any real intent or value in us
9 supplying the map of an entire -- any entire gas
10 gathering system.

11 What's really important is to find out
12 where the well is and where the applicable section
13 of that gas gathering system is, so they can really
14 understand what we're talking about and what part of
15 that gas gathering system needs to have the capacity
16 to take that well's projected gas factor.

17 **Q. Will that also cut down on the burden on**
18 **the division in dealing with what could potentially**
19 **be confidential business information?**

20 A. It would. And quite frankly, it cuts down
21 on everyone's burden without losing any value, quite
22 frankly.

23 **Q. And we see a change in Subpart 2B Roman**
24 **numeral 4.**

25 **Is that -- for similar reasons, is that**

1 **change appropriate?**

2 A. It is. I mean, when you talk about the
3 daily -- maximum daily capacity of the natural gas
4 gathering system, that -- that's a very, very broad
5 piece of business there. It may not have anything
6 to do with what -- whether this well that you're
7 anticipating to drill will have capacity. So
8 let's -- let's focus in on the segment that is of
9 interest.

10 **Q. And then we see the division, over on**
11 **page 10, made a change to Subpart 2C Roman numeral**
12 **2.**

13 A. Yes.

14 **Q. Can you explain why this change proposed**
15 **by the division is important?**

16 A. Certainly. The original language had,
17 basically, the natural gas gathering system's
18 capacity at the time of application.

19 Well, sometimes, or many times, these
20 wells are not planned to be drilled for a long time,
21 perhaps a year, even two. And so it really should
22 be focused on the natural gas capture -- or excuse
23 me -- the natural gas gathering system's capacity at
24 the anticipated time that that well is going to be
25 completed. And so this is a very reasonable and

1 practical change.

2 Q. Okay. Now before we leave this particular
3 section, Subsection C -- let me see here. Okay.

4 I believe that the Climate Advocates here
5 have proposed an addition to this subsection,
6 Mr. Smitherman, on page 10 of their Exhibit
7 Number 1.

8 A. Yes, I see that.

9 Q. Do you -- I don't think I have it readily
10 available in PDF. I could check real quick.

11 MR. BAAKE: We could share that, if you
12 would like.

13 Is this to start redlines?

14 MR. FELDEWERT: Yes, the redlines,
15 page 10. That would be great, Mr. Baake.

16 I would appreciate that.

17 MR. BAAKE: Let me see if I can do this
18 here.

19 MR. FELDEWERT: I guess I need to stop
20 sharing. I will do that.

21 Mr. Baake, you've got the...

22 So I'm on page 10 of your Exhibit 1A,
23 Part 27.

24 MR. BAAKE: Here?

25 MR. FELDEWERT: Yes. Down there at the

1 bottom, yes, the bottom of page 10.

2 Can you blow that up at all, make it
3 bigger?

4 MR. BAAKE: Is that better?

5 MR. FELDEWERT: Oh, that looks good, yes.

6 Q. (By Mr. Feldewert) Mr. Smitherman, this
7 was -- has been proposed -- this was not proposed by
8 the division, it has not been proposed by the
9 environmental division. It's been proposed by
10 Climate Advocates.

11 Do you see -- what do you see is the
12 problem with this proposed revision?

13 A. The problem with it is, the reality is a
14 little more complex than this implies.

15 As I said before, when you first apply for
16 a permit, many times that permit is related to a
17 well that you are probably not going to drill for a
18 year or so.

19 And so in one sense, you don't know what
20 the circumstances are going to be that you have
21 made.

22 You have to certify that you have the gas
23 takeaway capacity in the segment of the gathering
24 system that is near you.

25 But there are many, many other changes

1 that can occur over time over that year or more that
2 could, in essence, change which plant or plants that
3 our particular molecules of gas are going to be
4 processed in. Even today many of these gathering
5 companies have more than one plant. These systems
6 are interconnected, and they probably can't even
7 tell me where the molecules actually are.

8 You also have the possibility that one
9 gathering company could offload some of the gas that
10 they have in their system, too, the gas gatherer.

11 So do the molecules go to those other
12 plants or not? It is simply impossible to know.

13 MR. FELDEWERT: And thank you, Mr Baake,
14 for saving me some time.

15 (Discussion off the record.)

16 Q. (By Mr. Feldewert) All right. I want to
17 look at the division's Exhibit 2A again,
18 Mr. Smitherman. Okay?

19 A. Yes.

20 Q. We're starting to get towards the end of
21 the rule.

22 If I look at the division's proposed
23 change to subpart -- let me get to the right spot --
24 natural gas management plan, it would be D3 on
25 page 10.

1 **Does this make sense to NMOGA?**

2 A. It does. I think that it is a nice
3 clarification. We appreciate that.

4 **Q. And addresses circumstances in how**
5 **confidential business information will be treated?**

6 CHAIRWOMAN SANDOVAL: Can you put your
7 screen share back up, please?

8 MR. FELDEWERT: Didn't I do that?

9 CHAIRWOMAN SANDOVAL: No. Thank you.

10 MR. FELDEWERT: Sorry about that.

11 Can you see it now?

12 CHAIRWOMAN SANDOVAL: Yeah. There it is.
13 Thanks.

14 MR. FELDEWERT: I'm sorry, Madam Chair, we
15 are there in D3. And it's on page 10 of the OCD's
16 Exhibit 2A. Okay?

17 A. Counsel, I didn't respond to that last
18 question because I was confused. There is a
19 Section 2, Roman numeral 3, which is Roman numeral
20 3, right above Section 3.

21 So I was looking at the Roman numeral 3, I
22 guess.

23 **Q. (By Mr. Feldewert) I'm sorry. I'm**
24 **talking about -- yes. I'm sorry, Mr. Smitherman.**

25 **Just to be clear, the division has made**

1 **some changes to what is now D3?**

2 A. Yes.

3 **Q. It addresses the statutes governing the**
4 **confidential business information?**

5 A. It does. And we agree with this change.

6 **Q. Okay. Then I want to talk about the**
7 **change down here -- I think we've already covered**
8 **this. We don't have any concerns with the**
9 **division's proposed change to 6B?**

10 A. Can we back up to one thing? There's
11 something I did not address earlier, which is in 5.

12 **Q. Okay.**

13 A. There's a scribner's error that was not
14 mentioned before.

15 **Q. Good catch. Thank you.**

16 A. In the red proposed modification redline
17 language there is a reference to 19.15.27.7. And
18 that should be 27.9. There is no 7 Subsection B4.

19 MR. FELDEWERT: Did you get that,
20 Mr. Ames?

21 He must be on mute.

22 **Q. (By Mr. Feldewert) And that change**
23 **would -- in other words, Mr. Smitherman, Paragraph 4**
24 **they're referencing here is actually the paragraph**
25 **right above it, right?**

1 A. That's exactly right, which makes
2 perfectly good sense.

3 Q. And so it should be 27.9 not 27.7?

4 A. Correct.

5 Q. All right. Then when we get down here to
6 the change that's been made to subparagraph 27.9D6E.
7 And part of this change clarifies the applicable gas
8 capture requirement.

9 Correct, Mr. Smitherman?

10 A. That -- that's correct.

11 Go ahead and ask your question.

12 Q. And then the division has added the
13 language here "for each well plans to spud during
14 the next 90 days."

15 Does that make sense from NMOGA's
16 perspective?

17 A. Yes, it does.

18 Q. Okay.

19 A. There -- there still seems to be kind of a
20 verbiage problem in this section that should be
21 corrected. And that is --

22 Q. Oh, I see.

23 A. The language that was so carefully
24 crafted, and we went through the exhibit in D2, is,
25 in essence, the same trigger, timing trigger, that

1 appears to be -- that appears that the division is
2 trying to put in 6B.

3 But there's some words that have been left
4 out. And I think it would be much better if we were
5 to add -- basically we would prefer that they -- the
6 operators become aware that it's out of compliance,
7 as defined in that earlier paragraph, or repeat the
8 language here.

9 There's language referring back to a
10 previous year that's not here.

11 They've really done a great job in 2, but
12 we didn't quite carry it through to 6B, and I think
13 the concepts are the same.

14 So once again, saying the same thing
15 differently -- meaning the same thing and saying it
16 differently, can be very different. So we would
17 really prefer that the division look at that and
18 clarify it. And, quite frankly, we didn't see it
19 until too late to offer a redline for it.

20 **Q. So, Mr. Smitherman, I believe that was**
21 **discussed with one of the division's witnesses. And**
22 **what we are suggesting is to add "for the previous**
23 **year after natural gas capture requirements," in**
24 **that first clause in 6B?**

25 **A.** That's correct. And that would suffice.

1 Actually, the language in D2 is even more clear,
2 that refers to the baseline year and then the
3 previous year. The previous year -- conceptually,
4 previous year is sufficient.

5 Q. Okay. Now, if I go to the division's
6 proposed modifications to subpart -- I'm sorry --
7 NMOGA's proposed modifications to Subpart 7.

8 A. Yes.

9 Q. So that would be 27.9.D7. We're on
10 page 27, the last page of NMOGA's proposed
11 modifications.

12 We see that we have added some references
13 to the paragraphs that we understand the division is
14 referencing by this paragraph.

15 Do you see that?

16 A. Yes.

17 Q. And I believe their witnesses confirmed
18 that those are the paragraphs they intended to
19 reference?

20 A. Yes.

21 Q. Okay. And the other change that was not
22 discussed with their witnesses was they have
23 adequate -- they have adequate venting and flaring
24 plan.

25 Why has NMOGA proposed to add "a

1 **complete"?**

2 A. Well, that, again, looks at subjectivity.
3 We -- we should -- the industry, the operator,
4 should submit a complete venting and flaring plan as
5 per Paragraph 4 of this paragraph. That makes
6 sense, if you will. The -- the descriptions of what
7 needs to be in that plan are very clearly laid out
8 in 5.

9 And so it seems that for clarity, for
10 regulatory certainty, using the words a complete
11 venting and flaring plan, as per Paragraph 5, is
12 more clear.

13 MR. FELDEWERT: Mr. Baake, can I call on
14 you again to bring up your Exhibit 1A?

15 MR. BAAKE: 1A? I'll be happy to.
16 What page?

17 MR. FELDEWERT: The last page, page 11.

18 MR. BAAKE: Our numbering isn't right. I
19 think -- yeah, the last page. Okay.

20 (Discussion off the record.)

21 **Q. (By Mr. Feldewert) There we go.**

22 **So I'm focused there on Paragraphs 7**
23 **and 8, Mr. Smitherman. This is some changes that**
24 **the Climate Advocates have proposed to this section.**

25 **Now, how do you -- what do you glean from**

1 **these changes? What are you concerned about here?**

2 A. Well, I guess the first thing I'm
3 concerned about is, in essence, taking away the
4 division's discretion.

5 The division has the obligation to look at
6 these type of things and see if they are -- see if
7 they are sufficient, if you will.

8 It has the -- first of all, has the
9 operator submitted a complete one, which we've
10 suggested, and also taking a look at how the
11 operator has evaluated these various alternative
12 beneficiary uses.

13 It may be the circumstances are that
14 perhaps 100 percent of the gas is going to be
15 captured, but because of the circumstances in
16 bringing this home, although we expect gas capture
17 to improve, the division will approve it, the AVD,
18 or conditional AVD.

19 This does not give them the opportunity.
20 This is a three strikes you're out rule that takes
21 away the discretion. We don't think that's wise.

22 **Q. Now, the division didn't propose this**
23 **change.**

24 **Correct, Mr. Smitherman?**

25 A. That's correct, sir.

1 Q. And neither did the Environmental Defense
2 Fund?

3 A. I believe that that's correct.

4 Q. And you agree it's appropriate to leave
5 the discretion with the division under the
6 parameters that they had laid out as to whether to
7 deny the AVD or conditionally approve the AVD?

8 A. Yes, sir, I do.

9 Q. Okay.

10 MR. FELDEWERT: Madam Hearing Officer, I
11 have a little bit more, not much more. We're going
12 to be involved in Part 28. There are some sections
13 in Part 28 that we have not addressed.

14 I don't know if you want to take a break
15 now, or if you want me to finish up. I'm thinking
16 maybe 30 minutes, tops, maybe less than that.

17 HEARING OFFICER ORTH: All right. We have
18 gone almost 90 minutes.

19 Madam Chair, is a break okay with you now?

20 CHAIRWOMAN SANDOVAL: Sure.

21 HEARING OFFICER ORTH: All right. Let's
22 take 10 minutes and come back a few minutes after
23 2:00.

24 (A recess was taken from 1:52 p.m. to 2:03
25 p.m.)

1 HEARING OFFICER ORTH: Mr. Feldewert, I
2 believe you indicated that you are soon to wrap up
3 with Mr. Smitherman's direct presentation.

4 MR. FELDEWERT: Yes.

5 HEARING OFFICER ORTH: Let's go ahead.

6 MR. FELDEWERT: Certainly. So now,
7 Madam Hearing Officer, Madam Chair, members of the
8 commission, we're going to move now to the black
9 binder. It will be NMOGA Exhibit B.

10 It addresses our changes to Part 28, and
11 most of them we've already covered through Part 27,
12 but there are a few that are unique to Part 28 that
13 we need to address here in the remaining minutes.

14 And the first relates to the section on
15 performance standards, which is 28.8C, as in Cindy.
16 And that can be found on page 6 of NMOGA Exhibit B.

17 Q. (By Mr. Feldewert) Mr. Smitherman, are
18 you there?

19 A. I am. Can you hear me?

20 Q. Yes. Okay. All right.

21 Would you please explain how this --
22 briefly, because I think it was already addressed.
23 But if you would just orient us -- how this was
24 proposed by the division and the change and approach
25 that NMOGA has suggested with its proposed

1 **modification?**

2 A. Certainly. The division has basically
3 proposed that the operators of gas gathering systems
4 create some kind of an operations player.

5 That's not defined very well. In fact,
6 it's not defined at all. We need to make some
7 suggestions of some of the topics that might be
8 considered in that play, or included in that play.

9 And it is -- we have some concerns about
10 whether or not even that part of the rule would be
11 something that would be even something the operators
12 could respond to properly.

13 There don't seem to be any sideboards.
14 There's very little description about that. And,
15 quite frankly, we don't see a whole lot of value in
16 trying to describe everything that a midstream
17 operator is doing.

18 This could be a five-page plan, it could
19 be a five-binder plan. It doesn't seem to have a
20 size limit.

21 So we -- we somewhat question, if you
22 will, the impact, the value of this -- submitting
23 this plan for waste reduction.

24 But what does seem to be reasonable and
25 does seem to be something that is very useful, is if

1 a midstream operator is out of compliance with their
2 gas capture requirements, first of all, they're
3 going to know why they're out of compliance, because
4 they're going to have reported these volumes to the
5 division.

6 The division is going to know, at least by
7 category, why this operator seems to be out of
8 compliance. And so it would, in essence, be, I
9 guess, a proportionate requirement.

10 The division is saying, if that operator
11 is out of compliance they need to come bring in a
12 mitigated plan. Basically a plan, let's say, what
13 is causing you to be out of compliance, and what are
14 you going to do to get back into compliance and give
15 us a time frame for doing so.

16 That seems like a very useful process, and
17 that's what we're proposing here in this.

18 Q. Now, Mr. Smitherman, you said first, this
19 would apply if they were out of compliance?

20 A. That's correct.

21 Q. And is there a time frame as to when they
22 would be required to submit this mitigated plan?

23 A. There is. I'm trying to find it. I know
24 it's in here somewhere.

25 Q. Oh, here we go. Down at the bottom of

1 **page 6.**

2 A. Little A?

3 **Q. Little A, yes.**

4 A. Yes. If the operator's gas capture
5 percentage is not in compliance, and it gives you
6 the reference to understand what that means, "shall
7 submit to the division a mitigative action plan
8 within 90 days of their annual reporting."

9 And their annual reporting would have been
10 the way that they would have known, and the division
11 would have known, that they were out of compliance.

12 So it's really a way for -- it's much like
13 the division has taken the posture in other parts of
14 both these two rules where they have, in essence,
15 incentivized operators to do the right thing.

16 And if they haven't been able to be
17 successful in meeting those requirements for one
18 reason or another, then they have to do something
19 more.

20 And this would be targeted. This is not
21 going to be some plan that's going to sit on the
22 shelf somewhere. There's not even any kind of
23 implication, and no witnesses have talked about
24 whether this plan that they suggest is even going to
25 be subject to approval. It seems like it's an

1 exercise that doesn't have a whole lot of impact.

2 But I think the plan that -- we've talked
3 about this -- this mitigative plan will have impact,
4 and it will be able to show the division what that
5 operator has found, why they're not meeting their
6 capture requirements, and what they're going to do
7 to get back in compliance.

8 It's something that the division can hold
9 in their hand and use it to monitor that progress.

10 **Q. As a result of NMOGA's proposed change in**
11 **the approach here, a number of these subcategories**
12 **are no longer needed, right?**

13 **We've already addressed Subpart A, which**
14 **would require the plan in 90 days.**

15 **What is subpart -- our opposed Subpart B**
16 **on page 7, at the top of that page?**

17 A. Oh. Where it basically says that they've
18 got to continue the conversation with the -- with
19 the division, basically.

20 **Q. Okay. And --**

21 A. This is what I said earlier. The division
22 has got the plan, they've got what the operator is
23 going to do to get back into compliance, and this is
24 kind of a followup for that.

25 **Q. Okay. Now, the one -- as a result of**

1 NMOGA's proposed change, the division's former
2 Paragraphs 2 and 3 that we see on page 7, will no
3 longer be necessary?

4 A. That's correct. So this would be a more
5 targeted process for being able to get -- watch --
6 watch that an operator is, in fact, coming under
7 compliance.

8 Q. Okay. Now in the event the commission
9 doesn't agree with this, Mr. Smitherman, is there a
10 concern and -- well, let me step back.

11 In the event the commission doesn't agree
12 with NMOGA's approach and retains the language that
13 we see in Subparagraph 2 on page 7, that we have
14 proposed to strike under that scenario, do you see a
15 concern with the division's proposed language in
16 27-point I'm sorry -- 28.8.C2?

17 A. Yes. This is the similar concern we've
18 talked about in other parts of the rule, where the
19 division has -- in essence, seems to be requiring
20 flaring versus venting.

21 And there's no difference to -- to waste,
22 whether you have to -- whether you have to burn,
23 combust, or vent gas. And so that's a concern to
24 us.

25 It seems to be outside the jurisdiction,

1 if you will, of the OCD, and falls much more -- it's
2 clearly in the purview of the NMED and air quality.

3 Q. Okay. Then I want to take a look -- I
4 want to move to page 9 of NMOGA's proposed changes,
5 because I think we've already discussed the monthly
6 AVO change.

7 And we see at the bottom of page 7 that
8 carries over into the top of page 8, and the request
9 to review -- externally addressing hydrocarbon
10 odors, so I think that gets us down to -- let me
11 see. We cut some areas.

12 I think we can jump over to page 9.

13 A. I'm there.

14 Q. Under Subpart 28.8D, as in David.

15 A. Got it.

16 Q. I just see a few changes here.

17 What's the purpose here of adding
18 telephonic or electronic, in addition to written?

19 A. It simply gives the operators the ability
20 to communicate, as effectively as they can, with
21 upstream operators. This is faster. It's more
22 ubiquitous, quite frankly, right now. And giving
23 them that flexibility is probably going to make
24 things -- make communications better.

25 Q. Okay. All right.

1 Then I believe the other change that you
2 need to upstream gathering operators is over on
3 page 13 of NMOGA Exhibit B.

4 And I believe everything in between we've
5 already discussed under Part 27.

6 So I want to move to page 13 of NMOGA
7 Exhibit B.

8 A. Okay.

9 Q. I am under -- hold on one second.
10 I'm sorry. I should move to page 14.

11 A. Okay.

12 Q. We are under the 27.9C location
13 requirements.

14 A. Yes.

15 Q. Okay. We see that the -- I think the
16 initial draft had two subparagraph Cs, as in Cindy.

17 We have stricken the first Subparagraph C
18 dealing with an updated GIS map with layers -- with
19 various layers that are described in there.

20 Do you see that?

21 A. I do see that.

22 Q. Okay. First off, orient us -- what does A
23 and B require, and why has NMOGA proposed to delete
24 the first Subparagraph C?

25 A. Certainly. Really, A1 and 2 kind of set

1 the stage here for the idea that the division is
2 asking for -- and we believe is the right thing to
3 do, to ask for and have -- maps of these gathering
4 systems, GIS-based maps.

5 And so there's a requirement for each
6 operator on a given time frame, if you will, for new
7 gathering pipelines or natural gas gathering
8 systems, no later than 90 days after placing the
9 gathering pipeline into service, that the operator
10 must, if you will, supplement or give the division
11 an updated GIS map. This is an electronic,
12 visual-type mapping system.

13 And so the division would have an adequate
14 base of knowledge of where these pipelines are,
15 where these facilities are, and et cetera.

16 The part that is in C that we're strik- --
17 that we're suggesting to strike -- is, we suggest
18 striking it because, in essence, it's duplicative of
19 information that we already sent in.

20 All of the things that they asked for, it
21 seems to me, in C that identifies the date, the
22 location, volume of vented or flared natural gas,
23 each emergency, malfunction release, these have all
24 been reported on a C29. And that C29 requires
25 location. It requires -- it actually requires even

1 more information, I think, that's even listed here.

2 And so it seems duplicative to have the
3 operator to have to send in another GIS system with
4 the same information on it.

5 So we -- we are suggesting that that is
6 overly burdensome and unnecessary.

7 Q. And then of course the remaining change we
8 see on this page, Mr. Smitherman, dealing with what
9 was marked as the second Paragraph C, as in Cindy,
10 that deals with confidential information.

11 And we believe that the way the division
12 has crafted their provision address our concerns
13 there?

14 A. Yes, we agree with their language.

15 Q. Okay. All right.

16 Did I forget anything, Mr. Smitherman?

17 A. I can't think of anything.

18 Q. Okay. We're -- Mr. Smitherman, were NMOGA
19 Exhibit C1 through C23 prepared by you or compiled
20 under your supervision?

21 A. Yes, sir.

22 MR. FELDEWERT: Madam Chair, or Madam
23 Hearing Officer, I move the admission into evidence
24 of NMOGA Exhibits C1 through C23.

25 HEARING OFFICER ORTH: Let me pause for a

1 moment to see if there are any objections.

2 C1 through C23 are admitted.

3 (Exhibits admitted, C1 - C23.)

4 MR. FELDEWERT: Thank you.

5 And as a matter of course, I should
6 also -- I think they have been attached to our
7 prehearing statement.

8 But I should also move into evidence NMOGA
9 Exhibit A, which are our changes to Part 27, and
10 NMOGA Exhibit B, as in boy, which is our changes to
11 Part 28.

12 HEARING OFFICER ORTH: I will pause for a
13 moment.

14 Objections to Exhibits A or B?

15 Okay. Exhibits A and B are admitted.

16 (Exhibits admitted, NMOGA A and B.)

17 MR. FELDEWERT: Thank you very much.

18 I will pass the witness.

19 HEARING OFFICER ORTH: Thank you.

20 Mr. Ames, do you have questions of
21 Mr. Smitherman?

22 MR. AMES: I do.

23 EXAMINATION

24 BY MR. AMES:

25 Q. Good afternoon, Mr. Smitherman.

1 A. Good afternoon, sir.

2 Q. So one of the last things you addressed
3 was 28 -- in Part 28, the operational plan?

4 A. Yes.

5 Q. If I understood correctly, you said that
6 you don't think an operator should prepare an
7 operational plan until they are in compliance.

8 Is that right?

9 A. Well, the words that I actually used were
10 that they should file a mitigating plan if they're
11 out of compliance. We think that is a much more
12 effective process.

13 Q. So just to clarify, then, your view is
14 that operators should not have to submit a plan,
15 whether we call it an operation plan or a mitigation
16 plan, until they are out of compliance.

17 Is that right?

18 A. I think that that's correct. That's a
19 correct characterization, yes.

20 Q. When an operator is out of compliance,
21 damage is already done, isn't it?

22 A. Well, of course I guess that implies that
23 somehow the act of putting on paper what an operator
24 is already doing to meet these gas capture
25 requirements is somehow going to be changed by

1 writing them down.

2 You would think that an operator is
3 already planning their operations to meet these
4 compliance requirements, whether they have written
5 them down or not.

6 **Q. Well, so you're saying now that operators**
7 **should have done a plan initially, before they're**
8 **out of compliance, right?**

9 A. Well, I think that your characterization
10 is twisting my words a bit.

11 Any operator either had or has a plan of
12 what they're going to do, whether it's written down
13 or not. They have their plan of operation. They
14 know what they're going to do. Their plans, if you
15 will, or their expectations of the different areas
16 of their company are communicated and dwell within
17 the company. They have simply not been compiled,
18 necessarily, in some binders or on some shelf
19 somewhere.

20 **Q. I've never heard this term, "inherent**
21 **plan." An inherent plan is something in somebody's**
22 **head? Is that what you are saying?**

23 A. What I'm saying to you is that operators
24 have -- I'm going to try to use a different word
25 than "plan," because we seem to be sticking on the

1 word plan.

2 Q. That's the term you put in your proposed
3 language, mitigation plan. I'm not using words that
4 you didn't use.

5 MR. FELDEWERT: I'm going to object.
6 Mr. Ames, let him finish the answer first. Okay?
7 And then you can ask your next question.

8 HEARING OFFICER ORTH: All right. Please
9 go ahead, Mr. Smitherman.

10 MR. AMES: I'm sorry?

11 HEARING OFFICER ORTH: I said, Please go
12 ahead, Mr. Smitherman.

13 A. The division's language calls for an
14 operations plan. And what I am trying to
15 distinguish from that concept of some compiled list
16 of whatever that company plans to do on a variety of
17 subjects, which could go from, you know, operations
18 to construction to safety, whatever that might be,
19 every company has got direction for what they are
20 planning to do to operate effectively, efficiently,
21 and safely and, quite frankly, meet the requirements
22 and comply with all regulatory requirements,
23 including gas capture.

24 That doesn't necessarily mean that they
25 have an operations plan, as we think is contemplated

1 in the rules below.

2 Q. (By Mr. Ames) Okay. So working from
3 NMOGA's proposed language, if an operator is out of
4 compliance, then it does a mitigation plan.

5 Is that right?

6 A. That's correct.

7 Q. And that plan is going to take some amount
8 of time to do, since the operator is already out of
9 compliance, right?

10 A. I think -- in fact, we have suggested a
11 time frame for submitting that mitigation plan --

12 I'm getting some background noise.

13 We suggested that that plan be compiled
14 and submitted within 90 days of reporting of your
15 natural gas capture percentage performance.

16 Q. So three months after the operator is out
17 of compliance it's going to complete a plan that it
18 should have had done -- or you say actually do have
19 done, at least in their heads -- before they were
20 out of compliance?

21 MR. FELDEWERT: Object to the form of the
22 question. Mischaracterizes his testimony.

23 HEARING OFFICER ORTH: Mr. Smitherman, if
24 you would please state where you disagree with
25 Mr. Ames' characterization.

1 A. Can you repeat the question please, sir?

2 Q. (By Mr. Ames) Sure. It's always a
3 challenge to do that. I could ask that it be read
4 back, but I'll try and reframe it.

5 My understanding now is that you are
6 saying that an operator who is out of compliance
7 will have to submit his mitigation plan three months
8 after he's out of compliance, even though that same
9 operator you said earlier has that plan somewhere in
10 writing or in their heads.

11 Is that correct?

12 A. No, sir. That's not what I said.

13 Q. Okay. Then correct it, please.

14 A. What I've said here, and what NMOGA
15 proposes, is that a midstream operator may not meet
16 its gas capture requirements, even though it is
17 trying to do operations that are effective,
18 efficient, safe, in compliance with all regulations
19 including gas capture plans -- gas capture
20 requirements.

21 And if they do not meet their gas capture
22 requirements, then they are to come -- basically,
23 tell the division why they're out of compliance and
24 what they're going to do to get back in compliance.

25 Now, they didn't intend to be out of

1 compliance, but it happened. So something that
2 they -- even if they had written down a plan, if
3 they're out of compliance, clearly, that plan was
4 not sufficient.

5 So you would still want us to come in with
6 a mitigating plan to respond to that.

7 It seems like this is a much more
8 effective way for that operator to communicate its
9 future operations and future actions to meet
10 compliance.

11 Q. I have to agree with you that a mitigation
12 plan makes sense in that context. If an operator is
13 out of compliance, it should prepare some kind of
14 plan to come back into compliance.

15 But wouldn't an operator want to know that
16 there might be a problem before the rule is
17 violated?

18 A. Well, if you were to write a plan and they
19 were out of compliance, what good was the plan? No
20 one plans to be out of compliance. Even if you
21 wrote a plan down, you still might be out of
22 compliance. So in -- in that sense, what was the
23 benefit of writing the plan, then?

24 It is much more effective to respond to
25 why you're out of compliance with a specific and

1 targeted mitigation plan that is responsive to why
2 you're out of compliance.

3 Q. So getting ready for this, Mr. Smitherman,
4 I reviewed your CV. And you do have an impressive
5 amount of experience. You were vice president of
6 operations for the Permian.

7 Is that right?

8 A. No. Vice president for the whole company.

9 Q. For the whole company. But do you -- I
10 think your resume did reference to your
11 responsibility for operations in the Permian.

12 Is that right?

13 A. Well, I guess to be clear, I spent almost
14 20 years in the Midland office, which was the office
15 that was responsible for the Permian Basin and some
16 other areas of our company's business.

17 And in that time I was operations
18 superintendent, drilling superintendent, and
19 basically engineering manager. And then I managed
20 the entire division, which is mostly the operations
21 portions of activities in our company.

22 But then I was promoted to vice president
23 of the company, so I had many of those same
24 responsibilities and more, but across the entire
25 company's operations, which span from Louisiana,

1 Texas Gulf Coast, to Colorado. And actually, we had
2 some operations in Canada.

3 Q. That is quite a lot of territory to cover.
4 But the Permian was part of that, right?

5 A. It was. It certainly was.

6 Q. And how many wells did you oversee in the
7 Permian?

8 A. I can't remember a specific number, but it
9 was hundreds.

10 Q. Hundreds?

11 A. Yes.

12 Q. Do you remember roughly how many, or what
13 percentage were on state land?

14 A. I couldn't even venture a guess.

15 Q. How about federal land?

16 A. Well, it's the -- well, no. I can't
17 venture a guess on that either.

18 Q. Was it a significant number of wells?

19 A. It was a significant number of wells on
20 both federal and state and private.

21 Of course the Permian Basin is not just
22 New Mexico, of course.

23 Q. Uh-huh. So the operations -- as either
24 operations engineer, manager, or as vice president
25 for all of these wells, you had to be familiar

1 **with -- or you were familiar with all the rules that**
2 **were applicable to those wells, right?**

3 A. I can't say that I was familiar with every
4 single rule. But we certainly had folks that were
5 familiar with every rule. And I was familiar with
6 those that were important for my knowledge.

7 **Q. Emergencies are important for your**
8 **knowledge?**

9 A. Yes.

10 **Q. Okay. All right.**

11 **So I assume, then, you're familiar with**
12 **the BLM's definition for emergency?**

13 A. I certainly couldn't quote it.

14 **Q. But you're familiar with it?**

15 A. Yes.

16 **Q. Now, the BLM's definition of emergency**
17 **says the words "immediate and substantial adverse**
18 **effect," don't they?**

19 A. I'll have to take your word for it. I
20 don't recall those specific words.

21 **Q. And the BLM definition of emergency also**
22 **says "exceeds sales contract volume of natural gas,"**
23 **doesn't it?**

24 A. Again, I'll have to rely on your specific
25 memory of that particular passage.

1 MR. FELDEWERT: Madam Chair, if I may step
2 in there?

3 Mr. Ames, do you have the definition of --
4 the BLM's definition that you're referencing that
5 you can put up on the screen?

6 MR. AMES: No, I do not.

7 MR. FELDEWERT: Can you advise us as to
8 which BLM definition you are referencing?

9 MR. AMES: The definition in the BLM
10 rules, Mr. Feldewert.

11 MR. FELDEWERT: And which one is that?
12 What's the cite?

13 MR. AMES: I don't have a citation for you
14 right now. And this is my cross.

15 MR. FELDEWERT: That's fine, but you're
16 implying that you are accurate and completely
17 quoting from an undisclosed BLM rule, and I think
18 that's not appropriate.

19 If you want to ask him about it, put it on
20 the screen and ask him about it.

21 MR. AMES: Whether you think it's
22 appropriate or not is not relevant. I can provide
23 testimony later, if necessary, to rebut the
24 testimony that has been presented now.

25 MR. FELDEWERT: Then I object to the form

1 of the question. I would ask Mr. Ames to either
2 identify the rule that he's referring to,
3 number one, and then put it up on the screen so that
4 everyone has the benefit of what he's referencing.

5 HEARING OFFICER ORTH: All right.

6 Mr. Ames, if you would just give me enough of an
7 indication of where you are going with the
8 questioning, with Mr. Smitherman not being able to
9 see the language?

10 MR. AMES: Mr. Smitherman testified that
11 certain language should be stricken from the OCD's
12 proposed definition of emergency.

13 He also argued for adding other words to
14 the OCD's definition of emergency.

15 And later on, he testified that OCD ought
16 to adhere more closely to regulations adopted by
17 certain federal agencies, like BLM and EPA.

18 And so I'm asking him if he's aware that
19 certain words that appear in our definition also
20 appear in the BLM definition, which is in the
21 record. It's in an exhibit, and we don't need to
22 show it to him. We can argue this in our closing
23 and in our findings of fact.

24 HEARING OFFICER ORTH: All right.

25 MR. FELDEWERT: I would object to Mr. Ames

1 hiding behind the ball and not wanting to disclose
2 the exhibit, that he says is in the record, to
3 Mr. Smitherman.

4 Let's be fair here. If he wants to pick
5 and choose language, put it up on the screen.

6 MR. BAAKE: I think I have the language,
7 if that would be helpful. This is rule --

8 MR. AMES: Please, Mr. Baake, I appreciate
9 your offer of assistance, but I don't want it.

10 MR. FELDEWERT: Oh, for goodness sakes.

11 HEARING OFFICER ORTH: Mr. Ames, what is
12 your objection, so long as Mr. Baake has it -- has
13 it available and it's an exhibit?

14 It might help the commission.

15 MR. AMES: Well, it is an exhibit in our
16 pleadings, and I will find it momentarily.

17 We will continue for the moment.

18 MR. FELDEWERT: I would appreciate, for
19 the record, if you would identify what exhibit it is
20 so that everybody understands what you have
21 purportedly been quoting from.

22 I don't disagree that you are quoting
23 words from it, but we would like to be able to see
24 it.

25 MR. AMES: Moving on.

1 Q. (By Mr. Ames) Mr. Smitherman, when you
2 were in charge of the oil and gas company, did you
3 keep statistics on emergencies?

4 A. How would you define "emergencies," sir?

5 Q. Well, emergencies, as the BLM defines
6 them, perhaps. Or as any of the states in which
7 your company operated defines them.

8 A. What I'm struggling with here, sir, is the
9 word "emergency" is rather broad. And it is more
10 encompassing than I think what you have in your
11 mind, so I cannot answer.

12 Q. And so you're saying your company, as far
13 as you are aware, did not keep statistics on
14 emergencies, either as any state or federal agency
15 defined it or even as your company defined it for
16 itself?

17 A. I would say that's not fair.

18 MR. FELDEWERT: I object. It
19 mischaracterizes his testimony.

20 HEARING OFFICER ORTH: Please go ahead,
21 Mr. Smitherman, and clarify your answer.

22 THE WITNESS: Well, I did not say what he
23 said I said.

24 Q. (By Mr. Ames) Did your company keep
25 statistics on emergencies, regardless of who defined

1 **them?**

2 MR. FELDEWERT: Let me step in. I'm going
3 to object to the question, Mr. Ames. The practices
4 of his company are not at issue here.

5 What's at issue here is the proposed rule
6 that the division has put out there.

7 So the practices of his company, what his
8 company did 10, 15, 20, 30, 40 years ago, and what
9 statistics they keep have absolutely nothing to do
10 with this rule making proceeding.

11 HEARING OFFICER ORTH: Mr. Ames, your
12 response? Because I think, obviously, you have a
13 legitimate line of questioning here around the
14 documentation of emergencies.

15 But if you would, again, just describe
16 where you're going with this question to this
17 witness.

18 MR. AMES: I will withdraw the question
19 and ask a different one.

20 **Q. (By Mr. Ames) Mr. Smitherman, you are a**
21 **senior adviser for the New Mexico Oil and Gas**
22 **Association?**

23 A. Yes, sir.

24 **Q. And in the course of preparing for your**
25 **testimony, you consulted with a team of 79 others**

1 from other companies within the NMOGA family.

2 Is that correct?

3 A. That's a current -- roughly that number.
4 That's correct.

5 Q. Did any of those team members provide you
6 with statistics regarding emergencies that their
7 companies have experienced?

8 A. I don't think we talked about that
9 particular topic in that particular way, no.

10 Q. So in terms of the time required to
11 respond to emergencies -- and I'm trying to
12 understand your logic here.

13 When there is a fire, you expect the fire
14 department to respond right away, correct?

15 A. You would hope so, certainly.

16 Q. And when there's an accident, you would
17 expect the police department to respond right away,
18 correct?

19 A. I guess I'm kind of wondering what you
20 mean by "right away," quite frankly.

21 I think that that term carries a
22 particular -- it needs to have some context around
23 it.

24 Q. So the question I have for you is: Why
25 should your company, or your -- why should your

1 facility get a pass when it's venting and flaring
2 uncontrollably?

3 A. Well, let me first start by saying that
4 the division has suggested this term "pass," by the
5 way, and it has suggested a number of hours that are
6 appropriate for an upstream company to respond to
7 something that was outside the control of that
8 upstream operator, to be able to respond to that
9 situation.

10 So I mean, I'll suggest that the division
11 is the one that sees the appropriateness to that.

12 We agree that that concept is true. We
13 appreciate the fact that they have done so.

14 Q. Thank you for that.

15 Let's talk about the four hours proposed
16 by OCD and the eight hours proposed by NMOGA.

17 The Chair suggested, during some earlier
18 questioning, that perhaps four hours would be
19 appropriate for companies that operate an automatic
20 SCADA system, and that perhaps longer would be
21 appropriate for those that don't.

22 Do you recall her making that statement or
23 asking that question about that?

24 A. I do.

25 Q. So if someone has a SCADA system, they

1 don't have to roll out of bed, jump into their
2 truck, maybe in their PJs, and haul down bad roads
3 in bad weather to a remote location, right?

4 A. No, that's not correct.

5 Q. They still do?

6 A. Let's first talk about what SCADA is.

7 I think there's a misunderstanding,
8 perhaps here, and a misunderstanding generally,
9 about what SCADA is and what SCADA isn't.

10 So would you like to talk about that?

11 Q. Well, if I understand correctly, it was
12 earlier stated that a company with a SCADA system
13 can shut in a well remotely.

14 Is that correct?

15 A. Someone might have said that. I wouldn't
16 say that, because SCADA is not necessarily -- I
17 mean -- well, let's back up.

18 The word SCADA is an acronym that stands
19 for supervisory control and data acquisition. And
20 quite frankly, most of the systems that companies
21 have in New Mexico are actually not SCADA, because
22 they don't have supervisory control in most places.
23 They have data acquisition. They are basically
24 souped-up monitoring systems that make it -- that
25 make it, in a sense -- in essence, are an

1 improvement over an alarm system.

2 So they don't have the ability to actually
3 effect changes in the field remotely.

4 **Q. Some systems do, though.**

5 **Is that right?**

6 A. Some systems may. I am not familiar with
7 the particular intricacies of most operators. I
8 know our system, the company that we had, had very
9 limited abilities to make any changes remotely to
10 the field. Very limited.

11 **Q. If some companies are able to remotely**
12 **shut in wells to deal with venting and flaring**
13 **resulting from an upstream emergency or malfunction,**
14 **is there a reason why they need to have eight hours,**
15 **as opposed to an operator who perhaps doesn't have**
16 **the benefit of that advanced technology?**

17 A. I would always prefer to have a human
18 being go to a location and make an assessment and
19 make a decision, coordinate that decision with
20 others, coordinate the decision with the midstream
21 company who's dealing with the same, perhaps, source
22 of this venting and flaring.

23 And perhaps shutting in is not the right
24 answer. Perhaps that operator has the ability to
25 transfer gas away from one gathering system to

1 another.

2 Perhaps shutting in all of the wells is
3 not appropriate. You can -- you can damage wells by
4 shutting them in. So maybe having a human being in
5 the process is a much smarter way to do it. And
6 having that person in the field and on the location
7 makes a lot more sense to me.

8 Q. Now we have noticed, and we appreciate,
9 that NMOGA has agreed to many of the changes
10 proposed by OCD here.

11 Some of those changes were in direct
12 response to NMOGA's comments.

13 And you're aware of that, right?

14 A. Yes, sir.

15 Q. Do you know that NMOGA proposed almost 200
16 changes to our December's -- to our -- let's see --
17 our October version of the rules?

18 A. I'll have to rely your count, sir. I
19 didn't keep track of those.

20 Q. You would agree, though, there are many
21 changes?

22 A. Yes, sir, we did.

23 Q. Did you know that the division has agreed
24 to almost 40 percent of NMOGA's proposed changes to
25 the October rule?

1 A. And we thank you for that. Of course many
2 of those were simple clarifications to what we
3 thought the division intended, personally.

4 Q. But some were quite significant, wouldn't
5 you agree?

6 A. Yes, sir, I do.

7 Q. So during your testimony, I heard you
8 complaining that the OCD's proposed requirement in
9 9D1E was not necessary because it duplicated
10 language in Section 8.3 -- let's see. I got this
11 cite wrong -- 8E1. No, I'll review those with you.
12 I won't expect you to remember those.

13 (Discussion off the record.)

14 Q. (By Mr. Ames) So 9D1 --

15 A. Which rule are we in, sir?

16 Q. We are in 27. So we are in 9D1E. And
17 this is part of the management plan requirement.

18 A. In Rule 27?

19 Q. In Rule 27. 27.9D1E.

20 A. Just a second, please.

21 Can you tell me what page that is?

22 Q. No I cannot, and not because I'm not
23 wanting to.

24 A. Are you referring to your redline or
25 NMOGA's exhibit?

1 **Q. I am referring to OCD Exhibit 2A.**

2 CHAIRWOMAN SANDOVAL: Mr. Ames, is there
3 any way it would be possible for somebody else from
4 the division to control the screen, maybe, so that
5 you don't -- just sort of assist? I don't know if
6 there's anyone available to do that.

7 (Discussion off the record.)

8 MR. AMES: This is one of those situations
9 where in-person cross would be considerably more
10 efficient.

11 **Q. (By Mr. Ames) But, anyway, 9D1E.**

12 **So there we are.**

13 **So, Mr. Smitherman, do you see**
14 **Subparagraph E up there on the screen?**

15 A. I do. Thank you, sir.

16 **Q. And that's a requirement of the plan to**
17 **provide information on anticipated volumes of**
18 **liquids and gas production and a description of how**
19 **separation would be sought.**

20 **Is that correct?**

21 A. Yes, I see that.

22 **Q. And the -- this provision is about what**
23 **actions you will take, correct?**

24 A. That's correct.

25 **Q. It's a planning requirement, correct?**

1 A. That is part of the natural gas management
2 plan.

3 That's correct.

4 Q. Okay. And it -- then this plan is
5 submitted with the APD.

6 Is that correct?

7 A. That's correct, also.

8 Q. Okay.

9 MR. AMES: Brandon, can you go to 8E1,
10 please?

11 Q. (By Mr. Ames) So, Mr. Smitherman, you
12 recognize Section 8E1 here?

13 A. Yes.

14 Q. This is a requirement that the operator --
15 that the operator shall design completion of
16 production separation equipment for a maximum
17 anticipated throughputting pressure, correct?

18 A. Yes, I see that.

19 Q. And this is a performance standard,
20 correct?

21 A. Yes. It's under that section, yes.

22 Q. This is what an operator is expected to do
23 under the proposed rules, right?

24 A. I understand that, yes.

25 Q. These are two different things, right?

1 **Planning, before you submit your APD to OCD, and**
2 **actually installing the equipment to comply with the**
3 **performance standard?**

4 A. Well, I don't see them as separate things.
5 I see them as perhaps E1 being the overarching
6 requirements of operators in building facilities.

7 And that section in the management plan is
8 kind of a subset that would be applicable to a well
9 that you plan to drill, but perhaps -- I think the
10 concept here, what I am trying to get to, is the
11 concept in E1 seems to already require that the
12 operator anticipate the amount of gas -- oil and gas
13 and water production from a well, and is required to
14 build their separation facilities in a way that
15 minimizes waste.

16 I see no additional advantage of sending
17 in some -- maybe either design criteria or some
18 particular calculations for a separator that is just
19 attached to a particular APD, many times of which
20 that APD is going to go into a facility that already
21 exists.

22 Q. So I understand that you don't think that
23 these -- that one of these requirements is
24 necessary.

25 But you will agree that they are

1 **different, right? One is a planning requirement and**
2 **one is a performance standard.**

3 **Is that right?**

4 MR. FELDEWERT: I object. I think he's
5 already answered that question.

6 MR. AMES: Mr. Smitherman did not answer
7 that question. He decided to answer the question of
8 whether both provisions were necessary.

9 HEARING OFFICER ORTH: Mr. Feldewert?

10 MR. FELDEWERT: No. I think his initial
11 entree into E1 was the same question that he just
12 asked him.

13 HEARING OFFICER ORTH: All right. I'm
14 sorry. I didn't remember it that way.

15 Please answer the question,
16 Mr. Smitherman.

17 A. Can you restate? I'm sorry. I get
18 confused with all the chattering.

19 **Q. (By Mr. Ames) Mr. Smitherman, 9E1 is a**
20 **planning requirement, and 8E1 is a performance**
21 **standard. Those are different types of**
22 **requirements, correct?**

23 A. They appear in different parts of the
24 rule, under the title performance standard and under
25 the title of management plan.

1 But I don't necessarily see them
2 conceptually different.

3 Q. All right. Thank you.

4 Let's talk about commissioning pipelines.

5 You testified that after commissioning
6 pipeline equipment and facilities, operators must
7 vent and flare gas sometimes because of O2 content
8 and oxygen content in the gas.

9 Is that correct?

10 A. I did say that, correct.

11 Q. You didn't say how long operators might
12 have to flare that gas, did you?

13 A. No, I did not.

14 Q. You did not say how much natural gas
15 operators would have to flare in that circumstance,
16 did you?

17 A. I did not specify, no, sir.

18 Q. Yet, you're asking the commission to punch
19 a loophole in this rule without telling them what
20 the effect would be, aren't you?

21 A. Sir, I would not ask the division to punch
22 a loophole in any rule.

23 Q. Isn't that what you are doing by asking
24 for an exception for the venting and flaring of
25 natural gas due to O2 content, after the commission

1 **of a pipeline equipment or a facility?**

2 A. No, sir. I would not characterize it that
3 way.

4 **Q. How would you characterize it?**

5 A. I would characterize it as saying the
6 division has carefully crafted a reasonable
7 accommodation for the realities of the necessity,
8 the safety necessity of purging new equipment.

9 **Q. The division?**

10 A. I'm saying the rule -- if you put that in
11 the rule, that would be -- basically a nod to the
12 realities of the safety nec- -- excuse me -- the
13 operational and safety-oriented necessity of these
14 operations.

15 I don't think that's a loophole, sir.

16 **Q. You don't think that's a loophole. Okay.**
17 **Let's talk about 8G2.**

18 **8G2 says that operators need to file a**
19 **C 115B.**

20 **The division's proposal says that,**
21 **correct?**

22 A. I see that, sir.

23 **Q. And NMOGA's proposed that -- that**
24 **operators file a C 115.**

25 **Is that right?**

1 A. That's correct. A modified C 115.

2 **Q. Did you file the C 115 before?**

3 A. Not me personally, but my staff has. Back
4 when I was working, I was very familiar with our
5 accounting -- production accounting system and that
6 personnel. And I'm familiar with the process of
7 filing a C 115.

8 **Q. And --**

9 A. I haven't done it myself.

10 **Q. So you are familiar with C 115s and what's**
11 **in them.**

12 **Is that right?**

13 A. Generally speaking, yes, sir.

14 **Q. And, sir, you're aware that a C 115 is**
15 **based on taxable property.**

16 **Isn't that right?**

17 A. I actually don't recall that detail.

18 **Q. So you aren't aware that the C 115 is not**
19 **targeted to a specific well?**

20 A. Well, you didn't say that. You said a
21 taxable property.

22 **Q. Okay. Is a C 115 addressed to the**
23 **production from a specific well?**

24 A. Yes, sir. That's my understanding of it.

25 **Q. Okay. So you're saying that the C 115**

1 **reports production for a single well?**

2 A. Actually, I think the specific term -- and
3 I can't remember the term. There's a -- there's a
4 term that the division has created as a reporting
5 entity. And it's mostly, generally, an individual
6 well. But there may be exceptions that I'm not
7 familiar with.

8 Q. Are you aware that other agencies rely on
9 the C 115 data as it is currently reported?

10 A. I'm not aware of that, sir.

11 Q. So you're not aware that the state land
12 office and the taxation and revenue department
13 depend on the data in the C 115 as it is currently
14 reported by operators to OCD?

15 A. I'm not aware of the specific interactions
16 between those two agencies that you just described,
17 no, sir.

18 Q. And so I assume, then, you're not aware
19 that OCD's database is set up to process the C 115
20 data for the benefit of OCD, as well as other state
21 agencies?

22 A. I think that's asked and answered.

23 Q. Well, that's not an answer.

24 A. I think I've answered that question
25 already, sir. I am not aware of the interaction

1 between the division and other agencies as respects
2 the C 115 database.

3 Q. Thank you.

4 And so that would -- I assume you are,
5 then, not aware of how the changes you propose to
6 the C 115 will affect OCD or the other state
7 agencies?

8 A. I think I'm giving the same answer. I'm
9 not aware of the interaction between these agencies
10 with respect to the C 115 database.

11 Q. So I heard you testify that OCD's rule
12 would require operators to train personnel to detect
13 and report leaks at wells and other facilities.

14 Is that correct?

15 A. I didn't -- I think that mischaracterizes
16 my testimony, sir.

17 Q. You did not testify that personnel would
18 need to be trained to detect leaks at facilities?

19 A. I -- I think that mischaracterizes my
20 testimony in that regard.

21 Q. Well, you say you remember your testimony
22 in that regard. What was it, then?

23 That's what I remember. But if you
24 remember it differently, please explain.

25 A. I think I was referring to -- and subject

1 to check. We could look back at the record.

2 But I think I was referring to training as
3 opposed -- as respects that AVO recordation process.

4 If a company has a form that they want
5 their employees to fill out, they need to understand
6 how they fill that form out; what they look for, how
7 they judge things, and how they record it on that
8 particular form.

9 That's the training I was referring to.
10 There's other training in the field, of course. But
11 that's what I was referring to.

12 **Q. So you would agree that operators should**
13 **be training their personnel to detect and report**
14 **leaks.**

15 **Is that right?**

16 A. I agree with that. It wasn't my testimony
17 earlier, but I do agree with that.

18 **Q. It seems to be a basic duty for operators**
19 **to train -- a prudent operator to train its**
20 **personnel to do that, right?**

21 A. Yes. In fact, I think I did talk about
22 that concept, the lease operators should be looking
23 for leaks. That's part of pumper 101, I think is
24 the words I used.

25 That is the part of the testimony that I

1 was referring to.

2 MR. FELDEWERT: Mr. Ames, let me interrupt
3 you for one minute, only for the purposes of
4 pointing out that it's 3:00.

5 Mr. Smitherman and others have been at
6 this since, I think 12:30. And I'm wondering if
7 there is a time, Mr. Ames, where you might be at a
8 point where we could have a short break?

9 HEARING OFFICER ORTH: Mr. Feldewert, we
10 took a break from 10 of 2:00 to a few minutes after
11 2:00, at your request.

12 MR. FELDEWERT: Okay. All right.

13 HEARING OFFICER ORTH: We've been going a
14 little less than a hour at this point.

15 MR. FELDEWERT: Okay. And this is more
16 for personal reasons more than anything else, and I
17 apologize.

18 HEARING OFFICER ORTH: All right.

19 Mr. Ames, would you mind a short break at
20 this point?

21 MR. FELDEWERT: Mr. Ames, whenever it's --
22 whenever you -- if you think you're going to be
23 finished soon, that is fine. I just don't know how
24 you -- how much more you had.

25 MR. AMES: I prefer to continue going. I

1 don't expect to go too much longer.

2 HEARING OFFICER ORTH: All right. Go
3 ahead.

4 Q. (By Mr. Ames) So, Mr. Smitherman, I was
5 asking you about AVOs. And I think you had told me
6 prudent operators train their staff to conduct AVOs.

7 Do prudent operators have their personnel
8 conduct AVOs whenever they are on site?

9 A. And I'm struggling with my answer here,
10 sir, because I think that in the context of this
11 rule, AVO is a particular -- a particular process
12 that includes documentation, and I am not sure what
13 you mean.

14 Q. What documentation do you expect to have
15 to do for an AVO? You did hear the department's --
16 or the division's testimony, right?

17 A. I did.

18 Q. And the division was fairly clear that it
19 wasn't expecting any specific type of documentation.
20 Isn't that right?

21 A. And that's not what I'm confused about,
22 sir.

23 Q. What are you confused about?

24 A. I am confused about whether you are asking
25 about the normal duty -- I'll call it pumper 101

1 again -- that a company might expect their employees
2 to do every time they're on location. Which is, in
3 essence, look around, listen, smell, and see if
4 there's something going wrong.

5 That's a very different thing than the
6 AVOs that are contemplated in this rule, which would
7 require the same -- perhaps more detailed review by
8 the lease operator, and include documentation, which
9 is a much bigger and more complicated part the AVO
10 adds with respect to this rule.

11 That's why I'm confused.

12 **Q. So you're reading our AVO to require more**
13 **than look, see, smell.**

14 **Is that right?**

15 A. Well, I think your -- your testimony
16 itself said that there's more required than that.

17 The testimony of your own witnesses has
18 said that that also includes documentation and the
19 retention of that documentation for five years.

20 **Q. So I would like to just focus on the**
21 **physical aspects of the AVO.**

22 **Are you saying that the physical aspects**
23 **of the AVO, that actually conducting of the AVO,**
24 **involves more than looking, seeing, and smelling --**
25 **and listening, I should say.**

1 A. Well, again, I think there's a physical
2 aspect of documenting. So yes, I think there's a
3 difference between someone simply using their
4 senses, and someone conducting an AVO as respect to
5 this rule, which requires physical action to
6 document their findings.

7 Documenting whether they have seen
8 something wrong, documenting what they did, if they
9 did see something wrong. I think those are very
10 different.

11 Q. When your personnel go on site, they are
12 documenting right then, right? They're documenting
13 they've been on site, and they're documenting what
14 they've done, and they're documenting how much time
15 they've spent there, and you're tracking all of that
16 information because you're interested in cost
17 control, as well as what's happening on your sites,
18 right?

19 A. Well, I think that's actually a lot of
20 speculation as to what each company's requiring
21 their employees to do.

22 Q. Mr. Smitherman, you testified regarding
23 the downhole maintenance exception in 8D2E.

24 You said it's good enough if the operator
25 is in close proximity during liquids unloading and

1 some liquids unloading.

2 Do you remember that?

3 A. I remember the concept of in close
4 proximity to be related to liquids unloading only.

5 Q. Okay. That's fine.

6 Are you aware that the BLM Rule 3179.104
7 downhole maintenance of liquids unloading, requires
8 that the person conducting the unloading remain
9 present on site throughout the event?

10 A. Yes, sir. I'm aware of that.

11 Q. You're aware of that BLM rule?

12 A. Yes, sir.

13 Q. Are you aware of the Colorado Rule 1009
14 Part D2G1B that says the owner/operator must be
15 present on site during any planned downhole well
16 maintenance during liquids unloading or well
17 plugging event?

18 A. I'm generally aware, but I'm nowhere
19 nearly as aware of the specifics of the Colorado
20 rule as you may be implying.

21 Q. So if I understand correctly -- BLM and
22 EPA rules, except when it doesn't.

23 Is that substantially it?

24 MR. FELDEWERT: I object to the
25 argumentative nature of the question.

1 MR. AMES: Withdrawn.

2 HEARING OFFICER ORTH: Thank you.

3 MR. AMES: Nothing further. Thank you.

4 HEARING OFFICER ORTH: All right. We will
5 continue with the cross-examination after a
6 10-minute break.

7 Please come back at 3:17. Thank you.

8 (A recess was taken from 3:07 p.m. to 3:20
9 p.m.)

10 HEARING OFFICER ORTH: Certainly what I'd
11 like to do is come to a natural stopping point, if
12 we're in the middle of a witness at 5:00, and could
13 continue and finish up before 5:30. That's usually
14 what I'm driven by.

15 Does anybody have another proposal?

16 Mr. Feldewert?

17 MR. FELDEWERT: Madam Chair, we're
18 certainly willing to stay as late as you want to
19 this evening. I know it's Friday, but we're
20 certainly willing and able to be here as late as you
21 deem appropriate.

22 HEARING OFFICER ORTH: Anyone else have a
23 comment on the end of the day today?

24 MS. FOX: I'm available.

25 (Discussion off the record.)

1 HEARING OFFICER ORTH: Thank you.

2 What I would like to do is proceed through
3 cross-examination, commission questions, take the
4 one comment if the witness shows up at 4:30,
5 continue on a little bit after 5:00, but not too
6 long. But long enough to be getting us to a good
7 stopping point. That's what I'd like to do.

8 So, Mr. Baca?

9 Thank you.

10 So our plan, as we discussed on the break,
11 is to proceed with questions from the remaining
12 counsel and the commissioners. And we will accept
13 the public comment, if the commenter shows up at
14 4:30. We may well proceed beyond 5:00 today, but we
15 certainly will stop before 6:00. And the point will
16 be to get to a natural stopping point.

17 So having said all of that, Mr. Ames
18 finished his questioning.

19 So we would move then to -- let's see --
20 Mr. Biernoff.

21 MR. BIERNOFF: Yes. Good afternoon,
22 Madam Hearing Officer.

23 EXAMINATION

24 BY MR. BIERNOFF:

25 Q. I have just a few questions for you,

1 **Mr. Smitherman.**

2 **You have testified, Mr. Smitherman, that**
3 **you worked with a company called Besco or Bopco,**
4 **right?**

5 A. That's correct. It is the same company
6 from my very first day until I retired. The name
7 changed a few times, but it's the same company.

8 Q. Okay. Can we just call it Besco for
9 purposes of these questions?

10 A. That would be fine with me, sir.

11 Q. Okay. Did Besco have leases with the
12 New Mexico state land office?

13 A. Yes, sir, we did.

14 Q. Did Besco ever have any difficulty
15 contacting the New Mexico state land office?

16 A. Golly. "Ever" is a big word. I'm not
17 sure I can even answer that.

18 Q. Did Besco have access to the New Mexico
19 state land office's address and phone number?

20 A. Oh, certainly.

21 Q. As an operator of wells in New Mexico, did
22 Besco report royalties regularly to the New Mexico
23 state land office?

24 A. When you say "report royalties," I am
25 having a little bit of difficulty there. I know

1 that we paid royalties.

2 Q. In connection with that payment, did Besco
3 submit any kind of paperwork to the state land
4 office?

5 A. I'm actually not familiar with that
6 particular aspect of reporting and paperwork. So I
7 assume if it was required, we did that.

8 Q. Okay. So --

9 A. I'm speculating, sir.

10 Q. Okay. You're speculating. I'm not going
11 to ask you to identify someone else with your former
12 employer who could help us answer the question
13 conclusively.

14 But certainly, you were able -- your
15 company was able to reach the state land office, if
16 it needed to, for purposes of communicating
17 regarding its leases?

18 A. Yes.

19 Q. Okay. Was there -- are you aware of
20 any -- okay. I will strike that.

21 In your testimony, Mr. Smitherman,
22 regarding the oil and gas association's proposed
23 changes to the Oil Conservation Division's proposed
24 rule, you had indicated, I believe in your
25 testimony, that the association opposes a

1 **requirement that operators report vented and flared**
2 **volumes to the royalty owners, right?**

3 A. NMOGA suggested some changes -- in fact,
4 striking a particular passage in the rules -- that
5 require -- you know, I forget the language itself.
6 But the language -- let's go to the language. It
7 might be much more helpful.

8 Can we do that? Can you recall where that
9 is, sir?

10 Q. I'm pulling up the -- I'm pulling up the
11 rule now, and I'll give you a citation in just a
12 moment.

13 A. Thank you, sir.

14 Q. Mr. Smitherman, we are looking at Part 27,
15 Subpart 8G4.

16 A. Yes. I see that now, sir.

17 Q. Okay. So the association has proposed
18 that the oil and gas conservation division proposed
19 rule not include a requirement that operators report
20 vented and flared volumes to royalty owners?

21 A. That's correct.

22 Q. The association did not make any kind of
23 distinction in its proposal striking this language
24 between working interest owners and royalty owners,
25 right?

1 A. Well, this provision doesn't contemplate
2 any communications of working interest owners.

3 Q. NMOGA did not suggest, in its proposal,
4 that this reporting provision be limited to royalty
5 owners as opposed to overriding royalty interest
6 owners.

7 Isn't that right?

8 A. We made no distinction between those two.

9 Q. You're asking for the language to be
10 stripped out of the rule completely, right?

11 A. Yes, sir.

12 Q. Okay. And you're asking for that. And I
13 understood you to testify earlier that it's
14 particularly difficult and burdensome for operators
15 to locate the identities of, and the contact
16 information for, royalty owners, right?

17 A. In fact, I'll go beyond that. Impossible,
18 in some cases.

19 Q. Impossible in some cases. And you
20 testified a moment ago, in response to my question,
21 that you're -- at least your former company -- had
22 no difficulty, that you know of, contacting the
23 New Mexico state land office, a royalty owner.

24 A. Is that a question?

25 Q. Yes. You testified to that proposition a

1 **few minutes ago, right?**

2 A. Yes.

3 Q. Okay. So what is -- what is the
4 **impediment, Mr. Smitherman, to operators**
5 **communicating this information to the New Mexico**
6 **state land office?**

7 A. This rule doesn't contemplate that
8 particular communication. So quite frankly, we've
9 not even discussed that particular communication.

10 Q. So are you saying, Mr. Smitherman, that
11 **the state land office is not a royalty owner?**

12 MR. FELDEWERT: Let me object here,
13 Mr. Biernoff.

14 I'm not aware that the state land office
15 has proposed any modification for parties to
16 consider, or filed any modifications.

17 So I'm not sure --

18 MR. BIERNOFF: Madam Hearing Officer,
19 Mr. Feldewert -- to his concern in some other form.
20 I don't think he raised a valid objection to my
21 question.

22 MR. FELDEWERT: I didn't even get to
23 finish my objection, Mr. Biernoff, so let me finish
24 my objection this time, please. Okay?

25 HEARING OFFICER ORTH: Okay.

1 MR. FELDEWERT: My point being, I don't
2 see the relevancy of this question, in light of the
3 fact that no distinction is made by -- in the
4 language proposed by the commission, and no such
5 suggestion has been made by any distinction by the
6 state land office.

7 MR. BIERNOFF: The state land office's
8 witnesses aren't on the stand. NMOGA, through
9 Mr. Smitherman, has proposed changes to the rules,
10 and we're entitled to ask him about it.

11 HEARING OFFICER ORTH: Mr. Feldewert, I
12 agree with Mr. Biernoff. Whether they have proposed
13 new language or not, I believe they can question the
14 witness about the language that NMOGA has proposed.

15 Go ahead, Mr. Biernoff.

16 Q. (By Mr. Biernoff) So I was asking you,
17 Mr. Smitherman: Is the state land office a royalty
18 owner?

19 A. Yes, sir.

20 Q. And you've already testified that there's
21 no impediment to communicating with the state land
22 office.

23 So why does NMOGA object to this provision
24 to the extent that it calls for royalty owners, like
25 the state land office, to be notified of vented and

1 **flared volumes?**

2 MR. FELDEWERT: Object to the form of the
3 question. It assumes a position not established.

4 MR. BIERNOFF: Madam Hearing Officer, I'm
5 asking the witness to explain why his client, the
6 association, is proposing the wholesale removal of
7 this reporting requirement.

8 And that's a valid question. And if the
9 witness knows the answer to that, he should answer
10 it.

11 HEARING OFFICER ORTH: I agree with you.

12 Mr. Smitherman, can you answer the
13 question in its most recent formulation for
14 Mr. Biernoff?

15 THE WITNESS: I will try.

16 The division has proposed that the
17 operator shall report vented and flared natural gas
18 to all royalty owners of the mineral state on a
19 monthly basis.

20 And we've reviewed that requirement,
21 recognized the difficulty and impossibility in some
22 cases, and have chosen to suggest that this
23 provision be struck.

24 **Q. (By Mr. Biernoff) But the association has**
25 **not proposed that the reporting requirement be**

1 limited to a certain threshold, let's say, of a
2 royalty ownership interest, right?

3 A. That's correct. We did not offer anything
4 other than striking Subsection 4.

5 Q. So in the association's view, for purposes
6 of this provision that we're looking at, the state
7 land office, which owns -- well, the State of
8 New Mexico through the state land office -- owns the
9 mineral estate in a particular tract, is the same as
10 somebody who owns 1/10th of 1 percent of an
11 overriding royalty interest.

12 Is that right?

13 NMOGA is treating those two the same in
14 this provision, right?

15 A. We -- we -- in essence, we're suggesting
16 that the provision that the division has put forward
17 is overly burdensome and, quite frankly, impossible
18 in some cases.

19 And we are suggesting that the entire
20 section be struck.

21 Q. Mr. Smitherman, you did not answer my
22 question.

23 I asked you if, for purposes of this
24 provision your client, the oil and gas association,
25 is treating the state land office, the State of

1 **New Mexico, which owns the underlying mineral**
2 **interest in a given tract, the same as somebody that**
3 **owns a tenth of 1 percent of an overriding royalty**
4 **interest.**

5 A. And I might suggest to you, sir, that the
6 division is doing the same thing in putting all of
7 those state owners in the same provision.

8 Q. Once again, Mr. Smitherman, you are not
9 answering my question.

10 I am not asking you what the division did.
11 I'm asking you about what your client has done.

12 Would you please answer the question yes
13 or no?

14 MR. FELDEWERT: Let me interject here.
15 Madam Chair, I'm going to object to the form of the
16 question.

17 I think Mr. Smitherman has answered his
18 question. If Mr. Biernoff has a -- if he has a
19 suggestion, that's fine. I haven't heard it yet.

20 We are responding to the language that the
21 division has put out there. It was also briefed,
22 and the state land office has not suggested any
23 particular modification, either in its brief or in
24 its filings.

25 MR. BIERNOFF: Madam Chair, once again,

1 the state land office is not on the stand, and the
2 association witness is. And he should have to
3 answer relevant questions about his client's
4 proposal.

5 HEARING OFFICER ORTH: I agree with you,
6 Mr. Biernoff.

7 Mr. Feldewert, you have already argued
8 that particular objection. I've already overruled
9 that particular objection.

10 Mr. Smitherman for some reason has not
11 acknowledged -- made the simple acknowledgment that
12 Mr. Biernoff is asking him to make.

13 Regardless of, perhaps, related to what
14 the division did in that provision, which was to
15 require reporting to everyone Mr. Biernoff has
16 described, by striking that provision, NMOGA -- or
17 proposing to strike that provision, NMOGA again is
18 having them treated the same.

19 He simply needs to make that simple
20 acknowledgment, and we can move on.

21 **Q. (By Mr. Biernoff) Mr. Smitherman, are you**
22 **prepared to make that simple acknowledgment? Yes or**
23 **no?**

24 MR. FELDEWERT: Can we ask that the
25 question be asked again, so the record is clear?

1 Go ahead, Mr. Biernoff.

2 Q. (By Mr. Biernoff) I'm glad to try again.
3 I think this is the third time I've asked the
4 question.

5 Mr. Smitherman, I'm asking you, with
6 respect to the provision that we are looking at,
7 isn't the association treating the New Mexico state
8 land office, which on behalf of the State of
9 New Mexico manages the mineral interests, own the
10 mineral estate in a given tract, you're treating
11 them and us the same way as you are treating
12 somebody who has a 1/10th of 1 percent of an
13 overriding royalty interest, right?

14 A. We are treating all mineral owners the
15 same.

16 Q. So that's a yes to my question?

17 A. To the best I can tell, that's a yes, sir.

18 Q. Okay. Thank you.

19 Mr. Smitherman, let me ask you: In the
20 course of this work did the association study the
21 burden, the additional burden, that an operator
22 would face in adding the New Mexico state land
23 office, basically, as a cc to a report that it's
24 submitting to the Oil Conservation Division?

25 A. We did not study that particular concept,

1 no.

2 Q. And in fact, there is no meaningful
3 burden, additional burden, when simply copying the
4 state land office on information that the operators
5 are already gathering and submitting to the Oil
6 Conservation Division, right?

7 A. Well, since we didn't study it, I can't
8 answer that.

9 Q. Well, can you think, sitting here today,
10 of any meaningful additional burden that that would
11 impose on an operator?

12 A. Can you again describe what filing, what
13 ccs? Cc of what?

14 Q. Well --

15 A. I'm not following you.

16 Q. Well, okay. That's fine.

17 The provision that we're looking at
18 concerns reporting, right? We were looking at
19 Part 27. We were looking at 8, and we were looking
20 at the reporting provision. So that's in G. And
21 specifically, we were looking at language that your
22 client is suggesting be stricken from the proposed
23 rule in G4.

24 And the language is that the operator
25 shall report vented and flared natural gas in a

1 volumetric and percentage basis to all royalty
2 owners and mineral estate being produced by the well
3 on a monthly basis.

4 The provision goes on, but I read you the
5 part that we are looking at.

6 So now that you are reoriented, I'm asking
7 you -- you said that your client and the 80 people
8 that got their heads together, and it sounds like
9 spent a lot of time studying this rule and
10 developing recommendations, did not study any
11 additional burden, economic burden or other burden,
12 that reporting to royalty owners would impose,
13 reporting to the state land office as a royalty
14 owner.

15 And I'm now asking you -- you said you
16 didn't study it.

17 So I'm asking you, sitting here today, can
18 you think of any additional burden that would be
19 imposed on operators by having to cc the state land
20 office on operator reports of vented and flared
21 volumes to the division?

22 MR. FELDEWERT: I'm going to object to the
23 form of the question, Mr. Biernoff, only because I
24 think you would acknowledge it went so long.

25 What I'm requesting is that you rephrase

1 your question to focus on that last portion.

2 MR. BIERNOFF: Mr. Feldewert, I'm glad --
3 and, Madam Hearing Officer, I'm glad to try to
4 rephrase my question. I did need some time to get
5 the witness back focusing on the section that we are
6 looking at.

7 Q. (By Mr. Biernoff) Now that we've done
8 that I'm asking you, Mr. Smitherman, can you think
9 of any additional burden, any meaningful additional
10 burden, that an operator faces in ccing the state
11 land office on the reports that the operator is
12 already sending to the Oil Conservation Division?

13 A. Well, as I said before, we didn't study
14 it, so I really hate to speculate.

15 So I am still not going to answer that
16 question.

17 Q. So you -- you cannot think of a burden.
18 Is that right?

19 A. I'm telling you that I don't want to give
20 you an answer, because we haven't thought it
21 through. That's different than I can't think of a
22 burden.

23 Q. Mr. Smitherman, this is a very serious
24 proceeding. I know you know that, because you've
25 given very serious considerations of this rule, and

1 you've given very deliberative testimony. And I
2 appreciate that, and I appreciate the attention that
3 you've paid to this rule.

4 The association is making a very
5 significant change -- proposing a serious change to
6 this rule.

7 And I am asking you to give us an honest
8 answer about whether you can think of a burden that
9 this reporting requirement would impose on an
10 operator vis-a-vis the state land office.

11 Can you do that?

12 A. Might I suggest something that may clear
13 this impasse?

14 We have another witness that's coming
15 later that is very familiar with reporting and
16 reporting details. And that witness probably has a
17 better understanding of the additional burden that
18 would be required to, as you say, cc the state land
19 office.

20 I might suggest that that witness would be
21 in a much better position to give you a good, clear,
22 and correct answer to your question.

23 Q. I will be glad, Mr. Smitherman, to ask
24 that witness such a question, if that witness
25 presents, in their direct testimony, testimony about

1 this rule provision.

2 But since you have testified about this
3 rule provision, I'm simply asking you -- I'm not
4 asking you to think for anybody else. I'm asking
5 you, as an expert, as a member of the association,
6 and as an employee of the association, to tell me --
7 to tell the tribunal.

8 Can you think of any additional burden on
9 an operator, in ccing the state land office on the
10 reports that are being submitted to OCD?

11 A. My understanding is the state land office
12 already gets copies of the C 115.

13 Isn't that correct, sir?

14 And if that's the case, then it would be
15 no additional burden, because you're already getting
16 copies.

17 And so what I'm struggling with is what
18 the rule is going to look like once the division --
19 once the commission has decided what pieces they are
20 going to accept, which additional forms that they
21 may require from us; and, therefore, what additional
22 burdens it might be to inform the land office.

23 MR. BIERNOFF: Madam Hearing Officer, I'm
24 going to ask for your assistance.

25 Mr. Smitherman has had, I think, four

1 opportunities now to give an answer to what is a
2 yes-or-no question, and he has failed to do that.

3 And it's a reasonable question, it's
4 directly relevant to the association's position in
5 this proceeding, and specifically to testimony that
6 this witness himself has given.

7 HEARING OFFICER ORTH: Mr. Smitherman,
8 would you please answer the question? If it weren't
9 within the scope of your own testimony, I would rule
10 otherwise. But it was within the scope of your
11 testimony.

12 THE WITNESS: Yes, Madam Hearing Officer.
13 I understand that.

14 And Mr. Biernoff seems to think this is a
15 yes-or-no answer, and it is not.

16 It -- it can be more complex than that,
17 and I'm trying very hard to give him a correct
18 answer. The last thing that anybody wants, I
19 think -- maybe he does -- is for me to give a
20 yes-or-no answer that doesn't really encompass all
21 of the correct answers.

22 In fact, you asked me at the very
23 beginning for the whole truth and nothing but the
24 truth. And a yes-or-no answer may not be the whole
25 truth here.

1 So I am trying to answer his question. He
2 wants a yes or no. I can't give him a yes or no.

3 Q. (By Mr. Biernoff) Mr. Smitherman, you
4 can't give me a yes-or-no answer because you cannot
5 think of any additional burden that this reporting
6 requirement imposes on operators, right?

7 MR. FELDEWERT: I object to the form of
8 the question.

9 A. I cannot give you a yes-or-no answer.

10 Q. (By Mr. Biernoff) You can't --
11 Mr. Smitherman, you've been sworn in.

12 Mr. Smitherman, if you can think of such
13 an answer, of such a reason, such a burden, you need
14 to provide that here. Do you understand?

15 MR. FELDEWERT: Madam Chair, I'm going to
16 step in right here and lodge my objection again.
17 Okay? And this is important.

18 There is no one who has proposed and asked
19 the division to -- or NMOGA to determine whether
20 this reporting that he's talking about, which
21 remains fairly vague, okay -- is -- is -- whether
22 that has a burden, if it's limited to the state land
23 office.

24 That was not proposed by the division, it
25 is not proposed by the state land office, so nobody

1 has examined that, number one.

2 And no one has examined that in the
3 context of knowing what type of reporting they are
4 now suggesting.

5 None of that has been brought forward,
6 because they chose -- not themselves, the state land
7 office -- not to suggest any modifications.

8 MR. BIERNOFF: Madam Hearing Officer, the
9 issue here is not what other parties have or have
10 not suggested. The issue is that we have a witness
11 on the stand who is refusing to answer questions.

12 And if Mr. Smitherman cannot answer the
13 question whether he can identify whether he has
14 thought of, and whether he today can think of a
15 burden that's called for by this provision, then I
16 don't -- I think his testimony needs to be stricken.

17 HEARING OFFICER ORTH: All right. So I'm
18 not striking his testimony.

19 And, Mr. Feldewert, I did hear your
20 objection.

21 Having said that, Mr. Biernoff, we may
22 have gone as far as we can with Mr. Smitherman
23 answering your question directly.

24 What I've heard him say is that he is
25 unable to answer your question, and I think that's

1 the answer you're going to get today. He cannot
2 answer your question.

3 MR. BIERNOFF: I think he will not answer
4 the question, but I take your point, Madam Hiring
5 officer.

6 Q. (By Mr. Biernoff) Mr. Smitherman, there's
7 another provision in the same section that I want to
8 direct your attention to. And that is Sub 6.

9 And you have testified earlier today that
10 you don't think that this -- you, on behalf of your
11 client, the association -- you don't think that this
12 language that upon -- I'm going to read it -- "upon
13 the New Mexico environment department's request, the
14 operator shall promptly provide a copy of any form
15 filed pursuant to 19.15.27 NMAC."

16 You testified earlier that you don't think
17 that that language should be included in the final
18 rule, right?

19 A. That's correct. NMOGA has suggested
20 striking that language.

21 Q. And you further testified that you think
22 that it's inappropriate for operators to be required
23 to provide the specified forms to NMED, right?

24 A. Yes, I did say -- use that word. I
25 testified that I thought it was odd for an NMED

1 requirement to be in an OCD rule.

2 Q. And yet, earlier in your testimony, you
3 testified about the importance of the Oil
4 Conservation Division and commission coordinating
5 the rule making with NMED, right?

6 A. I did say that, yes.

7 Q. Okay. Is sharing information a form of
8 coordination?

9 A. I would say that coordination is more
10 avoiding duplication, avoiding overly burdensome
11 duplication of requirements. And in this particular
12 case, that the forms that we're filing to the
13 division are already available to the NMED.

14 Q. Thank you, Mr. Smitherman. I'm glad that
15 you mentioned burden, because that brings us to the
16 next question.

17 There isn't any additional burden, any
18 meaningful additional burden on an operator for
19 simply sending NMED a form that it's already filed
20 with OCD, right?

21 A. I disagree with that, sir.

22 Q. There is a burden?

23 A. Well, let's read the rule, okay, that
24 we've suggested to strike.

25 "Upon the New Mexico environment

1 department's request the operator shall promptly
2 provide a copy of any form filed pursuant to 9.15.27
3 NMAC."

4 So that is a runoff response to the NMED's
5 request. So there is a -- there's an administrative
6 burden to make sure that we get the right forms, and
7 get those submitted to the NMED that they request.

8 Q. Would --

9 A. May I finish?

10 Q. Please do.

11 A. It takes someone to manage that request.
12 It takes someone to oversee that request, QC the
13 response to that request. It takes some burden to
14 make sure that this response -- or excuse me -- this
15 request has been answered timely and properly.

16 Q. And does NMOGA oppose -- would NMOGA
17 oppose operators simply being required to furnish
18 these forms to NMED as a matter of course?

19 A. We haven't discussed that. I don't know.

20 Q. Because that would not impose an
21 additional burden on the operator, would it?

22 A. As I said, we haven't discussed that, so I
23 don't know.

24 Q. Is the burden that you believe operators
25 would suffer under Sub 6 more of a burden than the

1 burden than would be imposed on operators to report
2 venting and flared volumes to royalty owners like
3 the state land office?

4 A. I don't know, sir.

5 Q. Okay. Mr. Smitherman, while testifying in
6 the definitions section of the proposed rule, you
7 gave some testimony on the definition of the term
8 "emergency," right?

9 A. Yes, sir.

10 Q. And the association has proposed some
11 changes to the definition of emergency, right?

12 A. That's correct.

13 Q. And the association has specifically
14 proposed enlarging the window of time from
15 four hours to eight hours for response to an
16 emergency, right?

17 A. That's correct, sir.

18 Q. Okay. And you testified about some of the
19 risks that you believe operators might -- operators
20 or employees might experience as a result of having
21 to move quickly, move within a four-hour window,
22 right?

23 A. Yes, sir.

24 Q. And I think you had testified that people
25 might drive -- not over the speed limit, but a

1 **little too fast.**

2 **Is that right?**

3 A. I think my words were specifically talking
4 about especially responding during adverse weather
5 conditions. Because many of these -- in my history
6 and my experience, many of these upsets that are
7 caused by midstream malfunction happen during
8 extreme weather.

9 And so yes, we are concerned about our
10 employees maybe driving faster than they should
11 during those adverse weather conditions, even though
12 they may not be speeding, as opposed to the actual
13 speed limit, but perhaps taking a little more risk
14 than they should.

15 Yes, I'm concerned about that.

16 **Q. Is the association concerned about**
17 **operators or their employees driving a little too**
18 **fast if there are not exigent weather conditions?**

19 A. Certainly.

20 **Q. Okay. Has the association obtained any**
21 **kind of empirical evidence that report any accidents**
22 **in the course of responding to the kind of exigent**
23 **events that the rule contemplates?**

24 A. Well, since these employees haven't been
25 under this particular burden, I'm not sure how you

1 would collect that type of empirical data. So no.

2 Q. Okay. So I'm asking whether or not
3 specifically, than, this rule, which I recognize is
4 new, has the association obtained any empirical data
5 on risks that employees face when responding to any
6 kind of oil and gas operation in an emergency?

7 A. We have not looked at that, because it
8 does not seem to be relevant. We're talking about
9 the additional incentives and the additional
10 motivations that, with this limited time frame,
11 would impose on our employees, and that has not
12 existed.

13 So I don't know that there is empirical
14 evidence that even exists to do that.

15 Q. So, Mr. Smitherman, your testimony before
16 about employees driving too fast but not over the
17 speed limit to get to an emergency is purely
18 speculative, right?

19 A. I would not characterize it that way. I'm
20 talking about my experience in dealing with
21 employees and dealing with motivations. And so it
22 is not speculative. It's based on my experience
23 with employees over 40 years.

24 Q. Well, can you give us some specific
25 examples that -- you've said already, I think, that

1 you think you don't have any empirical information
2 to support this.

3 Do you have any anecdotal information to
4 share with us?

5 A. I have anecdotal information, specific
6 information of, if you will, accidents that have
7 occurred in my company in the past that I believe
8 were -- had some nexus to employees -- I will use
9 the word "taking shortcuts," which is in the same
10 category, if you will, as driving a little faster
11 than they should have, and they got a -- in a
12 limited period of time.

13 Q. Any accidents -- go ahead. I'm sorry.

14 A. I -- I'm trying to, in essence, draw a
15 line between my experience and seeing people's
16 behaviors and extending that to what I expect
17 employees, perhaps, to do when given this extra
18 motivation of the four-hour limitation.

19 Q. And in your 40-some-odd-year experience,
20 Mr. Smitherman, do you recall any accidents that
21 employees got involved in because they were
22 hastening to respond to an emergency event in a time
23 frame specified by a governmental regulation?

24 A. I'm trying to think, Mr. Biernoff, if
25 we've had operations where we had to respond within

1 a particular time frame, that would be relevant to
2 your question, and I cannot think of one.

3 I can think of -- I can think of instances
4 where I have -- employees have had accidents where
5 they have, perhaps, been going too quickly.

6 **Q. And that's certainly not my question.**
7 **Just to be clear, that's not my question.**

8 It sounds like you answered my question
9 with a no.

10 Is that correct?

11 A. Well, I'm saying that because -- not
12 because I can't think of accidents that have
13 occurred, but I can't think of particular situations
14 where a government -- a government-imposed time
15 limit was involved.

16 **Q. Okay. You've answered my question, then.**
17 **And thank you very much.**

18 **Madam Hearing Officer, I'm ready to pass**
19 **this witness to the next examining party.**

20 HEARING OFFICER ORTH: Thank you very
21 much, Mr. Biernoff.

22 And my -- I apologize -- my apologies to
23 the next examining party, actually. But we have a
24 Commissioner who needs to depart before we would
25 likely get to him with questions, Commissioner

1 Engler.

2 I'd like to provide an opportunity for him
3 to ask his questions before he has to leave.

4 Commissioner Engler, can you hear me?

5 COMMISSIONER ENGLER: Yes, Madam Hearing
6 Officer.

7 Can you hear me?

8 HEARING OFFICER ORTH: Yes.

9 COMMISSIONER ENGLER: And I have my video
10 on. If I can't keep bandwidth, I'll probably turn
11 it off. Okay?

12 And thank you. Again, I do have to get
13 moving along here shortly.

14 EXAMINATION

15 BY COMMISSIONER ENGLER:

16 Q. I guess it's afternoon. And good
17 afternoon, Mr. Smitherman.

18 Can you hear me?

19 A. Yes, sir. I can hear you loud and clear.

20 Q. All right. Again, I -- again, lucky for
21 you, my questions again are going to circle back to
22 royalty questions, about the royalty ownership.

23 My questions are more about clarification,
24 so I -- I would suspect I won't get an objection.
25 If I do, I hear I can get absolution somehow, so

1 maybe we'll be all right.

2 I want to start -- again, most of my
3 questions are on royalty ownership and some
4 clarification there and from what I understand from
5 my past work.

6 I guess my first question, if I could take
7 yourself away from being an operator.

8 If you were a royalty owner, would you
9 want to know how much gas has been vented and
10 flared?

11 A. I guess the answer is it might make a
12 difference to me as a royalty owner. I don't know
13 that that means that it's something that the
14 operator can do.

15 I think those are very different.

16 Q. Okay. I think I heard you, hopefully. I
17 might lose you every now and then.

18 But yeah, I think -- so your point is,
19 again -- correct me if I'm wrong, because I'm losing
20 a little bit here.

21 But -- yes, but you know, it's a question
22 of whether we can accomplish the task of an
23 operator.

24 Is that how you said it? Or is that
25 correct?

1 A. Yes, sir. Our striking of that provision
2 doesn't have anything to do with our expectations of
3 what a royalty owner wants or doesn't want.

4 It's striking a provision that is not only
5 very difficult; but, actually, in many cases,
6 impossible to do.

7 And so it doesn't really have anything to
8 do with the motivation of the royalty owners. It
9 has to do with our ability to accomplish what the
10 division has put in front of us.

11 Q. That's good. That leads me to -- if I
12 remember, any and all royalty owners. And they
13 share, I guess -- well, they -- as a royalty owner,
14 they share a part of the revenue stream, correct?

15 A. That's correct. It's a cost-free revenue
16 stream, other than taxes.

17 Q. Correct. So that would mean, you know,
18 a -- I know the difference between operator and
19 working interest owner.

20 But any royalty owner should be getting
21 some kind of -- your financial accounting should be
22 sending some kind of financial statement over some
23 period of time, correct?

24 A. Well, let's explore that a little bit. I
25 think that's a great question.

1 The truth is that -- especially because a
2 lot of these royalty and override royalty interests
3 have become so fractionalized and there are so many
4 of them and, quite frankly, many of the payments are
5 so small that many companies have set up systems to
6 pay these royalty owners. And they've given the
7 royalty owners several options. And many times the
8 options are simply make a direct deposit to a bank
9 account.

10 And actually, in many of those cases, the
11 royalty owner is given a choice as to whether or not
12 they want any more communications from the operator.

13 And if they choose not, the operator's
14 only obligation, and only ability, quite frankly, to
15 reach that royalty owner, is to make the direct
16 deposit to them and send them a 1099.

17 Q. Yeah. And I believe -- and again, I'll
18 circle back on that.

19 But I do believe -- and let me go a little
20 bit on that one. I know -- and again, I'm not going
21 to be quoting a rule. I believe it's asking for
22 monthly reporting on that.

23 Is that correct?

24 A. Yes, sir. In fact, let me back up a
25 second.

1 I'm not even sure about the 1099. But
2 let's just talk about the actual payments
3 themselves.

4 Yes, they are asking for monthly reporting
5 of any -- of every royalty and overriding interest
6 owner. And that's the difficulty. In fact, that's
7 the impossibility.

8 Operators, many times, don't have the
9 contact information to do that either, because their
10 own -- I'll call them their own -- royalty owners or
11 overriding royalty interest owners have chosen to
12 take direct deposit; and, therefore, not get any
13 other correspondence from them, or the fact that
14 they are not even corresponding or given direct
15 deposit on a monthly basis.

16 Sometimes these royalty checks are so --
17 the amounts are so small that the operator, even on
18 a direct deposit, doesn't communicate monthly.
19 They -- they communicate on a quarterly basis or
20 even an annual basis.

21 Q. Yeah. I guess -- yeah. Just to further
22 clarify.

23 From my understanding from what I saw --
24 again, I have a little bit of experience many years
25 ago -- I think the timing is an issue for you, or

1 **for NMOGA, because a lot of the financial accounting**
2 **was more on a quarterly basis than a monthly.**

3 **Does that sound reasonably correct, still,**
4 **today?**

5 A. I actually think that it's a problem,
6 both -- from a monthly standpoint, but mostly
7 because we don't know who they are or don't
8 communicate with them. We don't have a way to
9 communicate with them at all.

10 And again, let's go back to some of the
11 testimony before. It gets a little complicated.

12 When you put together several working
13 interest owners' mineral interests in a unit, you
14 pool a bunch of people's leases in the same unit.
15 There's one operator, there may be many working
16 interest owners. And those working interest owners,
17 not all of them, have some kind of royalty owner --
18 overriding royalty owner where they might want
19 royalties to -- now think about this.

20 If Operator A -- or if Working Interest
21 Owner A is that operator and Working Interest Owner
22 B is a non-op, nonoperating working interest owner,
23 if Operator A doesn't pay Operator B's royalty
24 owners properly, Operator B is the one that suffers
25 the consequence by losing this lease.

1 So many times, those other nonoperating
2 working interest owners choose to pay their own
3 royalty owners.

4 And so Operator A -- excuse me -- Working
5 Interest Owner A, who is the operator, doesn't even
6 know who those people are. So how could that
7 operator be able to send information directly to
8 those working -- those mineral interest owners?

9 Q. Well, again, I think that's a good -- I
10 understand what you're saying. Again, I do believe
11 that whether it's Operator A or Working Interest
12 Owner B, there is a contractual obligation to that
13 royalty owner.

14 A. And typically, that contractual obligation
15 to the royalty owner comes from the operators who --
16 the working interest owner that has that lease,
17 because it may not be the operator of that pool
18 unit.

19 Q. So that's very helpful. I think -- I
20 guess -- so if I, like, circle around and finish up,
21 because I am running out of my time. I'm sorry.

22 The issue here is there are so many
23 potential interest owners, royalty interest owners,
24 and with very limited, let's say, knowledge of who
25 or where they are, you know like I said, a lot of

1 them with just straight direct deposit, the problem
2 is really confined to that the -- just the level of
3 trying to accomplish the task or the recommendation
4 that the OCD wants in the order.

5 Is that right? Is that a fair summary, I
6 guess? I was trying to -- I was trying to not get
7 an objection from Mr. Feldewert, but I could try.

8 A. Apparently it's easy to do.

9 MR. FELDEWERT: Commissioner Engler,
10 you're doing a great job, so I have no reason to
11 object yet.

12 (Discussion off the record.)

13 A. The answer to your question, sir, is
14 that -- yes, it's the entire obligation that the
15 division has suggested in a rule, in toto, that
16 makes it impossible.

17 Now are there little subsets that could be
18 done? Perhaps, but that's not what's been proposed.

19 COMMISSIONER ENGLER: Mr. Smitherman,
20 thank you very much.

21 Madam Hearing Officer, thank you for
22 letting me go real quick. I do have to run now for
23 other obligations. I'm sorry.

24 But thank you very much.

25 HEARING OFFICER ORTH: Thank you,

1 Commissioner Engler.

2 Let's see. Ms. Fox?

3 MS. FOX: Mr. Baake, at this point, has a
4 little cross.

5 HEARING OFFICER ORTH: All right. Thank
6 you very much.

7 Mr. Baake, do you have questions for
8 Mr. Smitherman?

9 MR. BAAKE: I do. Thank you, Madam
10 Hearing Officer.

11 Thank you, Mr. Smitherman, for your
12 testimony today. I apologize for suggesting it was
13 putting me to sleep. It has more to do with my
14 schedule than anything.

15 HEARING OFFICER ORTH: I'm sorry to
16 interrupt you. You were cutting out a lot. I am --
17 I hope I wasn't the only one who was hearing that.

18 Did anyone else hear any of that cutting
19 in and out?

20 (Discussion off the record.)

21 HEARING OFFICER ORTH: Mr. Baake, it might
22 be helpful if you turned off your camera. You're
23 lovely, but I want to be able to hear you.

24 MR. BAAKE: Okay. Is this okay here?

25 HEARING OFFICER ORTH: Yes, it's much

1 better.

2 EXAMINATION

3 BY MR. BAAKE:

4 Q. Mr. Smitherman, I want to talk first
5 about -- pull up NMOGA Exhibit A, page 8.

6 This is Section 8D of the Part 27.

7 A. What page did you say, sir?

8 Q. It's -- I believe its number is page 8 on
9 NMOGA's...

10 A. I'm there.

11 Q. Okay. So the subject is venting and
12 flaring during operations.

13 Do you see that section? We're on the
14 same page?

15 A. Yes, I do see that. Thank you, sir.

16 Q. Okay. And the section states that venting
17 and flaring natural gas -- well, it says that it's
18 generally disallowed, subject to certain -- do you
19 agree that that's how the commission operates?

20 A. Yes, sir, I see that.

21 Q. Okay. And I think during your testimony,
22 you -- you used kind of an interesting term. You
23 said that -- I think you said the street term for
24 venting and flaring would be -- or you might -- I
25 think you might have meant the more sufficient

1 **availability or capacity of the natural gas**
2 **gathering system.**

3 **Is that -- do you agree that that's kind**
4 **of a good working definition of venting and flaring**
5 **due to that cause?**

6 A. There -- it's -- of course different
7 people have viewed that term differently. But it
8 seems, in looking at a lot of different literature
9 and articles and things like that, that -- I'll say
10 that the -- that the street understanding of the
11 term "routine flaring" involves producing a well
12 where there's inadequate gas takeaway capacity.

13 Q. Okay. Great. I think that's a good
14 understanding that we can work with.

15 So under Section 8E, is that -- is
16 insufficient availability or capacity for the
17 natural gas gathering system one of the exemptions
18 that is listed as an exemption of prohibition of
19 venting and flaring?

20 A. I'm sorry. I missed what the question
21 was.

22 (Discussion off the record.)

23 Q. **(By Mr. Baake) So under Section 8D of**
24 **Part 27, is insufficient availability or capacity on**
25 **the natural gas gathering system listed as an**

1 **exception to the general prohibition on venting and**
2 **flaring?**

3 A. I don't recall seeing that. If you can
4 find it, I would like you to point it out to me.

5 Q. I would represent that it's not. That's
6 my -- we've looked at it closely.

7 And then did NMOGA suggest adding that as
8 an acceptable reason to vent and flare under
9 Section 8D?

10 A. Well, I think that the -- perhaps there is
11 one place that it is in here, and I'm trying to find
12 it.

13 But I think that -- here it is. It's in
14 Section D4. And that is the first 12 months of the
15 delineation well, now called an exploration well, I
16 think.

17 But in essence, that is flaring that's
18 allowed as an exception that, if you will, conforms
19 to that street definition of routine flaring. It is
20 an exception that is allowed in very specific and
21 very limited cases.

22 Q. Okay. I think that's -- that's fair. I
23 agree with that.

24 But other than for delineation or
25 exploration wells, it's not included under that

1 section.

2 Is that your understanding?

3 A. I believe that that's correct, sir.

4 Q. Great. I really appreciate that.

5 I don't have too many more questions. I'm
6 going to try to do this fairly quickly, because I
7 know we are all exhausted. At least I am.

8 And these questions are -- deal with
9 spudding. And they relate to Section 9D6 and
10 Part B7.

11 A. Again, can you give me a page number?
12 That might help me get there quickly.

13 Q. Yeah. Yeah. I think it's very close to
14 the end. Let me pull this up.

15 Maybe -- maybe 24 or 25, because -- oh,
16 I'm sorry. It's 26.

17 A. Okay. I'm there.

18 Q. Okay. So the first question is: How long
19 prior to spudding do operators typically have
20 contracts in place and have been -- typically taken
21 the steps they need to take to spud the well?

22 A. Golly. That is -- there isn't a typical.
23 And I hate to be evasive on that, because I think
24 that's a reasonable question. But there just isn't
25 a typical. I'm sorry.

1 It kind of depends on the drilling
2 schedule and when you want to drill or need to drill
3 a well and, quite frankly, even what jurisdiction
4 that you're getting the APD from, or basically what
5 lands you're talking about.

6 **Q. And I appreciate that. I certainly**
7 **understand that there's a lot of variation.**

8 **So why don't we take sort of the quick end**
9 **of that.**

10 **If you -- if an operator wants to move as**
11 **quickly as possible, how long is it going to take to**
12 **get drilling -- drilling rigs, other equipment,**
13 **other services, and -- and also make sure that**
14 **there's going to be takeaway capacity or beneficial**
15 **use of the nat- -- the associated gas, if we're**
16 **talking about an oil well?**

17 **A. I'm understanding that it seems like a**
18 **simple question, but it's really a much more complex**
19 **situation than that.**

20 **They are all different, if you will, the**
21 **time frames for drilling rigs and other services and**
22 **the takeaway. Is there -- is it just a small little**
23 **additional piece of pipe that needs to be laid for**
24 **the gas gathering? Is it something more**
25 **significant?**

1 There really isn't an answer to that
2 question that's -- that I can give you. It's just
3 more complex than that.

4 **Q. I appreciate that, Mr. Smitherman. And I**
5 **can tell that you're not being evasive. You're --**
6 **you're being honest about, you know, talking about**
7 **an extremely complicated industry, so I do**
8 **appreciate that.**

9 I guess my question is: Is it realistic
10 that in -- in the majority of cases, and that --
11 that you could -- that an operator could gather
12 sufficient plans, the takeaway capacity, within
13 90 days?

14 A. I'm really not trying to evade your
15 question, but it really depends on the context and
16 the situation.

17 Maybe 90 days works in some cases. Maybe
18 a much longer time works in some cases. There
19 really just isn't an answer to that question as
20 posed.

21 **Q. And I appreciate that. And I guess the**
22 **reason why we're interested in this is that NMOGA**
23 **has suggested that -- and you can see at the bottom**
24 **of page 26 -- that if an operator is out of**
25 **compliance, that it would only need to address APDs**

1 and intents of spudding within the next 90 days as
2 part of compliance.

3 And so I guess my -- my question, and I'm
4 trying to be direct here, and I'm not, you know,
5 playing games.

6 Do you think 90 days is -- is -- if
7 that's -- if that's not going to be sufficient in
8 all cases, wouldn't it be more appropriate for it to
9 be something like six months or even a year, in
10 terms of looking forward and seeing which APDs you
11 reevaluate, if an operator is out of compliance?

12 A. Yeah. I think I see your -- kind of the
13 context of the question.

14 And I guess my answer is that an operator
15 may be out of compliance. They may have had a
16 really tough January, February, for example. They
17 may have had a lot of freezes and they get behind,
18 and they then have to, in essence, prove that
19 they've got takeaway capacity of the APDs that they
20 plan to -- the wells that they plan to spud over the
21 next 90 days.

22 In essence, it could be that every one of
23 those has got anticipated 100 percent capacity
24 available for those wells. It doesn't mean just
25 because you've fallen out of compliance for a short

1 period of time that the wells that you're planning
2 to spud don't have takeaway.

3 So you see the disconnect between the
4 concept here of having to prove that you've got
5 takeaway versus being out of compliance, and then
6 somehow this 90 days is meaningful in trying to
7 establish these contracts. There really is a
8 disconnect between those two concepts.

9 I think it's -- quite frankly, it's
10 appropriate for the division to ask us, if we're out
11 of compliance, that if we're going to drill some
12 more wells in the next 90 days let's take a look at
13 whether or not we think we've got the capacity for
14 those wells, and we've agreed to that.

15 Q. And I appreciate that.

16 I guess my question is: Would it be
17 appropriate to look even a little further into the
18 future? Because I think at some -- you might have a
19 bad month, you might have, you know, difficulties
20 that aren't likely to be repeated, but you might
21 also have an operator who has had -- and what I
22 might term as systemic problems. They might have to
23 go through some operational changes, they might have
24 to acquire new equipment, rethink how they're
25 drilling these wells.

1 And so I guess my question is: For
2 those -- if there is an operator that has a little
3 bit more of a systemic problem, by looking a little
4 further into the future, not only the 90 days, but
5 also if -- if it may take -- if it may take them
6 six months to implement some of these -- these
7 bigger changes, would it possibly be appropriate to
8 look further than 90 days in that case?

9 A. Well, I think the div- -- thank you for
10 that question, sir.

11 I think that the division has, in essence,
12 addressed that in a different section. If you've
13 got some, as you call them, more systemic problems,
14 that an operator gets out of compliance and has
15 difficulty getting back into compliance, that is
16 addressed in the Section 27.9A4, where they talk
17 about an operator that has gotten out of compliance.

18 And there, it's not just looking at
19 paperwork. There, if the division reviews your, if
20 you will -- I'll call it a plan, or response plan,
21 if you will -- they can actually take the action of
22 not letting you spud wells. Not just paperwork, but
23 a much, much more profound action against the
24 operator.

25 So I think that we're trying to strike a

1 balance between this -- an operator that literally
2 month to month might have fallen out of compliance
3 for a short period of time, perhaps. Maybe they're
4 going to be back in compliance in the next month,
5 taking action on that type of a situation versus
6 something that's more systemic.

7 I think the division has handled that
8 properly.

9 Q. Okay. I appreciate your answer there,
10 nuanced and responsive, and I -- I really do
11 appreciate that.

12 I'd like to move on to one last topic
13 here. I don't think this will take us very long,
14 because I know we have a 4:30.

15 I think you've testified a couple of times
16 that extreme weather is often a driver of upset in
17 conditions, specifically in the Permian Basin,
18 probably anywhere in New Mexico.

19 Is that what you testified to?

20 A. Yes. I think that that's a pattern that
21 I've seen over many years.

22 Q. And do you agree that climate change is
23 attributing to extreme weather?

24 MR. FELDEWERT: Madam Chair -- Mr. Baake,
25 I'm sorry. I'm going to have to object to that

1 question. I don't see how Mr. Smitherman's personal
2 opinions on a topic such as climate change has
3 anything to do with the rule that has been proposed
4 by this division.

5 HEARING OFFICER ORTH: You're right.

6 So, Mr. Baake, I'm not sure that he has
7 the expertise to speak about that particular
8 question.

9 MR. BAAKE: I'm not asking for an expert
10 opinion. I'm just asking for his -- his opinion,
11 whether it's expert or not.

12 And I think climate change is certainly a
13 major reason why this rule is happening. And if one
14 of the parties doesn't recognize that as an issue,
15 that would affect how they're valuating the cost and
16 benefits of the rule.

17 So I think it's a relevant question. And
18 just to give you a preview, we're not planning to,
19 you know, go far down this rabbit hole. I just want
20 to ask the question.

21 HEARING OFFICER ORTH: I'm sorry.

22 Would you repeat your question, please?

23 MR. BAAKE: Mr. Smitherman had testified
24 that extreme weather was often a direct upset in
25 conditions in the Permian Basin.

1 And the question is: Does he agree that
2 climate change has changed extreme weather.

3 MR. FELDEWERT: Madam Chair, I object to
4 that question. That's -- personal opinion on those
5 types of topics has nothing to do with this rule.

6 HEARING OFFICER ORTH: Right.

7 So, Mr. Baake, I'm going to suggest to you
8 that this is outside the scope of Mr. Smitherman's
9 testimony. It's not his expertise.

10 MR. BAAKE: Okay. Well, that concludes my
11 questioning. And I do appreciate your time.

12 Thank you so much.

13 HEARING OFFICER ORTH: Thank you.

14 And thank you, Mr. Smitherman.

15 Let's see. We have Ms. Paranhos, who has
16 said she did not have cross-examination of you.

17 We have Commissioner Kessler, then, and
18 perhaps any followup that Mr. Feldewert would want
19 to have with you.

20 Having said that, it's now 4:29, and I'm
21 wondering -- Commissioner Kessler, I know that you
22 have a stopping of time as well. Can I go to the --
23 oops. You've disappeared.

24 Can I go to the public comment before your
25 questioning?

1 COMMISSIONER KESSLER: I should be fine.

2 I turned off my video because I have low bandwidth,
3 but I have a few questions. Not many.

4 HEARING OFFICER ORTH: All right.

5 I'd like to take the public comment first,
6 and then return to Mr. Smitherman, and maybe even
7 take a short break in there.

8 So it's exactly 4:30 at this moment. We
9 have many opportunities for public comment during
10 this hearing. This is the 4:30 session in Case
11 21528.

12 I have two names, actually, to call. And
13 I will call them in this order.

14 Peter Boleto and Cheyenne Antonio.

15 You may be calling in. I believe our
16 technical host is going to unmute the callers.

17 And if Mr. Boleto, would identify himself,
18 please.

19 Mr. Boleto?

20 (Discussion off the record.)

21 HEARING OFFICER ORTH: We will take them
22 when we're at a natural stopping point.

23 So shall we take just a 10-minute break
24 and then return for questions by Commissioner
25 Kessler, and any followup by Mr. Feldewert?

1 Does that make sense?

2 CHAIRWOMAN SANDOVAL: I have questions
3 too.

4 HEARING OFFICER ORTH: Oh, yes. Thank
5 you.

6 CHAIRWOMAN SANDOVAL: I have quite a few
7 questions.

8 HEARING OFFICER ORTH: All right. Thank
9 you so much.

10 Let's take 10 minutes and come back at
11 4:41.

12 (A recess was taken from 4:31 p.m. to 4:42
13 p.m.)

14 HEARING OFFICER ORTH: All right. Thank
15 you.

16 So when we broke, Mr. Smitherman was about
17 to be questioned by Commissioner Kessler, our
18 chairwoman, and then perhaps some followup.

19 Do we have Mr. Smitherman handy?

20 THE WITNESS: Madam Hearing Examiner, I'm
21 here.

22 HEARING OFFICER ORTH: There you are.
23 Great. Thank you.

24 Commissioner Kessler, if you would,
25 please.

1 EXAMINATION

2 BY COMMISSIONER KESSLER:

3 Q. Good afternoon. Am I coming in clearly?

4 A. You are. Thank you.

5 Q. Mr. Smitherman, my first set of questions
6 is related to NMOGA's request to have O2 and some
7 reporting categories for the gas plan as to nitrogen
8 and carbon dioxide.

9 Can you tell me -- can you tell me how
10 often oxygen is in the gas stream such that it needs
11 to be flared?

12 A. I can't give you a specific answer. I
13 can't give you an absolute quantification, so let's
14 just talk about it in just kind of general terms.

15 Q. Sure.

16 A. These well interventions that I talked
17 about are maybe not very common on an individual
18 well, because there's a long time before you have to
19 do it again.

20 But these -- when you've got a lot of
21 wells you can have the same concept, the same need
22 for well intervention using a foamer unit on a
23 regular basis. I can't tell you what that would be,
24 that it would be weekly or monthly.

25 But it's -- it's not -- I'm going to say

1 it's not rare, especially when you have a relatively
2 large number of wells.

3 You also have commissioning of new
4 equipment. That happens quite often. When you
5 think about commissioning pipelines -- and pipelines
6 are being built all the time. And also, new
7 equipment is being installed and/or repaired. And
8 don't forget the commissioning of equipment sounds
9 like it's what you do to something new.

10 In actuality, this purging kind of
11 operation happens every time that you have to, in
12 essence, depressurize and purge the natural gas out
13 of a vessel.

14 When you put that vessel back into
15 service, you again have to purge it. It's got air
16 in it, it's got oxygen in it. And so it's quite
17 often.

18 The oxygen causes us to want to flare gas
19 because it would cause our gas to be out of spec.
20 Now that's different, if you will, than, Oh, I got
21 shut in because I'm out of spec. We want to avoid
22 that.

23 You put a new separator in place in an
24 existing battery, you're going to then flare some of
25 the gas to prevent it ever from going into the gas

1 gathering system, because the gas gatherer, they
2 shut your whole system down. That's not good.

3 I don't know if that answers your
4 question.

5 Q. Yes. I'm trying to get a sense of what
6 the effect of the commission including or not
7 including that reporting category would be.

8 Would it be, you know, something that
9 would be taken advantage of frequently,
10 infrequently?

11 And a followup question to that is: When
12 an operator does have to flare because oxygen has
13 been introduced into the gas stream, can you give me
14 a sense of would they flare for four hours? Would
15 they flare for four days? Would they flare for a
16 month?

17 Just a general sense of what the answer to
18 that question would be.

19 A. Sure. And as you've already guessed,
20 there's not a specific answer to that. But it's a
21 relatively short period of time.

22 I mean if we're talking about something
23 very large, like a brand-new long section of
24 gathering line, it might take quite a bit of time
25 for that. Even quite a bit of time for that is

1 probably less than a week, so just to try to give
2 you a little bit of framework about what that is.

3 The other part I want to make sure, and it
4 didn't come out on the direct testimony, is that
5 the -- well, I guess -- I think that answers your
6 question.

7 If -- if we've got -- let me state it
8 another way.

9 If -- if gases are being flared because
10 it's out of spec, regardless of what the contaminant
11 is, the division will see that. And I've heard
12 Ms. Polak talk about the fact that they're going to
13 be using advanced techniques to look at the data.
14 I'm going to use the term data analytics. I know
15 that's a buzzword these days.

16 And I applaud that. I think that's a
17 great idea for the division to look at the data
18 without having a lot more people instead, and to
19 look for those patterns that I think Mr. Bolander
20 talked about, and respond to those patterns.

21 And for the division to see a pattern that
22 a company is abusing that provision, that ought to
23 become apparent, and that ought to result in a
24 conversation between the division and that operator,
25 to make sure that it's not being abused.

1 What we really object to is, in essence,
2 any time oxygen is in the system to be counted
3 against us, as if we're bad operators. And that's
4 exactly the term we heard before, poor maintenance,
5 bad operations, and it just doesn't equate to those
6 two.

7 Q. Okay. Thank you. I understand.

8 My next set of questions is related to the
9 provision requiring our proposed relations and
10 requiring notification on a monthly basis to royalty
11 owners of flared gas.

12 And your testimony focused on, really,
13 what I would categorize as infeasibility, or
14 impracticability of being able to provide that
15 information to royalty and overriding royalty
16 owners.

17 I understand that. I understand that
18 testimony.

19 I think what Mr. Biernoff's suggestion is
20 related to the burden of providing that information
21 to one or two parties, the land office or the BLM.

22 And so if you have that information, if
23 you have the parties' addresses, what would be the
24 burden to an operator supplying that information to
25 just one or two entities?

1 A. Let's talk about that. I appreciate that
2 you asked that question that way.

3 I was having a very difficult time with
4 Mr. Biernoff, because his questions seemed very,
5 very specific and he was asking for a yes-or-no
6 answer. And I simply couldn't answer it as a
7 yes-or-no answer.

8 So I appreciate the fact that you've asked
9 it in a more conversational way.

10 Let's talk about -- first of all, the fact
11 is that we've already supplied copies of the C 115
12 to the state land office for those wells that are on
13 state land.

14 So if we were to add -- we already do
15 that.

16 If we were to enhance the C 115 the way
17 that we suggest, which would include more categories
18 of venting and flaring for a variety of reasons, the
19 land office would get that automatically and there
20 would be no additional burden.

21 We don't see any reason that that
22 wouldn't -- wouldn't satisfy the state land office's
23 needs.

24 So again, I'm having a real hard time with
25 trying to answer Mr. Biernoff's questions. But I

1 think that we can have a conversation about this and
2 work out a way that you can get the information that
3 you need.

4 Q. Even taking the division's proposed rule,
5 which has a different type of reporting requirement
6 for vented and flared volumes, is aggregating the
7 information on a statement to the royalty owner, as
8 suggested in the current division-proposed rule, is
9 that burdensome when you're supplying that
10 information to one or two royalty interest owners,
11 or does the burden come with the number of royalty
12 owners that -- that hypothetically could be existing
13 in, you know, a given lease?

14 A. Well, unfortunately, the question is a
15 little more complicated, because reality is a little
16 more complicated.

17 The concept really is -- we have
18 production accounting systems that are, in essence,
19 well-centric. We report production that reports
20 volume on a well basis, for the most part.

21 There are some exceptions to that. But
22 generally speaking, we provide on a well basis.

23 And companies have reported to operators
24 and royalty owners on a property basis. It doesn't
25 necessarily measure up with individual wells.

1 And so it implies a pretty massive change
2 within each company's information system to be able
3 to meet the goals, meet the objectives that were in
4 that Section 4.

5 The state land office is different. The
6 state land office already gets copies of them, and
7 that's based on the individual wells. It shows
8 individual vented and flared volumes.

9 We don't think that would be difficult at
10 all. You already get them. So if we simply could
11 enhance the 115 to provide all of those details, we
12 already get those, by well.

13 Q. Yeah. I guess that's just what I'm still
14 trying to parse out, is your testimony saying that
15 it was difficult to provide that information because
16 it was difficult to ascertain location information,
17 addresses, et cetera, for royalty owners.

18 And that's different, to me, than the
19 burden that may exist trying to compile that
20 information for a given royalty owner.

21 So compiling the information, having that
22 information, is different to me than not being able
23 to locate the royalty interest owners.

24 Are you following that?

25 A. I'm trying to. I think I am.

1 Let's talk about the difficulty in
2 communicating with royalty and nonroyalty owners.
3 Maybe that will help us.

4 Q. Well, that I understand well. I don't
5 think that we need to go over it. We talked about
6 that a lot.

7 What I'm trying to understand is, isn't it
8 a little bit concerning that there are essentially
9 two separate burdens, or that this is burdensome for
10 two separate reasons, which is that, A, it's
11 difficult to figure out who all the royalty interest
12 owners are, and you might not have that information
13 to get that.

14 The second piece is trying to determine
15 what the burden is for coming up with that
16 information for a given royalty owner.

17 So is the trouble communicating
18 information to the royalty owner or is the trouble
19 or burden getting the information and understanding
20 and analyzing the information?

21 A. I guess I've never thought about it that
22 way, other than the state land office has that
23 runoff, if you will. Partly because -- which one --
24 which royalty owner would we choose to gather that
25 information? Or it seems --

1 **Q. The state land office?**

2 A. The state land office. That would be
3 different, if you will. And as I said, the state
4 land office, I don't think -- we do not have -- we
5 don't know what this is going to end up being. We
6 have suggested that something be modified on those
7 wells, but we don't know what is going to come out
8 of this process.

9 **Q. And if the NMOGA proposal is not accepted**
10 **and the reporting is required the way the division**
11 **has already proposed it, what are the burdens then?**

12 A. I'm sorry. Say that again, please.

13 **Q. If NMOGA's proposal to simply expand the**
14 **C 115 is not accepted, and the commission elects to**
15 **follow the commission's proposed requirements**
16 **instead, can you please discuss how you see the**
17 **burden of providing that information to a single**
18 **royalty owner would look then?**

19 A. Well, I'm happy to do that. And I guess
20 the first part is, we don't know what the 115 is
21 going to look like.

22 I could -- I could imagine that it might
23 be no more difficult than sending in the C 115, but
24 I don't know that.

25 And so I'm a little reluctant to -- to

1 basically guarantee that same result with an
2 unknown.

3 Q. So is it fair to say, then, that the
4 challenge for operators, in your opinion, is
5 transmitting the information to royalty -- to
6 unknown royalty owners on a given lease rather than
7 compiling the information?

8 A. The compiling of the information is going
9 to happen, I mean, no matter what. We're going to
10 gather the data. Through our production accounting
11 process, we're going to have that information.

12 Let me give you one exception, though. It
13 just kind of came to my mind. It may be -- I'm
14 going to leave a little caveat for myself, because I
15 just don't know.

16 We talked about the fact that we've got
17 multiple leases that are involved in a particular
18 pool unit. And I, quite frankly, don't know how the
19 communication would go if -- can I think about it
20 the way I think you're thinking about communicating
21 to non state land office royalty owners?

22 I might not know -- well, that's not true.
23 Forget all of that.

24 I think that the concept is we'll know
25 state lands are involved in a pooled unit. We're

1 sending you the information, I think, on those,
2 anyway.

3 Now, there is a little caveat there that
4 I'm a little uncertain of. And that's if a well
5 is -- if the operators' leases are not on state
6 lands, where state lands are pooled in a unit, I've
7 got to say I don't know what the rules are on
8 sending copies of the C 115 to the land office. I
9 simply don't know.

10 Q. If the state land is involved, we should
11 be getting the information?

12 A. Yes, that makes sense to me. I just -- I
13 can't quite be authoritative on it.

14 Q. Okay. Moving to another set of questions.

15 I heard your testimony related to issues
16 with certifications, so there were certain areas
17 where NMOGA proposed striking the certification
18 requirement.

19 Did there -- did those changes relate to
20 where NMOGA had proposed to estimate volumes of
21 vented or flared gas?

22 To put it differently, does NMOGA have an
23 issue with certifying its estimates?

24 A. From memory, I think there's only one
25 place in maybe both rules. But subject to check,

1 there's only one place in Rule 27 that we struck the
2 concept of certification.

3 And that was for the somewhat open ended,
4 if the division asked for additional information.

5 And we don't know what that information is
6 going to be. We don't know where it's going to come
7 from. So it is very uncomfortable for us to say
8 that we can right now, this very moment, say that I
9 can certify.

10 I think that's the only place that we have
11 said that, subject to change.

12 **Q. My last set of questions I'd like to pose.**

13 Initially, it may be better suited for a
14 future witness, but I have questions related to the
15 cost of retrofitting stripper wells with the various
16 types of technology that the division requires for
17 new wells.

18 So different types of flares, the --
19 certainly measurement -- costs of measurement for
20 retrofitting stripper wells.

21 Are you prepared to give that information,
22 or is that better suited to a future witness?

23 **A. It is better for a future witness. We**
24 have a witness that is much more -- actually, two
25 witness that are much more involved, kind of on a

1 day-to-day cost information and logistical
2 information on flares.

3 We have a different witness, measurement
4 expert, that would address the cost for adding
5 measurement devices.

6 So I really think you'll get better
7 answers and more complete answers from them.

8 **Q. Okay. Who are those two witnesses?**

9 A. The two witnesses that may have better
10 insight on the flaring is our -- Morgan and/or Joe
11 Leonard.

12 And our measurement expert is a gentleman
13 named David Grieves. So they should be prepared to
14 answer your questions, since I'm sure they've had
15 this conversation.

16 COMMISSIONER KESSLER: Okay. Thank you.
17 Those are all my questions.

18 THE WITNESS: Thank you, ma'am.

19 HEARING OFFICER ORTH: Thank you,
20 Commissioner Kessler.

21 Madam Chair, do you have questions? I
22 think you said you did.

23 CHAIRWOMAN SANDOVAL: I have a handful.
24
25

1 EXAMINATION

2 BY CHAIRWOMAN SANDOVAL:

3 Q. First, I don't know if this is a question,
4 and I am not sure. I don't know. I'm sure
5 Mr. Feldewert will stop me if need be.

6 But I'm really struggling sitting here
7 listening to you testifying and making inaccurate
8 statements about the C 115 reporting, with
9 information that is just, quite frankly, wrong. And
10 so that's -- I'm very much struggling listening to
11 that knowing how wrong it is what you're saying.

12 And that is just a statement, again.

13 A. Well, can I respond?

14 Q. Feel free.

15 A. I have -- I have tried to answer to the
16 best of my ability. I may be wrong in certain
17 instances.

18 I'd kind of like to know where I was
19 wrong. We do have witnesses coming later than me
20 that are very familiar, maybe more familiar, with
21 some of our filing forms.

22 But can you point out where I was wrong?

23 Q. You have said that the state land office
24 is receiving C 115 reports that reports on a
25 well-by-well basis. C 115 reports on -- one of the

1 huge issues that came up in the entire map process
2 was that the venting and flaring areas -- and that
3 is not on a well-by-well basis. It's on a property
4 basis.

5 Sure, some properties might have one or
6 two wells. Other properties may have six, seven,
7 800 wells. It's quite literally impossible to
8 discern, is all of the venting and flaring for those
9 500 wells coming from one well, or is it coming from
10 across the five-section grid? And so just saying
11 that we're getting information on a well-by-well
12 basis is just wrong.

13 A. I didn't know that. And I thought,
14 through experiences with the company that I used to
15 work for, that we file production information on an
16 individual well basis.

17 So if I'm wrong, then I stand to be
18 corrected.

19 But we will have someone that will come in
20 later that is much more deeply -- that is more aware
21 of those details.

22 And I do apologize if I was incorrect. I
23 certainly did not mean to mislead you.

24 Q. I think that is, you know, likely why it
25 sounded like some of Mr. Ames' questions was trying

1 to maybe get -- get to that point in some form or
2 fashion, that the C 115 reports are, one, very
3 heavily relied on by the state land office and the
4 tax and rev.

5 And so any modifications to those is not
6 necessarily just modifications on the OCD side, it's
7 potential impacts to the money that's coming into
8 the state. And a glitch in that will be monumental
9 versus like, Oh, there are a little bit of glitches
10 in the OCD system. Maybe the first month of
11 reporting is maybe a little goofy. It's the entire
12 state budget just fell apart tomorrow.

13 So it's really a very -- it's a very big
14 deal. And that's, from the sounds of it, why an
15 entirely different report was proposed.

16 And so understanding that, does it maybe
17 make more sense why there's an entirely different
18 report that's proposed, understanding that? And
19 then that actually the C 115 right now is not set up
20 on that well-by-well basis?

21 Does it make more sense to you that maybe
22 a separate report is more appropriate?

23 A. Well, it's certainly a concept that I
24 haven't seen discussed. So I -- I -- certainly, if
25 the division has significant changes within their

1 system that makes a difference to the division, we
2 want to make those correct if we can.

3 Certainly, we don't want to have any
4 glitches in money flowing through the state. That's
5 vital.

6 I probably still don't appreciate the
7 challenge. So perhaps this other witness that we
8 have is much more involved and much more
9 knowledgeable about reporting details and can have a
10 better conversation with you about that.

11 Q. Okay. That sounds good.

12 And then -- so I want to sort of go
13 through my list. I'm going to try to remove
14 questions that have already been asked. I tried to
15 do that as we were going through there. I apologize
16 if I missed one.

17 But sort of starting out, do you support
18 this rule?

19 A. We report -- we do support this rule as
20 modified by the NMOGA suggestions.

21 Number one, we think it's very important
22 that the -- well, I'll just leave it at that.

23 Q. Without the NMOGA suggestions do you not
24 support the rule?

25 A. Well, we wouldn't have made suggestions if

1 we wanted to support the rule as written.

2 So we support the rule as modified by
3 NMOGA's suggestions.

4 Q. And that does imply that you don't support
5 the rule if the division were not -- or the
6 commission were not to take NMOGA's suggestions.

7 Is that correct?

8 A. Well, I think that that may be a little
9 overly broad. You know, that's a little bit of that
10 yes/no, kind of answer.

11 We have very carefully thought through all
12 of the changes that we had offered in our
13 modifications.

14 And some of the modifications are not
15 substantive, and some of the modifications are very
16 substantive.

17 So it really kind of depends on the final
18 rule. I can't tell you that I support the final
19 rule, when I haven't seen it.

20 Don't you think that's fair?

21 Q. I mean, partially. You're walking around
22 the question. But if that's the way you want to
23 answer it, then that's your choice.

24 You know, I -- I think this question sort
25 of goes to each -- you were not certifying each

1 witness as an expert. We have established that.

2 I think it's been established that people
3 are giving their opinions, and if their opinions are
4 slanted in one way or another because they do or
5 don't support the rule, I think it's important for
6 me to understand as I am asking my questions.

7 The next question: Do you believe that
8 this was a collaborative process?

9 A. First of all, I have not been involved in
10 rule making before, so I really don't have any --
11 any reference to say whether this was more
12 collaborative or less collaborative than other rule
13 makings.

14 So with that caveat, I would say yes, it
15 seemed to be a fairly collaborative process.

16 Q. Okay. Thank you. All right.

17 I'm going to try to get some of these in
18 order so I'm not bouncing.

19 So yesterday, I think I asked a bit of a
20 question, and Mr. Ames asked a question about
21 records regarding emergencies.

22 I want to ask that question in a slightly
23 different way.

24 Do companies keep records, either
25 independently or for the environment department, for

1 some sort of reporting on start and shutdown and
2 malfunction records, on any sort of instances where
3 that happened?

4 A. I've got a lot of experience in a lot of
5 areas, but that's not one area that I'm very
6 familiar with.

7 So I really don't have the background to
8 answer that question.

9 Q. Okay. I would really be shocked if they
10 didn't.

11 Companies who were required to report for
12 greenhouse gas reporting, for example, midstream
13 companies are required to track blowdowns in their
14 reporting.

15 So would you expect that a midstream
16 company would track a blowdown or a -- when a
17 compressor gets shut off for that blowdown reporting
18 for the greenhouse gas reporting?

19 A. I would say, just like our company that I
20 used to work for, was required to report greenhouse
21 gas data, I would expect the midstream companies
22 would basically keep recordings that were necessary
23 to file greenhouse gas reports, absolutely.

24 Q. Okay. And the company you worked for, did
25 you have some sort of, I don't know, operations

1 reliability group that managed -- well, quite
2 literally, the equipment reliability, and tracked
3 those stats?

4 Is that something that you're familiar
5 with?

6 A. I'm familiar with the concept. Our
7 company was -- we -- we kind of handled things a
8 little differently. We didn't have an explicit kind
9 of digital tracking system for everything.

10 We had certain systems that we tracked
11 very carefully, and every time we had an event we
12 tracked it. We kept cost on it. We looked at
13 the -- kind of the reasons that things failed.

14 So I -- I guess what I am saying to you is
15 our company had some of that, maybe is the best way
16 to say that.

17 Q. Okay. You -- what I'm trying to figure
18 out here and -- you know, there was a lot of this
19 talk of emergencies and how there was concern with
20 the definition of getting from Point A to Point B,
21 and a story and where that went.

22 What I can't glean is, are we talking
23 about -- we spent a whole lot of time talking about
24 .02 percent of the time, or are we talking about
25 2 percent of the time, or are we talking about

1 20 percent of the time?

2 Because that's going to change, you know,
3 maybe my -- you know my viewpoint, on where this
4 definition should go.

5 But I can't make those decisions on a
6 handful of stories. I need data. So maybe that's
7 something that another company can provide. And
8 even -- even just one company's data, I -- that's
9 one company. Representative data stats on those
10 types of things would be very helpful. Otherwise,
11 you know, I'm forced to make this decision without
12 that data, only on an anecdotal story.

13 A. And I appreciate that. You're an
14 engineer. You think --

15 Q. I'm very much an engineer, yes.

16 A. I kind of do the same thing. I was born
17 that way. So I appreciate your need for data.

18 I'm not sure. Maybe the -- maybe the best
19 answer is, let's see if we can find that data for
20 you.

21 Q. Okay. So then -- let's see. I think it's
22 27 and 28. I just wrote down 27, 27G -- G2.

23 A. So tell me what you're interested in.

24 Q. 27G2I, which is the monthly reporting of
25 uncertified gas. It's one of the categories that

1 NMOGA has proposed to strike. It is pneumatic
2 controllers, pumps, et cetera.

3 A. I see it.

4 Q. In your testimony earlier, you referred
5 to -- and I wrote it down in quotation marks, a wild
6 range. None were right. Emission factors are out
7 there.

8 But I guess my question is, if this
9 information is already required to detract for
10 production companies and midstream companies
11 production as of 2011, midstream companies as of
12 2015, the number of pneumatic controllers that you
13 would have out there.

14 What I don't understand is if the
15 information you are reporting is good enough for
16 EPA, how is it not good enough for us?

17 If you're comfortable enough reporting
18 that to EPA, I don't understand, maybe, where the
19 issue is. It's not -- it's good enough for EPA but
20 it is not good enough for OCD? That seems...

21 A. That's an excellent question. I really
22 appreciate it. I understand why that would come up.

23 I -- I stand by the -- the statement that
24 these emission factors that have been studied by
25 numerous academic institutions and others, have a

1 wide range. Okay?

2 And I don't know that there's a big
3 difference -- a disagreement with that. There is a
4 wide range, possibly.

5 The EPA has simply chosen one of them.
6 Okay?

7 It -- it -- quite frankly, it isn't right.
8 It's just one of them.

9 And if the EPA then says, Okay. I want
10 you to count your pneumatic devices and use this
11 particular factor to report, what value is that?

12 Well, there is some value in doing
13 something the same way over and over. Even if the
14 number is wrong you're seeing a trend.

15 So if the EPA is interested in seeing
16 trends on emissions, then the trend might be right,
17 but the absolute value of the number might not be
18 right.

19 And I don't know that the companies are
20 saying that it's good enough or for the -- for the
21 EPA. The EPA has told us that that is what we have
22 to do.

23 I don't know that any company would say
24 that it's accurate. It's simply what they asked us
25 to do.

1 I think it's very different when the
2 division wants to ask us for volumes that -- that
3 need to be accurate.

4 You're going -- in essence, the division
5 is proposing to make this a performance standard for
6 us, and basically count it against us in the gas
7 capture part of it.

8 That doesn't mean a trend is necessary.
9 That means an absolute value is necessary. So
10 there's a big difference between why we want to
11 push back, if you will, on that particular
12 impossible-to-measure-accurately for production
13 accounting methods versus the fact that we do, in
14 fact, use a factor for trend data for the EPA.

15 **Q. So I guess I have a couple followup**
16 **questions after that.**

17 One, so if there are a range of what
18 you're saying, emissions factors, but the OCD
19 doesn't actually -- I'm not concerned about
20 emissions concerning -- concerned about waste, yes.

21 So if -- from, I guess where I'm thinking
22 from -- you have the count, right? In production
23 you've had to have the count since 2011.

24 Understanding there's an exemption here
25 which looks like it's sort of aimed for the smaller

1 companies that probably aren't required to report
2 under greenhouse gas reporting. So you have the
3 count.

4 You have to know the type of pneumatic
5 controller, right, because it's classified into the
6 high, low, intermittent, so you have to have that.

7 So you already have the count and the
8 type. You -- and you don't need the emissions
9 factor. All you need -- I mean, I'm sure you've got
10 a manufacturer's spec that says it bleeds it -- this
11 much SCF per hour or actuation or whatever.

12 I think that's different information than
13 an emissions factor that -- yes, as you're saying,
14 could have a wild range.

15 But are there not manufacturer specs that
16 should say this -- this controller bleeds at X SCF
17 per hour?

18 I mean you take that and you multiply it
19 by, I don't know, 5,000, 10,000, whatever your
20 number is.

21 Maybe I'm -- can you please help me
22 understand the concern there? I'm just -- I am
23 struggling to understand.

24 A. Sure. I will do my best.

25 I'm going to get to the end of -- the

1 limit of my knowledge of this. But we've got
2 somebody else -- if we need to go past, we have
3 others with a little deeper knowledge of it. But
4 let me give it a try.

5 Even the manufacturer data is not -- if
6 you will, it's not all you need. Because the
7 emissions from these pneumatic devices depend on the
8 frequency of actuation. And so it depends on where
9 that device is.

10 Is it on a separator that's dumping, you
11 know, five times a minute?

12 Is it on another vessel that's dumping
13 once a month?

14 There isn't a manufacturer data -- piece
15 of data that is reliable for every installation.
16 And so that's part of the problem.

17 And that's part of, really, where some of
18 these academic studies have looked at, is they
19 recognize that it's the actuation frequency that
20 makes a big difference. And that's on the
21 intermittent and even on the low bleeds. High
22 bleeds are typically -- and I won't worry about
23 those.

24 But there are -- there is more testimony
25 coming that has a little deeper information about

1 that.

2 But that's generally where we have a
3 problem, is that even though you know the type, even
4 though you know the count, even though you know the
5 manufacturer, it doesn't lead you to an accurate,
6 let's say, emissions or gas usage, because it
7 depends on the situation.

8 Does that make sense?

9 **Q. It does. It sounds like -- who is the**
10 **person coming who would maybe be more appropriate?**

11 A. Probably Mike Smith is --

12 **Q. Okay.**

13 A. -- a little more deep in expertise than I
14 am on that.

15 **Q. Okay. All right. I will make sure to**
16 **have my questions ready for him.**

17 From my understanding of what Mr. Bolander
18 said, though, yesterday in his testimony, it doesn't
19 actually count against you. It's on the usage. It
20 counts against you if it's malfunctioning, in the
21 term that it counts against your capture.

22 So I'm not sure what the big fight is.
23 And you're saying that -- you have said it counts
24 against you, is what I've heard from you, and that's
25 maybe not my understanding.

1 **If it's malfunctioning, we have a problem.**

2 A. True. Let's put those aside. Let's talk
3 about normal operations. And let's even expand that
4 a little bit.

5 Normal operations in pneumatic devices,
6 normal operations of other production vessels that
7 emit some gas due to normal operations.

8 What we heard from Mr. Bolander was that
9 those emissions -- what I thought I heard from
10 him -- was that those wouldn't count against us.

11 And that's -- that's fine. We were happy
12 with that, and that -- that concept.

13 But we also heard that this "other"
14 category, that we would actually have to report some
15 of these volumes in this thing called "other," and
16 that "other" category would count against us.

17 So we are confused, quite frankly, as to
18 whether we understand how these -- some of these
19 low-volume/low-pressure sources that still remain as
20 reported categories would or wouldn't count against
21 us.

22 Can you -- can you help us with that?

23 **Q. I mean, that's what I'm here to**
24 **understand.**

25 A. Okay.

1 Q. That sort of hits on one of my next --
2 well, I'll go to my next question.

3 So I looked at the "other" category, and I
4 could see it says "other not described device."

5 I could see where that could maybe be
6 ambiguous. Would something such as any venting or
7 flaring not included in Categories A through
8 whatever above, would some language changes like
9 that make it more clear? Is it a clarity issue or
10 is it a -- it's one more clarifying categorical
11 issue?

12 A. It's not the latter.

13 As we walk through -- and again, recall
14 kind of our overall concept is that we are trying to
15 identify every emission source that can be measured
16 or estimated with good accuracy.

17 And so we have suggested categories for
18 every one of those. And we can't think of another
19 one that we haven't already made.

20 And so we -- if you put "other" in there,
21 then there can be some mischief. There can be
22 misunderstanding of what goes there. There can be
23 some lack of clarity. And we just don't see the
24 need.

25 If that's the case, if that's the way we

1 look at this, that we really focus in on these
2 high-pressure sources, which is probably the vast
3 majority of the emissions, then there's no need for
4 that "other."

5 So that's answer one.

6 Answer two is, if we're not going to be
7 required to measure and have categories -- I'll call
8 it counted against us. We've got categories that
9 have been removed. Mr. Bolander walked us through
10 several, right?

11 Are those truly removed or -- so that we
12 don't have to report those? That's unclear to us.

13 Q. I recall yesterday from his testimony he
14 said consolidated, not removed.

15 And if we want to go into that, I've got
16 some concerns about the removal of those categories.

17 I'm not sure if that was appropriate.

18 But first, I want to ask -- my other
19 question is: How would we ever know what 98 percent
20 truly is, if we don't have an understanding of what
21 the whole is, what we are dividing by.

22 And if you start to cut out categories,
23 how do you truly know what that is? I -- I welcome
24 your -- your response here.

25 A. I guess I go back to, again, a little bit

1 of a broader view of how we view this rule.

2 And we view this rule in looking at waste.
3 We view reporting of waste categories. And if it's
4 not waste, in essence, it is -- it's normal
5 operations that should be expected to be utilized
6 and emissions emitted, and that those volumes
7 wouldn't count against the 98 percent capture.

8 We've talked about this volume -- here's
9 the street language of routine flaring. That's
10 high-pressure source, and we don't want that to
11 occur.

12 We believe that that is the type of
13 emissions that are going to fall in this 98 percent
14 capture.

15 So I -- it really kind of depends on the
16 perspective. I mean, it seems undoable. Let me
17 back up again.

18 If -- if you can't even measure with any
19 accuracy some of these low-volume sources, as I've
20 said before, that's simply bad data. How would you
21 even know?

22 **Q. I think I may be less convinced at this**
23 **point that some of those things that you named need**
24 **to be excluded. And even the division -- I'm not**
25 **sure I agree with what the division's concept of**

1 waste is. I'm hoping that gets illustrated a little
2 bit more throughout this testimony.

3 But I'm not convinced that some of those
4 categories that were excluded actually should have
5 been.

6 Another one that seems to want to be a
7 large exclusion here -- and let's see if I can find
8 the citation -- 27-8D5. I think you guys maybe
9 think this was your fugitive piece.

10 A. Is this the NMOGA redline or the OCD
11 redline?

12 Q. I think it's an NMOGA redline.

13 A. Okay.

14 Q. Item 28. That's why it is not from there.
15 I think it is 27-8D5.

16 A. I'm with you.

17 Q. I am trying to find it now on mine.
18 Do you have a page number?

19 A. It's page 9.

20 Q. 9? Okay.

21 Oh, yes. Okay. It's D5, and then it's --
22 I think the addition you guys have is H. D5H.

23 A. Yes.

24 Q. I'm concerned that this is totally
25 unbounded. I don't see a definition for future

1 **emissions component.**

2 **Am I correct?**

3 A. There is not a definition in this rule.
4 And I'm not an expert of NMED's rules, so I might
5 just speculate as to whether it's defined there.

6 But I understand that these emissions are
7 associated with, as you see here, valves, flanges,
8 and connections and things, and that that is the
9 target -- one of the targets of NMED's L-bar
10 program, where you're looking at four excessive
11 emissions on valves and flanges.

12 This equipment actually emits a little bit
13 of gas, a very little bit of gas, sometimes right
14 out of the box. And there are limitations on how
15 much they can emit under NMED's authority.

16 So I don't know much more about it than
17 that, but maybe that was helpful to you.

18 Q. **No. I very much understand, so I'm**
19 **looking at the rule. I'm looking at NMED's proposed**
20 **rule. And they say basically it's a leak if it is**
21 **over 500 PPM.**

22 Well, what this language just said is
23 **fugitive emissions components excluded.**

24 So the way I read that -- and correct me
25 **if I'm wrong here -- is that you could have a valve**

1 that's just pouring gas, because either it's faulty
2 and needs to be replaced, it needs to have some
3 maintenance done, something is happening, that could
4 be happening.

5 But no, it's not waste. There's no waste
6 there to be seen. That's how I'm reading it. That
7 it doesn't really matter if there are fugitive
8 emissions coming from these components, they get a
9 free pass.

10 Is that what the intent is?

11 A. No, I don't think that's the intent.

12 There are several, if you will, safeguards
13 against that particular scenario that you just gave.

14 What we're trying to do here is, in
15 essence, follow the initial language in D, the
16 opening sentence in D:

17 "In venting and flaring during production
18 operations the operator shall not vent or flare
19 natural gas except..."

20 And so that is a pretty hard statement,
21 thou shalt not.

22 And if you know that some of these
23 components do have small emissions from them, yet
24 they are operating properly, then they should be
25 included in the exception to vent.

1 Now I put backstops on that, right?

2 We have people that are on these
3 locations, for the most part, every day. We've got
4 a requirement -- we don't know the frequency yet --
5 of doing AVOs that are formal, that require some
6 documentation. And if one of these components is
7 leaking a lot we should catch them in an AVO.

8 There's also requirements, and I'm not an
9 expert on this at all, so I don't want to get too
10 deep, for LDAR inspections that the NMED requires
11 that does, in fact, look for emissions that exceed
12 their limitations.

13 And again, I don't want to go too far down
14 that road, because I don't know the details of it.

15 But there are a lot of backstops here
16 that, in essence, could prevent the routine
17 systematic waste of large volumes of gas associated
18 with these type of components.

19 But they do leak a little gas. And so we
20 suggested putting them in this rule so that that
21 small leak, no matter how small it was, was not a
22 violation.

23 **Q. It absolutely would have to be bound.**

24 **Right now, the way it reads is it doesn't**
25 **matter what's coming out of it. It could be a major**

1 leak, but it's cool. It's fine. That's how this
2 language reads.

3 So you know, that may be something we need
4 to look at. And from my own operational experiences
5 from doing probably hundreds of -- of different LDAR
6 greenhouse gas surveys, it's actually quite possible
7 to have one of these valves, flanges, et cetera,
8 leaking, have people on site each and every day
9 doing AVOs, and it not be possible to know about it
10 and go, Oh, my God, I just looked through the
11 camera, didn't know about that.

12 It is actually very possible. So these
13 are things I'm concerned about, and this language
14 doesn't bound it.

15 So that wasn't a question, that was a
16 statement. But that's -- it's a very real concern I
17 have about that language.

18 And I understand what you're saying is
19 that there are low levels that may be involved with
20 everyday operation. But that's not what is
21 reflected in that language in any way, shape, or
22 form.

23 So it's good to understand what the intent
24 of that was, because it seems like that's a loophole
25 that could run amuck as is.

1 I feel like we sort of beat oxygen to
2 death, but just one question.

3 Would -- again, sort of categorizing a
4 more reasonable one, oxygen introduction because of
5 something that is not a fault of the operator versus
6 oxygen introduction which is a fault of the
7 operator, because they both exist.

8 Would that be more reasonable?

9 A. I haven't thought through that. I think
10 that there could be some room for mischief there.

11 And perhaps as I went back to my
12 speculation, if you will, that data analytics could
13 be useful with the division. Because if you report
14 gases that are being flared because of
15 contamination, contaminants, if there is a pattern
16 with a particular company or a particular site,
17 maybe there should be a conversation between the
18 division staff and that operator at the site and see
19 what the problem is.

20 And quite frankly, if they're just a bad
21 operator and poor maintenance, it's their fault
22 because they're just not doing the job right.

23 The commission has got quite a wide range
24 of authority to -- to deal with that.

25 So I think maybe rather than trying to

1 complicate it in -- in quote, maybe even open the
2 door for mischaracterizations; and, therefore, lack
3 of clarity, maybe that's the better way to go.

4 But leave all of these -- all of these
5 contaminants in one place, and let's see if we can
6 find patterns.

7 Q. Let's move on to 27-8D2B, I believe
8 NMOGA --

9 A. I'm not there yet. Just give me a second.

10 Q. You're fine. I think it's the page right
11 before you. Page 8 on NMOGA 27.

12 A. I got it.

13 Q. It says close proximity.

14 Are you aware that OCD regulates 461
15 different operators in the state?

16 A. I didn't know the number. That doesn't
17 surprise me, though.

18 Q. Can you see the ways that -- I think you
19 have multiple times referred to prudent operators.
20 And a prudent operator would do this and a prudent
21 operator would do that.

22 And then when you were giving your
23 testimony, there were some things that made sense
24 there. But again, using your framing, there's quite
25 a few opportunities for mischief by those 461

1 operators who may not be all prudent.

2 So can you see where someone saying
3 something such as close proximity could leave the
4 door open for mischief?

5 I'm in close proximity -- I'm in close
6 proximity to Carlsbad compared to New York City as I
7 sit here today.

8 You're probably in close proximity to
9 Carlsbad as opposed to New York City.

10 Do you see where there could be some
11 issues with the not prudent operators?

12 A. I -- I do see that. And we've tried to
13 explore this amongst ourselves and tried to have a
14 little more clarity on that. It's difficult to do.

15 So perhaps we can continue the
16 conversation about that with the division and see if
17 we can come up with something that is maybe a little
18 more mischief proof.

19 Q. I would prefer less mischief, as much less
20 mischief as we can get.

21 I understand, I think, what some of your
22 testimony was and what the validity was for it. But
23 I also see people completely taking advantage of
24 that, and I have a lot of concerns about that.

25 Let's see. We were right here.

1 27-8, I think E2. It talks about auto
2 gauging. A lot of your testimony was really focused
3 on things that have worked for the past 50 years,
4 and that it seems like -- and what I want to
5 understand a little bit better is, what is -- who is
6 it that's driving that you have to open the hatch
7 and do a manual gauge, exactly? And maybe that's
8 the first question.

9 Who exactly is driving that?

10 A. I -- I don't have a name. I know that
11 I've discussed this with our group, and our group
12 has reported that some of their purchasers require
13 manual gauging.

14 I'm sorry I can't be more specific than
15 that, but that's all I know.

16 Q. I wonder if this regulation could change
17 that. I mean, you said a lot of things about, like,
18 tried and true -- and we're using quotes here --
19 there was a tried and true method.

20 But I'm trying to think of some example of
21 what was a tried and true method ten years ago, but
22 it's now been overrun by technology, things like
23 that. Things have to move and adapt.

24 And do you see that things move and adapt
25 with a change in regulation? Do you see how that

1 **could be possible?**

2 A. I -- I do see that could be possible.
3 It -- change can be drivers of changes in
4 operations.

5 Perhaps -- perhaps it should be an option.
6 Maybe there's a way to find a way to find some
7 middle ground on this. I don't know.

8 I know -- I don't know this, but I'm going
9 to speculate, just from my experience, that the
10 reason that some of these purchasers are reluctant
11 to adopt some of this new technology is perhaps that
12 it's not accurate enough for them. I don't know
13 that.

14 And it may be that some automatic gauges
15 are accurate enough, some are not. So it's -- it
16 may be a little more complicated than it kind of
17 first appears here.

18 Q. Okay. I mean -- but do you agree that
19 manually gauging does -- you do have gas loss when
20 that happens?

21 A. It depends on the circumstance. But
22 you're right, it certainly can do that.

23 Q. And an issue that has been amongst -- I
24 mean, I think the operators in every site, sometimes
25 a guy goes up there and he doesn't close the hatch

1 on his way back down. And that's a problem, is it
2 not? It can be a problem?

3 A. That's a problem. We do not want that to
4 happen.

5 Q. So in your mind, is there another
6 mechanism, other than auto gauging, that would have
7 the same effect, making sure that there's no room
8 for that human error -- quite literally human
9 laziness sometimes, like, I'm just not going to walk
10 up the tank a second time.

11 Is there another option that would get us
12 to that same desired effect of not having to open
13 that hatch and then having it not get left open?

14 A. Well, I think there are quite a few
15 backstops in this rule. That -- you know, that's
16 the purchaser that's going up there to gauge the
17 tank. And I don't want to call somebody lazy, but
18 maybe they're just forgetful. Maybe they forgot to
19 close it.

20 So it's still a problem. It's still open.
21 We don't want that.

22 We've got company people that come by the
23 property basically every day. They are supposed to
24 be looking for those things too.

25 I know that it may not happen every time.

1 But the AVO provisions of this rule are one of the
2 backstops.

3 The possible use of ALARM technology is
4 one of the backstops.

5 Basically, prudent operators looking after
6 their business is, again, one of the backstops to a
7 purchaser who's gone up on a tank and has simply
8 forgotten to close the hatch. We don't want that
9 either.

10 Q. Maybe if there's another witness who has
11 any more information on this it may be helpful on
12 other alternatives, because there are a lot of
13 situations where this has happened, and it's a very
14 big issue.

15 And regardless if it's a third party, it's
16 the operator's problem. It's their responsibility
17 to manage their gas and their equipment and their
18 operations.

19 A. I understand. And perhaps we can talk to
20 some of our other witnesses and see if we can
21 address that.

22 I don't know that we have prepared for
23 that, but perhaps we can have a conversation.

24 Q. Okay. One of the things you just said,
25 people are there almost daily. So I'm still a

1 little bit struggling on the concern with the AVO.
2 The concern is just purely the reporting side of it.

3 Because if people are there daily, and
4 it's not the person being there's problem, and the
5 time to get there, it's the -- I don't know,
6 checking a box on a piece of paper, that's the
7 problem?

8 A. Yes. I don't particularly think that you
9 characterized it correctly and it's just checking a
10 box.

11 There is a process that is associated with
12 an actual official AVO. And I think I've walked
13 through this. I won't belabor it too much.

14 But the concept there is making sure that
15 the right documentation is done, the complete
16 documentation. We've got to have somebody QC-ing
17 the information.

18 So that is a person who we might not have
19 even had, and we would have to hire somebody for
20 that particular part of it, and make sure that all
21 of the AVOs have been done in the proper time
22 frames, make sure that they have been filled out
23 properly, make sure they have been committed to a
24 file system where you can get them back.

25 There is an administrative part of the

1 official AVO process that doesn't exist with a lease
2 operator going out and conducting what -- I'll call
3 it a casual AVO. His normal walking around
4 inspection. Pumper 101, as we've talked about
5 before.

6 It's simply making sure that there's
7 nothing that is spewing or open, a leak that you can
8 smell, see, or hear.

9 So it's not that person's time
10 particularly, but it's the rest of the time that
11 goes with that that builds up an administrative
12 burden.

13 And we're not asking for it to not be
14 done. We're simply asking for a little less
15 frequency on our wells.

16 So, quite frankly, I think that we will
17 achieve the same objective of making sure that we
18 capture and document those AVOs and reduce leaks
19 with a monthly, rather than a weekly, on regular
20 wells.

21 MS. ORTH: We only have less than
22 ten minutes left before our conference stops.

23 CHAIRWOMAN SANDOVAL: I think I have well
24 more than ten minutes left, to be honest.

25 MS. ORTH: Okay. Mr. Feldewert may have

1 some followup, so I believe Mr. Smitherman will be
2 with us Monday morning. Are you available?

3 CHAIRWOMAN SANDOVAL: Is there a reason we
4 have a hard stop at 6:00?

5 MS. ORTH: Our technical host.

6 (Discussion off the record.)

7 CHAIRWOMAN SANDOVAL: We can stop at 6:00
8 and I'll save my thoughts for Monday.

9 HEARING OFFICER ORTH: We can start at
10 8:00 on Monday morning, and we have no sign ups for
11 the 8:30 Monday comment.

12 Ms Fox?

13 MS. FOX: Yes, thank you. I just wanted
14 to know from Mr. Feldewert, if he could confirm the
15 order. This is for the remainder of his direct
16 case, if they are the same as in his prehearing
17 statement.

18 I think the other day he did affirm that
19 the first four were going to go in order. But it
20 would be helpful for our preparations if he knows
21 the order of his witnesses. And I wanted to get
22 that in before we all turn into pumpkins at 6:00.

23 MR. FELDEWERT: Totally understandable,
24 Ms. Fox.

25 I anticipate proceeding in the order in

1 our prehearing statement with the exception that
2 Mike Smith will be the witness before Yolanda Perez.

3 But besides that, I think we will go in
4 the same order.

5 MS. FOX: I appreciate it.

6 MR. FELDEWERT: All right?

7 MS. ORTH: Thank you very much, Ms. Fox
8 and Mr. Feldewert.

9 Madam Chair, do you have, say, two more
10 questions?

11 CHAIRWOMAN SANDOVAL: Yeah. Maybe let me
12 just try to figure out -- finish my questions on
13 AVO.

14 HEARING OFFICER ORTH: Okay.

15 Q. (By Chairwoman Sandoval) All right.
16 There -- I think, then -- I don't know what the
17 citation is on those. But I know the word
18 "hydrocarbon" is in here. Basically, you're
19 supposed to find hydrocarbon odors, as you've
20 testified, not other odors.

21 I guess could you see a world where it
22 would be important to -- if you identified, for
23 example, a rotten egg odor, mark that down, because
24 that could be an indication of a leak somewhere on
25 your site? But that's not hydrocarbon.

1 A. Well, that's a good point. And we would
2 certainly not want to have hydrogen sulfide gas
3 leaking. And perhaps you could smell hydrogen
4 sulfide more quickly than hydrocarbon. But it would
5 be part of the hydrocarbons.

6 It would be part of, if you will -- it
7 would be part of the gas. And so I'm not so sure
8 that the verbiage wouldn't still apply, but I see
9 your point.

10 Q. Yeah. My concern would be that, you know,
11 you -- well, I smelled rotten eggs, but I don't
12 smell formaldehyde today, so we're all good.

13 But that's the way it would read. And I
14 think it can also mean low levels -- and if you
15 can't smell it, you have a bigger problem. That's
16 why we have monitors.

17 A. Right.

18 Q. But it can still be an indicator that you
19 have a leak on site. And so I think that's an
20 important thing to consider, and something that I
21 think would be excluded with that addition.

22 That wasn't a question. It was more of my
23 statement. Sorry.

24 But it is very helpful to understand where
25 that thought process came from. It sounds like,

1 **though, it may have forgotten a component.**

2 A. Perhaps.

3 **Q. You said earlier -- and I know this is one**
4 **of the quotes -- there is no substantial benefit**
5 **from doing more frequent AVOs.**

6 You truly believe there is no substantial
7 **benefit in doing weekly AVOs as opposed to, say,**
8 **monthly?**

9 A. Well, perhaps I could say little benefit.
10 Maybe not be so absolute.

11 This goes back to Ms. Polak in her
12 testimony, when she said "always," and then realized
13 she said a big word.

14 And I said "all" is -- I think that's a
15 big word.

16 So maybe "no" is too big. Little -- I do
17 believe little.

18 **Q. Okay. But the issue goes back to the**
19 **documentation, not the people being on site?**

20 A. Exactly.

21 **Q. Okay.**

22 A. It's the -- it's the administrative burden
23 kind of around that whole documentation process that
24 is the burden. It's not -- it's not necessarily the
25 person who is on site, as you said, checking a box.

1 Q. Okay. All right.

2 My last question on this. It's less of a
3 question. It's more of a statement again.

4 From the division's rules and the NMOGA --
5 and I should say maybe in our proposals -- if you
6 find a leak there's no required documentation that
7 you actually fixed it, even if it was just fixed on,
8 I don't know, found on 12-1, fixed on 12-31, fixed
9 on 5 -- you know, some 5 months later.

10 I mean, do you think that could be an
11 important aspect of this, if you find a leak that
12 substantially -- you actually document the fix of
13 it?

14 I know that adds more to your
15 administrative burden.

16 A. It does. It gets really complicated. And
17 in fact, we've thought about that. And in essence,
18 when we -- when we find leaks, we fix them. And
19 whether that operator was able to fix that leak on
20 site because he had the tools and the capabilities
21 and it was within his kind of capabilities, or he
22 had to do it through a process, by getting what is
23 called a picket in the system, where he had a crew
24 come out, either a third-party crew or company crew,
25 to fix something.

1 It's going to be documented within our
2 system itself. It just adds a lot more burden to
3 try to tack that back onto that AVO documentation.

4 So the way we read it was, they expected
5 us to fix it. We are going to fix it. We are going
6 to have records in our own systems. However they
7 audit could be a very rudimentary system, it could
8 be a very complex system.

9 But we are going to have records in our
10 systems that we have done something. Either spent
11 money, we have an invoice for it, or we have got
12 some other type of record in a more sophisticated
13 maintenance system.

14 **Q. Yeah. I mean, I'm very familiar with**
15 **traditional LDAR programs and even the sort of**
16 **lesser LDAR programs as a way for production sites,**
17 **and I'm not thinking of that type. That can get**
18 **very complex. Well, it was delayed, so it's now on**
19 **a delayed list, and there's something to monitor,**
20 **and you've got all of that.**

21 I am not thinking -- and let's not go
22 crazy here. But it seems like it would be a very
23 important piece of information.

24 But I can understand your concern of the
25 time burden.

1 CHAIRWOMAN SANDOVAL: Well, that is my
2 last question on AVO, and I guess we'll start the
3 morning together on Monday.

4 THE WITNESS: Have a nice weekend.

5 MR. FELDEWERT: I'm afraid I forgot to
6 object. I apologize for that.

7 MS. ORTH: Thank you, Mr. Feldewert.

8 You all have a good weekend. We will
9 reconvene at 8:00 a.m. Monday morning. We'll talk
10 to you then.

11 (Proceedings concluded at 5:59 p.m.)

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CERTIFICATE

I, Paul Baca, RPR, CCR in and for the
State of New Mexico, do hereby certify that the
above and foregoing contains a true and correct
record, produced to the best of my ability via
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