

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

ORIGINAL

APPLICATION OF THE NEW MEXICO OIL AND GAS
ASSOCIATION FOR AMENDMENT OF CERTAIN PROVISIONS OF
TITLE 19, CHAPTER 15 OF THE NEW MEXICO
ADMINISTRATIVE CODE CONCERNING PITS, CLOSED-LOOP
SYSTEMS, BELOW GRADE TANKS AND SUMPS AND OTHER
ALTERNATIVE METHODS RELATED TO THE FORE GOING
MATTERS, STATE-WIDE.

CASE NO. 14784 AND 14785

VOLUME 8

June 22, 2012
9:00 a.m.
Wendell Chino Building
1220 South St. Francis Drive
Porter Hall, Room 102
Santa Fe, New Mexico

RECEIVED OGD
2012 JUL 8 PM 1:47

THE COMMISSION:

JAMI BAILEY, Chairperson

GREG BLOOM, Commissioner

DR. ROBERT BALCH, Commissioner

MARK SMITH, Esq.

FLORENE DAVIDSON, COMMISSION CLERK

REPORTED BY: Jan Gibson, CCR, RPR, CRR
Paul Baca Court Reporters
500 Fourth Street, NW - Suite 105

1 APPEARANCES

2 FOR NEW MEXICO OIL & GAS ASSOCIATION (NMOGA):

3 HOLLAND & HART, LLP
 4 P.O. Box 2208
 Santa Fe, New Mexico 87504-2208
 5 505-988-4421
 BY: WILLIAM F. CARR
 6 wcarr@hollandhart.com

7 JORDEN BISCHOFF & HISER
 8 7272 E. Indian School Road, Rd. Suite 360
 Scottsdale, Arizona 85251
 9 480-505-3927
 BY: ERIC L. HISER
 10 ehiser@jordenbischoff.com

11
 12 FOR OIL & GAS ACCOUNTABILITY PROJECT (OGAP):

13 NEW MEXICO ENVIRONMENTAL LAW CENTER
 14 1405 Luisa Street, Suite 5
 Santa Fe, New Mexico 87505
 505-989-9022
 15 BY: ERIC D. JANTZ
 ejantz@nmelc.org

16
 17 FOR THE OCD:
 18 GABRIELLE GERHOLT
 19 Assistant General Counsel
 1220 St. Francis Drive
 20 Santa Fe, New Mexico 87505
 505-476-3210
 21 gabrielle.Gerholt@state.nm.us

22
 23
 24
 25

APPEARANCES CONTINUED

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

FOR INDEPENDENT PETROLEUM ASSOCIATION OF NM:

K. FOSTER ASSOCIATES, LLC
5805 Mariola Place, NE
Albuquerque, New Mexico 87111
BY: KARIN FOSTER
505-238-8385
fosterassociates@yahoo.com

FOR THE NEW MEXICO CITIZENS FOR CLEAN AIR & WATER:

DR. DONALD NEEPER and DR. JOHN BARTLETT
2708 B. Walnut Street
Los Alamos, New Mexico 87544
505-662-4592
dneeper@earthlink.net

FOR JALAPENO CORPORATION:

PATRICK FORT
P.O. Box 1608
Albuquerque, New Mexico 87103
patrickfort@msn.com

FOR NEW MEXICO WILDERNESS ALLIANCE:

JUDITH CALMAN
142 Truman Street, Suite B-1
Albuquerque, New Mexico 87108
judy@nmwild.org

FOR NEW MEXICO STATE LAND OFFICE:

HUGH DANGLER
310 Old Santa Fe Trail
P.O. Box 1148
Santa Fe, New Mexico 87504
(505) 827-5756

1 APPEARANCES CONTINUED

2 FOR NEARBURG PRODUCING COMPANY:

3 JAMES G. BRUCE
 4 P.O. Box 1056
 Santa Fe, New Mexico 87504
 5 505-982-2043
 jamesbruc@aol.com
 6

7
 8
 9 INDEX

10
 11 OPENING STATEMENT BY MS. GERHOLT.....1818

12
 13 THE WITNESSES: PAGE:

14 BRANDON POWELL

15 Direct Examination by Ms. Gerholt...1823

16 Cross-Examination by Mr. Carr.....1840

17 Cross-Examination by Ms. Foster.....1848

18 Cross-Examination by Mr. Jantz.....1852

19 Cross-Examination by Mr. Dangler....1865

20 Cross-Examination by Dr. Neeper.....1867

21 Cross-Examination by Mr. Fort.....1868

22 Redirect Examination.....1879

23
 24
 25

INDEX CONTINUED

1		
2	THE WITNESSES:	PAGE:
3	ED MARTIN	
4	Direct Examination by Ms. Gerholt...	1880
5	Cross-Examination by Mr. Carr.....	1902
6	Cross-Examination by Ms. Foster.....	1912
7	Cross-Examination by Mr. Jantz.....	1933
8	Cross-Examination by Mr. Dangler....	1939
9	Cross-Examination by Dr. Neeper.....	1940
10	Cross-Examination by Mr. Fort.....	1942
11	Examination by the Commission.....	1943
12	Redirect Examination.....	1956
13		
14	Reporter's Certificate.....	2009

EXHIBITS

15		
16		
17		
18	OCD	
19	1. Affidavit of Notice.....	1818
20	2. Modifications.....	1961

1 (Note: In session at 9:00.)

2 CHAIRPERSON BAILEY: Good morning. This
3 is the meeting of the Oil Conservation Commission on
4 Friday, June 22nd, in Porter Hall in Santa Fe, New
5 Mexico. All three commissioners are present. There
6 is a quorum of the commission. We will provide time
7 for public comment before we break for lunch and at
8 the end of the day. We will be hearing a
9 continuation of Consolidated Cases 14784 and 14785.
10 When we broke yesterday, I believe it was time for
11 the OCD to begin its case.

12 MS. GERHOLT: Thank you, Madam Chair.
13 Madam Chair, Commissioners, if we may begin with a
14 bit of housekeeping on behalf of the Oil
15 Conservation Division. If I could draw your
16 attention to the Oil Conservation Division Exhibit
17 No. 1, Affidavit of Notice. The division offers
18 this Affidavit of Notice as proof that the division
19 followed the rules pertaining to rule-making and
20 that proper notice was given. We would seek to move
21 that into evidence.

22 CHAIRPERSON BAILEY: Any objection?

23 MS. FOSTER: No objection.

24 MR. CARR: No objection.

25 DR. NEEPER: No objection.

1 MR. FORT: No objection.

2 CHAIRPERSON BAILEY: Exhibit 1 is
3 admitted.

4 (Note: OCD Exhibit 1 admitted.)

5 MS. GERHOLT: Thank you. In addition, so
6 that everyone knows what page we are on, the
7 Exhibits 3 and 4 will not be used by the Division.
8 We will be focusing on Exhibit 2, the modification
9 filed pursuant to the deadlines for the rule-making.
10 So there will not be a slide show today. With that
11 bit of housekeeping I would like to give my opening
12 to the commission.

13 CHAIRPERSON BAILEY: Please go.

14 MS. GERHOLT: The legislature has
15 entrusted the Oil Conservation Division with the
16 authority to regulate the oil and gas industry in
17 the state. One of the requirements that the
18 legislature mandated in granting this authority is
19 the division must have rules which it can
20 effectively enforce. The division requests that the
21 commission adopt a rule which can be effectively
22 enforced. The division's modifications are the
23 responses to the applications submitted by NMOGA and
24 IPANM. If the commission chooses to adopt the
25 proposed amendments, the division respectfully

1 requests its modifications be included.

2 This request is based on, first of all, a
3 need for clarity. The need needs to be written in a
4 manner which allows regulators and regulatees to
5 easily decipher the requirements. And, two,
6 consistency. There needs to be consistency between
7 OCD rules. Where a word has previously been defined
8 by another rule, the division requests that
9 definition remain unchanged. And where a rule
10 addresses how to remedy a situation, such as the
11 Spill Rule, we would seek that rule be the rule that
12 is in force. And that would be in agreement with
13 some of the language that IPANM has offered, that if
14 there is a minor or major release that you follow
15 the Spill Rule. We will present testimony in
16 regards to that today.

17 The OCD does not want to create conflict
18 between rules or conflict within a single rule and
19 we ask the commission to keep that in mind as you
20 promulgate a rule.

21 The division will not be presenting
22 technical evidence. Technical evidence has been
23 offered by other parties to this hearing. As a
24 regulatory body, the Oil Conservation Division will
25 enforce the rule the commission adopts that protects

1 human health and the environment, prevents waste and
2 protects correlative rights. As members of the
3 commission, you will weigh the technical evidence
4 presented when you promulgate a rule. The division
5 will enforce the adopted rule.

6 Because the division has enforcement
7 authority, the division has made certain
8 modifications. Specifically, we ask that if the
9 commission chooses to adopt new closure standards
10 that the language be clear and unambiguous. That is
11 the purpose of the division's rewrite 19.15.17.13
12 closure statement. It is not a comment on the
13 technical standards. It is not anything more than
14 for clarity's sake.

15 In the division's response to the
16 applications we have also offered means by which to
17 streamline the permitting process, registering
18 below-grade tanks and notification requirements for
19 closed-loop systems. The Oil Conservation Division
20 was entrusted to protect water, not just unconfined
21 groundwater or continuously flowing water, but
22 confined groundwater and significant watercourses.
23 The division's modifications are reflective of this
24 authority.

25 The division is also asking that certain

1 controls be in place such as automatic shutoff
2 controls for below-grade tanks s and that a liner be
3 repaired or replaced within 48 hours. By including
4 in these requirements, the division can be confident
5 the correct measures are in place and can be
6 enforced effectively.

7 The division is also supportive of
8 testimony that was presented by NMOGA's witness -- I
9 believe it was Mr. Hasely -- to allow for a call
10 alarm to individuals within the company. So we are
11 striving to make sure that the regulation is clear
12 and that there is allowance for strong measures to
13 be in place so things can be taken care of quickly.

14 The division has also requested closure
15 identification be included within the rule because
16 the division needs to know where sites are in case
17 there is ever a future problem. By requiring an
18 operator to disclose the information on the C 102,
19 the division with easily retrieve information and
20 effectively enforce the rule. Reporting on the C
21 102 is useful for the division, but it may be less
22 useful to the citizenry of New Mexico. As a state
23 agency, the division encourages the dissemination of
24 information to the public. Not all members of the
25 public are familiar with division forms, but a

1 landowner knows to review a title to a piece of
2 property. By requiring an operator to also file a
3 deed notice, the citizens will have the information
4 necessary to make an informed decision.

5 The most significant modification offered
6 by the division is in regard to exceptions and
7 variances. The proposed modification allows for the
8 Oil Conservation Division to grant or deny an
9 exception or variance effectively. The modification
10 provides clear standards to the regulated community,
11 an important aspect when seeking to enforce a rule.

12 If the regulated body does not understand
13 the requirement, it becomes more difficult for the
14 regulator to enforce the requirements. The
15 modification provides notice to those who may be
16 affected by the requested exception or variance.

17 Finally, the modification provides for
18 greater involvement by the district. The districts
19 are best suited to grant a variance because they
20 know the area, the geology. They are the ones who
21 visit the sites routinely. The division also
22 requests the commission adopt its permit approval
23 modifications because they set forth clear standards
24 for the division and regulatees, thereby allowing
25 for effective enforcement.

1 Ultimately, the Oil Conservation Division
2 is confident that the commission will adopt a rule
3 which protects human health and the environment.
4 The rule also needs to fulfill the additional
5 legislative mandate of effective enforcement. The
6 division's modifications do just that.

7 The division will be presenting two
8 witnesses, Brandon Powell and Ed Martin. I would
9 like to call Brandon Powell at this time.

10 BRANDON POWELL
11 after having been first duly sworn under oath,
12 was questioned and testified as follows:

13 DIRECT EXAMINATION

14 BY MS. GERHOLT

15 Q. Good morning. Would you please state your
16 name for the record?

17 A. Brandon Powell.

18 Q. Where do you work, Mr. Powell?

19 A. In the OCD Aztec District Office.

20 Q. Which district is that?

21 A. District 3.

22 Q. How long have you been employed by the
23 OCD?

24 A. A little over six years.

25 Q. What position do you currently hold?

1 A. I'm the inspection and enforcement
2 supervisor.

3 Q. What are your current job
4 responsibilities?

5 A. I oversee inspection and field activities
6 and the environmental program. I also review and
7 approve sundry noises and environmental reports.

8 Q. How long have you held that position?

9 A. I have been in this position for
10 approximately a little over a year.

11 Q. What position did you hold previously?

12 A. I was the environmental specialist.

13 Q. How long were you the environmental
14 specialist?

15 A. Approximately five years.

16 Q. During the course of your tenure in your
17 current position, have you been presented with
18 situations which required you to enforce a rule?

19 A. Yes.

20 Q. And during your entire tenure with the
21 OCD, have you become familiar with the OCD rules?

22 A. Yes, I have.

23 Q. And do you have to enforce all of the
24 rules?

25 A. Yes, I do.

1 MS. GERHOLT: Madam Chair, at this time I
2 offer Mr. Powell as an expert as it relates to
3 enforcement of OCD rules.

4 CHAIRPERSON BAILEY: Objections?

5 MR. CARR: No.

6 MS. FOSTER: No objections.

7 MR. JANTZ: None.

8 CHAIRPERSON BAILEY: He is so accepted.

9 Q (By Ms. Gerholt) Mr. Powell, did the OCD
10 form a review group after receiving NMOGA and
11 IPANM's applications?

12 A. Yes, they did.

13 Q. Were you a member of this group?

14 A. Yes, I was.

15 Q. Do you recall who the other members were?

16 A. The other districts were represented by
17 the district supervisors and their environmental
18 representatives. The district supervisors included
19 Charlie Perrin, Randy Dade, E.L. Gonzales and Ed
20 Martin. The environmental representatives were
21 Geoffrey Leking and Myke Bratcher and it was also
22 represented by the OCD Environmental Bureau which
23 included Jim Griswald and the Legal Bureau, which
24 included David Brooks and Gabrielle Gerholt.

25 Q. During your review, what was the group's

1 focus?

2 A. The administrative feasibility and
3 enforceability of the rule.

4 Q. If I could draw your attention to the
5 witness notebook, and specifically Exhibit 2, Page
6 1. 19.13.17, Definitions. Are you there, sir?

7 A. Yes.

8 Q. First of all, below-grade tank. Have
9 below-grade tanks been previously defined by an OCD
10 rule?

11 A. Yes, they have.

12 Q. Which rule has previously defined them?

13 A. Rule 2.

14 Q. And why is the division requesting the
15 definitions in Rule 17 remain the same as Rule 2?

16 A. For consistency.

17 Q. If I could now draw your attention to Page
18 2, Paragraph N, biolake. Is the division also
19 requesting that biolake remain as it's defined in
20 Rule 2?

21 A. Yes, they are.

22 Q. And for consistency again?

23 A. Yes.

24 Q. If I can now draw your attention to Page
25 3. And the definition for restore. Why is the

1 division requesting that a definition for restore
2 remain in Rule 17?

3 A. To clarify to the operators what the
4 division expects when they use "restore a site" in
5 the rules.

6 Q. And would that help you in enforcement of
7 a rule?

8 A. Yes.

9 Q. How would it help you?

10 A. It would make it clear and concise and
11 consistent within the rules.

12 Q. The next definition is for significant
13 watercourse. What is the definition the division is
14 offering to the commission?

15 A. A watercourse with a defined bed or bank
16 either named or identified by a dashed blue line on
17 a USGS 7.5 minute quadrangle map or the next lower
18 order tributary with a defined bed and bank of such
19 watercourse.

20 Q. Is there any adjustment that needs to be
21 made to that language?

22 A. If we identify with the dashed blue line,
23 I believe we do not need the next lower order
24 tributary with the defined bed or bank of such
25 watercourse.

1 Q. Is that repetitive?

2 A. It would be unnecessary.

3 Q. It would be unnecessary. And do you have
4 an opportunity to work with USGS 7.5 minute
5 quadrangle maps?

6 A. Yes, I work with them quite extensively in
7 the northwest.

8 Q. Are they standard in the mapping
9 community?

10 A. Yes.

11 Q. And is this something that any individual
12 could take a look at and identify a dashed blue
13 line?

14 A. Yes, it is.

15 Q. So why is the division offering this?

16 A. One, for clarity. It's consistent. It's
17 not left open to interpretation. Also in the
18 northwest there are times when watercourses may be
19 named with several feeders going into it with
20 defined bed and banks and we have flash flood events
21 that would create a large amount of water in those
22 channels that if you just took the next word above a
23 named watercourse would be unprotected. And having
24 those unprotected in a pit in or next to those
25 watercourses could jeopardize the water in the

1 rivers in the area in the northwest and farmers'
2 fields and different situations.

3 Q. Now drawing your attention to the
4 definition for sump. The division has offered a
5 definition for sump that is different than other
6 proposals. First of all, what is the division's
7 proposed definition?

8 A. A collection device with a capacity less
9 than or equal to 500 gallons which remains
10 predominantly empty and serves as a drain receptacle
11 for diminimus releases on an intermittent basis and
12 is not used to store, treat, dispose of or evaporate
13 products or waste. Buckets, pails, drip pans or
14 similar vessels that are not in contact with the
15 ground surface are not sumps.

16 Q. Why should the commission adopt this
17 definition?

18 A. It's very clear what we expect. Also
19 having the partially buried in the original
20 application would be hard to enforce because it
21 doesn't give a standard whether it's an inch up on
22 the tank or if it's completely buried. Having that
23 wording taken out, we could ensure that any sumps
24 that are out there that act as sumps are protected.

25 Q. And finally, in regards to definitions,

1 the Oil Conservation Division has proposed to modify
2 the definition for visible. What is the OCD's
3 proposed definition for visible?

4 A. Any sheen located on the pit or any sheen
5 on the pit liquid surface area.

6 Q. Why is the division offering this
7 modification?

8 A. For a consistent approach. Having the 30
9 percent criteria would be hard to enforce because
10 there's no standardized testing that I'm aware of.
11 It would also be at the discretion of the inspector
12 in the field as to what they feel is 30 percent, so
13 it would be left to an inspector instead of being
14 left to a standard. Also wind in the area could
15 push any oil to one side of the pit or the other and
16 stack it upon itself, which would reduce the 30
17 percent area. So for consistency we took that
18 portion out.

19 Q. Very good. Thank you. In your opinion,
20 do the division's modifications of the definitions
21 provide for effective enforcement?

22 A. Yes.

23 Q. And as a regulator, are these
24 modifications demonstrative administratively
25 feasible?

1 A. Yes.

2 Q. If I could now draw your attention to Page
3 5. It will be Pages 6 and 7. The division has
4 proposed to allow for standardized plans for
5 temporary pits, multi-well fluid management pits and
6 below-grade tanks. Why?

7 A. For consistency and lessening the burden
8 on the operators and the OCD. Having a standardized
9 plan goes through a stringent review process to make
10 sure all rules are complied with. And then also
11 having the standardized plan, it doesn't have to be
12 in each application. The field people, once they
13 have a standardized plan that they work with, it's
14 easier for them to deal with because it's familiar
15 to them. And having that helps with the enforcement
16 and also with the operators complying with the rules
17 because there's less of a chance for things to
18 change in an individual plan.

19 Q. Now, if something does need to change, is
20 an operator welcome to come to the OCD and ask for
21 that?

22 A. Yes.

23 Q. And would the division work with the
24 operator?

25 A. Yes.

1 Q. Why does that the division want
2 below-grade tanks to be registered?

3 A. For a couple reasons. One is there's
4 times when there's multiple operators on a well
5 site. If there's a situation going on where we have
6 to identify who is the owner of the tank, having
7 registration on-site would allow us to be able to
8 find out whose tank it was and address it
9 accordingly. It would also allow us that after the
10 below-grade tank was closed, we could go back out if
11 it was rediscovered or there was a situation to find
12 out if it was a below-grade tank closure and if it
13 was closed properly at the time of closure or if
14 it's another release or activity that went on on the
15 site and how to deal with it proceeding.

16 Q. Now drawing your attention to 19.15.17.10
17 Siting Requirements, specifically Pages 9 and 10 of
18 OCD's modifications. Throughout the siting
19 requirements OCD has stricken "unconfined" in
20 several places. Why is that?

21 A. The division is charged with protecting
22 all groundwater. Also the use of confined and
23 unconfined would be very difficult for the division
24 to enforce as we do not have the equipment to go out
25 and verify whether water is confined or unconfined.

1 Also a confining layer that's holding back
2 freshwater may not allow the protection from
3 chemicals that could be in a pit such as acids to go
4 through that confining layer.

5 Q. Mr. Powell, if I can stop you for a
6 moment. If I can specifically draw your attention
7 to Paragraph A1A, the last line of that paragraph.
8 The division has stricken "unconfined" there. Do
9 you see that?

10 A. Yes.

11 Q. And that relates to protection of
12 groundwater, correct?

13 A. Correct.

14 Q. And to protect all groundwater?

15 A. Correct.

16 Q. And the same is true for Paragraph A1B, to
17 protect all groundwater.

18 A. Correct.

19 Q. And again then for Paragraph 2B, A2B on
20 Page 10.

21 A. Correct.

22 Q. Thank you. If the commission were to
23 adopt OCD's proposal, would the division be able to
24 effectively enforce this?

25 A. Yes.

1 Q. Drawing your attention to Paragraphs A1B
2 on Page 9 and also Paragraph 3A on Page 10, the
3 division reinserted "continuously flowing
4 watercourse" for "other significant watercourse or
5 lakebed, sinkhole or playa lake (measured from the
6 ordinary high-water mark)." Why?

7 A. For the protection of surface water.

8 Q. And do you believe with the definition for
9 continuously flowing watercourse and significant
10 watercourse that there would be protection?

11 A. Yes.

12 Q. On Page 10, why is the division
13 reinserting siting requirements for below-grade
14 tanks?

15 A. To make it clear what the division expects
16 when siting a below-grade tank and for the
17 protection of human health and the environment and
18 public safety.

19 Q. If adopted, would the division be able to
20 effectively enforce it?

21 A. Yes.

22 Q. Drawing your attention to Page
23 19.15.17.12, Operational Requirements. Why does the
24 division want the liner to be repaired or replaced
25 within 48 hours of discovery?

1 A. If repaired within the 48 hours there's a
2 lesser chance of that tear increasing due to wind or
3 pressures exerted by the pit. It's not saying it
4 has to be repaired within the 48 hours. It's saying
5 if it's not repaired they need to notify the
6 district or seek a variance. If all the fluid has
7 been removed and they are getting to close it, they
8 can notify the district to seek a variance to leave
9 it until closure, but this allows the protection of
10 the environment and the area by the companies
11 responding quickly to fix it.

12 Q. So if an operator is able to repair or
13 replace within 48 hours, they don't need to notify
14 the division?

15 A. Correct.

16 Q. It's only if they are unable to do that
17 within 48 hours do they need to notify the division?

18 A. That's correct.

19 Q. And ask for more time; is that correct?

20 A. Yes.

21 Q. The division has also offered a
22 modification that would require the operator to
23 inspect a below-grade tank for leakage and damage.
24 And that's on Page 24. Why has the division
25 submitted this modification?

1 A. Because if there's signs of damage it can
2 also indicate that a release may occur in the near
3 future or a release that's unseen could be
4 occurring.

5 MS. GERHOLT: Madam Chair, may I approach
6 the witness?

7 CHAIRPERSON BAILEY: Yes.

8 Q. Mr. Powell, I'm handing you IPANM's May
9 15th proposed amendments. Could I have you turn to
10 the purple tab? What page is that on?

11 A. Page 24.

12 Q. Page 24 of IPANM's May 15th filing. Could
13 you please read aloud the highlighted portion?

14 A. "The first one, "If upon visual inspection
15 in the area beneath the tank there are any areas
16 that are wet, discolored or showing other evidence
17 of a possible release, the operator shall test the
18 sample of the soil and shall report as required on a
19 Form C 141 pursuant to 19.15.29."

20 Q. Are you in agreement with that proposal?

21 A. Yes, I am.

22 Q. Why is that?

23 A. Because if there are wet or discolored
24 soils there are obvious signs of a release and it
25 needs to be handled under the Spill Rule for

1 consistency.

2 Q. That's Rule 29?

3 A. Yes.

4 Q. In your opinion, is that clear language of
5 what the division offered to the commission?

6 A. It's the same as what we have offered.

7 Q. Is the intent the same?

8 A. The intent is the same.

9 Q. All right. And if that were adopted by
10 the commission, would the division be able to
11 enforce it?

12 A. Yes.

13 Q. Now if I could draw your attention back to
14 OCD's Exhibit No. 2, specifically Page 36. Closure
15 Identification. The division has reinserted that
16 requirement, correct?

17 A. Correct.

18 Q. To begin, what is the division's proposed
19 closure identification?

20 A. "The operator shall cause a licensed
21 surveyor to survey the area of the closure and
22 certify said location in a Form C 102. A person
23 shall not build a permanent structure over an
24 in-place disposal. The operator shall file a deed
25 notice identifying the exact location of the

1 in-place disposal with the County Clerk in the
2 county where the in-place disposal occurs."

3 Q. First of all, what's a C 102?

4 A. A C 102 is a plat that's surveyed by a
5 surveyor identifying where a location is.

6 Q. Why is the division, first of all,
7 requesting that it be identified on the C 102?

8 A. That way it's accurately identified and
9 filed with the division the exact placement, so if
10 we ever need to go out and refind it, that is
11 available.

12 Q. And it's important to have that done by a
13 surveyor?

14 A. Yes, it is. That way it's as accurate as
15 possible.

16 Q. Now, with regards to the second proposal
17 not to have permanent structure built over in-place
18 disposal, why is the division requesting that?

19 A. That way if there's contaminants that
20 potentially could be found later left in place, it
21 doesn't endanger whatever permanent structure is
22 over the top of it.

23 Q. And finally, why file a deed notice?

24 A. To notify the current landowner and any
25 future landowners of the in-place disposal.

1 Q. Why isn't a C 102 enough?

2 A. Because once the well is plugged, the
3 future landowners may not know how to access our
4 files to find that.

5 Q. Also on Page 36 there's timely
6 requirements for closure, and drawing your attention
7 to Page 37, why has the division included language
8 "or by an earlier date that the appropriate division
9 district office requires because of imminent danger
10 to freshwater, public health or the environment"?

11 A. That allows the division the discretion to
12 require an earlier closure date if a situation
13 occurs that could injure public health or the
14 environment.

15 Q. In your opinion, if these modifications
16 are adopted would the division be able to enforce
17 them?

18 A. Yes.

19 Q. Would they be able to administer such a
20 rule?

21 A. Yes.

22 MS. GERHOLT: Madam Chair, if I may have a
23 moment?

24 CHAIRPERSON BAILEY: Yes.

25 MS. GERHOLT: Madam Chair, I have no

1 further questions for the witness.

2 CHAIRPERSON BAILEY: Mr. Carr, do you have
3 questions?

4 CROSS-EXAMINATION

5 BY MR. CARR

6 Q. Mr. Powell, in your role as an
7 environmental specialist have you had
8 responsibilities for the enforcement of the current
9 Pit Rule?

10 A. Yes, I have.

11 Q. What does that entail?

12 A. That entails the approval, review and
13 approval of the C 144s. If there's violations to
14 the rule, the corrective action taken to remedy
15 those violations.

16 Q. And during the last four years working
17 with the rule, have you been able to stay ahead of
18 the applications that have come before you for
19 review?

20 A. For applications regarding work to be
21 done, yes.

22 Q. Have you had problems administering the
23 current rule?

24 A. No.

25 Q. Do you approve applications for

1 below-grade tanks?

2 A. Yes, I do.

3 Q. And have you been able to stay current on
4 any application for a below-grade tank?

5 A. For new applications coming in, we have
6 stayed current.

7 Q. Do you have a backlog in the agency of
8 below-grade tank applications?

9 A. Yes, backlog for below-grade tanks that
10 existed prior to the rule that were filed.

11 Q. Are you aware of how many applications
12 might be pending for those below-grade tanks?

13 A. It's in the thousands.

14 Q. And those have been filed but you just
15 simply don't have the staff to process them?

16 A. Correct.

17 Q. When you worked on the Administrative
18 Feasibility Committee that the OCD established to
19 review its proposal, I assume that you looked at the
20 current rule and the problems with administering it?

21 A. We were reviewing the application.

22 Q. And with when you did that, you recognized
23 that a number of functions were being shifted from
24 the Santa Fe office to the district office?

25 A. Yes.

1 Q. My question is, did you consider whether
2 or not you would have the staff and the ability to
3 process those applications at a district level?

4 A. We didn't look at it specifically in that
5 regard.

6 Q. When you look at this rule, the proposal,
7 in the context of what your job and your
8 responsibilities are, if the rule is adopted as
9 proposed do you anticipate being able to administer
10 the rule in a timely fashion?

11 A. Yes.

12 Q. This would include matters such as
13 variances, things of that nature?

14 A. Yes.

15 Q. Do you have anyone to assist you in this
16 effort?

17 A. We work as a district. There's a
18 compliance officer that does assist me.

19 Q. When you look at this rule, you are
20 proposing certain amendments to the definitions that
21 were proposed by NMOGA and IPANM; is that correct?

22 A. Correct.

23 Q. And you want to reinsert the definition
24 for the term "restore"?

25 A. Correct.

1 Q. What was the reason for that?

2 A. To clarify to the operators what the
3 division expects when they refer to restoring an
4 area in the rule.

5 Q. Do you know how many times the word
6 "restore" actually appears in the rule?

7 A. No, sir.

8 Q. Would it surprise you when you do a word
9 search that it only appears at one point in the
10 rule?

11 A. It wouldn't surprise me.

12 Q. And that is in Section 17.13F. And the
13 proposed definition for this that you are inserting
14 for this term simply provides that you return the
15 site to its condition in accordance with
16 19.15.17.13. Does that seem to be redundant to
17 define a term by referring to the only section in
18 which the term appears?

19 A. Can you rephrase the question?

20 Q. Does it seem redundant or unnecessary in
21 the rule to define the term by saying you restore in
22 accordance with this section, and yet that section
23 is the only place the term appears? Or do you have
24 an opinion.

25 A. I would have to look at the definition.

1 Q. It's on Page 38.

2 A. The reference portion of the definition
3 "restore" may be redundant, yes.

4 Q. Do you see any reason to have a special
5 definition for a term that only appears one place?

6 A. As long as it's clear to the operators
7 dealing with it.

8 Q. I would like to talk with you for a minute
9 about the provision of the definition of the term
10 "visible." When I look at this term, you are
11 deleting the 30 percent standard that was proposed
12 by NMOGA?

13 A. Correct.

14 Q. And the rule as you would propose it
15 provides that if there is any sheen it would have to
16 be --

17 A. Correct.

18 Q. Have you done any research to determine
19 how much of a hydrocarbon might be required to
20 produce a sheen on water?

21 A. I have not.

22 Q. Would it surprise you to learn that a
23 silver appearance, a sheen with a silver appearance
24 has only a thickness of 1/10,000th of a millimeter?

25 A. It wouldn't surprise me.

1 Q. And that a 30 percent sheen would require
2 only 3/1,000 of a gallon?

3 A. It wouldn't surprise me, no.

4 Q. And would you have an opinion on whether
5 3/1,000 of a gallon on a two-acre pit would pose a
6 threat or do you have an opinion?

7 A. I don't know if it would pose a threat.

8 Q. Do you believe that a sheen that poses no
9 threat should require action by an operator or --
10 and if not taken, leave that operator in the
11 position where they have violated your rule?

12 A. I don't know that if it would cause a
13 threat or not so I don't know that I can state
14 whether that would.

15 Q. Do you think an action that causes no
16 threat should be something that an agency should
17 require operators to respond to?

18 A. No.

19 Q. I really don't have very many questions.
20 You talked about the closure identification for
21 pits, and you have requested that a licensed
22 surveyor be required to go out and survey the
23 location of that pit.

24 A. Correct.

25 Q. Do you realize that requires employing

1 someone to go out to each site and conduct that
2 survey?

3 A. Correct.

4 Q. Did you consider whether or not any
5 consumer grade GPS location might provide you with a
6 sufficient location for that?

7 A. The concern was the accuracy of a
8 hand-held GPS.

9 Q. And you believe that it would be
10 preferable to require that a surveyor be retained
11 other than use the GPS?

12 A. Yes.

13 Q. On the C 102, do you currently provide the
14 location of the pit?

15 A. For what C 102?

16 Q. When you file a C 102, do the filings of
17 the OCD currently contain information as to the
18 location of the drilling pit?

19 A. They are usually filed for APDs for
20 location of the well.

21 Q. And those forms are available online?

22 A. Correct.

23 Q. In addition to that kind of information
24 currently available, OCD wants a deed notice filed;
25 is that right?

1 A. Yes.

2 Q. Did you determine whether or not it was
3 appropriate for you to do that on federal lands?

4 A. On federal lands, I believe that you
5 cannot file a deed on federal lands.

6 Q. The individual who would be filing the
7 deed would be the operator of the well; is that
8 right?

9 A. That's correct.

10 Q. Do you understand that the operator of the
11 well doesn't hold title to the property?

12 A. Correct.

13 Q. Are you aware of the Surface Owner
14 Protection Act?

15 A. I have not read it. I am aware of it.

16 Q. In that act, if you can just accept that,
17 the operator of the well and the surface owner can
18 reach an agreement on a number of things. Probably
19 you don't know. Are you aware of whether or not --
20 strike that. That calls for a legal conclusion.

21 Has any contact been made with any county
22 clerk to determine whether or not they will accept
23 these notices?

24 A. They are accepting them currently on
25 private land.

1 Q. Now, I was receiving notes from people in
2 the back. My question is, first of all, did you
3 discuss the language concerning exceptions to the
4 rule? Is that something Mr. Martin will cover?

5 A. I believe that's something will Martin
6 will cover.

7 Q. And did you discuss the provisions
8 concerning the time frames on approval of
9 applications?

10 A. No, I did not.

11 Q. Again, I get to save that for Mr. Martin?

12 A. Yes.

13 MR. CARR: That's all I have.

14 CHAIRPERSON BAILEY: Ms. Foster?

15 CROSS-EXAMINATION

16 BY MS. FOSTER

17 Q. Good morning.

18 A. Good morning.

19 Q. Just a quick question. You mentioned in
20 your direct testimony that you would prefer to have
21 standardized plans filed and a standardized will
22 most likely be filed by a company that has a
23 multiple-well drilling program, correct?

24 A. Yes.

25 Q. So if the large companies are working with

1 you to get templates, which is what the standardized
2 plans would be, how is it that a small operator who
3 might be drilling one or two wells a year are going
4 to know what standards you are currently imposing on
5 the larger companies in their templates?

6 A. They can come in the office and discuss it
7 with us. They can review their files because part
8 of it would be online. It would be available.

9 Q. Thank you. Now, you mentioned in your
10 direct testimony that groundwater protection is one
11 of your responsibilities with the division?

12 A. Correct.

13 Q. Are you aware of how many times the word
14 "groundwater" actually appears in the statutory Oil
15 and Gas Act?

16 A. No.

17 Q. And to repair a liner, you stated that you
18 would prefer to have companies repair it within 48
19 hours, and if they can't then they have to notify
20 the division and ask you for a variance?

21 A. Correct.

22 Q. Now, the variance procedure in the
23 proposal is a very standardized process; am I
24 correct?

25 A. Yes.

1 Q. And in order to obtain a variance we have
2 to prove that this is more protective to livestock,
3 human health and the environment according to the
4 NMOGA proposal.

5 A. I would have to look at the wording.

6 Q. Okay. I'm directing you to 19.15.17.15B2,
7 which is on Page 43 of your application. Do you see
8 that language?

9 A. Yes.

10 Q. So it states just to be able to ask for a
11 variance we have to demonstrate to the requested
12 variance provides equal or better protection to that
13 list of items, including human health and the
14 environment, livestock safety, et cetera.

15 A. Correct.

16 Q. Right? Now, you have been with the OCD
17 five years?

18 A. Yes. Six years.

19 Q. Five years as --

20 A. Yes.

21 Q. And one year in the managerial position?

22 A. Correct.

23 Q. Are you equipped to determine whether an
24 application would actually be protective of public
25 safety?

1 A. If it's an ongoing process, I would assume
2 that after the repair of that process it would be
3 equal.

4 Q. How about protection of livestock? Have
5 you ever, in your enforcement capacity, ever had to
6 do a protection of livestock in your --

7 A. Depending on the application of certain
8 rules. The fencing of the pits would be in
9 protection of the livestock.

10 Q. Fencing. Thank you. Looking at the OCD
11 modification, there was an additional modification,
12 and I apologize if you already discussed this but I
13 missed it when I was taking notes. In your
14 definition of temporary pit, which is OCD
15 Modification Page 3, the OCD does add some language
16 there. "Temporary pits may be used for one or more
17 wells." Do you see that language?

18 A. Yes.

19 Q. Was this language approved by your working
20 group and as a recommendation of the OCD?

21 A. It was reviewed. I don't know if we
22 proposed it. It's not on the comments.

23 Q. Having read that, is that something that
24 you, as an OCD witness, would agree is a necessary
25 revision to the rule?

1 A. Yes.

2 Q. Thank you. I have no further questions.

3 CHAIRPERSON BAILEY: Mr. Jantz?

4 MR. JANTZ: Thank you.

5 CROSS-EXAMINATION

6 BY MR. JANTZ

7 Q. Good morning.

8 A. Good morning.

9 Q. I want to get a better sense about your
10 responsibilities at the division. Ms. Gerholt
11 talked some about what your responsibilities are. I
12 wonder if you could elaborate in some more detail.

13 A. Which aspects?

14 Q. From soup to nuts. You are a supervisor;
15 is that right?

16 A. Yes, I am.

17 Q. What does that entail?

18 A. That entails I direct the inspection
19 staff, do the scheduling for tests that are going on
20 in the field.

21 Q. Sorry to interrupt, Mr. Powell. For
22 clarification, direct inspection staff, that means
23 sending them out to sites to inspect wells, pits,
24 whatever?

25 A. Correct.

1 Q. Every aspect of the operation?

2 A. Of the field operation.

3 Q. Please go ahead.

4 A. I also review and approve sundry notices
5 for well work, which includes P & As, the drilling,
6 the active field drilling. There's multiple
7 aspects.

8 Q. That's the supervisory stuff.

9 A. Right.

10 Q. What about the environmental aspect of
11 your job? What does that entail?

12 A. It entails reviewing any circumstances
13 that may be abnormal that the inspectors find in the
14 field. It would entail reviewing applications that
15 come through for environmental projects. It is
16 overseeing the 144 permit process. It's overseeing
17 the 141 release notification process.

18 Q. Could you explain to me what the 144
19 process is?

20 A. The 144 process, the process in our office
21 is the 144 comes in our office.

22 Q. Is that a form?

23 A. Yes, it is. It's logged into our office
24 for tracking purposes. From there it goes for
25 review. It's reviewed to make sure it's complete

1 and correct. If it's found to be complete and
2 correct and meets the standards then it's approved.
3 From there it goes back into scanning.

4 Q. What kind of information is on this 144?

5 A. It's very extensive, but overall it
6 includes an operation design plan, a siting section
7 that states whether it meets siting requirements,
8 hydrogeologic report, a closure plan, a topo map, a
9 water plane or a FEMA flood plane map and an aerial
10 map.

11 Q. Does reviewing that form bring to bear any
12 judgment calls on the part of the people reviewing
13 it under the current rule?

14 A. No.

15 Q. So as long as they have -- it's like
16 checking off boxes?

17 A. Correct.

18 Q. And what's a 141?

19 A. A 141 is the form that's filed to notify
20 of a release.

21 Q. Okay. And so do your environmental duties
22 encompass anything else?

23 A. If there are special projects going on,
24 large projects, we review those plans and determine
25 where to go with them. If there's ongoing releases,

1 it's responding to them and dealing with them
2 appropriately.

3 Q. Okay. So you also deal with when there
4 are some kind of spill or pit leak or whatever?

5 A. Correct.

6 Q. Just out of curiosity, have there been pit
7 leaks in your district?

8 A. Yes.

9 Q. Have they impacted groundwater?

10 A. General classifications of pits, yes.

11 Q. You talked about this OCD working group.

12 A. Yes.

13 Q. What was the mandate of the working group?

14 A. We reviewed the administrative feasibility
15 and enforceability of the rule.

16 Q. Did you talk about environmental impacts
17 in this working group?

18 MS. GERHOLT: Objection. The question was
19 asked and he answered it.

20 MR. JANTZ: This is a different question
21 with a different answer.

22 A. The scope did not include the
23 environmental impacts of the rule.

24 Q. So you didn't talk about any environmental
25 impacts?

1 A. No.

2 Q. Did you talk about -- I assume that the
3 answer is going to be the same, no, but just to make
4 sure, did you talk about any technical aspects of
5 that?

6 A. No.

7 Q. Of the proposed rules? You testified in
8 2007, didn't you? I remember your face.

9 A. Yes, I did.

10 Q. OCD was the proponent of Rule 17 at that
11 point. It was OCD's petition, wasn't it?

12 MS. GERHOLT: Objection, relevancy.

13 MR. JANTZ: If you will let me finish my
14 line of questioning, I will be happy to --

15 CHAIRPERSON BAILEY: You are laying a
16 foundation?

17 MR. JANTZ: Yes.

18 CHAIRPERSON BAILEY: Then go ahead.

19 A. Yes, they were.

20 Q. Why didn't this working group address the
21 technical/environmental aspects this time around?

22 A. That was not the scope that we were
23 directed to.

24 Q. You don't know?

25 A. I don't know.

1 Q. Do you know who may know?

2 A. I work with our legal counsel.

3 Q. You talked a little bit about standardized
4 plans. Can you explain to me how you see that
5 working from an administrative and enforcement
6 perspective, both for multi-well fluid management
7 pits and temporary pits?

8 A. For the standardized plan, currently what
9 we use in the district is templated plans which
10 could then be converted to a standardized plan. It
11 allows for the field people to understand better
12 what's going on and what conditions they have to
13 meet. Using the standardized plans and keeping them
14 on file would reduce any variance that could happen
15 on one permit without having a direct application
16 for such.

17 Q. I'm kind of unclear on how a standardized
18 plan might be used. So an oil company comes in with
19 a pit application, pit permit application or
20 multi-well fluid management pit application. And it
21 says, "Here we have standardized plan. This is part
22 of our application." OCD says, "Okay. This looks
23 good." Does that company get to use that
24 standardized plan for every future permit
25 application irrespective of where it's located or is

1 it only good for that one permit?

2 A. For that situation.

3 Q. So for that permit application?

4 A. Yes.

5 Q. So if there's a standardized plan, it only
6 is good for one permit application; it doesn't
7 necessarily mean you approve the same standardized
8 permit for another location, another permit
9 location?

10 A. Not necessarily for that one application,
11 that one C 144, but for that type of operation that
12 meets certain siting criteria.

13 Q. So another project in another location, as
14 long as it meets the siting criteria, they can still
15 use that standardized plan?

16 A. If it meets the same siting criteria, yes.

17 Q. Does administering these things include
18 going out and inspecting the site during
19 construction?

20 A. It could, yes.

21 Q. It could but does it necessarily?

22 A. We have inspected construction in the
23 past. We don't inspect all construction.

24 Q. And is that because of staffing issues or
25 is it just a low priority in the range of things?

1 A. It depends on day-to-day operations what
2 our inspectors inspect. If we have other priorities
3 to inspect that day they may not go out and inspect
4 it.

5 Q. While we're talking about inspectors, how
6 many inspectors do you have in your bureau?

7 A. In our district?

8 Q. District, I'm sorry?

9 A. We have four.

10 Q. Is that more or less than 2007?

11 A. I would have to go back and look how many
12 inspectors we had in 2007. I'm not sure.

13 Q. Are you aware of any staff layoffs,
14 inspector layoffs since then?

15 A. No.

16 Q. Let's talk about the multi-well fluid
17 management pits a little bit. I'm looking at the
18 operational requirements so it's Section 11 J. If
19 you take a look at Subsection 2. Let me first ask
20 you, what do you understand the purpose of
21 multi-well fluid management pits to be?

22 A. They are an area to hold the liquid to use
23 for fracking operation.

24 Q. Do you have a sense of how big these pits
25 are?

1 A. We haven't used them. I believe the
2 regulation says less than ten acre feet.

3 Q. That's for temporary pit, isn't it?

4 A. I don't know.

5 Q. Let's take a look.

6 MS. GERHOLT: Madam Chair, I would object
7 to this line of question. It is getting to be
8 beyond the scope of direct, and so far there hasn't
9 been a question that's related to enforcement or
10 administrative.

11 MR. JANTZ: This is foundation for such a
12 question.

13 CHAIRPERSON BAILEY: Let's hear such
14 question soon.

15 MR. JANTZ: You certainly will, Madam
16 Chair.

17 Q. Do you see a limit on size in the
18 operational requirements?

19 A. I do not.

20 Q. Can we take a look at the design and
21 construction or the permit requirements? That would
22 be Section 9E.4 for multi-well fluid management
23 pits.

24 MS. GERHOLT: Page 7 of the OCD
25 modifications.

1 A. Okay.

2 Q. Do you see a volume limitation there?

3 A. No, I don't.

4 Q. So at least for the part of the regulation
5 we have just looked, at there's no volume
6 limitation?

7 A. None that I can see.

8 Q. Is there a time limitation, how long these
9 things can be open? Did you read a time limitation
10 in either of the sections we just looked at?

11 A. I believe it was for as long as the
12 pits -- the locations it's proposed for. At the end
13 of the last one it has to be closed.

14 Q. In your experience, how long can it be?

15 A. It depends on the operations.

16 Q. Can you give me a range?

17 A. I really couldn't. It depends on the
18 operator's well program.

19 Q. Let's take a look at J2 back in the
20 operational design requirements.

21 A. You said J2?

22 Q. Yes.

23 MS. FOSTER: Page 19.

24 Q. If you take a look at the second sentence,
25 it says, "The operator shall conduct the pit so that

1 the slope does not place undue stress upon the liner
2 and is consistent with the angle of repos." Does
3 this seem to you to be something that would be
4 easily enforceable?

5 A. If while on-site it appears that it's
6 stretching a liner or endangering a liner, I would
7 say yes.

8 Q. But doesn't that leave some room for
9 interpretation between, say, inspectors or, say,
10 between inspectors and an operator?

11 A. If there's obvious signs of stretching or
12 stress, I would say it wouldn't be much
13 interpretation.

14 Q. What about consistent with the angle of
15 repose? What does that mean?

16 A. I had to have that explained to me and I
17 don't remember the definition for angle of repose.

18 Q. Let's take a look at the next subsection,
19 Subsection J3. That subsection talks about a
20 geomembrane liner with a leak detection system. I
21 haven't seen any specifications for a leak detection
22 system. What does this mean, leak detection system?

23 MS. GERHOLT: Objection. This is beyond
24 the scope of this witness' direct testimony, and I
25 would object based upon that.

1 MR. JANTZ: The witness testified to
2 interpreting the regulations and he is an expert on
3 regulation enforcement so it is well within the
4 bounds of his area of expertise and his direct
5 testimony.

6 CHAIRPERSON BAILEY: These questions are
7 better directed to the applicants who have discussed
8 this type of information. I'm waiting for your
9 direct question for the foundation that you have
10 been laying.

11 MR. JANTZ: I wanted to know from an
12 enforcement perspective what a leak detection system
13 is. What is OCD going to consider an appropriate
14 leak detection system?

15 CHAIRPERSON BAILEY: That is an acceptable
16 question.

17 MR. JANTZ: Thank you, Madam Chair.

18 A. The leak detection system would be an area
19 underneath the primary liner that could be monitored
20 to see if there are any fluids.

21 Q. So a secondary liner?

22 A. Yes.

23 Q. Would it be appropriate to put some
24 specification in the regulation that specifies such
25 a leak detection system?

1 A. Possibly by saying it has to have
2 secondary leak detection. It has to be designed to
3 be a leak detection system, I would assume.

4 Q. Because if you go down to J9, it says, "An
5 operator shall design a leak detection system to
6 adequately detect any leak from the primary liner."
7 And couldn't be that a range of things?

8 A. Yes.

9 Q. In the working group, did you talk about
10 the siting requirements? Let's see what section
11 that is. That's Section 10.

12 A. I believe we discussed proposed changes to
13 the siting requirements.

14 Q. And did you talk about all of them or only
15 unconfined versus confined groundwater?

16 A. I believe we discussed most of the
17 proposed changes but I would say probably not all of
18 them.

19 Q. And you found all those to be enforceable?
20 You would be able to enforce those?

21 A. Yes.

22 Q. Let me just ask you one last question.
23 Have you not been able to administer and enforce the
24 current Pit Rule?

25 A. We have administered and enforced the

1 current Pit Rule.

2 Q. You have?

3 A. Yes.

4 Q. I think that's all I have. Thank you,
5 Mr. Powell.

6 CHAIRPERSON BAILEY: Mr. Dangler?

7 CROSS-EXAMINATION

8 BY MR. DANGLER

9 Q. First, I did hear you answer a question
10 about release and there had been some releases, but
11 I thought your answer was there has been a general
12 classification of pits that have affected
13 groundwater. Could you say which kinds of pits have
14 affected groundwater?

15 A. Without going through the records, I
16 couldn't say specifically. I know production pits
17 were the predominant pits that caused groundwater
18 contamination.

19 Q. That's what I guessed you meant but I
20 wanted to know. Mr. Carr asked you a question about
21 sheen, and I think he did some math but I'm afraid
22 to follow in the footsteps of that, but it's
23 suggested that the sheen might only contain a small
24 amount of contaminant. Is there another reason why
25 the sheen on a pit might be important to a

1 regulator?

2 A. The sheen, if you let the sheen compile
3 and the tank overruns, that would be a concern.

4 Q. Why would that be a concern?

5 A. Because it would carry more hydrocarbons
6 that would overflow the tank which could cause more
7 contamination.

8 Q. So it may be an indication of something
9 else rather than just in itself a poisonous thing?

10 A. Correct.

11 Q. Were you here for other testimony or have
12 you just come in for this testimony today?

13 A. I was here late Wednesday afternoon.
14 That's all I have been here.

15 Q. Okay. So you haven't heard all of the
16 testimony from Mr. Mullins and the modeling?

17 A. No, sir.

18 Q. I had a question about that. I won't ask
19 the part that has to do with remembering what he
20 said. Can you say why it's important to repair
21 breach of a liner, in your opinion?

22 A. If it's left open and there's fluid in the
23 pit or contaminants in the pit, if it's left open
24 for extended periods of time wind can cause the tear
25 to increase. If there's pressure put on the liner

1 it can cause it to increase and go into those
2 contaminants or that fluid.

3 Q. And are you familiar with OCD studies of
4 releases from temporary pits?

5 A. I haven't been involved with the studies
6 for releases for temporary pits.

7 Q. But you are familiar there were studies
8 done?

9 A. I think there were, yes.

10 MR. DANGLER: No further questions. Thank
11 you.

12 CHAIRPERSON BAILEY: Dr. Neeper?

13 CROSS-EXAMINATION

14 BY MR. NEEPER

15 Q. I have at most, I think, three questions.
16 Good morning.

17 A. Good morning.

18 Q. You have testified that if wording
19 "unconfined aquifer" remained in the rule, that
20 would be difficult to enforce. Did I understand you
21 correctly?

22 A. That's correct.

23 Q. Are you aware of a classification of
24 aquifers that is called partially confined?

25 A. No, sir.

1 Q. If such a classification were brought to
2 your attention, would that make such a rule even
3 more difficult to enforce?

4 A. Possibly, yes.

5 Q. Thank you. The terms that have been
6 proposed in the rule of used spring as opposed to
7 just a spring, meaning where water comes out of the
8 ground, would that offer you any difficulty in
9 interpretation and enforcement?

10 A. Yes.

11 Q. And would the term "occupied house" as
12 contrasted with just "house," would that cause you
13 any difficulty in interpretation or enforcement?

14 A. Potentially, yes.

15 MR. NEEPER: Thank you.

16 CHAIRPERSON BAILEY: Dr. Bartlett?

17 DR. NEEPER: He may be out. He has to
18 keep standing up for his condition.

19 CHAIRPERSON BAILEY: Mr. Fort?

20 CROSS-EXAMINATION

21 BY MR. FORT

22 Q. Mr. Powell, you mentioned the USGS maps.

23 A. Yes.

24 Q. And there's a title to those that you used
25 to look for watercourses?

1 A. I believe the dotted blue line.

2 Q. Okay. And what are the standard -- what
3 is the type of USGS map that you referred to?
4 Because it's a certain size or certain scale?

5 A. I believe it's a 7.5 quadrangle map.

6 Q. What are the standards for the USGS to put
7 that blue line on a watercourse?

8 A. I don't know the standards. I just worked
9 with the mapping systems.

10 Q. Do you know how often those maps are
11 updated?

12 A. I don't.

13 Q. Do you know if they take -- do you have
14 any idea whether or not they take into account
15 precipitation in a given year or if they do some
16 type of a period of time to look at annual rainfall
17 to make a determination?

18 A. In an effort for us to address that that's
19 why it also had the bed and bank, because I don't
20 know.

21 Q. Do you know how often -- you did answer --
22 you don't know how often the maps are updated?

23 A. No, I don't.

24 Q. Thank you.

25 CHAIRPERSON BAILEY: Commissioner Bloom?

1 COMMISSIONER BLOOM: Thank you. Good
2 morning.

3 THE WITNESS: Good morning.

4 COMMISSIONER BLOOM: A couple questions
5 about confined versus unconfined water. Do you
6 anticipate any difficulties in being able to
7 distinguish in enforcement level what is confined or
8 unconfined?

9 THE WITNESS: Yes.

10 COMMISSIONER BLOOM: In your work group
11 did you discuss with the other members supporting or
12 not supporting this distinction between confined and
13 unconfined?

14 THE WITNESS: We do not support the
15 distinction between the two because of how hard it
16 would be to identify and enforce.

17 COMMISSIONER BLOOM: Yet OCD's proposal
18 still has confined and unconfined.

19 THE WITNESS: I thought we had stricken
20 all the unconfined. I'm sorry.

21 COMMISSIONER BLOOM: Could we move to the
22 definitions?

23 THE WITNESS: Sure.

24 COMMISSIONER BLOOM: Page 1, is that not a
25 definition of confined groundwater there?

1 THE WITNESS: Yes, it is.

2 COMMISSIONER BLOOM: And then I guess
3 looking at Page 3R, that's the definition of
4 unconfined groundwater.

5 THE WITNESS: Yes, it is.

6 COMMISSIONER BLOOM: And then we go to
7 Page 9, please. A couple places where unconfined
8 groundwater was struck. Top of Page 9. I'm looking
9 at C1A. It says, "Where unconfined groundwater is
10 less than 25 feet below the bottom of the pit."
11 Unconfined is still in there, correct?

12 THE WITNESS: Correct.

13 COMMISSIONER BALCH: 2A also.

14 COMMISSIONER BLOOM: Yes, thank you.
15 Wouldn't that then leave you having to verify what's
16 confined or unconfined?

17 THE WITNESS: Yes, it would.

18 COMMISSIONER BLOOM: If I told you that
19 angle of repose is the point at which a bank were
20 pushed any steeper the material would start to roll
21 off of it, would that sound about right?

22 THE WITNESS: I believe that's what was
23 described to me.

24 COMMISSIONER BLOOM: If you are out in the
25 field and you are looking at the bank of a pit,

1 would it be easy to tell if something is at the
2 angle of repose? Could it vary?

3 THE WITNESS: Based on that definition, I
4 would say it would be fairly easy to see if there
5 was sluffing down to the bottom.

6 COMMISSIONER BLOOM: Could there be
7 situations where the angle of repose would change
8 based on, say, rainfall or other activity?

9 THE WITNESS: Yes.

10 COMMISSIONER BLOOM: Is a two to one ratio
11 in the current rule easy to distinguish?

12 THE WITNESS: Yes, it is.

13 COMMISSIONER BLOOM: I don't know if you
14 are the person to ask about this, but I'll bring it
15 up. We are moving to a system where closed-loop
16 systems would be -- you would simply be notified of
17 the use of a closed-loop system, correct?

18 THE WITNESS: Correct.

19 COMMISSIONER BLOOM: From the existing,
20 which there's actually a permit that's given?

21 THE WITNESS: Yes, a C 144 CLEC.

22 COMMISSIONER BLOOM: So the OCD feels that
23 there's enough uniformity in closed-loop systems
24 that whatever you are being told industry is putting
25 out there, you are comfortable with that?

1 THE WITNESS: Yes.

2 MS. GERHOLT: Commissioner, not to
3 interrupt you, but Mr. Martin will be
4 testifying about that and he may be better to direct
5 your questions to.

6 COMMISSIONER BLOOM: We are seeing -- my
7 last line of questions here, Mr. Powell. We are
8 seeing transfer of decision-making potentially from
9 Santa Fe to the district offices and you discussed
10 this in your working group?

11 THE WITNESS: Yes.

12 COMMISSIONER BLOOM: And you feel that you
13 have sufficient staffing to be able to make these
14 decisions at the district level?

15 THE WITNESS: Yes.

16 COMMISSIONER BLOOM: That's all. Thank
17 you.

18 THE WITNESS: Thank you.

19 CHAIRPERSON BAILEY: Commissioner Balch?

20 COMMISSIONER BALCH: I a couple questions.
21 Page 9, the definition of continuously flowing
22 watercourse or other significant watercourse or
23 lakebed, sinkhole or playa lake measured from the
24 ordinary high-water mark. I think the comment is
25 the change in this particular one --

1 THE WITNESS: Correct.

2 COMMISSIONER BALCH: -- to the language?

3 THE WITNESS: We added back in the
4 significant watercourse, lakebed, sinkhole and playa
5 lake.

6 COMMISSIONER BALCH: Significant
7 watercourse, that would be an ephemeral stream,
8 where the water flows only part of the year?

9 THE WITNESS: Correct.

10 COMMISSIONER BALCH: And good morning,
11 Mr. Powell. Sorry. I forgot to socialize. Almost
12 all the rest of my questions are based on other
13 cross-examination so I'm asking for clarification
14 potentially. I think Mr. Carr asked you to identify
15 backlog of below-grade tanks, and you mentioned
16 there were several thousand of them --

17 THE WITNESS: Correct.

18 COMMISSIONER BALCH: -- potentially in the
19 State. Would modifications that are proposed to
20 Rule 17 address that and in what way?

21 THE WITNESS: The proposed modification
22 would create a registration process for below-grade
23 tanks, which instead of them being a permit process
24 it would be a registration or notification process
25 that they are out there and what they are doing with

1 that.

2 COMMISSIONER BALCH: So an operator that
3 had 100 tanks right now, would the new rule just
4 give you a list of them, the registration form?

5 THE WITNESS: Right. It would give a list
6 of registration, how they were constructed, I
7 believe.

8 COMMISSIONER BALCH: What's causing the
9 backlog right now in that process?

10 THE WITNESS: When the original Rule 17
11 was put into place it required all existing
12 below-grade tanks to be registered that were ever
13 put into place, and in our district I believe there
14 was something on the magnitude of 16- to 17,000
15 below-grade tanks already in use.

16 COMMISSIONER BALCH: So you have to review
17 the form. Does the review also have to take place
18 when you are looking at --

19 THE WITNESS: Not as part of the review
20 process of the permit.

21 COMMISSIONER BALCH: It's just a huge
22 stack of paper?

23 THE WITNESS: Correct.

24 COMMISSIONER BALCH: Following up on some
25 questions from Mr. Jantz, he was asking you about

1 judgment by reviewers on the C 144. My question is
2 how long it would take to process the C 144 from the
3 time it hits your desk to the time it's reviewed or
4 denied? Can you walk me through the process?

5 THE WITNESS: I can only speak to our
6 district but for a temporary pit it comes in, gets
7 logged in usually the day it's received. If not,
8 the very next day. It goes back to be reviewed. As
9 long as there's no complications with it, if it's
10 complete and correct when it comes in and nothing
11 has to be properly defined, usually we have the 144
12 out either that week or the very next week. If
13 there's complications, we work with the operator to
14 try to identify those and work with those.

15 COMMISSIONER BALCH: And that process has
16 improved over time, I imagine?

17 THE WITNESS: Yes, it has.

18 COMMISSIONER BALCH: You mentioned for
19 your district, Aztec and the District 3, you have
20 form inspectors and then yourself. I assume you do
21 some inspection well?

22 THE WITNESS: Yes.

23 COMMISSIONER BALCH: That would give you
24 somewhere between 800 and 1000 inspector hours
25 available potentially in a year. Obviously, you

1 have other duties, things you must do. You have
2 your existing facilities. I presume there's some
3 ongoing inspection and involvement with those, and
4 then you have a number of APDs or new wells at least
5 drilled in a particular year. What's the kind of
6 average number? I know it's probably not very high
7 right now for new wells, but kind of in an average
8 wells?

9 THE WITNESS: For new APDs?

10 COMMISSIONER BALCH: Yes.

11 THE WITNESS: I don't deal with the APD
12 process. For the most part as far as permitting, I
13 do get the calls for notifying of spuds. I would
14 say roughly a few a week that are spud.

15 COMMISSIONER BALCH: And for you and your
16 inspectors, about how many of the hours a year do
17 you have for inspection of new drills?

18 THE WITNESS: Of new drills, if they are
19 on state or private ground, we try to inspect all of
20 those and be on-site when they are running their
21 casing and cementing.

22 COMMISSIONER BALCH: That's a few hours
23 per trip to go out there, drive out there.

24 THE WITNESS: Correct.

25 COMMISSIONER BALCH: And then you have

1 also -- addressed by Rule 17 you have tanks and
2 sumps and things like that you also inspect?

3 THE WITNESS: Correct be.

4 COMMISSIONER BALCH: For purposes of any
5 Rule 17 existing modifications do you have adequate
6 staff for dealing with new drills?

7 THE WITNESS: For the current rule? I'm
8 sorry?

9 COMMISSIONER BALCH: Not counting the
10 backlog you can keep up with the existing workload?

11 THE WITNESS: Yes.

12 COMMISSIONER BALCH: Is that easy to keep
13 up with or is it a strain?

14 THE WITNESS: It takes quit a bit of time
15 per week. Well, for new drills not as much because
16 we are not as active in the northwest. A few hours
17 a week.

18 COMMISSIONER BALCH: Do new modifications
19 that are composed impact in any way your ability to
20 pursue your inspection of everything else you have
21 to look at? All the thousands of tanks and things
22 like that?

23 THE WITNESS: The proposed modification
24 more than likely would take less time in the office,
25 which would allow for more time in the field for

1 inspections.

2 COMMISSIONER BALCH: For other type of
3 things?

4 THE WITNESS: Yes.

5 COMMISSIONER BALCH: Such as production
6 pits?

7 THE WITNESS: Production pits and tanks
8 and sites.

9 COMMISSIONER BALCH: Thank you very much.

10 CHAIRPERSON BAILEY: I have no questions.
11 Do you have any redirect?

12 REDIRECT EXAMINATION

13 BY MS. GERHOLT

14 Q. Mr. Powell, do you know is the Oil
15 Conservation Division a constituent agency of the
16 Water Quality Commission?

17 A. I believe we participate with the WQCC.

18 Q. And is part of being a constituent agency
19 that we protect groundwater?

20 A. Yes.

21 Q. I have no further questions.

22 CHAIRPERSON BAILEY: You may be excused.
23 Call your next witness.

24 MS. GERHOLT: I would call Ed Martin.

25 UNIDENTIFIED SPEAKER: Can we take a

1 break?

2 (Note: The hearing stood in recess at
3 10:25 to 10:38.)

4 CHAIRPERSON BAILEY: The OCD was about to
5 put on their second witness?

6 MS. GERHOLT: At this time we would call
7 Ed Martin to the stand.

8 ED MARTIN

9 after having been first duly sworn under oath,
10 (being duly sworn, testified as follows:)

11 DIRECT EXAMINATION

12 BY MS. GERHOLT

13 Q. Would you please state your name?

14 A. Ed Martin.

15 Q. Where do you work?

16 A. I work with the OCD in Santa Fe.

17 Q. How long have you been employed by the
18 OCD?

19 A. Nineteen years.

20 Q. What position do you currently hold?

21 A. District 4 supervisor.

22 Q. How long have you been District 4
23 supervisor?

24 A. Six years.

25 Q. What territory does District 4 cover?

1 A. All the counties that are not huge
2 producers. From the northeast corner of the state
3 to almost the southwest corner.

4 Q. And you have been in that position six
5 years?

6 A. Yes, ma'am.

7 Q. Prior to that what was your position?

8 A. I was with the Environmental Bureau.

9 Q. Prior to that?

10 A. I was the on-guard implementation manager.

11 Q. During your tenure with the Oil
12 Conservation Division have you had the opportunity
13 to enforce OCD rules?

14 A. Yes.

15 MS. GERHOLT: Madam Chair, I would offer
16 Mr. Martin as an expert as it relates to the
17 enforcement of Oil Conservation Division rules.

18 MR. CARR: No objection.

19 MR. JANTZ: No objection.

20 MS. FOSTER: No objection.

21 DR. NEEPER: No objection.

22 CHAIRPERSON BAILEY: So admitted.

23 Q. If I could direct your attention to OCD
24 Exhibit 2, Page 4, specifically to notification
25 required and the comment box on the right of the

1 page.

2 A. Okay.

3 Q. Why is the division requesting to be
4 notified of closed-loop system?

5 A. The division believes that it is incumbent
6 upon us to know what equipment is on location of a
7 particular well and we need to be notified of all C
8 101 or C 103 as to the existence of all closed-loop
9 systems and tanks required to run closed-loop
10 systems.

11 Q. Currently closed-loop systems are
12 permitted, correct?

13 A. Correct.

14 Q. Why change the notification?

15 A. To make it easier for the operator and
16 encourage them to use such a system.

17 Q. You mentioned notifying on a C 101 or a C
18 103; is that correct?

19 A. Yes.

20 Q. For those of us who don't talk in form
21 numbers, what is a C 101?

22 A. Application to drill a well and C 103 is
23 the sundry notice which is used to report a variety
24 of different things about a well.

25 Q. How would the division propose to be

1 notified on those forms?

2 A. I think we envision just a check box on
3 the C 101. If an operator is going to drill a well
4 generally he knows what kind of solids system he is
5 going to use before drilling the well so he will
6 know to check the box on the C 101 to show us that
7 he is using a closed-loop system.

8 Q. Were you present yesterday for Mr. Scott's
9 testimony?

10 A. Yes.

11 Q. And do you recall Ms. Foster asking if
12 Mr. Scott would find a box that said "no materials
13 left on location" to be appropriate?

14 A. I recall that question.

15 Q. What do you think of that suggestion
16 instead of closed-loop system box?

17 A. Closed-loop system is a little more
18 descriptive of the equipment required to handle the
19 waste.

20 Q. And as an inspector, if the box is marked,
21 would you know what to look for if you are on-site?

22 A. I would.

23 Q. Drawing your attention now to Paragraph B
24 in the notification requirement, would you please
25 read that for the commission?

1 A. What page?

2 Q. Still on Page 4, Paragraph B.

3 A. "The division may issue a single permit
4 for all pits."

5 Q. No, still in the comment box to the right.
6 I'm testing your eyesight. So far not so good.
7 Would you read that paragraph?

8 A. "A closed-loop system shall use
9 appropriate engineering principles and practices and
10 follow applicable manufactured requirements or the
11 equivalent thereto."

12 Q. Why is the OCD requesting that in its
13 modification?

14 A. It's just some language that assures us
15 that the equipment used on-site is properly
16 engineered. Generally speaking, the equipment
17 coming from a subcontractor and other parties is
18 that way. It's just an assurance that that's the
19 case.

20 Q. Now, based on your understanding, are most
21 closed-loop systems already built to this standard?

22 A. Yes.

23 Q. Do they come that way?

24 A. Yes.

25 Q. And is this the division's attempt to

1 codify that?

2 A. Yes.

3 Q. If the commission were to adopt this
4 notification modification, would we be able to
5 enforce it?

6 A. Yes.

7 Q. And now if I could draw your attention to
8 Page 18. And this relates to design and
9 construction specifications. Drawing your attention
10 to the upper right-hand corner, why is the division
11 requesting a high level shutoff control device and
12 manual control device be installed on below-grade
13 tanks?

14 A. That recommendation came in opposition to
15 or as opposed to a simple alarm, which we took to
16 mean an alarm that would sound at the location. If
17 nobody is there to hear that alarm we were concerned
18 that the leak would continue and the overflow would
19 continue and we would like to have some kind of
20 automatic shutoff control at the location.

21 Q. Were you here a few weeks ago when
22 Mr. Hasely for NMOGA testified?

23 A. Yes.

24 Q. Do you recall him testifying about a
25 call-back system?

1 A. Yes.

2 Q. Does the division -- do you have an
3 opinion as to that?

4 A. I would not be opposed to such a type of
5 alarm. A call-back system or remotely monitored
6 alarm system, I think, is what we would support.

7 Q. A remotely --

8 A. Monitored.

9 Q. Alarm system?

10 A. One that could be monitored from a central
11 location.

12 Q. And is the division's purpose here that
13 there's response to a below-grade tank issue in a
14 timely fashion?

15 A. I'm sorry? Say that again.

16 Q. Is the goal of the division by offering
17 this modification and these opinions you have
18 provided to the commission today in order to quickly
19 address a below-grade tank situation?

20 A. Yes. Yes, that is our purpose.

21 Q. Now if I can draw your attention to Page
22 42.

23 A. Okay.

24 Q. 19.15.17.14, Emergency Actions.

25 A. Yes.

1 Q. The modification made in Paragraph B, do
2 you see that modification?

3 A. Yes.

4 Q. What is that modification?

5 A. The modification that we show in the
6 pink --

7 Q. Yes.

8 A. -- box? We wish to add a G right there.

9 Q. Paragraph B as in boy, a pit during an
10 emergency?

11 A. Yes.

12 Q. Why is it that the division, NMOGA and
13 IPANM, said an emergency pit? The division is
14 saying a pit during an emergency.

15 A. To distinguish or to prevent the drilling
16 of a -- the construction of a pit for no known
17 reason. Just to have one out there on a contingency
18 basis for a possible emergency is not something we
19 would prefer. We don't want to preclude the
20 construction of a pit should an emergency occur.

21 Q. So this wouldn't hamper an operator to be
22 able to build a pit if an emergency happened all the
23 sudden?

24 A. Correct.

25 Q. Now drawing your attention to Page 43,

1 Exceptions and Variances. Let's begin with what is
2 an exception?

3 A. The exception as we defined it in our
4 proposal is any variance, any -- let's use another
5 word -- any deviation from the rules as pertains to
6 permanent pits. A variance -- was that the
7 question?

8 Q. Yes.

9 A. A variance is any deviation from the rules
10 for any other pit.

11 Q. Let's start with the variances, and
12 drawing your attention now to Paragraph B as in boy,
13 Variances.

14 A. Okay.

15 Q. Paragraph 2. The division is requesting
16 language that in order for an operator to get a
17 variance they must provide equal or better
18 protection. Let's start with that, equal or better
19 protection.

20 A. Yes.

21 Q. Why that language?

22 A. To assure that the operator does still
23 protect, adequately protect public health and the
24 environment even after the granting of the variance.

25 Q. Now, moving along in that sentence, we

1 include freshwater.

2 A. Yes.

3 Q. Public health and safety, livestock and
4 the environment.

5 A. Yes.

6 Q. Why were those included?

7 A. We consider the safety -- let's talk about
8 safety for a minute. We consider the safety of
9 humans to be part of their health, directly
10 associated with their health, and we consider
11 livestock part of the environment.

12 Q. Is this an attempt to be clear for the
13 division and for the regulated community?

14 A. Yes.

15 Q. Now, moving to Paragraph 3. First of all,
16 why has the division requested a 60-day review
17 period? That would actually be in Paragraph 2 as
18 well.

19 A. We felt that 60 days was more than
20 adequate for us to review the specifications
21 provided.

22 Q. There's been the inclusion that if the
23 district office denies the requested variance or
24 fails to act in 60 days an operator may file for
25 hearing, correct?

1 A. Correct.

2 Q. What do you think the likelihood is that
3 the division will not respond in 60 days?

4 A. Highly unlikely.

5 Q. Why is that?

6 A. Well, for one thing, the first thing that
7 leaps to mind is I doubt that a district supervisor
8 would want to be called in here before the
9 commission and questioned as to why he did not
10 approve something within 60 days.

11 Q. Why not deem the variance approved if it's
12 not acted on in 60 days?

13 A. Because I think we believe that abrogates
14 our responsibility to the public. There's a chance
15 that something that is not protective of human
16 health and environment may be approved erroneously.

17 Q. As the district supervisor do you hear
18 from your operators --

19 A. Yes.

20 Q. -- on a frequent basis?

21 A. Yes.

22 Q. Do you try to work with your operators?

23 A. I do.

24 Q. Is there a lot of back and forth?

25 A. Yes.

1 Q. Do you think that would continue in a
2 variance process?

3 A. I believe so, yes.

4 Q. If an operator is denied a variance or the
5 division were to fail to respond, what would the
6 hearing application include?

7 A. The hearing application, I presume, would
8 include the nature of the variance and a
9 specification as to what the variance was and how it
10 deviated from the rules.

11 Q. Is there any requirement to notice the
12 surface owner?

13 A. Yes. Yes, there is.

14 Q. Why is that?

15 A. We want to make sure that the surface
16 owner is aware of any questionable variances. If we
17 deny one for whatever reason, we want to make sure
18 that the surface owner is aware of it and involved
19 in the process of the hearing, should it come to
20 pass.

21 Q. Now, drawing your attention to exceptions
22 under Paragraph C.

23 A. Okay.

24 Q. You have already stated that an exception
25 would be for a permanent pit; is that correct?

1 A. Correct.

2 Q. And who permits, under the proposed
3 amendments, who would permit a permanent pit?

4 A. The Environmental Bureau in Santa Fe. The
5 OCD Environmental Bureau.

6 Q. Here in Santa Fe?

7 A. Yes.

8 Q. So is it feasible, then, to have
9 exceptions come from the same bureau that would be
10 permitting them?

11 A. It is.

12 Q. What would an operator have to show in
13 order to get an exception?

14 A. That the exception, the specifications of
15 the exception are equally protective of public
16 health and environment. I'm not reading directly.
17 But if you will direct me to it, I will.

18 Q. Page 44, Paragraph 3.

19 A. "If the operator demonstrates through the
20 Environmental Bureau and the division of Santa Fe
21 office that the requested exception provides equal
22 or better protection to freshwater, public health
23 and safety, livestock and the environment, the
24 Environmental Bureau and the division of Santa Fe
25 office shall approve the exception within 60 days."

1 Q. So the same language as provided for in
2 the variance would have to be shown, correct?

3 A. Yes.

4 Q. Let's talk a little bit about the time
5 frames for exceptions. First of all, if an operator
6 wants an exception, OCD's modification would require
7 them to notice the surface owner; is that correct?

8 A. Correct.

9 Q. Why?

10 A. Again, they want the surface owner to be
11 involved and have the knowledge of what's going on
12 on the surface of their land and wants them to be
13 involved in the process of the hearing should it
14 take place.

15 Q. And exceptions break the timeline in two
16 30-day periods, correct?

17 A. Yes.

18 Q. There's the 30-day period where a person
19 with standing to contest could file a common or
20 request for a hearing with the division; is that
21 correct?

22 A. Correct.

23 Q. Now, just because someone would file a
24 comment or request for hearing, does that
25 automatically mean that a hearing would be

1 scheduled?

2 A. No, it does not.

3 Q. Would there be a review of that request?

4 A. I believe so, yes.

5 Q. And in Paragraph 4, what would need to be
6 determined?

7 A. If the director determines a common or
8 request for hearing presents issues that have
9 technical merit or there is significant interest
10 from the affected public, then the director may
11 cause the matter to be set for hearing.

12 Q. In total, the Environmental Bureau in
13 Santa Fe would have 60 days to review an exception
14 request?

15 A. Correct.

16 Q. What if they fail to respond? Is there a
17 right to hearing by the operator?

18 A. Yes, there is.

19 Q. And are the hearing application
20 requirements similar to that for a variance hearing
21 application?

22 A. Yes.

23 Q. Let's play devil's advocate for a moment.
24 Say I am an operator and I have filed a request for
25 either a variance or an exception and I have not

1 gotten a response from the Oil Conservation
2 Division. Why shouldn't I have my application be
3 automatically approved?

4 A. Again, I think that does the public a
5 disservice in allowing a possible environmentally
6 unsound practice to take place.

7 Q. If the commission were to adopt the
8 division's proposed variance and exception
9 modification, would the division be able to
10 administer it effectively?

11 A. I believe so, yes.

12 Q. Would you be able to enforce that rule?

13 A. Yes.

14 Q. Now drawing your attention to Page 47,
15 Permit Approvals; Conditions, Denials, Revocations,
16 Suspensions, Modifications or Transfers. Do you see
17 the comment box to the right?

18 A. I do.

19 Q. The division has proposed an
20 administrative completeness time period of 30 days,
21 correct?

22 A. Yes.

23 Q. First of all, what is administrative
24 completeness? What would you be looking for?

25 A. It's more of a quantitative review of an

1 application than it is a qualitative; in other
2 words, all of the pieces of information that are
3 required to make a qualitative review are present.

4 Q. And how long does the division have to
5 make such a determination?

6 A. Thirty days.

7 Q. After 30 days, what's the next step?

8 A. Then the 30-day evaluation period starts,
9 so that's the qualitative part of it. It gives the
10 division an opportunity to make decisions about the
11 quality of the information presented and the
12 applicability to the rule.

13 Q. Now, does the division have to wait an
14 entire 30 days to determine if something is
15 administratively complete?

16 A. No.

17 Q. Would the division have to wait an
18 additional 30 days to make the evaluation that the
19 permit is complete?

20 A. No.

21 Q. So the time frame could be less than 60
22 days?

23 A. Yes.

24 Q. Why, then, has the division requested 60
25 days total?

1 A. It's kind of a comfort factor for us since
2 it seemed to be a time period that was more than
3 sufficient for us to accomplish that task.

4 Q. Now, this 19.15.17.16, Permit Approval,
5 that deals with permits for Rule 17 only, correct?

6 A. Correct.

7 Q. Currently does the division permit
8 multi-well fluid management pits?

9 A. No.

10 Q. Could that, the initial applications, be
11 complex to review?

12 A. It could be.

13 Q. Does this 60 days build in a buffer time?

14 A. That's why -- yes, that's why we are more
15 comfortable with the 60 days. We can't foresee the
16 complexity of the multi-well fluid management system
17 so we want to make sure we have enough time to
18 adequately review that.

19 Q. And does this section provide an operator
20 a remedy if the division does not respond or denies
21 the request?

22 A. Yes.

23 Q. And what is that remedy?

24 A. To request a hearing.

25 Q. And how long does the operator have to

1 request that hearing for either denial or failure to
2 respond?

3 A. The time limit? I don't know.

4 Q. If I draw your attention to the box on the
5 right, Paragraph C, the last sentence.

6 A. Can you ask me the question again, please?

7 Q. Sure. How long does the operator have to
8 file an application in this hearing process?

9 A. We are limited to 20 days after the
10 receipt of the application for hearing. I'm not
11 sure I understand the question.

12 Q. Okay.

13 A. His time limit, I'm not sure when.

14 Q. So if the applicant so requests within 20
15 days after receipt of such notification, isn't it
16 that the operator has 20 days?

17 A. We will set the matter for hearing within
18 20 days. Is that what you mean?

19 Q. No.

20 A. Oh, I'm sorry. I misread. If the
21 applicant so requests in 20 days of receipt of such
22 notification. Yes, I'm sorry.

23 Q. So the operator would have 20 days after
24 they receive notification to request a hearing,
25 correct?

1 A. Correct.

2 Q. Why 20 days? Is that ample time for an
3 operator, do we believe?

4 A. I would think so.

5 Q. Now, if I'm an operator and I have
6 submitted a permit and there's this administrative
7 completeness time frame and then there's this
8 evaluation time frame and it potentially could take
9 me out to 60 days, correct?

10 A. Correct.

11 Q. And then let's say for whatever reason
12 there needs to be a hearing afterwards. That could
13 be three months total, four months total?

14 A. It's possible.

15 Q. Could that cause a burden to an operator?

16 A. It could.

17 Q. Given that, why does the division still
18 feel this is an appropriate time frame?

19 A. The initial 60 days?

20 Q. Correct.

21 A. Again, because of the unknown complexities
22 of the type of hearing that might come up, the type
23 of application that might come up.

24 Q. And if the commission chooses to adopt the
25 division's language as it relates to permit

1 approvals and 19.15.17.16, would the division be
2 able to practically enforce this?

3 A. Yes.

4 Q. And would it be something that could
5 administer?

6 A. Yes.

7 Q. May I have a moment? If I could draw your
8 attention, and I believe Mr. Powell left it up
9 there, to IPANM's filing of May 15th and their
10 requested language of variance. I believe it will
11 be around Page 43. I would rely on Ms. Foster to
12 direct us to the specific page.

13 MS. FOSTER: The variance section starts
14 on Page 43. That's correct.

15 Q. IPANM has offered instead of equal or
16 better protection, reasonable. Do you see that?

17 A. Yes.

18 Q. For you as a regulator, does that provide
19 enough clarity?

20 A. No. There's no definition for -- I would
21 be hard pressed to come up with the definition of
22 reasonable.

23 Q. But as a regulator, do you understand what
24 equal or better is?

25 A. Yes.

1 Q. And to you, what is that?

2 A. If the specifications outlined in the
3 variance request or the exception request does
4 provide the same protection or better than the rule
5 stipulates.

6 Q. Are you familiar with current Rule 17?

7 A. Yes.

8 Q. Does the current Rule 17 have a variance
9 provision in it?

10 A. No.

11 Q. Does it have an exception provision in it?

12 A. It does.

13 Q. As an inspector, what is your opinion
14 about this new proposed exceptions and variances?
15 Do you think it's a good alternative?

16 A. I believe it is.

17 Q. Why?

18 A. Because more of the site-specific
19 information resides with the local offices than in
20 Santa Fe on drilling pits, which are much more
21 numerous than permanent pit.

22 Q. Are the district offices familiar with the
23 area's geology?

24 A. Yes.

25 Q. And do they have the opportunity to go out

1 to locations?

2 A. It's much more convenient for them, yes,
3 than the Santa Fe people.

4 Q. Is it correct that you are a district of
5 one?

6 A. I am.

7 Q. Do you believe that the commission were to
8 adopt this exception and variances provision you
9 would be able to administer it?

10 A. I do.

11 Q. As a solo?

12 A. Yes, I do.

13 Q. So you feel you are adequately staffed?

14 A. I am adequately staffed.

15 MS. GERHOLT: I have no further questions
16 for the witness. I pass the witness.

17 CHAIRPERSON BAILEY: Mr. Carr?

18 CROSS-EXAMINATION

19 BY MR. CARR

20 Q. Good morning, Mr. Martin.

21 A. Good morning.

22 Q. Mr. Martin, I would like to ask you some
23 questions about your ability to administer the
24 proposed rule, if adopted, and what the time frames
25 are in terms of the approvals and how you interpret

1 this would work. That's just giving you a heads up
2 and now I will go to the question.

3 Did you work or participate in a work
4 group that looked at the proposal and evaluated it
5 in terms of administrative feasibility?

6 A. I did.

7 Q. And as part of that, did you look at the
8 current rule?

9 A. We did, yes.

10 Q. And that rule was adopted on a
11 recommendation of the OCD?

12 A. Correct.

13 Q. It requires permits for closed-loop
14 systems, below-grade tanks or pits?

15 A. Correct.

16 Q. Mr. Powell indicated take there were
17 probably thousands of permits pending for
18 below-grade tanks, pre-existing below-grade tanks.

19 A. Yes.

20 Q. Do you have an opinion on whether or not,
21 as the OCD is now structured under the current rule,
22 whether or not you will be able to, with the
23 manpower you have, ever really process those
24 applications?

25 MS. GERHOLT: I would object. It's beyond

1 the scope of this witness' testimony.

2 CHAIRPERSON BAILEY: If he is unsure as to
3 the answer he can say he is unsure.

4 A. I can give you my opinion.

5 Q. Yes, sir.

6 A. I can't foresee how fully staffed or
7 sparsely staffed we will be in the future. But I
8 would say that we, as a group, do need to know where
9 the below-grade tanks are and we certainly have --
10 we should have the opportunity to develop some kind
11 of tracking system for them.

12 Q. As I recall your testimony, you talked
13 about having notification of closed-loop systems?

14 A. Yes.

15 Q. Is what is contained in the proposed rule
16 adequate to enable the OCD to monitor the
17 closed-loop systems?

18 A. Yes.

19 Q. Is going to a registration for below-grade
20 tanks something that would provide you with
21 sufficient information to do the job?

22 A. As opposed to a permit?

23 Q. Yes, sir.

24 A. I believe so.

25 Q. You testified you were able to do your

1 job.

2 A. Yes, sir.

3 Q. When you looked at the proposed changes to
4 the rule that transfer functions to you from the
5 state office, did you make a determination on
6 whether or not you would be able to handle that job?
7 I believe you testified you would?

8 A. I did and I can.

9 Q. When you looked at that, we looked at
10 provisions concerning exceptions and variances.

11 A. Correct.

12 Q. And would you agree that changes in the
13 current rule on how exceptions and variances are
14 obtained, certain changes are made, revisions are
15 needed?

16 A. I believe so.

17 Q. Can you just tell me the difference
18 between a variance and an exception?

19 A. A variance -- I mean, in reality there's
20 not much difference. A variance is a name that we
21 have attached to deviation from the rule as applied
22 to everything, every kind of pit except for
23 permanent pits. Exceptions are deviations from the
24 rule as they pertain to permanent pits.

25 Q. When I look at the exceptions and

1 variances section, Section 15.17.15.

2 A. In NMOGA's proposal?

3 Q. I am trying to look at yours, which is on
4 Page 43.

5 A. Yes.

6 Q. We have the exceptions and variances as
7 Part 15 of this rule and later on we have another
8 section, Section 16, which governs permit approvals.

9 A. Yes, I see that.

10 Q. My question is, the exception and variance
11 provisions are separate and independent from the
12 permit approvals. You can read just the provision
13 on exceptions and variances and know what to do
14 there. Other permits under Rule 16 would be
15 governed by the later section.

16 A. That's correct.

17 Q. These provisions set time frames for
18 approval of a variance or an exception. Is there an
19 opportunity for an operator, if they are going to
20 propose something that they think is ultimately
21 going to find its way to the commission, to simply
22 file an application for hearing or are they required
23 to go through this process?

24 A. I would not think they would be required
25 to go through the process if they wanted to call it

1 to hearing.

2 Q. When we look at the provisions on
3 exceptions, the division added language concerning
4 notice to the surface owner and they also stated
5 "and to such other persons as the division shall
6 require." Are you familiar with that?

7 A. Yes.

8 Q. Why was that included?

9 A. We wanted to reserve the right to notify
10 people such as adjacent owners if we thought that
11 was required.

12 Q. Under the current rules there are
13 provisions governing to whom notice is required for
14 certain kinds of cases.

15 A. That is correct.

16 Q. And there's a cash-all provision that is
17 similar to this that says who may require additional
18 notice.

19 A. I believe there is.

20 Q. Is there any requirement in the rule that
21 would tell us as an operator when we might hear from
22 the division if you required additional notice?

23 A. Not to my knowledge.

24 Q. If I told you that there were a number of
25 cases where we get to the end of the hearing and at

1 that time are advised maybe we should notify an
2 extra half mile out, there's nothing in these rules
3 or in any rule that you're aware of that would
4 address that?

5 A. No.

6 Q. Let's go to Subpart 16, the permit
7 approval section in the rule.

8 A. Okay.

9 Q. As I read the Oil Conservation Division's
10 proposal, the first step is a determination on
11 whether or not the application is complete.

12 A. Yes, sir.

13 Q. The application is filed and the rule
14 provides that the OCD will make a determination
15 within 30 days?

16 A. Yes.

17 Q. Do you believe you can meet that 30-day
18 time frame?

19 A. I believe so.

20 Q. If you do not meet that, this rule
21 provides that the application will be determined
22 complete.

23 A. I believe that's correct. Hold on. Yes,
24 that's correct.

25 Q. So I'm an operator and I have filed an

1 application on the 1st of June and it's now the 5th
2 of July. I can assume that that application is
3 complete?

4 A. Yes.

5 Q. Then after that first 30-day period
6 there's a second 30-day period within which the OCD
7 may act on the application?

8 A. Correct.

9 Q. If I understood your testimony, you
10 believe you will be able to do that?

11 A. I believe so.

12 Q. In that second 30-day period, if you
13 conclude that the application isn't complete, that
14 we forgot something, you are not going to be bound
15 by the earlier determination, are you?

16 A. I would think we would be. We have 30
17 days to deem it administratively complete. If you
18 don't hear back from us -- if the operator does not
19 hear back from us, we both assume, the operator and
20 the division both assume it's administratively
21 complete at that time, I would say.

22 Q. If we go through 60 days and we haven't
23 heard from you, this is when we come to the point of
24 whether it's deemed granted or deemed denied.

25 A. Right.

1 Q. If I look at the rule as you are proposing
2 it, if the OCD determines that the application is
3 denied and writes me and tells me so as an operator,
4 I have 20 days after receipt of that notification to
5 file for a hearing.

6 A. Correct.

7 Q. If I don't file, am I barred from going to
8 hearing if I miss the 20-day limit?

9 A. I'm not sure.

10 Q. If I don't hear from you, I have 60 days?

11 A. Yes.

12 Q. And then I have the option at that point
13 in time of filing for a hearing?

14 A. Yes.

15 Q. In that circumstance, how do I find out
16 what it is you don't like about my application?

17 A. Well, I can only speak from my experience,
18 and that is that the operator would call me within
19 some time way before 60 days is up and ask the
20 status of the application request.

21 Q. But if I am just waiting for an approval
22 and it's the 60th day, to find out I need to call?

23 A. That would seem logical, yes.

24 Q. At that time what would you do?

25 A. After the 60 days is up? I think -- I

1 believe that even before a hearing is scheduled, in
2 the interim period if there is one, any differences
3 between myself and the operator could be hashed out
4 and a hearing would not be required.

5 Q. Do you understand that oftentimes an
6 operator is on a relatively tight time frame when
7 they come in to seek approval?

8 A. I do.

9 Q. Under the rule, if we set out just the
10 provisions set out in the rule, it takes 30 days to
11 know if we are complete. Could. I'm not saying it
12 would, but there's circumstances where you may get
13 delayed. But 30 days to know it's complete. Then
14 there could be 30 days until we can assume it's
15 denied, and then there's some time in there where we
16 figure that out, and then we file for a hearing and
17 we have at least 30 days before we get to a hearing.

18 A. Correct.

19 Q. And there are circumstances where it could
20 take a very long time to really get a determination
21 on this matter.

22 A. It's possible.

23 Q. Is there anything that you are aware of in
24 the rule that would prevent an operator simply for
25 filing for a hearing at the initial -- instead of

1 going through this process seeking a hearing to try
2 to get a timely resolution of something that he
3 anticipates?

4 A. Anything that will preclude that?

5 Q. Yes.

6 A. No.

7 Q. That's all I have. Thank you.

8 CHAIRPERSON BAILEY: Ms. Foster?

9 COMMISSIONER BLOOM: What was the answer?

10 THE WITNESS: There's nothing to preclude
11 the operator from requesting a hearing prior to that
12 time.

13 CROSS-EXAMINATION

14 BY MS. FOSTER

15 Q. Mr. Martin, you began your testimony
16 concerning a discussion of the closed-loop system.
17 And could you describe what you think a closed-loop
18 system actually is? What equipment does that
19 entail?

20 A. Tanks, some plumbing on-site to handle the
21 solids and liquids produced from the drilling
22 process.

23 Q. How many tanks would that be?

24 A. Depends on the depth of the well and the
25 operation, the specific operation.

1 Q. So the number of tanks is subjective?

2 A. Subjective, yes. Well, it's governed by
3 the situation, the mechanical requirements of the
4 well in question, yes, but it's subjective I would
5 say.

6 Q. All right. Then who determines the
7 mechanical requirements of the well as to how many
8 tanks are on location?

9 A. The operator.

10 Q. And how about the number of shell shakers?

11 A. The operator's decision.

12 Q. How about the number of centrifuges on
13 location?

14 A. Again, the operator.

15 Q. So there's language in here that you
16 stated that the closed-loop system needs to be
17 properly engineered to manufacture's specifications?

18 A. Yes.

19 Q. If on each instance it is up to the
20 determination of the operator, the engineer on
21 location, that the closed-loop system is going to be
22 different, how is it that we can meet that standard?

23 A. I'm sorry, say that again.

24 Q. Let me point you to the actual section of
25 the rule.

1 MS. GERHOLT: Page 4 of the OCD's
2 modifications.

3 Q. The OCD -- and this is in the change. We
4 are talking about Subsection B, "The Closed-loop
5 system shall use appropriately engineered principles
6 and practices."

7 A. Yes.

8 Q. Now, you have been with the OCD 19 years,
9 you said?

10 A. Yes.

11 Q. And you are an engineer?

12 A. No, I'm not.

13 Q. And so how is it that you would determine
14 as a regulator whether something is to properly
15 engineered specifications?

16 A. The operator would, by virtue of the
17 application, would affirm that it was properly
18 engineered.

19 Q. But wouldn't it be possible that you might
20 decide that location might need two centrifuges
21 instead of one?

22 A. I suppose that's conceivable.

23 Q. And would it be possible that maybe a new,
24 younger regulator inspector who might not have as
25 much experience as you might have a different

1 determination as to what a properly engineered
2 closed-loop system is?

3 A. It's possible.

4 Q. In fact, closed-loop systems are more than
5 solids control equipment; is that correct?

6 A. That's correct.

7 Q. Isn't really the concern of the OCD not
8 really with what the equipment is on location but
9 really whether there's going to be cuttings that are
10 generated that will be left on-site?

11 A. I would agree with that.

12 Q. Now, what about use of closed-loop system
13 in workover operations?

14 A. Yes.

15 Q. Have you had operators that have had to
16 file the C 104 for use in workover operation?

17 A. C 144?

18 Q. C 144 for using a closed-loop system in a
19 workover operation?

20 A. Yes.

21 Q. Can you describe what a workover operation
22 is? It's not drilling?

23 A. It's not drilling. It could be construed
24 in a wide variety of things. To me a workover
25 operation requires a workover rig. It's a sizable

1 operation. Changing a pump out is not -- I wouldn't
2 consider it a workover exactly.

3 Q. Wouldn't it be possible for operators just
4 to notify you on a sundry notice that they are doing
5 a workover operation?

6 A. They could.

7 Q. So why would you have the additional
8 requirement of having to report a tank on location
9 as a closed-loop system on a C 144 for a workover
10 operation?

11 A. We wouldn't.

12 Q. Okay. Well, directing your attention to
13 the OCD definition of closed-loop system, which is
14 on Page 1 of your application, the closed-loop
15 system definition there includes a management system
16 for workovers?

17 A. Yes.

18 Q. Would you agree that maybe workovers
19 doesn't belong in that definition for this Pit Rule?

20 A. I'm not sure I understand the question,
21 but I don't think the inclusion of workover in the
22 closed-loop system definition requires the operator
23 to file a C 144 for a workover operation.

24 Q. But operators are currently, under the
25 current Rule 17, having to file a C 144 under the

1 current Pit Rule?

2 A. Yes.

3 Q. And we are here revising the Pit Rule.

4 A. Yes, I follow.

5 Q. And this Pit Rule really doesn't pertain
6 to workovers.

7 A. Correct.

8 Q. So I'm just making the suggestion that for
9 clarity's seek when you have a workover, that that
10 should probably be not under this rule.

11 A. If a closed-loop system is used in a
12 workover operation, I see no harm in the operator
13 notifying us via check box on the C 103 or some
14 other mechanism on the C 103 that that equipment
15 exists on the location.

16 Q. But not a C 144?

17 A. No.

18 Q. Closed-loop system used for drilling?

19 A. Correct.

20 Q. So as it pertains to this Pit Rule, would
21 you have a problem with taking out the word
22 "workover" in the definition of closed-loop system
23 for this rule?

24 A. I hate to hedge my answer, but if it
25 means -- if I answer yes, and if that means an

1 operator does not have to notify us or tell us that
2 they are using a closed-loop system, then no, I
3 don't agree with that. Just looking at this by
4 itself, I wouldn't have a problem.

5 Q. But you agree with me that the scope of
6 this rule pertains to drilling operations and pits
7 used in drilling operations, not pits used for
8 workover operations and closed-loop systems used for
9 workover operations?

10 A. I wouldn't fully agree with that. A pit
11 is a solids and liquid management system just like a
12 closed-loop system is.

13 Q. An earthen pit?

14 A. Any kind of reserve pit.

15 Q. Let's clarify, because I know -- and my
16 witness had the same problem. A pit is used
17 interchangeably. When you are talking about a pit,
18 are we talking about a steel tank as part of a
19 closed-loop system or are we talking about an
20 earthen depression?

21 A. I have seen work pit interchangeably.
22 There are steel pits and there are earthen pits.

23 Q. In a workover operation, disposing into a
24 steel pit, for the purposes of clarity, and passing
25 your cuttings through a shale shaker, you would

1 consider that to be a closed-loop system?

2 A. Yes.

3 Q. Whether it's used for a workover or a
4 drilling operation?

5 A. Yes.

6 Q. Moving on, looking at the variance
7 section, you stated that equal or better protection
8 is a standard that you feel comfortable with as a
9 regulator?

10 A. Yes.

11 Q. Now, could it be possible that another
12 regulator, say Mr. Brandon Powell who just finished
13 testifying, might consider equal or better a
14 different standard?

15 A. I suppose it's possible, but to me it's
16 unlikely.

17 Q. Why would it be unlikely? Isn't that a
18 subjective standard?

19 A. The words equal or better, equal to or
20 better than, seem pretty clear to me. I can't speak
21 for anybody else but it seems like clear language to
22 me.

23 Q. As opposed to reasonable?

24 A. As opposed to reasonable.

25 Q. Are you aware that in the Oil and Gas Act

1 the standard for protection of freshwater is
2 reasonable?

3 A. I'm not --

4 Q. In the Oil and Gas Act? Okay. Now, you
5 stated that you think that safety of humans is
6 actually part of their health, and livestock is part
7 of the environment and, therefore, that's your
8 rationalization for including that additional
9 language and responsibilities for operators when
10 asking for the variance?

11 A. I did say that.

12 Q. So let's talk about that. As the oil and
13 gas division, your statutory responsibility is
14 protection of correlative rights and prevention of
15 waste, right?

16 A. Correct.

17 Q. Is it protection of the air?

18 A. No.

19 Q. Is it protection related to vehicle
20 standards on locations?

21 A. No.

22 Q. And would you agree that vehicle standards
23 might have something to do with public safety?

24 A. I would agree with that.

25 Q. So are you saying then we should include

1 vehicle standards in that list as well as a new
2 responsibility that operators need to report?

3 A. I'm saying you could include them or not
4 include them.

5 Q. But are vehicle standards part of the OCD
6 statutory responsibility?

7 A. No.

8 Q. And air? Is that part of the statutory
9 responsibility?

10 A. No, it's not.

11 Q. But that would be probably part of public
12 safety or health, correct?

13 A. I agree.

14 Q. Now, Mr. Martin, do you ever go on
15 vacation?

16 A. Not a lot of time.

17 Q. Does the OCD actually grant vacations to
18 their inspectors?

19 A. They do.

20 Q. And do you ever get new staff into your
21 offices, the district offices?

22 A. Yes.

23 Q. And --

24 A. Not mine, but yes.

25 Q. This 30-day time period for administrative

1 approval, wouldn't it be possible if somebody were
2 to go on vacation or you had new staff that wasn't
3 up to speed that maybe a permit application could
4 end up sitting on somebody's desk for longer than
5 the 30-day period?

6 A. It's conceivable.

7 Q. How about for the 60-day period?

8 A. It's possible.

9 Q. Basically what you are saying then is if
10 an application is sitting on somebody's desk and
11 hasn't been taken care of, then you feel the OCD
12 should have the right to automatic denial of the
13 application?

14 A. I am saying that.

15 Q. Okay. And do you think that that -- and
16 you also stated that you feel that the OCD's
17 responsibility is to the public; that --

18 A. I think we are certainly responsible to
19 the public, yes.

20 Q. Are you responsible to the oil and gas
21 industry?

22 A. I think we are responsible to the oil and
23 gas industry.

24 Q. In fact, your statutory responsibility is
25 prevention of waste is correlative rights, right?

1 A. Yes.

2 Q. So IPANM's proposal is granting an
3 automatic approval should the OCD not notify an
4 operator within a 60-day period.

5 A. Yes.

6 Q. If I heard you correctly in your direct
7 testimony, you stated that there are often
8 communications and conversations, phone calls
9 between you and operators?

10 A. That's my experience.

11 Q. Generally an operator will call you in the
12 60-day period and say, "Hey, what's going on with my
13 application?" Right?

14 A. Yes.

15 Q. Would it be possible for a regulator who
16 is having a really bad day to tell the operator if
17 he is calling on day 53 and that regulator is in a
18 bad mood to say, "Call me in eight days?"

19 A. I suppose that's possible.

20 Q. After the 60-day period?

21 A. That's possible.

22 Q. Where there would be an automatic denial
23 without a conversation?

24 A. It's possible, yes.

25 Q. Now, you also stated that you believe that

1 communications will continue between operators and
2 generally we have a good working relationship; is
3 that right?

4 A. I do.

5 Q. Now, isn't it true, though, that with this
6 process that's outlined in this proposal, that now
7 there's actually a set process in an application
8 form or a piece of paper that you need to have
9 concerning a variance in order to discuss --

10 A. Yes.

11 Q. -- a variance?

12 A. Yes.

13 Q. Right? And as far as I can see, there are
14 three different time periods from which an operator
15 would have to possibly request a variance. One
16 would be at the time of application?

17 A. Correct.

18 Q. One would be at the time of operations
19 when something goes array, and the other time would
20 be at closure?

21 A. Yes.

22 Q. So say, hypothetically, you have an
23 operator who files his APD, gets the APD approved
24 but needs to come to you -- well, doesn't get the
25 APD approved but during the process he needs to ask

1 you for a variance from the standards, okay?

2 A. Okay.

3 Q. You don't like that, he has to go to
4 hearing, okay?

5 A. Okay.

6 Q. Then the same thing could happen during
7 the operational phase and the same thing could
8 happen during the closure phase.

9 A. I suppose that's possible.

10 Q. So an operator could end up having to go
11 to a hearing three or four times during the life of
12 a well.

13 A. Again, possible.

14 Q. As opposed to just making a phone call and
15 saying, "Hey, Ed, listen, I'm having a problem. I
16 have a tear in my liner. I can't fix it in 48
17 hours. My digging contractor won't respond to me.
18 He is on vacation. I'm working on it." Right?

19 A. Right.

20 Q. This process seems to imply that we need
21 to formally ask you for a variance.

22 A. That's the implication, yes.

23 Q. And we need to formally state to you that
24 our variance is protective of livestock.

25 A. Correct.

1 Q. What happens if we have a rancher out
2 there who says, "You know what? I see a tear there.
3 I want to have an extra fence out there."

4 A. I don't get involved in surface owner or
5 landowner agreements with the oil and gas industry.
6 If they get in disputes among themselves, unless
7 they both decide to come and talk to me about it, I
8 don't get involved.

9 Q. But in effect, the ranchers are now
10 brought in because now we have to prove that our
11 variance request is more protective to livestock,
12 right? So now the rancher is a party in the room?

13 A. Correct.

14 Q. Now, I understand, and Mr. Powell
15 corrected me on this, that protection of wildlife
16 and livestock is something we generally do with
17 fencing requirements?

18 A. Correct.

19 Q. It's not something we generally do in
20 terms of torn liners or the size of the repose, the
21 angle of repose or the type of liner we are going to
22 put in there or even siting requirements, correct?
23 Under current Rule 17?

24 A. Under current rules, I believe that's
25 true.

1 Q. So with this variance provision here now
2 we are bringing other parties into the room with
3 these additional requirements that we have to prove
4 equal or better.

5 A. Okay.

6 Q. Correct? Now, would you agree with me
7 that notification to a rancher doesn't just mean
8 notification, it means an invitation to his
9 involvement?

10 A. I suppose it could be construed that way
11 but it does not give him right of approval or
12 disapproval.

13 Q. What if a rancher calls you up and he is
14 mad as heck that he got notified on a variance?
15 Doesn't that put you in a position that it's easier
16 for you to say no and push everything to a hearing?

17 A. It's easier but I wouldn't do that.

18 Q. You wouldn't but maybe a new young
19 inspector might?

20 A. Again, possible.

21 Q. Looking at the hearing process for
22 variance, can an operator come in without an
23 attorney for the hearing process?

24 A. I don't think so.

25 Q. So he would have to -- if he gets pushed

1 to a hearing for a variance he would have to hire an
2 attorney and come to Santa Fe?

3 A. I believe that's true.

4 Q. How often are hearings granted?

5 A. When they are requested?

6 Q. Right. In other words, the hearing
7 officers are working how many days a week up here in
8 Santa Fe having hearings on requests?

9 A. They have generally hearings once a week
10 during which are heard numerous cases.

11 Q. So there will be a delay for an operator
12 to actually get on the hearing docket and have a
13 hearing in front of a hearing officer on something
14 as simple as I couldn't get to repairing a torn
15 liner within 48 hours.

16 A. Again, possible.

17 Q. Just a quick question. The OCD
18 recommendation is for a licensed surveyor when
19 closing a pit?

20 MS. GERHOLT: Objection. It's beyond the
21 scope of the witness' testimony.

22 MS. FOSTER: Okay.

23 CHAIRPERSON BAILEY: Sustained.

24 MS. FOSTER: I withdraw the question.

25 Thank you.

1 Q (By Ms. Foster) Page 37 of the OCD
2 application as well as the IPANM's application.
3 Now, there are -- this is a situation where the
4 appropriate division -- let me direct your attention
5 so the record is clear. This is Section 13 Sub F,
6 Timing Requirements for Closure, Section 6, 7 and 8,
7 I think it is. 5, 6 and 7, sorry.

8 A. As they apply to permanent pits?

9 Q. No, this is in regard to timing
10 requirements for closure.

11 A. Okay.

12 Q. There's language in here that if an
13 operator basically can't close a temporary pit
14 within the required time frames, there's language in
15 there that the district office may grant an
16 extension not to exceed three months.

17 A. Correct.

18 Q. Do you agree with this provision in the
19 rule? In other words, we wouldn't need to ask for
20 the variance to get the additional three months?

21 A. I agree.

22 Q. How about Section 6, the automatic
23 extension of six months to close the drying pad with
24 the closed-loop system? Subsection 6?

25 A. And an operator requested six months

1 additional?

2 Q. Yes.

3 A. That would be not a variance. Is that
4 what you're saying?

5 Q. Right. So it's here in black and white.
6 It's an automatic extension that an operator can
7 count on, based on making a phone call and notifying
8 you that we need to have the extra time.

9 A. Correct.

10 Q. And then the same would hold true for the
11 multi-well fluid management pits, Section 8; is that
12 correct?

13 A. Yes.

14 Q. If you could give me one moment. I want
15 to make sure I have all my questions asked. As an
16 expert on OCD rules, under current Rule 17 for
17 siting, an operator needs to demonstrate that he has
18 a certain distance from a significant and
19 continuously flowing watercourse; is that correct?

20 MS. GERHOLT: I object. Mr. Martin hasn't
21 been here to testify about significant or
22 watercourses. Mr. Powell was here. He did testify
23 to that, so it would be beyond Mr. Martin's scope.

24 MS. FOSTER: Mr. Martin is an expert on
25 OCD regulations. I think he testified he was

1 enforcing under Rule 17 which is the standard I am
2 asking about.

3 CHAIRPERSON BAILEY: If the question goes
4 to enforcement rather than definition.

5 MS. FOSTER: Yes, enforcement of the
6 current provision of Rule 17, which is a continuous
7 and flowing watercourse.

8 CHAIRPERSON BAILEY: Then I will allow the
9 question.

10 Q. (By Ms. Foster) Yes. Are you currently
11 enforcing for siting?

12 A. I am.

13 Q. And you as a regulator, there's no
14 confusion on determining whether an operator is in a
15 significant or continuous watercourse?

16 A. Not in my district.

17 Q. And did you hear the testimony of
18 Mr. Powell?

19 A. I did.

20 Q. Concerning the use of the blue line on the
21 7.5 quadrangle map?

22 A. I heard that.

23 Q. Do you use the same method in your
24 district office for determining if an operator is in
25 a continuously flowing watercourse area?

1 A. I use the 7.5 degree quadrangle map and
2 the on-ground observation.

3 Q. And as it's currently in force, because
4 really the OCD is not changing that part of the Rule
5 17, right? IPANM and NMOGA made some
6 recommendations on that, but OCD wants to go back to
7 what you currently have?

8 A. Correct.

9 Q. Being in a continuous and flowing
10 watercourse, isn't there the possibility that an
11 operator would end up being in a dry arroyo and you
12 would prevent him from siting there?

13 A. Not likely in my district but I can see
14 that happening somewhere else, yes. It's possible.

15 Q. So then in order to assist in clarity with
16 the siting requirements, wouldn't there need to be a
17 separation of the continuous versus flowing siting
18 requirements?

19 MS. GERHOLT: Again, I object. These
20 questions were better directed to Mr. Powell who
21 actually testified to this.

22 CHAIRPERSON BAILEY: I agree with that,
23 because that does go to the definition.

24 MS. FOSTER: Then I will withdraw the
25 question and I have no further questions for the

1 witness. Thank you.

2 CHAIRPERSON BAILEY: Mr. Jantz? Well, it
3 is now 20 until 12:00. Do you have lengthy
4 questions?

5 MR. JANTZ: I will probably take 15 or 20
6 minutes.

7 CHAIRPERSON BAILEY: Why don't we stop and
8 look for any kind of public comment. We first none.
9 If you would like to begin and then we will break at
10 noon or we can break now.

11 MR. JANTZ: Why don't we get this done. I
12 think we can do it before lunch.

13 CROSS-EXAMINATION

14 BY MR. JANTZ

15 Q. Good morning, Mr. Martin.

16 A. Good morning.

17 Q. I wanted to make sure I heard you right.

18 You are the only person in your office in your
19 district?

20 A. Correct.

21 Q. So you are responsible for everything,
22 including the inspections; is that right?

23 A. Yes.

24 Q. How many pits are in your district?

25 A. The drilling programs in my districts are

1 generally 25 to 30 a year, so drilling pits
 2 associated with the reserve pits and the drilling
 3 operations at any given point in time are
 4 approximately 30 a year give or take.

5 Q. So that's total average per year?

6 A. Yes.

7 Q. What about permanent pits?

8 A. None.

9 Q. How often do you get to go out and inspect
 10 those?

11 A. As often as I can.

12 Q. Can you give me a ballpark figure?

13 A. I try to get out at least -- not once a
 14 week but two or three times a month for two or three
 15 days at a time.

16 Q. You hit all of them at that point?

17 A. I try. I can't hit them all but I try to
 18 get as many as I can over that period of time.

19 Q. Let's talk about the -- oh, just sort of
 20 the follow-up question. Have you had any problems
 21 doing your enforcement duties under the current
 22 rule?

23 A. I have not.

24 Q. You talked some about the variance
 25 provision and there's this distinction between a

1 variance and exception.

2 A. Correct.

3 Q. Exceptions apply -- essentially they are
4 the same thing except for expenses apply to
5 permanent pits?

6 A. Correct.

7 Q. You were on the working group; is that
8 correct?

9 A. I was.

10 Q. Why did the working group decide that
11 multi-well fluid management pits should be a
12 district responsibility rather than a Santa Fe
13 responsibility?

14 A. They are not permanent pits. They are
15 long-term but they are not permanent pits by
16 definition, and the same site-specific requirements
17 that have to be looked at for the drilling pit would
18 apply to a multi-well fluid management pits.

19 Q. When you were talking about timelines, did
20 I hear you say that 60 days -- I guess it was 60
21 days -- was needed to look at multi-well fluid
22 management pits because of the complexity of those?

23 A. It was viewed during the working group
24 that we don't know what the complexities are for
25 those systems, so to short us on the number of days

1 for review didn't seem to make a lot of sense. It's
2 a longer time period to cover those possible
3 complexities that we are not aware of yet.

4 Q. Is it fair to say multi-well fluid
5 management pits are more complex? The issues
6 surrounding them are more complex?

7 A. The leak detection system makes it more
8 complex, yes.

9 Q. Going to the exceptions section, Page 44,
10 Subsection C4, why did the working group limit the
11 ability to contest an exception to somebody
12 withstanding?

13 MS. GERHOLT: Objection. This calls for a
14 legal --

15 A. I'm not sure I can answer the question.
16 I'm not aware of the specific definition of standing
17 to begin with.

18 Q. Okay. Do you have a sense of, going down
19 to the second to the last line, what technical merit
20 means?

21 A. Second to the last line?

22 Q. That same subsection?

23 A. Of 4?

24 Q. Yeah.

25 A. Okay.

1 Q. Do you have a sense of what the term
2 technical merit means?

3 CHAIRPERSON BAILEY: I'm not sure which
4 section we are talking about here.

5 MR. JANTZ: Page 44 of OCD's revisions,
6 Exceptions, C4.

7 Q. Let me ask you this: Was that discussed
8 in the working group?

9 A. Technical merit? No, it's a criteria that
10 the director uses to set a matter to hearing or not
11 set a matter to hearing.

12 Q. So that wasn't discussed within the
13 working group?

14 A. No.

15 Q. Ms. Foster asked you a question regarding
16 the term equal or better --

17 A. Yes.

18 Q. -- as being subjective. Isn't reasonable
19 also subjective standard?

20 A. I would say so.

21 Q. And actually the last question I have
22 is -- two more questions. Ms. Foster talked a lot
23 about livestock owners being involved with the
24 variance process. I think she posed one question,
25 as I recall, asking about additional fencing. If a

1 livestock owner says, "OCD, I need additional
2 fencing that will be reasonably protective of my
3 livestock," isn't the livestock owner the best
4 person in the position to make that call and make
5 that recommendation to OCD?

6 A. I would say it's well within his rights to
7 require something else to protect his livestock and
8 he would have the knowledge to propose such an
9 arrangement.

10 Q. Right. So he may be best stated -- he or
11 she may be best situated to make the recommendation
12 to the OCD. Whether OCD wants to take the
13 recommendation or not is up to the OCD, right?

14 A. Correct.

15 Q. In your working group there's been a lot
16 of talk today about the variance and hearing process
17 and the potential delays that it might impose upon
18 operators.

19 A. Correct.

20 Q. The reverse side of this seems to me to be
21 that the other option is automatic approval if OCD
22 doesn't make -- at least that's the recommendation
23 from the independent producers -- that a variance be
24 automatically granted if OCD is unable or unwilling
25 to act. Was there a discussion in the working group

1 as to the regulatory enforcement liability of each
2 of those options?

3 A. Enforceability?

4 Q. Yes.

5 A. No, I'm not sure I would say that. It was
6 more a discussion based on the rightness or
7 wrongness of one particular approach to another.

8 Q. So it was sort of a policy call?

9 A. I guess. A philosophy call maybe.

10 Q. And just so I understand, it was the
11 group's determination that it would be better to
12 potentially, however unlikely, impose delays on an
13 operator than approve a permit that may jeopardize
14 public health and the environment?

15 A. I wouldn't use the word better probably,
16 but I would say that to grant automatic approval
17 does a disservice to the public.

18 Q. Thank you. That's all I have.

19 CHAIRPERSON BAILEY: Mr. Dangler, do you
20 have any questions?

21 MR. DANGLER: I have two questions.

22 CROSS-EXAMINATION

23 BY MR. DANGLER

24 Q. Mr. Martin, there were some hypotheticals,
25 and I think one of them was somebody got to go on

1 vacation, call me back and leave then to have it
2 expire. In your experience, what would be the
3 consequence for that bureaucrat of doing that
4 action?

5 A. He would more than likely be called on the
6 carpet and asked to explain himself.

7 Q. And would that happen within 60 days?

8 A. I would hope so.

9 Q. Thank you. No further questions, Madam
10 Chair.

11 CHAIRPERSON BAILEY: Dr. Neeper, do you
12 have questions?

13 MR. NEEPER: Yes, I have just two
14 questions.

15 CROSS-EXAMINATION

16 BY MR. NEEPER

17 Q. Good morning, Mr. Martin.

18 A. Good morning.

19 Q. You have received some questions this
20 morning regarding the responsibilities particularly
21 as they include correlative rights. Did I
22 understand that correctly?

23 A. Correct.

24 Q. Do your responsibilities also include
25 protection of the environment?

1 A. The way the question was phrased to me,
2 statutorily are we mandated to protect correlative
3 rights and prevent waste, I think the answer to that
4 is yes. I'm not sure the answer to your question
5 exactly based on the given circumstances. In other
6 words, are there statutes that require us to protect
7 the environment? I'm not quite so sure it's so
8 clear-cut. But I think it's incumbent upon us to do
9 that, to protect the environment.

10 Q. All right. You would agree that it's
11 possible that the Oil and Gas Act includes that
12 word?

13 A. I'm not sure.

14 Q. You are not required to be an expert on
15 that. If you were required to protect the
16 environment, would that environment include the
17 earth's surface and water?

18 A. In my mind, yes.

19 Q. One of the questions this morning dealt
20 with the air. Would air, as most of us regard it,
21 be part of the environment?

22 A. Yes, it would, but air quality is governed
23 by another -- it's a jurisdiction of another state
24 agency.

25 Q. Correct. So you do not have to look at it

1 because that has been very specifically assigned to
2 another agency.

3 A. Correct.

4 Q. Thank you very much. No further
5 questions?

6 CHAIRPERSON BAILEY: Mr. Fort? Do you
7 have questions?

8 MR. FORT: I have a couple.

9 CROSS-EXAMINATION

10 BY MR. FORT

11 Q. Mr. Martin, I believe that you indicated
12 that you are familiar with current Pit Rule 17?

13 A. Yes.

14 Q. And I believe you indicated at some point
15 that there's an exception provision under the
16 current Pit Rule 17 but there's not a variance?

17 A. That's correct.

18 Q. Okay. How many applications have been
19 filed for exceptions to the Pit Rule 17?

20 A. Current Pit Rule, I don't know. Those all
21 go to the Environmental Bureau here in Santa Fe.

22 Q. You don't know?

23 A. I don't know.

24 Q. Do you know if any permit for an exception
25 to the current Pit Rule has ever been issued?

1 A. I do not.

2 Q. Thank you.

3 CHAIRPERSON BAILEY: Commissioner Bloom,
4 do you have questions?

5 COMMISSIONER BLOOM: Just a few. Thank
6 you. Good morning, Mr. Martin.

7 THE WITNESS: Good morning.

8 COMMISSIONER BLOOM: I just wanted to
9 clarify, on below-grade tanks currently an automatic
10 shutoff is required, correct?

11 THE WITNESS: Under the proposed rule.

12 COMMISSIONER BLOOM: Were you saying that
13 remote monitoring would be acceptable to OCD in
14 place of that?

15 THE WITNESS: Yes, in place of that I am.

16 COMMISSIONER BLOOM: With regard to --
17 looking at the definition of closed-loop systems and
18 you see the inclusion there of workover fluids.
19 Ms. Foster had a line of questioning on that. Are
20 workover operations or workover fluids covered under
21 any other rules that you are aware of?

22 THE WITNESS: The management of those
23 fluids, not to my knowledge.

24 COMMISSIONER BLOOM: Okay.

25 THE WITNESS: Only in the general sense.

1 We require -- it's performance-based. We require
2 spills be reported from workover tanks used on a
3 workover operation just as on any spill.

4 COMMISSIONER BLOOM: So if workover fluids
5 are not regulated here, to your knowledge they are
6 not regulated anywhere else?

7 THE WITNESS: Not specifically.

8 COMMISSIONER BLOOM: One last question. I
9 don't know why I didn't think of it earlier and I
10 will ask you because you are talking about ease of
11 enforcement based on what you see in regulations.
12 Could we turn to Page 3 for the definition of
13 temporary pit? This might have come up earlier.
14 You see it says, "Temporary pits may be used for one
15 or more wells and located either on-site or off-site
16 of a well drilling location."

17 THE WITNESS: Yes.

18 COMMISSIONER BLOOM: Currently can a
19 temporary pit be used for more than one well?

20 THE WITNESS: A drilling pit is limited to
21 one well currently.

22 COMMISSIONER BLOOM: Would this create any
23 confusion for you as to when the clock starts
24 ticking on the time period if the temporary pit is
25 allowed for?

1 THE WITNESS: Starts ticking? No, to me
2 it's when the liquids are first placed in the pit.

3 COMMISSIONER BLOOM: Perhaps when the
4 first well is spudded?

5 THE WITNESS: I would prefer when the
6 first liquids are placed in the pit myself because
7 that's when -- that's during construction of the pit
8 usually. That's when the use of the pit starts
9 basically.

10 COMMISSIONER BLOOM: And then the
11 temporary pit would have to be closed one year after
12 it began under the current rule? Is that your read
13 on that?

14 THE WITNESS: I would agree with that.

15 COMMISSIONER BLOOM: You don't have any
16 concern that this could be another route to what
17 will be almost a multi-well pit? I guess it is a
18 multi-well pit at this point.

19 THE WITNESS: I think that's why the
20 language is placed in there is to cover the concept
21 of multi-well fluid management systems.

22 COMMISSIONER BLOOM: No further questions.
23 Thank you.

24 COMMISSIONER BALCH: I have a few
25 questions. Going to Page 10, Paragraph 3, Section

1 A, there's a change of definition of continuously
2 flowing watercourse to add flowing significant
3 watercourse. What about non-flowing significant
4 watercourses? I guess I'm trying to figure out what
5 the distinction is and what would be confused there?

6 THE WITNESS: Where are you?

7 COMMISSIONER BALCH: Page 10. I meant to
8 ask this of Mr. Powell and I forgot. Fortunately, I
9 can do that, but you can say you don't know the
10 answer. To me the language is confusing.
11 Continuously flowing watercourse or flowing
12 significant watercourse. If you specifically say
13 flowing significant watercourse you can exclude
14 non-flowing significant watercourses.

15 THE WITNESS: I would agree with that
16 analysis, yes. I would agree that it could
17 conceivably preclude unflowing.

18 COMMISSIONER BALCH: If I drive by the Rio
19 Salado in July, it's very likely to have water in it
20 and in September it's very likely not to have water
21 but it's still a significant watercourse.

22 THE WITNESS: Right.

23 COMMISSIONER BALCH: On proof of notice to
24 surface owners on Page 43, Section 3A, you might
25 recall yesterday Mr. Scott from a producer's point

1 of view mentioned this could cause confusion and
2 burden another entity such as the BLM. Do you have
3 any experience that could provide insight on whether
4 that would be a likely occurrence?

5 THE WITNESS: I have not had that
6 experience myself. I'm not sure.

7 COMMISSIONER BALCH: When the BLM gets a
8 notice of something, what is the typical response?

9 THE WITNESS: I mean to speak generally,
10 but really I only have experience with the BLM in my
11 area. They and I generally agree to work together
12 on the particular thing. We generally agree on the
13 concepts that are applied to drilling operations.

14 COMMISSIONER BALCH: On Section C4 on Page
15 44 now, if any person in good standing contests,
16 this is just something I don't understand, what a
17 person with standing would be. Who would that
18 constitute?

19 THE WITNESS: I'm not sure myself.

20 COMMISSIONER BALCH: I can ask you?

21 MR. SMITH: Yes, but not on the record.

22 COMMISSIONER BALCH: I will pass that.

23 Okay. So irregardless of who a person of standing
24 is, how would they obtain that notice in general or
25 how would they become aware of the variance or

1 exception process?

2 THE WITNESS: The surface owner is
3 required to be notified, so they would know that the
4 subject is coming to hearing. If the district, the
5 OCD, decides there are any other interested parties
6 or parties that might be interested like adjacent
7 landowners, we would notify them also.

8 COMMISSIONER BALCH: I'm going to make a
9 guess that Mr. Jantz would be interested in some of
10 the variances.

11 THE WITNESS: There's a list that I'm not
12 intimately familiar with that Florene Davidson keeps
13 of persons that are always notified of such a thing.
14 And I'm not sure Mr. Jantz is on the list.

15 COMMISSIONER BALCH: But there's a
16 mechanism to get on the list?

17 THE WITNESS: Yes.

18 COMMISSIONER BALCH: Thirty and 60 days, a
19 lot of people asked what happens if you get to the
20 end of the 60 days. What's a typical turn-around
21 for you?

22 THE WITNESS: Two or three days.

23 COMMISSIONER BALCH: And you obviously
24 talk to other supervisors in other districts. Do
25 you have a feel for their turn-around time?

1 THE WITNESS: I know that I'm atypical, my
2 district is. The southeast is going strong now and
3 the volume is much, much more than mine. Still, the
4 latest communication I saw from District 1 was that
5 the turn-around is ten or 12 days.

6 COMMISSIONER BALCH: On Page 47, you and I
7 both have confusion about A40, Section C, about the
8 20 days and what that meant. I thought there might
9 be a couple comments that specified that it was 20
10 days from the approval or denial of the 60 days.

11 THE WITNESS: Correct.

12 COMMISSIONER BALCH: When you could
13 contest the approval.

14 THE WITNESS: Twenty days from our
15 notification to the operator.

16 COMMISSIONER BALCH: I put in, "Of the
17 cause for denial or additional conditions and shall
18 set the matter for hearing, if the applicant so
19 requests, within 20 days." Would that clarify that
20 for you?

21 THE WITNESS: Yes. That's better to me.

22 COMMISSIONER BALCH: I read that exactly
23 the same way you read it. Typically how long from a
24 hearing request does it take to get a hearing?

25 THE WITNESS: I don't know for sure. I

1 don't know what the docket load is. About a month.

2 COMMISSIONER BALCH: It's short?

3 THE WITNESS: It's not short I don't
4 think. I'm not sure.

5 COMMISSIONER BALCH: I am also wrestling
6 with the concept of equal or better. I think
7 everybody asked about that. Equal in its pure sense
8 would be exactly the same, which would be easy and
9 not require a variance, although presumably you
10 could have a subjective measurement and an equal
11 protection using a different method. And better
12 would also be a subjective decision.

13 THE WITNESS: Better is subjective.
14 Equal, I think, is more readily defined than the
15 latter of the two using other specifications, but
16 still as protective.

17 COMMISSIONER BALCH: You think equal or
18 better is better than reasonable?

19 THE WITNESS: Yes.

20 COMMISSIONER BALCH: Do you think there
21 might be a better definition than equal or better
22 out there?

23 THE WITNESS: Could be.

24 COMMISSIONER BALCH: My last question was
25 asked by Mr. Dangler so I'm done.

1 CHAIRPERSON BAILEY: I have a few
2 questions and I'm sure that your attorney has
3 redirect, so you are still on the hot seat after you
4 come back from lunch at 1:15.

5 (Note: The hearing stood in recess at
6 12:05 to 1:15.)

7 CHAIRPERSON BAILEY: We will go back on
8 the record. Mr. Martin, I was going to ask you some
9 cross-examination questions. The discussion
10 concerning completeness review for permits, which
11 was part of 19.15.17.16, Permit Approval Conditions,
12 and the timelines that were discussed for completion
13 of the permit and review of the permit, what would
14 need to happen, point out the lack of timelines for
15 completion for applications for exceptions and
16 variances. Because these are applications, would it
17 make sense for the division to have the clock start
18 ticking if an application for a variance was
19 incomplete?

20 THE WITNESS: An application for a
21 variance included with an original APD? Is that --

22 CHAIRPERSON BAILEY: Yes. If an
23 application is incomplete, do you want the clock to
24 start ticking? Or should the clock start ticking
25 after an application for a variance or exception is

1 complete?

2 THE WITNESS: My guess would be after.

3 I'm sorry, say that again.

4 CHAIRPERSON BAILEY: Do you want the clock
5 to start ticking for --

6 THE WITNESS: The 60-day clock? Or the
7 30-day clock?

8 CHAIRPERSON BAILEY: Either one. For any
9 kind of clock ticking that puts the division under a
10 timeline. If an application is incomplete for a
11 variance or an exception, should the clock start
12 ticking at that point or should it wait until after
13 that application for an exception or variance is
14 complete?

15 THE WITNESS: My understanding is the
16 clock starts ticking upon receipt of the
17 application.

18 CHAIRPERSON BAILEY: Whether or not the
19 application has all the information that's necessary
20 to make a determination, whether or not the variance
21 or the exception should be granted?

22 THE WITNESS: Correct. I believe that's
23 true. Which would I prefer?

24 CHAIRPERSON BAILEY: Yes.

25 THE WITNESS: I don't have a problem with

1 the way it's written now, I don't think. The clock
2 starts ticking upon receipt, whether it's complete
3 or not.

4 CHAIRPERSON BAILEY: If it is not complete
5 and the information is needed in order to make a
6 decision for a variance, the division can ask the
7 operator to --

8 THE WITNESS: For additional information.

9 CHAIRPERSON BAILEY: For additional
10 information. If the operator waits until the 59th
11 day to give the division the necessary
12 information --

13 THE WITNESS: That would be a problem,
14 yes.

15 CHAIRPERSON BAILEY: That would be a
16 problem, wouldn't it?

17 THE WITNESS: Correct.

18 CHAIRPERSON BAILEY: So would it make
19 sense to you if on Page 43 of the IPANM May 15th
20 application for B2 if it read, "If an operator
21 demonstrates to the appropriate division district
22 office that the complete application requesting
23 variance provides equal or reasonable" -- whatever
24 is decided there, "to freshwater, protection of
25 human health and possibly safety of livestock and

1 the environment, the appropriate division shall
2 approve the variance within 60 days."

3 THE WITNESS: In the scenario you just
4 said, yes, that makes sense.

5 CHAIRPERSON BAILEY: And the following
6 change would happen in Paragraph 3 that the
7 requested complete application for variance in
8 writing within 60 days.

9 THE WITNESS: Yes.

10 CHAIRPERSON BAILEY: And wherever we find
11 that language necessity in that portion of the rule
12 such as in the following page under C, Exceptions,
13 3. "If the operator demonstrates to the
14 Environmental Bureau and the Division Santa Fe
15 office that the complete application for a request
16 of extension," the division would accept that and
17 support that change?

18 THE WITNESS: That makes sense, yes.

19 CHAIRPERSON BAILEY: The question was
20 brought up if an operator was working with an OCD
21 staff employee that was having a bad day and
22 manipulated the 60-day issue. Is it in your
23 experience that supervisors can always be contacted
24 if there's a problem with a staff member?

25 THE WITNESS: Yes, of course.

1 CHAIRPERSON BAILEY: Don't we each and
2 every one have a supervisor or manager all the way
3 to the top?

4 THE WITNESS: Yes, we do.

5 CHAIRPERSON BAILEY: Thank you. So much
6 has been made about proof of notification to the
7 surface owner, but that only happens if the
8 application goes to hearing.

9 THE WITNESS: Is denied, yes. Still
10 talking about variances?

11 CHAIRPERSON BAILEY: Yes.

12 THE WITNESS: Yes, that's correct.

13 CHAIRPERSON BAILEY: And that only if it
14 goes to hearing is the notification the notice
15 requirement?

16 THE WITNESS: Right. Yes, if it's denied
17 and it goes to hearing.

18 CHAIRPERSON BAILEY: Another question
19 about the automatic -- it's been termed automatic
20 extensions for closure of pits, Page 37. The
21 questions were brought up on Page 37, No. 5, and
22 that is referenced to the appropriate division
23 district office may grant an extension not to exceed
24 three months.

25 THE WITNESS: Correct.

1 CHAIRPERSON BAILEY: That's been termed an
2 automatic extension. Is there a request or a reason
3 to require just cause for an extension or is that
4 simply a loophole that's been invoked for not only
5 having the closure within the specified time of the
6 rule but also an additional time without regard for
7 what the rule actually requires?

8 THE WITNESS: I think there needs to be
9 some justification for the extension for an
10 additional three months. If they need an additional
11 time after that, then that requires a variance of
12 some sort.

13 CHAIRPERSON BAILEY: All right. But it is
14 your experience that the extensions are not
15 automatic?

16 THE WITNESS: They are not automatic.

17 CHAIRPERSON BAILEY: They are requested
18 for cause?

19 THE WITNESS: Correct.

20 CHAIRPERSON BAILEY: That's all I have.
21 Redirect?

22 REDIRECT EXAMINATION

23 BY MS. GERHOLT

24 Q. First of all, Mr. Martin, let's go back to
25 closed-loop systems for a movement on Page 4 of OCD

1 Exhibit 2. If the commission chooses to adopt
2 notification for a closed-loop system, would a C 144
3 be filed?

4 A. No, it would not.

5 Q. So if we have notification of closed-loop
6 systems, there's no C 144?

7 A. Correct.

8 Q. The division requested a check box?

9 A. A check box on the 101 and 103.

10 Q. If it is just a check box and you are
11 doing a workover, would that simplify the paperwork
12 for that workover?

13 A. I would think so, yeah. No C 144 would be
14 required in that instance either. The check box on
15 the C 103 would be required.

16 Q. So it would just require a check box, not
17 additional paperwork?

18 A. Right.

19 Q. Because when you are doing a workover do
20 you already file a C 103?

21 A. Yes.

22 Q. Thank you. Commissioner Balch which asked
23 you a question on Page 10 regarding continuously
24 flowing watercourse or flowing significant
25 watercourse. Do you recall that?

1 A. I do.

2 Q. If I could keep your thumb on Page 10 and
3 then if you will turn to Page 2. At the top of the
4 page is there a definition for continuously flowing
5 watercourse.

6 A. There is.

7 Q. And if you would now look at Page 3, is
8 there a definition for significant watercourse?

9 A. There is.

10 Q. Are these two definitions different?

11 A. They are.

12 Q. And is that why the division has requested
13 both a continuously flowing watercourse for a
14 flowing significant watercourse to be inserted?

15 A. Yes.

16 Q. The question was put to you earlier as to
17 does an operator need an attorney to come to
18 hearing. Do you recall that?

19 A. I do.

20 Q. Is there anything in any rule that the OCD
21 has that requires an operator to have an attorney?

22 A. Not to my knowledge.

23 Q. Is that a business decision by the
24 operator?

25 A. I would assume so, yes.

1 Q. Mr. Martin, you know that part of what the
2 division and the commission does is to prevent waste
3 and protect correlative rights, correct?

4 A. Yes.

5 Q. Has it also been pointed out to you that
6 there are statutory requirements for the division to
7 protect public health and the environment?

8 A. Yes.

9 Q. Would you consider a deer part of the
10 environment?

11 A. Yes.

12 Q. A deer ambles along, smells grass, drinks
13 water?

14 A. Yes.

15 Q. Does a cow do the same thing?

16 A. A cow does those things, yes.

17 Q. Mr. Martin, if you are hit by a train, are
18 you safe?

19 A. I have not been safe up to that point, no.

20 Q. Are you healthy?

21 A. No.

22 Q. Let's talk a little bit about variances.

23 Drawing your attention to Page 43, Commissioner

24 Bailey asked you about your thoughts in regards to a

25 complete application, the insertion of that

1 language. Prior to that insertion, is there
2 anything as presented by the division which would
3 require formal application to the district office
4 requesting a variance?

5 A. In writing you mean?

6 Q. In writing.

7 A. No.

8 Q. Could it be as simple as a pick up the
9 phone, "I was going to use a 20 mil but now I want
10 to use a 25 mil liner"?

11 A. I could envision that, yes.

12 Q. And what is the division's purpose in
13 offering this exceptions and variance modification
14 to the commission?

15 A. I believe that we distinguished those
16 things because the site-specific information for the
17 well locations, the knowledge of those locations
18 exists more readily in the district offices than at
19 the local level so that -- if I may answer the
20 question. So the variances proposed for a drilling
21 pit would be more easily analyzed by the district
22 office personnel.

23 Q. So it's only to spell out that hey, if you
24 need a difference from a temporary pit requirement,
25 go to your district office?

1 A. Yes.

2 Q. You don't need to come to Santa Fe; is
3 that correct?

4 A. Yes.

5 MS. GERHOLT: Madam Chair, at this time I
6 would officially move OCD Exhibit 2 into evidence.

7 CHAIRPERSON BAILEY: Any objection?

8 MR. JANTZ: No objection.

9 MR. CARR: No.

10 MS. FOSTER: No.

11 MR. FORT: No.

12 CHAIRPERSON BAILEY: Admitted.

13 (Note: OCD Exhibit 2 admitted.)

14 MS. GERHOLT: No further questions.

15 CHAIRPERSON BAILEY: You may be excused.

16 MS. GERHOLT: That concludes the
17 division's presentation.

18 CHAIRPERSON BAILEY: As I recall, the only
19 direct testimony that's still to be heard by the
20 commission is the additional information that
21 Mr. Mullins will be presenting next week or whenever
22 the next continued hearing date will be. So it is
23 now time to discuss rebuttal witnesses and potential
24 continued dates for this commission.

25 It's my understanding that we will have

1 Dr. Buchanan as a rebuttal witness, Dr. Dr. Neeper
2 as a rebuttal witness and Mr. Jantz?

3 MR. JANTZ: Ms. Kathy Martin.

4 CHAIRPERSON BAILEY: At this time are
5 those the only three that we anticipate to be
6 rebuttal witnesses? Mr. Jantz, you indicated that
7 there was a date issue for your rebuttal witness to
8 go before the commission?

9 MR. JANTZ: Yes, Madam Chair. She is
10 unavailable June 26th through July 8th.

11 CHAIRPERSON BAILEY: June 26th through
12 July 8th, that's all of next week except for Monday
13 and all of the following week. We have a problem
14 with the commission meeting here next Monday because
15 this room is being taken up by the examiner hearings
16 and Mr. Smith is not available on Monday. Then the
17 only time that we would even hear Ms. Martin would
18 be probably this afternoon if we don't have --
19 unless we can schedule the date sometime after the
20 29th, because Ms. Foster, you are unavailable the
21 latter half of July?

22 MS. FOSTER: That's correct. July 15th
23 through August 6th. Actually, it's through the end
24 of the week. It's August 9th.

25 CHAIRPERSON BAILEY: Dr. Buchanan, are you

1 available next week if we should find a date
2 available for the commission?

3 DR. BUCHANAN: I have to give up a little
4 fly fishing but I'm available.

5 CHAIRPERSON BAILEY: Dr. Neeper, are you
6 available next week should we be able to find a
7 date?

8 MR. NEEPER: Yes. I will give up my fly
9 fishing.

10 CHAIRPERSON BAILEY: Okay. Then why don't
11 we try to find a date next week and allow Ms. Martin
12 to have rebuttal?

13 MR. JANTZ: I see two problems, Madam
14 Chair. One is part of the rebuttal testimony is
15 going to involve Mr. Mullins' presentation. If he
16 is still going to supply information for direct
17 testimony we ought to be able to see that before we
18 do rebuttal. Second, I anticipate, and maybe this
19 is less of an issue, a fairly lengthy examination of
20 Ms. Martin.

21 CHAIRPERSON BAILEY: Okay. Then that
22 would throw us into August for the next time for
23 her.

24 MR. JANTZ: I'm sorry. Is it possible to
25 do it between July 8th and the 15th?

1 CHAIRPERSON BAILEY: No.

2 MR. JANTZ: The week of the 20th in August
3 Ms. Martin is unavailable. I have nothing scheduled
4 until the 26th.

5 CHAIRPERSON BAILEY: So you would be
6 available in early August?

7 MR. JANTZ: Yes, Madam Chair.

8 CHAIRPERSON BAILEY: Mr. Carr?

9 MR. CARR: One, I am unavailable next
10 Friday but beyond that in my retirement I guess I am
11 available. Now, I don't know if it's appropriate
12 but I have a couple of comments I would like to make
13 about the concerns for rebuttal testimony.

14 CHAIRPERSON BAILEY: Yes.

15 MR. CARR: This afternoon I anticipated
16 that OGAP might be calling a rebuttal witness and I
17 anticipate that that will probably take more than
18 half a day, more than three hours when you factor in
19 the cross. And I don't think that works very well.
20 I was going to object but I have to tell you, I
21 don't know if I have an objection or how to object
22 because I don't know what OGAP intends to present
23 and I think I have two possible objections, but
24 since we are not governed by court rules in state
25 administrative procedure provisions I'm sort of in a

1 gray area.

2 But I will tell you that I was -- one of
3 my great failures was serving on the committee to
4 draft rules for rulemaking. When I look at those
5 rules, the rules on rebuttal are a little gray. But
6 I don't think the intent of the rule is gray at all
7 because the rules provided if you are going to
8 present expert testimony, assuming in your direct
9 case, that you provide notice in advance of the
10 hearing. You identify your witness. You provide
11 their credentials. You identify in the prehearing
12 statement the things they are going to testify to
13 and you provide copies of your exhibits. After
14 Dr. Neeper's testimony, Dr. Buchanan and I felt we
15 had some issues that were not anticipated and we
16 needed to present brief rebuttal testimony. So we
17 provided notice, exhibits, and what he was going to
18 cover to everyone in the case.

19 The bottom line on all of this is I
20 believe the intent of the rules is to provide for
21 effective hearings where parties are fully informed
22 on the issues and can respond in an orderly fashion
23 and to prevent hearing by ambush, and I'm not
24 suggesting ambush, because I don't know what they
25 are going to testify to.

1 But that takes us to the question of what
2 is rebuttal? And when you look, you can get about
3 as many definitions as places you look. But one
4 definition -- this is a Fifth Circuit Court of
5 Appeals which certainly doesn't bind us anyway, but
6 it says, "Rebuttal is known as a term of art
7 denoting evidence introduced by a plaintiff," which
8 would be the applicant, I submit, "to meet new facts
9 brought out in his opponent's case." That's the
10 definition of rebuttal.

11 We are not under the general government
12 administration title of the New Mexico
13 Administrative Code. The OCD is not. But it does
14 define rebuttal evidence and I think it's important
15 for trying to find out what it should be that we
16 look there. It says, "It is not evidence which is
17 merely cumulative or could have been more properly
18 offered in the case in chief." If it is those
19 things, it is improper rebuttal.

20 So what I'm saying is it's certainly not
21 NMOGA's intention to suggest that anyone who has
22 something to present should not be allowed to do so,
23 but there are rules and procedures that govern what
24 we do, and you are authorized in the rule to make
25 exceptions for technical testimony, rebuttal in

1 character, if it's truly rebuttal. If it couldn't
2 be in the direct case. It has to be issues raised
3 in response. If we go today, no new exhibit would
4 be appropriate. It hasn't been disclosed. We would
5 object to that. If it raises a new subject, I guess
6 we have to object to it.

7 So I'm simply laying those out as I think
8 those are things that I have been wrestling with and
9 I can't get them to the point of formulating an
10 objection because I still remain in the dark.
11 Mr. Jantz notified me a week ago that he was going
12 to call a rebuttal witness and listed almost all his
13 witnesses. Mr. Hasely was exempted. And other than
14 that, if I need to look at something and get
15 prepared, I haven't seen it.

16 So those are my concerns. We can go
17 forward and we can object and it will be a mess and
18 then we can get half-way through and spend two
19 months kicking up all kinds of things to make it
20 worse when we get back. But my two recommendations
21 or requests are we not split a witness half-way
22 through the case; and two -- because really, two or
23 three months to work on rebuttal is going create
24 more problems than it will simplify. Either for me
25 to look at Ms. Martin or Eric to take a look at Dr.

1 Buchanan so I don't think we should split a witness.

2 Two, if there is going to be rebuttal, I
3 think the intent of the rule should be followed and
4 the witnesses need to be identified. If they are
5 going to present exhibits they need to be shared and
6 the areas which they intend to testify need to be
7 identified.

8 CHAIRPERSON BAILEY: Mr. Smith, would you
9 like to weigh in on this and give some guidance?

10 MR. SMITH: Not particularly. Well, in
11 terms of notice, it does seem to me to be pretty
12 clear that the rebuttal witness is not intended to
13 be identified in the notice of intent to give
14 technical testimony, and I say that because under
15 19.15.3.11B3, the rule says, "The commission may
16 exclude any expert witnesses or technical exhibits
17 not identified in or attached to the prehearing
18 statement unless the testimony or exhibit is offered
19 solely for rebuttal." I think "solely" is important
20 there, and that may have something to do with Mr.
21 Carr's interest in defining rebuttal.

22 It would seem to me that there is not an
23 intent here to allow someone to be used as a
24 rebuttal witness that could have as easily been
25 identified as a witness from whom direct testimony

1 was going to be sought and who could have been
2 listed on the statement of intent. But I don't
3 think it's required under the rules to file a
4 statement with respect to rebuttal. I understand
5 the frustration of that, but I don't see that as
6 required in the rule.

7 It seems to me that the real issue is
8 determining what rebuttal will be for a rebuttal
9 witness. And I would think that responding to
10 testimony of the other side would be broad but I
11 think sufficient as a rebuttal to the notion of what
12 rebuttal is.

13 Now, in terms of splitting witnesses, I
14 think that's exactly right. In terms of scheduling,
15 we have an issue because we have the rebuttal
16 witness here. Mr. Mullins is not going to testify
17 until later and that just leaves Dr. Buchanan.

18 MR. CARR: I am the applicant and I
19 request to go last. I have a chance to respond, not
20 just have the last thing presented to you someone
21 attacking me. That's the nature of rebuttal that
22 requires that.

23 MR. SMITH: Well, then, that being the
24 case, I guess we can all go eat ice cream. I don't
25 know what to do this afternoon.

1 COMMISSIONER BALCH: In rebuttal
2 testimony -- I'm not a lawyer, no legal background
3 whatsoever. I got a traffic ticket once. That's my
4 experience in courts. If we run into a situation
5 where we, as a commission, have to determine that a
6 rebuttal witness' testimony is directly related to
7 previous direct testimony, I envision a situation
8 where we have enough lawyers in this room where we
9 can be dealing with objections probably on almost
10 every question.

11 MR. SMITH: If they misbehave I think
12 that's probably true. It seems to me that if we
13 have an idea of what rebuttal testimony is, people
14 know what was said on direct, what was not said on
15 direct, that I would imagine whoever is offering the
16 rebuttal testimony would limit the questions to
17 questions that are responsive to prior direct
18 testimony and I would anticipate that objections
19 would be limited to situations where there's a good
20 faith belief that they have gone beyond the scope of
21 prior direct. And that is something I think that
22 lawyers can be expected to do, not to chill any kind
23 of question, not to chill any kind of objection, but
24 I don't think we need to expect that testimony
25 beyond the scope of prior direct will be asked for

1 in a rebuttal witness, and I don't think we need to
2 expect that there will be objections frivolously
3 lodged.

4 COMMISSIONER BALCH: Can I ask you a
5 question?

6 CHAIRPERSON BAILEY: What's that?

7 COMMISSIONER BALCH: If we were to take,
8 instead of Mr. Mullins' testimony in this case the
9 exhibits from 2005 and 2007 regarding infiltration
10 rates, would we be able to listen to the rebuttal
11 witness for OGAP and schedule the other rebuttal
12 witnesses sometime in July?

13 CHAIRPERSON BAILEY: If we take
14 administrative notice of that portion of the 2007
15 and the 2010 cases? Do we have to have 400 pages of
16 testimony copied and distributed everywhere or --
17 that opens the door to the entire 8,000 pages,
18 doesn't it?

19 MR. SMITH: No, I don't know that it opens
20 the door to the entire 8,000 pages. It opens the
21 door to the 400 pages depending on whether someone
22 wants to insist that the entire document be placed
23 in. I thought I heard Mr. Mullins testify that that
24 would not be useful, that the parameters are too
25 different. There was a problem, I think, that

1 Mr. Mullins testified to. The suggestion when we
2 were looking at doing that was that Mr. Mullins
3 would copy whatever pages from the exhibit he would
4 need in order to give you the information that you
5 wanted and then there would be the opportunity for
6 anyone in cross to copy whatever other pages they
7 needed for cross-examination and enter those.

8 COMMISSIONER BALCH: Maybe I could ask a
9 different question. If we were to put Mr. Mullins
10 back on the stand for direct and let him testify on
11 his understanding of those records, would those
12 records then have to be admitted that way? Could we
13 just ask him, "What's the infiltration rate, to the
14 best of your knowledge?"

15 MR. SMITH: You can do that. I would
16 advise against it simply because -- I mean, if you
17 want the answer, I think that the best answer is
18 provided in the documents.

19 CHAIRPERSON BAILEY: And I would like to
20 see Mr. Mullins do the modeling under the same
21 parameters that he did for the line items that he
22 gave us rather than rely and try to interpret
23 previous information. And I think these two pages
24 are absolutely critical to this commission to make a
25 determination.

1 MR. SMITH: Given that characterization, I
2 think you certainly don't want to ask for the best
3 of his recollection. May I ask a question of Mr.
4 Carr?

5 CHAIRPERSON BAILEY: Sure.

6 MR. SMITH: You're putting Dr. Buchanan on
7 for rebuttal, right?

8 MR. CARR: Yes, I am.

9 MR. SMITH: We have previously talked
10 about what is, I think, mischaracterized as rebuttal
11 ad infinitum, which I don't think we have to worry
12 about because we won't have repetitious testimony
13 and so forth.

14 MS. FOSTER: Well --

15 MR. SMITH: Let me just ask a question and
16 then you can talk. If you put Dr. Buchanan on today
17 and felt you needed more from him after you hear
18 rebuttal, can you call him back? Does that give you
19 heartburn?

20 MR. CARR: Yes, it does, because one, I
21 don't know if you recall but Dr. Buchanan is not
22 particularly an abbreviated speaker. And I'm being
23 serious. When I notified everyone that we were
24 going to call him I spent a very limited amount of
25 time practicing with him and we get longer every

1 time he talks about it.

2 It is testimony that I think is important,
3 and I think after Dr. Neeper rebuts again or
4 provides his rebuttal testimony, which he is
5 entitled to do that, it is important as the
6 applicant to be able to address the two issues we
7 want to address. Revegetation/remediation is one
8 and the other relates to the salt bulge. That's all
9 we are going to do and they are directly tied, but
10 we think it should be less.

11 There's one other thing that I would like
12 to point out. That is, that there are only two
13 people here that would look at what Mr. Mullins
14 prepared. I mean, the commission certainly is
15 interested in that and has requested it. But if
16 something comes up I'm denied it because I don't
17 know where you are going in terms of the record.
18 I'm going to be drafting proposed findings and how
19 do I do that if it's part taken sort of by
20 administrative note that may be critical information
21 to the order that you are going to enter? I don't
22 think that works. I'm not trying to -- I want it to
23 be done right now, have given a great closing and
24 disappear in the sunset, but I don't think to get to
25 that objective -- I think it's improper to try to

1 find a shortcut to the end at the end of this long
2 process that doesn't assure that the information the
3 commission needs is there and that people are
4 concerned about have a chance to be examined.

5 CHAIRPERSON BAILEY: Ms. Foster?

6 MS. FOSTER: Yes, I have a contention as
7 to the characterization of what is rebuttal
8 evidence. Because as you know, on behalf of my
9 client, Chesapeake Energy, I came in with a letter
10 that was directly in response to a question by
11 Commissioner Bloom and directly in response to
12 testimony that was public record. It's on the
13 record. And the ruling you made was that it was not
14 in on a timely basis.

15 Now, how is that evidence different from
16 what OGAP is trying to put in here today? I don't
17 know what they are going to testify to. The only
18 reason I even got Ms. Martin's CV was because
19 Mr. Jantz and I had an altercation. So they are
20 hiding things, is my contention. I really do feel
21 like I am being ambushed here.

22 I would like to know, and I think it's
23 fair to know what it is that they are going to be
24 responding to. I did not get an E-mail last week.
25 The first I heard of possible rebuttal testimony was

1 yesterday afternoon and that was only because again,
2 Mr. Jantz and I had a confrontation.

3 So I would say like to know, and I think
4 it's only fair, because I put on -- the week before
5 we started here I put on -- gave all parties my
6 rebuttal evidence. Mr. Jantz and OGAP has known
7 what this petition is going to look like since last
8 October, and if Ms. Martin had wanted to testify,
9 she could have testified as a direct witness.

10 I understand from speaking to Mr. Jantz at
11 lunchtime that her testimony is going to be
12 concerning modeling. They made the strategic
13 decision on their direct case to only talk about
14 economics, and now, after the fact, I'm assuming
15 based on Ms. Martin's CV, which is the only
16 information I have, that they will be talking about
17 modeling. I don't know which witnesses they will be
18 responding to. I don't know anything. I am
19 completely in the dark, and I think from a fairness
20 perspective I think it's completely unfair to put us
21 in a situation where I haven't seen any pieces of
22 paper. She is an engineer. I expect she will come
23 in with some exhibits or something in response to
24 whichever witness it is that she is talking to.

25 So there's two things in my complaint.

1 One is what exactly is rebuttal evidence, and I
2 think the Chesapeake letter is direct rebuttal and
3 that was denied as untimely and now we have a
4 situation where we are hearing this is a rebuttal
5 witness but they are completely out of the realm of
6 anything that's timely whatsoever.

7 MR. SMITH: May I respond?

8 CHAIRPERSON BAILEY: Please do.

9 MR. SMITH: There's nothing in the rule
10 that requires a revelation of what rebuttal
11 testimony is going to be. You may not like it. I
12 may not like it. It isn't required in the rule.
13 Second, with respect to the Chesapeake letter, that
14 was written public comment, and written public
15 comment was due five days before the hearing and
16 that's why it was included. It is not rebuttal
17 testimony. Do you contend it was rebuttal
18 testimony?

19 MS. FOSTER: Yes. I am contending it was
20 directly in response to testimony given by a public
21 citizen and specifically to a question that was
22 posed by Commissioner Bloom with me as the
23 representative to Chesapeake Energy.

24 MR. SMITH: I understand that, but you had
25 time before the hearing to submit that. You didn't

1 have to wait until the hearing was started. You had
2 from the time the request was made until five days
3 before this hearing reconvened on the 20th. You
4 didn't get it in.

5 MS. FOSTER: No, I was told by
6 Commissioner Bloom --

7 MR. SMITH: Excuse me. We had a host of
8 people that made written public comment that made it
9 too late that was not accepted and was not posted on
10 the website. I don't intend to treat written
11 comment from Chesapeake any differently.

12 MS. FOSTER: What you are saying then, the
13 ruling you are making is whenever a commissioner is
14 asking for additional information, it has to come in
15 either as evidence, with an actual witness coming
16 in, and it has to come in in a timely basis?

17 CHAIRPERSON BAILEY: I'm saying if it's a
18 written public comment it has to come in by the time
19 the Chair gave you a date. That's exactly right.

20 MS. FOSTER: It was not public comment.
21 It was in response to a commissioner's request.

22 MR. SMITH: Which was a follow-up on a
23 public comment, correct?

24 MS. FOSTER: It was follow-up on comment
25 on the record, that is correct.

1 MR. SMITH: A public comment.

2 MS. FOSTER: A comment on the record.

3 MR. SMITH: It was follow-up to a public
4 comment, was it not?

5 MS. FOSTER: It was a follow-up to
6 Commissioner Bloom's question.

7 MR. SMITH: The question was a follow-up
8 to public comment, was it not?

9 MS. FOSTER: I won't agree with that
10 characterization.

11 COMMISSIONER BLOOM: I will simply add
12 that I don't have a great recollection of it but,
13 Ms. Foster, I believe you asked me during a break if
14 you could provide me with an answer to a question I
15 had. I did not ask you for it. I did not ask you
16 to contact Chesapeake and bring me a letter or
17 anything like that.

18 MS. FOSTER: It does state on the record
19 that I said I represented Chesapeake Energy and I
20 can get you the information when we were here on the
21 record and you responded, "Thank you, thank you."
22 After, when we had a break, I asked you, "How is it
23 that you would like to have this information" and
24 you said, "Just a letter would be fine." But now
25 that's being characterized as public comment.

1 Apparently I missed something somewhere. But again,
2 you know, you are putting time restraints on the
3 public that wants to come in and make comments. Yet
4 OGAP does not have any time restraints whatsoever on
5 the evidence they are putting in through Ms. Martin,
6 who we don't know who she is and what she is going
7 to talk about.

8 MR. SMITH: I understand your frustration
9 with rebuttal evidence. The fact nonetheless
10 remains that rebuttal evidence, exhibits and
11 testimony is contemplated by the rules and there is
12 no requirement of notice on it. Maybe there should
13 be. It was perfectly gentlemanly and lady-like of
14 you all to do that. Mr. Jantz did not. It's not
15 within the commission's purview, I think, to require
16 that he behave gentlemanly.

17 MR. JANTZ: Although just for the record,
18 Mr. Smith, once we have the remainder of
19 Mr. Mullins' direct testimony I certainly will
20 provide that information to Ms. Foster and Mr. Carr.

21 MS. FOSTER: And the other parties. There
22 are other parties besides us.

23 MR. JANTZ: I appreciate you looking after
24 them, Ms. Foster, and I will provide the information
25 to them as well.

1 CHAIRPERSON BAILEY: Mr. Fort? You would
2 like to make a comment?

3 MR. FORT: Yes, I would. Again, we don't
4 know what OGAP -- other than what I have heard that
5 she is going to testify regarding Mr. Mullins'
6 modeling. There's a case in New Mexico, and I
7 realize that we are not subject to the rules of
8 evidence or civil procedure in this proceeding.
9 However, it does use the term, not just rebuttal, it
10 says only rebuttal. Here is how the courts handled
11 that.

12 This is State v. Wilson 130 N.M. 319.
13 This is an interesting case because they cite
14 another case from Maryland where there was a
15 jailhouse confession made by the defendant to a
16 cellmate. What the State did was they entered that
17 as rebuttal, not as part of their direct testimony
18 in their case to prosecute the defendant. What the
19 Court held there was, and it's cited in New Mexico
20 because they used that as a basis to go on and say
21 why this was one different, and I will explain that
22 as well.

23 But they said because it could have been
24 presented in the prosecution's case-in-chief and it
25 bore on the issue of the defendant's guilt, the

1 issue at question. If you have rebuttal -- for
2 instance, let me give you an example of how I see
3 where you will hear objections from me on modeling.
4 It's one thing to -- and I will use as example
5 Mr. Mullins, because the real issue was what was the
6 depth of the cover, how that was different from
7 '07/'09 to '12.

8 And that was his primary thing and he
9 said, "Here is my output." I believe that based on
10 this case, because the issue of output bears
11 directly to the issues in this case, i.e. these
12 changes in the rules, that this expert -- and I
13 don't know where she is going to be qualified
14 because there have been a lot of experts who
15 testified here and they cover a broad range -- can
16 only talk about where she would contend would be
17 input into the model.

18 She cannot tell you, "Here is what my
19 model would show," because that is direct evidence
20 of the issue that's present before this body. It's
21 a very limited -- she has got to say, "I disagree
22 with Mr. Mullins because I think it should be 46
23 inches and here is why," but she can't tell you what
24 the outcome is. That should have been in her
25 case-in-chief.

1 Now, here is what New Mexico did with this
2 case. They talked about whether or not the evidence
3 in this case -- the defense had put up two theories
4 in New Mexico about how the defendant or the victim,
5 excuse me, the victim, not the defendant, how the
6 victim suffered his injuries. And they put it on
7 and said, "Oh, that's not a problem because that
8 doesn't bear directly on the issue of whether or not
9 the defendant was guilty or not." So it has -- if
10 it could have been in their case-in-chief and those
11 injuries would have not been in the case-in-chief
12 for the prosecutor's standpoint, then it can be
13 brought up on rebuttal.

14 Rebuttal is very limited. We are not
15 talking about spending a whole day on rebuttal.
16 Because if it is, if that's their contention about
17 where we are going to be, I can tell you it should
18 have been brought up on their case-in-chief. They
19 made a tactical decision but they don't get to
20 present another model. They don't get to present
21 the outcomes of what their model might show. They
22 may contest what his input is, but that's it.

23 MR. SMITH: I would like to make a
24 suggestion.

25 CHAIRPERSON BAILEY: Yes.

1 MR. SMITH: We have already heard that
2 Mr. Jantz will inform you of what the anticipated
3 testimony is after he has heard Mr. Mullins'
4 completed testimony. Right now everyone is
5 speculating as to what the rebuttal is going to be,
6 and obviously none of us know that. All we know is
7 Mr. Jantz wants to put on rebuttal testimony and
8 Mr. Jantz has the right to do that. So why don't we
9 hear argument on whether the particular testimony
10 that Mr. Jantz wants to put on, whether that is
11 rebuttal testimony after he has told everyone what
12 that's going to be, which will be after Mr. Mullins'
13 testimony. I know that makes it cumbersome, but
14 based on what we have heard here today I don't know
15 how it can be done any more fairly. Of course, what
16 I think doesn't make a lot of difference because you
17 guys have to decide.

18 COMMISSIONER BALCH: Their rebuttal
19 witness doesn't have to be here for Mr. Mullins'
20 direct testimony?

21 MR. SMITH: No, if they intend to rebut --
22 we know that much --

23 COMMISSIONER BALCH: Their witness hasn't
24 had to have been here the whole time.

25 MR. SMITH: Could have been. That would

1 have been their choice. But if they want their
2 witness to be here during Mr. Mullins' testimony, I
3 think they have the right to do that.

4 CHAIRPERSON BAILEY: So with your
5 suggestion, we would have Mr. Mullins present his
6 direct testimony. Then we would require Mr. Jantz
7 to submit a document, a brief on what the
8 rebuttal -- who the rebuttal witness is, their
9 qualifications?

10 MR. SMITH: Well, I don't know that we
11 want to require Mr. Jantz to do that. He has said
12 that he would and it makes more sense to me. The
13 reason I am suggesting it is because it will avoid
14 testimony/objection, testimony/objection. We can
15 argue generally about what portions Mr. Jantz wants
16 to put on that are allowable and that are not
17 allowable as rebuttal testimony. The
18 qualifications, I don't know that we are in a
19 position to require, although I think it would be a
20 good idea for him to give the qualifications of his
21 witness.

22 CHAIRPERSON BAILEY: So we can request
23 Mr. Jantz to give us a brief on what the rebuttal
24 testimony should cover?

25 MR. SMITH: Something like a statement of

1 intent.

2 CHAIRPERSON BAILEY: Statement of intent.

3 At a certain date after Mr. Mullins' direct
4 testimony and prior to the date for our next meeting
5 in August?

6 MR. SMITH: I think that's right.

7 Although let me just ask Mr. Jantz a question. The
8 testimony that Mr. Mullins is going to be giving is
9 relatively specific and limited. You know what that
10 is?

11 MR. JANTZ: Right.

12 MR. SMITH: At least the topic of it?

13 MR. JANTZ: Right.

14 MR. SMITH: Would it be fair to say that
15 it would not take you very long to be able to
16 produce a statement of intent once you've heard
17 that?

18 MR. JANTZ: I think that's correct.
19 Actually, as long as we get -- it's my understanding
20 Mr. Mullins is going to produce model runs based on
21 this additional data; is that right? Is that
22 understanding correct?

23 MS. FOSTER: Yes. He is basically going
24 to produce a one-page document that says "This is
25 what the number is three feet away from when the

1 contaminant hits the groundwater source," which was
2 what was requested, as to the different levels.
3 It's a one-page thing and he will provide you copies
4 of the runs as well. We can get that to parties
5 early next week. I can get that by Monday
6 afternoon.

7 Again, his testimony is going to be
8 extremely narrow. I don't see why it is that
9 Mr. Jantz can't tell us and give us his information
10 as to the rest of the testimony at this time so we
11 can at least prepare and maybe go next week.
12 Because Mr. Mullins' testimony again is in response
13 to a request by a commissioner. It's a very narrow
14 request and he is going to provide that information
15 in a timely manner on Monday.

16 MR. SMITH: I understand that. I'm not
17 prepared to recommend to the commission, though,
18 that they require a true revelation of rebuttal
19 testimony until all the testimony that is going to
20 be rebutted has been heard.

21 MR. JANTZ: Madam Chair, members of the
22 commission, I think to make things easier for
23 everybody, I think if we have Mr. Mullins' data that
24 he intends to produce for the remainder of his
25 direct, we can get a general notice of our rebuttal

1 testimonying to the parties within a week of that
2 time easily along with the credentials of our expert
3 and we can make our determinations about whether it
4 constitutes rebuttal at that point.

5 MS. FOSTER: That's an additional delay.

6 MR. SMITH: I would like to say, though,
7 that with respect to the general description, I
8 think it needs to be specific enough that people can
9 look at it and make a good faith determination and
10 argument about whether it truly is rebuttal. If
11 it's too general, it won't move things along. So I
12 think you need to make it specific enough that
13 people can tell whether they really think it's
14 rebuttal or not.

15 MS. FOSTER: I would say as a proponent to
16 this case, I would like to have the last word. If
17 this witness is intending to talk about Mr. Mullins'
18 testimony, I have the right to put him back on to
19 rebut whatever she comes up with.

20 MR. SMITH: That's fine.

21 MS. FOSTER: Again, in terms of timing, I
22 believe that Ms. Martin was ready to go on the stand
23 this afternoon. Why is it again that we need
24 another week delay?

25 MR. SMITH: I was suggesting that so we

1 could avoid testimony/objection,
2 testimony/objection. My other question to you is
3 did you just want the last word on testimony?

4 MS. FOSTER: Mr. Mullins' testimony.

5 MR. SMITH: That was it?

6 MS. FOSTER: I'm assuming that you will
7 apply the same rules to me on rebuttal, right? That
8 I am rebutting whatever Ms. Martin is saying.

9 MR. SMITH: That's right.

10 MS. FOSTER: As the proponent of the case
11 I get the last word.

12 MR. SMITH: Just with respect to
13 Ms. Martin's testimony.

14 MS. FOSTER: Correct. I don't want to
15 fight with you.

16 COMMISSIONER BLOOM: Mr. Smith, Madam
17 Chair, I think maybe at one point this week I heard
18 Dr. Neeper ask of us whether there could be a
19 rebuttal of a rebuttal. Did we reach a decision on
20 that or do we expect rebuttals on rebuttals?

21 MR. SMITH: I think we said yes, but given
22 this, you might want to reconsider, Madam Chair.
23 One rebuttal has been pretty painful.

24 CHAIRPERSON BAILEY: And we haven't even
25 gotten there yet. All right. Where do we stand

1 here? As far as Ms. Martin's rebuttal, she cannot
2 do that until she has heard Mr. Mullins or until she
3 has received Mr. Mullins' brief, the document that
4 he is going to produce? He will be able to produce
5 that next week.

6 MS. FOSTER: Monday.

7 CHAIRPERSON BAILEY: The problem with
8 meeting next week was because of Ms. Martin, but if
9 we get that information from Mr. Mullins on Monday,
10 we could proceed with Dr. Buchanan. We could have
11 Dr. Neeper and that will be all that we would be
12 able to hear next week would be Dr. Neeper's
13 rebuttal; is that correct?

14 MS. FOSTER: As well as closing out
15 Mr. Mullins' testimony. Actually, she needs to be
16 here for that. Mr. Mullins is available next week.

17 MR. NEEPER: Madam Chair, I may be missing
18 something as to why Dr. Buchanan couldn't give his
19 rebuttal at any time since my testimony is finished,
20 and if I had questions I could ask them in cross.
21 If it were necessary, I could then appeal for a
22 rebuttal of a rebuttal. That might not be necessary
23 at all. Is there anything stopping that process?
24 What seems to be stopping it is Mr. Mullins'
25 testimony, but I think the discussion between Dr.

1 Buchanan and myself does not depend on Mr. Mullins'
2 testimony.

3 CHAIRPERSON BAILEY: Mr. Carr invoked the
4 right --

5 MR. CARR: I'm not sure we could finish
6 this afternoon.

7 CHAIRPERSON BAILEY: No, I know we would
8 not be able to this afternoon.

9 MR. CARR: We prefer to do it at one time
10 and we prefer to do it last. We defined the areas
11 we are going to address and we think that if we
12 don't do this and say we are going last and do it
13 once, we will do it twice because there will be a
14 rebuttal on a rebuttal and a rebuttal to the
15 rebuttal to the rebuttal to the direct and that
16 doesn't serve anything.

17 CHAIRPERSON BAILEY: You are requesting to
18 go last, which means after Dr. Neeper. Dr.
19 Buchanan's not having to do with modeling or
20 anything else.

21 MR. SMITH: He also does not want to split
22 his witness' testimony, which is fair. People split
23 their witness' testimony all the time, and you know
24 it.

25 (Note: The commission talks inaudibly.)

1 COMMISSIONER BALCH: We might be able to
2 finish -- with the cooperation of Mr. Jantz, we
3 might be able to finish at least direct testimony
4 next week.

5 MR. SMITH: You mean the direct rebuttal?

6 COMMISSIONER BALCH: No, the direct
7 testimony. There's one remaining piece from
8 Mr. Mullins.

9 MR. SMITH: Yeah, you could do that
10 because Mr. Jantz has already said that he can
11 characterize -- maybe we should ask. Mr. Jantz, you
12 said that you can characterize adequately the nature
13 of Ms. Martin's testimony based solely on a document
14 produced by Mr. Mullins on Monday. Does that mean
15 that Ms. Martin does not have to be here during
16 Mr. Mullins' testimony?

17 MR. JANTZ: I think that based on my
18 previous understanding of what sort of notice you
19 were trying to get at in terms of what Ms. Martin
20 would be testifying to, we could provide at least
21 some notice of rebuttal based solely on that
22 document. If you want to get into very specific
23 notice, obviously Ms. Martin would need to hear
24 Mr. Mullins' testimony. She doesn't necessarily
25 need to be here if we could have a way that she

1 could listen to Mr. Mullins' testimony on the phone.
2 I think that would be sufficient.

3 MR. SMITH: I think the controlling
4 feature to whatever you produce for people to review
5 is that its character has to be such that people can
6 review it and determine that this topic they think
7 is not rebuttal and this topic they think is, so
8 that can be disposed of prior to her taking the
9 stand and you can have smooth testimony without
10 constant objection.

11 MR. JANTZ: I think we can do that based
12 on the document that Mr. Mullins produces.

13 MR. SMITH: The question is now that we
14 know that, the question is does your witness have to
15 be here in order to hear Mr. Mullins' testimony?

16 MR. JANTZ: Physically here? Or just be
17 able to listen to the testimony?

18 MR. SMITH: Either one.

19 CHAIRPERSON BAILEY: She can listen by
20 telephone.

21 MR. SMITH: Do you have an objection to
22 her attending by telephone?

23 CHAIRPERSON BAILEY: No objection.

24 MR. JANTZ: If she can listen to
25 Mr. Mullins' testimony via telephone, just as long

1 as she gets the information, I think that's okay.

2 MR. SMITH: Is that all right with
3 everybody else?

4 CHAIRPERSON BAILEY: So next week we will
5 be able to hear Mr. Mullins. Dr. Neeper, your
6 rebuttal testimony has to do with rebuttal of
7 Mr. Mullins or rebuttal of Dr. Buchanan?

8 MR. NEEPER: Rebuttal of Mr. Mullins. I
9 am trying very much to handle any discussion between
10 Dr. Buchanan and myself as part of cross-examination
11 without going into yet another rebuttal for the
12 convenience of the commission and the commission of
13 my colleagues.

14 CHAIRPERSON BAILEY: Following
15 Mr. Mullins' direct testimony would you then be able
16 to provide your rebuttal testimony?

17 MR. NEEPER: I would be pleased to provide
18 it at any time because I do not think it would be
19 affected by what I am expecting him to present next.

20 CHAIRPERSON BAILEY: So we can meet at
21 least one day next week to have that portion taken
22 care of. Then following your rebuttal we can have
23 Dr. Buchanan?

24 MR. CARR: We could do that if Mr. Jantz
25 doesn't want to address those issues, but if they

1 are going to be addressed by Ms. Martin we want to
2 go last.

3 CHAIRPERSON BAILEY: Let's find a day next
4 week that we will be able to take care of this.
5 Monday, you are not available?

6 MR. SMITH: No, I'm sorry, I am not.

7 CHAIRPERSON BAILEY: Tuesday.

8 MR. SMITH: I am not available.

9 CHAIRPERSON BAILEY: Wednesday people are
10 not available? Porter Hall is not available
11 Wednesday or Thursday.

12 MR. JANTZ: I am not available Monday,
13 Tuesday or Thursday.

14 CHAIRPERSON BAILEY: Friday?

15 MR. JANTZ: I am available.

16 MR. CARR: That's the day I'm out. I'm
17 sorry.

18 COMMISSIONER BALCH: Is there an alternate
19 location for Wednesday?

20 COMMISSIONER BLOOM: Morgan Hall? I can
21 call and check.

22 CHAIRPERSON BAILEY: Let's take a short
23 break and you can call to see if Morgan Hall is
24 available.

25 MR. SMITH: Let's make sure all other

1 parties are available on the 27th.

2 CHAIRPERSON BAILEY: Who is not available
3 on Wednesday the 27th?

4 COMMISSIONER BLOOM: 9:00 to 5:00 at
5 Morgan Hall?

6 CHAIRPERSON BAILEY: Let's take a
7 ten-minute break while Commissioner Bloom checks to
8 see the availability of Morgan Hall at the State
9 Land Office building.

10 (Note: The hearing stood in recess at
11 2:21 to 2:31.)

12 CHAIRPERSON BAILEY: Back on the record.
13 We have found a building, an auditorium to meet next
14 Wednesday at the State Land Office building down in
15 the basement for Morgan Hall. Parking is very
16 limited at that building. I suggest that you plan
17 on parking in the PERA parking lot which is up the
18 street on Old Santa Fe Trail across from the
19 Roundhouse. That is the closest public parking
20 place.

21 MR. FORT: Madam Chair, the last time I
22 had to go to the State Capitol, they have all of
23 those spaces where before you had some that were not
24 reserved for different offices, they are all
25 reserved now.

1 MS. FOSTER: There is a public parking
2 garage on the other side.

3 MR. DANGLER: Madam Chair, if I might
4 speak to the parking issue, we have supplemental
5 parking now for the summer and it's actually across
6 the street from us there's a hotel complex and
7 there's parking behind that. You go through that
8 parking lot and behind it. There's another parking
9 lot. It's not a huge space but we have parking
10 there. It's the Desert Inn.

11 COMMISSIONER BLOOM: I don't know that we
12 can offer the Desert Inn parking yet. You can get a
13 few cars but --

14 UNIDENTIFIED SPEAKER: We will have to
15 park in PERA.

16 COMMISSIONER BLOOM: Or behind the Capitol
17 in the new parking garage. If someone has a
18 mobility issue we can get you in.

19 CHAIRPERSON BAILEY: So we will continue
20 Wednesday, 9:00 o'clock, State Land Office building,
21 Morgan Hall, to Mr. Mullins direct testimony.
22 Ms. Martin. There may be issues with having the
23 telephone line there so cell phones may have to be
24 the means.

25 UNIDENTIFIED SPEAKER: We will try to

1 Skype.

2 MS. FOSTER: Concerning Mr. Mullins'
3 exhibit, I will just have him hold it until he comes
4 and testifies on Wednesday.

5 UNIDENTIFIED SPEAKER: I will be sitting
6 in the Starbucks in Indianapolis so I won't have
7 access to a fax machine but it could be E-mailed to
8 me.

9 MR. SMITH: The thing about producing the
10 document exhibit on Monday is it gives --

11 MS. FOSTER: Gives them enough time to
12 prepare.

13 MR. SMITH: You are a last word freak.
14 No, it gives them the time that they will need to
15 generate the document that you are looking for that
16 identifies her testimony. That was what I was going
17 to say.

18 MS. FOSTER: I will bring it in on
19 Wednesday along with Mr. Mullins' testimony.

20 MR. SMITH: I will leave it up to Madam
21 Chair.

22 COMMISSIONER BALCH: I would like to see
23 it.

24 MS. FOSTER: I would be more than happy
25 to.

1 CHAIRPERSON BAILEY: E-mail Mr. Mullins'
2 results and the document on Monday. The commission
3 will have the chance to be able to look at that as
4 well as all counsel so that we will be prepared in
5 our questions to Mr. Mullins.

6 MS. FOSTER: I will do that.

7 CHAIRPERSON BAILEY: Thank you. So at
8 this point I believe we can adjourn.

9 MR. CARR: I am not trying to do anything
10 but ask if it is all right for Dr. Buchanan to go
11 fishing next Wednesday. Is there any reason he
12 would need to be here?

13 CHAIRPERSON BAILEY: After we are finished
14 with Mr. Mullins on Wednesday, it would be very nice
15 to have Dr. Neeper give his rebuttal because you
16 will be able and prepared by that time, will you
17 not?

18 MR. NEEPER: I am prepared now. You mean
19 for the short rebuttal of Mr. Mullins?

20 CHAIRPERSON BAILEY: And/or for any
21 rebuttal you have for other witnesses.

22 MR. CARR: Yes.

23 DR. NEEPER: The only other question would
24 be with Dr. Buchanan's -- whatever he may wish to
25 say about mine. I don't have other rebuttal at this

1 point.

2 CHAIRPERSON BAILEY: So Mr. Mullins'
3 testimony and examination will be a very short
4 period of time. Dr. Neeper's will be a very short
5 period of time but you don't want Dr. Buchanan to go
6 until at what point?

7 MR. CARR: I think he needs to go last.

8 CHAIRPERSON BAILEY: Last of all rebuttal
9 witnesses?

10 MR. CARR: That's correct.

11 CHAIRPERSON BAILEY: Not just rebutting
12 the specific --

13 MR. CARR: No. Because we are the
14 applicant. If anything is said by OGAP I want to be
15 able to rebut it.

16 CHAIRPERSON BAILEY: I wanted that
17 clarification.

18 COMMISSIONER BLOOM: Just to make sure I
19 have this right. We will have Mr. Mullins finish
20 his direct and then we will have Dr. Neeper's
21 rebuttal of Mr. Mullins on Wednesday and then at a
22 future date we will have OGAP's rebuttal of
23 Mr. Mullins and we will end with Dr. Buchanan's
24 rebuttal of Dr. Neeper?

25 CHAIRPERSON BAILEY: Sometime in August.

1 COMMISSIONER BLOOM: Can we hash out an
2 August date before we adjourn?

3 CHAIRPERSON BAILEY: That's a good idea.

4 (Note: Discussion regarding room
5 availability, et cetera.)

6 CHAIRPERSON BAILEY: August 16th is the
7 next regularly scheduled commission hearing in
8 August so we can go ahead and take August 16th. All
9 witnesses will be available at that time, all
10 attorneys? Mr. Fort? Please tell me yes.

11 MR. FORT: I will be available the 16th.
12 I also suggest if we have to have additional time
13 let's be here the 17th and get this thing over with.

14 CHAIRPERSON BAILEY: So we can schedule
15 August 16th and 17th.

16 MR. NEEPER: I didn't have my hand up
17 there. Without getting to where I can get out a
18 calendar I cannot guarantee the 16th and 17th. I
19 know somewhere I have the last three weeks of August
20 committed to being elsewhere. Whether that's going
21 to intercept the 16th is very close. I cannot tell
22 you right now without going home and pulling the
23 calendar off the wall whether I'm gone on the 16th.

24 CHAIRPERSON BAILEY: Let's schedule it and
25 make sure we get your testimony.

1 MR. SMITH: I think he wants to be here.

2 CHAIRPERSON BAILEY: At this point because
3 of uncertain calendars the week of August 13th
4 through the 17th, if we could all reserve that date,
5 that week. And then if Dr. Neeper is unable to make
6 August 16th, surely we can wait to see if we can
7 move it to the 13th, 14th or 15th.

8 MR. NEEPER: I can have an answer within
9 an hour after I get home.

10 CHAIRPERSON BAILEY: Let's reserve it, and
11 if you will please communicate with Ms. Davidson as
12 to your availability so we can set that date.

13 MS. FOSTER: Madam Chairwoman, one more
14 thing. In light of the fact that Mr. Mullins is
15 producing his exhibits in enough time for OGAP and
16 other parties to prepare for the hearing next week,
17 I would ask that if OGAP has exhibits on their
18 prehearing statement when they tell us effectively
19 what the rebuttal is going to be, if she has any
20 pieces of paper or any exhibits at that time she
21 produce them so we can adequately prepare for her
22 testimony as well.

23 MR. JANTZ: Absolutely. No problem.

24 CHAIRPERSON BAILEY: Thank you.

25 MR. SMITH: I would like -- I want to

1 state one thing for clarification. The point of the
2 production on Monday of Mr. Mullins' exhibit is not
3 to give OGAP the opportunity to prepare. It is in
4 order to allow OGAP to prepare the statement of
5 intent that you want on his rebuttal testimony,
6 okay? I just want to make the purpose of that
7 clear.

8 CHAIRPERSON BAILEY: Mr. Smith, would you
9 please repeat what the commission will be asking of
10 all attorneys at the conclusion of the hearing so
11 that they can begin their preparation for drafting
12 the findings and conclusions?

13 MR. SMITH: Yes. If this is different
14 from what I told you the last time, tell me, but I
15 don't think it will be. What we are looking for is
16 findings and conclusions with that citations to the
17 record, transcripts, exhibits. Also legal argument
18 that you believe supports either -- including an
19 amendment that you are in favor of or excluding an
20 amendment that you are not in favor of and a closing
21 argument. How you guys arrange that is entirely up
22 to you, but, of course, I think you want to do it in
23 the way that makes the access to not only your
24 position but your citations to the record the
25 easiest. I don't think it's necessary for you to go

1 change by change and say, you know, you need to make
2 this change because of X, Y Z. You might be able to
3 group them, X, Y Z supports this change.

4 MR. CARR: Did I hear you say that we will
5 be providing written closing statements?

6 MR. SMITH: I think that's best.

7 DR. BARTLETT: Madam Chair, do I
8 understand right there will be no more testimony or
9 rebuttal testimony dealing with economics? All
10 that's coming now is about modeling; is that
11 correct? Yes, there will be final arguments about
12 economics, I understand that, but there's no more
13 testimony or rebuttal of testimony or
14 cross-examination about economics?

15 CHAIRPERSON BAILEY: We have had direct
16 testimony concerning economics. Rebuttal of
17 testimony on economics is allowed.

18 DR. BARTLETT: But that's already
19 happened.

20 CHAIRPERSON BAILEY: The direct testimony
21 has happened. The cross-examination has happened.
22 But we have not had rebuttal.

23 DR. BARTLETT: We had something called
24 rebuttal.

25 MR. SMITH: Does anyone here intend to put

1 on any sort of economic testimony in the form of
2 rebuttal?

3 MR. JANTZ: OGAP doesn't anticipate any
4 rebuttal testimony on economics.

5 MS. GERHOLT: No.

6 DR. BARTLETT: What did you say, Eric?

7 MR. JANTZ: We don't anticipate giving
8 rebuttal testimony on economics.

9 DR. BARTLETT: So my statement is true?

10 CHAIRPERSON BAILEY: Yes.

11 DR. BARTLETT: Thank you.

12 COMMISSIONER BLOOM: Madam Chair, a
13 question, a comment. The closing statements be
14 written but will we hear them at some point or
15 simply read them? And might we want to think about
16 a week for deliberation?

17 CHAIRPERSON BAILEY: We have to provide at
18 least two weeks for the transcripts following
19 rebuttal. Rebuttal could be ending August 17th at
20 the very latest.

21 MR. SMITH: This is not going to be an
22 easy findings and conclusions or closing to write.
23 The lawyers --

24 COMMISSIONER BALCH: Actually, it's four
25 weeks past the end of what we anticipate to be the

1 end of rebuttal.

2 MR. SMITH: You have two weeks that we
3 have to wait then for the transcript and then the
4 lawyers have to have time to get their stuff
5 written. I mean, you might want to seek their
6 counsel on that.

7 CHAIRPERSON BAILEY: When would be a
8 reasonable time period for you to present your --

9 MR. CARR: Four weeks. I mean, I don't
10 know how --

11 MS. FOSTER: We have a lot of the
12 transcript already.

13 MR. CARR: I'm glad you didn't change it
14 very much. I'm trying to stay current as we go
15 through the hearing, so it will not take long once
16 the last transcript is in.

17 CHAIRPERSON BAILEY: Mr. Jantz, are you of
18 the same?

19 MR. JANTZ: We can do it in 15 days.

20 CHAIRPERSON BAILEY: So the commission
21 could actually begin deliberations on September
22 13th.

23 MR. SMITH: As long as you have the time
24 to -- you need to be able to read their stuff before
25 you start. You don't want to start deliberation and

1 be reading in the middle.

2 COMMISSIONER BALCH: I will want probably
3 a week or more, maybe a day or two more, to prepare
4 myself. The week of the 17th or the week of the
5 24th?

6 CHAIRPERSON BAILEY: September 17th?

7 MR. JANTZ: May I ask a question? Will
8 the commission have the transcripts at that point
9 within the two weeks?

10 CHAIRPERSON BAILEY: We get them no
11 earlier than you do.

12 MR. JANTZ: Where I was going is would
13 they be publicly available at that time?

14 CHAIRPERSON BAILEY: It will be posted on
15 the website as soon as possible. So the commission
16 will deliberate on the week of the 24th.

17 MR. SMITH: People are relying on the
18 posting. If you get closing statements on the 1st
19 it doesn't necessarily mean you will be able to have
20 them posted on the 1st, does it?

21 CHAIRPERSON BAILEY: Okay. On the 17th of
22 September. We will continue this on Wednesday.


23 (Note: The hearing was adjourned for the
24 day at 2:48.)

25

REPORTER'S CERTIFICATE

I, JAN GIBSON, Certified Court Reporter for the State of New Mexico, do hereby certify that I reported the foregoing proceedings in stenographic shorthand and that the foregoing pages are a true and correct transcript of those proceedings and was reduced to printed form under my direct supervision.

I FURTHER CERTIFY that I am neither employed by nor related to any of the parties or attorneys in this case and that I have no interest in the final disposition of this case.


JAN GIBSON, CCR-RPR-CRR
New Mexico CCR No. 194
License Expires: 12/31/12