

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 13

September 25, 2012  
9:00 a.m.  
Wendell Chino Building  
1220 South St. Francis Drive  
Porter Hall, Room 102  
Santa Fe, New Mexico

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GREG BLOOM, Commissioner

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(Note: In session at 9:00).

CHAIRWOMAN BAILEY: It's 9:02 on Tuesday, September 25th. This is a meeting of the Oil Conservation Commission. We are in the process of deliberating Consolidated Cases 14784 and 14785, which is the application of New Mexico Oil and Gas Association and the Independent Petroleum Association of New Mexico for revision of the current Rule 17.

We are just continuing the deliberations from yesterday, so we are now back on the record ready to go to where we stopped for that the day, which is deliberation of 19.15.17.9D having to do with filing the permit application.

First suggestion is to strike the language "and exceptions" pursuant to 19.15.17 NMAC. But to continue with the rest of the sentence, "An

1 operator shall file an application to request  
2 approval to construct a permanent pit," and striking  
3 again the same language, "or request an exception  
4 pursuant to 19.15.17 NMAC and providing a copy to  
5 the appropriate division district office."

6 Now, this is saying that the permanent  
7 pits are processed in Santa Fe by the Environmental  
8 Bureau with copies of the permit application or  
9 approval given to the appropriate division district  
10 office.

11 The current reference that is being made  
12 is to the exceptions portion of the current rule,  
13 and I expect that we will be hitting that section  
14 sometime later this week.

15 So do you have an opinion on deletion of  
16 the words "and exceptions requested pursuant to  
17 19.15.17.15"?

18 COMMISSIONER BALCH: Really it seems to be  
19 cleaning up and making it -- making the rule defined  
20 in areas where it's not well defined, so cleaning  
21 up, I think.

22 COMMISSIONER BLOOM: Is this just for  
23 exceptions for permanent pits?

24 CHAIRWOMAN BAILEY: Yes, because the title  
25 is Permanent Pits.

1           COMMISSIONER BALCH: What I was trying to  
2 say is I think the proposed amendments have changed  
3 and deal with exceptions and variances in a  
4 completely different section instead of spreading  
5 them throughout the rule.

6           COMMISSIONER BLOOM: Yes. Then I would  
7 agree we should leave the first one and the second  
8 one. Yeah, leave both of them.

9           CHAIRWOMAN BAILEY: Okay. And Paragraph 2  
10 under D strikes, "The application to temporary pits,  
11 closed-loop systems and below-grade tanks" and has  
12 it apply only to multi-well fluid management pits  
13 for requesting use in construction of the multi-well  
14 fluid management pit and how they should go about  
15 doing that with the district office.

16           COMMISSIONER BLOOM: We are removing the  
17 language because we are no longer permitting  
18 closed-loop systems and below-grade tanks.

19           CHAIRWOMAN BAILEY: That is correct.

20           COMMISSIONER BALCH: And they are adding a  
21 new category of multi-well fluid management pits.

22           CHAIRWOMAN BAILEY: We all agree to remove  
23 the language that's marked out?

24           COMMISSIONER BLOOM: Yes, agreed.

25           COMMISSIONER BALCH: Yes.

1 CHAIRWOMAN BAILEY: Do commissioners  
2 choose to go back to the areas that we have delayed  
3 or shall we go forward into the next Section 10?  
4 What is your preference?

5 COMMISSIONER BLOOM: I would prefer to  
6 move forward. We will be dealing with some of the  
7 same issues that were on the table yesterday in  
8 terms of low chloride fluids and siting issues.  
9 That could go either way, but I think going forward  
10 we would get into some interesting territory.

11 COMMISSIONER BALCH: I concur with  
12 Commissioner Bloom. I think discussing the issues  
13 in text will bring greater clarity.

14 CHAIRWOMAN BAILEY: I agree, but before we  
15 leave the section we need to have a motion to  
16 approve the areas that we have all indicated we  
17 agree on. Do I hear such a motion?

18 COMMISSIONER BALCH: I will make that  
19 motion.

20 COMMISSIONER BLOOM: I second the motion.

21 CHAIRWOMAN BAILEY: All in favor? Aye.

22 COMMISSIONER BLOOM: Aye.

23 COMMISSIONER BALCH: Aye.

24 CHAIRWOMAN BAILEY: None opposed. Now we  
25 go into 19.15.17.10, Siting Requirements, where the

1 first suggestion is in A1 to add the application to  
2 a multi-well fluid management pit, as far as the  
3 siting requirements are concerned, along with the  
4 temporary pit. Do we agree that we need to add the  
5 multi-well fluid management pit to siting  
6 requirements?

7 COMMISSIONER BLOOM: Yes, I agree to that.

8 COMMISSIONER BALCH: I think that there  
9 was -- we maybe ought to discuss this a little bit.  
10 There was testimony and cross-examination to the  
11 extent that perhaps multi-well management pits  
12 should have different siting criteria than other  
13 temporary pits, even though they are different in  
14 size.

15 Before we include that, I would like to  
16 have a discussion on whether we think they should be  
17 lumped together or should be a separate category.

18 COMMISSIONER BLOOM: Commissioner Balch, I  
19 would agree with you, and perhaps we include  
20 multi-well fluid management pit here, and if we need  
21 different siting requirements we could list those  
22 underneath or perhaps put them in separate sections  
23 as we have done with permanent pits.

24 COMMISSIONER BALCH: Looks like the way  
25 it's done right now, under A you have 1, which was

1 previously temporary pits and is now temporary pits  
2 and multi-well pits, and then you have 2, which is  
3 permanent pits. So we can maybe pass by it now and  
4 discuss later about siting criteria.

5 CHAIRWOMAN BAILEY: Okay. Because --

6 COMMISSIONER BALCH: And see if it needs  
7 its own category or not.

8 CHAIRWOMAN BAILEY: So we will discuss the  
9 rest of A1 with the understanding that at this point  
10 it only applies to temporary pits and would not add  
11 any multi-well fluid management pits as part of the  
12 discussion of A1, correct?

13 COMMISSIONER BLOOM: Correct.

14 COMMISSIONER BALCH: Sure, but I think if  
15 the opportunity arises to discuss siting criteria  
16 perhaps both should be discussed at the same time  
17 because in some senses they are similar in that they  
18 are not permanent, but the scale and contents of the  
19 pits are different.

20 CHAIRWOMAN BAILEY: Because they are a  
21 hybrid.

22 COMMISSIONER BALCH: Yes.

23 CHAIRWOMAN BAILEY: Then A1A, the first  
24 suggested change has to do with specifying  
25 unconfined groundwater. Now, we deleted any kind of

1 reference to distinctions between confined and  
2 unconfined.

3 COMMISSIONER BLOOM: Madam Chair, might I  
4 suggest that we do a search on the document and  
5 remove unconfined and confined throughout?

6 CHAIRWOMAN BAILEY: Yes. Theresa will do  
7 that at a later time.

8 COMMISSIONER BLOOM: Very good.

9 CHAIRWOMAN BAILEY: The next suggested  
10 change is to remove the reference to the temporary  
11 pit, which would make it applicable to both the  
12 temporary and multi-well fluid management pits so we  
13 can't really do that at this point.

14 COMMISSIONER BALCH: I think you probably  
15 can. If we conclude that they are the same animal  
16 in terms of siting, it doesn't matter if you remove  
17 the word "temporary" or not. If you decide to have  
18 the third category for multi-well pits then you can  
19 duplicate all the text in that category and then  
20 modify criteria as necessary.

21 CHAIRWOMAN BAILEY: So we can come back to  
22 it?

23 COMMISSIONER BALCH: I think we can get  
24 rid of the word "temporary." It doesn't change the  
25 discussion.

1                   COMMISSIONER BLOOM: Because it's under a  
2 section on temporary pits?

3                   COMMISSIONER BALCH: Temporary and/or  
4 multi-well fluid management pits.

5                   CHAIRWOMAN BAILEY: Deleting the  
6 language "or below-grade tank" so we agree on this  
7 one?

8                   COMMISSIONER BALCH: Yes.

9                   COMMISSIONER BLOOM: I may have some  
10 reservations about that, depending on where this  
11 goes and what we see as an appropriate distance  
12 between groundwater and below-grade tank.

13                  CHAIRWOMAN BAILEY: Okay. We skipped over  
14 the distance between groundwater and the bottom of  
15 the pit or the tank, and that's probably up for some  
16 discussion on whether or not we change the current  
17 requirement for 50 feet to the proposed 25 feet.

18                  COMMISSIONER BALCH: As I recall  
19 correctly, I think we still have a discussion on low  
20 chloride fluids.

21                  CHAIRWOMAN BAILEY: Yes. Because this  
22 paragraph as it's presented would only apply to low  
23 chloride fluid. Otherwise, where unconfined is less  
24 than 50 feet -- it's a complex paragraph.

25                  COMMISSIONER BLOOM: Madam Chair, might I

1 suggest we have a discussion about appropriate  
2 distances to groundwater and then perhaps after that  
3 low chloride fluids?

4 CHAIRWOMAN BAILEY: Okay.

5 COMMISSIONER BALCH: Those two discussions  
6 might well be entwined.

7 CHAIRWOMAN BAILEY: They clearly are.

8 COMMISSIONER BALCH: Seems that we reached  
9 a point where we have to have that discussion.

10 CHAIRWOMAN BAILEY: We have reached that  
11 point. Commissioner Bloom, do you have something?

12 COMMISSIONER BLOOM: Sure. I appreciate  
13 the work that Mr. Mullins did on his modeling, but  
14 I'm concerned that the model didn't reflect what we  
15 saw in some of the cases. One of Mr. Mullins'  
16 findings when we asked him to go back and do a  
17 little more calculation about fluids moving down 25  
18 feet and over 100 feet. He came back with findings  
19 of that occurring over a period of 950 years in  
20 Southeastern New Mexico and over 111,000 years in  
21 Northwestern New Mexico.

22 Mr. Mullins was asked by OGAP, Mr. Jantz,  
23 if he verified his results with real world data and  
24 he replied no, that he didn't look at a leak and  
25 then go back and try to recreate that through his

1 model.

2 I made a list of some of the real world  
3 releases and incidents that we discussed during the  
4 hearing, and Dr. Neeper spoke to going out during  
5 the time period of the last Pit Rule group in 2007  
6 with Marbob and looking at a couple sites, one of  
7 which at least Marbob had selected. And he spoke  
8 about well 49. This is on Transcript Page 1161. It  
9 was a well from 1976, 31 years old, and there he  
10 found the leading edge of the chloride plume at 25  
11 to 30 feet.

12 So we saw movement of about one foot per  
13 year, which is much greater than what Mr. Mullins'  
14 model said, which was somewhere in the range of  
15 approximately a millimeter a year. With Well 321,  
16 that well was spud in 2000 and closed. They went  
17 out six years later. There was a pit liner there,  
18 and the plume was seen or salt concentrations at 20  
19 feet and 30 to 35 feet.

20 The comment from Marbob, according to  
21 Dr. Neeper, was the liner didn't seem to do any good  
22 there. Dr. Neeper said he didn't know what it would  
23 look like in 100 years.

24 Interestingly, one of the things that he  
25 pointed out was salt rose to the top against the

1 inside of the top liner showing where the migration  
2 of salt was, having a discussion about liner caps.  
3 Testimony from Irvin Boyd, the rancher from Eunice,  
4 he gave a sworn statement. He works in the oil and  
5 gas industry to support his ranch and the pipeline  
6 there. He said he had a company, Lacy Resources,  
7 working on his ranch.

8 He asked for a closed-loop system.  
9 Interestingly enough, they said no, it would cost an  
10 extra \$30,000, so they went ahead and used a  
11 temporary pit and he got a call in 2007 during the  
12 Pit Rule hearing and they had seen -- they had a  
13 leak. The plume went down to about 30 feet.  
14 Groundwater was at 50 feet, so that was just within  
15 a period of a year or so.

16 Then we saw some other cases that were  
17 mentioned by Ms. Martin for OGAP. AP 81 Chevron  
18 Mark was spudded in January of 2006, excavated in  
19 January of '07. That was one year and -- about one  
20 year there. They found chlorides in the range of  
21 5,000 to 10,000 milligrams per kilogram at ten feet,  
22 so again, we are seeing a transit of ten feet in a  
23 period of about a year.

24 Pride Energy, which was spudded in  
25 November of 2004, was closed March of 2005. In 2008

1 a sample was taken, and in this case, interestingly  
2 the chloride plume moved 150 feet horizontally in  
3 that time. At 14 feet of depth the chloride plume  
4 was at a concentration of 1500 to 4200 milligrams  
5 per kilograms, 20 feet 450 to 2600 milligrams per  
6 kilogram and at 30 feet, 300 to 800. It looked like  
7 the plume stopped at 30 feet, so that was over about  
8 a four-year period and calculated at a velocity of  
9 about 90 feet per year, and horizontal travel was my  
10 estimate with 150 feet for about four years you're  
11 talking 35 to 40 feet a year.

12 There are a couple more wells that  
13 Ms. Martin brought up, but I think the cases that we  
14 are seeing in the real world, the movement of  
15 chlorides is sometimes at much greater velocity than  
16 what Mr. Mullins' model anticipated.

17 COMMISSIONER BALCH: I think that you are  
18 correct, but the context may be a little different  
19 than what Mr. Mullins was modeling and Dr. Neeper  
20 was modeling as well. It was transport through a  
21 dried out pit -- well, not necessarily a dried out  
22 pit in the case of Dr. Neeper's study. And the  
23 cases that you are talking about were brought up by  
24 Ms. Martin were more related to liquid spills. So  
25 liquid spills are really under the domain of a Spill

1 Rule, and I'm not sure how that interplays with what  
2 we are trying to discuss today. If we could have a  
3 clarification.

4 CHAIRWOMAN BAILEY: The reference to the  
5 Spill Rule comes into the closure plans in the  
6 requirements that this Commission will put for  
7 closure requirements, depending if there is evidence  
8 of a spill beneath a liner or beneath -- say a  
9 below-grade tank. That's where the spill and the  
10 abatement plans come into play.

11 COMMISSIONER BALCH: Right. So if there's  
12 a spill, I believe it's about five barrels?  
13 Anything above five barrels has to be -- it's a  
14 pretty small -- one to five barrels, I think. I  
15 don't know the exact number. But if there's a spill  
16 it has to be reported and then there will be some  
17 plan for digging out the soil.

18 So all the cases you discussed, I think,  
19 was before any of those rules were put into place.  
20 So if you did have a liquid spill in 1971, nobody  
21 would do anything about it. If you had a liquid  
22 spill now, then we have to go out there and  
23 sometimes at great expense dig out all the affected  
24 material.

25 I can think of at least one case in

1 Southeastern New Mexico where a reclamation like  
2 that has exceeded half a million dollars, so there's  
3 penalties for having a spill.

4           So there is really two things you are  
5 talking about. You are talking about the liquid  
6 phase where the liquids are in the pit, and then you  
7 are talking about what do you do with the material  
8 afterwards. Most of the modeling had to do with  
9 what's left afterwards because the pit is closed.

10           I saw a little -- the thing that I saw  
11 that was consistent in the real data provided to us,  
12 both by Dr. Buchanan and Dr. Neeper, was the salt  
13 bulge. And to the extent Mr. Mullins did not model  
14 an exact case, I would have to agree. However, the  
15 models that he used have been proven for other solid  
16 waste disposal and are commonly used in landfills  
17 and other applications across the United States. So  
18 the model itself has been vetted.

19           That model does not predict a salt bulge,  
20 and the reason his results were different from  
21 Dr. Neeper's was his assumptions about infiltration.  
22 That's the main difference right there. If you  
23 assume that there will be infiltration then you  
24 might attempt the model like that which Dr. Neeper  
25 used, where with a steady state flow boundary. A

1 steady stay flow boundary in most simulation  
2 modeling such as where we do with a reservoir  
3 simulation for oil, you use that when you expect a  
4 constant flux. So a good example of a case where  
5 you would use a steady stay boundary is where you  
6 have water in a water flood always coming into the  
7 system so you want the edge of your model, you  
8 always want an influx of water. That's when you use  
9 the steady stay boundary. Otherwise, you use what  
10 we call the open boundary and that allows flow in  
11 either direction.

12 So the assumption in Dr. Neeper's model  
13 was there would be infiltration. What I found  
14 interesting about Mr. Mullins' use of real world  
15 data is he did use actual predicted infiltration  
16 rates based on precipitation for the areas of the  
17 model and he came up with no infiltration that would  
18 get water transported to the water table at the  
19 depths of the model.

20 The significance of that is that I think  
21 dry material is going to be pretty safe, and then  
22 you take the other evidence that we saw, the  
23 physical evidence that was presented both by  
24 Dr. Neeper and Dr. Buchanan was the existence of the  
25 salt bulge. Neither model predicts the salt bulge.

1 But the salt bulge is also based on infiltration  
2 rate, and the depth to which the materials will  
3 deposit in the soil is dependent upon the rate at  
4 which water comes down above it.

5 What the record shows, the geologic  
6 record, is that in the major producing areas of New  
7 Mexico that's going to be a fairly shallow depth,  
8 somewhere 15 to 25 feet or so from the cases we saw.

9 Obviously, there's many more cases that  
10 could be looked at where you come up with a  
11 conclusive statement, but I think that geologically  
12 or hydrologically speaking, that doesn't indicate  
13 that the infiltration rates that do not necessarily  
14 drive water to great depths have been consistent  
15 over some time period of thousands of years.

16 But I want to reiterate, I think, that  
17 there is a Spill Rule and that there's a difference  
18 between a release during operations or a tank that  
19 has a backhoe back into it and has a leak sprung in  
20 it and you have a release and then the solid part of  
21 the waste.

22 So I think most of the examples presented  
23 in rebuttal by Ms. Martin were examples of things  
24 where you had the leaks. Those would have been  
25 before you had the Spill Rule that would cause an

1 immediate response to a leak and also before there  
2 were any significant guidelines for closure and  
3 burial?

4 COMMISSIONER BLOOM: Just to clarify, the  
5 cases that Ms. Martin presented that I am referring  
6 to are from '06, '05 --

7 COMMISSIONER BALCH: And earlier, I  
8 believe.

9 COMMISSIONER BLOOM: Those were -- I  
10 mentioned two and those were from '06 and '05.

11 COMMISSIONER BALCH: I remember her table  
12 and that table was pretty sparse on data since  
13 around that time period. So Rule 50 was put into  
14 play when? Rule 50 was the preceding rule to Rule  
15 19, and I think --

16 CHAIRWOMAN BAILEY: I can't give you the  
17 exact year.

18 COMMISSIONER BALCH: I remember looking at  
19 C144 forms for Rule 50 and it was a one-page  
20 document. You had to use a liner and other than  
21 that there wasn't a whole lot of specifications.  
22 There wasn't the siting criteria to the degree that  
23 you have in Rule 17. But it does show that pits in  
24 that era had contamination problems.

25 COMMISSIONER BLOOM: Sure. But I want to

1 point out that those two cases were from '05  
2 and '06.

3 COMMISSIONER BALCH: Rule 19 went into  
4 play in '08.

5 CHAIRWOMAN BAILEY: Rule 17.

6 COMMISSIONER BALCH: In '08.

7 COMMISSIONER BLOOM: I think that's been  
8 understood, but liners were used. I think what I am  
9 more interested in is the speed of the movement.  
10 Horizontal traveled 150 feet and --

11 COMMISSIONER BALCH: I think what you are  
12 talking about is sheet flow fluid from a broken pit  
13 or a tank spill or something like that, which is  
14 going to give you that immediate transport. As soon  
15 as you break the pit or the tank you are going to  
16 have a flow of liquid that goes across the surface  
17 and that will give you higher transport rates.

18 COMMISSIONER BLOOM: That went to --

19 COMMISSIONER BALCH: I think in one case  
20 she said 100 feet.

21 COMMISSIONER BLOOM: This one went down to  
22 about 30 feet vertically and 150 horizontal. My  
23 understanding was that was a pit but we can  
24 certainly check.

25 COMMISSIONER BALCH: Was that one of the

1 specific cases?

2 COMMISSIONER BLOOM: Yeah, Pride Energy.  
3 In the transcript it's Page 2211.

4 CHAIRWOMAN BAILEY: While you two are  
5 looking for that specific citation, I would like to  
6 bring out what Rule 29, the notification rule, does  
7 say. It says, "A minor release means an  
8 unauthorized release of a volume greater than five  
9 barrels but not more than 25 barrels or greater than  
10 50 MCF but less than 500 MCF of gases. A major  
11 release is an unauthorized release of a volume  
12 excluding gases in excess of 25 barrels." So we  
13 have those correct numbers in the record. Did you  
14 find your citation?

15 COMMISSIONER BALCH: There's a couple  
16 Pride Energy cases. Are you talking about AP 78 or  
17 77?

18 COMMISSIONER BLOOM: AP 78.

19 COMMISSIONER BALCH: Spud date 2004.  
20 Completed -- here is another?

21 COMMISSIONER BLOOM: Let me -- if I could  
22 read from the transcript. She says, "The second one  
23 I looked at would be 1878. You go down, that's the  
24 third one down after AP 81. It's Pride Energy  
25 Company. As you can see, there's five sites. I

1 picked one of them. This would be for Reserve Pit  
2 No. 15 in South Four Lakes Unit. Again, the things  
3 that I looked at, number one, was the drill date was  
4 November 4th. The well was completed actually in  
5 March 2005. September of 2005 they submitted the  
6 C104 form to allow transport of the products.  
7 August of 2007 the pit closure form was submitted.  
8 That's C144. That was basically -- they completed  
9 the well in 2005" --

10 COMMISSIONER BALCH: Mr. Bloom, can I get  
11 on the same page with you?

12 COMMISSIONER BLOOM: Page 2211.

13 COMMISSIONER BALCH: That's of the  
14 transcript?

15 COMMISSIONER BLOOM: Yeah, the transcript.

16 COMMISSIONER BALCH: Go ahead.

17 COMMISSIONER BLOOM: "They completed the  
18 well in 2005 so they didn't submit the form until  
19 August of 2007 and they had to revise it in December  
20 of 2007. They started doing initial groundwater  
21 sampling in 2008, which would be just about three  
22 years after the well was completed. The reason for  
23 potential pollution was 'brine from the pit migrated  
24 through the vadose zone to groundwater via saturated  
25 flow during operation of drilling pit regarding the

1 drying process.'" .

2 COMMISSIONER BALCH: This is Pride Energy  
3 No. 14?

4 COMMISSIONER BLOOM: Yes. It says Reserve  
5 Pit 15.

6 COMMISSIONER BALCH: Yes. Spud date 2004.  
7 So that indicates to me the pit was sitting there  
8 for three years or thereabouts and that for some  
9 period of that time it had brine in it. That's  
10 not -- what is the timeline now under Rule 19? Much  
11 shorter.

12 CHAIRWOMAN BAILEY: Rule 17.

13 COMMISSIONER BALCH: Rule 17. I'm stuck  
14 on Rule 19.

15 CHAIRWOMAN BAILEY: That's all right.

16 COMMISSIONER BALCH: Rule 17. I think now  
17 that there is a six-month closure, right?

18 CHAIRWOMAN BAILEY: Yes.

19 COMMISSIONER BALCH: So you would not have  
20 a pit sitting out there for three years, which the  
21 longer it sits there, obviously the greater chance  
22 it has to have something go wrong with it.

23 COMMISSIONER BLOOM: The well was  
24 completed in March of 2005. August of 2007 the pit  
25 closure form was submitted.

1           COMMISSIONER BALCH: That's almost three  
2 years later from the spud date. So when they spud  
3 it they are going to have the pit in place and  
4 fluids circulating. So, you know, I think to me  
5 that we want to be protective, and the reason there  
6 was a Rule 17 is because people want to protect  
7 groundwater and they had examples like the one you  
8 talked about, Exhibit 6B, where you did have a  
9 release from a pit.

10           Since -- when was the Spill Rule? That's  
11 relatively new as well, wasn't it?

12           CHAIRWOMAN BAILEY: Somewhere in that  
13 vicinity. Let me find the exact date for you.  
14 Effective date December 1, 2008.

15           COMMISSIONER BALCH: Okay. So the cases  
16 that we're talking about where you have a release  
17 and contamination, if they were to happen today, a  
18 large release like that, it would be reported.  
19 There would be an abatement plan. You would have an  
20 environmental consulting company go out and  
21 determine what is the best way to clean up the  
22 defective material and they would most likely have  
23 to dig it up and haul it all away.

24           At the same time, around 2007/2008, Rule  
25 17 was put in place, and part of that was limiting

1 the length of time that you would have a temporary  
2 pit laying around, which decreases the odds of a  
3 spill occurring.

4           So, you know, we can look at some of these  
5 cases and say they were the inspiration for the work  
6 that was done in 2007 and 2008 to increase the  
7 regulations, but I'm not sure that we can use it to  
8 judge the effectiveness of current siting criteria  
9 except a little bit anecdotally. You said you saw  
10 horizontal contamination higher than 50 feet from  
11 apparently a pretty good-sized pit release. That's  
12 my take on that.

13           I think that we had a lot less testimony  
14 on horizontal criteria than we did on vertical. All  
15 the modeling was focused on vertical. A lot of the  
16 transport discussion was on vertical as well. I  
17 think there was some testimony on horizontal but it  
18 was not nearly as detailed as it was for vertical  
19 migration.

20           CHAIRWOMAN BAILEY: For the record, I  
21 would like to point out that under Current Rule  
22 19.15.17.13A7, "An operator shall close any other  
23 permitted temporary pit within six months from the  
24 date that the operator releases the drilling or  
25 workover rig. The appropriate division district

1 office may grant an extension not to exceed three  
2 months." So there's a maximum of nine months for a  
3 testimony pit to remain open after the release of  
4 the rig.

5 COMMISSIONER BLOOM: Currently how soon do  
6 liquids have to be taken out of the pit? Is that 30  
7 days, I believe? I believe NMOGA wanted to go to 60  
8 on that.

9 CHAIRWOMAN BAILEY: It says, "The operator  
10 of a temporary pit shall remove all liquids from the  
11 temporary pit prior to closure and dispose of the  
12 liquids in a division approved facility or recycle,  
13 reuse or reclaim."

14 COMMISSIONER BLOOM: I'm looking at the  
15 operational requirements, Section 12 for temporary  
16 pits, B4. The language is currently, "The operator  
17 shall remove all free liquids from a temporary pit  
18 within 30 days from the date the operator releases  
19 the drilling or workover rig."

20 COMMISSIONER BALCH: You said that was  
21 under the discussion of modifications of 60 days?

22 COMMISSIONER BLOOM: Yes, from 30 to 60.

23 COMMISSIONER BALCH: Do you remember any  
24 testimony about why they wanted that change?

25 COMMISSIONER BLOOM: Yes, it was because

1 the current climate, it's often hard to get a crew  
2 out there to take out the liquids.

3 CHAIRWOMAN BAILEY: I would like to  
4 address some of the comments you made.

5 COMMISSIONER BALCH: Whether the equipment  
6 was available as well.

7 CHAIRWOMAN BAILEY: There's been evolution  
8 of oil and gas regulations as far as protection of  
9 freshwater is concerned from no lining at all to  
10 having lined pits. We have gone from having unlined  
11 pits and really no burial at any depth at all, and  
12 there's certainly, for many of those contamination  
13 cases, they did not have removal of the fluids and  
14 mixing of the pit contents to pass the point filter  
15 test, which we now have as part of the closure  
16 requirements.

17 The contamination cases represent past  
18 practices, past sins. We do not have a submittal of  
19 our proposal to change the lining requirements for  
20 temporary pits. We do have proposals or responses  
21 concerning burial of the pits, reclamation that  
22 would prevent salt migration. We have very  
23 important, in my mind, modeling to show the  
24 concentration of the chlorides once it reaches  
25 groundwater.

1 I think we not only have to look at  
2 whether or not the chlorides will be transported to  
3 groundwater but also at what concentration will the  
4 chlorides arrive and the maximum concentration that  
5 can be expected if certain reclamation requirements  
6 are taken care of.

7 Those concentrations are at such a minimal  
8 amount that they would not create a drinking water  
9 problem for the groundwater that is below the pit if  
10 those reclamation requirements are made.

11 Past practices, past sins did not have  
12 revegetation standards such as we are going to be  
13 deliberating in this case. There were often  
14 problems with burial. There was certainly no mixing  
15 of the pit contents to remove as much of the fluids  
16 as possibly could be removed.

17 I think we have the opportunity here to  
18 remove the barbed wire from the gate that I talked  
19 about yesterday where we don't need to have  
20 padlocks, electronic locks, electrification and  
21 barbed wire on the gate to prevent problems. I  
22 think with the potential for taking care of the  
23 reclamation requirements with understanding of what  
24 the maximum chloride concentrations are, that we do  
25 have this opportunity to reduce some of the

1 unnecessary requirements that have been put on  
2 industry, but still we will have protection of  
3 freshwater.

4           COMMISSIONER BLOOM: One thing, and I  
5 mentioned this during cross-examination during the  
6 hearing, was that as regulators, right now we are  
7 seeing a rule that appears to have worked. We  
8 haven't seen incidents since 2008. Nobody could  
9 find an incident where a pit led to groundwater  
10 contamination, if I'm correct. It seems like what  
11 we have is working and as regulators we want to  
12 protect the resources, protect groundwater. We want  
13 to do so in a way that doesn't move costs so high  
14 that it prevents extraction of oil and gas and  
15 resources.

16           There was some testimony by Dr. Bartlit  
17 that having these regulations in place creates jobs.  
18 I don't think as regulators we want to make  
19 regulations to create jobs. That's not what we are  
20 here to do. You wouldn't want to ratchet up  
21 regulations so high it squeezes out jobs in  
22 environmental services, for example.

23           We have a rule that works and we are being  
24 out to scale it back, and I'm concerned that we  
25 haven't heard much about possible waste. We haven't

1 heard if there's been economic penalty put on  
2 industry that's affecting its ability to operate in  
3 New Mexico.

4 COMMISSIONER BALCH: These guys  
5 particularly, and I always bring this up, they are  
6 very tenacious. They will find a way to do what  
7 they can. I think that the argument by is not going  
8 to stop us but make it more expensive and slow it  
9 down. NMOGA in their closing says, and I think this  
10 is what they tried to present in testimony, "The  
11 current rule creates a maze that operators have to  
12 work through to try to get applications for pits and  
13 below-grade tanks approved and this has, because of  
14 the ambiguities in the rule, resulted in confusion  
15 and inconsistent interpretations of the rule between  
16 division district offices. The regulatory  
17 uncertainty this creates discourages development,  
18 which reduces the ultimate recovery of oil and gas.  
19 Third, it creates regulatory delay. An industry  
20 that has thousands of pending permit applications is  
21 simply not able to administer the rule it asked the  
22 Commission to adopt."

23 So a 25-foot concrete wall will definitely  
24 stop a baseball but so will a cinder block wall.  
25 And I think to me what industry is asking us to do

1 is take the rule which has been shown to be  
2 protective, make sure that it still is as protective  
3 but streamline it and fix the things that aren't  
4 necessary for that protection. On the other hand --

5 COMMISSIONER BLOOM: I agree with you. I  
6 think we have already adopted some changes that will  
7 clarify definitions, make inspection work easier,  
8 reduce different interpretations of statute. We  
9 have taken a long line of below-grade tank  
10 permitting off of the shelf of registration, so I  
11 would agree that some of those things we can do and  
12 clarify.

13 COMMISSIONER BALCH: So when you go around  
14 the state -- and there's a lot of discussion about  
15 the expense of closed-loop systems -- I think  
16 everybody agreed that there was some additional  
17 expense. The debate was really over how much it  
18 would be, and I think that's probably the situation.  
19 Particularly early on when there wasn't very many  
20 systems available.

21 I do spend a lot of time in my day job as  
22 a researcher at the Petroleum Center of New Mexico  
23 Tech working with producers. That's the mandate of  
24 that research group is to enhance recovery in New  
25 Mexico, much like State Land Office wants to

1 maximize the leasing values that they can get, and  
2 the Oil Conservation Division is supposed to get as  
3 much oil produced as can be done safely and  
4 effectively.

5           When you talk to producers, you hear them  
6 complain. Maybe they don't have evidence for their  
7 complaints, but sometimes the perception all by  
8 itself is simply enough to cause a problem, at least  
9 initially. But you would expect that to go away  
10 over some time period if there really is an unfound  
11 concern.

12           If just being able to use closed-loop  
13 systems would solve the problem effectively, cost  
14 effectively without impacting operations, I think  
15 they would still not be complaining four or five  
16 years later. They would have settled into the new  
17 paradigm and been happy with it. And they are still  
18 complaining about it today. I think particularly  
19 the smaller operators that do have smaller margins,  
20 and if you take something -- I think even  
21 Ms. Denomy, the witness for OGAP on economics, comes  
22 down to an accounting of making a business decision,  
23 and if you have a million dollars to spend and you  
24 expect to get five million back, that's the way you  
25 do it. If the number comes up at \$999,999 you will

1 say yes. If it comes to one million and one dollars  
2 you will say no. So even a relatively small expense  
3 can have an impact when your margins are small  
4 enough, and a number of our operators do have small  
5 margins.

6 So I think that as regulators, and from my  
7 opinion as a regulator, you want to do everything  
8 you possibly can for our subsidiary role to protect  
9 the human health and safety, groundwater and surface  
10 water things like that, and you also want to make an  
11 environment that encourages the development of  
12 resources which are very important to the State of  
13 New Mexico in a number of ways.

14 That's why I think we are discussing these  
15 changes. I think the reason in this particular  
16 hearing there was a lot of discussion about vertical  
17 migration is because if you are allowed to have  
18 on-site burial, it does remove the need to dry,  
19 clean, truck and haul to a waste site where you can  
20 concentrate the material at some expense but also  
21 some environmental impact. You do have a greater  
22 amount of truck traffic. You have more greenhouse  
23 gases put in the air, and at that site where you are  
24 concentrating the waste you would increase the risk  
25 at that particular location.

1           Now, I don't know the exact number.  
2           Probably nobody really does know the exact number,  
3           but there's been somewhere over 100,000 wells  
4           drilled in New Mexico since the 1920s, and until  
5           fairly recently regulations pretty much did not  
6           exist in a contemporary sense and they have been  
7           evolving, like Commissioner Bailey said.

8           The idea is in any evolutionary process is  
9           you don't just make added changes. Things that are  
10          not effective should also be looked at or adjusted.  
11          So you don't always make things necessarily more  
12          stringent if less stringent does the job at less  
13          cost to the stakeholders, which in my opinion is  
14          pretty much everybody in the state of New Mexico.

15          On that same note, these hundreds of  
16          thousands of wells, many of them drilled with things  
17          like diesel or heavy brine, stabilizing drilling  
18          fluids, if there had been a substantial history of  
19          those operations causing groundwater contamination,  
20          that should have been completely obvious by now, 90  
21          years later. And the reason why I think it's not is  
22          because of the geologic conditions in New Mexico  
23          where we have low infiltration rates and the salt  
24          will go to a certain distance in the soil driven by  
25          that infiltration rate and then just stops. It

1 doesn't go anywhere.

2 CHAIRWOMAN BAILEY: But to ensure that the  
3 salt bulge does not continue in a downward way,  
4 there are several factors that need to be --

5 COMMISSIONER BALCH: If you apply  
6 infiltration. If you apply infiltration. An  
7 example of infiltration would be if you don't have a  
8 liner. So if you are taking the ten-foot water  
9 column and you keep adding water to it, of course,  
10 because it's going somewhere, that's going to  
11 artificially increase the infiltration rate at that  
12 location.

13 Similarly, if you have a spill or a leak  
14 you will have the same thing, but it will be more of  
15 a dynamic event. You will have a very short burst  
16 of change to the infiltration. You will have  
17 contamination to some depth at some distance, and  
18 once there's no longer additive flux of fluids, the  
19 infiltration rate will go back to whatever the  
20 background is. You will still have the contaminated  
21 area and I think that's where the Spill Rule was  
22 designed to come in and alleviate those areas.

23 CHAIRWOMAN BAILEY: With the abatement  
24 plan.

25 COMMISSIONER BALCH: With the abatement

1 plan, which I think are pretty expensive. I think  
2 the biggest single control -- you know, if you are a  
3 small company and you are worried about your bottom  
4 line, having a half a million dollar cleanup is not  
5 going to help your bottom line. So they have a  
6 strong incentive to make sure that they don't have  
7 large spills, and I think that's why the safety  
8 reference since 2007 and 2008 has been so good.

9 I'm just saying I think it's worth looking  
10 at the rule again and making adjustments where it's  
11 prudent and not assuming that if we make any changes  
12 it will affect the objections. We are here to  
13 determine what's protective, and we now have a few  
14 more years of evidence than they had when they did  
15 the first rule.

16 So it's very likely in a few years that  
17 somebody will look at it again, so it's not set in  
18 stone. I don't know how many pit rules there's  
19 been.

20 CHAIRWOMAN BAILEY: Two.

21 COMMISSIONER BALCH: Two. Then the  
22 modifications in 2009 and now there's a proposed  
23 modification in 2012.

24 CHAIRWOMAN BAILEY: You just made a very  
25 important comment; that we are not here to reduce

1 protection of water.

2 COMMISSIONER BALCH: Absolutely not.

3 CHAIRWOMAN BAILEY: We will maintain  
4 protection of water, but we don't need to have some  
5 of these over-the-top requirements that create  
6 enforcement issues as well as expensive, unnecessary  
7 requirements of the operators.

8 COMMISSIONER BALCH: I think there's been  
9 a lot of testimony as to the rule not being able to  
10 be -- the rule as it is currently presented is not  
11 being effectively administered because there's just  
12 not enough people to do the job that was put on it.  
13 And I think yesterday we were discussing the data  
14 that is available and to some extent the rule  
15 doesn't -- there's -- the data doesn't exist to  
16 provide the information that would let you make the  
17 determination that was required by the rule. So the  
18 best thing you can do is make sure that you're  
19 adequately -- you want to be as protective as you  
20 can be, but you also don't want to run into a  
21 situation where people can't do anything.

22 COMMISSIONER BLOOM: I understand that.  
23 Chairman Bailey, you mentioned expense, and  
24 Commissioner Balch, you talked about hearing from  
25 independents, small independents that there are

1 impacts here. But I haven't seen much testimony to  
2 the negative impacts of this rule on industry.

3 COMMISSIONER BALCH: There was a lot of  
4 testimony and it's kind of surprising to me because  
5 a lot of it was based upon rig count. When I looked  
6 at rig count data, I couldn't see a correlation  
7 between rig count and actual drilling activity, and  
8 if you want to discuss this in more detail I can dig  
9 out my calculations and notes. But the thing that  
10 struck me was that -- and the reason I think the rig  
11 count is not a good indicator is because what you  
12 are doing with those rigs is pretty important. So  
13 ten years ago when you were drilling a lot of coal  
14 and methane wells in the San Juan Basin the rig  
15 count could be very high but it's because you are  
16 only at the drill site for two or three weeks. They  
17 are shallow wells so the --

18 COMMISSIONER BLOOM: I think you noticed a  
19 divorce between rig count and spud.

20 COMMISSIONER BALCH: Spud, yes. I thought  
21 spud date was more important. When you looked at  
22 spud date you did see a depression and you continue  
23 to see a depression between, say, Texas where they  
24 don't have a rule, and I think even Colorado, where  
25 they have a different rule.

1                   COMMISSIONER BLOOM: That was intriguing  
2 but --

3                   COMMISSIONER BALCH: I don't think rig  
4 count is indicative.

5                   COMMISSIONER BLOOM: For a while we heard  
6 that out in the world -- we didn't necessarily hear  
7 it here, that the rig count was depressed because of  
8 the Pit Rule, but I think we saw that rig count  
9 around the time they were rolling in nation-wide.  
10 If we look at the difference between rig count and  
11 spud date, which we didn't really hear too much  
12 testimony on why we would see that split, I would  
13 still think it might have something to do with the  
14 sort of wells being drilled and not seeing  
15 shallower, low, shallower gas wells that we might  
16 have seen in the past.

17                  COMMISSIONER BALCH: Right now one of the  
18 most active plays in Southeast New Mexico is a big  
19 commingling play called the Yeso. There are a  
20 couple of other plays that contribute to that, but  
21 those are short wells, short spacing. Step out and  
22 drill and they just keep pumping them out, so rig  
23 count would naturally be high because of that. But  
24 if you are only drilling really deep wells it's  
25 going to change.

1           So I did, as you mentioned, I did go back  
2 and looked at spud counts. This is -- I did rigs  
3 per well and that's how I came up with the reason  
4 for spud date being perhaps a little more  
5 appropriate measure of activity. Even with that,  
6 I'm looking at in 2007 there were 1728 wells spudded  
7 with 83 rigs, which is 21 wells per rig. In 2011  
8 there are 990 wells spudded, so that's half of the  
9 number in 2007 and you have a much more favorable  
10 environment for oil drilling and a much less  
11 favorable for gas drilling now than you did in 2007.

12           So activity in the Northwest is very low  
13 and in the Southeast is very high. That may be a  
14 factor as well. You are getting 12 wells per rig in  
15 2011 with 81 rigs operating. So the number of  
16 operating rigs really hasn't changed between 2007  
17 and 2011. So essentially there was a dip. Some of  
18 it was nation-wide and some of it was regional, but  
19 we are more or less flat to where we were in 2007 or  
20 so, but everybody else around us is higher.

21           COMMISSIONER BLOOM: Your testimony that  
22 rig count tracks commodity prices?

23           COMMISSIONER BALCH: Well, if you look --  
24 it's like anything else that you try to track like  
25 that. If you look at rig counts nation-wide then it

1 will track more closely the commodity prices. If  
2 you look at rig counts locally, we have the impact  
3 of things like what is it you are drilling? Is it  
4 oil versus gas, liquids-rich gas, things like that.  
5 How shallow are the plays, how deep are the plays?  
6 So the narrower you look the less connected anything  
7 will be to a commodity price.

8 COMMISSIONER BLOOM: If there was found a  
9 decline in wells per rig in 2007 and 2011, doesn't  
10 some of that depend on what sort of wells are being  
11 drilled and what depth people are going to?

12 COMMISSIONER BALCH: Absolutely.

13 COMMISSIONER BLOOM: Do you have that  
14 data?

15 COMMISSIONER BALCH: We have the number of  
16 wells that were operating, which is essentially the  
17 same. I would posit, and I think it was proposed in  
18 testimony by Mr. Scott in particular, that if we  
19 were tracking the price of oil and development  
20 trends across the United States that you would have  
21 more rigs in New Mexico now than you would have in  
22 2007. So I think there has been a depression in  
23 activity and how do you separate out what the causes  
24 of that were? Were they solely economic? Were they  
25 in part because of Rule 17? Were they because of

1 the change in commodity prices from oil being --

2 COMMISSIONER BLOOM: I'm just not sure  
3 that we have seen something conclusive about Rule 17  
4 impacting oil and gas activity. Rig counts are back  
5 up. We don't necessarily know why we are seeing  
6 less wells per rig. It might have more to do with  
7 the depth per --

8 COMMISSIONER BALCH: Well, and the change  
9 of horizontal technology so you are spending more  
10 time at a particular well.

11 COMMISSIONER BLOOM: When Mr. Scott was --

12 COMMISSIONER BALCH: I think the point is,  
13 though, if you have the 20 percent growth in the  
14 industry nation-wide -- and I am throwing the number  
15 out, it's not real -- you expect to see 20 percent  
16 more activity in New Mexico now than you would have  
17 in the same time period. You don't. You see the  
18 same number of active rigs.

19 COMMISSIONER BLOOM: I don't know if that  
20 would -- I don't know if I would see that the same  
21 way, because you have sudden new growth elsewhere  
22 like the Baca --

23 COMMISSIONER BALCH: Baca and Marcellus  
24 are big.

25 COMMISSIONER BLOOM: -- and their plays,

1 so it's a little bit different.

2 COMMISSIONER BALCH: Those are gas plays.  
3 Most of the big new shale plays are gas plays and  
4 they are the reason why conventional or  
5 unconventional -- I hate to say the word traditional  
6 unconventional gas, but basically pipe gas, which is  
7 what we have in the San Juan Basin is conventional  
8 and unconventional and coal bed methane gas. You  
9 have a depression in that activity now because of  
10 the successful shale plays. It made gas very cheap  
11 and a lot of the gas is closer to the end point of  
12 of where it will be used, which are the large cities  
13 on the East Coast.

14 The connection, I think, is tenuous. But  
15 I really will go back to my statement that these  
16 producers are pretty tenacious people. If there  
17 wasn't an impact, I don't think they would have  
18 complained about it five years later. They would  
19 have just adjusted.

20 COMMISSIONER BLOOM: Back to the producer  
21 and claims of cost increases. I mean, I don't know  
22 that I saw much evidence of that here.

23 COMMISSIONER BALCH: There was evidence  
24 presented by Mr. Scott.

25 COMMISSIONER BLOOM: On a number of wells.

1                   COMMISSIONER BALCH: A number of wells.  
2     There was also public comment from a producer in --  
3     the Largo. So there was evidence presented that  
4     showed changing cost and even -- every witness that  
5     was cross-examined about that the cost of using  
6     closed-loop systems said that they were more  
7     expensive. The argument really was what the  
8     difference was.

9                   So if it is more expensive, there will at  
10    some level be an economic impact. The economic  
11    impacts in the oil industry affect small producers  
12    to a greater degree than they affect larger  
13    producers. They can't absorb even relatively small  
14    changes as easily as a large company can.

15                  I'm sure you read the paper but, for  
16    example, Papa John's Pizza said it would cost them  
17    eleven cents more a pizza for the health care  
18    report. They are a large company. They have a  
19    large distribution chain. They can soak up eleven  
20    cents change in the cost of pizza. But the local  
21    pizza shop on the corner may have a different take  
22    and it make cost them charge \$3 more a pizza.

23                  That's what I am really talking about.  
24    The fact that we have so many small producers in New  
25    Mexico, the impacts of changes in economics are

1 going to be magnified.

2 COMMISSIONER BLOOM: To get back to the  
3 independent that came in to public comment, Largo, I  
4 felt for him, but the gist of the cost overrun was  
5 they didn't forecast transportation, which we agree  
6 today was probably necessary.

7 COMMISSIONER BALCH: But what impacts  
8 transportation cost?

9 COMMISSIONER BLOOM: No, I understand  
10 that.

11 COMMISSIONER BALCH: If you have to move  
12 tanks then you need trucks. If you have to move  
13 fluids you have to have trucks. If you have to move  
14 solids you have to have trucks. If you don't have  
15 enough trucks, guess what happens. You have the law  
16 of supply and demand. The demand is high, the price  
17 goes up. There's a reason right now that a guy with  
18 a CDL can make \$100,000 a year in West Texas.

19 COMMISSIONER BLOOM: Sure.

20 COMMISSIONER BALCH: High demand.

21 COMMISSIONER BLOOM: Right. We heard from  
22 the company about cost overruns. We heard from  
23 Mr. Scott on a handful of wells that he drilled and  
24 some experience with closed-loop systems. One thing  
25 he said was a typical -- we heard from Conoco which

1 said that 80 percent of their wells used the pit, 20  
2 percent were closed-loop. Some of those they would  
3 have used anyhow because they would inside maybe a  
4 municipal limit. They came in around \$100,000 a  
5 well extra. They asked for a breakdown and I don't  
6 know that we got the breakdown. He wasn't a  
7 financial person.

8 That's it. That's the sum total of what I  
9 saw in terms of presented economic impact.

10 COMMISSIONER BALCH: There was the  
11 testimony of Ms. Denomy as well, which I think she  
12 was presented as an expert in accounting and she  
13 also had some experience in a family-owned small  
14 company in Colorado, but I think one thing that was  
15 uniform in all the testimony that was presented was  
16 that it did cost more. The argument was how much  
17 and what the impact would be of those changes in  
18 cost.

19 COMMISSIONER BLOOM: There was some talk  
20 about the offset of not having environmental legacy.  
21 You heard from the small producers that you work  
22 with. I talked to other producers at my job and I  
23 hear comments saying we are doing closed-loop  
24 systems now because we are looking at selling  
25 something off or mergers. We don't want to have the

1 environmental legacy on the ground. So there are  
2 companies that have wholesale adopted closed-loop  
3 systems, which made that bridge. So I think at the  
4 end of the day we have to stick with what we heard  
5 in front of us and understand that there's other  
6 folks out there as well.

7           COMMISSIONER BALCH: I think Mr. Smith has  
8 pointed out on several occasions that we are allowed  
9 to bring our own experience and understanding into  
10 the discussion and that's really what we are doing  
11 now. I really thought that there was testimony that  
12 there was an added expense, and my interpretation is  
13 any added expense will affect operations at some  
14 level. To do a detailed economic study would  
15 probably take a couple years, so we won't have that  
16 answer today.

17           COMMISSIONER BLOOM: Sure. I would agree  
18 that when you add regulations there's an added cost  
19 to it. I'm just not hearing that these costs were  
20 destroying industry in New Mexico. I see a rig  
21 count that went down with rig count around the  
22 nation during the recession when oil prices were  
23 low. It's coming back up. I think we heard  
24 testimony from Mr. Scott about how does State Land  
25 Office leasing work? Still good. Records. Money

1 is there. And out of the major producers in New  
2 Mexico, we heard from Conoco, heard from two  
3 independents. I just didn't hear a clamor or a  
4 chorus of folks saying this made New Mexico an  
5 impossible place to invest.

6 COMMISSIONER BALCH: Not impossible, just  
7 less likely. I think that was the argument.

8 MR. SMITH: I want to make sure that I  
9 have been understood. You are absolutely right,  
10 Commissioner Balch. I think you can bring in your  
11 own expertise into your deliberations and in the  
12 exercise of your judgment. It needs to be expertise  
13 that you possess, so if you are bringing in  
14 expertise that you have, I think that's fine and  
15 that's part of what you are supposed to do here.

16 CHAIRWOMAN BAILEY: The discussion on  
17 economics can continue for hours. The discussion on  
18 whether or not there is a negative impact that  
19 affects drinking water standards at any depth for  
20 freshwater can go on for hours. It is apparent that  
21 there are philosophical differences among the  
22 members of the Commission.

23 COMMISSIONER BALCH: I just want to point  
24 out Mr. Scott's exhibits one more time, because I  
25 think there is evidence that there was a suppression

1 of activity tied at the same time as the  
2 implementation on Rule 17.

3 If we go to Exhibit 15 in the IPANM book,  
4 I think the last two slides are pretty telling to  
5 me. The second to the last slide is just --  
6 actually the second to the last page in the entire  
7 book, so it's rig count, Eddy, Chavez and Lea  
8 Counties. If you want to use rig count, which I  
9 think is something of a disconnect unless you are  
10 comparing apples and apples, and what Mr. Scott  
11 attempted to do here was to compare three counties  
12 in New Mexico in The southeast with the equivalent  
13 three counties in Texas.

14 The slide you're looking at there, the  
15 second to the last slide, would be Eddy, Lea and  
16 Chavez Counties shows perhaps slightly increasing --

17 COMMISSIONER BLOOM: I'm sorry. If we are  
18 looking at -- let's make sure we are looking at the  
19 same page here. I'm seeing the top line is the  
20 total on Chavez, Eddy and Lea, not Texas.

21 COMMISSIONER BALCH: Texas is on the next  
22 slide. That's the comparison.

23 COMMISSIONER BLOOM: Okay.

24 COMMISSIONER BALCH: But I wanted to lay  
25 some groundwork here. You see something that's

1 pretty flat really from about 2008. You have a  
2 depression in '09 in the price of oil and you have  
3 an increase up through about '11 and then it  
4 stabilizes.

5 If you go to the last slide, you see rig  
6 counts. You have your three counties in New Mexico  
7 on the bottom. They have the red line. You see the  
8 same dip around the middle of 2008 and 2009. You  
9 see a steady increase up to about 11 and then it  
10 goes flat.

11 At the same time, the people around us are  
12 continuing to climb. They did have an economic dip  
13 just like we saw, but overall they are continuing to  
14 climb as the price of the resources has gone up. I  
15 think that this slide does show that something  
16 changed in New Mexico to cause less development  
17 activity compared to right across the border of  
18 Texas. That was Mr. Scott's evidence. So I think  
19 there is testimony to that effect. Whether you  
20 agree with it or not, that's up to you.

21 COMMISSIONER BLOOM: No, I see the same  
22 trend lines there that you do. That could be  
23 related to different developments and formations in  
24 Texas. I don't know --

25 COMMISSIONER BALCH: It could be but --

1                   COMMISSIONER BLOOM: I didn't hear an  
2 explanation.

3                   COMMISSIONER BALCH: If you're down near  
4 the Permian Basin you have approximately 30 stack  
5 plays and the Permian Basin doesn't stop at the  
6 border of New Mexico. The Permian Basin goes across  
7 the border into Texas so you have the same 30 stack  
8 plays, one foot in New Mexico and one foot in Texas.  
9 So he is comparing apples and oranges in those two  
10 slides. He's comparing the Permian Basin  
11 development in three counties in New Mexico that are  
12 adjacent to the Texas border and three counties in  
13 Texas that are adjacent to the New Mexico border or  
14 right across from each other. Essentially the same  
15 geology, essentially the same rocks. You would  
16 presume essentially the same development principles  
17 and you see one take off and one not take off. So  
18 something changed in New Mexico. Mr. Scott  
19 testified that he believed it was a direct result of  
20 the Pit Rule.

21                   COMMISSIONER BLOOM: What if I asked you  
22 the opposite? What if I asked if the Pit Rule was  
23 the cause, why did activity come back? Why didn't  
24 it stay low?

25                   COMMISSIONER BALCH: You are talking about

1 the depression in 2009. That's an outside limit.  
2 That's going to be the depression of the price of  
3 oil that caused the change for everybody.

4 COMMISSIONER BLOOM: But I don't know if  
5 you can say that any recovery is related to simply  
6 commodity prices but any movement out of sync with  
7 Texas is simply related to the rig count -- I'm  
8 sorry, to the Pit Rule.

9 COMMISSIONER BALCH: I can't say that.  
10 I'm telling you what Mr. Scott testified and I'm  
11 showing you his diagram which I think supports  
12 something changing in New Mexico, because New Mexico  
13 does have -- we are comparing the economic impact  
14 that was nation-wide or Permian Basin-wide, anyway.  
15 That dip was recovered from and you went back to the  
16 same level of development that you had in 2008 or  
17 2007. The three adjacent counties in Texas had a  
18 briefer depression from whatever that unknown  
19 external impact was and otherwise showed a steady  
20 increase in development activity.

21 COMMISSIONER BLOOM: Chairman Bailey, I  
22 understand where we are going and that we could have  
23 this, I think, back and forth for quite some time.  
24 And I would just lay out there that simply one of  
25 the reasons that these changes are being requested

1 is because there's an unnecessary impact on  
2 industry. I don't believe I have seen evidence --  
3 sufficient evidence of that. I have seen rig count  
4 come back up. I have heard the testimony from  
5 Mr. Scott that stuff looked good in New Mexico.  
6 Land Office leasing is good. People still want  
7 tracts here.

8 I'm not sure that the rules need to be  
9 scaled back just to keep industry going and growing  
10 in New Mexico, and I think we are in agreement that  
11 we want to protect our water and the health of the  
12 people of New Mexico, the environment as we are  
13 making these changes. We want to do things that are  
14 protective. And I think we ought to make any  
15 changes that won't have an impact on the environment  
16 but I don't think we ought to be making changes for  
17 some of the gross economic reasons that were  
18 presented to us.

19 And I'm fine with removing parts of --  
20 changing parts of the Pit Rule that just haven't  
21 worked or caused confusion in enforcement --  
22 definitions, some permitting and registration such  
23 as we did with below-grade tanks.

24 COMMISSIONER BALCH: There is a bit of a  
25 competing argument if you look in the findings. I

1 think NMOGA and IPANM made the argument that we were  
2 tasked -- I think correctly -- with administering  
3 the Oil and Gas Act and that we were supposed to,  
4 because of that, first prevent waste, and second,  
5 protect correlative rights, and then the word  
6 reasonable -- let's see if I can find the exact  
7 wording here.

8 CHAIRWOMAN BAILEY: Are you looking for  
9 the phrase "reasonable protection of waters  
10 designated by" --

11 COMMISSIONER BALCH: It wasn't so much  
12 there was, I guess, another use of the word  
13 reasonable and it had to do with -- I just found it  
14 interesting because both OGAP and NMOGA referenced  
15 the same case and came up with different  
16 conclusions. OGAP's main argument was, and I think  
17 it mirrors a little bit of what you've been saying,  
18 that we shouldn't do things for the convenience of  
19 industry, right?

20 COMMISSIONER BLOOM: That OGAP says that?

21 COMMISSIONER BALCH: That's what OGAP  
22 says. I'll cite the first finding of fact. "No  
23 evidence in the record established any reason other  
24 than the alleged convenience and financial gain of  
25 oil and gas operators for amending or reconsidering

1 the Pit Rule." That's the one side. Here we go.  
2 It's Findings 20 and 21 that I think are the  
3 counterpoints to OGAP.

4 Finding 20 by NMOGA, "The Commission and  
5 Division are required by law to carry out all the  
6 duties imposed on them by the Act and may not  
7 consider part of their legislative mandate while  
8 ignoring other parts of their statutory  
9 responsibilities."

10 Finding 21. "To carry out its statutory  
11 responsibilities when considering proposed revisions  
12 to the rules, the Commission is required to balance  
13 its duties to prevent waste and protect correlative  
14 rights against the responsibilities to provide  
15 reasonable protection of fresh water, public health  
16 and the environment to the end it meets all the  
17 responsibilities imposed on it by the New Mexico  
18 legislature."

19 The word balance, I think, is really what  
20 we are trying to argue about here. And where we  
21 have an impact on industry, whether it's proven to  
22 you or not, you do contribute or you could  
23 contribute to waste in the interpretation of waste  
24 as being resources left undeveloped.

25 I think OGAP would argue that just because

1 we don't now, they still exist and could be  
2 developed in some future. So balance for us is our  
3 two primary responsibilities and then our secondary  
4 responsibilities.

5 COMMISSIONER BLOOM: I wonder if we are  
6 making -- might be fruitful to talk about waste and  
7 No. 18, Finding 18 by NMOGA. The Oil and Gas Act  
8 defined it as "The locating, spacing, drilling,  
9 equipping, operating or producing of any wells in a  
10 manner to reduce or tend to reduce the total  
11 quantity of crude petroleum oil and natural gas." I  
12 mean, I'm not going to speak for OGAP, but I think  
13 that's --

14 COMMISSIONER BALCH: Ultimately covered  
15 under the rule.

16 COMMISSIONER BLOOM: Right. We haven't  
17 spoiled a resource that's it's still there, but by  
18 imposing costs you could have a de facto waste  
19 because the resources are no longer available.

20 COMMISSIONER BALCH: Not economically  
21 recoverable.

22 COMMISSIONER BLOOM: You could extend if  
23 out to mean that, but I don't know that you  
24 necessarily have to interpret it that way.

25 COMMISSIONER BALCH: Well, I think the

1 case that was cited again by both parties was  
2 Continental Oil. I think it was in closing. You  
3 might know more about the Continental Oil case than  
4 I do. All I heard was the citations.

5 CHAIRWOMAN BAILEY: I'm not a lawyer so I  
6 can't speak to it.

7 MR. SMITH: I just knew it. I just knew  
8 it. Let me review the Continental Oil case and I  
9 will be able to answer questions about it.

10 COMMISSIONER BALCH: I think it was in the  
11 concluding statements.

12 COMMISSIONER BLOOM: It's in -- IPANM  
13 makes reference to it. If you count back the pages,  
14 Page 14. There's a bold heading, "Statutory  
15 authority of the OCD does not include protection of  
16 waters not designated by the State Engineer."

17 COMMISSIONER BALCH: This is why I was  
18 saying we would probably have to discuss this  
19 yesterday, because I think the way we interpret that  
20 mandate impacts how you review changes. There was  
21 two interpretations. I'm obviously not a lawyer.

22 COMMISSIONER BLOOM: So are you referring  
23 to the Continental -- the rulings put emphasis on  
24 reasonable?

25 COMMISSIONER BALCH: Yes.

1                   COMMISSIONER BLOOM: Asking if there's  
2 balance? The quote is, specifically "70-2-12B15  
3 grants the Division the authority to regulate the  
4 disposition of water produced or used in connection  
5 with the drilling for or producing of oil or gas or  
6 both and to direct the surface or subsurface  
7 disposal of water, including disposition by use in  
8 drilling for or protection of oil or gas in road  
9 construction or maintenance or other construction,  
10 in the generation of electricity or in other  
11 industrial uses in a manner that will afford  
12 reasonable protection against contamination of fresh  
13 water supplies designated by the State Engineer."

14                   COMMISSIONER BALCH: I apologize if we are  
15 going too far off track.

16                   CHAIRWOMAN BAILEY: Well, we do need to  
17 come back to what's proposed between us for the  
18 change of the rule. Going into philosophical  
19 differences I don't think is productive, because you  
20 can talk about that for weeks and --

21                   COMMISSIONER BALCH: I agree 100 percent.

22                   CHAIRWOMAN BAILEY: But when it comes to  
23 defining or to examining what is reasonable  
24 protection of water supplies as designated by the  
25 legislature where it says specifically, "In a manner

1 that will afford reasonable protection against  
2 contamination of freshwater supplies designated by  
3 the State Engineer," then it's up to this Commission  
4 to maybe not be dogmatic in its philosophical  
5 differences but to try to reach some sort of  
6 agreement as to what is reasonable protection.

7           If we find, after we have explored this  
8 thoroughly, that we cannot reach a unanimous  
9 agreement on different points, what we can do is  
10 simply say that the record should show that the  
11 majority of the Commission reached agreement on a  
12 specific item. That's been done in the past. The  
13 order will reflect that a majority of the  
14 Commission, but that should be only invoked after we  
15 have had discussion to see if we can't work with  
16 each other to find that balance and to leave  
17 behind -- and maybe even compromise in some ways.

18           So we can find a workable solution so that  
19 we are performing the requirements given to this  
20 Commission by the legislature in affording  
21 reasonable protection against contamination of  
22 freshwater supplies.

23           That charge has been changed in many of  
24 the newspaper articles and in much of the media,  
25 much of the political action groups of the public

1 interest groups. The polarization between the two  
2 groups is very distressing when we all need to work  
3 together to ensure that we have a viable industry  
4 that is profitable to the industry and to the State  
5 and to the beneficiaries of the trust as the Land  
6 Office is charged so that we can reach some sort of  
7 agreement which will result in an order that is not  
8 punitive, that affords reasonable protection, that  
9 allows free enterprise.

10 I believe that we have spent enough time  
11 on airing the philosophical differences; that we do  
12 need to try to work together to reach some sort of  
13 order that we have been charged with, examining this  
14 proposal, these confined proposals. With that, I  
15 think we should take a 15-minute break so we can  
16 redirect our focus on what we have before us. We  
17 shall come back at ten till 11:00.

18 (Note: The hearing stood in recess at  
19 10:35 to 10:50.)

20 CHAIRWOMAN BAILEY: Back on the record.  
21 To clarify some points from our morning discussion,  
22 the differences between us can be boiled down to the  
23 differences in interpretation of the evidence that  
24 has been presented to us, and I think that's what we  
25 are working from, as far as this case is concerned.

1 I have asked our Commission counsel if he wants to  
2 talk to us about the Continental case, and he said  
3 that he would do research over lunchtime, but he is  
4 asking for specific questions on what you want out  
5 of the Continental case. So if you could help him  
6 by something the specific questions about what you  
7 want him to research over lunch.

8 COMMISSIONER BALCH: I think the language  
9 on reasonable balance is important to me.

10 MR. SMITH: I'm sorry?

11 COMMISSIONER BALCH: Reasonable balance.  
12 I want to understand how that's been interpreted.

13 MR. SMITH: It's good that it's going to  
14 be something easy to answer. Are you on board with  
15 that, Commissioner?

16 COMMISSIONER BLOOM: That's fine.

17 COMMISSIONER BALCH: That's really the  
18 only thing, different interpretations of what that  
19 meant.

20 CHAIRWOMAN BAILEY: All right.

21 MR. SMITH: I will warn you, reasonable is  
22 used in the law all the time. You will see  
23 references to reasonable man standard, reasonable  
24 balance, reasonable this, reasonable that.

25 COMMISSIONER BALCH: It may not be

1 significant if --

2 MR. SMITH: Well, no. I mean, I think it  
3 isn't that it isn't significant, it's that it is  
4 difficult to pin down. But I will read this and we  
5 can talk about it.

6 COMMISSIONER BALCH: Well, for me, when I  
7 was reading the closings and the findings, the  
8 petitioners in general are asking for reasonable  
9 balance of the regulations, in the regulations for  
10 protection and preventing waste. And I think OGAP's  
11 argument was we had to be protective without being  
12 reasonable, just protective of groundwater. So that  
13 case was cited as part of how the Commission is  
14 supposed to understand their obligations, and that's  
15 really what I was curious about, the interpretation  
16 of that particular phrase, to make sure I do my job  
17 the way the legislature intends it to be done.

18 MR. SMITH: Okay.

19 COMMISSIONER BLOOM: That will be helpful.  
20 If it adds anything to the conversation, that would  
21 be helpful.

22 CHAIRWOMAN BAILEY: So at this point we  
23 have hit the stumbling block on the depth to  
24 groundwater as far as siting requirements in A1A.  
25 Shall we delay any further discussion on the depth

1 to groundwater until we hear what reasonable  
2 protection means? Or would you prefer to discuss  
3 the difference between 50 and 25 feet as the  
4 limitation for the depth to groundwater below the  
5 bottom of the pit?

6 COMMISSIONER BALCH: If we --

7 COMMISSIONER BLOOM: A quick suggestion.  
8 If Mr. Balch would like to hear what Mr. Smith comes  
9 back with, perhaps we could jump ahead to design and  
10 construction specifications and that would get us  
11 out of the discussion of depth to groundwater. That  
12 might occupy us for an hour until lunch.

13 COMMISSIONER BALCH: I figure the same  
14 thing. Doc 11 and doc 12 are constructional and  
15 operational requirements.

16 CHAIRWOMAN BAILEY: All right. Why don't  
17 we go ahead to 19.15.17.11 and the first suggested  
18 change is in Section B, to delete the language  
19 relating to closed-loop systems as far as  
20 stockpiling the topsoil is concerned. Do either of  
21 you have an opinion on that?

22 COMMISSIONER BALCH: My understanding was  
23 the deletion was because with a closed-loop system  
24 you are doing it on the existing pad and you would  
25 have no need to stockpile topsoil.

1 CHAIRWOMAN BAILEY: That's my  
2 understanding. Commissioner Balch? Do you have a  
3 comment on that?

4 COMMISSIONER BLOOM: I think you are  
5 referring to Commissioner Bloom.

6 CHAIRWOMAN BAILEY: I'm sorry. I am  
7 looking at you and saying the wrong word.

8 COMMISSIONER BLOOM: We all blend  
9 together. I'm sorry, would you repeat that again?

10 COMMISSIONER BALCH: Okay. I think the  
11 argument for the closed-loop system is that the  
12 closed-loop system will be operated primarily on the  
13 pad where they have already graded and flattened it  
14 and brought in gravel, things like that.

15 COMMISSIONER BLOOM: There might not be a  
16 need for removal of soil. That was my understanding  
17 as well. I would be fine with adopting that change.

18 CHAIRWOMAN BAILEY: So we will delete "or  
19 closed-loop system" from Section B. Going down to  
20 Section C, there are also suggested deletions of  
21 closed-loop system as it applies to signs. Do the  
22 two of you agree that we can delete closed-loop  
23 system in both of those lines under Section C?

24 COMMISSIONER BALCH: The "or" at the end  
25 of all that is "or is located on a site where there

1 is an existing well, signed in compliance with  
2 19.15.16.8 NMAC," the regulation that I'm not  
3 familiar with, "that is operated by the same  
4 operator." What's the purpose of the sign?

5 CHAIRWOMAN BAILEY: So that people will  
6 know who the operator is where this facility is  
7 located.

8 COMMISSIONER BALCH: And in the normal  
9 well pad there will be a sign.

10 CHAIRWOMAN BAILEY: It is required.

11 COMMISSIONER BALCH: And if the  
12 closed-loop system is on the well pad there's  
13 already a sign.

14 COMMISSIONER BLOOM: I believe NMOGA said  
15 as well that there's always a continual presence  
16 within the closed-loop system, so I would be fine  
17 with that.

18 CHAIRWOMAN BAILEY: We will delete  
19 closed-loop system in both instances in Section C  
20 there. Then we will go to Section D, Fencing. The  
21 suggestion is made to change the word "prevent" to  
22 "deter unauthorized access." The operator shall  
23 fence or enclose the pit or below-grade tank in a  
24 manner that prevents or deters unauthorized access?

25 COMMISSIONER BLOOM: Madam Chair, I would

1 support that change. It's unreasonable to expect  
2 that a fence could be constructed that would  
3 absolutely prevent people from getting on to the  
4 site, so I think deter would be sufficient.

5 COMMISSIONER BALCH: There's some standard  
6 specifications for fencing?

7 CHAIRWOMAN BAILEY: Yes.

8 COMMISSIONER BALCH: Then I have no  
9 problem with that.

10 CHAIRWOMAN BAILEY: Okay. The next change  
11 is in D2 that would remove fencing to enclose a  
12 below-grade tank located within 1,000 feet of a  
13 residence. We will get to the second change in a  
14 minute.

15 COMMISSIONER BLOOM: Madam Chair, I  
16 believe this was being removed -- the testimony we  
17 heard said that the below-grade tank would be on the  
18 drill site which would have a fence around it so  
19 that a second fence is not necessary. Is that your  
20 recollection?

21 COMMISSIONER BALCH: I think there are  
22 various versions of the rule. Maybe it's better to  
23 just ask so we would know is there normally a fence  
24 in that situation around the entire site?

25 CHAIRWOMAN BAILEY: Around a well site?

1 COMMISSIONER BALCH: Yes.

2 CHAIRWOMAN BAILEY: Around a well site,  
3 yes. But --

4 COMMISSIONER BALCH: A drilling pad?

5 CHAIRWOMAN BAILEY: Not necessarily.

6 COMMISSIONER BALCH: I kind of think the  
7 important distinction comes in with the addition of  
8 "an occupied residence."

9 CHAIRWOMAN BAILEY: So we should look at  
10 those two proposals in conjunction with each other.

11 COMMISSIONER BALCH: So if you are within  
12 a certain distance of a building or facility, you  
13 have to have a fence around your operating wellhead.

14 CHAIRWOMAN BAILEY: Yes.

15 COMMISSIONER BALCH: But while you are  
16 drilling you don't necessarily have to have one.

17 CHAIRWOMAN BAILEY: No, but we are talking  
18 about whether or not it will include below-grade  
19 tank within --

20 COMMISSIONER BALCH: Which is more of a  
21 permanent structure on a pad.

22 CHAIRWOMAN BAILEY: Right. Which may not  
23 be related to current drilling operations. It could  
24 be part of the production facility. Should  
25 operators fence a below-grade tank.

1                   COMMISSIONER BALCH: And there's no other  
2 stipulations for fencing an above-grade tank, for  
3 example?

4                   COMMISSIONER BLOOM: I believe that this  
5 fencing exists because the sides are visible so  
6 there's a risk that somebody could fall in perhaps?

7                   CHAIRWOMAN BAILEY: I think it influences  
8 access to the pipes, the piping involved in the  
9 tank, to try to deter --

10                  COMMISSIONER BALCH: Don't want a kid from  
11 a nearby school coming over and turning a valve?

12                  CHAIRWOMAN BAILEY: Exactly.

13                  COMMISSIONER BLOOM: To my recollection  
14 from the testimony on this when I originally saw it  
15 I thought why wouldn't we want to fence a  
16 below-grade tank, and what I recall hearing is there  
17 was already a fence around the site.

18                  COMMISSIONER BALCH: If there's already a  
19 fence around the site I don't think it's an issue.

20                  CHAIRWOMAN BAILEY: So we will --

21                  COMMISSIONER BLOOM: We could add language  
22 saying the operational fence includes -- saying  
23 below-grade tank does not need a fence if there's  
24 already one at the site? Something along those  
25 lines.

1           CHAIRWOMAN BAILEY: I think the emphasis  
2 should be on whether or not its location is near an  
3 occupied residence, school, hospital, institution or  
4 church with a security fence at least six feet in  
5 height with two strands of barbed wire at the top  
6 and the gates are closed and locked. I think we  
7 need to look at that entire paragraph to get a sense  
8 of what this involves.

9           COMMISSIONER BALCH: I think the concern  
10 is brought about by occupied. You could have a  
11 structure that's not been used for a long period of  
12 time.

13           CHAIRWOMAN BAILEY: Right.

14           COMMISSIONER BALCH: And if you are  
15 wandering around the back of New Mexico you will  
16 often find a half torn down Catholic church in a  
17 town that doesn't exist anymore, and the existing  
18 rule would make you site away from that location.  
19 On the other hand, if you say occupied, it's just  
20 temporarily unoccupied.

21           CHAIRWOMAN BAILEY: It's a rental house  
22 that's in between tenants.

23           COMMISSIONER BALCH: Exactly. So we are  
24 trying to swap gray areas. I guess I don't know  
25 what the intent -- the intent is if you are close to

1 a place where there are going to be people you want  
2 to have fencing around your facilities. That's the  
3 intent of the regulation.

4 CHAIRWOMAN BAILEY: Right. We could put  
5 in a modifier, "of a permanently occupied."  
6 Consistently?

7 COMMISSIONER BALCH: Sometimes -- and this  
8 may not be a good example, but, for example, in  
9 Socorro about 15 years ago they built an elementary  
10 school and they built it on a vacant lot next to the  
11 bar and then the bar was forced to close because  
12 they were too close to the school. If you leave the  
13 language as occupied, then while nobody is in there  
14 they don't have to fence it but if somebody moves in  
15 would they then be forced to fence it to be in  
16 compliance.

17 CHAIRWOMAN BAILEY: Yes.

18 COMMISSIONER BALCH: So maybe it's not  
19 really an issue. If there is nobody there they  
20 don't have to fence it. If somebody moves in they  
21 have to fence it.

22 CHAIRWOMAN BAILEY: So you are suggesting  
23 that we do include the words "an occupied permanent  
24 residence"?

25 COMMISSIONER BLOOM: On the way to work I

1 was thinking about something like an occupied  
2 permanent residence or a residence that could be  
3 occupied or something like that, and it gets you  
4 away from the thing that's three adobe walls and a  
5 crashed-in roof. But maybe occupied works then  
6 as-is.

7 COMMISSIONER BALCH: As long as there's  
8 another mechanism already in existence, we shouldn't  
9 need to specifically regulate it.

10 CHAIRWOMAN BAILEY: Or if it becomes  
11 occupied they would have to fence it according to  
12 the rule.

13 COMMISSIONER BALCH: That would be up to  
14 the inspector to determine or up to the operator, I  
15 suppose.

16 CHAIRWOMAN BAILEY: Well, I'm sure the  
17 occupant would bring that to the OCD's notice or  
18 should.

19 COMMISSIONER BALCH: Regardless, they  
20 would be subject to the penalty.

21 CHAIRWOMAN BAILEY: Exactly. So shall we  
22 include the words "an occupied" and delete "or  
23 below-grade tank"?

24 COMMISSIONER BLOOM: So I wouldn't have  
25 any trouble removing it if we are certain that the

1 site would be fenced.

2 COMMISSIONER BALCH: In the exhibits that  
3 were shown of below-grade tanks they did not appear  
4 to be -- they could be open to the air but they  
5 always had a metal walkway or mesh on top of it.

6 COMMISSIONER BLOOM: Looking at NMOGA  
7 Exhibit 5-1 --

8 COMMISSIONER BALCH: Exactly what I was  
9 thinking about.

10 COMMISSIONER BLOOM: Now, I think this  
11 phase here, though, it could be a falling hazard for  
12 people and/or animals.

13 CHAIRWOMAN BAILEY: But with that exhibit  
14 there is the periphery fence.

15 COMMISSIONER BLOOM: There is one visible.

16 CHAIRWOMAN BAILEY: So we do have  
17 periphery fences.

18 COMMISSIONER BALCH: The below-grade tank  
19 is really going to come into existence during the  
20 operational phase of the well, and at that point the  
21 wellhead will be fenced if you are near a structure  
22 or if you are on somebody's farmland and they don't  
23 want their cattle falling in. So it may not be  
24 necessary.

25 CHAIRWOMAN BAILEY: Look at the next

1 paragraph. It talks about fencing any pit or  
2 below-grade tank to exclude livestock, so we have  
3 below-grade tanks fenced to exclude issues  
4 concerning livestock.

5 COMMISSIONER BALCH: The barbed wire fence  
6 won't stop a ten-year-old boy but he will sure know  
7 that he is not supposed to go in there.

8 CHAIRWOMAN BAILEY: If we have the  
9 periphery fence we don't need to have the additional  
10 fence around the tank.

11 COMMISSIONER BLOOM: Right.

12 CHAIRWOMAN BAILEY: So have we --

13 COMMISSIONER BALCH: I think we can delete  
14 it.

15 CHAIRWOMAN BAILEY: Delete "or below-grade  
16 tank"?

17 COMMISSIONER BALCH: Yes.

18 COMMISSIONER BLOOM: Yes.

19 CHAIRWOMAN BAILEY: Include, "An occupied"  
20 and move down to Paragraph 3 where the proposal is  
21 to strike the sentence, "The appropriate division  
22 district office may approve an alternative to this  
23 requirement if the operator demonstrates that an  
24 alternative process provides equivalent or better  
25 protection." And that has to do with fencing a pit

1 or below-grade tank for excluding livestock.  
2 Because the following paragraph deals with  
3 alternatives to these requirements, so that sentence  
4 could be deleted because we have the following  
5 paragraph which will deal with that issue.

6 COMMISSIONER BALCH: It's the catch-all.

7 CHAIRWOMAN BAILEY: Right. So Paragraph  
8 3, we go ahead and delete that sentence?

9 COMMISSIONER BLOOM: Agreed.

10 COMMISSIONER BALCH: Yes.

11 CHAIRWOMAN BAILEY: Okay. Theresa. And  
12 now we can go ahead and look at Paragraph 4, which  
13 does talk about alternatives to the fencing  
14 requirement. Right off the bat I would like to  
15 change the word "shall" to the word "may". The  
16 appropriate division district office may approve.  
17 Do you both agree with that?

18 COMMISSIONER BALCH: Yes.

19 COMMISSIONER BLOOM: Yes.

20 CHAIRWOMAN BAILEY: This allows  
21 alternatives if they provide equivalent protection.  
22 And then we have a change in the language back to  
23 what the statutes say. It removes "livestock,  
24 wildlife or human safety" and inserts "public health  
25 and the environment or reasonable protection of

1 freshwater as designated by the State Engineer." Do  
2 you have opinions on the last sentence?

3 COMMISSIONER BLOOM: OCD adds that?

4 CHAIRWOMAN BAILEY: OCD made a change to  
5 the may approve rather than the shall approve.

6 COMMISSIONER BALCH: When you are  
7 demonstrating protection of -- well, no. That's  
8 something that we discussed or it came up in  
9 cross-examination. Maybe we could get the  
10 alternative one in here.

11 COMMISSIONER BLOOM: That would be  
12 helpful.

13 CHAIRWOMAN BAILEY: We have agreed to  
14 change the word "shall" to "may." The OCD Findings  
15 of Fact Notice of Modifications retained livestock,  
16 wildlife or human safety. But that does not show  
17 either support or denial of the OCD. It was simply  
18 enforcement.

19 COMMISSIONER BALCH: This is a completely  
20 new addition to the rule. There were arguments from  
21 NMOGA that livestock was not in our list of  
22 considerations?

23 CHAIRWOMAN BAILEY: That was IPANM.

24 COMMISSIONER BALCH: IPANM.

25 CHAIRWOMAN BAILEY: Did not agree with

1 including livestock.

2 COMMISSIONER BALCH: And the alternative  
3 language was?

4 CHAIRWOMAN BAILEY: "Public health and the  
5 environment or reasonable protection of freshwater."  
6 So it depends on how you interpret public health and  
7 the environment as what protections are included.  
8 Whether that includes livestock, wildlife or human  
9 safety.

10 COMMISSIONER BALCH: Public health and the  
11 environment is the same terminology that exists in  
12 other OCD rules? Maybe the environment, livestock  
13 and wildlife.

14 CHAIRWOMAN BAILEY: It's a matter of how  
15 broadly do you interpret. There's no specific  
16 definition.

17 COMMISSIONER BALCH: Do you have an  
18 opinion, Mr. Bloom?

19 COMMISSIONER BLOOM: Actually, it would be  
20 helpful for me if I could read this other amendment  
21 that we're talking about. Theresa, can you bring  
22 that up?

23 COMMISSIONER BALCH: It's right below  
24 that.

25 COMMISSIONER BLOOM: Looks like the same.

1 So now we are talking about environmental  
2 protections to livestock, wildlife or public safety?

3 COMMISSIONER BALCH: That's stricken in  
4 the second version, so it's protection to public  
5 health and the environment and then I think there  
6 was something else about --

7 CHAIRWOMAN BAILEY: Or reasonable  
8 protection of freshwater.

9 COMMISSIONER BLOOM: I remember Ms.  
10 Gerholt cross-examining somebody on the environment  
11 and asking do cattle not make up part of the  
12 environment and therefore wouldn't they be  
13 protected, and I think the answer was yes.

14 COMMISSIONER BALCH: And wildlife.

15 COMMISSIONER BLOOM: But regardless what  
16 the answer was, I think we could have livestock  
17 included in the environment. How does fencing  
18 affect freshwater? Why that would be included?

19 CHAIRWOMAN BAILEY: That would be one of  
20 the criteria for the appropriate division district  
21 office to determine approval of an alternative that  
22 affords protection to whatever we interpret needs to  
23 be protected or reasonable protection of freshwater.  
24 That does seem to be superfluous in that sentence,  
25 doesn't it?

1           COMMISSIONER BALCH: I guess the  
2 environment to me would also include freshwater.

3           COMMISSIONER BLOOM: We are talking about  
4 specifically alternatives to fencing a temporary  
5 pit, below-grade tank. So we could then delete  
6 freshwater?

7           CHAIRWOMAN BAILEY: Yes.

8           COMMISSIONER BLOOM: Okay.

9           CHAIRWOMAN BAILEY: So do we choose to  
10 specify livestock, wildlife and human safety?

11          COMMISSIONER BALCH: Or public health and  
12 the environment.

13          CHAIRWOMAN BAILEY: Or use the terms  
14 public health and the environment?

15          COMMISSIONER BLOOM: Livestock, public  
16 health, health and the environment.

17          COMMISSIONER BALCH: I think that the  
18 public health and the environment provides enough  
19 protection.

20          CHAIRWOMAN BAILEY: It does, but when it's  
21 that broad it's pretty hard to enforce because  
22 that's open to interpretation by inspectors.

23          COMMISSIONER BALCH: In this case, though,  
24 they are only asking for a variance essentially that  
25 would change to another requirement, so they are

1 going to be trying to demonstrate some precise --  
2 they are going to be trying to determine that  
3 something is protected to a particular aspect of  
4 that site. And then it will be up to the judgment  
5 of the district office.

6 COMMISSIONER BLOOM: Let me offer this  
7 because we are still talking about fencing and we  
8 might want to include livestock and wildlife because  
9 there are often concerns about is a fence  
10 cattle-proof. Some fences, if you don't get enough  
11 barbed wire they will go through it. There's also  
12 fences that livestock can get hung up on, antelope,  
13 deer as well, so those, I think, are often common  
14 considerations that Game & Fish and other folks have  
15 with fencing.

16 So I think it might be important if we're  
17 discussing it to have livestock and wildlife be  
18 included along with public safety. If we threw in  
19 environment, that would cover water or whatever else  
20 may be of interest or concern.

21 CHAIRWOMAN BAILEY: So are you still  
22 thinking?

23 COMMISSIONER BALCH: I'm going to guess  
24 that the specifications in 3, "The operator shall  
25 fence to exclude livestock with a four-foot fence

1 that has at least four strands of barbed wire evenly  
2 spaced in the interval between one foot and four  
3 foot above the ground," that must be a livestock or  
4 cattle-proof fence. Certainly an antelope would  
5 ignore that and bound right over.

6 CHAIRWOMAN BAILEY: And then the last  
7 sentence of that paragraph.

8 COMMISSIONER BALCH: So in 3, in the  
9 existing language, the word livestock and wildlife  
10 are both used.

11 CHAIRWOMAN BAILEY: Yes, and that is the  
12 criteria for fencing. Now, alternatives are what  
13 are addressed in Paragraph 4. Do we want the  
14 alternatives to reflect the same requirements of 3  
15 as far as protection is concerned?

16 COMMISSIONER BALCH: Which is basically  
17 livestock, wildlife, and then the overall protects  
18 human safety.

19 CHAIRWOMAN BAILEY: Right.

20 COMMISSIONER BALCH: I think if you use  
21 the secondary wording, which is public health and  
22 environment, that that's probably too broad for the  
23 rule as regards fencing. You are probably better  
24 off to specifically talk about what you are trying  
25 to protect.

1 CHAIRWOMAN BAILEY: So you agree that with  
2 Commissioner Bloom to include the words "livestock,  
3 wildlife or human safety"?

4 COMMISSIONER BALCH: I guess the initial  
5 wording with the change of the word "shall" to  
6 "may," I'm comfortable with that.

7 CHAIRWOMAN BAILEY: Yes.

8 COMMISSIONER BALCH: I guess I like the  
9 first version of No. 4.

10 CHAIRWOMAN BAILEY: Okay. There was also  
11 the question whether or not the alternative needed  
12 to provide equivalent or better protections. That's  
13 also included.

14 COMMISSIONER BALCH: The original one was  
15 equivalent protections?

16 CHAIRWOMAN BAILEY: Do we want equivalent?

17 COMMISSIONER BLOOM: No.

18 CHAIRWOMAN BAILEY: Or better?

19 COMMISSIONER BALCH: Equivalent or better.

20 COMMISSIONER BLOOM: Equivalent or better,  
21 yes. I think --

22 COMMISSIONER BALCH: The intent there is  
23 if you have something that's better, you are not  
24 stuck with the rule. If you can provide something  
25 that is better or more protective, then they should

1 be allowed to do that without having to get an  
2 exception.

3 CHAIRWOMAN BAILEY: Okay. So we are  
4 agreed to use the upper Paragraph 4 and to delete  
5 the bottom Paragraph 4; is that correct?

6 COMMISSIONER BALCH: Yes.

7 COMMISSIONER BLOOM: Correct. And I would  
8 just offer do we want to include environment in  
9 there broadly?

10 COMMISSIONER BALCH: Well, I think that  
11 when you are talking about this being applied to  
12 fencing, I'm trying to figure out what I can do  
13 about the environment with a fence.

14 COMMISSIONER BLOOM: Superfluous.

15 CHAIRWOMAN BAILEY: Then we will go on to  
16 netting. The proposal is to include the multi-well  
17 fluid management pits and to delete the word  
18 "permanent" for open top tank for screening and  
19 netting. We do have netting requirements for  
20 permanent pits. Should we include multi-well fluid  
21 management pits in the same category for netting?

22 COMMISSIONER BLOOM: I think those changes  
23 seem appropriate.

24 COMMISSIONER BALCH: I think so, too. You  
25 are probably going to have a much larger surface

1 area, so I'm not sure how practical netting is, but  
2 you do have otherwise -- non-hazardous to wildlife  
3 and I think that's important. If they are permanent  
4 they will be there longer than a temporary pit.

5 CHAIRWOMAN BAILEY: Yes. So we will  
6 include the language, "a multi-well fluid management  
7 pit." Do we want to delete the word "permanent" for  
8 an open top tank for screening?

9 COMMISSIONER BLOOM: I can't see why we  
10 wouldn't want to do that.

11 CHAIRWOMAN BAILEY: Okay. So we will  
12 accept both changes in Paragraph E. Then we skip  
13 down to Section F2 and we are looking at the  
14 proposal to change the slope requirements from two  
15 to one to whatever does not place undue stress and  
16 are consistent with the angle of repose. We did  
17 have quite a bit of testimony on that.

18 Commissioners, do you have opinions on whether or  
19 not we should change the slope requirements and to  
20 accept angle of repose and under stress?

21 COMMISSIONER BLOOM: We probably spent too  
22 much time on angle of repose during the hearing, but  
23 I would prefer to see the existing language.

24 COMMISSIONER BALCH: I think for me I like  
25 to optimize processes, and if you have to go out as

1 a regulator and calculate the angle of repose on  
2 every pit, and I think that was brought out in  
3 testimony, it would be hard to visually inspect.  
4 Whereas two to one you definitely could inspect.  
5 The counter argument was, well, what if one side of  
6 your pit is a rock wall. Then you can't get two to  
7 one.

8 COMMISSIONER BLOOM: I think Dr. Neeper  
9 gave us an example where he did just that and he had  
10 a collapse on the rock wall.

11 COMMISSIONER BALCH: So for ease of  
12 regulation, I think the alternate wording suggested  
13 there does put a little more burden on the  
14 inspector. I'm trying to remember back to my  
15 geology days again. I do think that the angle of  
16 repose of two to one is something similar to what  
17 you have for sand or beads or something like that,  
18 which would be pretty much a worse case scenario.

19 CHAIRWOMAN BAILEY: Well, the sand or  
20 beads is the angle of repose.

21 COMMISSIONER BALCH: Right. If you drop  
22 sand in the hour glass it's two to one. Anything  
23 else will be more cohesive and have a different  
24 angle of repose that is, I think, less than two to  
25 one or more than.

1 CHAIRWOMAN BAILEY: Isn't it three to one?

2 COMMISSIONER BALCH: It might be three to  
3 one.

4 CHAIRWOMAN BAILEY: I think it's three to  
5 one.

6 COMMISSIONER BALCH: I'm going from  
7 memory.

8 CHAIRWOMAN BAILEY: So am I.

9 COMMISSIONER BALCH: Do you recall why it  
10 was two to one in the initial Rule 17?

11 CHAIRWOMAN BAILEY: I think it was to  
12 prevent unnecessary collapse of the slope under  
13 stress. It does require more area to sometimes have  
14 that two to one rather than angle of repose. But  
15 the whole point was that we want to protect the  
16 integrity of the liner.

17 COMMISSIONER BALCH: Well, I'm actually  
18 not very uncomfortable at all with the first part of  
19 the addition where it says, "Do not place undue  
20 stress upon the liner."

21 COMMISSIONER BLOOM: I thought about that,  
22 too. You could put an "and."

23 COMMISSIONER BALCH: Or you could say,  
24 "The operator shall construct the temporary pit so  
25 the slopes are no steeper than two to one or do not

1 place undue stress upon the liner," and maybe at  
2 that point you would want to have --

3 COMMISSIONER BLOOM: I think the problem  
4 is --

5 COMMISSIONER BALCH: -- after they were  
6 approved instead of just having it happened.

7 COMMISSIONER BLOOM: My concern with "or"  
8 is it would be difficult for an inspector to  
9 understand if there's undue stress. It's rather  
10 ambiguous. Two to one makes it easy for the  
11 inspector and provides that there not be undue  
12 stress on the liner.

13 COMMISSIONER BALCH: I believe the  
14 inspector questioned on the matter said exactly the  
15 same thing. He could go out there and see that it's  
16 two to one and it's not an issue.

17 In other places we have tried to remove  
18 the interpretative elements and make it so things  
19 are clear and easily applied.

20 CHAIRWOMAN BAILEY: So both of you would  
21 like to retain the current language of "no steeper  
22 than two horizontal to one vertical, 2H to 1V"?

23 COMMISSIONER BALCH: I think that's  
24 probably better language than the second language.  
25 Now, in testimony it was brought out what if you're

1 in a situation where you cannot get the two to one  
2 angle? What happens then? Right now nothing  
3 happens. You can't do it.

4 CHAIRWOMAN BAILEY: No, we have the  
5 following sentence. It says, "The district office  
6 may approve an alternative."

7 COMMISSIONER BALCH: All right. So  
8 there's already a solution to the problem.

9 CHAIRWOMAN BAILEY: Okay. So we will not  
10 accept the proposed language and we will retain the  
11 current language. Then we go on down to F7 that has  
12 to do with the edges of the liner, and it says, "The  
13 anchor trench shall be 18 inches deep unless  
14 encountered bedrock provides equivalent anchoring."  
15 Do either of you have an opinion on the proposal?

16 COMMISSIONER BLOOM: One comment that  
17 struck me at the time I first saw this, that -- this  
18 is silly but it doesn't actually say it has to be  
19 anchored to the bedrock. I don't know if you want  
20 to add, "Unless encountered bedrock provides  
21 equivalent anchoring in the liner."

22 CHAIRWOMAN BAILEY: Do you want to -- do  
23 you have an opinion on this phrase?

24 COMMISSIONER BLOOM: I guess I would move  
25 to add, "And the liner is anchored to it."

1 Chairwoman Bailey, you have been dealing with the  
2 interpretation of the regulations here for a while  
3 and if understanding this is clear, it's fine.

4 COMMISSIONER BALCH: What about something  
5 that says, "Unless anchored to encountered bedrock  
6 providing equal anchoring"?

7 COMMISSIONER BLOOM: One more time.

8 COMMISSIONER BALCH: "Unless anchoring to  
9 encountered bedrock provides equivalent anchoring."

10 CHAIRWOMAN BAILEY: Okay. That includes  
11 Commissioner Bloom's concern.

12 COMMISSIONER BLOOM: Could you repeat that  
13 for Theresa?

14 CHAIRWOMAN BAILEY: "Unless anchoring to  
15 encountered bedrock provides equivalent anchoring."

16 COMMISSIONER BALCH: Yes. After the  
17 "unless" on the last line.

18 CHAIRWOMAN BAILEY: Are we in agreement  
19 with that language there?

20 COMMISSIONER BLOOM: Yes. Thank you,  
21 Commissioner Balch.

22 CHAIRWOMAN BAILEY: Okay. Going on down  
23 to Paragraph 11. We are deleting "unconfined."  
24 Going on down to G, Permanent Pits, No. 4, this  
25 brings up the question of reasonable and public

1 safety. I think we should delay comment on  
2 reasonable until after we hear what our attorney  
3 says.

4 COMMISSIONER BLOOM: It might be a  
5 different reasonable. I'm sorry, where are we  
6 looking at? I don't have a change highlighted  
7 there.

8 CHAIRWOMAN BAILEY: G, Permanent Pits, No.  
9 4, that begins, "The Environmental Bureau in the  
10 Division's Santa Fe office." Are you there?

11 COMMISSIONER BLOOM: Yes.

12 COMMISSIONER BALCH: Yeah. I'm not seeing  
13 where anybody suggested a change.

14 CHAIRWOMAN BAILEY: IPANM.

15 COMMISSIONER BALCH: Was this in a  
16 closing?

17 CHAIRWOMAN BAILEY: It was part of their  
18 submittal.

19 COMMISSIONER BALCH: I guess I am looking  
20 at the NMOGA version.

21 CHAIRWOMAN BAILEY: The IPANM version  
22 includes the word "reasonably protects freshwater"  
23 for an alternative liner and deletes the  
24 word "safety" for public safety.

25 COMMISSIONER BALCH: So you probably need

1 to put those in and highlight this in red. I don't  
2 have a copy.

3 COMMISSIONER BLOOM: Add "reasonably" and  
4 delete "safety."

5 COMMISSIONER BALCH: It's just two words.  
6 If you go to "protects freshwater" right in front of  
7 that, the alternative liner reasonably protects  
8 freshwater. What's the other one?

9 CHAIRWOMAN BAILEY: Deletes the  
10 word "safety."

11 COMMISSIONER BALCH: So put a strike  
12 through on the word "safety." I think you can  
13 convert that whole thing to red underline, I guess.  
14 Then I think we can wait on this until we have an  
15 interpretation on reasonable.

16 MR. SMITH: You are really hoping for a  
17 lot.

18 COMMISSIONER BLOOM: Let me suggest that  
19 we are look to go Mr. Smith as a definition of  
20 reasonable --

21 CHAIRWOMAN BAILEY: Reasonable protection.

22 COMMISSIONER BLOOM: Why would we want  
23 to -- I mean, either it protects water or reasonably  
24 protects water?

25 COMMISSIONER BALCH: Okay. So I think the

1 crux of the argument, and I don't want to go too far  
2 off so please stop me if I do, Chairwoman Bailey.  
3 The crux of the argument is you can ultimately  
4 protect the source of freshwater by doing something.  
5 You can build a five foot thick wall, stainless  
6 steel tank all the way around the source and nothing  
7 can get in or out. Or you can do something lesser  
8 that has the same amount of protection.

9 COMMISSIONER BLOOM: Let me say this. The  
10 sentence goes on to say, "Protects freshwater as  
11 effectively as the specified media." Are we going  
12 to reasonably protect freshwater effectively? No,  
13 we are going to protect freshwater effectively.

14 COMMISSIONER BALCH: In this case I think  
15 the word is unnecessary.

16 CHAIRWOMAN BAILEY: I agree.

17 COMMISSIONER BALCH: Because it's already  
18 amended by, "As effectively as the specified media."

19 CHAIRWOMAN BAILEY: So we will not accept  
20 the insertion of the word "reasonably." Do we want  
21 to delete the word "safety"? I think the argument  
22 is that safety is a portion of public health,  
23 according to some of the testimony that we heard.

24 COMMISSIONER BLOOM: I would agree with  
25 that.

1                   COMMISSIONER BALCH: I would agree as  
2 well.

3                   CHAIRWOMAN BAILEY: So do we need to have  
4 the word "safety" here?

5                   COMMISSIONER BALCH: I think it's already  
6 encompassed public health.

7                   COMMISSIONER BLOOM: I would move to  
8 remove "safety."

9                   CHAIRWOMAN BAILEY: We will delete the  
10 word "safety." And that takes us to drying pads.  
11 We can begin this or we can start lunch and  
12 reconvene at 1:00 o'clock.

13                   COMMISSIONER BLOOM: Let's take it on.

14                   COMMISSIONER BALCH: We can go on a little  
15 bit longer.

16                   CHAIRWOMAN BAILEY: Works for me. The  
17 suggestion is to insert the words "drying pads  
18 associated with closed-loop systems" so that we know  
19 that we are dealing with a specific portion or a  
20 specific aspect of closed-loop systems. It would  
21 just be the drying pads. The suggestion is to  
22 delete "operator shall design, construct a  
23 closed-loop system to ensure the confinement of oil,  
24 gas or water to prevent uncontrolled releases" and  
25 "The operator of a closed-loop system that uses

1 temporary pits for solids management shall comply  
2 with the requirements of temporary pits."

3 COMMISSIONER BALCH: We have already  
4 separated closed-loop systems from temporary pits.  
5 For one, I believe the testimony that was presented  
6 was that closed-loop systems are inherently designed  
7 to ensure the confinement of oil, gas or water or to  
8 prevent uncontrolled releases, so this is  
9 superfluous.

10 COMMISSIONER BLOOM: Mr. Balch, to go back  
11 to Line 2 for a second. What we removed from the  
12 definition of closed-loop systems was saying that --  
13 so the definition has gone from "closed-loop system  
14 means a system that uses above-ground steel tanks  
15 for the management of drilling or workover fluids,"  
16 and we deleted "without using below-grade tanks or  
17 pits." So this now means that a closed-loop system  
18 could use a pit for solids management?

19 COMMISSIONER BALCH: No. In my  
20 understanding the closed-loop system has no -- all  
21 of the fluid movement between the wellbore and where  
22 you are mixing your mud and all that stuff is done  
23 through tanks and pipes. There's no contact with a  
24 pit of any sort.

25 COMMISSIONER BLOOM: Okay.

1           COMMISSIONER BALCH:  If it did have  
2   contact, it wouldn't be a closed-loop system.  Is  
3   that correct?

4           CHAIRWOMAN BAILEY:  I believe so.  I mean,  
5   we look at the way a closed-loop system is designed  
6   and it does incorporate shale shakers and tanks to  
7   have the solids fall out into specific areas.

8           COMMISSIONER BALCH:  Onto the drying pad.

9           CHAIRWOMAN BAILEY:  Right.

10          COMMISSIONER BALCH:  Which is then usually  
11   rolled up and hauled away.  The salts are removed  
12   that way.  It's only the salts on the drying pad.  
13   You are not putting -- you are putting wet rocks,  
14   but the wet rocks will pretty quickly become dry  
15   rocks.  So I think it came down to you're asking  
16   them to design and construct something that's  
17   already designed and constructed to do what you are  
18   asking it to do in 1.  We encountered that yesterday  
19   in another area.

20          The other -- I think it was when you were  
21   talking about separating closed-loop systems from  
22   pits, because if you are going to have closed-loop  
23   system which is subject just to a registration and  
24   pits, which are subjected to a regulatory process,  
25   the closed-loop system no longer needs to comply

1 with the rule if they are already separated.

2 COMMISSIONER BLOOM: Okay.

3 CHAIRWOMAN BAILEY: And for clarification,  
4 the closed-loop system just simply requires  
5 notification, not registration.

6 COMMISSIONER BALCH: Right.

7 CHAIRWOMAN BAILEY: So we can delete  
8 Section 2. We have not yet reached a decision on  
9 Section 1 for designing and constructing the  
10 closed-loop system to ensure the confinement of oil,  
11 gas or water to prevent uncontrolled releases. That  
12 appears to be a catch-all in case there is a spill  
13 from a closed-loop system. But spills are recorded  
14 under the Spill Rule, 29. This is simply requiring  
15 a design of construction that would anticipate.

16 COMMISSIONER BALCH: Yeah, which is what  
17 they try and do anyway. Now, I do remember in the  
18 testimony from -- I think it was Mr. Scott that if  
19 you do have a problem with a closed-loop system it  
20 may not be able to anticipate it. So --

21 CHAIRWOMAN BAILEY: If you have a burp?

22 COMMISSIONER BALCH: Yeah, right. So his  
23 argument there was you can design it however you  
24 want but there's no way you can ensure that it will  
25 100 percent of the time always prevent any spill or

1 release. However, if there is a spill or release,  
2 it then goes to the Spill Rule. I think that was  
3 what his testimony was.

4 CHAIRWOMAN BAILEY: I have to agree with  
5 that.

6 COMMISSIONER BLOOM: Yeah, I don't think  
7 that Line 1 serves any purpose. I think that --

8 COMMISSIONER BALCH: If you knew how to  
9 prevent the uncontrolled release, you would already  
10 do it.

11 CHAIRWOMAN BAILEY: So we will go ahead  
12 and delete 1 and 2 as suggested, correct?

13 COMMISSIONER BALCH: Yes.

14 COMMISSIONER BLOOM: Yes.

15 CHAIRWOMAN BAILEY: That takes us to I.

16 COMMISSIONER BALCH: There was a word in  
17 I2?

18 COMMISSIONER BLOOM: Below-grade tanks.

19 CHAIRWOMAN BAILEY: In below-grade tanks  
20 I4A there was discussion on the ambiguous term "or  
21 alarm" that was suggested for insertion and there  
22 had been some suggestions on how to make that more  
23 specific to what kind of alarm.

24 COMMISSIONER BLOOM: There was one thing  
25 we missed up above.

1           COMMISSIONER BALCH: In 2A there was a  
2 deletion of one word, "system," in the NMOGA  
3 version. Right there. It's still there.

4           CHAIRWOMAN BAILEY: Oh, okay. I don't  
5 have that on mine. There it is. That seems to me  
6 to be an obvious deletion.

7           COMMISSIONER BLOOM: There's no other  
8 mention of below-grade tank system.

9           CHAIRWOMAN BAILEY: So go ahead and  
10 delete "system." And now we can go to the question  
11 of alarm and how we can be specific in what kind of  
12 alarm rather than something that just rings on its  
13 own forever out in the middle of nowhere.

14          COMMISSIONER BALCH: Like the tree falling  
15 in the forest when nobody is around?

16          CHAIRWOMAN BAILEY: Exactly.

17          COMMISSIONER BALCH: I think those are  
18 recommendations more to require a shutoff and  
19 control device and manual controls.

20          CHAIRWOMAN BAILEY: It says the OCD  
21 recommendation was to --

22          COMMISSIONER BALCH: Remove the words "or  
23 alarm" and add "high level shutoff control device  
24 and manual controls."

25          COMMISSIONER BLOOM: I don't think they

1 are --

2 COMMISSIONER BALCH: It's already in  
3 there.

4 COMMISSIONER BLOOM: The OCD recommended  
5 not including alarm in the language.

6 CHAIRWOMAN BAILEY: That's what it appears  
7 to be.

8 COMMISSIONER BLOOM: I would support not  
9 including "or alarm." One of the concerns we heard  
10 about the automatic shutoff control is it can often  
11 go off when the lines freeze and it creates a mess.  
12 There's nothing stopping an operator from installing  
13 an alarm. I have seen some of the systems with a  
14 call-out. Automatically they could set the alarm to  
15 go off before the automatic shutoff went off and  
16 that would give them time to get out there. If for  
17 some reason the equipment was down, there wasn't a  
18 connection and people couldn't get out there because  
19 of bad weather or whatever, the automatic shutoff  
20 would still be in place.

21 COMMISSIONER BALCH: I think if you delete  
22 the "or alarm" and leave it the way it is, then as  
23 Mr. Bloom said, you leave it in the range of best  
24 management practices, and ultimately if you can't  
25 get out there you could have a spill that you would

1 not want to have. So I think I would support not  
2 including the "or alarm."

3 CHAIRWOMAN BAILEY: In the OCD Findings of  
4 fact Page 7, they do discuss the question. It says,  
5 "The alarm alone is insufficient because there may  
6 not be a person present to hear the alarm and  
7 respond. A call-back alarm system or a remotely  
8 monitored alarm system would allow for an operator  
9 to quickly address a potential overflow of a  
10 below-grade tank."

11 We could include that specificity and call  
12 it a call-back alarm or a remotely monitored alarm  
13 system.

14 COMMISSIONER BALCH: So you are suggesting  
15 keeping the "or alarm" and extending that to include  
16 the OCD's suggested language?

17 CHAIRWOMAN BAILEY: Yes, that's what I am  
18 suggesting, so there can be this remote notice back  
19 to the office, wherever it is. So that there's a  
20 call-back or a remotely monitored alarm system.

21 COMMISSIONER BALCH: I believe the  
22 testimony for having the "or alarm," and I think you  
23 alluded to it in your discussion, Mr. Bloom, was  
24 that these high level shutoff control devices are  
25 not necessarily very reliable with the current

1 technology, so providing the alternative might not  
2 be a bad thing, providing it's going to provide  
3 equal or better protection.

4 CHAIRWOMAN BAILEY: I think it provides  
5 enhanced protection to have an alarm that's  
6 monitored somewhere back at the office.

7 COMMISSIONER BALCH: One concern Mr. Bloom  
8 also brought up was what if somebody can't respond  
9 to the alarm? Weather or something like that.  
10 Frequently in the northwest you can get remote areas  
11 bogged down with mud and snow in the winter for  
12 significant periods of time. I believe that was  
13 also brought out in the testimony. Hopefully the  
14 best management practice would not have you relying  
15 solely on the alarm in a situation like this,  
16 whether it was remotely monitored or not.

17 COMMISSIONER BLOOM: That's my concern.  
18 It would be towards requiring a shutoff control  
19 device and if somebody wants to install an alarm so  
20 they can get out ahead of it, they can do so.

21 CHAIRWOMAN BAILEY: So you are suggesting  
22 charging the "or" to an "and"?

23 COMMISSIONER BLOOM: No, I would not  
24 include alarm. I would not include that phrase.  
25 Industry knows that they can go out and add an

1 alarm, but there is still going to be a shutoff.

2 CHAIRWOMAN BAILEY: Okay.

3 COMMISSIONER BALCH: I think that leaves  
4 the best practices for them to determine how best to  
5 control the situation.

6 COMMISSIONER BLOOM: I would just add, I  
7 don't know if the company was doing this kind of  
8 technology maybe a year or two ago, and you are  
9 probably well aware of these companies as well.  
10 They offer other services, too, in terms of  
11 reporting other problems at a location or sending  
12 out information to a company when a tank needs  
13 emptying, a collection tank needs emptying, things  
14 like that. So they are already being adopted  
15 currently.

16 CHAIRWOMAN BAILEY: Okay. So we are in  
17 agreement not to include the words "or  
18 alarm," correct?

19 COMMISSIONER BALCH: The only thing you  
20 can do if you want to leave flexibility would be to  
21 remove "or alarm" and some language that, again,  
22 allowed for equivalent or better solution, and that  
23 would be more on a case-by-case basis. If somebody  
24 came up with something that would be determined to  
25 be equally or better protecting, some system, maybe

1 they should have an option to --

2 CHAIRWOMAN BAILEY: Request a variance?

3 COMMISSIONER BALCH: Yes.

4 CHAIRWOMAN BAILEY: Which is an area that  
5 we will look at towards the end of this  
6 deliberation. There's a whole section on exceptions  
7 and variances. One of the suggested sentences in  
8 the section on exceptions and variances, "Except as  
9 provided below in Subparagraph C, an operator may  
10 apply to the appropriate division district office  
11 for a variance to any of the provisions of 19.15.17  
12 NMAC." So if we delete the words "or alarm" that  
13 does not shut the door for an operator to request a  
14 variance.

15 COMMISSIONER BALCH: As long as we approve  
16 the section on variances.

17 CHAIRWOMAN BAILEY: It all hinges on that.  
18 Okay. So we will delete the words "or alarm."  
19 Going to Paragraph 5 --

20 COMMISSIONER BALCH: There's another  
21 strike.

22 CHAIRWOMAN BAILEY: Yes, in B. For  
23 deletion of the word "other," for "all other  
24 below-grade tanks in which side walls are not open."  
25 It seems to me that we can delete that "other."

1                   COMMISSIONER BALCH: I don't see any  
2 reason for it to be there.

3                   COMMISSIONER BLOOM: I don't think it adds  
4 anything.

5                   CHAIRWOMAN BAILEY: So we will delete the  
6 word "other." Now we will go to 5. But it's now  
7 noon.

8                   COMMISSIONER BALCH: We are coming up on a  
9 couple pages where there are significant changes.  
10 If we want to break this might be a good place to  
11 break.

12                   COMMISSIONER BLOOM: I think that's fine.

13                   CHAIRWOMAN BAILEY: Okay. Until ten after  
14 1:00.

15                   (Note: The hearing stood in recess at  
16 12:00 to 1:10.)

17                   CHAIRWOMAN BAILEY: We will go back on the  
18 record. When we broke before lunch, we were about  
19 to begin discussions on I5, which has to do with  
20 below-grade tank constructed deleting the date and  
21 putting in the effective date of this amendment,  
22 removing the language that has the side walls open  
23 for visual inspection and removing the language that  
24 is not included in Paragraph 6 of the reference of  
25 Part 11. Do either of you have a position on those

1 suggested changes; deleting the old effective date,  
2 inserting in the language, "The effective date of  
3 this amendment," removing the language on side walls  
4 open for visual inspection and removing the language  
5 citing another portion of the rule?

6 COMMISSIONER BALCH: That's including has  
7 the side walls open for visual inspection, right?

8 CHAIRWOMAN BAILEY: Yes.

9 COMMISSIONER BALCH: This is essentially  
10 the grandfather clause to eliminate having to deal  
11 with 10,000 legacy tax?

12 CHAIRWOMAN BAILEY: Yes.

13 COMMISSIONER BALCH: These are tanks where  
14 you can visually inspect all the way around it from  
15 top to bottom. Side walls open to visual  
16 inspection.

17 CHAIRWOMAN BAILEY: I think the first  
18 question is simple. Get rid of the old date and put  
19 in the effective date of this amendment.

20 COMMISSIONER BALCH: Yes.

21 COMMISSIONER BLOOM: Yes.

22 CHAIRWOMAN BAILEY: Theresa, we can go  
23 ahead and make that change. Now it has the caveat  
24 of "a below-grade tank constructed and installed  
25 prior to the effective date of this amendment having

1 side walls open for visual inspection" and not  
2 meeting certain requirements.

3 COMMISSIONER BALCH: I think the testimony  
4 on this had to do with making them a place for  
5 10,000 tanks would be very expensive and since they  
6 have not leaked to this point they probably were  
7 adequately installed in the first place, even if  
8 they don't meet the letter of the new regulation.

9 CHAIRWOMAN BAILEY: It may be helpful to  
10 look at the paragraph below that is being struck  
11 out.

12 COMMISSIONER BLOOM: That's what I was  
13 spending some time on.

14 CHAIRWOMAN BAILEY: That language requires  
15 closure of tanks that were not installed correctly.  
16 So my opinion is that the suggested language removes  
17 those old tanks that have been brought up to  
18 standards. It updates so that we are now just  
19 registering below-grade tanks rather than permitting  
20 below-grade tanks.

21 COMMISSIONER BLOOM: Commissioners, I just  
22 had one concern when I was looking at 6 as a  
23 possible deletion. That is that it gives five years  
24 after June 16, 2008 so that would be June 16, 2013,  
25 about ten months from now. It is saying the

1 operator of the below-grade tank prior to June 16,  
2 2008 with a single wall or any portion that's not  
3 feasible shall equip or retrofit to the  
4 above-mentioned four criteria, either come into  
5 compliance with 1 through 4 above or it has to be  
6 closed. By deleting this are we getting rid of that  
7 requirement in any single-walled tanks that don't  
8 meet those requirements 1 through 4 above in the  
9 affirmative.

10 COMMISSIONER BALCH: I think the addition  
11 of the language has the side walls open for visual  
12 inspection would cover those cases that would need  
13 to be removed by 2013 so those would still need to  
14 be retrofitted or removed, I think. Any tank that  
15 does not have -- any below-grade tank that is  
16 single-walled and does not have all sides available  
17 for visual inspection would still have to be  
18 removed. There's just not a deadline, I guess.

19 CHAIRWOMAN BAILEY: In the upper paragraph  
20 it says, "If the existing below-grade tank does not  
21 demonstrate integrity, the operator shall promptly  
22 remove that below-grade tank."

23 COMMISSIONER BALCH: Promptly.

24 CHAIRWOMAN BAILEY: "From service and  
25 comply with closure requirements." So if it doesn't

1 demonstrate integrity it will have to be removed or  
2 removed from service and closure requirements. Then  
3 it is also saying that the current tanks that were  
4 installed prior to the work we do now. If it  
5 doesn't meet all the requirements of 1 through 4  
6 they are not required to equip or retrofit as long  
7 as they demonstrate integrity the.

8 COMMISSIONER BALCH: I think that since  
9 the time of Rule 17 none of these -- we are only  
10 talking about tanks that were installed prior to  
11 Rule 17 because there would not have been any tanks  
12 permitted in the last five years that would not meet  
13 the criteria. And I think there was the estimate  
14 of, I think, 10,000 or so backed-logged tanks, which  
15 indicates to me there's about 10,000 of those tanks.  
16 So the question is, what to do with the 10,000  
17 legacy tanks?

18 CHAIRWOMAN BAILEY: The proposal says that  
19 we have the criteria as whether or not they are  
20 demonstrating integrity. If they are not  
21 demonstrating integrity they have to close.

22 COMMISSIONER BALCH: And promptly take  
23 them out of service.

24 COMMISSIONER BLOOM: That answers one of  
25 my questions. What about a below-grade tank that

1 doesn't have the side walls for visual inspection?

2 What happens to that?

3 COMMISSIONER BALCH: It does not  
4 specifically say, but I think there would have to be  
5 a rule to put it out of service.

6 COMMISSIONER BLOOM: Right. I think we  
7 need to include language. Otherwise, I think we  
8 just allow them to keep going.

9 COMMISSIONER BALCH: Now, were those  
10 tanks -- are they still out there or are they all  
11 taken care of from 2008?

12 CHAIRWOMAN BAILEY: Well, they have until  
13 2013.

14 COMMISSIONER BALCH: So there could still  
15 be some out there?

16 CHAIRWOMAN BAILEY: Yeah.

17 COMMISSIONER BALCH: Probably are, because  
18 all the permits are backlogged.

19 CHAIRWOMAN BAILEY: So what would you  
20 suggest?

21 COMMISSIONER BLOOM: I don't know. I  
22 think we have a problem there.

23 COMMISSIONER BALCH: Well, we have a newly  
24 worded part of the regulation that says you have to  
25 be able to visually inspect a single-walled tank on

1 all sides. And then if it doesn't comply it has to  
2 be promptly removed, and there's no definition on  
3 promptly. In fact, I don't know if we don't know  
4 how many there are. With the proposed registration,  
5 what sort of information do you think would be on a  
6 registration? Is this something that the division  
7 would pick a form for?

8 CHAIRWOMAN BAILEY: It would be an  
9 amendment or an editing of one of the forms that's  
10 in place, the C144, which is already just a  
11 checklist of things that have been done and what  
12 this means.

13 COMMISSIONER BALCH: There would be a box  
14 that says it complies with 1 through 4 or it  
15 doesn't. If it doesn't, I think Mr. Bloom's concern  
16 is what happens then?

17 CHAIRWOMAN BAILEY: Right.

18 COMMISSIONER BLOOM: If we just leave that  
19 in there what would happen then?

20 COMMISSIONER BALCH: Well, they would have  
21 to be promptly removed. Once they are registered  
22 and listed as not in compliance they would have to  
23 be removed from service and closed. Keep in mind  
24 that these were supposed to be promptly permitted as  
25 well five years ago.

1 CHAIRWOMAN BAILEY: Which is to say you  
2 could not have them for five years?

3 COMMISSIONER BALCH: Right. So I'm not  
4 sure what promptly does.

5 CHAIRWOMAN BAILEY: But since we are not  
6 permitting here, we are simply registering  
7 below-grade tanks, the key is in the operational  
8 requirements maybe for below-grade tanks.

9 COMMISSIONER BALCH: Maybe this is not a  
10 terribly huge issue, because the first thing you are  
11 going to do is promptly remove it from service if it  
12 doesn't comply with the regulation.

13 COMMISSIONER BLOOM: I'm sorry, under 6?

14 COMMISSIONER BALCH: Under 5 now. You  
15 would promptly remove it from service. It might  
16 take you a while to go through the closure and have  
17 it all the way and all that, but if you remove it  
18 from service I'm assuming you are going to close it  
19 and not circulate fluids through it. Or am I  
20 assuming too much?

21 CHAIRWOMAN BAILEY: Remove it from service  
22 means you are not putting anything else in it.

23 COMMISSIONER BALCH: Other than what's in  
24 it already. I mean, to say promptly removed from  
25 service and drained?

1 CHAIRWOMAN BAILEY: That would be  
2 important.

3 COMMISSIONER BALCH: Then it doesn't  
4 necessarily matter how long it sits there waiting to  
5 be remediated or removed.

6 CHAIRWOMAN BAILEY: That would work.

7 COMMISSIONER BLOOM: I think I am still  
8 stuck on the previous question. What happens to  
9 existing below-grade tank that doesn't have the  
10 single-walled or a portion of the side walls below  
11 the ground surface and not visible?

12 COMMISSIONER BALCH: I think what 5 is  
13 saying is if it doesn't meet Criteria 1 through 4  
14 and does not have all portions of the wall visible,  
15 so I guess if any portion is against the berm or  
16 whatever, it would have to be promptly removed from  
17 service and then closed.

18 CHAIRWOMAN BAILEY: If it does not  
19 demonstrate integrity.

20 COMMISSIONER BALCH: That's a key point.

21 COMMISSIONER BLOOM: No, but I think it's  
22 only going to be the ones where the side walls are  
23 open for visual inspection. If it's not, this  
24 doesn't apply, 5 doesn't apply.

25 COMMISSIONER BALCH: Well, does not

1 demonstrate integrity would allow a tank that could  
2 not be visually inspected on all sides. What does  
3 demonstrate integrity could stay in operation. Do  
4 we have any idea how many of those are out there?

5 CHAIRWOMAN BAILEY: We have no way of  
6 knowing.

7 COMMISSIONER BALCH: I mean, if you wait  
8 long enough, the life cycle of an oil or gas well is  
9 such that in 20 years or so they will all be gone,  
10 just by natural effect of production going down.  
11 How does the tank demonstrate integrity? You  
12 visually inspect it to see if it's leaking. If you  
13 can't visually inspect part of the tank, how can it  
14 demonstrate integrity?

15 CHAIRWOMAN BAILEY: You'll never know  
16 until you remove the tank.

17 COMMISSIONER BALCH: It would be nice to  
18 know how many of those are out there.

19 CHAIRWOMAN BAILEY: There's no way to know  
20 that.

21 COMMISSIONER BLOOM: So there could still  
22 be single-walled tanks where some of the sides  
23 aren't visible out in the field. Those don't have  
24 to be removed until 2013, correct?

25 COMMISSIONER BALCH: Well, the way this is

1 reading now, if you have a legacy tank that does not  
2 meet all the criteria but has demonstrated  
3 integrity, it could stay in place. The question is  
4 how can it demonstrate integrity if you can't  
5 visually inspect all sides? Was that discussed at  
6 all in the testimony?

7 CHAIRWOMAN BAILEY: Oh, yes. It was.

8 COMMISSIONER BALCH: It might be worth  
9 looking at the record on that. My mind is not fresh  
10 on it.

11 COMMISSIONER BLOOM: Yeah, exactly.

12 CHAIRWOMAN BAILEY: I think one of the  
13 more objectionable parts of 6 is that an operator is  
14 required to promptly remove the below-grade tank and  
15 install a below-grade tank that complies with those  
16 portions. If we simply change in Paragraph 6 the  
17 June 16, 2008 date to the language, "The effective  
18 date of this amendment," retain the portion that  
19 gives the five-year deadline up until June 13th or  
20 June 2013, that might take care of Commissioner  
21 Bloom's problem.

22 COMMISSIONER BLOOM: I think that's right.

23 COMMISSIONER BALCH: Could we make that  
24 modification so we can compare them side by side?

25 CHAIRWOMAN BAILEY: But we would also

1 delete that portion of the next to the last sentence  
2 that requires installation of another tank that  
3 complies.

4 COMMISSIONER BALCH: Because they may not  
5 want to put another tank in.

6 CHAIRWOMAN BAILEY: And if they do, they  
7 would register it and meet the operational  
8 requirements of the current amendment. We would  
9 strike the June 16, 2008. Not that one, the one up  
10 above. Yeah. Retain the other one because that  
11 gives the original deadline that Commissioner Bloom  
12 was looking for. And then delete the portion of  
13 that next to the last sentence after the reference  
14 to 19.15.17.13. I mean 11.

15 COMMISSIONER BALCH: You want to go to the  
16 middle of the block you have highlighted where it  
17 says "and install a below-grade tank."

18 CHAIRWOMAN BAILEY: Yeah.

19 COMMISSIONER BALCH: Delete from there to  
20 the end of the sentence. Delete that, I think.

21 CHAIRWOMAN BAILEY: Yes.

22 COMMISSIONER BALCH: There was additional  
23 language "for removal."

24 COMMISSIONER BLOOM: I think that  
25 generally would meet the need there as you proposed

1 it, chairman Bailey.

2 CHAIRWOMAN BAILEY: We have an incomplete  
3 sentence there. 1 through 4 of Subsection I, blah  
4 blah blah "or close it if the tank does not  
5 demonstrate integrity."

6 COMMISSIONER BLOOM: It should be comma.

7 CHAIRWOMAN BAILEY: Comma, the operator.  
8 No, I was wrong.

9 COMMISSIONER BALCH: If you look at the  
10 language in the other revision, "If the existing  
11 below-grade tank does not demonstrate integrity, the  
12 operator shall promptly remove it from service and  
13 comply with the closure requirements," I think that  
14 language is still good and should stay included.

15 CHAIRWOMAN BAILEY: So if we go back to  
16 the other No. 5, change June 16, 2008 or delete that  
17 except "the effective date of this amendment." And  
18 has the side walls opened. Okay.

19 COMMISSIONER BALCH: I guess we have two  
20 situations here. We have single-walled tanks, which  
21 to have a single-walled tank now you have to have  
22 visual inspection on all sides but then you also  
23 have tanks that exist out there that are  
24 single-walled but do not have every wall available  
25 for inspection.

1 CHAIRWOMAN BAILEY: Okay. On the upper  
2 Paragraph 5, that language in the fourth line that  
3 says "and is not included in Paragraph 6," that  
4 should be struck because there is no Paragraph 6 of  
5 I.

6 COMMISSIONER BLOOM: Well --

7 COMMISSIONER BALCH: We are thinking about  
8 replacing it.

9 COMMISSIONER BLOOM: Yeah, but I would  
10 agree we should remove that language.

11 CHAIRWOMAN BAILEY: Okay. We reached that  
12 point.

13 COMMISSIONER BALCH: So the next question  
14 is, if you have one of those tanks, it does not meet  
15 the requirements of the new regulation, Rule 17 or  
16 this revision, if they are not required to comply  
17 with Paragraphs 1 through 4 which describe the  
18 installation, as long as it demonstrates integrity,  
19 I think the question is how can it demonstrate  
20 integrity if you can't examine it?

21 COMMISSIONER BLOOM: But you can, right?  
22 Because it has the side walls open for visual  
23 inspection.

24 COMMISSIONER BALCH: We are talking about  
25 the ones that may not have all walls available.

1           COMMISSIONER BLOOM: I think that would be  
2 in 6, right? Oh, that's only single-walled --

3           COMMISSIONER BALCH: These are all  
4 single-walled tanks..

5           COMMISSIONER BLOOM: Can't they be  
6 double-walled below-grade tanks?

7           CHAIRWOMAN BAILEY: They can be. It's a  
8 matter of whether or not they meet the standards  
9 that were set up in the Pit Rule.

10          COMMISSIONER BLOOM: What if we got rid of  
11 single-walled in 6 below? That would address  
12 anything that -- any tank where the sides aren't  
13 alterable?

14          COMMISSIONER BALCH: I think the solution  
15 is if you have a tank that is not going to have  
16 visible walls is to use a double-walled tank.

17          COMMISSIONER BLOOM: Okay.

18          COMMISSIONER BALCH: So the intent of the  
19 original six was to have tanks that did not meet the  
20 new rule removed within five years.

21          CHAIRWOMAN BAILEY: If it was  
22 singled-walled.

23          COMMISSIONER BALCH: If it was single  
24 walled, period. All of those tanks would be  
25 removed. The new rule has -- the new Paragraph 5

1 does not force removal of them if you can see all  
2 sides or if they can demonstrate integrity if you  
3 can't see all sides. It comes back to my question  
4 of reasonable.

5 CHAIRWOMAN BAILEY: I thought we would  
6 reach the question after we completed the section  
7 and went on to multi-well pit.

8 COMMISSIONER BALCH: We don't know what  
9 percentage of these fit into the classifications  
10 because nobody knows anything about them except for  
11 the operators. The registration would take care of  
12 that and you would at least know how many you are  
13 dealing with. Permitting was supposed to take care  
14 of that but proved to be unwieldy. So without  
15 knowing how many there are out there, we are  
16 challenged with coming up with a rule that deals  
17 with it, and that's why I think the reasonable  
18 protection has to be addressed.

19 MR. SMITH: Do you want to talk about  
20 reasonability now?

21 CHAIRWOMAN BAILEY: If you want to. Let's  
22 go.

23 MR. SMITH: Okay. I started out looking  
24 at the Continental case that was cited by everyone,  
25 and I have to say that I found it to be relatively

1    useless with respect to the concerns that you have  
2    voiced.  The Continental case was a case that  
3    surrounded a change in the formula for computing  
4    allowables, and the Commission changed from just  
5    pure acreage to acreage and including deliverables,  
6    and the Court ultimately decided -- the appellate  
7    court decided that the trial court did not have  
8    findings adequate to change the allowable formula.  
9    Actually, the Commission.

10                   And I thought I don't get it, so I looked  
11    at the propositions that the various people  
12    submitting statements to the Commission, the  
13    propositions for which they cited Continental.

14                   As nearly as I can tell, NMOGA cited  
15    Continental for the proposition that the Commission  
16    has to take into account waste when it's  
17    promulgating its regulations and reasons that the  
18    Pit Rule discourages development and, therefore,  
19    creates waste and that it's appropriate then for the  
20    Commission to take into account discouragement of  
21    development.

22                   IPANM cites it for the proposition that  
23    the primary concerns of the Commission are  
24    prevention of waste and the protection of  
25    correlative rights.  OGAP cites it for the

1 proposition that the Commission only has the  
2 authority granted by the legislature and that that  
3 doesn't include taking into account the economic  
4 well-being of operators because that's not a  
5 prevention of waste.

6           So it looks to me like the issue for which  
7 Continental is being cited has to do with whether  
8 you all can take into account the economic impact on  
9 the industry in the promulgation of your  
10 regulations.

11           So looking at that and trying to figure  
12 out what that has to do with reasonableness, I have  
13 these thoughts, okay? It seems to me that there is  
14 an implied requirement that your regulations and any  
15 regulations be reasonable. We are going to get to  
16 what that means later on maybe. And that means that  
17 I think that you have to identify your goal, what  
18 you want the regulations or the amendments to  
19 accomplish, determine whether they accomplish that  
20 goal and then determine whether there are  
21 consequences other than accomplishment of that goal  
22 that need to be reviewed.

23           It would seem to me that from a common  
24 sense perspective that the economic effect on the  
25 State and on the people that are being regulated is

1 one of the things that you would take into account.

2 I looked in the statute, failing  
3 everything else turning to the law, and in the  
4 enumeration of powers that you all have, and this is  
5 one that you have already cited, this is 70-2-12B15.  
6 There's a cite there to reasonable protection  
7 against contamination, which begs the question what  
8 does reasonable mean. I looked further, and in that  
9 same section under Subparagraph 22 there is a  
10 citation to the Water Quality Act as guidance for  
11 regulations that you should adopt for the  
12 disposition of non-domestic wastes. I looked for a  
13 definition of non-domestic wastes and I didn't find  
14 it.

15 The point is, the subsection in the Water  
16 Quality Act that is cited is 74-6-4 Subsection E.  
17 That portion of the Water Quality Act addresses the  
18 duties and powers of the Commission, which I take to  
19 be WQCC. And in adopting regulations for the  
20 prevention or abatement of water pollution, this  
21 section goes on to say, "Regulations may specify a  
22 standard of performance for new sources that  
23 reflects the greatest reduction in the concentration  
24 of water contaminants that the Commission determines  
25 to be achievable through application of the best

1 available demonstrated control technology,  
2 processes, operating methods or other alternatives,  
3 including, where practicable, a standard permitting  
4 no discharge of pollutants. In making the  
5 regulations, the Commission shall give weight it  
6 deems appropriate to all relevant facts and  
7 circumstances, including" -- and this, I think, is  
8 the important part of the Oil and Gas Act that cites  
9 you over here to give you guidance in adopting  
10 regulations.

11 So some of the factors, and this is not an  
12 exclusive list, I don't believe, that the WQCC is to  
13 take into account and I believe that you are to take  
14 into account as appropriate are "the character and  
15 degree of injury to or interference with health,  
16 welfare, environment and property, the public  
17 interest, including the social and economic value of  
18 the sources of water contaminants, technical  
19 practicability and economic reasonableness of  
20 reducing or eliminating water contaminants from the  
21 sources involved, and previous experience with  
22 equipment and methods available to control the water  
23 contaminants involved." And then it goes on with  
24 some other factors to take into account.

25 But it seems to me from looking at this

1 that the Oil & Gas Act, by incorporating and  
2 referencing specifically this section of the Water  
3 Quality Act, it confirms that it is allowable for  
4 you to take into account economic consequences of  
5 your regulations on the State and on the industry as  
6 well.

7 Now, it looks to me like that's the story  
8 for Continental, and as I read all of this you can  
9 take into account the economic factors. The  
10 question still remains, what is reasonableness? And  
11 under the law you will find reasonable is used all  
12 over the place.

13 Just making a couple notes from the things  
14 that occur to me, you will see references to  
15 reasonable person, reasonable time, reasonable  
16 opportunity, reasonable place, reasonable manner,  
17 reasonable care. And courts will be happy to tell  
18 you what is reasonable with respect to those various  
19 things in particular situations.

20 I haven't found a case where the courts  
21 will say, "And if you are interested in what  
22 reasonableness is generally, here it is." So I  
23 don't think that you are going to find that.

24 Now, this is just me kind of thinking in  
25 desperation, what do I tell these people? That

1    reasonableness implies, first of all, a context; and  
2    second, it's a limitation. So if you are to give  
3    reasonable protection, the operative word there is  
4    protection. It's supposed to be protection. But  
5    reasonableness is a limitation on what that means,  
6    and it seems to me that it implies a risk benefit  
7    analysis, and that is, you look at the benefit of  
8    what it is you are about to do and evaluate the  
9    risks of doing that.

10                   And I think also that risk has two  
11    components. Risk is not only the likelihood of an  
12    occurrence but it is also the severity of that  
13    occurrence, the consequence of it. And you have to  
14    weigh those two in order to determine what the risk  
15    is. When you determine what the risk is, then you  
16    look at the benefit, and ultimately reasonableness  
17    is a matter of judgment, which I know is not a whole  
18    lot of help to you guys. I don't know that I would  
19    call it a matter of balancing competing interests.  
20    I would say it's a matter of identifying the benefit  
21    and weighing against the risk and I don't know that  
22    that's the same thing as balancing two things,  
23    saying well, this is enough protection and we are  
24    going to weigh it against economic cost and this  
25    looks like a pretty good balance.

1 I don't think that's the issue. I think  
2 the issue is what is the benefit you want, what is  
3 the risk, and then you evaluate whether that benefit  
4 is worth that risk.

5 That's the best I can come up with, you  
6 guys. I do think you have the authority to take  
7 into account economic consequences, but I can't tell  
8 you as a lawyer a perfect explanation for  
9 reasonableness, except to say that it's a limit and  
10 it's a matter of judgment and that I think it is a  
11 risk/benefit analysis.

12 COMMISSIONER BALCH: Essentially  
13 reasonableness is left to the judge? What is  
14 reasonable in a particular instance is left to the  
15 judge?

16 MR. SMITH: Some have said the law is what  
17 the judge ate for breakfast. I don't think it's  
18 quite that arbitrary.

19 COMMISSIONER BALCH: But in practice,  
20 perhaps, and that's why there are appeals?

21 MR. SMITH: Well, in practice, the weight  
22 is on you all to determine, based on your expertise  
23 and the evidence before you, what the benefit is to  
24 making the changes and what the risks are, and I  
25 think the risks, again, there's two components

1 there. One is likelihood and the other is severity  
2 of the occurrence?

3 COMMISSIONER BALCH: Dr. Thomas had a  
4 lecture on risk for us.

5 MR. SMITH: I'm saying this in an effort  
6 to keep my job. It's the only answer I have with  
7 you.

8 COMMISSIONER BLOOM: Your job wasn't on  
9 the line there, but you did give up your lunch, I  
10 notice, so thank you.

11 COMMISSIONER BALCH: So I guess reasonable  
12 is somewhat personal, but I do like the idea of it  
13 not being a balancing effort and at the risk being  
14 too philosophical for Jami, the idea of the risk  
15 versus the reward analysis would probably simplify  
16 what we have to do.

17 MR. SMITH: I didn't mean to do that.

18 COMMISSIONER BALCH: Simplify what we mean  
19 to do?

20 MR. SMITH: No.

21 COMMISSIONER BALCH: It's complex enough.

22 CHAIRWOMAN BAILEY: It also goes to the  
23 point of do you need the barbed wire on the gate?

24 COMMISSIONER BALCH: That's the question  
25 that each of us as individuals has to determine

1 whether it's reasonable to have the barbed wire or  
2 reasonable to remove it. That gave us some  
3 guidance. Thank you.

4 MR. SMITH: Oh, good.

5 COMMISSIONER BLOOM: Helpful reminder.  
6 Thank you.

7 CHAIRWOMAN BAILEY: I'm looking for the  
8 regulation of the Water Quality Control regulations  
9 that discusses discharge of fluids that may reach  
10 groundwater, and it could take me some time to find  
11 this or I could run upstairs and get my highlighted  
12 copy of the Water Quality Control regs, but there is  
13 a section that discusses release of contaminants up  
14 to the standards of 3103, which is the reference  
15 that's always made for groundwater standards, which  
16 means that that explains why I am so focused on  
17 looking at the concentrations of chlorides, the  
18 maximum concentrations of chlorides that can reach  
19 freshwater. That's assuming that whatever water it  
20 reaches is considered -- has quality good enough for  
21 drinking water standards for humans.

22 If the maximum chloride concentration for  
23 freshwater in the aquifer will not be above the  
24 standards, then I believe we can allow what is, in  
25 essence, a discharge that will reach groundwater but

1 remain below the drinking water standards of 3103.

2           And Mr. Mullins' modeling of the chloride  
3 transport, both vertically and horizontally, shows  
4 that given those certain conditions, water-based  
5 drilling fluids with the low chlorides as they  
6 define them at 15,000 milligrams per liter would not  
7 contaminate freshwater supplies above drinking water  
8 standards.

9           To me, that means that we are still  
10 protecting groundwater because it's not exceeding  
11 those standards, and that release up to that point  
12 is allowed under Water Quality Control Commission  
13 regulations. So with our determination that we will  
14 and have to and need to and desire to protect  
15 groundwater supplies, I think that we can look at  
16 the testimony, use our own expertise and experience  
17 and determine a rule that doesn't necessarily  
18 require the barbed wire on the gate but does allow  
19 certain practices to be used in New Mexico under  
20 these conditions that we specify. That's my  
21 interpretation of what we need to look at when we  
22 are looking at these proposals.

23           COMMISSIONER BALCH: And to what level --  
24 if a contaminant does enter the water supply even if  
25 it's below the interpretation of the commissioners

1 as to what's reasonable, the law says that it's  
2 reasonable to X limit.

3 CHAIRWOMAN BAILEY: Correct.

4 COMMISSIONER BALCH: In fact, the law says  
5 that you can go above that limit if you have enough  
6 reward, but I don't think that that's somewhere we  
7 can go if we can avoid it.

8 CHAIRWOMAN BAILEY: If we can avoid it, I  
9 would very much like to stay with the guidance that  
10 the Water Quality Control regulation gives us.

11 COMMISSIONER BALCH: That's certainly  
12 defensible under appeal, I would hope.

13 MR. SMITH: If you are talking about water  
14 quality standards, I think that's advisable to stick  
15 with what you have there.

16 COMMISSIONER BLOOM: I don't think I --

17 MR. SMITH: That's not -- as I understand  
18 it, you all the are not discussing those standards  
19 at this point. You are discussing the likelihood of  
20 any contaminant reaching the groundwater to have  
21 some sort of effect on the water quality; isn't that  
22 where you are right now?

23 COMMISSIONER BLOOM: Close.

24 COMMISSIONER BALCH: There's effect on the  
25 water quality and then there's a legal cap on what

1 sort of impact can they make before you are out of  
2 compliance with the Water Quality Control Act.

3 CHAIRWOMAN BAILEY: You cannot exceed the  
4 standards.

5 COMMISSIONER BALCH: If it's 1,000 TDS  
6 solids or 1,000 parts per million chloride.

7 CHAIRWOMAN BAILEY: 250.

8 COMMISSIONER BALCH: You can't exceed  
9 that. I think what Commissioner Bailey is saying is  
10 as Mr. Mullins' model demonstrated is in some period  
11 of time which, I guess, we will all have to decide  
12 is reasonable, if you don't exceed that limit then  
13 we start the discussion of risk versus reward.

14 MR. SMITH: How would you know that  
15 without knowing the specifics of the quality of the  
16 water that you're worried about?

17 COMMISSIONER BALCH: You don't. If the  
18 water is 249 and you add one -- I'm sorry, 249.5 and  
19 you add one, you are exceeding the quality, right?  
20 If it's 20 and you add 229, then you are not  
21 exceeding it. So the gray area is probably why  
22 lawyers invented the word reasonable.

23 MR. SMITH: It's also why we don't sit on  
24 commissions.

25 COMMISSIONER BLOOM: Chairman Bailey, I

1 don't know that I would disagree with that approach  
2 to looking at what the impact might be. Keeping any  
3 release within the limits of water standards seems  
4 perhaps a good way to move forward. I just have  
5 questions about the model as well, and I still do.  
6 That's where we can separate it.

7 CHAIRWOMAN BAILEY: Okay.

8 COMMISSIONER BALCH: Great.

9 CHAIRWOMAN BAILEY: Then we can go back.  
10 Are we ready to go back to our discussions  
11 concerning this question?

12 COMMISSIONER BALCH: So maybe the way to  
13 phrase it is does leaving existing non-compliant  
14 single-wall tanks that you cannot visually inspect  
15 on all sides provide reasonable protection of  
16 groundwater?

17 COMMISSIONER BLOOM: I thought those had  
18 to be removed by 2013.

19 COMMISSIONER BALCH: But that language is  
20 stricken in the revision. What's proposed to us is  
21 that those would be left in play.

22 CHAIRWOMAN BAILEY: If they demonstrate  
23 integrity.

24 COMMISSIONER BALCH: Yes. And then my  
25 next question was how do you demonstrate integrity

1 if you can't inspect all sides. Of course, you  
2 could drain the tank and go inside with a flashlight  
3 and see if it looks okay on the inside. I don't  
4 know how practical or how often that is done or if  
5 it's done. Probably never. So maybe the first  
6 question is do we want tanks like that left in  
7 service?

8 CHAIRWOMAN BAILEY: I would feel more  
9 comfortable leaving the restriction in of the  
10 single-wall tanks that are not visible because of  
11 the potential for leakage in areas that we cannot  
12 see underneath them.

13 COMMISSIONER BALCH: Undetected leaks.

14 CHAIRWOMAN BAILEY: Undetected leaks.

15 COMMISSIONER BLOOM: Leaving 6 in with the  
16 modifications we have added?

17 CHAIRWOMAN BAILEY: Yes.

18 COMMISSIONER BLOOM: Okay. I would agree  
19 with that.

20 CHAIRWOMAN BAILEY: And henceforth tanks  
21 will simply be registered but they must meet certain  
22 standards.

23 COMMISSIONER BALCH: Which are supposed to  
24 be protective.

25 CHAIRWOMAN BAILEY: Yes.

1                   COMMISSIONER BALCH: So in that  
2 situation -- I just want to put this out there.  
3 There's 10,000 pending tank permits. We don't know  
4 if all of them are complying or none of them would  
5 be visually complying. Actually, another difference  
6 between 5 and 6 is the, "Has the side walls open for  
7 visual inspection." In 6, those would not be  
8 allowed to remain, I don't think.

9                   CHAIRWOMAN BAILEY: And where a portion --

10                   COMMISSIONER BLOOM: Correct. That was my  
11 interpretation.

12                   COMMISSIONER BALCH: All right. So it  
13 does cover that. Say there's 25 percent of them  
14 that are not in compliance. Is ten months a  
15 reasonable time to remove them from service?  
16 Understanding that they have already had three or  
17 four years to anticipate getting rid of them is the  
18 question I'm asking you guys.

19                   CHAIRWOMAN BAILEY: They have already had  
20 three-and-a-half to four years.

21                   COMMISSIONER BALCH: So the additional  
22 time would probably give them more like eight months  
23 by the time the rule is published. Would that be a  
24 reasonable amount of time?

25                   CHAIRWOMAN BAILEY: The good operators

1 will have already taken them out.

2 COMMISSIONER BALCH: One would hope so.

3 COMMISSIONER BLOOM: Yes.

4 COMMISSIONER BALCH: Then I think let's go  
5 through 6 again. I think maybe we can be in  
6 agreement. So 1 through 4 will allow the  
7 single-walled tank as long as you can see all sides  
8 of it. It's on the appropriate foundation. It's  
9 constructed of materials resistant to contents and  
10 resistant to the damage from sunlight.

11 COMMISSIONER BLOOM: If I'm understanding  
12 this correctly, if we accepted these changes as we  
13 see them up there currently, anything except a  
14 double-walled tank that's in contact with -- doesn't  
15 have all sides exposed would be removed. If there's  
16 a double-walled tank --

17 COMMISSIONER BALCH: Any covered side  
18 unless it was doubled-walled. But I couldn't find  
19 the unless it was double-walled, unless that's  
20 implicit somewhere.

21 CHAIRWOMAN BAILEY: Five applies to all  
22 tanks whether it's single or double because we are  
23 not specifying which kind.

24 COMMISSIONER BALCH: And 6?

25 CHAIRWOMAN BAILEY: Applies to

1 single-wall.

2 COMMISSIONER BALCH: Six seems to imply  
3 that -- okay. So it's only singling out  
4 single-walled tanks that have a covered side, so  
5 double-walled tanks would be okay if it has a side  
6 cover because of the existence of the double wall  
7 and you can open it up and see if there's damage to  
8 the integrity.

9 COMMISSIONER BLOOM: No. 5, would that get  
10 us in trouble?

11 COMMISSIONER BALCH: I think it would.

12 COMMISSIONER BLOOM: Because they might  
13 not have all sides available for inspection. So  
14 then they fall outside of regulations. So No. 5  
15 would be limited to single-walled tanks?

16 COMMISSIONER BALCH: Are we discussing  
17 using what is labeled 6 and stricken through there?  
18 That used to be 5, I believe.

19 COMMISSIONER BLOOM: No, 5 existed  
20 previously.

21 COMMISSIONER BALCH: So we are adding back  
22 6 with some modifications and then we are going to  
23 need to edit and modify 5 as well to make sure.

24 COMMISSIONER BLOOM: Yeah.

25 COMMISSIONER BALCH: We don't throw the

1 baby out with the bath water. Unless we're  
2 completely confused.

3 CHAIRWOMAN BAILEY: Well, the proposal is  
4 to totally eliminate 6 and simply focus on 5, which  
5 would apply to all tanks, whether they are single or  
6 double.

7 COMMISSIONER BLOOM: But it doesn't  
8 address tanks where the side walls are not fit for  
9 visual inspection.

10 COMMISSIONER BALCH: So Mr. Bloom pointed  
11 out, and I think correctly, that under 5, if you had  
12 a double-walled tank that was up against a bank, you  
13 would have to remove it.

14 CHAIRWOMAN BAILEY: Right. I don't think  
15 we necessarily want to do that.

16 COMMISSIONER BLOOM: No. So I think maybe  
17 we can clear up one thing. The recommended deletion  
18 at the end of Paragraph 5, do we agree that we no  
19 longer need that?

20 CHAIRWOMAN BAILEY: Yes.

21 COMMISSIONER BALCH: Yes.

22 CHAIRWOMAN BAILEY: Yes.

23 COMMISSIONER BLOOM: Okay. We can get rid  
24 of that.

25 COMMISSIONER BALCH: The new text is

1 smaller.

2 COMMISSIONER BLOOM: So if we said up in  
3 5, "The operator of a single-wall below-grade tank."

4 COMMISSIONER BALCH: Single-wall  
5 below-grade tank. Okay.

6 CHAIRWOMAN BAILEY: Is not required to  
7 retrofit as long as it demonstrates integrity.

8 COMMISSIONER BLOOM: Correct.

9 CHAIRWOMAN BAILEY: If the single-wall  
10 below-grade tank does not demonstrate integrity,  
11 operator shall promptly remove that tank from  
12 service and comply with closure.

13 COMMISSIONER BALCH: I think we discussed  
14 drain and remove. Drain tanks and then remove from  
15 service.

16 COMMISSIONER BLOOM: Drain and remove?

17 CHAIRWOMAN BAILEY: Shall promptly drain  
18 the contents and remove the below-grade tank from  
19 service?

20 COMMISSIONER BLOOM: I think you want to  
21 put -- so it should read, "The operator shall  
22 promptly drain the tank and remove from that  
23 service."

24 COMMISSIONER BALCH: Remove the  
25 below-grade tank. I think you want to say

1 below-grade tank, drain the below-grade tank and  
2 remove from service and comply with the closure  
3 requirements of 19.15.17.

4 COMMISSIONER BLOOM: We are getting there.

5 CHAIRWOMAN BAILEY: And delete 6 in  
6 entirety.

7 COMMISSIONER BLOOM: Wait.

8 COMMISSIONER BALCH: We have the language  
9 regarding five years of 2008.

10 COMMISSIONER BLOOM: Leave 6 when the case  
11 is such that there's a single-walled tank that does  
12 not have all of its sides visible.

13 COMMISSIONER BALCH: So the only thing we  
14 are really missing in 5 now is in the case of  
15 single-wall, non-compliant tanks that you cannot  
16 visually inspect on all sides except for, that you  
17 will promptly drain them and remove them, and  
18 there's no timeline on that. "Promptly drain  
19 contents" will take care of the risk portion of it.

20 COMMISSIONER BLOOM: It might be helpful  
21 if we can step back and say what are we trying to do  
22 with this language, right? We started fresh and --

23 COMMISSIONER BALCH: I think what we are  
24 trying to do, my interpretation, if you have a  
25 grandfathered tank that you can visually inspect on

1 all sides, you don't have to retrofit it to the new  
2 standards. If you have a single-walled tank that  
3 you cannot visually inspect on all sides, it needs  
4 to be removed by June 16, 2013. If it doesn't  
5 comply, the first thing you need to do is promptly  
6 drain the contents and then prepare to close it  
7 using 19.17.13.

8 So the only thing missing in 5 is the  
9 language in five years after June 16, 2008. Where  
10 is the best place to work that in? You could have a  
11 truncated Paragraph 6.

12 CHAIRWOMAN BAILEY: What we can do is in 5  
13 have it apply to single-walled tanks that do have  
14 the side walls open, which means that we would not  
15 be deleting that language. Then in No. 6 we would  
16 have the operator of the below-grade tank --

17 COMMISSIONER BALCH: So take everything --  
18 the last sentence of 5 would become a new Paragraph  
19 6 with some of the language.

20 CHAIRWOMAN BAILEY: Right.

21 COMMISSIONER BLOOM: Are you going to  
22 retain 6?

23 CHAIRWOMAN BAILEY: Well, that's what we  
24 are exploring the idea of. Retaining 6, but making  
25 it specific to single-walled tanks that do not have

1 side walls open.

2 COMMISSIONER BLOOM: Okay.

3 CHAIRWOMAN BAILEY: That cannot  
4 demonstrate integrity. So 5 would apply to  
5 single-walled with side walls open. Six would apply  
6 to single-walls with side walls not visible.

7 COMMISSIONER BLOOM: Okay.

8 COMMISSIONER BALCH: Maybe you could just  
9 hit return right now. That last sentence, if you  
10 make that a new paragraph. Add language to  
11 describe --

12 COMMISSIONER BLOOM: Don't we need the  
13 language in 6?

14 CHAIRWOMAN BAILEY: Let's leave it in 5  
15 and keep 6 but change it to deal only with  
16 single-walls where we can't see the side walls.

17 COMMISSIONER BLOOM: Let's try that. Look  
18 at 6.

19 COMMISSIONER BALCH: Actually, all that  
20 first sentence covers the language.

21 COMMISSIONER BLOOM: On No. 6, wouldn't we  
22 say "The operator of a single-walled below-grade  
23 tank"?

24 CHAIRWOMAN BAILEY: Yes, to make it  
25 specific to that.

1           COMMISSIONER BLOOM: After the effective  
2 date of this amendment we will get rid of that,  
3 correct?

4           CHAIRWOMAN BAILEY: And then we will  
5 change the date from -- the whole phrase, "Within  
6 five years from June 16, 2008," we will change that  
7 to "by June 16, 2013."

8           COMMISSIONER BLOOM: Yes.

9           COMMISSIONER BALCH: Then to be consistent  
10 you are leaving -- Once you change the promptly  
11 remove from service to match the language in the  
12 bottom of 5.

13          COMMISSIONER BLOOM: Yes.

14          CHAIRWOMAN BAILEY: The phrase "by June  
15 16, 2013" should actually go after the words "or  
16 close it by June 16, 2013, if the tank does not  
17 demonstrate integrity." We just need to move the  
18 phrase over a couple words.

19          COMMISSIONER BALCH: Shift it one comma.

20          CHAIRWOMAN BAILEY: Yes.

21          COMMISSIONER BALCH: Could I ask you a  
22 question?

23          MR. SMITH: Yes.

24          COMMISSIONER BALCH: All of the  
25 wordsmithing and the language in the rule have to

1 be -- we have to do all of that before it goes to --  
2 we have to do that in the process? We can't change  
3 the wording or something like that?

4 MR. SMITH: I don't know. I will have to  
5 look.

6 CHAIRWOMAN BAILEY: Are we happy with  
7 those two paragraphs?

8 COMMISSIONER BALCH: Shouldn't it say,  
9 "And remove the below-grade tank from service"?  
10 Sounds a little awkward. "Promptly drain the  
11 below-grade tank and remove it" -- seems like there  
12 needs to be something there. "Remove it from  
13 service."

14 COMMISSIONER BLOOM: "Remove it from  
15 service."

16 MR. SMITH: Commissioner Balch, I am  
17 informed by someone who has done a lot of regulating  
18 in the past that in order to submit these for  
19 recording, official recording with the State, they  
20 have to be reformatted, spelling errors and  
21 grammatical errors have to be corrected.

22 COMMISSIONER BALCH: So if we miss a typo  
23 we will not be forever --

24 MR. SMITH: That's right.

25 CHAIRWOMAN BAILEY: Theresa, we need to

1 change a few words here and there. In 6 down at the  
2 bottom, "The operator shall promptly drain the  
3 below-grade tank." Go up three lines. Remove that  
4 word "and" and put a comma after "tank." So we  
5 have, "drain the below-grade tank, remove from  
6 service and comply with the closure requirements."

7 COMMISSIONER BLOOM: How about remove it  
8 from service?

9 COMMISSIONER BALCH: I think remove it  
10 from service in both of those paragraphs.

11 CHAIRWOMAN BAILEY: Up above also?

12 COMMISSIONER BALCH: And if somebody wants  
13 to insert "below-grade tank."

14 CHAIRWOMAN BAILEY: There are a few words  
15 after the end of the sentence. It says "that  
16 below-grade tank," that needs to be deleted.

17 COMMISSIONER BLOOM: Less fragmented 6.

18 COMMISSIONER BALCH: All the way to the  
19 end.

20 COMMISSIONER BLOOM: Do we prefer  
21 single-wall or single-walled?

22 CHAIRWOMAN BAILEY: E-D, walled. Are we  
23 happy with those two paragraphs?

24 COMMISSIONER BLOOM: I think we are there.

25 CHAIRWOMAN BAILEY: So we want to remove

1 the strikeout in 6 because we are keeping 6. All  
2 right. Then we can move along.

3 COMMISSIONER BLOOM: Commissioners, one  
4 point of clarification, I guess, for myself. We  
5 mentioned single-walled tanks. Do we want to  
6 mention double-walled in any context for clarity?

7 COMMISSIONER BALCH: These are pretty  
8 specific to the case of single-walled tanks. The  
9 double-walled tanks has inherent added protection.  
10 Or is there another place where it shows up?

11 COMMISSIONER BLOOM: We were discussing  
12 design and construction specifications for  
13 below-grade tanks.

14 COMMISSIONER BALCH: Is that Page 17, 1  
15 through 4? That covers a whole lot of things.

16 COMMISSIONER BLOOM: I don't think we need  
17 anything that says double-walled tanks are not  
18 subject to these conditions.

19 CHAIRWOMAN BAILEY: I don't think we need  
20 to add that if we are making it specific to  
21 single-walled.

22 COMMISSIONER BLOOM: I think you are  
23 right. I'm fine with moving on.

24 CHAIRWOMAN BAILEY: Okay. Does anybody  
25 need a break?

1                   COMMISSIONER BLOOM: Yeah, quick bathroom  
2 break. Five or ten.

3                   CHAIRWOMAN BAILEY: Come back at 2:30.

4                   (Note: The hearing stood in recess at  
5 2:22 to 2:32.)

6                   COMMISSIONER BALCH: I think there's  
7 something bothering both of us about double-walled  
8 tanks in 5 and 6 that we just wrote.

9                   COMMISSIONER BLOOM: I think I'm okay with  
10 it. I don't know. What are you thinking?

11                  COMMISSIONER BALCH: Okay. What this does  
12 not include is a double-walled tank that doesn't  
13 meet 1 through 4.

14                  CHAIRWOMAN BAILEY: If you go back up to  
15 Paragraph A on that page, it talks about  
16 construction of use of below-grade tanks that do not  
17 have double walls.

18                  COMMISSIONER BALCH: I guess I am  
19 wondering if there's any legacy double-walled tanks  
20 that will have a properly constructed foundation, et  
21 cetera.

22                  CHAIRWOMAN BAILEY: In the next 20 years  
23 there will be.

24                  COMMISSIONER BALCH: Are there now? Is  
25 there such a thing as a double-walled tank?

1 CHAIRWOMAN BAILEY: Oh, yeah.

2 COMMISSIONER BALCH: There could be before  
3 this rule a double-walled tank that's out there  
4 that's not built using the requirements of I, that  
5 should perhaps be a legacy tank if it has integrity.

6 CHAIRWOMAN BAILEY: So in either 5 or 6,  
7 the last portion where we say, "If the existing  
8 below-grade tank does not demonstrate  
9 integrity," that could be made specific to "if the  
10 existing single or below-grade tank does not  
11 demonstrate integrity, the operator shall promptly  
12 remove." Or that could be a separate?

13 COMMISSIONER BALCH: Well, what we did in  
14 5, if you look at the wording in the very first  
15 sentence of 5 is we changed it -- I think it was a  
16 change by IPANM or OCD because I'm looking at the  
17 NMOGA version. Their version says, "The operator of  
18 a below-grade tank."

19 CHAIRWOMAN BAILEY: We changed it. We put  
20 in single-walled.

21 COMMISSIONER BALCH: So in doing that, we  
22 eliminated double-walled tanks being discussed in  
23 this paragraph and similarly in Paragraph 6. I want  
24 to make sure --

25 COMMISSIONER BLOOM: Right, because could

1 there be a double-walled tank that doesn't meet --

2 COMMISSIONER BALCH: I1 through 4.

3 CHAIRWOMAN BAILEY: So we could remove the  
4 single-walled requirement and have it apply to all  
5 below-grade tanks.

6 COMMISSIONER BALCH: For 5, I think that's  
7 just fine. For 6, we might have to change something  
8 so that a double-walled tank -- maybe we don't have  
9 to specify single-wall in either of those except for  
10 the case where you have a double-walled tank that --  
11 you might have to change the first sentence of 6 a  
12 little bit and take the single-wall out of the first  
13 part of paragraph 5. Paragraph 5 could cover any  
14 tank -- no, it doesn't.

15 COMMISSIONER BLOOM: I was trying to read  
16 through it and imagine what would happen if it had  
17 single-walled.

18 COMMISSIONER BALCH: In 5 we are also  
19 specifying, "Has the side walls open for visual  
20 inspection." You could just say "or have double  
21 walls." I don't know.

22 CHAIRWOMAN BAILEY: Now you are getting  
23 too --

24 COMMISSIONER BALCH: Like I said, it was  
25 crude.

1 CHAIRWOMAN BAILEY: But your concern is  
2 that we are letting double-walled tanks that don't  
3 meet the integrity test continue?

4 COMMISSIONER BALCH: We're not talking  
5 about them at all, and in theory in section 11  
6 through 4 we said below-grade tanks have to meet  
7 these four criteria and it's probably appropriate to  
8 allow a double-walled tank that is currently  
9 existing that has demonstrated integrity to exist,  
10 and that's not included in 5 or 6 unless it has all  
11 of the side walls open for visual inspection.

12 COMMISSIONER BLOOM: If there is a legacy  
13 double-walled tank out there that doesn't  
14 demonstrate integrity, it could still continue,  
15 right?

16 COMMISSIONER BALCH: Yes.

17 COMMISSIONER BLOOM: What if we just did a  
18 Paragraph 7 that addressed double-walled tanks?

19 CHAIRWOMAN BAILEY: Or No. 6, just remove  
20 the single-wall and that would apply to all  
21 below-grade tanks.

22 COMMISSIONER BALCH: If you did that, then  
23 a double-walled tank that had one of its or a  
24 portion of its sides covered, it would have to be  
25 removed.

1 CHAIRWOMAN BAILEY: If it does not  
2 demonstrate integrity.

3 COMMISSIONER BALCH: Okay. So there's a  
4 way to verify the integrity of double-walled tank.  
5 Okay. I think if you take the single-walled out  
6 there.

7 COMMISSIONER BLOOM: Actually, I think we  
8 are in trouble if we do that. Because that  
9 double-walled tank would then have to be -- if part  
10 of it is not visible it would have to be retrofitted  
11 or equipped to comply with 1 through 4 or be closed,  
12 right?

13 COMMISSIONER BALCH: Right.

14 CHAIRWOMAN BAILEY: If it's leaking.

15 COMMISSIONER BLOOM: No, but if one of the  
16 sides is not visible and can't be brought into  
17 compliance with 1 through 4, it would have to be  
18 closed.

19 CHAIRWOMAN BAILEY: If it doesn't  
20 demonstrate integrity.

21 COMMISSIONER BALCH: Well, it still has  
22 the visible inspection on it.

23 COMMISSIONER BLOOM: If you said the  
24 operator of a double-walled tank installed prior to  
25 the effective date or a portion of the tank wall is

1 below the ground surface and not visible, he shall  
2 equip or retrofit it to comply with Paragraphs 1  
3 through 4 or they would have to close it.

4 CHAIRWOMAN BAILEY: The last part of the  
5 sentence. Close it by June 2013 if the tank does  
6 not demonstrate integrity.

7 COMMISSIONER BLOOM: But do we want to  
8 make -- are we trying to make double-walled tanks  
9 come into compliance with 1 through 4?

10 COMMISSIONER BALCH: Right. In 6 if they  
11 don't comply with 1 to 4 you have to remove them.

12 CHAIRWOMAN BAILEY: That's the purpose of  
13 the last phrase. "If the tank does not demonstrate  
14 integrity."

15 MR. SMITH: Maybe you want to take the  
16 demonstrate integrity portion and put it after the  
17 word "shall, shall demonstrate a tank's integrity  
18 or" --

19 COMMISSIONER BALCH: If you could  
20 demonstrate by saying we have double walls and  
21 opened up a port and made sure there was no fluid or  
22 leakage.

23 CHAIRWOMAN BAILEY: So that whole phrase,  
24 "If the tank does not demonstrate integrity," can be  
25 moved to go after the first --

1           COMMISSIONER BLOOM: Just copy and paste  
2 that in case we need to go back to it. I'm  
3 wondering if we just might say --

4           MR. SMITH: So you are looking at three  
5 options.

6           COMMISSIONER BALCH: I think we have 5 is  
7 fine. We are just trying to make sure we don't  
8 throw out legacy double-walled tank that don't meet  
9 I1 through 4 but otherwise have integrity. That's  
10 the intent.

11          COMMISSIONER BLOOM: What if we just  
12 crafted a paragraph for double-walled tanks? The  
13 operator of the double-walled tank constructed and  
14 installed prior to the effective date of this  
15 amendment --

16          COMMISSIONER BALCH: You could probably  
17 remove that part, because we are really only worried  
18 about --

19          COMMISSIONER BLOOM: Get rid of anything  
20 that says "and where any portion of the" -- yeah,  
21 get rid of that. Great. Delete that, please.

22          COMMISSIONER BALCH: That might do it.  
23 Then I would say "If the existing double-walled  
24 below-grade tank does not demonstrate integrity,"  
25 and then everything else is the same.

1 CHAIRWOMAN BAILEY: So we will number that  
2 as No. 7.

3 COMMISSIONER BLOOM: Now, is this what we  
4 want to do with double walled below-grade tanks?

5 COMMISSIONER BALCH: What I think we want  
6 to do is we are only dealing with legacy tanks in  
7 these three paragraphs, I think. So in 7, my  
8 intent, which may not be your intent, is if there's  
9 a legacy double-walled tank that does not meet 1  
10 through 4 but otherwise demonstrates integrity, it's  
11 grandfathered in. If it doesn't demonstrate  
12 integrity, it has to be drained, removed and closed.

13 COMMISSIONER BLOOM: Do we want the  
14 language from 5 above that, which is that it doesn't  
15 meet the requirements but -- that's what we want,  
16 right?

17 COMMISSIONER BALCH: No, we are talking  
18 about the sentence above that.

19 COMMISSIONER BLOOM: Starting with "does."

20 COMMISSIONER BALCH: Let's go back just a  
21 couple words.

22 COMMISSIONER BLOOM: Copy that and paste  
23 that below. And 7.

24 COMMISSIONER BALCH: Paste it in the same  
25 place where you removed it from 5. So it would be,

1 "The date of this amendment shall" -- is that where  
2 that goes? So instead of shall, it's "which does  
3 not." It's already in there.

4 COMMISSIONER BLOOM: Integrity. Okay.  
5 That's right.

6 COMMISSIONER BALCH: Now we have the same  
7 language to be removed.

8 COMMISSIONER BLOOM: Delete where it says  
9 "equip or retrofit the below-grade tank."

10 COMMISSIONER BALCH: Not that.

11 COMMISSIONER BLOOM: Sorry, the next one  
12 down. There you go. Get rid of that.

13 COMMISSIONER BALCH: I think we wanted to  
14 keep that part.

15 COMMISSIONER BLOOM: Oh, sorry.

16 COMMISSIONER BALCH: Who would have  
17 thought this would be the most complex part of the  
18 regulation.

19 CHAIRWOMAN BAILEY: The word "which" needs  
20 to be changed to "and" because otherwise you are  
21 referring to the amendment not meeting the  
22 requirements.

23 COMMISSIONER BALCH: So what we really  
24 need now is some language that indicates if it does  
25 not become retrofitted it has to be removed.

1 COMMISSIONER BLOOM: By that date.

2 COMMISSIONER BALCH: So if you go to the  
3 language --

4 COMMISSIONER BLOOM: Maybe we could go and  
5 take the last sentence from the previous paragraph,  
6 copy and paste that.

7 COMMISSIONER BALCH: Right after the word  
8 "integrity" on the second line up, between  
9 "integrity" and "equip." Back a little bit more.  
10 About five words back. Right there. Right after  
11 the period with integrity is where you want to paste  
12 that. I think you can delete the remainder of what  
13 you just inserted. I think we still have some  
14 deletions but it's closer.

15 CHAIRWOMAN BAILEY: And which does not  
16 meet all the requirements?

17 COMMISSIONER BALCH: So I think we are  
18 trying to make a 7 that covers everything done in 5  
19 and 6 for single-walled, so you still have to have  
20 the ability to retrofit if they choose to do so. So  
21 if it does not demonstrate integrity, the operator  
22 needs to retrofit it or properly drain and remove.

23 COMMISSIONER BLOOM: I don't know about  
24 that. I think if it meets -- if it doesn't meet 1  
25 through 4 but demonstrates integrity it can

1 continue, right?

2 COMMISSIONER BALCH: Or it could be  
3 retrofitted or removed. If it doesn't demonstrate  
4 integrity.

5 COMMISSIONER BLOOM: But if it  
6 demonstrates integrity it could be repaired?

7 COMMISSIONER BALCH: Maybe there's extra  
8 language in there at the moment. After -- right  
9 there where it starts with equip?

10 COMMISSIONER BLOOM: You need everything  
11 else, correct?

12 CHAIRWOMAN BAILEY: Now, we want to keep  
13 the last portion for closing, so you delete up to  
14 the end of NMAC, the line above. There.

15 COMMISSIONER BLOOM: Back one.

16 CHAIRWOMAN BAILEY: Back two. After NMAC.  
17 There.

18 COMMISSIONER BLOOM: Try deleting that.

19 COMMISSIONER BALCH: I think if you delete  
20 the last sentence now, that would be fine.

21 COMMISSIONER BLOOM: Yeah.

22 CHAIRWOMAN BAILEY: So that sentence can  
23 be deleted.

24 COMMISSIONER BLOOM: I think I'm finally  
25 happy with that.

1 COMMISSIONER BALCH: Read the last  
2 sentence. I'm not sure that works. Oh, I see.  
3 There's an "or close" --

4 COMMISSIONER BLOOM: Two closes. I don't  
5 know that this --

6 COMMISSIONER BALCH: Did we lose something  
7 that we didn't need to lose? Hit Control Z real  
8 quick.

9 COMMISSIONER BLOOM: Does this need a  
10 date?

11 COMMISSIONER BALCH: There was a date.

12 COMMISSIONER BLOOM: It's there but I  
13 don't know that we need it.

14 COMMISSIONER BALCH: It would have been  
15 addressed by the original regulation, right?

16 CHAIRWOMAN BAILEY: Well, it says if it  
17 was constructed and installed prior to the effective  
18 date of this amendment.

19 COMMISSIONER BALCH: That could be --

20 CHAIRWOMAN BAILEY: So it's grandfathering  
21 in the double-walled below-grade tanks that don't  
22 meet the requirements and may not demonstrate  
23 integrity, then they shall promptly drain, remove  
24 from service or comply with closure.

25 COMMISSIONER BLOOM: Wouldn't we close it

1 immediately if it doesn't meet integrity?

2 COMMISSIONER BALCH: Well, the first thing  
3 you do, closure is a process. You have to do X, Y  
4 and Z.

5 COMMISSIONER BLOOM: Remove it from  
6 service, I guess.

7 COMMISSIONER BALCH: Draining is removing  
8 the risk and the rest of it can take as long as it  
9 needs to, I suppose. Draining and remove from  
10 service.

11 COMMISSIONER BLOOM: I'm wondering if we  
12 deleted everything after the last NMAC there.

13 CHAIRWOMAN BAILEY: I think that's a good  
14 idea.

15 COMMISSIONER BLOOM: Maybe that's what we  
16 want to do.

17 COMMISSIONER BALCH: Are we being  
18 consistent enough?

19 MR. SMITH: I think so.

20 COMMISSIONER BALCH: Then I'm happy with  
21 this.

22 CHAIRWOMAN BAILEY: So we have 5, 6 and 7.  
23 I would like to go back to some comments I made  
24 concerning the Water Quality Control Commission and  
25 what the regulations are concerning discharges.

1 20.6.2.3101 of the Water Quality Control Commission  
2 regulations says that "The purpose of Sections  
3 20.6.2.3000 through 20.6.2.3114 NMAC controlling  
4 discharges onto or below the surface of the ground  
5 is to protect all groundwater in the state of New  
6 Mexico which has an existing concentration of 10,000  
7 milligrams per liter or less TDS for present and  
8 potential future use as domestic and agricultural  
9 water supply and to protect those segments of  
10 surface water," and it goes on.

11           Sections 20.6.2.3000 through 20.6.2.3114  
12 NMAC are written so that in general, one, "If the  
13 existing concentration of any water contaminant in  
14 groundwater is in conformance with the standard of  
15 20.6.2.3103 NMAC" -- and here is the part that I was  
16 referencing -- "degradation of the groundwater up to  
17 the limit of the standards will be allowed, and if  
18 the existing concentration of any water contaminant  
19 in groundwater exceeds the standard of Section  
20 20.6.2.3103 NMAC, no degradation of the groundwater  
21 beyond the existing concentration will be allowed."

22           So that was the reference I was making as  
23 far as allowing the concentration that Mr. Mullins  
24 was indicating would be the maximum that would reach  
25 groundwater. And if that groundwater is below the

1 standards, the industry proposes that it will still  
2 be allowable under the Water Quality Control  
3 Commission regulations.

4 COMMISSIONER BLOOM: Mr. Mullins gave us  
5 chlorides but not TDS, correct?

6 CHAIRWOMAN BAILEY: Right.

7 COMMISSIONER BALCH: I think so.

8 COMMISSIONER BLOOM: TDS limit is 250?

9 CHAIRWOMAN BAILEY: No.

10 COMMISSIONER BLOOM: I'm sorry, the  
11 chloride limit.

12 CHAIRWOMAN BAILEY: Chloride limit is 250  
13 for domestic water supply. That's 250 milligrams  
14 per liter.

15 COMMISSIONER BALCH: And protected water  
16 is everything below 10,000 TDS.

17 CHAIRWOMAN BAILEY: Right. Okay. So  
18 that's in the record now. So we can continue on to  
19 J having to do with multi-well fluid management  
20 pits, and this is a whole new section to talk about  
21 the design and construction of the pit to ensure  
22 confinement of liquids to prevent unauthorized  
23 releases, and it talks about the liner that is  
24 required, and as was brought out, there is nothing  
25 in the rule that says they are requiring a

1 geomembrane bottom liner?

2 It gives geomembrane liner and leak  
3 detection system requirements without respect for  
4 the leak detection system, and it gives a thickness  
5 requirement for the geomembrane liner.

6 Commissioners, do you have opinions on any part of  
7 this section or all of the section?

8 COMMISSIONER BLOOM: I think it might be  
9 helpful if we can review what we talked about  
10 yesterday for the multi-well pits.

11 CHAIRWOMAN BAILEY: Yes.

12 COMMISSIONER BLOOM: I remember we  
13 discussed in terms of the liners going with what's  
14 described permanently for permanent pits.

15 CHAIRWOMAN BAILEY: Right.

16 COMMISSIONER BLOOM: I'm just trying to  
17 find where we went over that. Did we draft some  
18 language for that?

19 COMMISSIONER BALCH: We had a definition,  
20 I think, because that is mostly complete except for  
21 the on-site and off-site component. Page 2. I  
22 think we are looking at the same attachment.

23 COMMISSIONER BLOOM: I'm looking at what  
24 Theresa sent us yesterday after we finished. Maybe  
25 if we want to scroll up to the definitions.

1           COMMISSIONER BALCH: Yeah, because I  
2 didn't print that out. It should be on Page 2.

3           COMMISSIONER BLOOM: K. Scroll to K,  
4 please. All right.

5           CHAIRWOMAN BAILEY: And your comment was?

6           COMMISSIONER BLOOM: So I guess we have  
7 that there that we drafted yesterday and then I was  
8 just trying to remember if we drafted any language  
9 about liner standards for multi-well pits.

10          COMMISSIONER BALCH: In section --

11          COMMISSIONER BLOOM: I see where it is.

12          COMMISSIONER BALCH: 17.9B4.

13          COMMISSIONER BLOOM: Okay.

14          COMMISSIONER BALCH: We were talking about  
15 permit registration application. We also talked  
16 about multi-well pits.

17          COMMISSIONER BLOOM: I need to review  
18 that.

19          COMMISSIONER BALCH: Should be on Page 7.

20          COMMISSIONER BLOOM: Looks like we did not  
21 draft any language pertaining to --

22          COMMISSIONER BALCH: We had discussion  
23 about -- there was another place in here. We had  
24 some discussion -- actually, I think it was in that  
25 section -- about whether or not they were

1 appropriately grouped as temporary pits or if they  
2 should be with the permanent pits or they should be  
3 a third classification.

4 CHAIRWOMAN BAILEY: I had thrown out the  
5 idea that maybe multi-well fluid management pits  
6 would fall under the same permit requirements as a  
7 permanent pit.

8 COMMISSIONER BALCH: But I think they were  
9 also not a temporary pit.

10 CHAIRWOMAN BAILEY: Right. They are a  
11 hybrid between a permanent pit and the temporary  
12 pit, as far as I can see.

13 COMMISSIONER BALCH: So really a third  
14 classification with its own set of siting criteria,  
15 liners would probably be appropriate to discuss.

16 CHAIRWOMAN BAILEY: Yes.

17 COMMISSIONER BALCH: I concur with that.

18 COMMISSIONER BLOOM: It would help going  
19 back to the definition of on-site/off-site. I give  
20 that a little thought every evening. I think on or  
21 off-site could work, particularly when we are  
22 talking about a multi-well fluid management pit  
23 which would be fluids out to development or unit, so  
24 would that be agreeable?

25 COMMISSIONER BALCH: You want something

1 that large with potential impact to be sited  
2 correctly, not sited -- you want them to be able to  
3 site it where they can comply. It may or may not be  
4 right on-site.

5 COMMISSIONER BLOOM: I guess I'm trying to  
6 think if there's any down side to have it off-site  
7 of the drilling location. I'm not sure I can think  
8 of any.

9 CHAIRWOMAN BAILEY: I think as long as it  
10 meets the siting requirements that we impose on  
11 them, I think the construction is what we need to  
12 talk about, what those standards are as far as  
13 whether or not we are requiring geomembrane liners  
14 similar to temporary pits or similar to permanent  
15 pits. If we are requiring the leak detection  
16 system, do we need to go into the same deal that a  
17 permanent pit leak detection system requires? I  
18 think that's the point of this Section J.

19 COMMISSIONER BALCH: So does that mean we  
20 can go back to the definition K and take out the  
21 highlighting? I think we can all agree about  
22 on-site or off-site.

23 CHAIRWOMAN BAILEY: I believe we can.

24 COMMISSIONER BALCH: In that definition?

25 COMMISSIONER BLOOM: I believe we can.

1           COMMISSIONER BALCH: Now, in the broader  
2 context of on-site or off-site we also talked about  
3 a temporary pit that might be used by two wells or  
4 used by a drilling.

5           COMMISSIONER BLOOM: I think I am still  
6 struggling with that one. Why don't we come back to  
7 that one.

8           COMMISSIONER BALCH: So the highlighting  
9 in K can be removed and I think we can move to adopt  
10 that section, Section K.

11          CHAIRWOMAN BAILEY: Okay. Do I hear a  
12 motion to adopt it?

13          COMMISSIONER BLOOM: So moved.

14          COMMISSIONER BALCH: And second.

15          CHAIRWOMAN BAILEY: All in favor? Aye.

16          COMMISSIONER BLOOM: Aye.

17          COMMISSIONER BALCH: Aye.

18          CHAIRWOMAN BAILEY: None opposed. Okay.  
19 For construction of a multi-well fluid management  
20 pit we have for guidance construction requirements  
21 that are part of temporary pits and we have  
22 construction requirements that are part of permanent  
23 pits. If we want to have a comparison, the  
24 construction requirements for temporary pits are  
25 under Section F that talks about the foundation and

1 the slope and allows 20 mil string reinforced LLDPE  
2 or equivalent. The permanent pit requirements are  
3 in Section G and they talk about a foundation  
4 construction with inside grade of the levee a  
5 certain slope and the outside grade of three to one  
6 instead of the two to one, with criteria for the  
7 levee's top, for their width and installation of an  
8 anchor trench.

9 The permanent pit requires both an upper  
10 and a secondary lower liner with a leak detection  
11 and the liners have to be 30 mil flexible PVC or 60  
12 mil HDPE liner or an equivalent liner material with  
13 certain specific hydraulic conductivity.

14 Do either of you want to adopt what's  
15 given, which does not strictly follow either one of  
16 the examples that we have here? Or to hybridize  
17 them? It's given that we want to have a pit  
18 designed and constructed to ensure confinement of  
19 liquids to prevent unauthorized releases, so I think  
20 we can just focus on No. 2 concerning the  
21 construction and foundation and the anterior slopes.

22 The proposed language includes wording for  
23 construction of a pit so the slope does not place  
24 undue stress upon the liner and is consistent with  
25 the angle of repose. Earlier, we did not allow that

1 one.

2 COMMISSIONER BALCH: How about if we  
3 change the language back to "or no steeper than two  
4 horizontal feet to one vertical feet."

5 CHAIRWOMAN BAILEY: Exactly.

6 COMMISSIONER BALCH: That was for -- the  
7 primary purpose for not trying to be fancy about the  
8 calculation was for ease of inspection.

9 CHAIRWOMAN BAILEY: Much easier to  
10 enforce.

11 COMMISSIONER BALCH: Enforce. I think  
12 multi-well fluid management pits are probably going  
13 to be more closely examined, particularly initially  
14 than a temporary pit. So you would hope that an  
15 engineering design for such a pit would include a  
16 description of the appropriate angle for the sides  
17 if it was different from two to one.

18 CHAIRWOMAN BAILEY: But it may not  
19 necessarily justify why it's more appropriate. But  
20 what I'm hearing, we replace the language in 2 that  
21 says that the slope does not place undue stress upon  
22 the liner and is consistent with the angle of repose  
23 with the language that we agreed to under temporary  
24 pit --

25 COMMISSIONER BALCH: And which also exists

1 in permanent pits.

2 CHAIRWOMAN BAILEY: Right.

3 COMMISSIONER BALCH: So it's consistent.

4 CHAIRWOMAN BAILEY: So the interior slope  
5 is no steeper than two horizontal feet to one  
6 vertical foot, you could go to the temporary pit  
7 paragraph.

8 COMMISSIONER BALCH: Page 14 or so.

9 CHAIRWOMAN BAILEY: F, copy the sentence  
10 that says, "The operator shall construct a temporary  
11 pit." Just that one sentence.

12 COMMISSIONER BALCH: I think we can go  
13 past Section J. You can't fight Microsoft. If you  
14 start with "the operator shall construct," and  
15 delete from there to the end of the sentence we can  
16 give you the new language.

17 CHAIRWOMAN BAILEY: Let's take a  
18 five-minute break.

19 (Note: The deposition stood in recess at  
20 3:11 to 3:16.)

21 CHAIRWOMAN BAILEY: We are back on the  
22 record. The discussion had to do with the slope of  
23 the multi-well fluid management pit where we were  
24 going to use the same slope requirements of the  
25 temporary pit for the slope requirements of the

1 multi-well fluid management pit. So the sentence  
2 that is highlighted would be deleted and the  
3 sentence would read, "The operator shall construct a  
4 multi-well fluid management pit so that the slopes  
5 are no steeper than two horizontal feet to one  
6 vertical foot (2H:1V)."

7 COMMISSIONER BLOOM: Madam Chair, if we  
8 were to stay with the permanent pit and construct  
9 the guidelines here, the permanent pit has outside  
10 grade no steeper than two horizontal to one vertical  
11 foot.

12 CHAIRWOMAN BAILEY: Yes.

13 COMMISSIONER BLOOM: Do we want to  
14 consider or discuss whether that would be  
15 appropriate here?

16 COMMISSIONER BALCH: To me we're going to  
17 talk risk versus reward. The reward of the  
18 multi-well fluid management pit, the reason why I  
19 think it's important is so you can streamline and  
20 make more efficient operations, reduce waste and  
21 reduce traffic on roads, gas tanks, et cetera. The  
22 risk, because you are dealing with larger volumes of  
23 water, is that the release would have a greater  
24 impact. So you do want to have a stronger  
25 protection and the permanent pit has a well defined

1 berm for inside and outside dimensions.

2 CHAIRWOMAN BAILEY: So we could take the  
3 last two sentences of G1 where it says, "The levee  
4 shall have an outside grade no steeper than three  
5 horizontal feet to one vertical foot, (3H:1V); the  
6 levy's top shall be wide enough to install an anchor  
7 trench and provide adequate room for inspection and  
8 maintenance." Is that what you are proposing to add  
9 to the --

10 COMMISSIONER BLOOM: I am proposing we  
11 discuss that.

12 COMMISSIONER BALCH: I think my answer was  
13 I would support a very well built containment for  
14 something that could be 80, 100 acre feet  
15 potentially. You want to have a very large, very  
16 secure containment.

17 COMMISSIONER BLOOM: As we have  
18 constructed this until now, it could be out there  
19 for four years, correct?

20 CHAIRWOMAN BAILEY: Yes.

21 COMMISSIONER BALCH: In theory, yes.

22 COMMISSIONER BLOOM: So I propose using  
23 that language again.

24 CHAIRWOMAN BAILEY: Then we are all in  
25 agreement with adding that sentence to J2?

1           COMMISSIONER BALCH: That would be after  
2 the 2H:1V. I think it's also important to leave the  
3 language in there that says that the appropriate  
4 division office may approve an alternative if the  
5 operator demonstrates he can construct and operate  
6 the pit in a safe manner -- I wonder if we want to  
7 change the language to the standard we have already  
8 used in other places of equivalent or better.

9           CHAIRWOMAN BAILEY: Should we highlight  
10 that language?

11           COMMISSIONER BALCH: We can read it the  
12 way it is now. I think the place where you have to  
13 change it is where it says, "To construct and  
14 operate the pit in a safe manner to prevent" -- if  
15 we are going to be consistent instead in that area  
16 have "the equivalent or better protection."

17           CHAIRWOMAN BAILEY: So provide equivalent  
18 or better protection against contamination of  
19 freshwater and to protect public health and the  
20 environment?

21           COMMISSIONER BALCH: Something along those  
22 lines. Do you recall, Commissioner Bloom, where we  
23 used that before?

24           COMMISSIONER BLOOM: Right. I would be  
25 supportive of something along those lines.

1           COMMISSIONER BALCH: We used an equivalent  
2 or better standard in other places so far, and the  
3 way this one reads, it doesn't have to be  
4 equivalent. It could just be safe. Now, I presume  
5 that that's going to mean it's going to be better or  
6 equivalent. We may want to be more clear that it  
7 has to be equivalent or better.

8           CHAIRWOMAN BAILEY: So we could include  
9 that language, as I said a while ago. Only I can't  
10 remember what I said a while ago. Can construct and  
11 operate the pit in a manner that is --

12           COMMISSIONER BALCH: That provides  
13 equivalent or better.

14           CHAIRWOMAN BAILEY: That's right. To  
15 operate the pit --

16           COMMISSIONER BALCH: Operate the pit --

17           CHAIRWOMAN BAILEY: In a manner that  
18 provides --

19           COMMISSIONER BALCH: Equivalent or better  
20 protection. And I think you could say "to  
21 freshwater, public health" and take out "to prevent  
22 contamination."

23           COMMISSIONER BLOOM: Freshwater, public  
24 health and the environment?

25           COMMISSIONER BALCH: Yes.

1 CHAIRWOMAN BAILEY: Because that will  
2 allow construction in the area where topographic  
3 problems may arise that would prevent that type of a  
4 requirement.

5 COMMISSIONER BALCH: And I think more  
6 importantly -- that's philosophical again -- one of  
7 the complaints that was brought up in the testimony  
8 about the original Rule 17 was that it was not  
9 flexible enough to allow for improvements. If you  
10 came up with a better way to do it, the only way you  
11 could do it was with an exception. This allows the  
12 possibility of coming up with a better way than we  
13 defined and it should let the rule last longer.

14 CHAIRWOMAN BAILEY: We can go to the next  
15 paragraph that has to do with the liners and leak  
16 detection system. If we are unhappy with that  
17 particular paragraph we can borrow from either the  
18 temporary pit section that says -- that deals  
19 with --

20 COMMISSIONER BLOOM: Madam Chair, before  
21 we move on, may I point out the permanent pit  
22 specifies that most changes would have to be  
23 approved by the Environmental Bureau and the  
24 Division Santa Fe Office?

25 CHAIRWOMAN BAILEY: For permanent pits,

1 yes.

2 COMMISSIONER BLOOM: For permanent pits.

3 COMMISSIONER BALCH: Permanent pits.

4 COMMISSIONER BLOOM: Are we comfortable  
5 referring this to the division?

6 CHAIRWOMAN BAILEY: The district, the  
7 appropriate district area, yes.

8 COMMISSIONER BALCH: I think I'm  
9 comfortable with it because it is not going to be  
10 there -- it's going to be there at most between two  
11 and four years, whereas the permanent pit could be  
12 there for 30 years, and I think you definitely want  
13 to have oversight for something that will be there  
14 that long.

15 COMMISSIONER BLOOM: The district office  
16 will have an engineering staff or some people with  
17 background to make --

18 CHAIRWOMAN BAILEY: They currently approve  
19 designs for temporary pits. It would not be a  
20 stretch for them to be able to evaluate the design  
21 of a multi-well pit.

22 COMMISSIONER BLOOM: Okay.

23 COMMISSIONER BALCH: And if that person in  
24 the district office wasn't there, they would pass it  
25 on to the office in Santa Fe, I would imagine.

1 CHAIRWOMAN BAILEY: Yes, there's a lot of  
2 consultation back and forth.

3 COMMISSIONER BLOOM: Okay. Great. So we  
4 move on to the liner and leak detection system?

5 CHAIRWOMAN BAILEY: Yes, Paragraph 3. We  
6 do have a model under permanent pits. Paragraphs 2  
7 and 3 deal with liners and leak detection systems,  
8 as does Paragraph 4, so it would be 2, 3 and 4 as  
9 far as selection of the liners.

10 COMMISSIONER BLOOM: Madam Chair, I would  
11 be comfortable in using that same language from  
12 Sections 2, 3 and 4 and including that in the  
13 descriptions of the multi-well fluid management pit,  
14 and I would suggest we consider adding the language  
15 about anchoring in the bedrock or the -- I guess we  
16 don't have to do that. We could then potentially  
17 move that language over.

18 CHAIRWOMAN BAILEY: So copy the language  
19 in G2, 3 and 4 paragraphs?

20 COMMISSIONER BLOOM: Correct.

21 CHAIRWOMAN BAILEY: The problem --

22 COMMISSIONER BALCH: I think we are still  
23 discussing that.

24 CHAIRWOMAN BAILEY: Some of the issues --  
25 and I'm not sure that it's arising here -- is the

1 specificity of detailed things such as the hydraulic  
2 conductivity of a geomembrane liner. It already  
3 specifies that it needs to be a 30 mil flexible PVC  
4 or 60 mil HDPE liner or an equivalent liner that is  
5 approved.

6 COMMISSIONER BLOOM: So one would hope  
7 that those already have a hydraulic conductivity no  
8 greater than one times ten to the negative nine --

9 CHAIRWOMAN BAILEY: Exactly. I don't know  
10 that we need to go into this detail if we are just  
11 going to adopt Paragraphs 2, 3 and 4 and change it  
12 from division Santa Fe office to the appropriate  
13 division district office.

14 COMMISSIONER BALCH: One of the reasons I  
15 like things at the district level is that those are  
16 people that are on the ground familiar with the  
17 conditions, and I think from an initial assessment  
18 of anything they will be more qualified than  
19 somebody who is 200 miles away in a not so  
20 air-conditioned office.

21 CHAIRWOMAN BAILEY: I strongly agree with  
22 you. So is there anymore discussion on copying  
23 Paragraphs 2, 3 and 4 from permanent pits and  
24 inserting them instead of Paragraph 3 that's been  
25 proposed to us?

1           COMMISSIONER BALCH: I want to make sure.  
2 Let me run by the language here. I believe that's  
3 acceptable to me. Also I'm curious about the  
4 differences between essentially 4 -- I haven't read  
5 them yet -- in J and Section 5 which has to do with  
6 liner seams.

7           CHAIRWOMAN BAILEY: That comes next.

8           COMMISSIONER BLOOM: That will be the next  
9 one. We move down on the multi-well fluid  
10 management pits.

11          CHAIRWOMAN BAILEY: Theresa, go ahead and  
12 copy Paragraphs 2, 3 and 4 from Section G and insert  
13 them in place of the Proposed Paragraph 3 that we  
14 have here. And that gives a multi-well fluid  
15 management pit the same protection for upper and  
16 secondary liners, geomembrane liners with leak  
17 detection systems that may be -- that I believe are  
18 necessary for pits that have no size limitations, no  
19 volume limitations, that would be holding six  
20 million gallons of water or more.

21          COMMISSIONER BALCH: I think it's  
22 appropriate to treat them in the way you would a  
23 permanent pit as far as the level of protection that  
24 you give the environment from a fluid release. It's  
25 very critical. Because a fluid release of that size

1 will have significant sheet flow, will have  
2 significant infiltration and I think you are  
3 actually protecting the operators here, because if  
4 there was a release that's going to be one heck of a  
5 cleanup.

6 CHAIRWOMAN BAILEY: If we look at  
7 Paragraph 5 under the permanent pits, having to do  
8 with the installation and how the liner seam should  
9 be oriented in testing the seams, those requirements  
10 that are so very specific as to even setting the air  
11 pressure that should be required for testing, I  
12 don't know that we need to get that specific again.  
13 I'm looking at Paragraph 4 to see if that is  
14 sufficient.

15 COMMISSIONER BALCH: I'm going to guess  
16 the permanent pits are not terribly common.

17 CHAIRWOMAN BAILEY: They are not that  
18 common. They are not rare, but the number is not  
19 overwhelming.

20 COMMISSIONER BALCH: There were no  
21 suggested changes by the parties to permanent pits.

22 CHAIRWOMAN BAILEY: Exactly.

23 COMMISSIONER BLOOM: During the  
24 construction of permanent pits, isn't it probably  
25 standard fare for some of the crews that work on

1 these to have such specificity as is desirable in  
2 this case?

3 CHAIRWOMAN BAILEY: I don't know that an  
4 OCD inspector would be able to tell whether or not a  
5 seam was tested between 33 and 37 PSI.

6 COMMISSIONER BALCH: Seems awfully  
7 specific.

8 CHAIRWOMAN BAILEY: It does. And I am  
9 wondering if Paragraph 4 doesn't summarize the  
10 salient points; that the company that is actually  
11 installing one of these would be able to take care  
12 of.

13 COMMISSIONER BLOOM: One of the  
14 differences is that Paragraph 4 for the multi-well  
15 fluid management pits doesn't require testing of the  
16 seam and in Paragraph 5 we see that a test is  
17 required but there's a lot of detail there. What if  
18 we include language in Paragraph 4, the multi-well  
19 fluid management pits that requires a test.

20 CHAIRWOMAN BAILEY: We could put it in  
21 that second sentence. "The operator shall use  
22 factory welded seams where possible. Field seams  
23 shall be tested against leakage. Field seams shall  
24 be tested to" --

25 COMMISSIONER BALCH: I would suggest an

1 alternative.

2 CHAIRWOMAN BAILEY: What do you have?

3 COMMISSIONER BALCH: If you take Paragraph  
4 5 from the permanent pits definition for installing  
5 the liner, and you remove the second and third  
6 sentences, would the remainder of that accomplish  
7 the goal?

8 CHAIRWOMAN BAILEY: Well, the second  
9 sentence has to do --

10 COMMISSIONER BALCH: I'm sorry, the third  
11 and fourth sentences. I missed a period there.  
12 Where it starts with, "The operator shall ensure."  
13 Actually, you might keep it up to "seamed" and lose  
14 the specific information on how you are doing that,  
15 because that will be a best practice that will be  
16 more suited to the installation companies since you  
17 will have the professionals.

18 Then if you remove everything from "hot  
19 wedge" down to "shut off from the pocket," you  
20 remove the specificity while retaining more -- I  
21 think maybe what Mr. Bloom is trying to do is keep a  
22 higher attention to the seams than is necessary for  
23 a six to 12-month temporary pit with a smaller  
24 volume.

25 COMMISSIONER BLOOM: Correct.

1 COMMISSIONER BALCH: Does that satisfy?

2 COMMISSIONER BLOOM: That would work.

3 COMMISSIONER BALCH: And do you think that  
4 causes a complication?

5 CHAIRWOMAN BAILEY: No, I think that's a  
6 nice compromise on that one.

7 COMMISSIONER BLOOM: So if we go to  
8 Section G5 and you go to where --

9 CHAIRWOMAN BAILEY: Just copy the whole  
10 thing over and then we can delete the sentences that  
11 we need to.

12 COMMISSIONER BALCH: Now, that will be  
13 easier than what I was going to try to do. Insert  
14 it instead of Paragraph 4 in J.

15 COMMISSIONER BLOOM: Right. That  
16 Paragraph 4, delete what 4 said.

17 COMMISSIONER BALCH: Go down to where the  
18 first parentheses is to where it has "hot wedge."  
19 Go to the beginning of the parentheses and delete  
20 down to about four lines down where it says "pocket"  
21 all the way on the other side. On the right-hand  
22 side.

23 COMMISSIONER BLOOM: Go down another line.

24 COMMISSIONER BALCH: All the way to the  
25 end. Delete that section there.

1           COMMISSIONER BLOOM: Then I might suggest  
2 that on the last sentence we add at the end of that  
3 so it would read, "Qualified personnel shall perform  
4 field seaming and testing of field seams."

5           COMMISSIONER BALCH: I'm going to guess  
6 that part of the field seam process is making sure  
7 that the seam is going to work. It might be  
8 redundant.

9           COMMISSIONER BLOOM: Just a reminder.

10          CHAIRWOMAN BAILEY: So you want to insert  
11 in there "and testing."

12          COMMISSIONER BLOOM: And testing.

13          COMMISSIONER BALCH: That's less  
14 redundant.

15          COMMISSIONER BLOOM: Okay. That will  
16 work.

17          CHAIRWOMAN BAILEY: We are good. On to  
18 Proposed Paragraph 5, "Construction shall avoid  
19 excessive stress/strain on the liner."

20          COMMISSIONER BLOOM: I think we could  
21 delete that. It seems to be --

22          COMMISSIONER BALCH: That's going to be  
23 part of that.

24          COMMISSIONER BLOOM: Part of the standard  
25 of putting in a liner.

1           COMMISSIONER BALCH: That's why you use  
2 qualified personnel.

3           CHAIRWOMAN BAILEY: That's right. Instead  
4 of having 5 -- oh, okay. Yes. That's fine. Go  
5 ahead and delete 5. Go to 6, "Geotextile is  
6 required under the liner." We have taken care of  
7 that when we copied over sections from permanent  
8 pit.

9           COMMISSIONER BALCH: How to grade it,  
10 remove rocks and what not. That's already covered.

11          CHAIRWOMAN BAILEY: So can we delete  
12 suggested language 6?

13          COMMISSIONER BLOOM: Where did we include  
14 that?

15          COMMISSIONER BALCH: It's in the language  
16 that we borrowed from the permanent pit. Each  
17 permanent pit -- it's actually in the beginning  
18 of -- it's in 2 of J, "The pit shall have a properly  
19 constructed foundation and interior slopes  
20 consisting of a firm, unyielding base, smooth and  
21 free from rocks, debris, sharp edges or  
22 irregularities," so I think that might be redundant.

23          CHAIRWOMAN BAILEY: Theresa, can you go up  
24 a portion to make sure that we have that? Okay, we  
25 have that right there. So we don't really need to

1 have it in 6, do we?

2 COMMISSIONER BLOOM: Where do we have it?

3 In 2?

4 CHAIRWOMAN BAILEY: We have it right  
5 there. She is highlighting it.

6 COMMISSIONER BALCH: Basically, the firm  
7 unyielding base will require them to do something,  
8 either clay or geotextile base. I think that's  
9 probably better left to professionals than us  
10 telling them how to do it.

11 CHAIRWOMAN BAILEY: We need that  
12 highlighted language because we received --

13 COMMISSIONER BALCH: Oh, yes.

14 COMMISSIONER BLOOM: So what we are saying  
15 is repair the foundation by removing rocks, debris,  
16 sharp edges but we are not requiring geotextile  
17 liner.

18 COMMISSIONER BALCH: It's more than that.  
19 You will have the foundation and interior slopes  
20 consisting of a firm, unyielding base. You would  
21 use a geotextile in a place where you may have  
22 exposed bedrock and you wanted to smooth it out so  
23 you have a smooth and unyielding base. So what you  
24 are requiring them to do is what they are suggesting  
25 in 6. You are just telling them exactly how to do

1 it.

2 CHAIRWOMAN BAILEY: Not necessarily,  
3 because there's a difference between the geomembrane  
4 liner and the geotextile that goes under that liner,  
5 and 6 is requiring the geotextile to go under that  
6 secondary liner to prevent or to further protect  
7 that liner from any problems that may be  
8 encountered.

9 COMMISSIONER BALCH: If you think we need  
10 to be specific on a firm and unyielding base, that  
11 that should probably be in there.

12 COMMISSIONER BLOOM: We could leave it.  
13 If you look at the current proposed language for  
14 fluid management pits, 2 above has the language  
15 about "pit shall have a properly constructed  
16 foundation and interior slopes consisting of a firm  
17 and unyielding base," but then they elected to add  
18 geo "textiles required."

19 COMMISSIONER BALCH: I think if you are  
20 going to leave the language in, I would probably  
21 leave it as a separate line item like this.

22 CHAIRWOMAN BAILEY: Are we leaving 6 as  
23 proposed?

24 COMMISSIONER BLOOM: I think we should  
25 leave it. Might it make sense to move it up?

1 CHAIRWOMAN BAILEY: To be a part of No. 2?

2 COMMISSIONER BLOOM: Correct. Since it  
3 deals with preparing the base.

4 COMMISSIONER BALCH: Then it should go  
5 between Sentence 1 and 2 of 2?

6 COMMISSIONER BLOOM: Yes.

7 CHAIRWOMAN BAILEY: Or should it go after  
8 the first sentence in 3?

9 COMMISSIONER BALCH: It seems to really  
10 have to do with the construction of the foundation.

11 CHAIRWOMAN BAILEY: Okay. So it goes in  
12 2.

13 COMMISSIONER BLOOM: I think what is 2  
14 right now, could you put that Paragraph 3 after the  
15 end of the first sentence.

16 COMMISSIONER BALCH: Right after rupture  
17 or tear?

18 COMMISSIONER BLOOM: There you go.

19 COMMISSIONER BALCH: That makes more  
20 sense.

21 CHAIRWOMAN BAILEY: Then we go to  
22 anchoring the edges of all liners in the bottom of  
23 the compacted, earth-filled trench that's at least  
24 18 inches deep. We have already copied in this  
25 sentence.

1 COMMISSIONER BLOOM: Correct.

2 CHAIRWOMAN BAILEY: So we don't really  
3 need to have this. We already have it up above, so  
4 we don't need to have Proposed Sentence No. 7 or  
5 Paragraph 7.

6 COMMISSIONER BLOOM: Okay.

7 COMMISSIONER BALCH: Agreed.

8 CHAIRWOMAN BAILEY: So we are deleting 7.

9 COMMISSIONER BALCH: I think 8 is  
10 important because you are going to be having perhaps  
11 larger than normal fluids, so I would leave that.

12 CHAIRWOMAN BAILEY: Okay. I agree.

13 COMMISSIONER BLOOM: The language from the  
14 permanent pit Paragraph 6 is similar but a little  
15 bit different. We might want to just compare them.

16 COMMISSIONER BALCH: I think they are  
17 trying to say the same thing, but we may want to  
18 borrow the language from permanent pits just to be  
19 consistent.

20 CHAIRWOMAN BAILEY: Theresa, please copy  
21 that in.

22 COMMISSIONER BALCH: That would be G6. I  
23 think it wouldn't be anything remarkably different.  
24 As long as the language in G6 is clear enough.

25 COMMISSIONER BLOOM: It's quite similar to

1 "shall not penetrate the liner."

2 COMMISSIONER BALCH: I think it says the  
3 same thing but it uses different words.

4 COMMISSIONER BLOOM: Yes, exactly.

5 CHAIRWOMAN BAILEY: And insert it in place  
6 of No. 8 of the proposed language. Then we need to  
7 address the leak detection system which is in G7.

8 COMMISSIONER BALCH: Well, there's also  
9 G2. Did we adopt G2? I think we did. "Each  
10 permanent pit shall contain at a minimum a primary  
11 upper liner, secondary lower liner for the leak  
12 detection system appropriate to the site's  
13 conditions."

14 CHAIRWOMAN BAILEY: I think we need to be  
15 a little more specific than that.

16 COMMISSIONER BALCH: Okay.

17 CHAIRWOMAN BAILEY: But less specific than  
18 what the current Paragraph 7 is. I think, once  
19 again, it goes into more detail than is necessary.

20 COMMISSIONER BALCH: I think we have  
21 adopted some of that language already.

22 CHAIRWOMAN BAILEY: But there are really  
23 different kinds of leak detection systems, and not  
24 all of them require visual monitoring. I mean,  
25 there are a lot of details in Paragraph 7.

1           COMMISSIONER BLOOM: For example, down  
2 towards the bottom you see, "The slope of the  
3 interior sub-grade and of drainage lines and  
4 laterals should be at least a 2 percent grade" and  
5 it goes on to say "i.e., two feet vertical drop per  
6 100 vertical feet."

7           CHAIRWOMAN BAILEY: Could you go down to  
8 Paragraph 7, Theresa?

9           COMMISSIONER BALCH: Permanent pits?  
10 Okay. Thank you.

11          COMMISSIONER BLOOM: Can we copy that and  
12 move it down?

13          CHAIRWOMAN BAILEY: Yes, I think that  
14 would be a good idea.

15          COMMISSIONER BLOOM: To the multi-well  
16 fluid management pits.

17          CHAIRWOMAN BAILEY: In place of the  
18 proposed Sentence 9. And you can delete the upper  
19 sentence, please.

20          COMMISSIONER BLOOM: I recommend that we  
21 delete the language starting at "i.e. two vertical  
22 feet drop per 100 horizontal feet."

23          CHAIRWOMAN BAILEY: That necessarily  
24 should go, yes, but I'm also thinking that language  
25 after the sentence, "The leak detection system shall

1 constant of a properly designed drainage and  
2 collection and removal system placed above the lower  
3 geomembrane liner in depressions in slope to  
4 facilitate the earliest possible leak detection."

5 If we start deleting typing -- and the  
6 following sentence, "The material the operator  
7 places shall be sufficiently permeable," I'm not  
8 sure how much of that is necessary.

9 COMMISSIONER BALCH: I think you are  
10 getting very specific about the design, and in my  
11 opinion you want the regulation to reflect the  
12 intent and allow best practices.

13 COMMISSIONER BLOOM: I agree with that.

14 COMMISSIONER BALCH: In the application.

15 CHAIRWOMAN BAILEY: So we could delete  
16 everything beginning with the word "piping" and all  
17 the way down but leaving the last sentence, changing  
18 that -- yes, go ahead and delete. Changing the last  
19 sentence to reflect that "The operator may install  
20 an alternative method that the appropriate division  
21 district office approves," and that would delete  
22 "the Environmental Bureau in Santa Fe." Are we  
23 happy with that?

24 COMMISSIONER BALCH: I think the intent is  
25 to protect against leaks and detect them as early as

1 possible, and that captures that.

2 CHAIRWOMAN BAILEY: We are giving a  
3 performance standard.

4 COMMISSIONER BLOOM: I agree with that.

5 CHAIRWOMAN BAILEY: That takes us to  
6 Proposed Paragraph 10, "The operator shall design  
7 and construct the pit to prevent run-on of surface  
8 water. A berm, ditch, proper sloping or other  
9 diversion shall surround the pit to prevent run-on  
10 of surface water," which is essentially Paragraph 11  
11 under permanent pits.

12 COMMISSIONER BALCH: Do we want to adopt  
13 the same for consistency?

14 CHAIRWOMAN BAILEY: Shall we copy the  
15 Paragraph 11 of permanent pits?

16 COMMISSIONER BLOOM: Yes, that will be  
17 acceptable.

18 COMMISSIONER BALCH: Permanent pits, so  
19 G11. That would be a multi-well fluid management  
20 pit instead of a permanent pit. Multi-well fluid  
21 management pit. Instead of multi management,  
22 multi-well fluid management pit. You have to  
23 replace the other permanent in the sentence with the  
24 same phrase.

25 CHAIRWOMAN BAILEY: And delete the

1 language just above it. Okay. That takes us to  
2 Section K.

3 MR. SMITH: Actually, I'm sorry. I think  
4 there are other spots in here where you have  
5 references to permanent pits.

6 CHAIRWOMAN BAILEY: That we need to clean  
7 up the language?

8 MR. SMITH: You should probably check.

9 COMMISSIONER BALCH: Go up to 1 and we'll  
10 read through it. Or if you can do a word search  
11 from that point on the word "permanent."

12 MR. SMITH: First occurrence I know of is  
13 in 3.

14 CHAIRWOMAN BAILEY: Right there.

15 COMMISSIONER BALCH: Oh, yes.

16 CHAIRWOMAN BAILEY: Okay, we need to  
17 change "the Environmental Bureau of the Santa Fe  
18 division office" to "the appropriate division  
19 district office." And that's also in the first line  
20 of that paragraph.

21 COMMISSIONER BALCH: I think you have to  
22 take out "the Environmental Bureau" at the very  
23 beginning of that sentence. It should read, "The  
24 appropriate division district office."

25 CHAIRWOMAN BAILEY: And delete the next

1 few words. Paragraph 4 seems to be fine. Here is  
2 the permanent pits. Okay. Next paragraph? I think  
3 we're good.

4 MR. SMITH: Make a note to go back and  
5 doublecheck that just in case.

6 CHAIRWOMAN BAILEY: The next section has  
7 to do with burial trenches, closure and the way that  
8 the liner should be constructed.

9 COMMISSIONER BLOOM: Madam Chair, if I  
10 may, I'm going to have some concerns about deletion  
11 of on-site burial, and perhaps we could deal with  
12 that when we get to the section on closure after we  
13 come back to this later and take on some of the  
14 other recommendations and see if we can make it  
15 through some of the operational requirements this  
16 afternoon?

17 CHAIRWOMAN BAILEY: I agree with you that  
18 that's an area where we will probably spend a lot of  
19 time and we need to be fresh in order to do that.  
20 So we would go on to 19.15.17.12, Operational  
21 Requirements. The first proposed language change is  
22 in A1, with the deletion of the words "closed-loop  
23 system" as far as operate and maintain to contain  
24 liquids and solids and maintain the integrity of the  
25 liner, liner system or secondary containment

1 system." Since we are not permitting closed-loop  
2 systems, we are simply being notified, the OCD is  
3 being notified of the use of closed-loop systems, is  
4 it appropriate to remove that language from this  
5 paragraph?

6 COMMISSIONER BALCH: I think what you want  
7 to delete is from closed-loop system through sump.  
8 Would that be correct?

9 CHAIRWOMAN BAILEY: No, my copy says only  
10 deleting closed-loop system.

11 COMMISSIONER BLOOM: I'm looking at that  
12 version. I'm sorry, why again would we want to  
13 delete closed-loop system?

14 CHAIRWOMAN BAILEY: Because the OCD will  
15 simply be notified of the use of a closed-loop  
16 system. They will not be permitting or registering  
17 closed-loop systems.

18 COMMISSIONER BLOOM: Okay. As I'm looking  
19 at this, it's simply about operating that system, so  
20 they would operate it to contain liquids and solids  
21 and the integrity of the liner, the liner system,  
22 prevent contamination of freshwater, protect public  
23 health and the environment. So I don't know that I  
24 would remove it, because I think the closed-loop  
25 systems should still be operated in a manner to

1 prevent contamination to the environment.

2 COMMISSIONER BALCH: Is this the IPANM  
3 change?

4 CHAIRWOMAN BAILEY: Apparently so.

5 COMMISSIONER BALCH: You have that up  
6 there but it's not highlighted. Because there's  
7 also a closed-loop in the description of A.

8 CHAIRWOMAN BAILEY: That's right. So why  
9 delete it in 1 if it's included in A?

10 COMMISSIONER BLOOM: I'm sorry?

11 COMMISSIONER BALCH: Just in the general  
12 specifications there's also a closed-loop system.

13 COMMISSIONER BLOOM: May I ask, are there  
14 guidelines for the operation of the closed-loop  
15 system further down in the section here? Temporary  
16 pits, permanent, below-grade tanks, sumps,  
17 multi-well fluid management pits. I don't know that  
18 there's any.

19 COMMISSIONER BALCH: I think the initial  
20 regulation was addressing its closed-loops,  
21 below-grade tanks and sumps all in one broad  
22 category, several of which we have now separated out  
23 as notification and others we have separated out as  
24 registration. The operational requirements, I  
25 think, would necessarily apply to things that are

1 registered, tanks and sumps and things like that.

2 But the closed-loop system I think we had  
3 determined that you just want to know they are using  
4 it. You don't want to tell them how to do it.

5 CHAIRWOMAN BAILEY: The concern has to do  
6 with the drying pads associated with the closed-loop  
7 system.

8 COMMISSIONER BALCH: Okay. So the risk is  
9 from the material going through the drying pads and  
10 contaminating the ground. So there's a risk and  
11 therefore it should be addressed in the operational  
12 requirements?

13 CHAIRWOMAN BAILEY: I think it's logical  
14 to do that, particularly since closed-loop system is  
15 included in the first sentence of A, the  
16 introductory sentence there, which says that there  
17 are requirements, yet as Commissioner Bloom pointed  
18 out, there are no requirements that mention  
19 closed-loop systems, so that may have been an error  
20 on IPANM's part or it could be that --

21 COMMISSIONER BALCH: Well, in 5 there's a  
22 mention of closed-loop systems in A, in 1, in 5.

23 CHAIRWOMAN BAILEY: But they have been  
24 struck all the way through.

25 COMMISSIONER BALCH: Maybe we should talk

1 a little bit about the risk associated with the  
2 drying pads.

3 COMMISSIONER BLOOM: Are drying pads  
4 mentioned in the operational requirements?

5 CHAIRWOMAN BAILEY: I don't see that term  
6 used in this section.

7 COMMISSIONER BALCH: They were brought up  
8 in the findings of New Mexico Citizens for Clean Air  
9 and Water.

10 CHAIRWOMAN BAILEY: Dr. Neeper testified  
11 that drying pads left on the surface would leave  
12 chlorides on the surface which would prevent any  
13 kind of plant growth.

14 COMMISSIONER BLOOM: If we get to that,  
15 wouldn't it be in closure?

16 CHAIRWOMAN BAILEY: It would be, as far as  
17 what to do with any kind of waste material that's  
18 left on location.

19 COMMISSIONER BLOOM: From the drying pad.

20 COMMISSIONER BALCH: How are the drying  
21 pads typically located? Are they just mats rolled  
22 out on the ground? Are they rolled out on a  
23 contained pad or a liner material or anything like  
24 that? How is that typically done?

25 CHAIRWOMAN BAILEY: I have not seen them

1     except in photographs.

2                   COMMISSIONER BALCH:   How do you remember  
3     them being pictured?

4                   CHAIRWOMAN BAILEY:   I remember them in a  
5     shallow hole actually.   Just kind of spread out on  
6     the surface of the ground.

7                   COMMISSIONER BALCH:   So if -- I hate to be  
8     in the situation where we are trying to guess what  
9     these things are made out of.   The question would be  
10    in my mind are they permeable, and apparently  
11    Dr. Neeper thinks that they are.

12                   CHAIRWOMAN BAILEY:   Yes.

13                   COMMISSIONER BALCH:   And that basically  
14    the shaker is going to have solids, rocks, chunks  
15    that come out of the wellbore that they don't want  
16    to recirculate in the mud.

17                   CHAIRWOMAN BAILEY:   Let's go back to H.   H  
18    deals specifically with drying pads associated with  
19    closed-loop systems.   H we have already discussed  
20    and talked about.

21                   COMMISSIONER BLOOM:   Of section?

22                   COMMISSIONER BALCH:   Associated with  
23    closed-loop systems.   Around Page 17.

24                   COMMISSIONER BLOOM:   I see it.

25                   COMMISSIONER BALCH:   That's in the

1 previous section.

2 CHAIRWOMAN BAILEY: The one we discussed  
3 earlier. Appropriate liners that prevent  
4 contamination.

5 COMMISSIONER BALCH: So now you are going  
6 to put them on a liner of some sort or a shallow  
7 trench with a liner so they are not just being  
8 thrown out on the ground.

9 CHAIRWOMAN BAILEY: And there are sumps to  
10 collect liquids and there are berms to prevent  
11 run-on.

12 COMMISSIONER BALCH: So in that sense, I  
13 think we don't necessarily need to have them in the  
14 operational requirements and that concern of  
15 Dr. Neeper should be addressed by H1, 2 and 3.

16 MR. SMITH: May I say this? As I read the  
17 section in Dr. Neeper's closing statement, he seems  
18 to be concerned not just about protection of water  
19 but about the deterioration of vegetation.

20 COMMISSIONER BALCH: Okay. So the way it  
21 is proposed in 17.11 that we deal with drying pads  
22 in closed-loop systems is that you essentially, the  
23 way it's described in 1, 2 and 3, you make a shallow  
24 trench, you will put in a liner, there will be a  
25 berm to prevent run-on.

1 MR. SMITH: Okay.

2 COMMISSIONER BALCH: There will be a sump  
3 to collect fluids and a method for collection of  
4 solids. So the concerns, I think, by Dr. Neeper is  
5 that if you went out to the site, the closed-loop  
6 systems might have a drying pad just thrown on the  
7 ground with no protection. In that case there would  
8 be a risk to surface salt contamination.

9 I think that H1, 2 and 3 in 17.11 address  
10 that concern. 1 is appropriate liners that prevent  
11 contamination of pressure water; 2 is sumps to  
12 facilitate the collection of liquids; and 3 is berms  
13 that prevent run-on of surface water. So in the  
14 sense that you are disrupting the surface in order  
15 to make a safe place, you don't have the permanent  
16 salt right there.

17 CHAIRWOMAN BAILEY: H discusses design and  
18 construction for drying pads. 12A discusses  
19 operation and maintenance of drying pads, so in H we  
20 have required design and construction that will  
21 prevent contamination of freshwater and protect  
22 public health and the environment. In 12A we are  
23 not requiring operation and maintenance to fit those  
24 same standards.

25 COMMISSIONER BALCH: If you go with the

1 IPANM corrections.

2 CHAIRWOMAN BAILEY: If we delete  
3 closed-loop systems from --

4 COMMISSIONER BALCH: If we leave the  
5 closed-loop systems in there -- we are discussing  
6 the installation. We should discuss the operation.

7 MR. SMITH: If you think there's a need to  
8 discuss their operation. I mean, you don't need to  
9 do stuff just for symmetry, but if you think there's  
10 an issue there, there's a possibility of operating  
11 and maintaining so that it's going to have an  
12 adverse effect, then it's certainly appropriate.

13 COMMISSIONER BLOOM: Let me add something  
14 here. We may perhaps want to add a section under  
15 operational requirements for closed-loop systems.  
16 Dr. Neeper pointed out on Page 12 of his closing  
17 argument that the proposed rule does not require  
18 repair of a leak at a sump or closed-loop system.  
19 The code has no requirement to repair a leak at a  
20 sump or closed-loop system. There's no technical  
21 testimony indicating that the leaks should not be  
22 repaired in a timely manner.

23 COMMISSIONER BALCH: Well, okay. I think  
24 that by default a leak at a sump or probably even a  
25 closed-loop system would fall under the Spill Rule

1 if there was a release. Sumps in general, although  
2 we didn't put a size limit on them, are fairly  
3 small. It would probably be under the remediation  
4 requirement, for that matter.

5 CHAIRWOMAN BAILEY: Because they are only  
6 supposed to contain de minimis for a short period of  
7 time.

8 COMMISSIONER BALCH: Similarly with  
9 closed-loop drying pads. You are not applying  
10 significant liquid to that pad. You are basically  
11 shaking out wet rock fragments on to it.

12 COMMISSIONER BLOOM: I'm wondering if he  
13 might be referring to a leak somewhere else in the  
14 closed-loop system.

15 COMMISSIONER BALCH: Well, maybe that  
16 might be the case, but in H1, 2 and 3 where you are  
17 describing the use of the drying pads. There's a  
18 sump there that would catch the liquids, so there is  
19 a safety mechanism. I don't know how you would get  
20 five barrels -- if you prevent run-on, I don't see  
21 how you would get five barrels of fluid there unless  
22 the system failed, at which time you would be  
23 looking at a release that would be dealt with by the  
24 Spill Rule. If the closed-loop system sprang a leak  
25 and started spraying water all over the place, that

1 would fall under the Spill rule, correct?

2 CHAIRWOMAN BAILEY: It would, and also I  
3 question the enforceability of how do we enforce a  
4 ban against prevention of freshwater and protection  
5 of public health from the closed-loop system other  
6 than through the Spill Rule.

7 COMMISSIONER BLOOM: As I read down more,  
8 I think I see where Dr. Neeper's concern comes in.  
9 It's under Section 12A, Paragraph 5. "If the pit"  
10 and the proposal is to delete "closed-loop system or  
11 sump," the proposal is to delete that.

12 CHAIRWOMAN BAILEY: I lost you.

13 COMMISSIONER BLOOM: Under operational  
14 requirements, go down to 5. NMOGA has proposed  
15 deleting closed-loop system or sump.

16 CHAIRWOMAN BAILEY: Yes, I see.

17 COMMISSIONER BLOOM: That, as it stands,  
18 doesn't particularly work very well for closed-loop  
19 because it talks about the operator shall remove all  
20 equipment above the damage or leak within 48 hours  
21 and the closed-loop system might not necessarily  
22 have a liquid above.

23 COMMISSIONER BALCH: It's much more likely  
24 in a closed-loop system if you had a release of  
25 water that comes from a failure of a pipe or a

1 fitting.

2 COMMISSIONER BLOOM: Exactly.

3 COMMISSIONER BALCH: Which will be more  
4 similar to like a salt water disposal pipeline  
5 spill, which is very clearly defined under the Spill  
6 Rule, I think.

7 COMMISSIONER BLOOM: I don't know. I  
8 guess I would ask -- I don't know why we would  
9 delete closed-loop system from 5. If we leave it in  
10 there we have reason to leave closed-loop system in  
11 the other parts preceding that of Section 12.

12 COMMISSIONER BALCH: I think the problem  
13 with that Commissioner Bailey, is the enforceability  
14 issue. I think the reason why the Spill Rule has a  
15 lower limit on spills that are reported is probably  
16 related to enforceability. If the spill is small, I  
17 think the Spill Rule will interpret it necessarily,  
18 but I think the assumption would be that it's not  
19 going to cause a significant harm.

20 CHAIRWOMAN BAILEY: A minor release as  
21 opposed to a major release.

22 COMMISSIONER BALCH: Right.

23 CHAIRWOMAN BAILEY: Which is why we have  
24 the different volumes reported under each category.

25 COMMISSIONER BALCH: So in a similar

1 sense, if you had -- I think there's a couple cases  
2 that might be concerning you, and I want the words  
3 in your mouth. The first is if the sump overflows.  
4 The second one might be if there's a failure in the  
5 closed-loop system for some reason. If the  
6 closed-loop system fails it will be during  
7 operation. There will be people there and somebody  
8 will say, "Oh, my God, the pipe broke. There's  
9 water flying everywhere, turn it off."

10 COMMISSIONER BLOOM: What if the tank  
11 leaked and it wasn't discovered until the tank was  
12 moved?

13 COMMISSIONER BALCH: Related to the  
14 closed-loop system?

15 COMMISSIONER BLOOM: Yes.

16 COMMISSIONER BALCH: There would be a wet  
17 spot under the tank. I don't know what happens in  
18 that case.

19 CHAIRWOMAN BAILEY: We will have to  
20 address that when we get to testing the soils as to  
21 how you address --

22 COMMISSIONER BALCH: That's a closure  
23 question. However, we're not specifically  
24 regulating under the proposed operations closed-loop  
25 systems.

1 CHAIRWOMAN BAILEY: Correct. You are  
2 putting them in the category of part of the  
3 closed-loop system that we don't need to --

4 COMMISSIONER BALCH: On the other hand,  
5 the closed-loop system is going to be installed on  
6 top of a drilling pad which is a compacted material  
7 and will provide some protection anyway.

8 COMMISSIONER BLOOM: That's true.

9 COMMISSIONER BALCH: So maybe -- I think  
10 that the most likely scenarios, the risk, if you  
11 will, is for a closed-loop system to fail in some  
12 catastrophic manner which would probably be  
13 identified immediately and shut off. And the other  
14 one would be you have a large rain event or  
15 something and you have an overflow of the sump, at  
16 which point your greatest risk would be from the  
17 material that's in the sump being diluted by some  
18 amount and spread across some area. I think all  
19 these sumps are sided by berms, right?

20 CHAIRWOMAN BAILEY: Right.

21 COMMISSIONER BALCH: They are bermed, so  
22 you would have some way to try to at least minimize  
23 that overflow and you are never going to be able to  
24 stop everything. I think one of the cases brought  
25 out in the testimony was an example from Wyoming

1 where they had a very large spring runoff and a lot  
2 of the drilling pits were overrun by that. But you  
3 can't necessarily predict the one 50 year or  
4 100-year event.

5 So the risk, though, in the case of a sump  
6 is a relatively small volume, probably less than 15  
7 barrels or so, 500 gallons, is what they typically  
8 would run, being diluted and spread across an area.  
9 The risk from the closed-loop system I think would  
10 be during the operation and it would be most likely  
11 immediately addressed by the crew that's working  
12 there.

13 CHAIRWOMAN BAILEY: Probably a short-term  
14 leak of a limited amount, limited volume of fluid.

15 COMMISSIONER BALCH: Similarly if you have  
16 a tank associated with a closed-loop system that has  
17 a small leak in it, that tank is going to be there  
18 for a couple weeks and it's going to be on a pad so  
19 you probably will notice water coming out. If it  
20 was -- and why we are registering and examining  
21 permanent tanks or below-grade tanks is those leaks  
22 would be around for years and that's why you want to  
23 make sure that you may attention to them. Because  
24 over years then you'll have a significant leakage.

25 COMMISSIONER BLOOM: I guess one other

1 concern I have against removing the closed-loop  
2 system from this language which requires repairs is  
3 you wouldn't have any history or follow any trends  
4 if those were developing in the closed-loop systems.

5 COMMISSIONER BALCH: I think to do that  
6 you have to go back to the registering or permitting  
7 of closed-loop systems. There's a notification.

8 COMMISSIONER BLOOM: Yeah.

9 COMMISSIONER BALCH: The only other thing  
10 you could do -- perhaps there's a solution if you  
11 add in the language in registration or notification  
12 of a closed-loop system leak, notify when you close  
13 it and if there were any associated spills greater  
14 than -- but it still goes back to the Spill Rule.  
15 If they are operating and they have a release  
16 greater than five barrels they have to report it.  
17 If it's less than five barrels it will on the pad  
18 and already be picked up.

19 COMMISSIONER BLOOM: Right.

20 COMMISSIONER BALCH: So I think we run the  
21 risk of doubling the regulation.

22 CHAIRWOMAN BAILEY: So in summary, do we  
23 need to go ahead and delete the language of  
24 closed-loop system in 12A1 or are we leaving that  
25 reference to closed-loop system in 12A1?

1           COMMISSIONER BALCH: I think in A1,  
2 leaving it in or taking it out really doesn't have  
3 an impact.

4           CHAIRWOMAN BAILEY: Particularly since it  
5 is remaining in the introductory sentence for A,  
6 "General specifications. Shall maintain operating  
7 pit or closed-loop system in accordance with the  
8 following requirements." But there are no  
9 requirements that are specifically aimed towards  
10 closed-loop systems --

11           COMMISSIONER BALCH: Not in the  
12 modifications.

13           CHAIRWOMAN BAILEY: -- if we remove that  
14 language in A1.

15           COMMISSIONER BALCH: It's really kind of a  
16 nudge. It's a reminder to operate it.

17           COMMISSIONER BLOOM: I guess I would say  
18 leave it, but --

19           CHAIRWOMAN BAILEY: It doesn't hurt  
20 anything by being there. It's setting a standard.

21           COMMISSIONER BLOOM: Exactly.

22           MR. SMITH: Are you all's version of  
23 closed-loop system crossed out of A1?

24           CHAIRWOMAN BAILEY: In my version it is.

25           COMMISSIONER BALCH: A1 but not in A, and

1 it's crossed out in 5 as well.

2 MR. SMITH: Because it isn't crossed out  
3 in A1 in --

4 COMMISSIONER BALCH: In the NMOGA  
5 proposal. I think the second version of the  
6 proposal. That was IPANM's recommendation.

7 MR. SMITH: When was that submitted? Do  
8 you know?

9 CHAIRWOMAN BAILEY: From the IPANM? The  
10 27th.

11 COMMISSIONER BALCH: Maybe if we deal with  
12 5 first then 1 and A will be --

13 CHAIRWOMAN BAILEY: It will become  
14 apparent. Okay. Let's go to Paragraph 2 that has  
15 reasonably inserted in my version. It's not  
16 inserted in your version.

17 COMMISSIONER BLOOM: Where is that?

18 CHAIRWOMAN BAILEY: Paragraph 2 I have,  
19 "The operator shall recycle, reuse or reclaim or  
20 dispose of all drilling fluids in a manner approved  
21 by the division rules that reasonably prevents the  
22 contamination of freshwater and protects public  
23 health and the environment."

24 MR. SMITH: The inference there is the  
25 division rules might unreasonably prevent

1 contamination. I don't think you want to build that  
2 into your document.

3 COMMISSIONER BALCH: I think the sticky  
4 point is the word "prevents" because that's an  
5 absolute.

6 MR. SMITH: I understand that.

7 COMMISSIONER BALCH: You probably want to  
8 change the word "prevents" to "protects" or  
9 something like that instead.

10 CHAIRWOMAN BAILEY: Or we don't include  
11 the word at all.

12 COMMISSIONER BALCH: I don't know if you  
13 can prevent anything absolutely.

14 MR. SMITH: You can just take everything  
15 out after division rules. Why do you have to  
16 qualify division rules at all?

17 COMMISSIONER BALCH: The division rules  
18 already hold that you need to protect public health,  
19 safety and water.

20 COMMISSIONER BLOOM: Are we qualifying the  
21 manner?

22 CHAIRWOMAN BAILEY: In a manner approved  
23 by division rules. If we remove the comma after  
24 manner, that puts all "recycle, reclaim, reuse or  
25 disposal of all drilling fluids" under the

1 jurisdiction of the division rules.

2 COMMISSIONER BALCH: That's pretty much  
3 everything you would do with them. Other places in  
4 the rule already state about public safety and all  
5 that.

6 CHAIRWOMAN BAILEY: I'm not sure that the  
7 division wants to get into every request to reuse  
8 drilling mud at another location or recycle drilling  
9 mud for use at another well.

10 COMMISSIONER BALCH: Actually, you  
11 probably want to encourage the reuse of fluids.

12 CHAIRWOMAN BAILEY: Yes, we do. And it  
13 would simply create a problem and a time delay if  
14 every request to recycle, reuse or reclaim drilling  
15 fluids -- now, disposal is something that we are  
16 involved with, but I'm not sure --

17 COMMISSIONER BALCH: But division rules, I  
18 think if you stop there and take out the comma, as  
19 suggested, I think it would capture the intent.

20 CHAIRWOMAN BAILEY: Okay.

21 MR. SMITH: Well, in reality, division  
22 rules don't really approve manners, do they?

23 CHAIRWOMAN BAILEY: Oh, yeah.

24 MR. SMITH: They set forth --

25 COMMISSIONER BALCH: They tell you how to

1 do it.

2 MR. SMITH: Procedures.

3 COMMISSIONER BALCH: You can put in  
4 procedures.

5 MR. SMITH: Well, no. My concern is with  
6 the word "approval."

7 COMMISSIONER BALCH: Designated?

8 CHAIRWOMAN BAILEY: If we have a rule that  
9 requires approval of recycling or reuse, then  
10 whatever they do for recycling and reuse would fall  
11 under that all-inclusive category of division rules.

12 MR. SMITH: Consistent with division  
13 rules?

14 CHAIRWOMAN BAILEY: That would not require  
15 a process.

16 COMMISSIONER BLOOM: I think that could  
17 work.

18 COMMISSIONER BALCH: So remove "approved"  
19 and "by" and replace "by" with "with."

20 CHAIRWOMAN BAILEY: I like that.

21 COMMISSIONER BALCH: Are you okay with  
22 that?

23 COMMISSIONER BLOOM: I will be okay with  
24 that.

25 COMMISSIONER BALCH: I think it's fine.

1                   COMMISSIONER BLOOM: We have outlined we  
2 are operating in a manner to prevent contamination  
3 of freshwater, protect public health and the  
4 environment above and we are asking people to  
5 recycle, reuse or reclaim, so yes.

6                   CHAIRWOMAN BAILEY: Then we go to  
7 Paragraph 4. "If any pit liner's integrity is  
8 compromised or any penetration of the liner occurs  
9 above the liquid's surface, then the operator shall"  
10 and the proposed language is "notify the division  
11 district office within 48 hours of the discovery  
12 with a verbal plan," which changes notification  
13 requirements for potential leaks in the liner.

14                   The OCD has a suggested language  
15 replacement. "If any pit liner's integrity is  
16 compromised above the liquid's surface, then the  
17 operator shall repair the damage or replace the  
18 liner within 48 hours of discovery or seek a  
19 variance from the appropriate division district  
20 office."

21                   COMMISSIONER BALCH: I think the concern  
22 here was you had 48 hours to report it under the  
23 existing Rule 17 and then what? Then you didn't do  
24 anything until somebody told you what to do. So the  
25 risk is if you have a problem within the pit liner's

1 integrity, the risk is you will have a leak. And  
2 the thing that you want to do right away is fix it.  
3 So I kind of like the idea of fix it and then we  
4 will figure out how to take it from there. Do  
5 something right away.

6 CHAIRWOMAN BAILEY: I don't see that we  
7 need to delay approval of how to fix it when an  
8 operator can go ahead and fix it and notify the  
9 district office that they had repaired it.

10 COMMISSIONER BALCH: Even if they have a  
11 roll of duct tape they can at least patch the hole  
12 and call you. If you tell them to do more than duct  
13 tape they can do more, but you stop the leak in the  
14 short-term.

15 CHAIRWOMAN BAILEY: Commissioner Bloom, do  
16 you have an opinion on No. 4?

17 COMMISSIONER BLOOM: I thought that OCD's  
18 language looked acceptable. I wanted to review that  
19 one more time.

20 COMMISSIONER BALCH: Their modification  
21 seems to be specific to the case of a tear in the  
22 liner above the liquid surface.

23 COMMISSIONER BLOOM: They both are, but 5  
24 below addresses penetration that's not necessarily  
25 above the liquid surface.

1                   COMMISSIONER BALCH: Since I misread 4  
2 already and I clearly misunderstood what OCD's  
3 modification said, that might be better written.

4                   COMMISSIONER BLOOM: That's better written  
5 than the OCD's requirement that a repair take place  
6 within 48 hours, not that it be initiated within 48  
7 hours.

8                   CHAIRWOMAN BAILEY: So we could strike the  
9 proposed language that says "notify the division  
10 district office within 48 hours of the discovery  
11 with a verbal plan," and have the sentence read,  
12 "Then the operator shall repair the damage or  
13 replace."

14                   COMMISSIONER BALCH: "Initiate  
15 replacement" I think would be better. It might not  
16 be something that you can do immediately.

17                   CHAIRWOMAN BAILEY: "Or initiate  
18 replacement of the liner within 48 hours or seek a  
19 variance from the appropriate district office."

20                   COMMISSIONER BALCH: I think I still think  
21 that the OCD recommendation is a little more clear  
22 than what we have now. Their recommendation for  
23 that section is that it reads, "If any pit liner's  
24 integrity is compromised above the liquid surface,  
25 then the operator shall repair the damage or replace

1 the liner within 48 hours of discovery or seek  
2 variance with the appropriate division district  
3 office."

4 CHAIRWOMAN BAILEY: That's what I support.

5 COMMISSIONER BALCH: I think that's very  
6 clear. Since we are dealing with below the liquid  
7 surface in 5, that clearly states what you are doing  
8 with 4.

9 CHAIRWOMAN BAILEY: Thank you for giving  
10 the hard copy to Theresa so she can have an easier  
11 time. It's a quarter to 5:00 and I think we are all  
12 pretty loopy at this point.

13 COMMISSIONER BALCH: Is it possible to  
14 replace the liner in 48 hours?

15 CHAIRWOMAN BAILEY: That's why we say  
16 initiate.

17 COMMISSIONER BALCH: Initiate replacement.

18 CHAIRWOMAN BAILEY: It will probably be  
19 pretty difficult but you can initiate replacement of  
20 the liner within 48 hours of discovery or seek a  
21 variance.

22 COMMISSIONER BLOOM: Repair the damage or  
23 initiate replacement of the liner within 48 hours of  
24 discovery.

25 COMMISSIONER BALCH: Or seek a variance.

1 Seeking a replacement might be making a phone call.

2 MR. SMITH: Initiating repair or  
3 replacement.

4 CHAIRWOMAN BAILEY: Replacement.

5 MR. SMITH: So you want to take initiate  
6 out there. That should be repair.

7 COMMISSIONER BALCH: Four or five words  
8 down the line. There you go. Now change "replace"  
9 to "replacement of, or seek a variance from the  
10 appropriate division district office."

11 CHAIRWOMAN BAILEY: I like that.

12 COMMISSIONER BALCH: And they have a Spill  
13 Rule that keeps them from wanting to leave liquid in  
14 the pits.

15 CHAIRWOMAN BAILEY: So Theresa, if you  
16 would delete the paragraph above. Yes. I think  
17 this is a good stopping point.

18 COMMISSIONER BLOOM: Can we push down to  
19 the end of general specifications? I think we are  
20 close.

21 CHAIRWOMAN BAILEY: The next, Paragraph 5  
22 has to do with leak below the liquid surface. Do we  
23 want to delete "the closed-loop system or sump" from  
24 this paragraph?

25 COMMISSIONER BLOOM: We have --

1                   COMMISSIONER BALCH: There's no pit liner  
2 with a sump. There's no pit liner with a  
3 closed-loop system.

4                   COMMISSIONER BLOOM: If the sump develops  
5 a leak.

6                   CHAIRWOMAN BAILEY: Below the liquid  
7 surface.

8                   COMMISSIONER BLOOM: Then the operator  
9 should remove the liquid above the damage of the  
10 leak within 48 hours of discovery. Do we want the  
11 same for closed-loop system, too? It gets tricky  
12 but --

13                   COMMISSIONER BALCH: I think if we are  
14 going to go with notification for operation of  
15 closed-loop system then you have to rely on the  
16 Spill Rule --

17                   COMMISSIONER BLOOM: Okay.

18                   COMMISSIONER BALCH: -- for enforcement of  
19 any leaks.

20                   CHAIRWOMAN BAILEY: So we would delete  
21 "closed-loop system" in the first line and the  
22 second line and sump, which should only be holding  
23 de minimis volumes for a short periods of time. So  
24 we have all agreed to delete "closed-loop system or  
25 sump" in the first line and the second line. Do we

1 want to delete "below-grade tank" in the second  
2 line?

3 COMMISSIONER BLOOM: Below-grade tank is  
4 referenced above it, so I think it might be  
5 duplicative to have it again.

6 COMMISSIONER BALCH: If you read it, "If a  
7 pit or below-grade tank develops a leak or any of  
8 the pit liner occurs below the liquid surface, then  
9 the operator shall remove all liquid above the  
10 damage or leak within 48 hours of the discovery."  
11 If you read it through without the cross-outs and  
12 additions I think it makes sense to take out the  
13 second "below-grade tank."

14 COMMISSIONER BLOOM: Yes, I agree.

15 CHAIRWOMAN BAILEY: I agree.

16 COMMISSIONER BALCH: It's repetitive.

17 CHAIRWOMAN BAILEY: Then the process is to  
18 remove all liquids within 48 hours of discovery,  
19 notify the division district office and repair  
20 damage or replace the pit liner of below-grade  
21 tanks. Shouldn't it have the same initiation within  
22 48 hours?

23 COMMISSIONER BALCH: So if you took the  
24 initiate replacement to the end of -- if you start  
25 with "initiate replacement" and go to the end of 4

1 and replace everything after 4 right there, would  
2 that do it? I believe in testimony the concern was  
3 that the original Rule 17 forced replacement even if  
4 the repair would fix the problem below the liquid  
5 line, tear or leak.

6 CHAIRWOMAN BAILEY: So we should insert  
7 "initiate repair or replacement? "Repair of the  
8 damage or replacement of the liner"?

9 COMMISSIONER BALCH: They are already  
10 removing all the liquids, so you remove the risk,  
11 which I think is critical. So I think initiating  
12 the repair or replacement within 48 hours is fine or  
13 go for the variance.

14 COMMISSIONER BLOOM: The first appearance  
15 of damage, would that be better replaced with leak?  
16 You definitely don't want the "or" after the leak  
17 there.

18 CHAIRWOMAN BAILEY: Shall remove all  
19 liquid, comma.

20 COMMISSIONER BALCH: And a comma after  
21 "discovery."

22 COMMISSIONER BLOOM: We might clean up the  
23 beginning a little bit, too, and just say, "If a  
24 below-grade tank develops a leak or if any  
25 penetration" -- nevermind.

1                   COMMISSIONER BALCH: I think you really  
2 want to have a stop after leak and then if you  
3 could -- maybe I should propose that it reads, "Then  
4 the operator shall remove all liquids above the  
5 leak. Then initiate repair of the damage or  
6 replacement of the liner within 48 hours of the  
7 discovery or seek a variance." That way you ensure  
8 that the fluids are removed properly.

9                   CHAIRWOMAN BAILEY: Then "The operator  
10 shall initiate."

11                   COMMISSIONER BALCH: Because if we left it  
12 the way it was, they could have just called for a  
13 variance without emptying the liquids.

14                   COMMISSIONER BLOOM: Remove the liquids  
15 immediately or in 48 hours.

16                   COMMISSIONER BALCH: I think we used the  
17 word "promptly" before.

18                   CHAIRWOMAN BAILEY: "Shall promptly  
19 remove"?

20                   COMMISSIONER BALCH: "Shall promptly  
21 remove all liquid."" What's the lawyer have to say  
22 about promptly?

23                   MR. SMITH: As long as it's reasonably  
24 promptly.

25                   COMMISSIONER BLOOM: Put that in there,

1 reasonably promptly.

2 MR. SMITH: I think better off -- oh,  
3 promptly remove.

4 COMMISSIONER BLOOM: In this case it would  
5 be seen as something inside of 48 hours.

6 MR. SMITH: You have not used promptly  
7 elsewhere, have you?

8 COMMISSIONER BALCH: Yeah, we have another  
9 instance of the word "promptly." It's for when we  
10 were talking about the below-grade tanks that were  
11 found to be --

12 MR. SMITH: Damaged?

13 COMMISSIONER BALCH: Not up to code. We  
14 had the words "promptly drain" and then we went on  
15 to remove and close the site. "Removal, replace and  
16 close," so we had the word "promptly" before in that  
17 context. Maybe the thing to do is move the 48 hours  
18 up and say, "Then the operator shall within 48  
19 hours." Then "initiate repair of the damage or  
20 replacement of the liner or seek a variance." Take  
21 the highlighted phrase and replace the word  
22 "promptly" there. Does that make it better?

23 MR. SMITH: Well, is within 48 hours  
24 promptly, as far as you're concerned?

25 COMMISSIONER BLOOM: I think that's pretty

1 much what we had before. Yes.

2 CHAIRWOMAN BAILEY: The comma after  
3 "liquid" should be deleted.

4 COMMISSIONER BALCH: I think you can take  
5 the operator out of the next sentence. It's already  
6 implied.

7 MR. SMITH: No.

8 CHAIRWOMAN BAILEY: You have to have a  
9 complete sentence. There would be no subject then.

10 MR. SMITH: You need to take the comma  
11 out, I think, after the first occurrence of "liner"  
12 in the second line. There you go.

13 COMMISSIONER BLOOM: Now it sounds like  
14 the operator doesn't have to initiate repair or  
15 replacement necessarily within 48 hours.

16 COMMISSIONER BALCH: We were already  
17 talking about that.

18 MR. SMITH: Why don't you just say "within  
19 48 hours of discovery, one, remove; two, initiate  
20 repair, or seek a variance"?

21 COMMISSIONER BALCH: What happens in the  
22 case where you can't get a truck out within 48  
23 hours?

24 COMMISSIONER BLOOM: That's just initiate  
25 replacement, right? So it would be okay.

1                   COMMISSIONER BALCH: We have them removing  
2 liquids within 48 hours. Obviously, you want it to  
3 be as fast as possible.

4                   COMMISSIONER BLOOM: That's what we had  
5 there before.

6                   COMMISSIONER BALCH: Within 48 hours of  
7 discovery.

8                   COMMISSIONER BLOOM: The existing language  
9 is "The operator shall remove all liquid above the  
10 damage within 48 hours."

11                  CHAIRWOMAN BAILEY: I think the important  
12 point is that the below-grade tank or pit should be  
13 taken out of service until the leak or damage is  
14 repaired. We should not require repair or  
15 replacement of the liner if they determine that they  
16 need to completely replace the tank.

17                  COMMISSIONER BALCH: So maybe the thing to  
18 do so is say, "Then the operator shall remove all  
19 liquid above the leak, remove the pit or tank from  
20 service." And remove the pit or tank from service.  
21 Anything else would be up to them.

22                  CHAIRWOMAN BAILEY: However they want to  
23 fix the problem.

24                  COMMISSIONER BALCH: It would be a pit or  
25 tank or tank or pit.

1 MR. SMITH: Well, now, I'm sorry. I find  
2 that sentence confusing because you are going to  
3 have them remove liquid above the leak. That would  
4 seem to imply that there could be liquid below the  
5 leak. If there's liquid in the tank below the leak  
6 how are they going to remove it from service.

7 COMMISSIONER BLOOM: That would be perhaps  
8 implied.

9 CHAIRWOMAN BAILEY: And discontinue or  
10 prevent additional fluids.

11 COMMISSIONER BALCH: If you have a tear in  
12 the liner, a hole in the tank I think is different  
13 from a tear in the liner. A hole in the tank, if  
14 you get the liquids beneath the hole, the hole is  
15 probably not going to expand. The tear in the  
16 liner, if you leave liquids or load on the liner it  
17 will expand and become larger.

18 CHAIRWOMAN BAILEY: The stress on the  
19 liner continues.

20 COMMISSIONER BALCH: Right. So maybe the  
21 thing to do is separate them. What's the intent?  
22 The intent is to remove the risk of the leak. So  
23 you need to remove the fluids that are going to  
24 cause the leak. In the case of a tank that might be  
25 different from the case of the lined pit. Once the

1 risk is removed, I don't think it's necessary to say  
2 "repair, replace" or whatever. They will have to do  
3 something. If we tell them they have to repair it  
4 they will repair it but the better thing may be to  
5 replace it or put a temporary tank or any number of  
6 options.

7 COMMISSIONER BLOOM: It might be the last  
8 day.

9 COMMISSIONER BALCH: Then they have the  
10 fix the pit.

11 MR. SMITH: So you want them to remove the  
12 liquid and discontinue use.

13 COMMISSIONER BALCH: Remove it from  
14 service, yeah.

15 COMMISSIONER BLOOM: It would be easier to  
16 separate pit and below-grade tank here and knock  
17 them out?

18 COMMISSIONER BALCH: Have a 5 and a 6  
19 instead of a 5? I think that might be better.

20 CHAIRWOMAN BAILEY: The whole concept  
21 would be to discontinue additional fluids into  
22 either the tank or the pit.

23 COMMISSIONER BALCH: The pit or tank has  
24 to go out of service, and you have to get the liquid  
25 level to a point where it's no longer a risk. And

1 in a lined pit, that would probably be all fluids.

2 CHAIRWOMAN BAILEY: So if they have  
3 additional fluids; and two, the tank after they  
4 remove the liquid above the leak.

5 COMMISSIONER BALCH: They remove the  
6 liquid, remove the risk, and take it out of service  
7 to maintain the risk being removed. I think you  
8 still want to take it out of service. What was the  
9 word we used when we talked about tanks? No longer  
10 has structural integrity. It doesn't function the  
11 way it's supposed to so it can't be used that way.

12 COMMISSIONER BLOOM: Why don't we leave 5  
13 how it was and then in the second sentence, "Then  
14 the operator can initiate can repair of the damage  
15 or replace the liner or seek a variance"?

16 COMMISSIONER BALCH: Are we going to do  
17 the pit first?

18 COMMISSIONER BLOOM: We don't need to  
19 separate that. You could just --

20 COMMISSIONER BALCH: I think you have two  
21 separate types of risk associated with the two types  
22 of fluid containment. Because the tank is a rigid  
23 structure generally. Steel with fiberglass or  
24 composite. If you have a puncture it's probably not  
25 going to get bigger if you remove the liquid above

1 that point. In a pit, you have a tear in the liner,  
2 you leave the liquids in the pit, even if it's below  
3 that tear you are still putting stress on the liner  
4 and the tear could continue to spread down, which  
5 would trigger another response cycle.

6 CHAIRWOMAN BAILEY: The language of 5 that  
7 was originally given to us says, "develops a leak or  
8 if any penetration of the pit liner occurs below the  
9 liquid surface then the operator shall remove all  
10 liquid above the damage or leak within 48 hours of  
11 the discovery, notify the appropriate division  
12 district office pursuant to Spill Rule and repair  
13 the damage or replace the pit liner or below-grade  
14 tank as applicable."

15 That seems to cover all of the issues and  
16 we have worked around this for quite some time and  
17 agreed that that language really is what needs to be  
18 said.

19 COMMISSIONER BALCH: I think that maybe  
20 falls where you might want to stop the initial risk  
21 and slap a band-aid on it and work on fixing it.  
22 Full circle.

23 COMMISSIONER BLOOM: Yeah.

24 CHAIRWOMAN BAILEY: So are we agreed to  
25 use that language that was part of the original

1 proposed language?

2 COMMISSIONER BLOOM: I think so.

3 CHAIRWOMAN BAILEY: We will give Theresa  
4 time to do that.

5 COMMISSIONER BLOOM: Do we have underlined  
6 text anywhere else in the Pit Rule such as 4?

7 CHAIRWOMAN BAILEY: Run that by me again.

8 COMMISSIONER BLOOM: Do we have underlined  
9 text anywhere else in the pit rule?

10 COMMISSIONER BALCH: It might be a track  
11 changes thing.

12 CHAIRWOMAN BAILEY: Yes, in the next  
13 section we do under temporary pits and under  
14 below-grade tanks. We have quite a bit.

15 COMMISSIONER BALCH: The reason they put  
16 an "or," that's actually track changes because they  
17 had to change the conjunction when they removed the  
18 list of four things. Since they had this, this and  
19 that, they have this or that.

20 COMMISSIONER BLOOM: Okay.

21 MR. SMITH: Is that what you want in 5?  
22 You have remove the liquid. You don't have anything  
23 about repairing.

24 COMMISSIONER BALCH: There's some material  
25 missing between -- at the end of discovery. 48

1 hours of discovery, comma. I think your first  
2 instinct was better, stop until tomorrow.

3 COMMISSIONER BLOOM: Do you want to  
4 add "or seek a variance"?

5 COMMISSIONER BALCH: So right now, if they  
6 have a leak below the liquid line they need to drain  
7 it, they need to notify the appropriate division  
8 office and repair the damage or replace it as  
9 applicable, which gives them two options, and the  
10 third might be to remove it from service. It's  
11 already removed from as far as, but seems like they  
12 have to then repair or replace it.

13 CHAIRWOMAN BAILEY: So really we don't  
14 need a variance when we have a leak like that.  
15 Okay. The last thing to contemplate in the  
16 operational requirements Part A is whether or not to  
17 require the maintenance of an oil absorbent boom or  
18 other device to contain and remove oil from a pit's  
19 surface. We had testimony on that to indicate that  
20 that was unnecessary. They would call the truck  
21 whenever there was sufficient oil for that to be  
22 there; that booms deteriorate over time and --

23 COMMISSIONER BALCH: You might have to  
24 pull it out of the closet and it falls apart.

25 COMMISSIONER BLOOM: I think we also heard

1 testimony that they went to deploy a boom and it  
2 didn't work, which indicates a need for one.

3 COMMISSIONER BALCH: And testimony in  
4 regards to this particular issue was if we tell them  
5 to use a boom they won't have other options  
6 available. They will rely on the boom. So it kind  
7 of boxes them in to one response.

8 CHAIRWOMAN BAILEY: So Commissioner Balch,  
9 do you --

10 COMMISSIONER BALCH: I prefer striking  
11 that section.

12 CHAIRWOMAN BAILEY: Commissioner Bloom?  
13 How do you feel?

14 COMMISSIONER BLOOM: Actually, I want to  
15 keep it. I heard that someone reached for it, could  
16 have used a boom. So it would have been good to  
17 have one. It should have been kept in working  
18 condition. If we want to make other options  
19 available, I think we could do that.

20 COMMISSIONER BALCH: It does say "or other  
21 device," but the other device from testimony there  
22 would be a pumper truck and you can't leave that  
23 on-site. You can get one.

24 CHAIRWOMAN BAILEY: I'm about to sneeze.

25 COMMISSIONER BALCH: What is the purpose

1 of the oil absorbent boom if you think about it?  
2 They are used certainly in open water oil spills to  
3 contain the oil from its natural chemical tendency  
4 to spread into a very thin layer across a large  
5 area. If you already have an enclosed pit, what are  
6 you containing? You are using the boom to keep the  
7 oil on one-half of the pit instead of spreading  
8 across the entire pit? But by the time you notice  
9 it, it's significant enough to cover the entire pit,  
10 it's probably going to have already covered the  
11 entire pit.

12 If you're going to use it to try to  
13 contain a surface spill because there was a breach  
14 in a berm or there was a run-on or something like  
15 that, does an oil absorbent boom work the same way  
16 when it's sitting on mud as it does when it's  
17 sitting on water? I mean, I guess I don't know if  
18 it necessarily does anything to reduce risk,  
19 particularly in the case of an oil spill in a pit,  
20 which is already contained and relatively small in  
21 size. You are going to keep the oil in half the  
22 pit?

23 COMMISSIONER BLOOM: I think we have heard  
24 circumstances where one was needed. There was an  
25 analogy during the hearing that, for example, OSHA

1 requires first aid kits at work sites or places of  
2 work. Should they get rid of them and simply say,  
3 "Call an ambulance?"

4 COMMISSIONER BALCH: I remember that  
5 analogy.

6 CHAIRWOMAN BAILEY: A critical question is  
7 how soon does oil have to be removed from the  
8 surface of the pit if there's enough oil on the pit  
9 to require corralling and removal? If it is a  
10 critical situation, a boom is not going to be  
11 sufficient to take care of the problem and a pumper  
12 truck will have to be called in. If it is not a  
13 critical situation then if it takes an hour or two  
14 hours for a pumper truck to arrive to remove the oil  
15 it doesn't make any difference.

16 COMMISSIONER BLOOM: Are there any  
17 situations where there could be oil somewhere  
18 outside of the pit at the site?

19 COMMISSIONER BALCH: That's why I am  
20 wondering what a boom does if you are sticking it in  
21 the mud? Does it do anything? I don't know that it  
22 does.

23 COMMISSIONER BLOOM: It worked on sandy  
24 beaches on spills.

25 COMMISSIONER BALCH: I suppose what is the

1 intent of having the boom on-site? If it's to  
2 contain a large spill of oil moving across the land  
3 surface, that's one issue. If it's to contain  
4 within a relatively small pit or oil to one side of  
5 it, I don't think it does anything. I think by the  
6 time you notice it it's already covering the entire  
7 pit anyway. If you have a very large release of oil  
8 and it's spreading across land, then maybe it might  
9 be something, but if your boom is designed to the  
10 dimensions of a circulating mud pit, it may not be  
11 long enough to do any good in that situation either.  
12 So I guess I just don't know.

13 CHAIRWOMAN BAILEY: Let's think on this.

14 COMMISSIONER BLOOM: That's fine.

15 CHAIRWOMAN BAILEY: It's 5:15. We can  
16 begin with this in the morning so we will reconvene  
17 tomorrow morning at 9:00 o'clock.

18 (Note: The proceedings were adjourned for  
19 the day at 5:15.)

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REPORTER'S CERTIFICATE

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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  
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