STATE OF NEW MEXICO

ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

OIL CONSERVATION COMMISSION

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION COMMISSION FOR THE PURPOSE OF CONSIDERING:	)	
APPLICATION OF THE NEW MEXICO OIL CONSERVATION DIVISION FOR REPEAL OF EXISTING RULE 50 CONCERNING PITS AND BELOW GRADE TANKS AND ADOPTION OF A NEW RULE GOVERNING PITS, BELOW GRADE TANKS, CLOSED LOOP SYSTEMS AND OTHER ALTERNATIVE METHODS TO THE FOREGOING, AND AMENDING OTHER RULES TO MAKE CONFORMING CHANGES; STATEWIDE	)	CASE NO. 14,015

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

COMMISSION HEARING

BEFORE: MARK E. FESMIRE, CHAIRMAN
JAMI BAILEY, COMMISSIONER
WILLIAM OLSON, COMMISSIONER

Volume V - November 8th, 2007

Santa Fe, New Mexico

This matter came on for hearing before the Oil Conservation Commission, MARK E. FESMIRE, Chairman, on Thursday, November 8th, 2007, at Morgan Hall, State Land Office Building, 310 Old Santa Fe Trail, Santa Fe, New Mexico, Steven T. Brenner, Certified Court Reporter No. 7 for the State of New Mexico.

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C U M U L A T I V E I N D E X

Monday, October 22nd, 2007 (Volume I)
Commission Hearing
CASE NO. 14,015

(Continued...)

PUBLIC COMMENTS (Continued):

DIVISION WITNESSES (Resumed):

(Continued...)

(Continued...)

* * *

Wednesday, November 7th, 2007 (Volume IV)
Commission Hearing
CASE NO. 14,015

(Continued...)

DIVISION WITNESSES (Continued):

* * *

(Continued...)

Thursday, November 8th, 2007 (Volume V)
Commission Hearing
CASE NO. 14,015

* * *

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A P P E A R A N C E S

FOR THE COMMISSION:

CHERYL BADA
Assistant General Counsel
Energy, Minerals and Natural Resources Department
1220 South St. Francis Drive
Santa Fe, New Mexico 87505

FOR THE DIVISION:

DAVID K. BROOKS, JR.
Assistant General Counsel
Energy, Minerals and Natural Resources Department
1220 South St. Francis Drive
Santa Fe, New Mexico 87505

FOR NEW MEXICO OIL AND GAS ASSOCIATION; CONOCOPHILLIPS COMPANY; DUGAN PRODUCTION CORPORATION; and ENERGEN RESOURCES CORPORATION; and an INDUSTRY COMMITTEE comprised of BP America Production Company, Inc.; Benson-Montin-Greer Drilling Corporation; Boling Enterprises, Ltd.; Burlington Resources Oil and Gas Company; Chesapeake Energy Corporation; Chevron USA, Inc.; ConocoPhillips Company; Devon Production Company; Dugan Production Corporation; Energen Resources Corporation; Marathon Oil Company; Marbob Energy Corporation; Merrion Oil & Gas Corporation; Occidental Permian, which includes OXY USA, Inc., and OXY USA WTP Limited Partnership; Samson Resources Company; J.D. Simmons, Inc.; Williams Production Company, LLC; XTO Energy, Inc.; and Yates Petroleum Corporation:

HOLLAND & HART, L.L.P., and CAMPBELL & CARR
110 N. Guadalupe, Suite 1
P.O. Box 2208
Santa Fe, New Mexico 87504-2208
By: WILLIAM F. CARR

(Continued...)

A P P E A R A N C E S (Continued)

FOR NEW MEXICO INDUSTRY COMMITTEE
and YATES PETROLEUM CORPORATION:

JORDEN, BISCHOFF & HISER, P.L.C.
7272 E. Indian School Rd., Suite 360
Scottsdale, AZ 85251
By: ERIC L. HISER

FOR INDEPENDENT PETROLEUM ASSOCIATION OF NEW MEXICO:

KARIN V. FOSTER
Independent Petroleum Association of New Mexico
Director of Governmental Affairs
17 Misty Mesa Ct.
Placitas, NM 87043

FOR CONTROLLED RECOVERY, INC.:

HUFFAKER & MOFFETT, L.L.C.
155 Grant
Santa Fe, New Mexico 87501
P.O. Box 1868
Santa Fe, New Mexico 87504-1868
By: GREGORY D. HUFFAKER, Jr.

FOR NEW MEXICO OIL AND GAS ACCOUNTABILITY PROJECT:

New Mexico Environmental Law Center
1405 Luisa Street, Suite 5
Santa Fe, New Mexico 87505
BY: BRUCE FREDERICK
and
BRUCE BAIZEL

FOR NEW MEXICO CITIZENS FOR CLEAN AIR AND WATER:

BELIN & SUGARMAN
618 Paseo de Peralta
Santa Fe, New Mexico 87501
By: ALLETTA BELIN

* * *

ALSO PRESENT:

JOHN BARTLIT, PhD
DONALD A. NEEPER, PhD
New Mexico Citizens for Clean Air and Water

* * *

WHEREUPON, the following proceedings were had at 9:20 a.m.:

CHAIRMAN FESMIRE: At this time we'll go back on the record.

Let the record reflect that it is Thursday, November 8th, 2007, that this is a special meeting of the New Mexico Oil Conservation Commission to consider Case Number 14,015, the Application for rulemaking by the Oil Conservation Commission [*sic*].

Let the record also reflect that Commissioners Bailey, Olson and Fesmire are present, we therefore have a quorum. This is a continuation of the hearing from yesterday evening.

I believe that we were at the position where, Mr. Brooks, you were calling your next witness.

MR. BROOKS: May it please the Commission, call Brad Jones.

CHAIRMAN FESMIRE: Mr. Jones, you have not been sworn yet, have you?

MR. JONES: No, sir.

CHAIRMAN FESMIRE: Would you please stand and be sworn?

(Thereupon the witness was sworn.)

MR. BROOKS: Are we ready to proceed, your honor?

CHAIRMAN FESMIRE: You are, sir.

BRAD JONES,

the witness herein, after having been first duly sworn upon his oath, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BROOKS:

Q. Mr. Jones, would you state your name for the record?

A. My name is Brad Jones.

Q. By whom are you employed?

A. I'm employed with the New Mexico Oil Conservation Division.

Q. In what capacity?

A. As a -- my -- I guess my title is petroleum engineer, but we're considered environmental engineers.

Q. Mr. Jones, would you give a brief history of your education and experience in the environmental regulation field?

A. Yes. I've been with the Oil Conservation Division for approximately 15 months. Prior to that I came over from the New Mexico Environment Department where I worked for the solid waste bureau for approximately four years. In that capacity I was involved in permitting of landfills, solid waste facilities. I also oversaw groundwater monitoring programs and investigations for those facilities.

Prior to that I worked for the Department of Health for the State of Florida where I designed, permitted, inspected on-site sewage systems. My short period in Florida, during that time, Tampa, I also worked for a small consulting firm where I performed site investigations, remediation programs and cleanups of underground storage tank contamination sites.

Prior to that I worked for Island County, which is in the State of Washington, under a state-funded position, or grant fund, that involved overseeing solid waste programs, also cleanup programs, voluntary cleanup programs, and investigations for contaminated sites. With that, I was also involved in overseeing the cleanup of meth lab sites.

MR. BROOKS: Mr. Chairman --

THE WITNESS: You asked -- also asked about my educational background.

Q. (By Mr. Brooks) Okay, I'm sorry.

A. Just a little lapse there. I have a bachelor's of science of environmental health science from the University of Georgia.

MR. BROOKS: Mr. Chairman, we would tender Mr. Jones as an expert in environmental engineering and environmental regulation.

CHAIRMAN FESMIRE: Okay, any objection?

MR. HISER: No objection.

MR. CARR: No objection.

MS. FOSTER: No objection.

MS. BELIN: No objection.

CHAIRMAN FESMIRE: Ms. Belin?

Okay, Mr. Jones' experience is acceptable, and he will be so accepted -- so admitted, I'm sorry.

MR. BROOKS: Thank you, your Honor.

Q. (By Mr. Brooks) Mr. Jones, first one housekeeping matter -- May I approach the witness?

CHAIRMAN FESMIRE: You may, sir.

Q. (By Mr. Brooks) Mr. Jones, I have presented to you what has been marked as OCD's Exhibit Number 13B, and it is a series of slides which were previously shown in this proceeding. Before I ask you questions about it, let me ask you this: Were you a member of the Environmental Bureau team that conducted the out investigation and sampling in the southeastern part of New Mexico in connection with the Pit Rule task force during the earlier part of 2007?

A. Yes.

Q. Would you review those pictures and tell if you can identify them?

A. Yes, actually I see photographs of myself in these. So yes.

Q. And do you also see photographs of Chief Price in there?

A. Yes. Usually I'm following him into the pit to collect samples.

CHAIRMAN FESMIRE: Were you the one responsible for pulling him out?

THE WITNESS: I was trying to push him.

(Laughter)

Q. (By Mr. Brooks) Well, Mr. Price, would you -- I'm sorry, Mr. Jones, would you go through those photographs briefly and sufficiently to respond to this question which is, do they fairly and accurately represent pit sites that were examined by the team during that review as they existed at the time of that review?

A. Yes.

MR. BROOKS: May I approach?

CHAIRMAN FESMIRE: You may, sir.

MR. BROOKS: Mr. Chairman, we tender OCD Exhibit 13B.

CHAIRMAN FESMIRE: Any objection?

MS. FOSTER: I understand that they're tendering them just for the authenticity of what the sites looked like when they took those pictures?

CHAIRMAN FESMIRE: They're tendering them as part of the record for this hearing, yes, ma'am.

MS. FOSTER: I understand that, but I just want to clarify that Mr. Brooks asked the witness whether -- if they represented the sites as they looked when they went out on location, not whether -- what type of pits they were or anything like that.

CHAIRMAN FESMIRE: I think that would be a subject-to-cross-examination question, but I'm going to go ahead and admit them -- if that is your only objection, I'm going to go ahead and admit them --

MS. FOSTER: Yes, I just -- for the grounds under which they were admitted, that's -- I just wanted clarity --

MR. BROOKS: For clarification, we are tendering them for -- whatever they are, for all purposes.

CHAIRMAN FESMIRE: Okay, and the record will reflect they are so admitted into the record.

MS. FOSTER: Thank you.

MR. BROOKS: Thank you, your Honor.

Q. (By Mr. Brooks) Now there's one other preliminary -- well, first of all let me ask you, were you the principal drafter of the part 17 -- proposed part 17 that is the focus of this proceeding?

A. That is a difficult answer to -- or question to answer. Initially Mr. Hansen was involved in the initiation of it, myself and Mr. Hansen. At some point I

became a primary person -- the primary person modifying the language.

Q. Were you a participant in numerous meetings of the Environmental Bureau at which the drafts was reviewed and discussed?

A. I would say I was probably at all of them.

Q. And was the drafting a team effort for the Bureau?

A. Yes.

Q. But is it -- were you the one who did the most drafting work, the actual drafting work on the pit rule?

A. I would say so.

Q. Now in process of preparing the new rule, did you also familiarize yourself with the provisions of the existing Rule 50 that we're proposing to repeal?

A. Yes, it was necessary.

Q. Do you have a copy of Rule 50 in front of you?

A. Yes.

Q. In yesterday's proceedings, Commissioner Bailey read a portion of Rule 50 that requires liners for drilling pits --

A. Yes.

Q. -- do you recall that?

Is there another provision of Rule 50 that appears to create an exception to that provision?

A. Yes, it's -- I believe the correct citation -- Let me make sure I have this correct. It's under -- I think it's paragraph -- make sure I'm saying this right, it's -- I'm sorry, it's subparagraph (g) of paragraph 2 of subsection C of 19.15.2.50 NMAC.

Q. Now subparagraph (g) -- does subparagraph (g) of paragraph 2 of subsection C have a title?

A. It's titled unlined pits.

Q. Okay. Now is there a provision in there that could be construed as authorizing unlined -- new unlined pits in certain areas?

A. In item 1 -- I assume that's the way it's stated -- of subparagraph (g), the last statement or the last sentence of that item states that after April 15th, 2004, construction of unlined pits is prohibited unless otherwise provided in section 50 of 19.15.2 NMAC.

Q. Okay. Then what does clause (iii) --

CHAIRMAN FESMIRE: Mr. Brooks, would you have Mr. Jones repeat the citation, please?

MR. BROOKS: Oh, I'm sorry.

THE WITNESS: I'm sorry, it's -- is it -- You want the exact citation, or do you want the subparagraph?

CHAIRMAN FESMIRE: Please give the citation that you gave just a minute ago so we can find it.

THE WITNESS: Okay, it's -- I guess it's little

(i) -- or they're -- commonly refer to items, I believe -- of -- and if you want to go from the beginning of the rule to it, it's easier from section 50 to go to subsection C, which is design, construction and operation standards, and then find (g) under C, which is titled -- and that would be -- and that's -- I'm sorry, that's under paragraph 2, special requirements for pits. So it would be subparagraph (g), which is unlined pits.

CHAIRMAN FESMIRE: Thank you, Mr. Jones.

THE WITNESS: And this item that I'm addressing is item 1, or little (i).

Q. (By Mr. Brooks) Okay, I believe you read that second sentence of item 1, did you not?

A. Yes.

Q. Okay, I won't ask you to read it again.

Then would you go down and look at item 3 under subsection (g)?

A. Okay, did you want me to read item 1 again?

Q. No, I don't want you to read --

A. Okay.

Q. -- it again. We try to minimize repetition.

A. Okay.

CHAIRMAN FESMIRE: Thank you, Mr. Brooks.

Q. (By Mr. Brooks) Now what does item -- read the opening clause of item 3 before -- up to the point where it

starts out, Township and range.

A. Okay. Unlined pits shall be allowed in the following areas, provided that the operator has submitted and the Division has approved an application for permit as provided in section 50 of 19.15.2 NMAC, and provided that the pit site is not located in a freshwater-bearing alluvium or in a wellhead protection area.

Q. Okay. Now I won't ask you to read the remainder of clause 3, but I will ask you, were you here in the room when Mr. -- when Chief Price testified about the vulnerable area and the nonvulnerable area and the exempted area?

A. Yes.

Q. Is the description in clause 3 a description of the exempted area and the nonvul- -- and -- the nonvulnerable area?

A. No -- Well, I'm sorry, say that again. I want to make sure I'm answering this correctly.

Q. Is the description in clause 3, the township and range description and the narrative description following it -- do they define the concepts of the exempted area and the vulnerable and nonvulnerable areas? Without using those words?

A. I just want to make sure I'm understanding your question. Can you please repeat it?

Q. Okay, the -- I guess I'll break it down this way.

The area described by township and range --

A. Yes.

Q. -- in clause 3, is that what we've been calling the exempted area?

A. I believe that is not correct. I thought it was the vulnerable area, is what's being described here.

Q. Okay. Well, let me modify my question then.

Does this rule permit unlined pits in the areas described by township and range in clause 3?

A. Yes.

Q. Now -- then the rule goes on to say, And that area of San Juan, Rio Arriba, Sandoval and McKinley County that is outside the valleys of --

A. Okay.

Q. -- and it goes on and on with the description.

A. Yes.

Q. Does the rule permit unlined -- does that clause appear to permit unlined pits in the areas that are outside of those valleys in the remaining description?

A. Yes.

Q. Is it the construction that -- to your knowledge, is it the construction of the Oil Conservation Division that under that rule, new unlined pits can be constructed in the areas defined in clause 3 where it says unlined pits will be permitted?

A. Yes.

CHAIRMAN FESMIRE: I'm going to -- Okay, he answered the question. I didn't quite understand the question, that's why I was objecting to it.

CHAIRMAN FESMIRE: Apparently the witness did.

MS. FOSTER: Okay, thank you.

THE WITNESS: The answer is yes.

Q. (By Mr. Brooks) Okay. So while -- well, I think I've covered -- Now, this -- the clause -- the subsection (g) and the clauses that you've referred to, do they distinguish one type of pit from another?

A. No, they do not.

Q. Would you construe that to mean that they apply to all pits, temporary, permanent, drilling, storage, et cetera?

A. Yes, I would imply that they would -- they would address all pits.

Q. Thank you, Mr. Jones. I believe that's all my questions on that subject.

A. Okay.

Q. Now Mr. Jones, are you the individual whom the Environment Bureau has designated to explain to the Commission the reasons why the Division is proposing various provisions of this rule and the reason why we have not proposed other provisions that have been recommended to

us?

A. Yes.

Q. And is your -- in your testimony are you going to refer to the Division's position on various matters?

A. Yes, I will be talking about the intent behind each provision.

Q. Now were you present at meetings of the Environment Bureau in which these issues were discussed and the Division arrived at a position on many of these issues?

A. Yes.

Q. Now have you submitted your intended testimony on these issues to Chief Price for --

A. Yes.

Q. -- review?

A. Yes.

Q. And has he given you any indication of whether or not you are authorized to make those statements on behalf of the Division?

A. He has reviewed my -- what I plan to present today and discuss, and he has expressed that this is the intent of the Division.

Q. Very good. Now I want to look at your exhibits, Mr. Jones. What is Exhibit Number 23?

A. I apologize, I don't have my exhibits numbered up here. If I could have a volume so I can --

MR. BROOKS: Do we have another Volume 2 somewhere?

THE WITNESS: I believe Exhibit 23 may be my --

MR. BROOKS: Well, don't speculate.

THE WITNESS: Why don't we get --

MR. PRICE: Here's one right here.

THE WITNESS: I appreciate that.

Exhibit 23 is the new rule that we're proposing to the Commission. Incorporated into this document -- and I hope that the Commission does have the color copy of that. With this what we intend to do is go through each provision, or I plan to go through each provision, discuss the intent behind it, and the color-coding, for clarification purposes, is -- it's very New Mexican, it's red and green.

And the green is to indicate provisions that were based on consensus items from the task force. We tried to keep our commitment to the task force by incorporating those concepts and ideas into the rule.

The red items were items that were nonconsensus based on -- it consists of nonconsensus items or concept or based on the final summary report that was submitted to Daniel Sanchez of our department, on the behalf of the task force. So it's the final report submitted to the task -- or from the task force to OCD.

And of course, items that are black, in normal print, either derived from the existing rule, the guidelines or proposed new language by the Division.

Q. (By Mr. Brooks) What are the footnotes in Exhibit 23?

A. The footnotes are based on -- during the process of the task force, the summary report was submitted to OCD. We were asked to draft a rule for comments from members of the task force. Our purpose of having these in here is to try to clarify some items that were brought up by the task force members, and also to show our consideration of these comments -- and I will discuss those considerations -- and to identify if they actually facilitate a change in the regulation from this draft version.

So we want to show that we were trying to consider these things. In some cases we accepted those recommendations and incorporated them into the version that is being proposed in front of the Commission today.

Q. Very good --

CHAIRMAN FESMIRE: Mr. Brooks, just a second.

Commissioner Olson?

COMMISSIONER OLSON: I just wonder if you could go over again -- The green is the consensus, and the red was --

THE WITNESS: -- nonconsensus.

COMMISSIONER OLSON: -- nonconsensus.

THE WITNESS: And that's from the final report, which I believe is submitted as Exhibit 24.

COMMISSIONER OLSON: And that's nonconsensus proposed by the --

THE WITNESS: -- the task force. It was part of the final report that was submitted to Daniel Sanchez, Enforcement and Compliance Manager of OCD, by the task force. It was a final summary report.

MR. BROOKS: This is Exhibit 24.

THE WITNESS: Yes, Exhibit 24 will reflect those items. They use the same format. Of course, there it was just red and green, reflecting what was consensus and what was nonconsensus, and -- So we will be referring to those at some point today.

COMMISSIONER OLSON: I just wanted to be clear, then. So the red lettering is --

THE WITNESS: -- nonconsensus.

COMMISSIONER OLSON: -- nonconsensus, proposed by the Division?

THE WITNESS: No, it's nonconsensus item from the task force, meaning that there was not a consensus to anything in red.

CHAIRMAN FESMIRE: Coming out of the task force.

COMMISSIONER OLSON: Okay.

THE WITNESS: We -- What we tried to do is incorporate the concept. We spent, I think, approximately four months with the task force, coming up with these ideas, which -- anything that was consensus, we would try to incorporate into the regulation, and that's what I'm going to show by showing how we did that with the new proposed rule.

The nonconsensus items, since there were certain provisions that -- it may be a number distance. The concept itself was not argued and determined by the task force at the time to strike the whole provision or the concept; it was just that there may be a certain distance that was not agreed upon. So we'll discuss those.

We did express at the time that anything that remained nonconsensus, OCD was at liberty to come up with what they thought was appropriate for that, and that's --

COMMISSIONER OLSON: That's what I was thinking. So that the items in red are items that are proposed for inclusion in the rule by the Division, then, because there was no consensus?

THE WITNESS: Yes.

COMMISSIONER OLSON: Okay.

THE WITNESS: Yes, that is correct.

COMMISSIONER OLSON: Thank you.

Q. (By Mr. Brooks) Okay. And what is Exhibit 24

again?

A. 24 is the final task force summary report that was submitted to, as I said earlier, Mr. Daniel Sanchez, Enforcement and Compliance Manager of the Oil Conservation Division on the behalf of the task force.

MR. CARR: Mr. Chairman, just for clarification, consensus means consensus by the task force members, correct?

THE WITNESS: Yes.

MR. CARR: And that doesn't necessarily mean that parties here today who are not members of the task force are necessarily in agreement with those provisions, correct?

THE WITNESS: I can't comment on their perception of --

MR. CARR: We're only talking about the results of the task force?

CHAIRMAN FESMIRE: Is that correct, Mr. Jones?

THE WITNESS: I don't know if they agree or disagree. I can only say it's from the task force.

MR. CARR: That's what we've just --

THE WITNESS: Okay.

Q. (By Mr. Brooks) Okay, what is Exhibit 25?

A. Exhibit 25, this is the current guidelines for below-grade tanks and pits that the OCD has available.

Q. And skipping over to Exhibit 27, what is Exhibit 27?

A. 27 is -- I believe it's the City of Aztec. I just want to make sure, I don't think it's town. City of Aztec, their city code regarding oil and gas, whatever codes and/or ordinance they may have on file.

Q. Okay. We've identified all the exhibits.

Now I forgot to ask you a question that I intended to ask you about Rule 50, so if you still have your copy of Rule 50 up there -- ?

A. Yes.

Q. I don't think you'll need to refer to specific provisions for this because this is a question of is there anything in it. But if you need to, you have it available, right?

A. Yes.

Q. We're talking about liners for drilling pits that are required under Rule 50. Does that refer to the construction of the drilling pit during its operation and use, or does it refer to the construction of the drilling pit for purposes of closure?

A. It's for use only.

Q. Now is there any provision in Rule 50 that would expressly require, or specifically require, that the integrity of the liner for a drilling pit be maintained

after the drilling pit is closed?

A. There is no such provision.

Q. Or during the closure process?

A. No.

Q. Is there any provision in Rule 50 that requires the operator at the time of closure or after closure of a drilling pit to test the soils beneath the drilling pit to determine if there has been a release of contaminants from the pit?

A. No.

Q. Thank you. That concludes my questions about Rule 50.

Now Mr. Jones, have you continued to work on reviewing comments the Division has received about the rule and explaining why -- how they relate to the actual provisions of the rule?

A. Yes, the primary comments I have reviewed are the ones that were required by, I believe, October 22nd, the proposed changes --

Q. Okay.

A. -- or -- to the language. And I will be discussing those today.

Q. Now do you have some written notes that summarize what you're going to be saying about that?

A. Yes.

Q. And those were not designated as an exhibit?

A. No, they were notes to myself. Since this is quite comprehensive, my testimony, that would kind of keep me on track.

Q. I don't know how many copies you have. You probably don't have extra copies today --

A. I don't have, I only have electronic copy right now.

Q. -- but when you have the opportunity to make copies, would you have any objection to furnishing those notes to other counsel who have appeared in this proceeding?

A. No, I don't, but I do -- might have -- I don't know how this could affect, but if there are comments that I do not state from my notes and -- do not state for the record, I would not want those to be included or used in any fashion because they would not be in my statements.

Q. Well, the question of whether they would be admitted in evidence would be another issue. I'm just simply asking if you have any objection to sharing --

A. Oh, no --

Q. -- these with --

A. -- no.

Q. -- other counsel in this proceeding?

A. No.

MR. BROOKS: Very good.

CHAIRMAN FESMIRE: Mr. Brooks, let me clear that up. You don't intend to admit them as evidence, but as a courtesy you will provide them to other counsel?

MR. BROOKS: Mr. Chairman, we do not intend to offer Mr. Jones' notes -- what he calls his talking points -- we do not intend to present those in evidence in addition -- other than what's in the exhibit book.

However, we understand that the rules of evidence require that if counsel uses something -- or if a witness uses written materials to refresh his recollection while testifying on the stand, that counsel are entitled to a copy of that and are entitled to present portions in evidence subject to relevance and other applicable objections, and we are prepared to comply with that rule.

CHAIRMAN FESMIRE: Thank you, Mr. Brooks.

Mr. Jones, continue.

Q. (By Mr. Brooks) Okay. Mr. Jones, at this point would you -- Well, let me ask you. Are you going to go through the rule section by section and explain it to the Commission.

A. Yes, I actually plan to go through the rule provision by provision, which indirectly will be section by section.

Q. Okay. Mr. Jones, I'm going to do the same

procedure with you as I have with the other witnesses, and I'm going to ask you to proceed on your own to testify, give the testimony that you propose to give, and I will interrupt you only if I have questions.

A. Okay. I would like to ask the Commission something. For viewing purposes, for the public, there's two different formats.

There's the printed format that you have in front of you that tried to incorporate the footnotes on the page that's being addressed. The problem that we have is the capability of the computer to make that size legible to the general public.

There is another format that is shown up here, and what happens, as -- scroll through these provisions, the footnotes should pop up at the bottom, they should move as the footnote pops up in the text.

So I -- I ask the Commission, would this be proper to use, or would this create confusion? We're going line by line, so I doubt that people will get lost.

CHAIRMAN FESMIRE: Commissioner Bailey, do you have any preference?

COMMISSIONER BAILEY: I'll be looking at the hard copy anyway.

THE WITNESS: Okay, I just -- I thought --

COMMISSIONER OLSON: -- I don't have a problem

with this either, so...

THE WITNESS: Okay.

CHAIRMAN FESMIRE: Whatever is most -- easiest for you, Mr. Jones.

THE WITNESS: Yeah, I thought this might be better for other parties.

As Mr. Brooks brought to your attention, my presentation is quite comprehensive. We will be -- go line by line discussing the consensus and nonconsensus items that were incorporated into the rule, or concepts that were incorporated into the rule that derived from the final report of the task force. And I guess I've already explained the color-coding of that.

The other items that we'll be discussing are, of course, these items, these footnote items, which -- for clarification purposes, once again, these are from task force members based on the draft version that we submitted to them. I may have to explain a little bit more of what was provided in the draft to explain why we made a change, but -- and how it constituted a change.

And then the final --

CHAIRMAN FESMIRE: Mr. Jones, Ms. Foster either wants to say something or is trying to get her exercise in.

(Laughter)

MS. FOSTER: Thank you, Mr. Chairman.

Just -- I just wanted to get a clarification in terms of the -- The footnotes are statements made by task force members. Were those made during the hearing verbally, or were they pursuant to electronic communication between --

THE WITNESS: They were actually pursuant to the direction of the guidelines of the task force, from the Secretary of the Department. If I'm not mistaken, the letter that was reviewed yesterday for the process that was delegated to the task force and the agreement amongst the task force was that the task force was to generate a final report to be submitted to OCD for recommendation.

It was also agreement that within -- I believe it was three weeks, that OCD will provide a draft for the task force members to review and comment on. Thus we have a lot of comment, but those -- we only had three weeks to create a rule during that time.

MS. FOSTER: So these footnotes might have been comments that were made verbally at the task force meeting?

THE WITNESS: No, these are written comments.

MS. FOSTER: Okay, so these are only the written comments that were submitted to you at the -- after the conclusion of the task force --

THE WITNESS: At --

MS. FOSTER: -- in response to preparation of the

final report?

THE WITNESS: No, this was based upon the draft that we provided as agreed upon in the task force.

MS. FOSTER: Prior to the creation of the final report?

THE WITNESS: Final report or final rule?

MS. FOSTER: Well, the report that you submitted to Mr. Daniel Sanchez.

THE WITNESS: It was -- this was comments provided after -- the final report was submitted to OCD -- I don't have the dates with me, but the way it worked was that the task force provided to the OCD a final summary report with recommendations. The agreement that was set in the task force was that OCD would provide task force members a draft within three weeks of that submittal to respond to. So they would have kind of a preview of what OCD was intending for a proposed rule.

These footnotes are their response, because they had seven days to respond to that draft. This is their -- the footnotes represents their response based upon that draft of the proposed rule at that time.

MS. FOSTER: Thank you for the clarification.

THE WITNESS: Okay. And in addition -- I think Mr. Brooks brought this up -- I will be commenting on the proposed language changes from various parties that were

required to be submitted by October 22nd on the final proposed rule and how they would be interpreted by OCD.

MR. BROOKS: Excuse me. The witness may find a laser pointer helpful in this presentation. Would it be acceptable if Mr. Price were to approach the witness to give him one?

THE WITNESS: I came prepared.

MR. BROOKS: Your boss does not have adequate confidence --

(Laughter)

MR. BROOKS: -- and let the record so reflect.

CHAIRMAN FESMIRE: With respect to acquiring a laser printer [*sic*], not with respect to the rules, correct?

(Laughter)

Q. (By Mr. Brooks) And by the way, Mr. Jones, are you an attorney?

A. There's different opinions --

Q. Well, I was going to ask you --

A. -- and interpretations.

Q. I was going to ask you, but I'm not supposed to ask leading questions. But I would ask you, are you not an attorney, Mr. Jones --

A. No.

Q. -- although you sometimes play one?

You may continue.

A. Okay. This is something I would just like to point out, that we took the opportunity to address under this new -- this chance in proposing the new rule, and I just want to point this out to the Commissioners and everyone else. The title, the part title, actually has been modified. Previously it was just pits and below-grade tanks. We thought it would be appropriate to reflect all items addressed under this rule, which would be pits, closed-loop systems, below-grade tanks and sumps. So we just wanted to make sure that clarification was present and identified by the various parties.

Just for information, these other things -- issuing agency, scope, statutory authority, duration, effective date, objective -- is a format required by State Records. And so we're not really making any claims to a lot of these, except for maybe the objective, that part of it's just protocol and required for all the new regulations filed with the registry.

I guess something -- something that -- of course, with the development of this, we had to modify or adjust the objective. So we wanted to make sure this is really clear, the objective is right here that this objective of this part or this rule is to regulate pits, closed-loop systems, below-grade tanks and sumps used in the connection

with oil and gas operation for the protection of public health, welfare and environment. We just want to show that we have included everything inside there, as previously stated.

I guess, if you look at the title, definitions, there of that section, there's a couple of footnotes there, footnotes 1 and 2. There was a lot of expressed concern about defining hazardous waste, and those -- it seemed, based on their comments, that they either wanted an EPA reference and New Mexico reference, or some type of definition.

For clarification, I would like to state that there is such a definition. Under the general provisions and definition section, which is part 1 of 19.15 NMAC, which is part of the oil and gas rules, in their definition there is a definition that -- in section 7 of that, that addresses hazardous waste.

It also addresses the exemptions that are applied to oil and gas waste, and it goes in -- I believe it's under -- Make sure I've got this correct. It may be under subsection -- Yes, it's subsection W, which has -- defines waste under oil and gas, or -- well, it's anything with a W. So there's multiple wastes, there's waste that's exempt, there's waste that's hazardous, there's waste that is nonexempt and waste that is nonhazardous. So these

definitions currently exist in the general provisions and definitions for all rules under -- make sure I've got this right -- under Chapter 15 for oil and gas.

And the reason that they are under this general provisions and definitions, because they address any reference to those wastes under any of the rules that follow that, unless they specifically are redefined in that part.

So these definitions do exist. I just wanted to bring that up so if people want clarification, it's actually in the rules already.

The third comment referred to the definitions for downstream and upstream. There was some question about the distinction between the two in the comment, the footnote, and that they were actually needed for the minor distinction. We thought this was a great opportunity to make this distinction and put it in part 1 under the definitions in section 7. So any future reference to the upstream/downstream, I don't think -- my understanding from task force and everything else, it's very understood what is an upstream facility and what is a downstream facility. And those terms were proposed by the task force and, if I'm not mistaken, they are a consensus item by the task force, what those -- what that means.

And so we have put those definitions in part 1,

section 7, to apply to all rules under title 15, which is for oil and gas.

I guess since we're going line by line, we might as well start with the definitions, and the current definition -- well, alluvium is a definition that actually is a definition that is in the current Rule 50. I believe through legal counsel we did modify it based on the tense, the verbiage tense, to make it more appropriate. We did not make a substantive change, but we did make it be modified from a passive tense to an active tense for its description. That's the only change that we actually implemented to that definition. And as far as I know, there was no comments from October 22nd relating to that change.

Closed-loop system. I believe, Mr. Hansen, if you could bring up the -- yes, the comment from OXY.

Our intent -- Well, this is a new definition. It was -- closed-loop systems weren't specifically addressed under Rule 50. This gives us an opportunity to address those type of systems. So we had to create a new definition to make a distinction of why they're different from pits and so forth, below-grade tanks or sumps.

So we created this to identify an advanced method of drilling that encourages the recycling, re-use of drilling fluids and reduced waste solids.

As you see from the comment from OXY, they have a different interpretation on this. They want -- they include management of solids in their proposal. We think there's a clear distinction that the difference between using a closed-loop system and utilizing a standard or conventional system is management of fluids. They're capable of recycling those fluids for using them, and it has nothing to do with the solid management, with the fluid management that is implemented in that system.

So our definition reflects the management of drilling and workover fluids without using below-grade tanks or pits.

This also goes in -- and we kind of put it right up front. It also goes into when we propose further language about permitting, construction, operational, closure. We address those distinctions by only referring to closed-loop systems for drying pads, not pits.

And with that, if there is -- we also provide language inside there that informs applicants and operators that if you're going to use a pit and a closed-loop system, which is -- does happen. Not everyone has the capability to centrifuge off the liquids to re-use them, so they put in the pit and they draw off the pit. We make that distinction that if you're going to use a pit, the you have to comply with the temporary pit regulations, or

provisions.

So we make that distinction that closed loop, to us, deals wit the management of fluids.

Okay. Division-approved facility. This is also a new definition created to broaden OCD's ability to utilize other facilities designed and permitted for similar purposes. We used this term within the definit- -- or within the rule. We felt it was needed to define it. And so we came up with this language. As you can see, it talks about Division-approved permitted surface waste management or injection facilities, facilities permitted pursuant to the WQCC regulations. It also allows facilities approved pursuant to 712, which allows us to allow certain wastes into solid waste facilities. It then also grants us some other flexibility within the language.

We received several comments on October 22nd, specifically from the industry committee and Yates Petroleum Corporation. They requested that small landfarms registered pursuant to 36 be included in this list.

I think that maybe they didn't look at the waste acceptance criteria for those type of facilities, but drilling fluids or drill cuttings are exempt. They cannot be accepted at those facilities, which would be the storage of the waste material generated from these activities.

So we just -- it's only -- if I -- Let's see. I

believe the -- Here it is. The waste acceptance criteria limits the operator to -- and this is a direct quote from part 36 -- accept only exempt or nonhazardous waste consisting of soils, excluding drill cuttings, generated as a result of accidental releases from production operations that are predominantly contaminated by petroleum hydrocarbons, do not contain free liquids, would pass the paint filter test and where testing shows chloride concentrations are 500 milligrams or below.

So there is a restriction in what those facilities can accept. And it wouldn't be appropriate to list that as an approved facility, as is referenced throughout the rule. So I just wanted to make that clarification.

Okay, emergency pits. This is pretty straightforward, if I'm not mistaken. This definition actually comes from Rule 50. It was incorporated into the regulatory language of Rule 50, and we just pulled it out to make sure it's understood, when we talk about emergency pits, what it means. So this was -- as you can see, it's in green. This is something that the task force talked about, and it's in the summary report as a consensus item from the task force, and they ask that it would be a definition, so we have included it in the definitions.

Q. Now there are also some provisions in the rule

about pits constructed in the event of an emergency to contain unanticipated spills?

A. Yes, there is a provision specifically about emergency pits under part 17.

Q. Yes, but a pit constructed when an emergency is occurring, to contain a spill, would not be an emergency pit under that definition, would it?

A. I'm sorry, if you would say it -- I want to make sure --

Q. A pit constructed in an emergency --

A. Yes.

Q. -- would not be an emergency pit under that definition, correct?

A. No. Well, it would -- well, let me ask you this, would it -- It states it's for a precautionary matter, so I would have to understand what you're meaning by emergency.

Q. Well, I will ask those questions when we get --

A. Okay --

Q. -- to that portion --

A. -- because I --

Q. -- of the rule.

A. -- that's kind of -- It's difficult to answer.

One of the big things that developed out of the task force was the distinction of temporary pits and permanent pits. And instead of -- I guess Rule 50 talks a

lot about pits and then it makes that distinction, it starts identifying those. Here we want to make -- to make it easier to follow within, we could make that distinction and separate those two, and the task force agreed upon that.

So this definition is -- actually was created by the task force, and its intent is to identify to applicants or operators of permanent pits what regulations apply. Each section of the regulation has subsections that identify if it applies to a temporary pit, a below-grade tank, a permanent pit, closed-loop system or below-grade tank.

So this makes it easier to follow, and you don't have to look for the hidden meaning in the regulations. We want it plain and simple, easier to follow. So this actually is a good thing for all parties.

And we -- as far as I've seen, there was no comments from October 22nd pertaining to this.

The next term, restore. This is -- this was something by legal counsel we were asked to include in here. It's a new definition, it's a general-concept-type term. It's utilized only twice in the proposed rule. And in each case, the conditions in which the term is used is specified; it tells you, you must restore it to this.

Certain parties such as the industry committee

and Yates Petroleum Corporation, they have recommended much like OXY has to change this definition -- or not the definition but the term from restore to site restoration.

The only problem that we have for that is that site restoration is not suggested or used anywhere in the rule. Therefore, we're defining a term that's not used under the rule. Restore is used. There's no recommendations to turn restore into site restoration in the other recommendations, so we still stand by using -- keeping restore as it is, because the recommended change would define a term that is -- is not used at all within the proposed rule.

So we couldn't quite understand their -- the logic behind that, it was just proposed.

Re-vegetate. Okay, re-vegetate, this another new definition created to provide a general concept again. The details pertaining to re-vegetation are provided in the re-vegetation requirements under subsection G of 19.15.17.13. We'll discuss those when we get there. But this, once again, just a general, conceptual-type definition of what we're trying to obtain through re-vegetation, but the specifics are addressed in those provisions.

Okay, sump. The definition -- or the source of the definition for sump derives from the current Rule 50. Our intent was to propose modifications to the original

definition in order not to place the limits on the types of options of vessels that are utilized.

I believe the current definition is provided in -- well, it's not -- I take that back, it's not in -- per se, in 50. It is a definition under 19.15.2 under section 7, definitions. And that current definition limits the vessel to only be single-walled. We'd like to open that up so they can use double walls, double-walled sumps and incorporate or ensure that there's some form of secondary containment incorporated into the original vessel or used in conjunction with a primary vessel to prevent any potential releases from overflows or -- and -- and we also do not want to limit the ability of a sump to be used either below or above the ground surface. So these -- it's my understanding these proposed modifications reflect the current use and practices of such vessels by operators.

There was a recommendation from IPANM that requested that the words, within secondary containment, be omitted from the definition. Their justification is that a sump is already a secondary-containment vessel. That doesn't quite coincide with the language -- the intent of the language that we've proposed, or with the current definition which stipulates that it's a single vessel. A single vessel would imply that it's a primary tank, not a -- which means there's no secondary tank, so therefore

there's no secondary containment, so...

And the current definition clearly states that -- and this is current definition in our current rule under 19.15.2, section 17, clearly states that a sump is a single-wall vessel, and it does not require secondary containment or incorporate a secondary containment system in it.

So our definition clarifies that secondary containment is required or should be incorporated with the use of these -- these sumps.

The final definition here is temporary pit. This definition is a -- was suggested by the task force. It was actually created by the task force and incorporated into the rule.

As you can see there, there is a footnote, and the definition. It's an OXY footnote. They have suggested that we change liquids to fluids.

We contend -- it's OCD's contention that a liquid can be considered a fluid, but a fluid cannot be con- -- is not a liquid. And this is a crucial consideration in proposing the language under this definition and the proper use of it.

Liquids are considered free liquids, such as produced water, that is generated in the drilling process.

Fluids may include drilling muds, gels, additives

that have been potentially settled out from the drill cuttings.

By making this change, it would suggest that they would -- when we talk about this, that it would only restrict a temporary pit to hold those and not the produced water or the free liquids, because it would only address fluids. And if -- the way the rule is proposed is that we do have provisions to remove those liquids off the pit, which would indicate that there are liquids in the pit, in conjunction with fluids. We address those separately under different provisions, so we'd like to make a distinction between those.

And with this -- it has to do with the -- the language that was proposed is to hold liquids for less than six months and be closed within one year.

So what this would require if you were to change this to fluids, it would suggest that operators would be required to remove not only the produced water, but also the drilling muds, the gels, the additives, which we don't think is really practical. And we're not -- and that's not our intent, to require them to remove those additional items. We realize that's part of the waste material, and to extract or separate those from the drill cuttings is not a practical application.

So just one little change between those two terms

could result into something that is -- I would say is not very practical, a practical application by the operator.

And I would like to comment that, much like the footnote, industry committee and Yates Corporation has also recommended the same change. I just don't think they've realized the implication such a change would constitute.

What we have here, I guess, permit required, footnote 7 -- well, let me -- I'll talk about the intent of this section first. This is permit required.

Task force agreed upon the language requiring permitting of pits. It was for temporary pits and permanent pits, below-grade tanks and closed-loop system. We have expanded this section under subsection A to notify operators that permanent pits -- unlined permanent pits will be prohibited, and we'll no longer be issuing permits for those permanent pits. So we did modify or expand upon what the task force proposed, but their language is in there.

The -- subsection B also provides language, to inform applicants of closed-loop systems which use a pit, a temporary pit, that they must comply with the temporary pit requirements specified within the rule.

This is one of those issues where there's a distinction that coincides with the definition of closed-loop system. So we're taking this opportunity to let

operators know, if you're going to use a temporary pit you've got to comply with the temporary pit provisions. And we further refer to closed-loop systems with drying pads, to make that distinction within the rule.

The footnote, footnote 7 -- there seemed to be a concern from OXY about the alternative methods. We considered this. I guess what we were trying to do, we include things in our listing up here -- and maybe I should have made this clarification, is that we did include the alternative methods within the permitting, because the alternative -- any alternative method other than the ones up there would be an exception to the standard which is permitted under this.

And since we don't know if they're going to be requesting alternative method -- well -- I'm trying to get this straight here.

Since we don't know what it's going to pertain to, a pit or below-grade tank or a closed-loop system, it's hard for us to identify this. And there are provisions for exceptions under the application process that allows operators to address these. So we didn't feel like it was needed to put it up there because it's -- include it under permit required, because it is an exception to a permit to one of these others that are addressed up under there. So indirectly it still requires a permit.

Also, the -- for other clarifications, the alternative methods cold also pertain to closure. In this provision if you're requesting an alternative closure method, even though for a new application under this rule, the -- part of the application process and permitting process is to submit a closure plan and have that approved as part of your permit.

In some cases, for existing-type operations, they would only submit a closure plan for approval, which would not require a permit but would require approval of the closure plan. If they were to ask for an exception to a standard, one of the proposed closure methods, that would be an alternative method that would not require a permit.

So there's multiple uses of this, and we think they're covered within the provisions of the rule.

Q. Mr. Jones, why do we refer to alternative methods without specifying any?

A. The main reason is that we don't want -- I think, you know, a lot of the concern was, what are they -- how do we apply for them, what do they pertain to? We've opened up the door for industry to suggest alternatives. We're open to alternatives, there's exceptions, there's an exception provision. We don't want to place any restriction of new technology, new ideas to come to us.

The current rule with the closed-loop system, we

have to -- you know, that was something new. We realized that we could apply portions of the rules to it, but it didn't specifically address it. So this kind of opens up the door for those new technologies that we have not --

CHAIRMAN FESMIRE: Mr. Jones --

Mr. Hiser, do you have a -- ?

MR. HISER: Mr. Chairman, Mr. Brooks and members of the Commission, it may be helpful just to clarify something. I don't -- I have no objection if Mr. Jones wants to proceed down this route and Mr. Brooks wants to go there, but it might be helpful for the Commission members to understand that a number of these comments were made on the August draft, and what we now have is the September language up here. And so in some cases there's some disparity as a result of that. That might be what sometimes is confusing.

CHAIRMAN FESMIRE: Okay. Well, if it is confusing would you take the opportunity to point it out?

MR. HISER: Okay.

CHAIRMAN FESMIRE: Okay?

MR. HISER: I just thought I would make that clear so that if people are wondering why sometimes we don't parallel --

THE WITNESS: Yeah, and actually this language didn't change. I'd like to clarify. The reason this --

the OXY comment is up there is because under the application we talk about -- and they didn't directly reference that but the question is, why aren't alternative methods included in the permitting?, is their comment.

And it's actually -- if you see, they have a reference of 19.15.17.9.A, which is the application, and state that, you know, it is there. And I believe the comment -- The permit application requirements state that an operator applying for a permit to construct or use a proposed alternative method must do so under -- with the C-144 form, under section 9. This is section 8.

And then they comment that it's silent in this section for -- well, there's several comments. Part of it is permit required, part of it is the provisions, suggesting that we didn't address it throughout the rule of every exception that you can have.

We don't think that's practical, because we don't know what alternatives that one may propose. If we list those alternatives, then they're not alternative anymore, they're a prescribed method. In this case they're wondering why there was a permit requirement.

So I -- it's in the rule, and it addresses something that's in the rule. This was not changed due to that, there was no change based upon what's being proposed today for the proposed rule, because --

Q. (By Mr. Brooks) I believe that's been explained, if you can move on.

A. Okay. There was a certain party that's made comments on October 22nd. It was Energen. Their comments were somewhat difficult to interpret since they took our proposed rule and either deleted things, modified things, and didn't provide any explanation of why they did. But it is -- it was submitted in that form on the 22nd. And in their request they modified -- it was subsection B for closed-loop systems to suggest that -- to allow closed-loop systems to be used as submitted on a sundry notice or OCD C-144.

Upon this review -- they actually admitted a lot of the language requiring the permit. To accept such a change would be interpreted to allow a closed-loop system to be used without the review or approval of OCD. Their suggestion is only to submit it to us, not to allow us to approve it.

And I guess the problem we have is, if you use a summary notice it's not a C-144, which is the application. This creates other problems because -- other recommendations that they suggest through here is, in the application process they don't want to submit things like the engineering design plan, which incorporates the closure plan, which allows us no opportunity to review what they

plan for closure or approve what they plan for closure, which kind of cuts us out of the loop of the whole process. It kind of alludes to -- and it's difficult to read their language, but it's -- personally, I would interpret it as that it would allow them to operate without an approved permit and without an approved closure plan, which would kind of pull them out of the rule.

And so I just wanted to point that out in their October 22nd proposed language changes, this is -- this section was omitted, and all they want to do is submit the sundry notice or a C-144. But with that C-144 it will provide no details.

Okay, let's see, can we scroll up, Mr. Hansen? I believe -- Did I address all the footnotes through there? I believe I did.

Okay, the permit application. This subsection was created based upon the pit rule task force input to provide instructions to applicants, and different methods for operation that comply with the permit.

The concept of the utilization of the C-144 form originates -- for the current rule 50. It was consensus language. This language that's proposed for the permit application, A, was consensus language. OCD did take the opportunity to expand upon that language.

And this is also language from Rule -- if I'm not

mistaken, from Rule 50, to recommend -- or recommending that the applicant be required to submit a C-144 form in order to request permit at an upstream facility. This seemed to be important by the task force, to make this distinction and include this. This is actually task force right here, their recommendation.

We agree with the task force recommendation, and we have also incorporated some additional -- well, we incorporated the concepts that are proposed by that consensus language into the proposed rule.

Our intent is to use the C-144 form as the sole mechanism to track and permit a pit. Right now I think there's a multitude of applications -- or ways to request a permit for a pit.

And what we have found out, I think, is a good reflection of the comments from Mr. Price and Mr. von Gonten in their testimony, is that we have -- we can't come up with a concise number of the number of pits that are there or what type of pits that are there. And part of that is, the different forms -- or different formats that can be submitted to request those approvals. If we used one form to supply that information, then that information could be entered into our database and used to track those pits.

So through our changes we are recommending that

you -- regardless of if you're closing a pit, plugging a well, you have to comply with these provisions, which would mean if you were going to close a pit in conjunction with that, you have to submit application and include your closure plan and identify those pits.

So this is a tool that will assist OCD in documentation, so in the future we can actually say from this date to this date there was this many closures or this many pits permitted. We will have that capability.

Right now with the formats, it's difficult for district office to give us a correct number, because there are so many different formats in which -- the forms are used for other purposes, to continue drilling, for plugging and so forth. That is hard to track that, because it may go to that person that assesses that part of it, but not the closure.

Q. Mr. Jones, if I may interrupt you, the -- in one of Lewis Carroll's poems the character called the Bellman says, What I tell you three times is true. There's a tendency to assume that, but I believe you've made that last point several times, so I think the Commission would probably be appreciative if you'd move on to another point.

A. Okay, I'm sorry about that.

There is a comment that goes with this section, a footnote, and I believe it's footnote 9. It was to insert

"or tank" between the "pit" and "will".

This comment refers -- and this is one of those things where I like to bring this up -- it refers to the Surface Owners Protection Act. The original task force sum- -- well, final report, had some language in there that suggested that the application should include proof of compliance to the Surface Owners Protection Act. This is consensus by the task force. It was the language that they proposed in their summary report.

Upon consideration, we -- originally in our draft we did incorporate that because we were trying to stay true to the task force. Once the draft went out, we received comments regarding that language. And upon consideration, we have determined that the implementation and compliance of that act is a best issue resolved between the surface owner and the applicant. So we pulled that language out from that provision, and it no longer exists.

So I'd like to state, this was a comment that was brought up. We had to reconsider what was proposed by the task force, and we actually made a change, basically.

Okay, subsection B. For clarification, I guess, in subsection A it's -- there is a C-144 form, and we want to, for clarification purposes identify that this is only a part of the application. The other portion of the application is the engineering design plan.

The pit rule task force recommended that the applicant should provide a detailed engineering design play in their application for a permit for a pit. They didn't distinguish temporary or permanent. And in those discussions we -- when we talk in the general sense of a pit, it would -- in this case, it would apply for both.

The task force consensus language also proposed that the engineering design plan include operating and maintenance procedures, a closure plan, a hydrogeologic report and details of the site's depth to groundwater.

We agree that this information is required for proper review in order to determine approval or denial of the application. We've also incorporated these ideas or these concepts into the rule. The engineering design plan -- in the engineering design plan.

The operational maintenance procedures should be based -- and this is part of my demonstration also, I'm kind of going to say what we -- based upon this, so people have a better understanding of what we're requesting for this information -- that the operational maintenance procedures should be based upon the specified provisions for operations from the rule, or the items proposed in the rule.

You know, once something like this is created, it can be provided to operators as a format or an

instructional for proper operations and maybe utilized as a template for future submittals of a similar project. So if it was for a temporary pit, there are specified operational requirements.

If someone were to create a general plan that covers those operational requirements, so the operator could have that on site or have it available to understand if the inspector comes out and says, Hey, you know, based upon the rules of this provision -- or the provision requiring the use of this temporary pit, these are the operational requirements -- they would have knowledge of that and have it available. If it was a below-grade tank, it would apply to those operational provisions for that below-grade tank.

So this is a mechanism that can also be used by operators on site to educate them. And it allows us to make sure they have a clear understanding of those rules when they submit it.

The closure plan, the submittal of the closure plan as part of the permit application for consideration of approval of the permit is a new concept. This is suggested in the consensus language proposed by the task force. The OCD agrees with this concept --

Q. Now Mr. Jones, when you say that's a new concept, are you referring merely to the regulation of pits in the

Oil Conservation Division?

A. Yes, I'm referring -- that reference is based on what's currently required under Rule 50 provisions.

Q. Is it a concept that is frequently encountered in environmental permitting? The concept of requiring closure plans to be included in the permit application?

A. In my experience, yes.

Q. Okay, continue.

A. We agree with this. Having the applicant submit a closure plan for approval as part of the initial permit prevents any delays in closure. The current Rule 50 requires operators to submit a closure plan for review and approval prior to commencing closure.

So if submitted after the fact, it has to be reviewed and approved before they can even start closing, under the current rule.

By approving a closure plan as part of the permit, the closure can commence immediately.

The hydrogeologic report, this provides OCD with the information that it can utilize to assess the proper siting for a permit. More importantly, it also provides information, if submitted, that can be utilized to assess a potential release and determine the possible mobility, extent and direction a plume may follow.

And this is important. We're not saying that all

pits are going to have releases, but if there is a release, if the operator notifies us of such release, we have information on site that we can automatically start assessing. Other than that, it would be waiting for that information to be provided by the operator, so we can make a -- determine -- determine if there is any imminent threat or danger to public health, fresh water or the environment, and we would have to wait for that information. If we have it on hand, we can make that assessment, that -- you know, within an appropriate time.

So we think this is a good idea to have such information and request it.

The OCD also proposes to require the submittal of the engineering design plan for all activities under this proposed rule that will require a permit. So anything that would require a permit, we have incorporated similar language -- or at least for the engineering design plan aspect, to be required in their applications for a permit.

There is a comment, a footnote, that was a request to delete "detailed" or replace it with "an", so it would just say engineering plan. The proposed language from the task force included detail, and we consider detail to reflect the quality of the information provided in the -- an engineering design plan, since the quantity or the items required are listed.

And this may be silly to have such a thing in there, but I put together guidelines where I said, give me a brief summary, and I got very little information. It was argued that we said provide a brief summary, and there was no details at all in that submittal, so --

MR. BROOKS: Let me interrupt again, Mr. Jones.

Mr. Chairman, in the interest of making this presentation -- possibly omitting some things to make this presentation go faster, I want to clarify something.

Mr. Hiser and Mr. Carr, I believe, have stated that they are not opposing any of the provisions that the rule relating to permanent pits, but I did not know for sure if that was necessarily the decision of all counsel. If all counsel are agreed that there's no opposition to the provision regarding permanent pits, we can simply instruct the witness not -- to pass over those provisions.

CHAIRMAN FESMIRE: Ms. Foster?

MS. FOSTER: I would actually like to speak to my clients about that --

CHAIRMAN FESMIRE: Okay.

MS. FOSTER: -- because I would also like to try and speed this up if possible, but I'm finding this presentation to be rather instructive and rather useful in terms of the processes, both thinking and actual, that the Division went through.

So at the break if I could speak to my clients about that.

CHAIRMAN FESMIRE: Okay. Given that cue, why don't we go ahead and take a --

(Laughter)

CHAIRMAN FESMIRE: -- 12-minute break and reconvene at eleven o'clock. I do need to tell you that it's my intention to go to about 12:20 today, to ask for public comments at 12:20, and break for lunch at about -- from 12:30 to 1:30, just for planning purposes.

(Thereupon, a recess was taken at 10:48 a.m.)

(The following proceedings had at 11:02 a.m.)

CHAIRMAN FESMIRE: Let's go back on the record. The record should reflect that it is now eleven o'clock a.m. on Thursday, November -- 7th?

COMMISSIONER BAILEY: 8th.

COMMISSIONER OLSON: 8th.

CHAIRMAN FESMIRE: -- 8th. Ms. Foster, have you had a chance -- Oh, let me go through the recitation, I'm sorry.

The record should reflect that all three Commissioners are still present, the Commission therefore has a quorum. We were in the direct examination of Mr. Brad Jones.

Ms. Foster, you had raised an issue that you

wanted to discuss with your client. Have you had the opportunity to do that?

MS. FOSTER: Yes, Mr. Chairman, I have discussed it with my client, and our position is that we do not -- we would agree with the OCD's recommendation to line permanent pits. Therefore, sections of the rule, changes in their regulation, we would not oppose.

Obviously it's a question -- that doesn't mean that I'm withdrawing my right to cross-examine on anything having to do with the liner, but just as it pertains to this discussion for the actual rule line by line with you, we could -- it would be okay with my clients to skip those sections.

CHAIRMAN FESMIRE: Okay. Mr. Brooks, I don't think you intended to skip them, did you? Did you just intend to abbreviate the presentation?

MR. BROOKS: Well, my suggestion -- it actually was Mr. Price's suggestion, was that if the permanent pit provisions are not at issue, that we could simply skip over the explanation of those provisions that relate specifically and only to permanent pits.

CHAIRMAN FESMIRE: Okay. Mr. Huffaker, would you have a comment on that?

MR. HUFFAKER: I do not, Mr. Chairman.

CHAIRMAN FESMIRE: Okay. And is it acceptable to

your client that we basically treat the permit pit provisions as not in contest?

MR. HUFFAKER: It is.

CHAIRMAN FESMIRE: Okay. Mr. Baizel?

MR. BAIZEL: That would be fine.

CHAIRMAN FESMIRE: Mr. Brooks, proceed. Sounds like you've got a good plan.

Q. (By Mr. Brooks) Okay. Then you may go on to the next subsection, or paragraph.

A. Okay. I don't know how to address those, based upon the comments from the parties over here. There are recommendations pertaining to permanent pits that have been suggested by those parties. Am I to only address those?

MR. BROOKS: Mr. Huffaker -- I mean, Mr. --

MR. HISER: No, that's --

MR. BROOKS: -- Hiser?

MR. HISER: -- Mr. Huffaker over there.

What I had recommended, if it please the Commission, is that I think we can do exactly what's been suggested, as long as, if there's a particular question we have on the permanent pit site, we can bring that up in cross. And then I have no objection if they want to colloquy a little bit about that.

CHAIRMAN FESMIRE: Okay. And Mr. Brooks, you understand that even though it's not contested, we do have

a minimum hurdle that --

MR. BROOKS: I understand that. And of course I believe that we will cover the matters adequately if we do that.

CHAIRMAN FESMIRE: Okay.

MR. BROOKS: Thank you.

MR. HISER: Right, and our agreement doesn't necessarily mean that we're accepting everything that otherwise he would say.

(Laughter)

CHAIRMAN FESMIRE: Hopefully the record got that.

THE WITNESS: I'm not sure if I understand it.

CHAIRMAN FESMIRE: Mr. Brooks, do you want to take a minute to converse with your client?

Q. (By Mr. Brooks) Now, Mr. Jones, just go through everything except those sections that relate specifically and only to permanent pits. And I may ask you a few questions about permanent pits afterwards, but --

A. Then we need to confer, because there are proposals that impact permanent pits from other parties, especially in siting and in closure, that have been recommended in the October 22nd proposals.

Q. Okay. Well, you may address those, and I will stop you if I feel it's unnecessary.

A. Okay.

CHAIRMAN FESMIRE: Mr. Jones, why don't you just go ahead and proceed with your presentation, just be mindful that --

THE WITNESS: Yeah, I'll try to be brief in the sections where there's no comment, but hit the high points for permanent pits.

CHAIRMAN FESMIRE: Sounds reasonable.

THE WITNESS: Okay. I guess we are in subsection (1), and this is the engineering design plan for permanent pits. The high points here, I'd just like to state that this was recommended by the task force that permanent pits should comply with similar provisions required for evaporation ponds permitted to part 36, the surface waste management regulations.

The difference between this engineering design plan that -- from the others, are -- part of that provision is that it would require that a registered professional engineer certify the engineering design plan. This the high point. We accept those recommendations, we've incorporated those into the provisions.

There are some additional requirements. I believe they are -- get my reference right -- subparagraphs (e) through (n) that are directly from part 36, since that was a recommendation through the task force, for it to comply with those.

Q. (By Mr. Brooks) Now are these provisions that are essentially the same as those that are required for evaporation ponds under part 36?

A. Yes.

Q. Continue.

A. This is the provision for engineering design plan for temporary pits, the -- subparagraph (2). It's the OCD's intent to require applicants with temporary pits to submit an engineering design plan with their application, to ensure that the temporary pit is properly sited, designed and constructed, a closure plan is approved and in place for immediate implementation of closure, and to ensure that the operator has a complete understanding of the operational requirements of the rule.

As you can see, these things are specified under the engineering design plan to be submitted as part of the application.

The source of this proposed language originates from the task force.

The concept of the use of the standard engineering design plan, as it's stated in the last -- I believe it's the last part of that provision -- was also something that was -- kind of originated in the guidelines. This was one of the things that we incorporated in the -- or the task force considered. But they came from the

guidelines.

The task force also suggested that a standard design could be submitted by the applicant and then referenced in their applications under this provision -- so it's as if it was already approved -- and not resubmitted every time they submit an application. And this would make things easier for applicants and speed up that process.

There was a footnote -- I believe it's in the middle of that provision, footnote 11 -- that was asking -- there was some question about the hydrogeologic report and what were the expectations beyond the depth to groundwater? And I feel like I've already discussed this prior to this as a general overview of what that report provides to us, beyond just depth to groundwater for siting.

It also provides this information if a release occurs, that we would have information readily available, once notified, to make an assessment if there needs to be immediate reaction -- or action taken to protect human health and the environment.

In this same provision there was several comments from parties. The first comment, or recommendation, was from the industry committee and Yates Petroleum Corporation, and they had recommended that this provision only require that the permit application for a temporary pit shall include a design plan for construction, operation

of a temporary pit meeting the applicable requirements of 19.15.17.11 and shall include a closure plan meeting the applicable requirements of 19.15.17.13 NMAC.

Such a change would limit the information submitted to OCD for review to the extent of -- well, if they were to supply only that information, there would be no information submitted for us to assess the siting criteria, to have the information available to assess, if there is a leak, what concerns we may have, or release.

The other thing with this recommended language is that section 11 only refers to the -- it only pertains to the design and construction. Section 12 addresses operations. So they state section 11 as the source of what they're going to base their operation plans off of, so with that there would be no operational plan submitted. So that's just a clarifying point on that.

The other party that had made a recommendation was IPANM. They suggested that the last sentence be modified. Their modification to that last sentence was to allow -- Let's see if I've got it here. Allow -- and this was my understanding of it. It would allow applicants to reference a standard design, regardless of which company submitted it in their application.

And I could read their -- read from their submittal for further clarification. Now I can't find it.

MS. FOSTER: I have the thing that he's referring to right in front of me --

THE WITNESS: Yes, if --

MS. FOSTER: -- if you'd like, I could just make it a little faster and just read it.

THE WITNESS: I would appreciate that.

CHAIRMAN FESMIRE: Anything that can make it a little faster --

THE WITNESS: Yes.

CHAIRMAN FESMIRE: -- would be appreciated --

MS. FOSTER: Yeah.

CHAIRMAN FESMIRE: -- yes.

MS. FOSTER: Our recommendation is that we would be allowed to have the ability to file a standard pit design that can be used by multiple companies by reference. That was the --

THE WITNESS: Yes, yes, that -- I guess that's what I was trying to get at. We're kind of opposed to this change, and the reason why is that if this change is accepted it's going to be difficult to determine what's the original source.

If they reference something or if they -- there's multiple companies that submit applications, so in the process, when you make a reference -- to the district office in this case -- for their application, they're going

to have to go back and search the files to determine if the design depth allows that design to be applied to the site which has -- may have a separation to groundwater demonstration that has to be considered. So if the standard design is at a depth of 15 feet, they're going to have to find that to make that determination. The fact that it's not submitted delays the review process and will delay the consideration of approval for such application if it's done in this fashion.

And, you know, our intent is not to delay this but to speed it up. I mean, in all honesty, it would be recommended to have applicants always to submit that -- if they know what it is, they can create it, and only submit it -- it would definitely speed up the process, because then we wouldn't have to figure out which design they're referring to, because there may be multiple designs by multiple companies.

So you know, we want -- we're not -- we're kind of opposed to this change.

Provision --

MS. FOSTER: Again, in the interest of not having to repeat the discussion that you just had, we made the same recommendation for paragraph (3) as well as paragraph (4), and the comments of Mr. Brad Jones would be accepted by us.

CHAIRMAN FESMIRE: Okay.

THE WITNESS: Subparagraph (3), closed-loop systems, this is new language created by OCD, the source of the idea. The proposed language derives from the consensus language regarding the engineering design plans and standard design plan for temporary pits.

We felt like such information is required for a proper review of the application in order to determine approval or denial.

Once again, it was our intent that this -- that these type of provisions are the same as for temporary pits, to ensure that closed-loop systems are properly designed, constructed, that a closure plan is approved and in place for immediate implementation for closure, and to also ensure that the operator completely understands the operational requirements of the rule.

As you will notice, there is some exception to this. The engineering design plan that's required for this does not require a hydrogeologic report. We -- This is due to the ability of a closed-loop system -- especially in the way we address it under the rule, because these are not temporary pits. If you use a temporary pit with a closed-loop system, we've already specified up front that you have to follow the provisions for temporary pits, the application would be for a temporary pit, these would be

for drying pads, that the ability of -- this is due to the ability of the closed-loop system to recycle and re-use process drilling fluids that will result in a drier, less saturated waste solid and also reduce the volume that's generated.

So we felt that it was -- since they're not storing fluids on their drying pads, and -- but they're storing cuttings and so forth that have been centrifuged -- that groundwater considerations -- there's not hydraulic head on it, there's not produced water on it, that we wouldn't need that information, because there's less concern for release occurring at that site.

One of the parties that provided comment from October 22nd was Energen. They recommended to omit the requirement of the engineering design plan from the provision. Such a change will allow operators of closed-loop systems not to be regulated by OCD. There would be -- therefore prohibiting OCD the authority to deny, suspend or modify their operations.

Other parties, such as the industry committee and petroleum -- or, I'm sorry, Yates Petroleum Corporation -- they have recommended to omit the reference to applicable manufacturer recommendations, and they also have -- I apologize, they've also recommended this for temporary pits as well. Their justification is that they're not

manufacturers for temporary pits or closed-loop systems.

I have to agree, they are correct, somewhat correct. There are installers for temporary pits and closed-loop systems, and there are manufacturers for the geomembrane material installed in the design and construction of such pits and closed-loop systems. The installers actually use applicable manufacturer recommendations when installing these geomembranes, so that's what we meant by applying that, that language.

As Ms. Foster has recommended, or commented on, they have the recommendation for the standard design, the change to a standard design and how it would be applied by reference, so I will -- I think that's already been addressed.

So paragraph (4), below-grade tanks, this is -- once again, this is new language created by OCD.

The current Rule 50 requires a permit for below-grade tanks. They're -- Of course, if they were pre-existing, they could be registered.

The task force has also continued its recommendation to require permits for below-grade tanks, and OCD agrees with this. And this is to -- in order to ensure that below-grade tanks are properly designed, constructed and closed, and to satisfy the siting criteria that we have specified.

The OCD requires the submittal of an engineering design plan for review. Without it, a proper assessment and determination cannot be performed. Once again, our intent is the same as that as temporary pits and closed-loop systems. We want to make sure that they're properly sited, designed, constructed, we want to make sure that there's a closure plan in place and approved for immediate closure when that occurs, and we want to ensure that the operators have complete understanding of what they're required to do under the operational requirements of the rule.

Once again, there was a comment on October 22nd from IPANM about the standard design, and it's referenced, but Ms. Foster has already addressed that.

Closure plans, we -- Closure plans, as you notice, just the title is green up there. We feel like this was a consensus item, because it's incorporated into the engineering design plan, but we also had a lot of questions about these and how they would be addressed. And then we also realized there was references that needed to provide instruction to certain operators. So we created this subsection with the intent to inform and educate applicants that anticipated information required for a proper closure plan submittal.

Right now, the current Rule 50 does not specify

any prescribed closure methods, nor does it provide any detailed protocols for a complete closure.

And it was brought to my attention during the break that I was wrong about operators having to submit a detailed closure plan prior to commencement. The actual wording is that the Division may require. May require. So they have no obligation to submit it. We may request it under Rule 50. So under our new proposed rule it is a requirement.

A closure plan shall demonstrate which identified closure method the applicant or the operator proposes. It should state how they will comply with the closure requirements, section 13 of the proposed rule. For example, if an applicant proposes the closure of a temporary pit by a method of waste removal commonly referred to as dig-and-haul, the applicant should describe such activities as the removal and disposal of free liquids, including the identification of the proposed disposal facility. We just want to make sure that these are being properly disposed of and they're going to the correct facility.

The method of treatment to stabilize or solidify the contents of the pit, if necessary. The excavation of the pit contents and liner. The testing and sampling protocol to determine and/or delineate a release the

temporary pit. And if a release has not occurred, instructions describing the backfilling of the excavation and the installation of the prescribed soil cover and the re-vegetation of the impacted area.

A lot of these, once they -- once someone, a party, puts this together, they could have areas that they could modify, and these plans should be pretty standard unless there's something unusual about it.

The -- paragraph (1) under closure plans, OCD received several comments from task force expressing concerns regarding the re-notification if initial proposed on-site closure method -- if they were unable to achieve what they had originally suggested in their permit application.

There was concerns that since the closure plan is required to be approved as part of the permit, that -- they suggested the were done -- a good example is, they anticipated that the pit contents would meet the standards for on-site closure and they satisfied all the other requirements such as the 100-mile radius demonstration, and they had written consent from the surface owner, and they had stated that there was -- their anticipation is that the pit contents would meet the standards to allow on-site closure. And in this case, let's say they didn't meet it. They had concerns that they would have to modify their

permit in order to get a modification to the closure, and in doing so they may have to re-notify, gain written consent from the surface owner again and make similar demonstrations that they had made previously.

What we're suggesting in this language is that if you propose such a method, propose backup methods such as, if you're not going to meet the standard, if for some reason you don't meet it, you can also say, if we don't meet the standard, we're going to stabilize it, treat it t this standard. If for some reason the pit contents are at high concentrations where the treatment doesn't work, they may offer up a backup in their closure plan, their initial closure plan, to -- if they can't meet the standard, to dig and haul it.

So we're saying do it up front, make sure you have all your bases covered in case your initial proposal isn't really practical or may not work out. And so we're trying to get some instruction to the operators, there is a way to do this, that -- and we can allow those because all of those are approvable methods under that, and they would be addressed under those on-site closure standards.

And so we're trying to give some information up front, if you're going to pursue this on-site closure method, address those in case your initial plan doesn't work. Also provide a backup plan for those. And the last

backup plan should be dig-and-haul if you can't meet any of those.

I would like to comment on October 22nd, Energen had recommended that this provision be omitted. Such a change will eliminate instructions to prevent multiple modifications and additional notice and would create delays in the closure. Okay.

My computer just died. Yeah, sorry about that.

Provision (2) and (3) -- yeah, paragraphs (2) and (3), I would like to discuss both of these at the same time.

OCD created paragraphs (2) and (3) with the intent to notify and instruct operators that are required to submit a closure plan but who are not seeking a permit, and to notify them which office they are required to submit these plans.

These are provisions -- these types of facilities as they're listed with the unlined permanent and registered permanent pits or existing lined or unlined permanent pits not permitted or registered, identified -- and there's a provision for that. These are also listed -- instructed under the transitional provisions to submit a closure plan. The other ones, of course, are the existing unlined temporary pits and existing below-grade tanks.

We've provided this language so we could notify

those parties that qualify under this, that aren't seeking a permit, that are required to close under the transitional provisions, who to submit their closure plan to.

I would like to comment also that Energen in their October 22nd submittal has also recommended that this provision, or these two provisions, be omitted. We would like to state that such a change will eliminate instructions to inform operators who or which office they should submit their closure plans for this, which could create some confusion. We're trying to clarify that for these provisions.

Q. (By Mr. Brooks) Now in that connection, Mr. Jones, does existing Rule 50 require an operator to submit a closure plan for a temporary pit?

A. As I stated earlier, it doesn't require them. It grants the option for the Division -- may require them to do that. It doesn't stipulate that the operator is required to submit a closure plan.

Q. Now would this provision require operators who have gotten their pits permitted without submitting a closure plan, that are still open now, to submit a closure plan?

A. Yes.

Q. Okay, continue.

A. Paragraph (4), this was created by our counsel's

recommendation, just to provide clarification to operators -- or more of a reminder, that when you submit a closure plan, if it's for a new permit, it's going to be part of your permit application under the engineering design plan.

Certain parties, such as industry committee, Yates Petroleum Corporation, have recommended that this provision be omitted due to it being required elsewhere in the proposed rule.

We just thought since we were addressing closure plans, it would be good to address all applications of closure plans in that, so it's not forgotten and it wouldn't be misunderstood that you wouldn't have to submit it with your application.

Okay, subsection D, filing of permit application.

OCD proposed that -- proposes that all exceptions and permanent pit applications be submitted to the Santa Fe office for consideration and approval.

The task force suggested that at least the Santa Fe office be responsible for the review of the permanent pits, due to our technical -- due to the technical complexity and the similarity of the evaporation ponds permitted under Rule 36 and which we currently process.

So they thought it was appropriate that we -- since it was agreed upon, and it sounds like there's a lot of consensus here, that permanent pits follow those

provisions, that the party that -- the group that actually permits those facilities review those applications.

The intent of having the exceptions come to Santa Fe or to a central office is to establish some uniformity and regulatory consistency in the decision and determination of approvals and denials regarding exceptions. We would just like to make sure that there's some type of consistency. If you have one office addressing the exceptions to the provisions, that means there's one voice speaking for the Division. And in the past we've seen people argue that a similar request from a different district -- they may have a different determination. We're trying to satisfy that request for consistency by requiring that.

Paragraph (2), temporary pits, closed-loop systems, below-grade tanks -- this is filing of the permit application. There was consensus by the task force. Their language suggests that operator should apply to the district office for a permit to construct a permit or below-grade tank, closed-loop system at an upstream facility.

We agree with this concept, we've incorporated this into the rule.

One clarification I'd like to make is that these exceptions would be exceptions for the Santa Fe office for

filing of the application, would be only exceptions pursued under -- if I'm not mistaken, it's section 15. There are provisions in the rule that allow for administrative approval by the district office for certain issues, and we'll get to those and address those. So we are granting some flexibility where you don't have to go through this whole process of submitting it to Santa Fe for approval.

Siting requirements, section 10, the development of the siting criteria evolved from the pit rule task force. The current rule includes some similar -- and I say similar -- siting criteria, such as watercourse, lakebeds, sinkholes, playa lakes, wetland, wellhead protection areas. They currently exist in the current Rule 50.

One of the things that did happen in task force, they seem to only address -- and I was part of the final part of that -- temporary pits, permanent pits and emergency pits, during the deliberations. If you notice, we've included below-grade tanks and closed-loop systems. Well, I take that back, not closed-loop systems, just below-grade tanks. And we also included the excavated material from pits, and we've created a provision for on-site closure.

Subsection A.(1), this is siting criteria for temporary pits and below-grade tanks. The decision to apply the siting criteria of temporary pits to below-grade

tanks is based upon the operational, safety and practical application concerns, and the proper placement, construction and operation of a below-grade tanks is to establish a cumulative level of protection and to prevent contamination of fresh water and protect human health and the environment.

If you notice, there's a lot in green, and then you see certain items that are in red. This is what I was referring to earlier, that the concepts that were provided -- or suggested by the task force, are incorporated and they are also up there. And some of them, the concept was consensus, the distance or depth was nonconsensus. And it wasn't that there shouldn't be one, it was more that there was -- that it wasn't agreed upon what those distances should be.

So as -- I'll talk -- let's see. Okay, for subparagraph (a), the 50-foot separation from the bottom of the temporary pit or below-grade tank, the distance or separation to groundwater from the bottom of the temporary pit or below-grade tank is a nonconsensus item from task force. Concerned citizens and local government members of the task force suggested 100-foot separation for adequate protection of the groundwater. Some other members of the task force suggest as little as two feet separation. So there was a wide range discussed about that.

Our intent is to require a 50-foot separation from the bottom of the tank or pit to provide adequate protection of fresh water. And I think Mr. Price talked about this, Mr. Hansen's modeling modeled the impact of the 50-foot, the 100-foot, and less than 50 feet. So those were technical demonstrations and discussions that would support this.

What I would like to address is what we would anticipate in a submittal of a demonstration and compliance to siting criteria. And in this case we would be looking for current groundwater data from reliable sources such as the State Engineer's office, the USGS, or if there was any wells nearby, some real-time data obtained from those, so those would suffice for a demonstration for the siting criteria for this portion.

So that this would all be included as part of the information submitted in the hydrogeologic report of the engineering design plan, so this will allow us proper assessment of that information to make sure the proposal would grant the use of a temporary pit at that site. So that's why we're asking for that.

As you notice, there's some footnotes up there, 12 and 13. I'd like to address those together. I'll have to look at those from here.

There was, you know, the questions were, what are

the science and rationale for that? I think we've demonstrated that over the past couple days by Mr. Hansen's modeling, Mr. Price's discussions of the physical separation.

And then there was some comments that -- if you see there, there is a comment from -- it's comment -- footnote number 13 that suggests that it should be 100 feet. So this is from a task force member of what -- their recommendation of what they think it should be, greater than what we actually proposed.

So the 50-foot separation, we believe that the 50-foot separation to groundwater provides a minimal level of protection to support the proper construction and installation of a temporary pit.

The combination of the properly installed prescribed design, the 50-foot separation, is required to establish this -- I can't even say it -- cumulative level of protection for fresh water, public health and the environment.

We would like to comment on the -- that there was a comment provided October 22nd from Energen that recommended that this be omitted from the rule, and if that were to occur, such a change were to occur, it would allow operators the opportunity to install temporary pits and below-grade tanks in groundwater, since there would be no

defined separation.

Subparagraph (b), 300 foot to -- 300 feet to a continuously flowing watercourse, 200 feet to other watercourses, lakebeds, sinkholes, playa lakes.

The 200 foot was a nonconsensus item. In the summary report, this item is still highlighted in red, indicated as a nonconsensus at the time. We had discussed 200 feet, somebody suggested 30 feet so we put that in. It was still red in the summary report as -- and identified as a nonconsensus item.

And the reason I want to clarify that is because there are comments, as you see in footnote 14, that the 30-foot distance -- their reference to the 30-foot and the change to the 200-foot, by no means did the task force summary report indicate it was a consensus item. It was red, 30 feet, in that report. And we had -- we also provided the color-coding to that to identify as a nonconsensus item. So I just want to make sure that's clear in that.

So -- and there was -- it was widely discussed, this application. At a lot of -- I don't know how to approach this, but our basis of proposing the 200 feet to the watercourse lakebed, sinkhole, playa lake provision was based upon discussions from the task force and our participation in that. And I'd like to ask if it's okay to

-- because that's our foundation of this, if that's okay to comment on our -- not saying what other parties have stated, but based on our foundation on that, I just want to make sure that's okay.

Q. Go ahead.

A. Okay.

CHAIRMAN FESMIRE: I'm glad you answered it.

THE WITNESS: Yeah, I'm glad someone did.

It was really based on -- well, there were several provisions or considerations. One of them was practicality of operating equipment around a pit. The more you reduce that area of operation, the less you can actually do anything with that pit. And we realize that there's a lot of heavy equipment out there, so forth, that you need adequate room for that.

And the reason the 200 foot was proposed is that when you construct a temporary pit, you're required to have anchor trenches. That may not truly reflect the footprint of your temporary pit, it may go beyond that. So in that case you're already taking up additional space by putting in the anchor trenches. And there has to be room for that, which reduces that separation even more, reduces that area.

The other part of this is, you're also required to install and implement diversion measures to control surface water run-on into the pit or below-grade tank. In

order to do that, you have to have space to make that happen. So you may be putting up berms, you may be installing ditches or other mechanisms. And when you start installing those mechanisms, then you start restricting the use of that setback area. So if you have 30 feet, you've got your anchor trenches for your liner, and then you've got to implement these other measures to divert run-on, that area gets smaller and smaller.

The other concern is -- depending -- and we're talking about watercourses, being able to implement measures that will control erosional runoff from the operations site. Because we're talking about watercourses, sinkholes, we're talking about protection of surface water at this point. If you have 30 feet, you've installed your anchor trench, you installed your diversion measures, there should be some measure to protect surface water for erosional runoff from the area, which is runoff control. Where do those go, and how would you operate around that pit?

So our justification of the 200 feet is that it allows ample room for all these things to take place, safe operation with the pit -- actually, just operation with the pit -- and it's more of a practical matter, if you have 30 feet, with all this implementation of all these things that are required, you would -- there would be quite a reduction

of workable area around the pit. And so we're just wanting to make sure that there's ample room to implement the rest of the regulations, or proposed regulations or -- and provisions.

A good example for a demonstration of compliance for such -- for this siting criterion, would be the submittal of a topographic map, with the appropriate scale on it. This would allow us to determine the setback requirements and the proposed location of where the pit is going to be. And you know, we're looking at the pit footprint, not all these -- the anchor trench is not part of the -- it is part of the liner of the pit, but it is not the pit, so we wouldn't include that.

Certain parties, such as the industry committee, Yates Petroleum Corporation, have suggested to modify this and reduce it -- reduce the setback to 100 feet and limit the setback only to a watercourse, lakebed, sinkhole, playa lake, and to locate such activity safely above the water mark. I believe that's correct.

Such a change will allow operators to construct a temporary pit either next to or within five feet of a watercourse, because we don't know what safely means, so it could limit it to five feet or less from a watercourse, as long as it's out of a watercourse, is what they're alluding to.

Q. (By Mr. Brooks) And that would actually be in accordance with our existing Rule 50, would it not?

A. That is true. Such a change would also increase the chance of surface water contamination from erosional and stormwater runoff.

And just as a note, and this is -- the industry committee has also requested this change for the same provisions for excavating material and on-site closure. So I probably would just mention that as we go through and not address them again.

IPANM, they have suggested to modify the proposed language to reduce the setback to 10 feet. Their justification is that it is more than ample. A leak from the pit lining is not going to cause the contents to go sideways. Groundwater also as more than a 50 -- more than 50 feet below already, per provision, subparagraph (a).

In addition, the liner requirements of the proposed rule -- In addition, with the liner requirements of the proposed rule, it shouldn't matter how far away the nonflowing water is. This is a direct quote from their submittal from October 22nd.

The justification provided by IPANM does not demonstrate a concern for erosional runoff and potential surface water contamination, nor does it consider the required design and construction features of a temporary

pit or below-grade tank and the operational requirements of the proposed rule which address run-on diversions that are required to be constructed.

One of the most basic considerations not addressed is the practicality of working around the pit which we've considered.

As for the movement of liquids from a release, free liquids released from a pit or any other type of containment can and will move in all directions. They were worried about it moving sideways. And I guess what I'm getting at is that by diffusion, capillary pull, hydraulic head, it's going to move in the path of least resistance, and then it's not going to move just down. Once a free liquid is released into the environment, all these things will impact that, and it will move up, down, sideways, it will move in all directions.

I'd like to also state that they have requested this change to be applied to permanent pits, excavated material and on-site closure.

Two other parties have made similar recommendations, Energen and Devon. They've recommended that this provision be replaced with the siting criteria that currently exist in Rule 50, which states, No pit shall be located in any watercourse, lakebed, sinkhole or playa lake. Pits adjacent to any watercourse or depression shall

be located safely above the ordinary high-water mark of such watercourse or depression. No pit shall be located in any wetland. The Division may require additional protective measures for the pit located in groundwater sensitive areas or wellhead protection areas. That's what currently exists in Rule 50.

Devon has also requested that this change be provided for excavated material and on-site closure, and Energen has also requested the same provision be applied to permanent pits. Such a change would increase the chance of surface water contamination for erosional runoff and stormwater runoff from the working site.

Subparagraph (c). This is the setback requirements to permanent residence, schools, hospitals, institutions, church that are in existence at the time of the initial permit application.

This is task force consensus language.

And at the same time, I made my comments only to address the footnote that goes along with this. The footnote -- it's footnote 15. It was suggested that there's -- may be some city regulations that require a setback for a well itself and that this may not be necessary, or to set a minimum standard.

We would like to point out that not all municipalities, cities, towns, villages or counties have

established ordinances to address the location of drilling and the pit or below-grade tanks -- pits or below-grade tanks associated with those activities, especially in rural areas.

This concern was discussed during the task force meetings, and in the final task force meeting we actually reduced this distance from 1000 feet to 300. We agree with what was recommended by the task force. We think it's appropriate.

One of my exhibits was the city code from the City of Aztec. In that exhibit their recommendation is 400 feet. And from my research, I only found four municipalities in the State of New Mexico that actually have oil and gas ordinances, that have some type of ordinances to address oil and gas. All of them were not accessible to access, except for Aztec's via the Internet, to determine what the other setbacks -- or if they had setbacks. I know they do -- they state that they do have ordinances. They were not available through their websites.

So I'd like to point that out. And, you know, due to that limitation of those ordinances, we feel that OCD has a responsibility to at least set a minimal standard that will provide some type of level of protection and to prevent that.

Now another thing that impacts this, that could actually expand this 300-foot setback, is the provision, sign provision for the -- and even though it doesn't state it, it's for the wellhead protection area. So if there's a private domestic freshwater well or spring or a domestic or stock watering -- or -- yeah, or a domestic well, it may push this back to 500 to 1000 feet, even further. So there are those provisions. And those provisions currently exist in Rule 50, that you're not allowed to place a pit in a wellhead protection area.

So by -- I just want to make it clear that this is only -- this has a certain impact, that in rural areas where people have private wells, this may have a bigger impact, because they'll have to satisfy what is currently in Rule 50 for a wellhead protection area. And we also have that in here.

Something I forgot to mention, and I had mentioned earlier, are -- make sure I've got this right -- for paragraph (b), the 300 foot from continuous watercourse, this is one of the design provisions that we have that allows the district office to approve an alternative distance, based upon a demonstration by the operator.

We put this provision in there -- and this was actually task force language, I believe -- to address the

issues of a determination of the watercourse in the northwest part of the state. And everyone is worried about this little tributary or -- it's not even tributary, it's just an erosional line, being considered a watercourse. We're allowing the -- in this case, the district office to grant administrative approval based on their consideration by the demonstration by the operator to justify that that's not what they think it is. So I just wanted to point that out.

For this demonstration, for the 300-foot setback, things that we'd be looking at in this -- and we're trying to make this not as difficult as it sounds, but with this proposed rule we realize we're going to have to probably modify our C-144 form to make it appropriate to assist in these applications. So what we'd probably be looking for is some type of checkoff box for confirmation. And on our form we probably include some type of certification statement from the applicant or operator stating that this is true.

Let's see, subparagraph (d), within 500 feet -- or horizontal feet of a private well, domestic freshwater well or spring that less than five households use for domestic or stock purposes, or within 1000 feet of freshwater well or spring. This is the definition of a wellhead protection area as it is in 19.15.1.7, the general

provisions definitions. This is the language that defines wellhead protection area.

Q. This is the definition that currently is in effect?

A. Yes --

Q. Okay.

A. -- and this is also siting criteria that currently exists under Rule 50.

Q. However, that siting criteria are not mandatory under Rule 50 in that there can be pits within wellhead protection areas under Rule 50, subject to such additional protection as the Division requires, correct?

A. Yes.

Q. Continue.

A. This is task force language. They thought it was prudent to define what a wellhead protection area is, then state that it shouldn't be within a wellhead protection area. We concur with that. It makes it easier for applicants and operators to understand what they have to comply with in this case. And of course, the intent is to protect existing and established freshwater sources, thus protecting public health and the environment.

An example for a compliance demonstration for the siting criteria would be -- and this is an example -- would be current data from the State Engineer's Office, which

would be provided in the hydrogeologic report. They have the data base, their i-WATERS database, showing permitted wells, domestic wells, the classification of those wells, some topography maps, wells that have indicated springs are present.

And we would probably provide also a checkoff box that would confirm this is true. And the reason -- the need for the checkoff box is that, even though the State Engineer's i-WATERS database has a listing of permitted domestic wells, they do not have all wells that have been constructed because of their -- I believe it's declaring certain water areas. They -- there was -- prior to their implementation of the database, wells were installed and were not documented. So there's no record of such wells. So there may be a domestic well present that is not documented by the State Engineer's Office, and by having a checkoff box that certifies -- has a certification statement which someone will sign, would -- if one was discovered within proximity of the proposed pit or a below-grade tank, they would be subject to some type of action from the OCD of falsifying that information, since they have knowledge of that information, and we could address that. But we're counting on them providing us the correct information, making their statements true.

Certain parties such as industry committee and

Petroleum Yates -- or, I'm sorry, Yates Petroleum Corporation -- they have recommended to reduce the setback for a freshwater well or spring to 500 feet. Their justification is that the OCD proposal provides greater protection to public wells and springs. Such a change will allow operators to construct temporary pits, below-grade tanks within a wellhead protection area, which is not the intent of the proposed provision and conflicts with the requirements operators have been and are currently complying with today. Industry committee and Yates petroleum corporation have also requested this change to the same provision for on-site closure.

Subparagraph (e). This language here was proposed -- well, is proposed -- a portion of it, the part that's in green, clarify that, is proposed language by the task force. And of course their portion only addressed incorporated municipal boundaries and the ability for municipalities to specifically approve an alternative setback.

The generation of the siting criterion stemmed from concerns associated with population densities and potential of future construction over buried waste material -- I think Mr. von Gonten demonstrated the outcome of that through the Westgate site.

The footnote, footnote 16, is a comment from the

City of Lovington of their -- I guess they were nice -- it was kind of comment, a positive comment, of including some provisions, and they are one of the parties that have their own provisions.

Q. Is that rather unusual for the OCD to receive a positive comment?

(Laughter)

A. Yeah, and I wanted to note that. But we provide this additional language addressing the municipal freshwater wellfields due to the case where such wells may be located outside -- or separate from incorporated municipal boundary.

And the additional provision identifies section 3 which is titled Potable: jurisdiction over water facilities and sources, of article 27 which is titled water facilities, of chapter 3 which is titled municipalities of New Mexico -- I'm sorry, yeah, of New Mexico statute. This is a statute which authorizes the jurisdiction of the municipalities to protect its water facilities and water from pollution which extends from within and without its boundary to all territory occupied by the water facility, all reservoirs, streams and other sources supplying the reservoirs and streams, and five miles above the point from which the water is taken. By doing so, this ensures the protection of fresh water, public health and the

environment.

I do believe, if I'm not mistaken, one of my exhibits has this statute in it. So if there's any -- There it is right there. So this is the plain language of the statute, if anyone would choose to -- wish to review it.

An example for this -- example of this -- of exception [*sic*] to compliance of the siting criterion would be a checkoff box -- and this is an exception, because what it does -- yeah, within the incorporated municipal boundary unless a municipality specifically approves, and the same with the freshwater fields -- it would require the municipality to specifically approve that a temporary pit or below-grade tank would not be allowed in this area.

And so what we would have for a demonstration would be a checkoff box with a confirmation or a certification statement with the signature. And if they're asking for exception -- or approval from the municipality, then we would be -- let me see, make sure I've got this -- yeah, a written statement from the municipality approving such an exception to what's listed. So if they were saying it's going to be within an incorporated municipal boundary or within that defined municipal freshwater well field, they would have to provide a written statement from that municipality. Other than that, we would have no other way

to confirm that, so... Okay.

And for clarification purposes, I just want to state that if a municipality approves an alternative, it will not trump or supersede a stricter, more stringent siting criteria within this provision, meaning that if they say that you can locate it over here, and by chance it's within 200 feet of a public water source or a private well, that approval by the city does not supersede all these other restrictions such as the setbacks from the watercourse, continuous stream, 500 feet of a wetland or in a floodplain, that would not allow that to supersede these other provisions that are listed. I just want to make that clarification.

Subparagraph (f), within 500 feet of a wetland. This is task force consensus language. The protection of a wetland currently exists in Rule 50. The generation of the siting criterion stems from concerns associated with the sensitivity of wetlands due to surface water impacts from contaminants and erosional runoff. By establishing the setback to wetlands, it reduces the risk of contamination of surface water and groundwater, thus protecting human -- or public health and the environment.

An example of a compliance to this siting -- demonstration of a compliance to this siting criteria would be a topographical map. And this information would be

provided as part of the hydrogeologic [*sic*] report of the engineering design plan.

Subparagraph (g), within the area overlying a subsurface mine, unless the appropriate district office specifically approves. This is another one of those provisions that is subject to administrative approval by the district office. This is task force consensus language. The intent is to ensure that a temporary pit or below-grade tank is not constructed in the area that is structurally unsound. If placed over a shallow or unstable subsurface mine, the pit or below-grade tank could collapse in the mine, it could create a release, it could create danger -- it could endanger workers, so forth.

So we just want to make sure that that is considered in the construction of these -- and siting of these pits and below-grade tanks.

An example of compliance for the siting criterion is usually -- and this is applied to other regulations, even today -- is usually a written response and assessment from the Mining and Mineral Division which would identify the legal description of the proposed area that should be assessed. And they have maps, and they print out those maps and send them out, or else they say there are no subsurface mines in that area. They do this for hydrostatic tests, discharges, they do this for solid waste

facilities for their assessment, to make sure they're not constructed over those areas. And so this is a common thing that they're -- request to do, to make these assessments.

And of course this information would be provided as part of the hydrogeologic report and the engineering design plan.

Subparagraph (h), within an unstable area,unless the operator demonstrates that it has incorporated engineering measures into the design to ensure that the integrity is not compromised. This is task force consensus language, and the intent is to ensure that a temporary pit or below-grade tank is constructed in an area that is structurally sound.

Examples of unstable area would include areas of poor foundation conditions, areas susceptible to mass earth movements and karst terrain areas where karst topography is developed as a result of dissolution of limestone, dolomite or other soluble rock.

And I'm sure you guys are wondering, Where is he coming out with this language, and does it sound familiar? It is the definition for unstable area, to some extent, that is provided under part 36 that was approved by the Commission. We have taken out landfill, out of that definition, but included the conditions. And we're

preparing that to be a new definition to go into part 1, section 7, the general definitions, so it can be applied to all OCD rules that may reference the unstable area. Then it would be defined.

An example of compliance for this siting criterion would be data from such reliable sources as the New Mexico Bureau of Geology and Mineral Resources, USGS or New Mexico Geological Society, and we would also anticipate the submittal of a topography map -- or a topographic map, because usually they do indicate such features, especially some of the karst formations that would indicate sinkholes. This information would be provided as part of the hydrogeologic report of the engineer design plan.

Subparagraph (i), within a 100-year floodplain. This is a task force consensus -- this is task force consensus language. The intent of this language is to ensure that a temporary pit or below-grade tank is not constructed in an area subject to a 100-year flood event. The siting requirements prevent the flooding or washing away of a temporary pit or below-grade tank if one of these events occurs.

I think last summer would be a good example for the southeast of those events occurring, with the tremendous amount of rain that was received in those areas.

An example for compliance with this criterion

would be the submittal of a FEMA map, FEMA, the Federal Emergency Management Agency. They designate these areas, they have a website, these people, directly off the website. It takes about five to 10 minutes, as soon as you can figure out where you're at. And this would be submitted as part of the hydrogeologic report of the engineering design plan.

I would like to comment that Energen has suggested that this provision be omitted from the proposed rule. Such a change would subject such activities to flooding and overflowing, causing pits and below-grade tanks to be washed away during a flood event. Energen has also requested this provision -- the same request that this apply to permanent pits.

Just for some general topics I'd like to discuss, the examples of compliance with the siting criteria, the demonstrations of compliance I have referenced. They are examples. Each proposal will have to be assessed on a case-by-case basis. In some cases, OCD may have prior knowledge or data that contradicts or opposes the information or statements provided in the applications. In such instances, OCD may request additional information or require more extensive assessment of the proposed site. For example, the district office may require the installation of a piezometer if there is any question about

the 50-foot separation based on prior knowledge of groundwater in the area.

As you may observe, some of the siting criteria are subject to district office administrative approval for alternatives based on specific demonstrations. Those not subject to administrative approval are open to exceptions, which must be pursued through the exception provisions and submitted to the Santa Fe office for consideration.

Another clarifying point. If an application is approved, a permit is issued and an OCD representative visits the site during the operation of the permitted activity and observes that the siting criteria proposed in the approved application does not represent the location of the activities at the site, the OCD may determine that the operator is in breach of the conditions of the permit, and the operator may be at risk of having their permit revoked or suspended.

We're counting on the applicants' operators to provide us the appropriate information that represents the site that they're proposing to construct these temporary pits or below-grade tanks, and we're counting on that. But if we do go out and observe that the information they have provided us is not correct, then we would have to respond.

Q. Mr. Jones, the next section which -- or sub- -- I'm sorry, the next paragraph, which deals with the --

CHAIRMAN FESMIRE: Mr. Brooks, would this be a good place to take a lunch break?

MR. BROOKS: Well, I think just after the next question would be, Mr. Chairman. This is going to, I think, elicit a rather brief response.

CHAIRMAN FESMIRE: Something to the effect that this is just like the ones we just went through?

MR. BROOKS: That's exactly what I'm going to ask.

CHAIRMAN FESMIRE: Why don't you go ahead and ask that question.

Q. (By Mr. Brooks) With one exception, is not the -- are not the siting criteria for permanent pits exactly the same as the siting criteria for temporary pits?

A. I don't want to limit it to one, because there are some notes here --

Q. Well, I'm talking about just the statutory provisions.

A. Okay. Yes, there's only one provisional change, compared to the -- And actually, I prepared my presentation to spare the Commission, to hit the high points. And there is only one difference in the siting requirements between a permit --

Q. And what is that?

A. That would be the distance, the setback

requirement, for permanent residence, schools, hospitals and institutions at the time of the application, and the difference is, is that the temporary pits, that standard will be 300 feet. For permanent pits that has been extended to 1000 feet. And this is to provide additional protection due to the duration of the use of such a pit and the size and the permanence of it and the type of operation that occurs there.

MR. BROOKS: Very good.

Mr. Chairman, that will be a good place for us to take a break.

CHAIRMAN FESMIRE: Okay. Prior to breaking for lunch, is there anyone that would like to make a public comment on the record?

Okay, there being none, we will break for lunch and reconvene at one o'clock in this room.

Thank you all.

Oh, I'm sorry, 1:30.

(Thereupon, noon recess was taken at 12:20 p.m.)

(The following proceedings had at 1:34 p.m.)

CHAIRMAN FESMIRE: Let's go back on the record. Let the record reflect that we have reconvened. It's 1:35 on Thursday, November 8th, 2007. This is Case Number 14,015. Let the record reflect that Commissioner Olson, Commissioner Bailey and Commissioner Fesmire are all

present, we do have a quorum present.

I believe we were in the middle of the direct testimony of Mr. Brad Jones; is that correct, Mr. Brooks?

MR. BROOKS: That is correct. May it please the Commission?

CHAIRMAN FESMIRE: It may, sir.

Q. (By Mr. Brooks) You may proceed.

A. I think when we last left, there was a brief question about permanent pits and siting criteria. I'd just like to make a general statement that the justifications expressed for temporary pits -- I think I've stated that -- for temporary pits and below-grade tanks can apply to permanent pits. And the examples for a demonstration of compliance, most of the suggested examples I've provided for temporary pits and below-grade tanks would be acceptable.

The only one that might require some additional investigation would be for groundwater determination for a permanent pit, we might request or require the installation of a piezometer, just for verification due to its permanency. So I just wanted to -- for the record.

The next provision, paragraph (3), this is a topic that was brought up and discussed in the task force. This is the location of the materials excavated from the construction of a pit. This could be applied to a

permanent pit or a temporary pit, we did not specify which.

But the original task force language and the summary report kind of incorporate this under temporary pits. And I believe, if I'm not mistaken, under permanent pits for the location of the soil, and it had -- put it in relationship to the watercourse siting criteria.

We looked at this and we decided to expand upon this. We felt like it should be a separate item. And our reasoning for this is that we were looking at events that were naturally -- well, we were looking at this material, not that it has contamination in it, but its potential to contaminate surface water. So we suggested that we include wetlands and floodplains in order to prevent natural forces or events from displacing this excavated material and to prevent the erosional runoff from contaminating surface water. So that's why we separated this and we made this suggestion.

Of course, emergency pits, this was also an item, task force item, that was recommended in the summary report. We thought it was prudent that, you know, it would only be used in emergency situation. And you know, this would -- this is exempt from the siting criteria in order to promote the application of an immediate safety -- immediate safety protocols for the primary protection of human health and public health. And secondarily, it would

be a protection of freshwater and the environment.

But there are provisions as we go down through here that -- when we get to the emergency pit provisions, that we'll address that if the operator is to construct such a pit, they do so in a manner that's consistent with the requirements of a temporary pit. So we do have some language inside there that it's -- even though it doesn't meet the siting criteria, that it is required to be constructed consistent in a manner with the requirements of the temporary pit.

C, this is a new concept here, and it's the on-site closure method, siting criteria. What we're looking at here, our attempt -- our intent is to establish the siting criteria for these -- any type of method that would involve on-site closure.

And our reasoning behind this is, the permanence and duration of the application of the closure is permanent. It's not a temporary-type deal. If it's going to apply, it's going to be there. And so we felt that the siting criteria would provide this additional level of protection over time.

As you notice, the siting criteria are the same as those for the construction of a temporary pit or below-grade tank. The conceptual idea is that an operator shouldn't bury or leave waste material in a location that a

temporary pit cannot be constructed, operated or permitted. So we thought at least it provides a level of protection.

Once again, most of the justifications and the expressed intents for each of the siting criteria are those -- well, for this provision, would also apply for those -- well, let me make this clear. The expressed justification and intention for temporary pits would also apply to these provisions and also the demonstrations.

And the reason I like to bring up the demonstrations is that for existing pits, closed-loop systems and below-grade tanks, if they were -- well, in this case it would only address temporary pits and closed-loop systems, which are allowed for on-site closure. If they're existing and they do not have a closure plan submitted, if they were to propose an on-site closure method, this would -- they would have to meet the siting criteria.

And I believe there's a comment to that section, comment 17. And at the time we had -- and I'll explain this as well. Our draft version had on-site closure addressed as the exception, and it was incorporated into the exception section of the rule.

After receiving multiple comments, we decided to incorporate this into the rule to a certain extent, especially deep -- what we call on-site deep-trench burial.

In the alternative to that, we would also process that through the exception process. So this comment is somewhat addressing that provision.

So what we were going to do is clarify that we've created this subsection to ensure that equivalent protection would be considered when implementing an on-site closure method, as it would for operation of any permitted activity.

Okay, design and construction specifications. Our intent is to establish a uniform design and construction standard that when applied collectively with the proper siting and operation provides an adequate level of protection for fresh water, public health and the environment. The current Rule 50 doesn't provide any detailed design and construction specifications for pits or below-grade tanks.

It does provide some general -- In some areas -- I'd like to clarify this -- it does provide in some areas, especially for disposal pits, double-lined secondary containment, but it doesn't state what thickness of the liner to be used and so forth, and that's the difference we're looking at here.

In the current regulations, some of the general performance standards which have been referenced here state things like, Each drilling pit or workover pit shall

contain, at a minimum, a single liner appropriate for the conditions at the site.

This right here, the reason that we're adding these specifications is, a lot of materials could be considered a liner material. Six inches of bentonite clay could be considered a liner, a geosynthetic liner could be considered a liner. We'd like to clarify this to make sure that there is a standard in which we think will provide the proper protection. And by creating -- our guidelines kind of alluded to what that intent was. So this is where we're going to start incorporating those ideas of the guidelines into the rule.

Subsection A, general specifications.

The general specifications are just that. I mean, they are a general performance standard --

CHAIRMAN FESMIRE: Mr. Jones, I'm a little lost. Where are we at now?

THE WITNESS: We are under design --

CHAIRMAN FESMIRE: 17.11?

THE WITNESS: Yes.

CHAIRMAN FESMIRE: Okay.

THE WITNESS: Yes. The previous comment was just to put the idea of why we've created this subsection --

CHAIRMAN FESMIRE: Okay.

THE WITNESS: -- for design and construction.

Now discussing subsection A, general specifications.

If you notice in the footnote -- and I believe it was footnote 18, there's an inquiry about sumps. Sumps were a discussion of the task force. The consensus language proposed operational requirements for operators of sumps. We incorporated those operational requirements into the rule. The permitting of sumps was discussed during the task force meetings, and it was agreed upon that the intended purpose of a sump was not to store waste material but be put in place to capture material if it -- if a leak occurred. Thus, the proposed operational requirements would be sufficient to support OCD's ability to enforce if that's not the way it was performed, or if they didn't provide proper operation of the sumps.

The current and proposed definitions -- I don't quite understand my comment there, but -- Okay, we concurred with the task force assessment of the operational requirements, but we also thought it was prudent to ensure that the sump be included in this general specification of design and construction -- or proper construction -- for proper containment, prevent contamination of fresh water. So the idea is that it should be constructed to contain the liquids if it were to capture -- or solids, to capture those. So it's just a general specification requirement.

Subsection B, stockpiling of topsoils. This is

actually a concept that came out of the 2004 OCD guidelines, and this was something -- of course, you see it's in black, it was not really -- I don't know if it was discussed -- well, it was discussed in placement for siting criteria during the task force, but we thought that this language would provide proper instruction to operators to assist in the facilitation and implementation of best management, which are really goal-oriented. If you can stockpile the topsoil, then you can use it for your final cover design or your soil cover to facilitate the vegetation, the re-vegetation in the area.

So we actually took this from the guidelines and incorporated it into the rule.

Subsection C, signs. The OCD's intent is to provide information and instruction to regulators, general public and operators to assist in the identification of the responsible party and the contact information in order to resolve any emergencies or outstanding compliance or safety issues.

Once again, this concept of requiring signs is not a new concept. It originates from the OCD guidelines. So in this case we're incorporating that provision into our rules, which currently doesn't exist in Rule 50.

The fencing requirement. The task force consensus language for fencing was created to address

safety issues for the protection of the public, especially small children, wildlife and livestock. The current Rule 50 doesn't provide any detailed construction specifications. It does state that you have adequate fencing to prevent access. We thought that it would be prudent to look at this, to make that more finite and to add these specifications.

So we agree with -- and these were things that were discussed at task force. We agree with these -- the recommendations from the task force and for the design specifications and construction, and -- in order to at least establish some type of minimum standard protection.

Paragraph (1). This right here, if you notice, this is kind of the general performance standard for all. This is -- the majority of the proposed wording for this provision is task force consensus language, except for the inclusion of below-grade tanks.

As stated before, the main focus of the task force discussions were regarding pits. Thus, below-grade tanks, closed-loop systems, were not always included in the discussions regarding specific requirements. This left the OCD with the responsibility to determine which of the other permanent activities should be incorporated and covered by the concepts suggested by the task force.

In this case, OCD decided that including the

fencing requirement for below-grade tanks was prudent in order to establish the minimum level of protection for public, wildlife and livestock.

The proposed language expands upon the existing language of the rule and informs operators that if the surrounding perimeter fencing satisfies the specified requirements, additional fencing is not required.

OCD agrees with the concept suggested by the task force and has incorporated those into the rule.

Paragraph (2). The siting requirement, minimum design specification and operational requirements are proposed to provide a minimum level of protection to the general public, especially when the operator or personnel are not on site. The 1000-foot setback was recommended by the task force due to concerns of public safety. OCD agrees with the task force recommendation and has incorporated it into the proposed rule.

I'd like to state that based on the October 22nd submittals, Energen suggested to reduce the setback to 300 feet. Such a change would allow operators to use a four-strand barbed wire fence at 103 [*sic*] feet to restrict unauthorized access and provide public safety. We don't feel like that setback is adequate.

Paragraph (3), this pertains to other types of fences that are to be applied to pits and below-grade

tanks. Minimum design specifications provide primarily for the protection of wildlife and livestock. The language allows the OCD the opportunity to require additional fencing if minimum specifications are not sufficient.

The language also -- just for clarification, this language and the authority is in the current Rule 50, so this is what is required by Rule 50.

Certain parties such as the industry committee and Petroleum -- Yates Petroleum Corporation, has recommended to change the five feet to four feet, saying that standard fencing height is four feet, and establishing the five-foot condition would require operators to purchase and install nonstandard-height fencing at great additional time and expense.

I'd just like to clarify that the five-foot reference is to the required maximum height in which a stand of barbed wire must be installed or placed.

This provision requires the installation of a barbed wire, which is commonly constructed and not pre-manufactured. So this is not a chain-link fence, this is a barbed-wire fence.

Subsection E, netting. The proposed -- or the pit rule task force language for netting is a modified and expanded version of the requirement of the existing rule. The new language requires routine inspections or reporting

if netting is not feasible. This allows the operator the chance to work with OCD to resolve any outstanding issues. OCD agrees with the concepts proposed by the task force language as incorporated into the proposed rule.

As you will notice, there are no design specifications for netting. This is due to the multiple methods that can be applied or have not yet been proposed. We're unwilling to place that restriction, especially if there's a practical proposed method.

Subsection F, this is temporary pits. This is for the construction, design. The intent of the proposed language is to incorporate specific design specifications into the regulations in order to establish a standard level of protection. The siting requirements, design and construction specifications, operational requirements and proper closure combined provide a cumulative level of protection for fresh water, public health and the environment.

The first -- I guess paragraph (1), this is a modified version of the task force consensus language. The proposed language informs the applicant or operator that proper sizing and construction is required. OCD agrees with this general concept presented by the task force as incorporated into the proposed rule.

There was a suggestion from certain parties --

and I didn't identify those in my notes, and I thought they might be -- well, I won't say -- I'll just say certain parties, to request a removal of gas. This language is a modified version of language in Rule 50 that addresses natural gas. It's my understanding that natural gas can come out in a liquid form, and that was our -- the reason that we had gas in there.

Paragraph (2), the task force consensus language for subgrade, foundation preparation derived from similar specifications in the OCD guideline. Current rule does not provide for any instruction or specification for subgrade or foundation preparation in which the liner will be placed.

I guess the slide show that we saw on the first day and some slides that Mr. -- some photos that Mr. von Gonten had, demonstrates the importance of a proper subgrade prep. It definitely has an impact on the liner. Actually, during our sampling event, I would state from my observations that it was, in most cases, the primary cause for liner-integrity failure, it was due to either not preparing the subgrade or properly preparing the subgrade prior to putting in the liner.

Another issue addressed in this provision is the interior slopes of the temporary pit. Slopes greater than 2 to 1 place undue static stress on the liner materials and

seams as the drilling fluids and cuttings accumulate and build up at the bottom of the pit. Liners are geomembrane-type material. They do have some flexibility or elasticity to them that allow them to stretch, but there's a limit to their ability to do that.

And I believe Mr. Chavez will be talking about the importance of the proper subgrade construction and the impact of the integrity of the liner in conjunction with that.

Certain parties, such as the industry committee and the Yates Petroleum Corporation and IPANM have recommended to omit the interior slope requirements. The industry committee and Yates Petroleum Corporation recommended that the slopes be established to avoid undue stress on the liner system and not to exceed the angle of repose.

This is an example of a performance-based provision, which we're trying to move away from, and such a change will allow for the construction of temporary pits to have interior slope of at least 90 degrees. What this creates, it not only will create additional stress and strain on the liner and seams, it also creates a safety factor.

From our sampling events, we had to harness up to get into the pits, and at times it took several people to

pull us our or prevent us from falling into the pits, even at, I would say, four-to-one slopes or three-to-one slopes at times. To have a straight sidewall wold create a safety hazard for workers or for anyone that did gain access into that area. If they fell into that pit, they would not be able to get out. The liners are slick, and once you get into the monitored and produced water, it would create some danger.

So we're -- we propose this two-to-one. I know there's a lot of concern about expanding the area of a pit, but there is a safety issue related to that slope -- interior slope requirement.

Paragraph (3), this was definitely a nonconsensus item, the determination of the liner specifications or -- This was a nonconsensus item for the task force. There were several options discussed, 12-mil, linear low density polyethylene, 20-mil PVC, 20-mil HDPE, 20-mil linear low density polyethylene, 30-mil PVC and 60-mil high density polyethylene geosynthetic materials were discussed in the task force committee meetings.

Q. (By Mr. Brooks) Let me interrupt you here. What -- the current Rule 50 does not have a liner-type specification, correct?

A. No, it only requires a liner.

Q. What is the liner thickness that -- or what is

the liner specification in the current guidelines?

A. I believe it's 12-mil.

Q. Does it specify the kind of liner, or just the thickness?

A. I'll have to check. I have it right here. It's just thickness.

Q. Okay, continue.

A. OCD's proposal of the 20-mil liner provides an observed higher level of protection in conjunction with proper siting and operating. Mr. Carl Chavez will be discussing this in detail, regarding the proper liner.

Our intent is to move away from practices utilizing unlined pits, which I believe everyone has agreed upon to a certain extent, and substandard liners.

Paragraph (4), OCD's intent is to ensure proper placement of liner seams in order to prevent seam closure due to unavoidable design and construction static stresses.

During our process of creating, reviewing and revising the proposed rule, we accidentally removed some of the task force consensus consensus language. This is part of the submittal Mr. Brooks provided yesterday.

At this time I'd like to read into the record, OCD proposes an additional sentence be added to this paragraph, and the new language would read, The seams shall be welded.

I'd like to clarify that this is in the final summary report by the task force, this language, and it was --

Q. Is this consensus -- are you saying that this is consensus language?

A. This is consensus language from the task force.

Q. The added language?

A. Yes, yes.

The current practice of dual seaming is stitching. I think you saw a lot of those photos shown of the stitching, and it's -- I don't know -- personally, I don't know what material that they used. It looked like the natural -- the stitching I've seen looks like some type of natural material, not a geosynthetic material, that's being used.

And the way it works is that usually the stitching requires needling or sewing to connect separate pieces of the geomembrane together. We feel that this weakens the integrity of the liner and creates a conduit or pathway in which fluids can escape.

Field seaming methods -- I'm sorry, geomembrane material such as linear low density polyethylene, it's designed to stretch. This is a characteristic of the material. If you use a field seaming method like stitching, that's not going to give. It's pretty much set,

so it's going to -- if it does stretch, the stitch -- a lot of the photos that were shown the other day have shown that it either pulls it apart, the seam apart, or the stitching itself seems to fail. So we are recommending that welded seams be used for this.

Now, welded seams may involve the use of solvents -- that's considered a chemical weld -- or a thermal weld from such methods as heat seals, heat guns, dielectric seaming, extrusion welding or hot welding [*sic*] techniques.

The welded seams allow installers to verify their integrity by performing these non-destructive tests which usually involved putting air and trying to hold air pressure within the seam, because it's an overlap of the material, it's seamed on two sides, and it leaves an air pocket in the middle.

If you use a stitched seam there's no way to demonstrate or know if that's going to hold, but a welded seam can be tested for that purpose. So there is some difference between the two.

Paragraph (5), the intent of the proposed language for this is to inform applicants and operators that care is required in the insulation of a geosynthetic liner material, that the operator installs the liner in a manner which does not rest smoothly on the prepared foundation and the interior slopes exceed 2-to-1

requirements, excessive stress and strain will be placed on the liner when the operator begins to collect fluids or solids in the temporary pit.

So this is just one of those general -- it is general, but it's supported by more specific requirements for installation, design and construction.

Paragraph (6), the proposed language is a modified version of the suggested task force language. The intent of the proposed language is to address situations or scenarios where the existing subgrade or foundation consists of rocks, debris, sharp edges or irregularities that may compromise the integrity of the liner.

I believe there's a lot of locations in New Mexico that we have discovered, especially in the southeast.

The task force suggested that the geomembrane -- or geotextile material may be required, making it optional and not specifically -- specifying which party has authority to make the determination. The language proposed by OCD states that it "is" required to ensure the protection of the liner.

Paragraph (7), the task force recommended the concept of anchoring of the edges of the liner, but suggested an additional method -- OCD suggested an additional method of -- I -- rephrase this.

The task force recommended the concept of anchoring for the edges of the liner, and in doing so the additional method of the use of anchor trench.

This -- And what they didn't do in their proposed language was specify the construction of that anchor trench. An unidentified [*sic*] method that would prevent pooling of the edge of the liner to the surface -- to the ground where it would be exposed to the wind as the liner settles in the pit. The most common application of such a method is having the liner lay on the ground and place dirt on it. I think this was discussed yesterday.

Mr. von Gonten talked about -- and I can't think of the term he used, when the wind blows the liner, and -- but a lot of the photos have demonstrated that that method does not secure that liner in place, so it seems to be a deficient method.

The anchor --

Q. Is that term wind whip?

A. Wind whip was the term he used yesterday, yes.

The anchor trench requirement ensures that the liner is secured and that it will not allow for erosion as used in the other method to occur beneath the pit and compromise its integrity by washing the liner edge into the pit below the fluid level creating a potential cause for release or compromise the integrity of the liner.

IPANM has recommended that the anchor trench -- provision about the anchor trench shall be at least 18 inches deep be omitted from this provision. Their justification is that the field evidence demonstrates that anchor trenches are not needed.

I believe the photos speak for themselves from the past couple of days that it is definitely needed to prevent compromising the liner itself with the -- be it solids or fluids, the integrity beneath the liner, if not the liner itself.

Paragraph (8), the intent of the proposed language is to protect the liner from damage during discharge into or suction from the pit. And I thought there was -- well, I know there was at least one photo of a fencepost in Mr. von Gonten's slide show. And I'm unsure if there was one where there was a piece of rebar stuck in one that's seen, but I -- I can't say without confirmation if that was there.

Those photos -- Well, since I don't know for sure I won't state. But based on Mr. von Gonten's testimony yesterday, his concern was compromising the integrity of the liner. But I personally have seen at sites, is, I've seen rebar stuck into the liner, up -- and it -- I will admit, it was up on the -- I wouldn't call it the bermed area, but it was the area outside the pit. And its intent

was to maybe put a suction hose inside there to pull the water out by certain operators.

And our concern about this is that it does compromise the liner material, it can cause liner to continue to rip down the side into the pit, especially when it's up high above it. And so we have placed this provision in the regulation in order to prevent that activity.

This concept is nothing really new, it actually comes from the OCD guidelines. It was recommended by the task force. We have made a few additions, but we have incorporated this into the rule.

Paragraph (9), the intent of the proposed language is to require the operator to implement measures that will divert surface water run-on away from a temporary pit and to prevent the collection of runoff surface water in the pit as well, and overflowing -- or overflowing of the fluids from the pit if collected, and any erosional issues around or beneath the pit that may compromise the integrity of the liner.

The proposed language was recommended by the task force and incorporated into the proposed rule. Once again, several pictures have been shown the past couple of days to show the importance of the diversion of this water, how it has eroded soils underneath the pit, and this is why we are

requiring this. We like to -- if the pit is delayed in its closure, as is stated in our closure plan, pull the water off, you still have solids, the solids are still wet. We like that pit to be -- the liner in that pit not to be compromised during that process.

Paragraph (10), the proposed size limit was suggested by the task force. OCD modified the proposed language to include in that sizing the two-foot freeboard in the calculation of the size of that pit.

Paragraph (11), the proposed language recognizes and identifies current and common practices which are implemented during drilling. The installation of a liner would not always be prudent due to the results of the venting or flaring of gas compromising the integrity of such liner if it was installed.

So we have -- in this case we're talking about the venting and flaring of gas while drilling, especially if it's flaring. If you put a liner up, the likelihood of that liner serving the purpose would probably be minimal.

As for venting of gas, usually such events or activities include the venting of gas and liquids in which the force of the venting may compromise the liner as well, making it ineffective.

OCD would like to request that one additional sentence to this provision be added in order to provide

clarification of the anticipated operational requirements regarding this part of the temporary pit used for gas and flaring during the drilling or workover operation. The additional sentence would be added to the end of the provision and state, The operator shall not allow free-standing fluids to remain on the unlined part of the temporary pit used to vent or flare gas.

Q. This is one of the recommended changes that was submitted to the Commission yesterday, correct?

A. Yes.

Okay, subsection G, permanent pits.

There's a footnote with this. There was -- I guess there was some confusion by task force members, because it was our understanding that it was agreed upon by the task force that permanent pits would be designed and constructed in the same if not similar manner as evaporation ponds permitted under the surface waste management rule, part 36.

Since the design and construction specifications for evaporation ponds are already established, and in fact under the surface waste management rule the task force chose not to re-address the technical requirements in those regulations, OCD agreed with the assessment of the task force, and due to the nature and purpose of the permanent pits that would be regulated under the proposed rule to

store and hold liquids for extended periods of time and have large volumes of liquid commonly associated with those, we agreed that the rules under part 36 are appropriate for these types of pits.

In stating that, there was another footnote, footnote 22. Dr. Neeper brought this to our attention. The regulatory requirements provided in the draft version to the task force mimic the regulatory requirements if part 36, which allows an operator to use a three-foot clay -- three feet of clay in place of a synthetic liner to construct the secondary liner, which is part of -- the leak detection system is incorporated into part of that.

As the regulation -- regulatory language continues to refer to this upper -- they refer to the upper and lower geomembrane, so it creates some confusion, because in the original language under 36 it says there has to be an upper and lower membrane, but then it allows for three feet of clay in substitution of the secondary liner, the lower geomembrane.

We agreed with Dr. Neeper that this language from part 36 may create some confusion, so we decided that the -- to make that secondary liner that originally was -- we considered the three feet of clay to be inappropriate for this design, so now we've changed the -- modified the language in (3) of -- paragraph (3), to state that the

upper -- or the primary (upper) liner and the secondary (lower) liner shall be a geomembrane liner, and we've specified what that should be, so...

And with the agreement with everyone else, since this is established in part 36 I won't go into the details of the construction of the permanent pits.

Subsection F -- I'm sorry, H, closed-loop systems.

The intent of the proposed language is to instruct operators of which design and construction requirements apply, depending on how a closed-loop system is utilized. Operators of closed-loop systems that use a temporary pit must comply with requirements for temporary pits.

For operators of the closed-loop systems that uses a drying pad, OCD has proposed some less stringent design and construction specifications. These are due to the ability of their method to reduce the waste volume and reduce risk of contamination of fresh water, public health -- fresh water and protect health and the environment by extracting and removing fluids and liquids from the waste stream.

So we felt that their method in the use of the drying pads, since it's not holding liquids, would be more protective and would need -- wouldn't need as stringent

requirements as a temporary pit or a permanent pit.

I'm going to let those requirements speak for themselves, unless you guys want me to go line by line.

Q. I think that will not be necessary.

A. Okay.

I, below-grade tanks.

The proposed requirements for the design and construction of a below-grade tank is a combination of proposed language by the task force, regulatory language from the existing Rule 50, and language from the guidelines.

OCD's intent is to ensure that all below-grade tanks have both secondary containment and leak detection. The secondary containment provides a level of protection for fresh water, public health and the environment if the integrity of the primary tank fails. The leak detection system is the mechanism which allows operator to monitor the integrity of the primary tank so it will be detected.

Paragraph (1), this language that's proposed in paragraph (1) is task force consensus language. I guess I would probably like to -- Based upon comments and recommendations provided by various industry groups, OCD has determined there seems to be some type of misunderstanding or confusion of the provision requiring below-grade tanks.

Multiple parties have stated, A double-wall below-grade tank located in a pit or vault should be exempt from the secondary containment requirements. I guess I'm kind of confused, because if it's double-walled, it actually meets the requirement specified under the rule -- and we'll get to that -- because for its different mechanisms for secondary containment include a double-walled tank. So basically they're telling us they've got a below-grade tank that meet the requirement.

And the request is to exempt those tanks from this provision, which -- which would be interpreted that they would be regulated by this rule, even with their below-grade tank. So I don't know if there's a misunderstanding of that, this provision, and we'll discuss more about those details as we go through.

OCD has incorporated the recommended language provided --

MS. FOSTER: Mr. Chairman, may I make a suggestion here? I didn't understand any of what Mr. Jones just said concerning what industry's understanding was of below-grade tanks. If I could just make the suggestion that the definition of below-grade tank be discussed, which I understand is --

THE WITNESS: We will --

MS. FOSTER: -- another part of the rule, but --

THE WITNESS: -- yeah.

MS. FOSTER: -- it would be very useful to know what the OCD's understanding or definition is of a below-grade tank as we go over this, so that maybe I might have a better understanding of what Mr. Jones just said.

CHAIRMAN FESMIRE: Mr. Brooks, would you mind if Mr. Jones --

MR. BROOKS: Actually --

CHAIRMAN FESMIRE: -- altered his order a little bit?

MR. BROOKS: -- I think that would be a very good idea, Mr. Chairman.

CHAIRMAN FESMIRE: Okay, Mr. Jones, would you --

THE WITNESS: Well, I --

CHAIRMAN FESMIRE: -- be capable of doing that?

MR. BROOKS: While we're breaking for a minute, my -- or while we've broken the testimony, may I be -- I'm having some back problems. May I be permitted to stand for the next few minutes?

CHAIRMAN FESMIRE: No problem, Mr. Brooks, if you don't mind if Ms. Bada and I did the same thing.

MR. BROOKS: I think we should, I just want to not have to sit in that chair for the next few minutes.

CHAIRMAN FESMIRE: Do you need a better chair?

MR. BROOKS: Well, I think I'll be okay --

CHAIRMAN FESMIRE: Okay.

MR. BROOKS: -- thank you.

CHAIRMAN FESMIRE: Mr. Jones, would you be able to comply with Ms. Foster's request?

THE WITNESS: I would, but what I would like to do is give her the provisions of the construction of a below-grade tank so there's a clear understanding when we go to the definition of how that's applied.

CHAIRMAN FESMIRE: Okay. Ms. Foster, would you mind if he does that?

MS. FOSTER: That should be fine, thank you.

CHAIRMAN FESMIRE: Proceed, Mr. Jones.

THE WITNESS: Okay. Under paragraph (1), this was task force consensus language, and I'd like to read it. Maybe this will help for clarification for people that can't see it.

A below grade tank's side walls, where the tank's bottom is below-grade, shall be open for visual inspection for leaks. The below-grade tank's bottom shall be equipped with an underlying mechanism to divert leaked liquid to a location that can be visually inspected. A below-grade tank not meeting these conditions shall be in a vault or have a double wall that will contain any leaked liquids.

I think this will play part in our definition, in our discussion.

Q. (By Mr. Brooks) Okay, would you then go now to the definition?

A. Well, there's some other requirements too about new permitting of tanks and their requirements and how they should be done.

Q. Well, I think it might be helpful, actually, if we talk about the definition first and then go into the permitting language.

A. Okay. I've misplaced my part 1, proposed part 1. Are you referring to the new language or the old language?

Q. Well, tell us what the new language is, and then we can go back to the old language.

A. Let's find me a copy of definitions. Wayne, do you have definitions?

MR. PRICE: Yeah.

THE WITNESS: Due to the changes that we're addressing in this rule, there were some definition changes that were proposed for part 1, section 7. One of these changes was to the existing definition for below-grade tank, and if I may read, Below-grade means a vessel excluding sumps and pressurized pipeline, drip traps, where a portion of the tank's sidewalls is below surrounding ground surface's elevation.

Q. (By Mr. Brooks) This is different from the old below-grade tank definition, correct?

A. Yes.

Q. Now would you explain how the definition has changed?

A. It's actually reflected in the strikeout of this version. The difference would be that the tank's sidewalls is below the ground surface and not visible.

Q. That's the old definition, right?

A. Right.

Q. And under the new definition, how is that different?

A. The visibility aspect of it is not a consideration.

Q. So if you have a tank that is -- the tank is entirely above the surface at the point where the tank is installed, but the surface is depressed so that it's sort of a tank that's inside a pit. Under the old rule, would that have been a below-grade tank?

A. No.

Q. And under the new rule is that a below-grade tank?

A. Yes.

Q. Okay, you may continue.

CHAIRMAN FESMIRE: Mr. Brooks, would you go over that one more time to make sure I understand it?

Q. (By Mr. Brooks) Okay. Let us suppose that you

have a tank, all or part of which is in a pit, so that -- inside a pit, so that the -- a portion of the tank is below the surface of the surrounding terrain, but the sides of the pit are not flush with the sides of the tank so that there's some space around the tank, all the way down to the bottom of the tank. Is that a below-grade tank under the proposed definition?

A. Under the proposed definition --

Q. Yes.

A. -- for part 17, yes.

Q. Now would it have been a below-grade -- is it a below-grade tank under existing Rule 50?

A. No, it is not.

Q. And is that the primary change that's made in the definition?

A. Yes.

Q. Okay, continue.

COMMISSIONER OLSON: Mr. Chair, just a question. Can you point out to me where that is in the -- what's been submitted to us so far? I don't remember seeing that.

COMMISSIONER BAILEY: Rule changes, definitions.

THE WITNESS: It's definitions to part 1, section 7.

MR. BROOKS: The definitions to part 1, section 7, were not included in what -- behind tab 3 in the

notebook, but I believe they have been submitted to the Commission as part of the Application.

COMMISSIONER OLSON: No, because I didn't see that as part of the exhibit.

MR. BROOKS: No, it's not part of the exhibit, it would be part of the Application that was filed for rulemaking.

THE WITNESS: I do apologize. The current definition for the below-grade tank is in part 1, because it addresses any tanks that fit that description under all the rules. So we thought it was prudent to leave it there and not pull it from the general definitions --

COMMISSIONER OLSON: Uh-huh.

THE WITNESS: -- because it could -- it applies to different references to tanks.

COMMISSIONER OLSON: Do you have a copy of that? Because I didn't bring that with me.

MR. BROOKS: I have another copy -- I have one more copy here, if it's needed.

CHAIRMAN FESMIRE: Well, I'm going to have to borrow it or look over Mr. Olson's shoulder.

MR. BROOKS: I apologize for not having the appropriate number of copies readily available.

COMMISSIONER OLSON: Should this be submitted as an exhibit, then?

CHAIRMAN FESMIRE: It wasn't part of the record.

COMMISSIONER OLSON: Okay.

CHAIRMAN FESMIRE: Mr. Brooks, why don't you continue?

Q. (By Mr. Brooks) Mr. Jones, continue with your discussion of the requirements for below-grade tanks.

A. Okay. In our proposed language we address those tanks not meeting the conditions under paragraph (1). Are we -- Okay. And as you can see, all this is in green this is task force consensus language for (1), (2) and (3) -- and (4), I apologize for that.

In these provisions -- and I'll state it again, especially paragraph (1), the below-grade tank sidewalls --

CHAIRMAN FESMIRE: Yes, Ms. Foster? Oh, I'm sorry.

MR. HISER: I'll take that, I think, in the spirit it was intended.

(Laughter)

MR. HISER: I guess -- I'm not quite sure how to raise this, but we don't think this is a task force consensus item at all, so we would disagree with green --

CHAIRMAN FESMIRE: Okay. You can -- I'm sure you can raise that in cross-examination of your own witnesses.

Q. (By Mr. Brooks) Continue.

A. As provision (1) states, the below-grade tank's

side walls, where the tank's bottom is below-grade, shall be open for visual inspection for leaks. The below-grade tank's bottom shall be equipped with an underlying mechanism to divert leaked liquid to a location that can be visually inspected. A below-grade tank not meeting these conditions shall be in a vault or have a double wall that will contain any leaked liquids.

The way we view this, this would indicate that these tanks -- even though the sidewalls are visible, the bottom is not -- that the underlying mechanism would be a form of secondary containment and leak detection.

Paragraph (2) states, A below-grade tank shall have secondary containment and leak detection.

Paragraph (3) talks about newly constructed -- or, I'm sorry, Operators of below-grade tanks constructed prior to the effective date that does not have secondary containment and leak detection shall test its integrity annually. If the existing below-grade tank does not demonstrate integrity, the operator shall promptly install a below-grade tank that complies with paragraph (2) of subsection I of 19.15.17.11 NMAC. In any event, the operator shall equip or retrofit such below-grade tank with secondary containment and leak detection or close it within five years after the effective date.

What we're looking that -- and I'd just like to

go into my intent part of this, is that what we're looking at here for the retrofit, certain examples of that would be a tank within a tank, would suffice for a retrofit. We're not looking at people digging out what they have and constructing something totally new. They can modify what they have, as long as the integrity of that existing tank is good. If it's leaking, then it does not provide secondary containment.

Paragraph (4), The operator shall ensure that a below-grade tank is constructed of materials resistant to the below-grade tank's particular contents and resistant to damage from sunlight. I do have some additional comments I'll hold on those while we discuss the nature of this.

Paragraph (5), A below-grade tank system shall have a properly constructed foundation consisting of a level base free of rocks, debris, sharp edges or irregularities to prevent punctures, cracks or indentations of the liner or tank's bottom.

This is actually proposed -- it originates from the guidelines, and this is a provision within the guidelines that we've incorporated into the rule. We believe it allows, much like the liner installation, since you can create secondary containment with the liner material. If you don't have a proper subgrade and there's rocks and stuff down there, if it punctures that liner then

it no longer serves as secondary containment. So that's why we've allowed this foundation, kind of subgrade requirement.

Paragraph (6), A below-grade tank system shall consist of either a double wall system with the capability to detect leaks or a tank placed within a geomembrane lined collection system or alternative system that the appropriate district office approves based upon the operator's demonstration that the alternative provides equivalent or better protection.

This language originates from the guidelines. It's something that we currently have out there to address these tanks. We like to identify that the -- that this rule does allow double-wall systems, the comments -- that's why there seems to be some confusion about double wall systems, and this is why I wanted to read this part. And it also allows for --

Q. Which paragraph is this?

A. This is paragraph (6).

Q. Thank you.

A. Paragraph (7), the operator shall design and construct a below-grade tank system in accordance with the filing requirements if the below-grade tank system consists of a tank placed within a geomembrane lined collection system.

I don't know if I really need to go into all the details of this, but once again it specifies the liner that would be required, the type of liner, the -- it provides specifications for the leak detection system itself and how it should be constructed. And this is also a provision that originated from the guidelines, so it's a reiteration of what's currently in the guidelines with maybe some tense changes, passive to active, so forth.

And then of course paragraph (8), The operator shall construct a below-grade tank to prevent overflow and the collection of surface water run-on.

That provision is pretty straightforward. It also originates from the -- from the guidelines.

Are we going to have discussion on this or -- ?

MR. BROOKS: Well --

THE WITNESS: -- at this point, I mean.

MR. BROOKS: -- I think that the principal concern here was what exactly a below grade tank is, and I think we've gone into the definition and explained that, so I'm not sure further discussion is necessary at this point. But I will ask the Chair if the concept has been adequately explained.

CHAIRMAN FESMIRE: Mr. Brooks, it's not my case.

MR. BROOKS: Yes, sir. Very good. Well, other attorneys may explore the matter on cross-examination.

THE WITNESS: That's fine. Since we went through this quickly, to make sure there's a clear understanding of what this is, I would like to address paragraph (4) pertaining to this section -- or subsection.

The industry committee and Yates Petroleum Corporation have recommended replacing -- under provision (4), replacing "resistant" with "compatible", the term "resistant" with "compatible".

We believe that the term "compatible" weakens the standard. The intent of the provision is to ensure that a below-grade tank is capable of containing its contents. Having a tank constructed of a material that's resistant of its contents would suggest that it is not compatible with its contents. This -- it does not --

MS. FOSTER: Mr. Chairman, might I make a suggestion again? Since he is talking about what industry comments are concerning below-grade tanks, it might be helpful again for him to go back to the definition of below-grade tank and discuss what industry suggested to the proposed changes to the definition, because I believe the definition and our understanding of the definition really does impact on any recommendations that we might have made to this section of the proposed rule, since he is talking about the --

CHAIRMAN FESMIRE: Well, Ms. Foster, you can

bring all this up in your case, or in cross-examination.

MR. BROOKS: I agree, I will ask the witness --

CHAIRMAN FESMIRE: I guess I'm overruled.

(Laughter)

MR. BROOKS: Mr. Chairman, I would -- I -- the reason I asked for clarification was because I want everyone to understand it, and I think that it would be helpful if the witness would go over it again, if there are people who don't at this point

Q. (By Mr. Brooks) So would you go back and tell us what the comments were on the definition of below-grade tank, Mr. Jones?

A. Okay. There were -- and I've got to kind of pull this up right here, it should be readily accessible for this discussion.

My understanding is, the industry committee and the Yates Petroleum Corporation, their recommendations for the changes to the below-grade tank definition, their language changes state, Below-grade means a vessel excluding sumps or pressurized pipeline, drip traps, placed so that any part of the vessel's sidewalls is covered with soils such that the condition of the integrity of the tank cannot be visually inspected.

Q. Now, Mr. Jones, is that very similar to the definition in existing Rule 50?

A. It is similar.

Q. It's not identical?

A. It is not identical, and if I may say, it looks that IPANM has proposed the same language, and Devon has proposed the same language as well.

Q. But it is -- though it is not similar -- though it is not the same in language, is it -- in terms of the concept, the conceptual difference we were talking about between the old -- the existing definition and the proposed definition, is the definition that was suggested in the comments conceptually very much the same -- very similar to the old definition?

A. The suggested language from these parties is very similar to the definition that currently exists in Rule 50.

Q. In other words, according to that definition -- according to the parties' suggested definition, they would retain the feature that a portion of the tank must actually be underground and not visible in order for it to be -- qualify as a below-grade tank?

A. That -- I would disagree with that. Nowhere in their definition does it state that the sidewalls, any portion of the tank would be below ground, but it does state it is covered with soils. One could interpret this as an above-grade tank with soils pushed up against it, could be considered one of these tanks.

Q. Okay. Then continue with the comments that have -- with any other comments that have been made on the definition.

A. Well, those are the only definition --

Q. Okay.

A. -- or, everyone suggested the same thing.

Q. Okay. So the objection that you have primarily is to the inclusion of tanks where the entire sidewall is visible, in the definition of below-grade tanks?

A. Well, that's one of them. The other is that their definition for a below-grade doesn't necessarily require it to be below-grade.

Q. Okay.

A. That's the second...

Q. Now the rule -- the portion of the rule that you were talking about when we had this interruption -- I'm sorry --

MS. FOSTER: No, thank you.

Q. (By Mr. Brooks) -- I apologize -- is the portion of the rule that requires that the below-grade tank be retrofitted to require -- to comply with the requirement for a secondary liner and leak detection; is that correct?

A. Can you restate the question?

Q. At the time we digressed into the definition of below-grade tank, you were talking about paragraph (3) of

subsection I, which describes the requirement to retrofit all below-grade tanks with double liners with leak detection; is that correct?

A. I think I have discussed secondary containment and leak detection.

Q. Okay. My understanding was, the concern was about the definition was somehow related to that. Have you already discussed all the comments that were received on that particular provision?

A. There were no comments provided on that. It was paragraph (4) about the material used for below-grade tanks, is what I was discussing.

Q. Okay. I thought I heard something about -- a comment about something should not apply to double-wall -- to below-grade tanks with double walls?

A. Yes, you're correct, that is paragraph (1).

Q. And paragraph (1) provides what?

A. Paragraph (1) within the proposed language allows such below-grade tanks to be equipped with some type of underlying mechanism to divert that leaked liquids so it can be visually inspected. The concern there is the bottom of the tank. This request of placing a tank below the surface and looking at the sidewall would imply that tanks only leak on their sidewalls, they do not leak beneath. We disagree with that. There is a potential for a leak to

occur at the bottom of the tank, which could not be inspected at any point.

So we have written provisions, if there are such tanks, that they could equip them with these underlying mechanisms to divert, to indicate if the bottom is leaking. We'd still consider them a below-grade tank.

Also, a below-grade tank not meeting this provision or this condition, it states that it should be placed in a vault or a double wall that will contain that leaked liquid.

Q. And what was it the comment wanted to dispense with if it was double-walled?

A. The comment was that a double-walled below-grade tank located in the pit or vault be exempt from secondary containment requirements. That was the comment.

Q. Okay. And what is your response to that comment?

A. Well, my response is that -- They talk about a double-wall below-grade tank. My response is that it meets the requirements if it's double-walled. It's -- as stated in the regulations, it's one of the options for the secondary containment systems. A double-walled tank is specified as a way to satisfy the secondary containment and leak detection.

So I -- that's there I'm confused on their comment, and -- because what they described to ask to be

exempt from the secondary containment actually provides secondary containment.

Q. Okay, thank you. You may resume your presentation at the point where you were when we went off on this --

A. Okay. Paragraph (4), as I was saying earlier, it was from recommendations from the industry committee and Petroleum Yates [*sic*] Corporation. Their recommendations were to replace the term "resistant" with "compatible".

As I was stating earlier, compatibility doesn't imply that it would be able to -- I guess the idea here is that material that is resistant is capable of containing those contents and would not allow any penetration through that material. If it's compatible -- if you look it up in the dictionary, it means it's harmonious with that environment. One could argue that my jacket is compatible to water but is not resistant to water, so if I were to put water on my coat it would go through my jacket. So we think it weakens that regulation. By stating "resistant", that's pretty clear that it should not -- that it should resist that content.

Another recommendation provided by industry and Yates Petroleum Corporation is to restrict -- let's see -- okay, is to restrict the resistance of the material of the tank to damage caused by prolonged exposure to sunlight.

Our current language states that the material -- the below-grade tank is constructed of material resistant to sun- -- from sunlight. They wish to state that it is prolonged exposure to sunlight.

We feel this is a restriction, because it could be argued that if damage were to occur in a short duration or intermittent duration, it would suggest that that material is -- would be appropriate for this application. It would only be to a prolonged, as they put it -- a prolonged exposure that it would not be -- that would be the restriction to it. So the damage could only occur from prolonged exposure. So we feel like it doesn't address if the material is not resistant for a shorter length.

So we -- in our recommended language, we do not consider the length of exposure based -- the damage based upon a specified length. Any damage to that material from exposure to sunlight would be inappropriate in that case, be it short or intermittent.

CHAIRMAN FESMIRE: Mr. Brooks, would this be a good place to take a break?

MR. BROOKS: I think so, your Honor.

CHAIRMAN FESMIRE: Okay, why don't we take a 10-minute break? We'll reconvene at five minutes after three by that clock.

(Thereupon, a recess was taken at 2:55 p.m.)

(The following proceedings had at 3:05 p.m.)

CHAIRMAN FESMIRE: Let's go back on the record. Let the record reflect that this is a continuation of Case Number 14,015. Let the record also reflect that all three Commissioners are still present, that there is a quorum present, and we will continue with the direct examination of Mr. Brad Jones.

Q. (By Mr. Brooks) Very good. Mr. Jones, you may continue with your presentation.

A. Okay, I guess at this point we talk about below-grade tanks, construction, design. The next subsection would be subsection J. This subsection is for on-site deep trenches, the construction and design for closure.

OCD has created this new subsection which specifies the design and construction requirements for on-site deep trenches for on-site closure. The intent of the proposed language is to instruct and educate operators as to some of the expected and anticipated information and details that should be included in the closure plan if the operator proposes this method.

Since the posting of this proposed rule, comments have been provided recommending that the design and construction specifications for the on-site deep trenches be incorporated into the closure requirements. OCD has formatted this rule with the intent to keep permit,

application, siting, design and construction, operation and closure requirements separate. By doing so, and not directly integrating and combining one into the other or others, it provides clear instruction and direction to applicants and operators which provisions apply when general references, such as siting requirements, design and construction specifications, operation requirements or closure requirements are requested.

Paragraph (1), the intent of this provision is to notify operators of the variables that must be considered and demonstrated prior to pursuing this closure method. The recommended initial consideration is siting criteria. It is basically the siting criteria for the temporary pit and below-grade tanks, it's the same requirements.

The other provision that's referenced here is the distance from the initial pit. We do have a provision to put it within a reasonable distance of the initial pit or, in this case, closed-loop system that could be utilized for this method. The intent of the proposed language is to prevent the burial of waste in a location that a lined or temporary pit would be prohibited.

Paragraph (2). OCD has discovered that one of the primary causes of liner integrity failure is due to the operators not properly preparing or preparing the foundation. For on-site deep-trench burial, OCD believes

that the same care and consideration should be taken to construct a temporary pit and should be applied when constructing a deep trench for burial of waste.

So this is once again the foundation or sub-grade prior to putting in the liner. It should not have any items present that would compromise that liner in the process of installing it or using it.

Paragraph (3), the intent of the proposed language is to address situations or scenarios where the existing subgrade or foundation consists of rocks...

I guess I could simplify a lot of this. A lot of these specifications are going to be similar specifications in which we -- especially for, I believe, (1), (2), (3) and (4), (5) -- there's -- A lot of this language is similar language to -- that is applied in the construction -- design and construction of a temporary pit. Instead of reiterating all that, the justifications again, I would like to state that -- I mean, they're going to be basically the same justifications. So instead of repeating all of those again, if it's all right, I'll just move on, to save us some time.

I would like to comment, though, on paragraph (5), that this is one of the provisions in which we have recommended new language in that request that was submitted by Mr. Brooks yesterday, and in provision (5) -- or

paragraph (5), we would like to -- the new language should read, The seams shall be welded.

Once again, the reason for this is, we'd rather not have stitching when the applied -- when you bury or construct a pit with a liner, in this case a deep trench where you're going to be placing this material inside there for pretty much an indefinite time, we want to make sure those seams are properly welded to prevent any type of release.

Q. Mr. Jones, that is the same language you propose to add in the case of temporary pits, correct?

A. Yes.

Q. And the provision to which you propose to add it is the same provision -- it's otherwise identical to the provision proposed for temporary pits, correct?

A. Yes.

Q. Continue.

A. Paragraph (6), this states that the operator shall install sufficient liner material to reduce the stresses.

This is -- you know, this provision is for the construction and design of a deep trench and the liner that's going to be placed inside there. The idea behind this, the concept behind this, is actually to inform the applicants that this needs to be considered when installing

the liner, the additional -- or the sufficient liner material -- if it's not there, it will -- you know, as people place the waste content or the waste material into the deep trench, if sufficient material isn't present, again, two effects. If they secured it at the top or on the sides in some fashion, it may make the liner material sag and put undue stress on it. The other thing, if there's not enough material it could fall into the pit and the waste material could be placed on top of it.

So we put this provision as a guide, to kind of show people there needs to be sufficient material in order to -- so it won't collapse into the trench. And it can be -- the trench can be lined and the liner can stay open as the material is placed into that deep trench.

Paragraph (7), once again, these two kind of go hand in hand, (6) and (7) go hand in hand. This is to ensure that the outer edges of the liner are secure for the placement of excavated waste into the trench. I think my explanation for (6) kind of justifies or -- I wouldn't say justifies, but explains the reasoning of securing these so they do not fall in while waste is being placed into that lined trench, and it prevents that waste material from being placed on top of the liner rather than inside the lined trench.

Paragraph (9), the installation of the

geomembrane cover ensures that the waste material is completely enveloped and the infiltration of rainwater will not come in contact with the waste material. By requiring the operator to install the geomembrane cover in a manner that prevents the collection of water, water should not accumulate or penetrate the geomembrane cover, and it should be diverted around the enveloped waste material, so...

I think I skipped (8), and I do apologize for that. Prior to putting on this -- applying this geomembrane cover, the provision requires that -- the outer edges of the trench liner to overlap the waste material prior to the installation of that geomembrane cover.

The idea is that it -- I guess this is based on what we've been -- that's been explained as a current practice in certain areas of the state, a lot of operators will cut off this outer edge of the liner and then cover the liner either by backfilling. And I'm unsure about parties that may use a geomembrane cover, currently use that, that they practice this.

What we're trying to do with this is, if we can take those outer edges, fold them over, kind of create a burrito, so to speak, out of this, it will -- it will prevent the liner itself -- it will add an additional level of security of, once that cover is in place, that the lined

deep trench with the waste material in it would not become a bathtub in which the infiltration water will collect. That's our goal, is to keep this dry, the waste material, once it's placed inside there.

So by overlapping, it provides an additional layer or level of protection. And then the geomembrane, when it's placed over it, will be able to provide an adequate cover as well, on top of that.

Of course, paragraph (10) actually provides the specification of that geomembrane cover. And by having the geomembrane cover consistent with the same material as the trench liner, it ensures equivalent protection security from the buried waste to outside influences and sources.

Okay, operational requirements. This is section 12.

As you can see, this is to -- these -- the provision, the general specifications specify this is for the operation of a pit, closed-loop system, below-grade tank or sump. This is where sumps are addressed, under these provisions, the operational requirements.

Paragraph (1), the intent of this provision is to inform operators of their obligation and responsibility to operate and maintain each activity for its intended purpose. In this case we're looking at the contained liquids and solids and to maintain the integrity of the

liner or liner system or secondary containment system.

There is a footnote to this provision, it's footnote 23, and there was a request from a task force member to delete "maintain the integrity of the liner and liner system". They were -- their argument is that there are no liners with closed-loop systems, addressed in operations.

Our response to this is that all of the listed operations under this provision are subject to and may be subject to using a geosynthetic liner or liner systems. Closed-loop systems use liners in the construction of the drying pad. So if they do that, they should maintain the integrity of that liner. So we put it in there in cases where it may be optional that they -- if they do use one, it's covered.

Paragraph (2), the intent of the proposed language is to address those operators that recycle, re-use, reclaim all drilling fluids during the operation of their activities and to inform or notify them of their responsibilities not to dispose of such fluids and -- okay, to notify them of their responsibilities.

This is not to notify them of the disposal of the fluids during closure. I'd like to clarify that this is an operational requirement, which indicates that these drilling fluids may be in use.

There were several comments provided on this topic from the industry committee and Yates Petroleum Corporation and IPANM. They were wanting to include language to address the disposal of such fluids. They want to include that into this provision.

If you were to include this language, it would indicate that during the operation they should be disposing of the fluids while they're operating the pit, or -- or whatever operation it may be linked to, they should be disposing of them as they're operating, at the same time. This is operation, not closure.

So we felt like there's -- that this is more appropriate when the drilling has ceased and closure has commenced, the disposal aspect. And it's actually addressed in the closure requirements. It is not an operational requirement to dispose of fluids while you're operating.

So by mixing or incorporating the closure requirements into the operation requirements would create confusion to the operators, when other provisions of the proposed rule instruct operators that they must comply with the closure requirements.

So just for clarification, it is an operational requirement, and we're just stating if you're going to do these activities, you must do it in this manner to prevent

contamination. And this is during operations, it addresses the operations that take place with pits, closed-loop systems, below-grade tanks and the sumps. If you were to dispose of those fluids, you would be in the process of closing.

This was also a provision which we had a recommended change that was submitted yesterday. We would like to request some additional language be added to this provision in order to allow operators the opportunity to request an alternative to their original approved proposal and allow the appropriate district office to grant the administrative approval of this. Meaning that if they -- for some reason in their operational plan they said they were going to recycle these and they were unable to do it, then they could request that -- put in a request to the division office for administrative approval.

The new proposed language would state, The operator shall recycle, re-use or reclaim all drilling fluids in a manner that prevents the contamination of fresh water and protects public health and the environment and the appropriate district office approves.

Q. Mr. Jones, what was the reason for making that change -- for requesting that change?

A. As it stands now, if an operator is -- and there's -- yeah, as it stands, based upon the language that

we have here, the recycling or re-use or reclaiming of these drilling fluids would -- I guess the district office would have no knowledge of this occurring and where these fluids are being re-used and so forth. So if they went out and they inquired, they may not know how it's being re-used or reclaimed and so forth. So the district office had some concerns about this, and they would like to be privy of this and to make sure that it's being done to satisfy the provisions to prevent contamination of fresh water and to protect human health and the environment. They felt they should provide that oversight for those operations.

Q. Continue.

A. Paragraph (3), the intent of this provision is pretty straightforward. It deals with, Operator shall not discharge into or store any hazardous waste in a pit, closed-loop system, below-grade tank or sump.

For clarification, hazardous waste is currently defined in section 7 of part 1 of the general provisions and definitions of title 15 for oil and gas. The definition identifies the non-exempt status and references the federal regulations that apply. And the definition in part 1 applies to all the rules under title 15.

Certain parties in their October 22nd submittals, such as the industry committee and Yates Petroleum Corporation, have recommended to reference 20.4.1 NMAC to

define hazardous waste. Such a change would require operators to access a different set of regulations to make a determination of if they're in compliance with that.

It's currently in our rules. We don't think it's appropriate to different -- to reference. And I believe, if I'm not mistaken, that the 20 -- the chapter 20 is the environmental protection regulations, rather than the oil and gas regulations.

So since we currently have them in our definitions we don't think it's appropriate to reference other regulations. And ours specify the application of those to oil and waste.

Paragraph (4), the intent of the proposed language is to provide a protocol which allows OCD the opportunity to determine if damage to the liner poses an imminent threat or not and if immediate action is required.

This right here is based upon a penetration to the liner that occurs above the liquid surface. The reason that we're stating this is that -- and it's based also on a comment that was provided, and I think it explains it well Energen has recommended -- and this is October 22nd -- that the notification requirement be removed from this provision.

What we're trying to do is that in this case a pit would be in operation, meaning that the level of the

fluids would be going up and down. So a result of this change would require OCD, upon discovery of the damage, to take immediate enforcement for not allowing the operator -- having immediate response in repairing that damage.

We think the 48-hour notice requirement allows operators time to assess the damage, inform OCD of the results of their assessment and provide OCD with a schedule for repair or replacement.

So by removing the 48-hour notice would mean if we were to go out, it would change the intent of the language, which means that it would need -- they would have to immediately repair it. And if it's not repaired upon our arrival, they would be in violation of the regulation. That's not what we're intending with this, with our language.

Part (5) -- or paragraph (5), the intent of the proposed language is to have the operator take immediate action to stop and prevent a release. The provision allows the operator to initiate action and make repairs without the involvement of OCD.

Based upon the October 22nd comments, Energen has recommended removing the provision of the 48-hour response time. Without a specified action time, the operator would be allowed to continue to operate, meaning that there would be nothing to restrict them to continue to operate, waiting

a repair.

The plain language of this provision -- and maybe I should read it for clarification -- is that, If a lined pit develops a leak, or if any penetration of the liner occurs below the liquid's surface, then the operator shall remove all liquid above the damage or leak from the pit within 48 hours and repair the damage or replace the liner.

If you remove the 48-hour provision, then there's no time frame in which they must take any action.

There was another party, R.T. Hicks. They have recommended that the proposed language be modified to begin with, If the lined pit releases material to underlying soil or groundwater. They had recommended adding that to this to make it conditional, and their justification for this is due to permanent pits being double-lined.

There's multiple problems with this recommendation for this modification to the provision. In order to make a proper assessment of a release, the liner would have to actually be removed to make a determination. As they put it, the material of the underlying soil -- a release that -- if an unlined [*sic*] releases material to the underlying soil or groundwater, the only way to make that assessment is to remove the liner.

As for permanent pits, if the primary liner is damaged and the operator decides not to make a repair, the

secondary liner becomes the primary liner, and the permanent pit is no longer -- it no longer satisfies the design and construction specifications of having a primary upper liner and a secondary lower liner with leak detection. It becomes a single lined permanent, which is a violation of the regulation.

Paragraph (6). The intent of the proposed language is to require the operator to monitor the fluids for drastic changes in a lined pit to determine if there is damage to the liner that cannot be seen and -- cannot be seen, and to control a potential release.

Certain parties such as the industry committee and Yates Petroleum Corporation have argued that the installation or implementation of such a device would be expensive.

OCD believes that the cost of a cleanup or remediation of a release would far outweigh the costs associated with the purchase of a device that can be utilized at multiple sites.

Energen has recommended that this provision be omitted from the rule. We would like to state that this provision was suggested by the task force and incorporated into the rule.

Paragraph (7), the intent of the proposed language is to instruct operators of which mechanisms may

be utilized to inject or withdraw fluids from lined pits and the care required to prevent damage to the liner.

Certain parties such as the industry committee and Yates Petroleum Corporation have recommended that "other materials" be added after "other hardware".

As stated before, the provision identifies mechanisms that may be used. Other materials are not considered mechanisms. The intent of the language proposed by OCD is not to specify the material in which the mechanism is to be composed of, but to identify the mechanisms and their ability not to damage the liner.

Paragraph (8). The intent of the proposed language is to instruct operators of their responsibility to prevent the collection of surface water run-on. Even though the design and construction specifications require operators to install and implement diversion measures, the operational requirements allows the OCD the authority to require operators to repair or initiate other diversion measures if the initial measures fail.

Energen is a party that submitted -- on October 22nd, has recommended that this provision be omitted from the rule.

Paragraph (9), the operator -- Oh, I'm sorry, paragraph (9) has a footnote to it. It's footnote 24. This provision -- it states that operator shall install or

maintain onsite an absorbent boom or other device to contain or remove oil from the pit's surface.

The comment was inquiring about the rationale for this requirement for temporary pits, and should the material just be available?

Our original language -- and this was -- I believe it was a consensus -- Well, let me see. No, it wasn't. I take that back, it was not.

The original language that we had stated that the operator shall install and maintain. This is one of the comments that we did consider, that installation of such a device is not required as long as a device is available at the site. And the reason for this is that there was task force language specifically addressing permanent pits and temporary pits, and that for the -- if I'm not mistaken, for the temporary pits there is language that is incorporated in the rule stating that any visible or measurable layer of oil shall be removed from the surface of any drilling or workover pit. And I'm summarizing on that, not a direct quote.

For a direct quote of the regulation for permanent pit, No oil or floating hydrocarbon shall be present in a permanent pit.

We put this provision inside there to -- and this is an operational provision -- to instruct how they are to

comply with the other provision. And so this is the mechanism in place for that, how they can satisfy that.

Subsection B, temporary pits.

Paragraph (1). The intent of the proposed language is to instruct the operator of the intended permitted use of a permanent [*sic*] pit and the manner in which the temporary pit shall be operated.

Certain parties such as the industry committee and Yates Petroleum Corporation have recommended in this provision, in the language, that there should be a change to -- if I'm not mistaken, to the language that I just quoted earlier. It's the last sentence. Their change would mean -- would imply or state that immediately after cessation of the drilling or workover operations, the operator shall remove any visible and measurable layer of oil. And the rest of it is there as well.

Such a change would limit the removal -- if you -- the difference between "and" and "or" in this case and the use of it is, you have to address both, visible and measurable. There's -- it kind of -- both of those conditions would have to apply. So such a change would limit the removable [*sic*] to measurable oil and -- it would limit to include just measurable oil, not visible -- strictly just visible oil. Meaning that if there's a sheen from condensate or something on there that has no oil

related to it, that would not have to be removed. But measurable oil, anything with measurable oil, would have to be removed.

Maybe I'm not explaining this well, but the significance of the change, right now as it states, is either visible or measurable. So it's not -- it has to be both; it could be either. But the change of making it visible and measurable means it would have to -- both would have to qualify for removal. So if it was just visible, it may not qualify for removable -- to be removed. If it -- But if it's measurable, then it's visible. So if it had -- if it's an "and", it would require that it both be measurable and visible. If it's only visible, then it would -- this change of language would not address the visible indication of oil, because it could be visible and not measurable, such as the sheen, as I was talking about.

Q. Mr. Jones, does the present Rule 50 include the language, no measurable or visible layer of oil shall be allowed to accumulate under the pit?

A. Yes, it does.

Q. So the proposed language would be maintaining the present rule, whereas the proposed -- the change that was proposed by the commenters would change the rule and make it less stringent than it now is?

A. Yes --

Q. Continue.

A. -- yes. I would also like to state that this provision was a suggestion from the task force incorporated into the rule.

There is a footnote associated with this, and the footnote is footnote 25. There was a request -- there is this -- It asks to relocate the hydrocarbon based drilling fluid requirements to section 11.D. 11.D, if I'm not mistaken, is construction design, and I think what they were requesting in this, if I'm not mistaken, is, in that they're looking at the use of tanks made of steel and other materials that contain hydrocarbon or -- yeah, hydrocarbon-based drilling fluids.

The suggestion would -- that we are permitting and requiring -- permitting those type of tanks under the provision. And I guess even though they're used in the drilling operation, these would suggest that these are above-ground tanks, they are not used to store or hold exempt waste generated from the drilling operation because they are used -- these are drilling fluids that are used during the drilling process. And by moving them up there and specifying the requirements would allude that we're trying to permit those type of tanks, and that's not what we're trying to do with this provision.

This language also currently resides in Rule 50

as well.

Q. Now the reference to 11.D is an error, isn't it? Apparent error, is it not?

A. I don't want to say that, because that was the draft version, and offhand I don't remember what -- I just remember it referenced section 11.

Q. Okay, but presumably the reference in the current draft would be to section 12, subsection D? Because section 11, subsection D, is about fencing.

A. Yes, and that's -- for clarification purposes, this was -- once again, this footnote is from the draft version, I'd like to make that clear. And that draft version -- I think there was some provisions that we didn't have in there, and we moved things around. I'm not -- I just know it dealt with design and construction. That part didn't change, of that section. So...

Q. Very good.

A. Just --

Q. You may go ahead.

A. Okay. Where I'm at here.

Paragraph (2), the intent of the proposed language is to specify the operational standard in order to prevent the overtopping or overflowing of fluids. This provision was suggested by the task force, incorporated into the rule.

Paragraph (3), the intent of the proposed language is to create a mechanism that will encourage operators to observe fluid levels within the temporary pit. The log can also be used to determine if immediate action is required based upon assessment of the fluid loss. This provision was also suggested by the task force and incorporated into the rule.

Paragraph (4), the intent of the proposed language is to require the operator to remove all free liquids from the drilling pit as soon as possible in order to reduce the risk of a liquid release. It also would reduce overtopping of fluids after the collection of additional fluids, such as if there was a rainfall or if run-on were to enter the pit, and it also would reduce the hydraulic head on the liner.

Certain parties such as the industry committee and Yates Petroleum Corporation have recommended that this provision be omitted from the rule.

Paragraph (5), the intent of the proposed language is to require the operator to remove all free liquids from a workover pit as soon as possible. The same concerns are those as for the concerns stipulated for the drilling pit. It would -- by doing so, you reduce the risk of a liquid release, overtopping from collection of additional fluids, and you would reduce the hydraulic head

on the liner.

This topic -- it was discussed quite a bit by task force members and in my presence. It seemed to be recognized by the parties present, the importance of the rapid removal of those fluids and the reduced risk by doing so.

IPANM has recommended that the proposed period of 15 days be extended to 30 days to give operators time to make proper arrangements. This would suggest that operators would have no prior knowledge when they would anticipate the workover activities to be completed.

OCD believes that the provision grants operators the opportunity to request an extension if necessary. In order to grant such an extension all it would require is maybe a one-sentence written or e-mail request. We don't really consider requesting the extension -- 15-day period would be an undue burden and would create any delays.

Other parties such as the industry committee and Yates Petroleum Corporation have recommended that this provision be admitted [*sic*], meaning that the fluids will remain until closure on there.

Subsection C, this is for permanent pits. The minimal operational requirements proposed in this subsection are based upon the general operational requirements listed -- are based upon the general

operational requirements listed in this section, and the permanent pit design with a primary and epidary -- a primary --

Q. -- and epidary?

A. -- it's a -- because I've tried to use the language that's in there. Primary upper liner and the secondary lower liner with leak detection. So there's minimal operating standards that we're proposing for permanent pits due to their design, construction and the general provisions that are in the general provisions stated above for all pits.

With that, the -- paragraph (1). The intent of the proposed language is to specify the operational standards in order to prevent the overtopping and overflowing of fluids.

This provision was suggested by the task force and incorporated into the rule.

Paragraph (2), the intent of the proposed language is to ensure the removal of oil or floating hydrocarbons from a permanent pit. The provision originates from the guidelines and was suggested by the task force. OCD agrees with the concept as incorporated into the rule.

Subsection D, the intent of the proposed language is to instruct operators of their responsibility to prevent

the overflow of fluids and liquids and the collection of surface water run-on. Even though the design and construction specifications require the operator to construct a below-grade tank in a manner to prevent overflow and the collection of -- to prevent the collection of surface water run-on, the operational requirements allow OCD the authority to require the operator to initiate other measures if the initial design fails.

This is where we have a -- also have -- would like to request an additional provision be added to this section for below-grade tanks. And it probably will result into a paragraph (1) and (2) format, once provided, if it's accepted.

The proposed language would state, The operator shall remove any visible or measurable layer of oil from the surface of a below-grade tank.

Q. Now this was in the change sheet, was it not?

A. Yes.

Q. Okay, and it was not in the (1) and (2) format, the change sheet?

A. No. No, if it were to be considered for exception we'd probably change the format.

Q. Okay, you may continue.

A. Subsection E, sumps.

Paragraph (1). The intent of the proposed

language is to ensure the integrity of sumps and their capability to collect and contain leaks. The proposed provision currently exists in Rule 50 and was recommended by the task force to be included in the proposed rule.

OCD agrees with the task force recommendations and has incorporated the provision into the rule.

Paragraph (2), the intent of the proposed language is to instruct operators how the integrity test shall be performed. The proposed provision currently exists in Rule 50 and was recommended by the task force to be included into the provision -- into the proposed rule. OCD agrees with the task force recommendation and has incorporated the provision into the proposed rule. I think I said that twice.

Paragraph (3), the intent of the proposed language is to create a mechanism that will remind and encourage operators to inspect and test sumps.

This provision was suggested by the task force and incorporated into the rule.

Q. Mr. Jones, Chief Price has pointed out to me that -- perhaps it's going back to subsection D, that perhaps the proposed change language should read open-top below-grade tanks, since it would not be feasible to remove the oil layer from a closed-top tank.

A. That would be appropriate. We probably would --

that would be an appropriate recommendation.

Q. Okay, you may continue.

A. Closure requirements. This is Section 13.

Subsection A. The intent of the proposed time requirements for closure are provided to notify operators when and under what circumstances closure is required.

As you notice, there is a footnote with this -- it's footnote 26 -- and the footnote was a suggestion that -- if I'm not mistaken, that these timelines be placed in the transitional provisions so that they would be easily interpreted.

The problem with putting all these timelines inside there is that the timelines also address the closure of -- it could be temporary pits, below-grade tanks or closed-loop systems permitted under this rule which would need transition. We think that by having these all in one area, addressing closure only, that they are in the appropriate location when someone is looking for closure requirements, how it applies, and to have it up front would provide that additional clarification.

There was a comment submitted on October 22nd from Energen that recommended that this section, the time requirements for closure, be omitted from the proposed rule. Such a change will allow operators to either not close or close such activities at their leisure. It would

also tie OCD's hands to require closure.

Paragraph (1), I think this provision here, the intent of the proposed language is to close existing unlined permanent pits. This has definitely been discussed and agreed upon by certain parties, that this would be appropriate.

Paragraph (2), the intent of the proposed language is to close existing permanent pits not permitted or registered as required by the current rule.

Under the existing rule, operators had until October 30th, 2004, to file an application in order to continue the use of an existing pit or below-grade tank.

The provision is designed to address operators who have failed to satisfy the existing deadline.

Paragraph (3), the intent of the proposed language is to close existing unlined temporary pits. Very straightforward.

Paragraph (4), the intent of the proposed language is to close existing below-grade tanks not equipped with secondary containment and leak detection.

The design and construction provisions allow operators to retrofit existing tanks for the underlying mechanism to divert leaked liquids to a location that can be visually inspected. There's also other provisions that allow retrofitting, which is addressed in here.

OCD interprets the retrofit language to equate to a technique or method that allows operators to satisfy the requirements of secondary containment and leak detection. In this case, referring back to the underlying mechanism, we're looking at, for the secondary containment requirement, an underlying mechanism to divert leaked liquids would satisfy that provision for leak detection as it's stated in the provision for construction and design of below-grade tanks, that would be to divert leaked liquids to a location that can be visually inspected. Those provisions will allow operators to satisfy the provisions for construction and to allow -- be considered a retrofit.

And I assume we're going to get into further discussion of this later, but there was a suggestion that -- from industry, that the proposed language meant something other than secondary containment and leak detection.

Paragraph (5), the intent of the proposed language is to close permanent pits within 60 days of the cessation of operations. The proposed timeline for the closure requirements -- or the proposed timeline for closure requires the operator to immediately remove the liquids from the permanent pit and properly close the pit within an adequate time frame.

OCD can find no reason to allow a permanent pit

to continue to hold or store liquids if it is no longer in operation.

Paragraph (6), the intent of the proposed language is to ensure closure of a permitted temporary pit, especially a permitted temporary pit permitted under this part, to close within an adequate time frame. The six-month period allows ample time for the operator to remove free liquids, allow for the evaporation of fluids and solids remaining in the pit, and to make arrangements for the remainder of the closure requirements.

Q. Now the six-month period is the same period as provided under present rule, correct?

A. That I do not know.

Q. Well, I was sure that if I asked you enough questions today I would find one to which you did not know the answer.

A. Looking at my version of Rule 50, except otherwise -- and this is -- if I give the direct quote, it's 19.15.2.50 --

COMMISSIONER BAILEY: -- .S.(1).

THE WITNESS: Yes, yes.

MR. BROOKS: Thank you.

THE WITNESS: And this pertains to closure. Except as otherwise specified in Section 50, of 19.15.2 NMAC, a pit or below-grade tank shall be properly closed

within six months after cessation of use, yes.

Q. (By Mr. Brooks) So the six-months requirement -- However, is not the period for which it may be extended shortened from six months -- from an additional six months to an additional three months?

A. Can you re-ask the question?

Q. Well, would you compare the -- Okay, look at the third sentence of F.(2) of Rule 50.

A. Okay.

Q. And then look at --

A. Oh,

Q. -- at A.(6) of the new rule, 13.A.(6) of the new rule.

A. Yes.

Q. So --

A. Okay.

Q. -- what is -- what change has been made in the period of time for which the Division may extend -- the district office may extend the time for closure of a temporary pit?

A. Under the current rule there is no extension. But there is a provision that within one year of the closure of the pit they have to finish off the contouring of the surface under F.(2) for surface.

Q. Well, I think you may have misspoken. Look at

the third sentence of F.(1).

A. Okay, now I see. Yes, under the current rule, the Division for good cause shown may grant a six-month extension of time to accomplish the closure.

Q. And how much extension can they grant under the new rule --

A. Under the new rule --

Q. -- the proposed rule?

A. Under the proposed rule, under paragraph (6), the appropriate Division district office may grant extension not to exceed three months.

Q. Okay, thank you. Continue.

A. Paragraph (7), much like the requirements for a permitted temporary pit, the intent of the proposed language is to ensure closure of a closed-loop system to close within an adequate time frame. The six-month period allows ample time for the operator to remove fluids, if they're located in sumps or the drying pad, if necessary, and allow for evaporation of the solids on the drying pad and make arrangements for the remainder of the closure requirements.

Paragraph (8), the intent of the proposed language is to close permitted below-grade tanks within 60 days of cessation of operation. The proposed timeline for closure requires operator to immediately remove the liquids

from the below-grade tank and properly close the tank within an adequate time.

OCD can find no reason to allow a below-grade tank to continue to hold or store liquids or solids if it is no longer in operation.

Okay, subparagraph B -- or subsection B, I apologize. This is the closure method for temporary pits.

The intent of the proposed language is to create specific closure requirements. The provision for closure in the current rule provides little or no instruction for closure. It states, The operator shall describe the proposed closure [*sic*] method in the -- Okay, let me go back.

The provision for closure in the current rule provides little or no instruction for closure. It sates that, The operator shall describe the proposed disposal method in the application for permit to drill -- or the sundry notice and reports on wells, or, where the pit contents will likely migrate and cause groundwater or surface water to exceed Water Quality Control Commission standards, the pit contents and the liner shall be removed and disposed in a manner approved by the Division.

Even though some of these concepts or similar options -- removal, you know, of the contents in the pits -- we've modified them somewhat. So I guess what we're

trying to get at here is that with our closure methods, they're more specified, they're identified, and they tell the operator how to accomplish the task.

Under the current rule it suggests what they should do but provides -- if -- under certain conditions -- it states that they should just maybe remove the contents of the liner, it doesn't require any additional information of testing beneath or backfilling the area that was used for the pit in covering and trying to re-establish that.

It does talk about re-establishing the surface -- sub- -- the surface, but it only states that it should prevent erosion ponding. And in our regulations we specify how they're going to accomplish that. So they're similar, but they're different.

IPANM has recommended to include the word "evaporate" in the list of methods under B. This is -- would be included, if I'm not mistaken, where it -- about removal of the liquids, pertains to the removal of the liquids, about the recycle, re-use, reclaim and evaporate. They were suggesting that.

The language proposed by OCD requires operators to remove free liquids within 30 to 15 days, depending on if it's a drilling pit or workover pit.

The operator must close the temporary pit within six months of the release of the rig. We feel that this

allows for a period of probably approximately up to four months to allow for evaporation to occur. Instead of having all the fluids present and trying to evaporate them, if you pull them off, there's less fluids present, or liquids present, to evaporate, which also allows the drying out of pit contents.

Other parties such as the industry committee and Yates Petroleum Corporation, they have recommended that the proposed language regarding the removal of liquids be omitted from this provision. Their justification is that all liquids must be removed from the pit in any event, but the timing and handling of the removal will vary by the nature of the closure option selected.

OCD has learned from the past not to assume that this is understood. By specifying the requirement in the rule, the operator will clearly understand their responsibility.

As to the second portion of their justification, each proposed closure method requires the removal of fluids. If an operator proposes the -- proposes waste excavation removal method, the material has to be -- is required to be free of liquids in order to be accepted at a division approved facility.

Under part 36 for a landfarm, a permitted landfarm, or a registered landfill, under part 36, in order

for any of those facilities to accept any of this waste, the waste has to pass the paint filter test or be free of liquids. So we're making sure that's understood up front. As for the deep-trench burial, it has to pass the paint filter test. So by us putting in as a provision that they have to dispose of the liquids or recycle, re-use the liquids, this is something that's going to be required for them to accomplish these other tasks.

Energen has recommended -- they had a recommendation to use a general plan for on-site closure, and in this general plan it would be a plan that OCD had previously approved, as they state, which includes techniques used at any particular site. A general plan would require -- or -- and also in their general plan they would suggest that it would not require separate approval from OCD.

The problem that we have with this is that since on-site closure has siting criteria, there's -- and they did not -- for that provision there was no change in their submittal that recommended that the siting criteria for on-site closure would be admitted from the rule, it would be difficult to determine what they propose meets the siting requirements.

So a general plan -- in order to not get another assessment based on that plan for on-site closure, we would

know if their closure method met the siting criteria. So we would know if they would be able to make a 50-foot separation of groundwater, because a general plan is a general design for closure, but since siting criteria are required for on-site closure, that has to be considered.

So if they say they're going to bury -- put the deep trench 15 feet, dig a 15-foot trench and line it, since there's no siting criteria to operate a closed-loop system, a closed loop system could be in an area where groundwater is at 20 feet. And if they decided to do deep-trench burial there, their design requires them to dig a trench that's 15 feet deep, then there would be a five-foot separation to groundwater, which would not satisfy the siting criteria of 50-foot separation.

So this idea of a general plan and not requiring any additional approval but -- state that since we have an approved plan, we can implement it without further approval at other locations, wouldn't be appropriate, and may not allow closure -- especially on-site closure to take place at sites that do not meet the siting requirements.

Okay, paragraph (1). Waste excavation or dig-and-haul is a closure method which is currently utilized by operators throughout the state. When used in its current practice, operators treat or stabilize the pit contents for removal, excavate the pit contents, the liner material and

usually a few additional feet of soil below it.

Currently no testing beneath the pit or the excavated pit or liner is performed to determine if a release has occurred. The excavated is backfilled without an assessment. This explains a lot of the comments that we have that there's no documented releases.

Under the current provisions, since testing is not required for closure, what we don't know can't be assessed. Without this type of assessment, the status will remain unknown until contamination of a public or private well occurs, at which point the costs of remediation or cleanup may far exceed the minimal time and additional expense required for testing.

The intent of the proposed language is to operators the procedures and protocols required to complete the waste excavation and removal closure method. It also provides a format in which the applicant should create and submit their closure plan.

IPANM has recommended that this provision be omitted or deleted from the proposed rule. Such a change would limit the options for operators to properly dispose of waste material.

In their comment, their justification for this is that they would rely on the industry committee's comments for proposed reasons. For clarification purposes, I'd like

to state that the industry committee did not request that this option be omitted or deleted, but they did recommend modifications to this.

Paragraph (a), I think, is pretty straightforward. Operator shall close the temporary pit by excavating all contents, if applicable, synthetic pit liner and transferring those materials to a Division-approved facility.

Our expectation of this, the fact that it requires it to go to a Division-approved facility, we would like the identification of that facility so we can confirm that is a Division-approved facility, since we permit most of those facilities.

Subparagraph (b), the intent of the proposed language and specified constituent limits for the provision requiring testing beneath the excavation is not a closure standard. The specified constituent limits are limits for delineation only. An operator would be required to continue to sample until the specified limits are obtained, at which point the delineation would be complete. Such methods of sampling would include the use of a geoprobe, a trackhoe or backhoe to obtain the samples.

A method that some operators have recently started to implement is to obtain background samples of the soils prior to the installation of the temporary pit. If

an operator obtains such samples, then their delineation would have to be to background concentrations or the specified limit, whichever is greater. So it may make that an easier process for them.

The requirement for testing is also prompted from information shared by operators about the methods they use to solidify and stabilize waste and how it's implemented. Operators have informed OCD during the task force meetings that in some of their processes to stabilize or solidify the contents, the integrity of the liner is usually compromised, thus creating a release. Once it's compromised, a release has occurred below the liner. Since the stabilization and the solidification process can take a few days, it would be difficult to determine the volume of liquids or fluids lost.

We have a couple of footnotes. And as you can see, it's bright red. It's a nonconsensus task force item.

In our footnotes, footnote 27, this was a footnote provided. Originally we had proposed that there would just be a composite sample obtained, and we considered this recommendation from this party and incorporated additional testing of any individual hot spots -- I believe it's individual grab sample from any hot spots -- and it should be -- beside the comment, the footnote up there, how we took consideration of this comment and

incorporated it into the regulation.

I think if you scroll up some more, Mr. Hansen, there are several other comments provided by certain parties.

Footnote 28 -- and these were -- as I stated earlier, these footnote comments were based upon the draft version. The -- Footnote 28 was also another comment that in case certain test methods were changed, since we were referencing EPA test methods, that we should have some language in there that would allow for an alternative method approved by EPA, so forth.

We did modify this language, based upon this recommendation. We modified it to include other EPA method that the Division approves, so we did take consideration of this recommendation and make a change to the rule.

There is a footnote 29. Once again, we -- this is a support comment that was provided for requiring testing beneath the pit.

Footnote 30. This comment I'll read aloud, that the siting, design, construction and operational requirements are followed and the limited time fluids are in the in the pit, visual observation should be adequate versus sampling and analysis. Note the organic constituent concentrations are lower than the NMED -- and that's the -- I believe that's the soil standards that they have. And

then of course they ask for consistency between agencies.

Well, I'd like to state that all those things that were addressed up above listed are open to exceptions which could change the perspective since they're not -- they could be requested under exception and change. So that's one thing.

But the other is that -- Let's see, what have I got here? The liner materials -- I guess Mr. Hansen kind of addressed this through his modeling. You know, in a perfect world siting, design, construction, operational requirements -- if they were followed and the liquids were removed in a timely manner, that would be great.

But you know, we're human, we're not perfect.

A good example of this is, liner materials are allowed to leave factories with minimal defects. This is something that even if you did it right -- Mr. Hansen modeled these defects. Pinholes, improper seams -- they may come directly from the factory. That has nothing to do with -- if someone did everything perfect, on the other spectrum of that.

So -- and then, of course, with this, with the methods of stabilization and solidification, there's no guarantee that the liner used for the temporary pit would not be compromised. It may result in some type of unintentional release. If you don't test beneath it, it

doesn't matter how you do all the other stuff. If you compromise that liner -- All these things are great, but it's still not going to resolve that issue of potential release -- unintentional release in the process of trying to stabilize these contents.

So the closure activities themselves can be the culprit of a release.

Of course, OCD considers testing beneath the pit crucial for confirmation that release has not -- or did not occur. The results may be beneficial to the operator at a later date if parties make claims that their pit was associated -- associated with their drilling activities is the potential source of contamination. This would -- if they test underneath to confirm that there was any contamination, then they could be eliminated from those parties under suspicion.

Of course, as for the visual observation, OCD does not consider a visual observation to be sound science, especially when compared to representative sampling and laboratory analytical results.

Q. And is the Oil Conservation Division in favor of using sound science, Mr. Jones?

A. We definitely are.

CHAIRMAN FESMIRE: Mr. Brooks, would this be a good time to take a break?

MR. BROOKS: It would, indeed.

CHAIRMAN FESMIRE: Mr. Carr?

MR. CARR: Before we do, Mr. Chairman, I'd like to file -- just make a statement to follow up on Mr. Jones' comment about being humans and not perfect.

We've been sitting in this afternoon, listening to comments -- repeatedly there have been comments that Energen has recommended that this be deleted, and it has caused Energen to take a look at what it filed, and it has discovered that it filed a totally incorrect version of its comments. In fact, it filed in lieu of its comments an attachment to an early --

For that purpose, we request permission to withdraw Energen's comments at this time. They are incorrect.

CHAIRMAN FESMIRE: Whoa. Okay.

(Laughter)

MR. CARR: Actually, I think it's -- having Mr. Jones discuss them as we go through the afternoon, we'd like to withdraw them, because it was the incorrect version. That was why.

CHAIRMAN FESMIRE: Mr. Carr, would it be satisfactory to your client if that were to be noted --

MR. CARR: Yes --

CHAIRMAN FESMIRE: -- however Mr. Jones has --

MR. CARR: -- please do.

CHAIRMAN FESMIRE: -- prepared his testimony?

Okay, so we'll note for the record that Energen's comments were -- they intend -- they have withdrawn them --

MR. CARR: Yes.

CHAIRMAN FESMIRE: -- but even withdrawn comments that OCD doesn't know about, apparently, were evaluated --

MR. CARR: Yes, but we -- we did discover that, and we think it would be inappropriate to go forward acting like that's what we really --

CHAIRMAN FESMIRE: Okay. And I'm -- on behalf of the Commission, I apologize for any incorrect assumptions, but I think at this time it would be sort of a burden on Mr. Jones to ask him to --

MR. CARR: We're not asking that he change his presentation. We just wanted that on the record because we did discover this afternoon that some of the comments didn't quite mesh with what we thought we had said, and we discovered that what we said was what we had not intended.

CHAIRMAN FESMIRE: Okay.

MR. BROOKS: Mr. Price has suggested that we make Mr. Jones start his presentation over again.

(Laughter)

MR. CARR: Mr. Chairman --

THE WITNESS: I object.

MR. CARR: -- I think that Mr. Brooks' use of his own version of the Chinese water torture --

(Laughter)

MR. CARR: -- is an inappropriate hearing tactic, and I'd like to have a continuing objection --

(Laughter)

CHAIRMAN FESMIRE: I think what Mr. Carr is objecting to is the emotional waterboarding --

(Laughter)

CHAIRMAN FESMIRE: -- necessary to implement rules in today's environment.

What do you say, instead of getting slap-happy, that we take about a 10-minute break, and then we'll go until about 5:30, so we don't have to go through much more of this?

(Thereupon, a recess was taken at 4:30 p.m.)

(The following proceedings had at 4:42 p.m.)

CHAIRMAN FESMIRE: Let's go ahead and go back on the record. Let the record reflect that it is 4:40 p.m., that the Case Number 14,015 is being reconvened, that all three Commissioners are present, there is a quorum present, and we were in the direct testimony of Mr. Brad Jones.

Mr. Brooks?

MR. BROOKS: May it please the Commission.

CHAIRMAN FESMIRE: Sir.

Q. (By Mr. Brooks) You may proceed, Mr. Jones, with your testimony.

A. Okay, I believe we were discussing the footnotes that were provided, and I had discussed footnote 30. Part of 30 also involved -- 30 and 32 were similar comments. The last part of 30, about consistency between agencies, and 32 reflect the same type of comment. I'd like to address that.

And the standardization of constituent concentration levels is not a practical consideration, since each separate governmental agency is delegated to create rules and standards based upon their statutory objective, such as the protection of air, drinking water, surface water, groundwater or human health, to state that one level -- one concentration level could add the same level of protection for each item would be inappropriate.

So we are -- we are proposing our own to apply to our type of waste and our concerns for that waste.

COMMISSIONER BAILEY: Can you explain what SSLS stands for in that --

THE WITNESS: Soil screening -- Where is that again?

CHAIRMAN FESMIRE: SSLS -- NMED SSLS.

THE WITNESS: Soil screening -- I --

MR. PRICE: -- concentration.

MR. BROOKS: That would be SSC.

MS. FOSTER: L is for levels.

CHAIRMAN FESMIRE: L is for --

MS. FOSTER: -- levels.

THE WITNESS: -- levels.

CHAIRMAN FESMIRE: Soil screening level -- S?

THE WITNESS: -- standards.

CHAIRMAN FESMIRE: -- standards, okay.

THE WITNESS: Okay.

CHAIRMAN FESMIRE: Soil screening --

COMMISSIONER OLSON: SSL --

CHAIRMAN FESMIRE: SSL --

COMMISSIONER OLSON: Actually, maybe that's plural. SSL's, soil screening levels.

CHAIRMAN FESMIRE: Okay.

THE WITNESS: Okay.

There is a footnote, footnote 31. Let's see, is that one up there, Mr. Hansen? Right there, the Marbob.

This footnote talks about, once again, if -- the integrity of the liner will be maintained if the siting, design, construction, operation requirements are followed, along with the removal of the fluids. Extensive sampling is not necessary unless a release has occurred.

I think the first part of that, the integrity of the liner shall be maintained -- I disagree with that

because of expressed -- of the techniques and the results of the techniques of stabilizing and solidifying the waste has been -- we've been informed that in that process, that the liner can become compromised. So that action, the closure activity itself, can be the cause of a release or create a potential -- unintentional release. Therefore, sampling should be done to make sure that release is addressed.

From the October 22nd submittals, industry committee and Yates Petroleum Corporation, they have recommended to modify the delineation testing parameters of one of the indicators. One of the indicator -- well, 2-to-1 indicator constituent, and that constituent would be chloride. Their suggestion is before there's delineation only chloride be used to determine if a release has occurred. They have also -- have recommended to increase that chloride standard to 500 milligrams per kilogram. Our current recommendation is 250.

One of their justifications is that the chloride is the most conservative of the various compounds.

Q. (By Mr. Brooks) Excuse me, Mr. Jones, is that 500 or 5000?

A. I'm sorry, 5000. 5000 milligrams per kilogram is their recommendated -- recommendation for increase of the standard.

As I was saying, their justification is that chloride is the most conservative of the various compounds. OCD agrees that chloride is -- is most likely the most conservative of the various compounds associated with these pits. We demonstrate that because we've used it in our modeling demonstrations.

Our objection is that to use chloride as a sole-source indicator for the standard would not represent all of the constituents present. Examples of this is Mr. von Gonten's demonstration of our pit sampling results. In the northwest -- and I think Commissioner Bailey pointed this out -- there's a wide range of levels for chlorides. In some of those instances I think they range -- the lowest was maybe 1700 or close to that.

If the standard was 5000, it would not detect a release. It would not mean that the content of that pit didn't have other constituents present. So it may indicate a false negative -- make sure I've got this right, making a clear statement -- it would indicate a false negative in that it would not -- the negative part of that, it would falsely indicate if a release has occurred, and that's what we're trying to do in the delineation process.

That's why we ask that the 3103 constituents be part of this, as well as BTEX and TPH, because there's other constituents that could be present. And if the

chloride standard is set too high then you may not detect a release -- a liquid release especially, into an area beneath the pit if only the chlorides were lower. You're counting on one constituent to make your determination.

We've already demonstrated that out of -- and I don't know how many were sampled, I don't see Mr. von Gonten, but out of those that were listed for the northwest, I think there was only one at 100,000. The majority were maybe 1000 to 7000.

COMMISSIONER BAILEY: The average was 3700.

THE WITNESS: There we go. This would be a clear indication that if those -- if the content of that pit were to release and the standard for delineation was set at 5000, the determination using that one constituent would determine that no release has occurred, even though the contents of the -- especially the liquid contents of the pit, could leak out from that. There could be BTEX, there could be TPH, there could be metals. It would not indicate that, counting on chloride alone.

So in our proposal, as you see, we have BTEX standards, especially for -- I believe it's benzene -- or -- no, that's -- yeah, that's BTEX. Benzene standard for .2 milligrams per -- I'm sorry, it's BTEX, total BTEX concentration, .2 milligrams per kilogram. We have TPH -- Let's see, I think I'm off here on my reading. It is

benzene not to exceed .2 milligrams per kilogram, for BTEX not to 50 milligrams per kilogram, TPH not to exceed 100 milligrams per kilogram.

And of course our chloride standard is set at 250, because we want to determine if a release has occurred. If it's set higher, we'll miss that determination.

Then of course we have the 3103 -- I take that back, I'm thinking of closure standards. My -- I'd like to correct. 3103 constituents from WQCC are not required for the delineation process, so I'd like to clarify that. So...

But our concern is, if you set the standard too high, you set it high enough that you'll never detect a release. And using one constituent to be the indicator constituent of the release may not be appropriate for certain regions of the state and cannot be universally applied for all situations, because in the southeast concentrations of chlorides are going to be higher than they are in the northwest, and by setting that standard too high you're not going to detect a release in the northwest.

Okay, another proposal by the industry committee and the Yates Petroleum Corporation, they have recommended an additional proposal that would allow -- if I may quote it, The operator may propose alternative testing of the

soils beneath the pit to determine whether a release has occurred based upon site-specific hydrology -- hydrogeology, and propose alternate site closure standards for district approval.

The proposal does not identify which site-specific hydrogeologic conditions would be considered or how they will -- how they should be considered to determine approval. The -- they have also -- and this is industry committee and Yates Petroleum, they also have requested that -- since they're requested earlier, and I think I've mentioned it earlier, the admission of the hydrogeologic report for the application permit, OCD would have to wait for them to generate that information for us to even consider assessment.

So since they're objecting to have that in the permit application, it will not be readily available.

So OCD -- at this point they're indicating that -- if they're proposing alternative standards based upon these conditions, OCD -- it would indicate that a release has been determined.

The recommendation that the operator may propose alternative testing of soil does not specify how this is determined or why. It also doesn't allow for OCD to have any involvement in the process, other than approval.

The plain language, as I have read earlier,

states that -- see if I've got it here -- the operator may propose alternative testing of the soil beneath the pit to determine whether a release has occurred, based upon the site-specific hydrology -- hydrogeology -- and the proposed alternative site-closure standards for district approval.

It doesn't say that -- it's not for consideration of a review or -- and it -- for consideration of approval. It states that it's for approval only, which mandates that we have to approve it.

So there is some issues about the language that they even proposed, that -- the way they proposed it.

They have offered another option. OCD is granted to require additional information to protect public health and the environment. If you notice, I did not say protection of fresh water, public health and the environment. They admitted the provision for protection of fresh water in their delineation assessment, so I'd like to point that out.

And I'd like to state that our intent for the delineation is primarily the protection of fresh water. We're delineating to determine if there's contamination in the vadose zone and fresh water. If it's in the vadose zone, it has the potential to impact groundwater.

Another provision that has been recommended by industry committee and Yates Petroleum Corporation is a

requirement of no testing. The required provision states, If records show that there is no useful groundwater below the pit or no hydraulic connection between the pit and usable groundwater, no testing is required.

In order for OCD to consider such a request, the operator would be required to install a monitoring well at each proposed pit to determine that the lithology beneath the pit -- to determine that the lithology beneath the pit and demonstrate that groundwater is present. It would also require testing of the water to determine of the concentration, the total dissolved solid concentration, is greater than 10,000 parts per million.

Since the defined volume of water -- well, a defined volume is not included in the statewide definition of groundwater, the usability of groundwater would have to be determined by the TDS concentration which used to determine if it's protectable or usable.

Since they don't define usable, this is the only way we can assess it.

Any proposed records would be insufficient since most documented discovery cases of groundwater are based on high-yielding sources. Also, without site-specific lithology, the hydraulic connection between and usable groundwater cannot be considered or demonstrated.

It is not OCD's intent to complicate the closure

process or require operators the additional cost of installing a monitoring well at each proposed site for closure.

Okay, we're at subparagraph (c). The intent of the proposed provision is to instruct operators that if it is determined that a release has occurred, the operator shall address the release pursuant to the provisions of the prevention and abatement of water pollution and/or release notification or corrective action. These are part -- or Rule 16 [*sic*] and Rule 19, whichever one may apply.

The release and the activities required to address -- to address this release if it's determined, no longer fall under this part. They must be addressed by either -- by one or both of the specified provisions.

What we're trying to state here, that if you determine that a release has occurred, that release is not handled by the pit rule or by part 17, it is handled by these other provisions, Rule 16 and Rule 19, and we just wanted to make sure that was clear.

Certain parties, the industry committee and Yates Petroleum Corporation, they have recommended that additional language be provided to this provision. The recommended additional language would place a condition or limit on the delineation, remediation and corrective action process. The additional language would change the

provision to state, If the operator or the Division determines that a release has occurred and there is no reasonable possibility to impact usable groundwater, then the operator shall comply with 19.15.3.116 NMAC and 19.15.1.19 NMAC as appropriate.

The additional language, There is reasonable possibility to impact usable groundwater, requires both conditions to occur. It's one of those -- it's an "and" statement that's added. A release has occurred, and then they -- it has to be determined that there's going to be a reasonable impact on groundwater. It's not a release has occurred and contamination has occurred in the vadose zone. It has to be linked to groundwater only, the impact of groundwater only.

So it's not addressing the source of the release and the removal and remediation of a release in that source material once a release has occurred. Their only stipulation is that we follow these provisions if it's going to impact usable groundwater.

That's going to be a difficult thing. Mr. Hansen's modeling demonstrates it's a matter of time, you know, of any type of release that occurs, and that's even with deep-trench burial and the concentrations of that waste material being stabilized or solidified.

So one could argue, based upon his demonstration

through his modeling program, that any release, it's a matter of time before impact, groundwater or fresh water. And since our intent is to protect -- and the intent of these provisions is to address releases, we're -- we do not recommend that change.

Subparagraph (d), the intent of the proposed language is to inform operators of the actions and steps required to complete a waste excavation removal closure if the delineation testing demonstrates a release has not occurred. The proposed backfilling, soil cover, and re-vegetation specifications provide instructions to the operator to complete the closure.

The current rule only recommends that the operator shall contour the surface where the pit was located to prevent erosion and ponding of rainwater.

With ours, we're talking about -- you know, we're talking about compacting these soils using non-waste-containing earthen material and putting a prescribed cover and re-vegetating to a certain standard. So we were adding a bit more specificity to it than the current rule has.

Now there is a footnote to this, it's footnote 33. I guess -- and we are talking about (d). I guess there was some confusion, I don't know. During the task force meetings, when we talked about a soil cover design and re-vegetation, we didn't -- I guess there might have

been some confusion. They didn't -- there was no stipulation of how this would be applied, but we talked about temporary pits. And so the section references the part pertaining to the prescribed soil cover that was agreed upon by task force and the re-vegetation standards for that.

The thing that was absent -- and this was part of -- and I apologize if I didn't make that clear, was, the backfilling was never talked about. There was talk about putting a soil cover on it, but not any specificity -- Well, I may have to look to clarify that. I didn't think that we addressed the backfilling part of that. We only talked about applying a cover.

There is a step -- additional step, since the cover is only four feet thick, if you have a trench that may be -- or a temporary pit that may be 12 feet deep or 10 feet deep, the four-foot cover is not going to bring it up to the existing grade, which is part of the requirement. There's going to have to be some backfilling.

So the comment during the draft version didn't even have backfilling requirements to it, so we did have to address this in here. The comment actually pertained to the soil cover and the re-vegetation standards, and I think that there was -- there might have been some confusion on that, because they didn't follow their reference.

Okay, paragraph (2), on-site deep-trench burial. The intent of the -- Well, let me go back for a second.

There was a comment provided by industry, the industry committee and Yates Petroleum Corporation. Their recommendation to subparagraph (d) of (1) was to omit the initial language, the part that states, If the sampling program demonstrates a release has not occurred or that a release does not exceed the concentration specified in subparagraph (b) of paragraph (1) of subsection D of 19.15.17.13 NMAC, they -- their recommendation is to omit that language. Such a change would allow operators to implement the backfilling activities and the installation of the soil cover and re-vegetation of the impacted area without addressing a confirmed release.

So if you were to remove that language from this requirement, it would apply that they would test if a release is determined and they would backfill that area -- there would be no condition to address it under part 16 -- or Rule 16 -- or Rule -- I'm sorry, Rule 116 or Rule 19, while the pit is opened. And this is the removal of the temporary pit, so this would imply that they would be able to just go back and backfill it, and if they put the cover on it, it would allow them to put the designed soil cover and re-vegetate the area and leave that contamination at the site and not address.

So that's not the intent that we had when addressing this. We want to make sure that the release was addressed.

Okay, paragraph (2), deep-trench burial. The intent of the proposed provision is to allow operators to implement a closure method that is currently used with additional requirements and modifications. The details of this will be further discussed further down, as we get down to, I believe, subsection F. But this is to direct them to subsection F if they plan to -- or propose this as a closure method. It's an instructional regulation.

We do have a footnote here, footnote 34 and 35. For clarification purposes, the draft that was provided -- draft version of the rule that was provided to the task force originally had deep-trench burial as an exception, a specified exception for closure. We had a lot of comments asking if we could incorporate this somehow into the general provisions and have it outside of exceptions.

We considered that, and this is our attempt to do that. So we did take their comments and address that and did incorporate the deep-trench burial method as an option, not an exception.

Also from the October 22nd submittals, the industry committee and Yates Petroleum Corporation, they have recommended to re-title this closure method, Deep

trench burial.

Our intent is to include the on-site in the title of the method to clarify to the applicants and the operators that the method falls under the provisions referring to on-site closure methods. We have siting requirements for on-site closure methods, we -- that we refer to, we have general provisions for on-site closure. So to identify it as an on-site closure method by having it in its title would notify those applicants where it falls within the realm of things.

Subparagraph (3), alternative closure methods. The intent of the proposed provision is to allow operators to propose an alternative to waste excavation and removal or on-site deep-trench burial. If the operator wishes to request an exception to any of the requirements of either of the two specified closure methods, any -- let's say for on-site -- for waste excavation or -- and removal -- if they want to specify something within that method, that would be addressed under general provision -- or general exceptions.

What we're looking at is something other than the two specified methods, not an alteration of those methods but something totally different. By requesting that, that is under -- that is under the exceptions provisions, and there's a special provision under exceptions to address

alternative closure methods.

A good example of this, of how this would apply, is, instead of requesting the dig-and-haul or waste excavation and removal or the deep-trench burial method, a party may come in and say, We want to take these pit contents that are dry, we want to construct maybe a lined pad and use them to place a tank battery -- construct a tank battery pad out of these contents, and we're going to collect any fluids that come in contact with these and dispose of them at an approved facility. That would be an example of an alternative closure method under this provision.

Certain parties -- industry committee, Yates Petroleum Corporation -- they have recommended a fourth closure option for temporary pits. The fourth option is referred to as closure in place. This proposed option requires the operator -- this is a direct quote -- the operator must meet the siting requirements -- I'm sorry, the proposed option requires that the operator must meet the siting requirements, not that the closure method satisfy the siting criteria for temporary pits or below-grade tanks, but the operator shall meet the siting requirements.

The proposed option would allow operators to backfill the existing pit and re-vegetate it if groundwater

is greater than 50 feet or considered unusable or not hydrologically connected and all free liquids are removed; the pit contents (after stabilization and based on the groundwater being greater than 50 feet) does not exceed a chloride concentration of 3500 milligrams per liter. There's additional provisions, if the groundwater is unusable and not hydraulically connected, then no testing of the waste material would be required for backfilling and re-vegetation.

Their justification for such option is that this in-place scenario is equally protective as deep-trench burial where the initial chloride concentration is 3500 milligrams per liter or less. They are proposing to change our standard from 5000 milligrams per liter to 3500 milligrams per liter, and this is their basis of their justification.

The proposed justification is not supported by their recommended changes to OCD's proposed rule. The proposed recommendation regarding deep-trench burial requires the operator to test the pit contents after treatment.

And they're suggesting -- is that the in-place is the initial chloride concentration prior to treatment. We only require them to test it after treatment in our proposal. They're suggesting that we require it -- the

initial contents be tested to make that determination.

The proposed recommendation regarding deep trench requires the operator to install a new liner in a separate trench, excavate the stabilized waste material and -- I'm sorry, The proposed recommendations regarding deep trench requires the operator to install a new liner in a separate trench, excavate the stabilized waste material and possibly compromised -- I take this back, this is -- I should be stating that this is their in-place method, their closure in-place method --

Q. (By Mr. Brooks) Mr. Jones, I want to clarify something on that, because you mentioned that they wanted to change our 5000 chloride standard to a 3500 chloride standard, if I heard you correctly.

A. Yes.

Q. The 5000 chloride standard is the standard for deep-trench burial, right? Or deep-trench burial or other alternative -- or what we call alternative closure methods, right?

A. Yes.

Q. And their 3500 is the standard for closure in place under their design -- their specification for closure in place, right?

A. Yes, it is.

Q. So they're suggesting a lower chloride screening

level, but they're also suggesting a less protective closure method?

A. Yes.

Q. Okay, continue.

A. Based upon the deep-trench type of closure, we're looking at placement of a new liner, the material being stabilized, treated to some extent, and we're looking at things like the folding over of the liner to envelope the waste material, putting a geomembrane cover on it and a four-foot cover on this.

Their proposal for just in-place only requires them to use the existing pit liner, that the -- of the existing pit, temporary pit, and they're going to stabilize this material and try to overlap it, and then they're going to just backfill it and cover it up --

Q. Now Mr. --

A. -- and if I'm not mistaken, I believe that's two feet of cover.

Q. Mr. Jones, I'm sorry, I thought you were through with that sentence.

A. Oh, no.

Q. What I was going to ask was, now, the -- we were talking about comparing the 5000 standard that we -- chloride standard that we proposed with the 3500 chloride standard that the industry proposed in this note that

you're referring to.

Now first of all, of course, in answer to my last question I understood you said that their 3500 standard is for in-place closure, as opposed to our 5000 standard is for deep-trench burials.

Now do you recall Mr. Price's explanation yesterday that the 5000 standard, because it's determined by the SPLP test, is actually a 100,000 standard for the waste that's in the pit?

A. Yes, based upon the method for the synthetic leaching procedure, it creates a 20-times dilution.

Q. Now is their 3500 standard the same as it -- is it determined by a method which actually equates to 70,000 p.p.m. in the waste?

A. If I read it correctly, they did not specify a different method. They -- and I'll have to look at it a little bit closer, but my understanding is that their method did not -- they did not change the method of that. And so if they used the same method, it would equate to 70,000 milligrams per kilogram --

Q. Okay --

A. -- which is for the pit contents --

Q. -- continue.

A. -- to be closed in place -- of course, this is -- they're proposing closing this, but it's closure in place

and the deep-trench burial that's this level.

Q. Continue.

A. If I may, I'll read the proposal, their proposed language for closure in place so I can get this correct.

The operator must meet siting requirements in section 19.15.17.10.A.(1). The following requirements and standards shall apply if the closure method involves closure in place. (a), if groundwater is greater than 50 feet below the pit and chloride concentration in the -- in the geotechnically stable pit contents do not exceed 35 milligrams per liter based upon EPA method 1312 and 300.1, the operator shall remove all free liquids from the pit, shall add inert material to make the pit content geotechnically stable, cover the pit contents with compacted earthen material and re-vegetate.

So I stand corrected, there is no thickness for soil cover for this.

If records show -- this is (b) under (2) that they propose -- if records show that there is no usable groundwater below the pit or no hydraulic connection between the pit and usable groundwater, the operator shall remove all free liquids from the pit, shall add inert material to make the pit contents geotechnically stable, cover the pit contents with compacted earthen material and re-vegetate.

Q. Now the EPA methods that they've specified in there, are those comparable to what we have specified for 5000 parts per million test?

A. I believe so. I can check this quickly here.

MR. HISER: They're intended to be.

(Laughter)

THE WITNESS: I'm trying to look at their version to make that statement.

The methods -- our requirement specifies for chloride concentration and determination they use EPA method 300.1, which they recommend, including -- they also list the extraction procedure as well.

Q. (By Mr. Brooks) Okay, continue.

A. What I would like to point out with this is that in this closure recommendation there is no proposal to test beneath the pit. They want to stabilize the contents of the pit. This would be existing pit, for in-place closure -- or closure in place, I believe, is the correct term they use, method. And what they would be doing is treating or stabilizing, solidifying the waste contents within the original pit, which we've already discussed, and it has been identified to us it will compromise the liner underneath, and then basically backfilling that.

Now the -- with this provision there's also a determination of no usable groundwater. They're stating if

there's no usable groundwater or no hydraulic connection between the pit and the usable groundwater, there should be no testing required for standard to allow it to close in place.

Once again, I've discussed how do we make that determination? Our view of this is that this requires them to go out and put a monitoring well or a borehole to let us determine what is the lithology beneath this pit, to make that determination. From the surface, you will not be able to make that determination.

CHAIRMAN FESMIRE: Mr. Jones, would this be a good place to call it a day?

THE WITNESS: I'm all for it.

(Laughter)

CHAIRMAN FESMIRE: Is there a second? No -- At this time, as has become our custom, I will ask is there anybody who wants to make a statement of position for the record or a sworn statement?

Mr. Johnson?

MR. JOHNSON: Up here?

CHAIRMAN FESMIRE: Please. Now you have two options with us. You can make a statement of position, or you can ask to be sworn and make an actual testimony for the record, at which point you will be subject to cross-examination, or could be subject to cross-examination.

MR. JOHNSON: I'll take option two.

CHAIRMAN FESMIRE: Option two. Would you please raise your right hand, then?

MR. JOHNSON: You bet.

(Thereupon Mr. Johnson was sworn.)

KEITH JOHNSON,

the witness herein, after having been first duly sworn upon his oath, testified as follows:

DIRECT TESTIMONY

BY MR. JOHNSON:

MR. JOHNSON: Mr. Chairman and members of the Commission, thank you very much for this opportunity to stand before you today.

My name is Keith Johnson, I am the city manager for the City of Bloomfield. I am also an elected official, I represent San Juan County as a county commissioner. I also had the opportunity to serve on the task force, and I'm grateful for that opportunity to have been able to do that.

In my past life I was the general manager for company called Basin Disposal, which is a produced-water disposal up in Bloomfield. I worked there for nine years, so I'm familiar a little bit with pits and their integrity and other things.

I've had a good -- I feel like I've had a good

working relationship with the Oil Conservation Division. I've worked with some great people over the years, Roger Anderson, Denny Foust, Martyne Kieling, Wayne -- working with him now -- Charlie Perrin. Right now we're working with Wayne on a remediation of a tract that the city would like to buy for -- to build a police station on, so we're excited about that.

The -- I'll go ahead and read my statement.

The oil and gas industry has had a greater impact upon the economy of the State of New Mexico than any other single industry in the state. Whether it's the number of high-paying jobs or royalties and taxes that are paid to local and state governments, I feel like we could not ask for a better partner. From capital outlay funds that are used to pay for projects in the cities and counties to the permanent fund and even schools from across the city, all benefit from the fact that we are blessed to have this tremendous resource in the State of New Mexico.

The Cities of Bloomington, Aztec, Farmington, and San Juan County all depend on the production and exploration of natural gas and oil to help fuel their local economies, and this draft of the proposed pit rule threatens that balance.

As a member of the pit rule task force, I'm a bit disappointed in what was produced. I believed that we

would use sound scientific principles to help us come to an appropriate conclusion, but that was not the case. I believed that to the credit of the industry members that participated in the task force, they conceded in several areas to try and help create a win-win solution to the problems.

By requiring the use of closed-loop systems for drilling and the subsequent hauling away of the cuttings for disposal at NMOCD-approved landfills will have a dramatic impact on the cost of drilling wells.

Over the last several years, due in large part to the success of the oil and gas industry, the State of New Mexico has had a surplus income that is in their budget that has allowed them to be able to address much-needed infrastructure issues including roads, water systems and schools.

At the same time, many other states were faced with large deficits in their budgets, so it was a real coup for the State of New Mexico to be able to have these surpluses.

There are two factors that are critical in this picture, and they're both interrelated: production and exploration. For example, if exploration does not continue at current or higher levels, then production will begin to decrease, which in turn lowers taxes and royalties that the

State receives.

The economies of the Cities of Bloomfield, Aztec, Farmington, and San Juan County, are tied to both production and exploration, and this draft of the pit rules threatens that balance.

When drilling costs rise significantly, as they will with this rule, then the number of wells that are drilled each year will decrease. Jobs will be lost, and the production of natural gas and oil will go down.

Those that are pushing for these stringent regulations and restrictions I don't believe are using sound scientific principles as a guide, but rather are of the belief that due to the higher prices that are being paid for natural gas and oil at this time, that they can afford to absorb those additional costs.

The proponents of this draft rule will try to tell you that this new rule will actually create additional jobs. But the thing that they're not telling you is that when drilling slows down, natural gas production will decrease, as will oil production. I believe that there will be a net loss of jobs.

You may also remember that it wasn't but just a few short years ago that both oil and gas prices hit the bottom. And when that -- and if these additional restrictions had been in place at that time, the industry

and the State would have been impacted to a greater degree, and we would not have seen the surpluses in our state budget that we have enjoyed these past several years.

I would also like to remind you that markets are cyclical, and prices could drop dramatically again. If that were to happen, then the economics of drilling would tilt the other way and it would become uneconomical to drill many of the wells that are being drilled today.

This draft will only punish those companies that are, and have been, good neighbors. Stricter rules aren't what is needed, but rather more enforcement of the current rules.

The OCD should be given a budget, it's my opinion, to help them -- to enable them to do the job that they are trying -- that you are trying to accomplish with this draft. That would be to hire more employees so that they can help monitor the oil patch.

As a city manager and a county commissioner, I represent the citizens and businesses of our community and county, and part of that responsibility includes job creation and development. This rule will have a significant impact on the costs associated with drilling and in turn will hurt our economy.

We also realize that these valuable resources will not be here forever, and we are working to try to

diversify our economy, so we're trying to be proactive in that way.

I'd like to thank you for your consideration.

CHAIRMAN FESMIRE: Thank you, Mr. Johnson.

The down side of this is that the attorneys and the Commissioners get to ask you questions now.

MR. JOHNSON: Okay.

CHAIRMAN FESMIRE: Mr. Brooks, do you have any questions of this witness?

MR. BROOKS: No questions, your Honor.

CHAIRMAN FESMIRE: Karin?

MS. FOSTER: No questions, sir.

CHAIRMAN FESMIRE: Mr. Hiser?

MR. HISER: No.

CHAIRMAN FESMIRE: Mr. Carr?

MR. CARR: No.

CHAIRMAN FESMIRE: Dr. Neeper?

DR. NEEPER: No questions.

CHAIRMAN FESMIRE: Bruce?

MR. FREDERICK: (Shakes head)

CHAIRMAN FESMIRE: Okay --

COMMISSIONER BAILEY: Yes --

CHAIRMAN FESMIRE: -- Commissioner Bailey?

COMMISSIONER BAILEY: -- I do have a question.

CHAIRMAN FESMIRE: Okay.

EXAMINATION

BY COMMISSIONER BAILEY:

Q. What impact do you believe this proposed rule would have on the maintenance and budget you have for road maintenance, with -- there will be so much hauling on your back roads?

A. You know, San Juan County has quite a few -- I can't remember the hundreds of miles that we maintain, and we -- just in some of the reports that I've seen that anticipated amounts of -- number of loads or tons that would be hauled, it would have a dramatic impact, a tremendous impact on our roads, and I believe it would tear them down even more so.

At the same time, it puts more heavy truck traffic out there. We've had ozone issues in the past, we came very close to being out of compliance and luckily were able to see that reduced. But as you increase that truck traffic we could see that again. So that --

Additionally with the heavy truck traffic there are safety issues for vehicles. Every year we have a number of accidents between, you know, regular citizens driving their vehicles and collisions with oil and gas. So I think we increase all of those things.

COMMISSIONER BAILEY: Thank you. That's all I have.

CHAIRMAN FESMIRE: Commissioner Olson?

EXAMINATION

BY COMMISSIONER OLSON:

Q. I just have one question. You were mentioning that the OCD didn't use sound science. What portions that they presented do you believe are not sound science?

A. When we did the testing of the wells -- or the pits up in New Mexico, I felt like some of the percentages of contaminants that would be in the material were not that significant.

So I think that -- You know, Basin Disposal used to have 18 mud recycling pits. We had to test whether or not those -- and they were buried in place, they had gotten out of the business of recycling the mud, and so they had us bury that in place. And we had to test all 18 of those, and they had been worked a number of years, and those liners were all intact, there was no leakage underneath. So I believe that with the concessions that the industry made about liner thickness and things like that, that they would be able to protect and keep any materials from contaminating groundwater.

COMMISSIONER OLSON: Okay, that's all I have.

EXAMINATION

BY CHAIRMAN FESMIRE:

Q. What concession did they make with respect to

liner thickness?

A. I'm sorry, what?

Q. What concession did industry make with respect to liner thickness?

A. I believe in our discussions we had -- they approved thicker liners than what are currently being used.

Q. You mean 20-mil instead of the 12-mil?

A. I believe so. And I think -- I don't remember if we went to 30 or if it was 20, but it was thicker than what was currently being used.

Q. Okay, is that the only example of unsound science that the OCD has used in this analysis?

A. Let's see, I've slept since then. Right now it's the only thing I can think of, at this time.

Q. Okay. Would it surprise you to know that there's several members of industry represented here today who are advocating a 12-mil liner maximum -- or a 12-mil liner requirement?

A. You know, if it still works, I don't have a problem with that.

Q. But the question was, would it surprise you?

A. Would it surprise me? No, because it was discussed also during -- at that time.

Q. But you said industry had given that in a concession, and now there are several members of industry

who are not supporting that idea in their pretrial filings, in the pre- --

A. Well, that's their prerogative, I guess. I don't have an issue with it. When we were -- We used temporary pits at Basin Disposal. There were times when we couldn't keep up with --

Q. -- injection?

A. -- injection. And at those times I believe we were using 12-mil liners, and we never had any problems with that.

Q. Mr. Johnson, how long have you been in San Juan County?

A. Eleven years.

Q. Eleven years? So you wouldn't -- Are you familiar with any of the domestic water supply systems in San Juan County that have been contaminated by pits?

A. I am not aware of any.

Q. Okay. Do you know anything about the contamination that occurred in Flora Vista in the late '80s?

A. I do not.

CHAIRMAN FESMIRE: Okay, I have no further questions.

Does anyone else have a question of this witness?

Mr. Johnson, thank you very much.

MR. JOHNSON: You're welcome, thank you.

CHAIRMAN FESMIRE: With that, we will prepare to adjourn. Let's reconvene back here in the morning at nine o'clock. We'll continue with Mr. Jones's testimony.

And then I guess at one o'clock -- 1:30?

MR. CARR: One o'clock.

CHAIRMAN FESMIRE: -- one o'clock, we will proceed to Dr. Stephens' testimony.

We'll see you back here at nine o'clock in the morning.

MS. FOSTER: Mr. Chairman, before we leave, I just wanted to clarify so I can get my babysitter lined up if necessary. It's my understanding that tomorrow evening we will go until we are completed with Dr. Stephens as the witness.

CHAIRMAN FESMIRE: It is my understanding that it's probably the only day we'll have Dr. Stephens, so we'll have to -- have to do that, yes.

MS. FOSTER: Okay, thank you.

CHAIRMAN FESMIRE: Okay?

MS. FOSTER: That's fine.

(Thereupon, evening recess was taken at 5:38 p.m.)

* * *

CERTIFICATE OF REPORTER

STATE OF NEW MEXICO)
) ss.
COUNTY OF SANTA FE)

I, Steven T. Brenner, Certified Court Reporter and Notary Public, HEREBY CERTIFY that the foregoing transcript of proceedings before the Oil Conservation Commission was reported by me; that I transcribed my notes; and that the foregoing is a true and accurate record of the proceedings.

I FURTHER CERTIFY that I am not a relative or employee of any of the parties or attorneys involved in this matter and that I have no personal interest in the final disposition of this matter.

WITNESS MY HAND AND SEAL December 20th, 2007.

STEVEN T. BRENNER
CCR No. 7

My commission expires: October 16th, 2010