

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)
)

CASE NO. 14,015

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

COMMISSION HEARING

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

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Volume XXIII - April 16th, 2008

Santa Fe, New Mexico

This matter came on for deliberations before the Oil Conservation Commission, MARK E. FESMIRE, Chairman, on Wednesday, April 16th, 2008, at the New Mexico Energy, Minerals and Natural Resources Department, 1220 South Saint Francis Drive, Room 102, Santa Fe, New Mexico, Steven T. Brenner, Certified Court Reporter No. 7 for the State of New Mexico.

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A P P E A R A N C E S

FOR THE COMMISSION:

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* * *

1 WHEREUPON, the following proceedings were had at
2 9:05 a.m.:

3 CHAIRMAN FESMIRE: The next matter on the docket
4 before the Commission this morning is Case Number 14,015,
5 the Application of the New Mexico Oil Conservation Division
6 for repeal of existing Rule 50 concerning the pits and
7 below grade tanks and adoption of a new rule governing
8 pits, below grade tanks, closed loop systems and other
9 alternative methods to the foregoing and amending other
10 rules to make conforming changes.

11 This is the matter that's been before the
12 Commission for a while. The counsel for the Commission has
13 been working on the rule and the order conveying the rule.
14 She's not completed it for -- one of the reasons being that
15 there were some issues that came up that the Commission
16 needs to address.

17 Commissioner Bailey, did you have some issues
18 specifically that you wanted to address that we needed to
19 look at in the meeting today?

20 COMMISSIONER BAILEY: I was looking at the
21 definition of below-grade tank, and I was looking at the
22 siting requirements which include below-grade tank for
23 these siting requirements, and I realized that we had not
24 thought about whether or not the large storage tanks, which
25 would be on location for some of the wells that are already

1 there, might be -- with their berms, confused as a below-
2 grade tank and would have to be removed, or because they
3 are in these locations.

4 And I wanted to be sure that we did not
5 inadvertently create a problem for these storage tanks,
6 closed-top storage tanks, that are bermed on location, that
7 are within 300 feet of a residence or 500 feet of a water
8 well or any of those siting requirements that are a part of
9 19.15.17.10.

10 Have --

11 CHAIRMAN FESMIRE: And you're --

12 COMMISSIONER BAILEY: -- any of you considered
13 whether or not we are inadvertently including those, are
14 abandoning those for locations that are either -- that are
15 specified in that section?

16 CHAIRMAN FESMIRE: You're afraid that because of
17 the berm -- the berm comes up over the...

18 COMMISSIONER BAILEY: And an inexperienced person
19 may see that as making it a below-grade tank.

20 CHAIRMAN FESMIRE: Didn't we cover that in our
21 definition of below-grade tank?

22 COMMISSIONER BAILEY: I don't think so.

23 COMMISSIONER OLSON: I thought --

24 COMMISSIONER BAILEY: That's what concerns me.

25 COMMISSIONER OLSON: I thought we did. I mean, I

1 know we had some discussion, because there was a
2 considerable discussion by industry about what tanks would
3 be considered below-grade. There was a lot of testimony
4 about how that works with berms, and I thought it was kind
5 of covered in the definition.

6 COMMISSIONER BAILEY: If you look at
7 19.15.1.7.B.(5), it does not exclude those types of storage
8 tanks that I'm talking about.

9 COMMISSIONER OLSON: Because I thought the change
10 to the definition was that end of the definition where it
11 talks about the sidewalls and below the surrounding ground
12 surface elevation --

13 COMMISSIONER BAILEY: Well, it's --

14 COMMISSIONER OLSON: -- not the berms themselves.
15 That's why I was thinking it was covered, because that
16 wasn't -- I didn't look at it as the intent -- it wouldn't
17 be my intent to include those as --

18 COMMISSIONER BAILEY: I don't think it's any of
19 our intent --

20 COMMISSIONER OLSON: Right.

21 COMMISSIONER BAILEY: -- but yet ten years down
22 the road, somebody who has not been a part of this hearing
23 could possibly see that a bermed large storage tank is
24 included.

25 Do we need to work with that definition to

1 exclude those large tanks that are even already present?

2 CHAIRMAN FESMIRE: In construction standards --
3 design and construction specifications, in 11 -- I.(1),
4 11.I.(1), the below-grade tank sidewalls where the tank's
5 bottom is below grade shall be open for visual inspection.
6 Is that -- we don't -- we don't want these classified as
7 below-grade tanks because the berm elevation is above the
8 bottom of the tank, right?

9 COMMISSIONER BAILEY: Right.

10 CHAIRMAN FESMIRE: So why don't we say that in
11 that definition?

12 COMMISSIONER BAILEY: To change the definition?

13 CHAIRMAN FESMIRE: Below-grade tank means a
14 vessel including sumps and pressurized pipeline drips where
15 a portion of the tank's sidewall is below the surrounding
16 ground surfaces or elevation.

17 That's why you use the word surrounding, but
18 that's -- you're saying that that's not clear enough, that
19 we should find some way to make sure that it doesn't
20 include bermed areas where the top of the berm is at a
21 greater elevation than the bottom of the tank?

22 COMMISSIONER BAILEY: Right.

23 CHAIRMAN FESMIRE: A portion of the tank sidewall
24 -- portion of the tank sidewall is...

25 MS. BADA: Could you just say it does not include

1 the storage tanks where the -- that are above-ground?

2 CHAIRMAN FESMIRE: Say that again, I'm sorry?

3 MS. BADA: You might just say that it doesn't
4 include storage tanks that are located -- you know, that
5 are not located below the surrounding ground surface but
6 have berms that --

7 COMMISSIONER BAILEY: And just make it real
8 specific.

9 COMMISSIONER OLSON: Uh-huh.

10 COMMISSIONER BAILEY: I would like to have that
11 additional sentence.

12 COMMISSIONER OLSON: Uh-huh.

13 CHAIRMAN FESMIRE: Yeah, that's --

14 COMMISSIONER OLSON: Because that was the
15 industry concern that was presented at the hearing, that
16 some of these above-ground storage tanks could be
17 considered below-grade tanks.

18 COMMISSIONER BAILEY: Uh-huh.

19 COMMISSIONER OLSON: Uh-huh. Yeah, I think
20 that's a good way to fix it.

21 COMMISSIONER BAILEY: So the additional sentence
22 would say something like, this does not include bermed
23 large storage tanks?

24 CHAIRMAN FESMIRE: And the other thing is that
25 the -- we need to make clear that, you know, we're

1 excluding tanks that are set in depressions that are not --
2 where the earth isn't immediately in contact, don't we?

3 COMMISSIONER BAILEY: This does not include
4 bermed large storage tanks where the sides are visible?

5 MS. BADA: What we could say is, this does not
6 include above-ground storage tanks that are located above
7 or at the surrounding ground surface's elevation but are
8 surrounded by berms.

9 CHAIRMAN FESMIRE: That's --

10 COMMISSIONER BAILEY: Works for me.

11 CHAIRMAN FESMIRE: That's it, yeah. Okay.

12 Counsel, have you got that?

13 MS. BADA: (Nods)

14 CHAIRMAN FESMIRE: Commissioner, have you got
15 anything else?

16 COMMISSIONER BAILEY: Should I go through all of
17 my comments on the order?

18 COMMISSIONER OLSON: Yeah.

19 CHAIRMAN FESMIRE: Yeah.

20 COMMISSIONER BAILEY: Okay, on page --

21 MS. BADA: I think -- Let's see, I think the rest
22 of yours were mainly corrections --

23 COMMISSIONER BAILEY: Grammar, format --

24 MS. BADA: Yeah, so I don't know that we need
25 to --

1 COMMISSIONER BAILEY: -- there may have been
2 something else.

3 CHAIRMAN FESMIRE: Anything else substantive that
4 we needed to make a decision on?

5 COMMISSIONER OLSON: Because I have a number of
6 edits as well, but what I looked at as the edits that I had
7 were either based on just basic editing or some portions of
8 things that we had conducted in the deliberations but were
9 -- I didn't think were reflected properly.

10 So those I didn't think we needed to discuss
11 further, just needed to make sure that was reflect- -- the
12 deliberations were reflected properly in the --

13 COMMISSIONER BAILEY: Right --

14 COMMISSIONER OLSON: -- in the --

15 COMMISSIONER BAILEY: -- which would include the
16 inclusion of a requirement for the location of the pit on
17 the C-105?

18 COMMISSIONER OLSON: Right.

19 COMMISSIONER BAILEY: Okay. Those were the only
20 substantive changes, then, that I had.

21 CHAIRMAN FESMIRE: Okay. Commissioner Olson, did
22 you have anything that we needed to address?

23 COMMISSIONER OLSON: As I said, not -- I had a
24 number of edits to it so far, but nothing that I saw it as
25 substantially different and that was not discussed during

1 the deliberations, so I see mine as just edits and
2 clarifications to the accurate reflection of the
3 deliberations.

4 CHAIRMAN FESMIRE: Okay. I do have a couple of
5 small issues that I felt that we needed to address, on --
6 starting in section 10, 19.15.17.10.A.(1).(d).

7 We introduced the concept of horizontal feet here
8 a couple of places, and I want to make sure that everybody
9 understood that every place we refer to a distance we're
10 talking about horizontal distances in this particular
11 siting requirement.

12 COMMISSIONER OLSON: Where are we at again?

13 CHAIRMAN FESMIRE: 19.15.17.10. It's page 3 on
14 the Division proposal. For instance, on B we start within
15 300 feet of a continuously flowing watercourse, and then
16 all of a sudden down here on D we start talking about
17 horizontal feet.

18 And we do it in -- By introducing the concept, I
19 want to strike the word horizontal, because unless we
20 specifically -- and I don't know of any place where we did
21 -- unless we specifically talk about vertical distance, the
22 distances -- we're talking about a horizontal.

23 And I don't want to leave any question in there,
24 and I want to make sure that none of the Commissioners was
25 talking about not allowing -- for instance, a siting

1 requirement within 300 feet of a continuously flowing
2 watercourse, we are not talking about vertical distance and
3 don't intend to, are we?

4 COMMISSIONER BAILEY: That was not my intention.

5 COMMISSIONER OLSON: No.

6 CHAIRMAN FESMIRE: So I'm asking that on
7 A.(1).(d), twice we strike the word horizontal, within 500
8 horizontal and within 1000 horizontal feet, (2).(d), the
9 same thing, and then down in C.(4) we've got the same
10 thing.

11 And make it clear that -- for instance in C where
12 we're talking about water that's less than 50 foot below
13 the bottom of the waste, we're not talking about horizontal
14 distance there. But the other displacements are, you know,
15 intended to be horizontal, you know, straight-line
16 distances.

17 Is there any problem from the Commission?

18 COMMISSIONER BAILEY: No problem.

19 COMMISSIONER OLSON: No --

20 CHAIRMAN FESMIRE: Commissioner?

21 COMMISSIONER OLSON: -- that's fine.

22 CHAIRMAN FESMIRE: Any problem from the
23 Commission. Oh, boy.

24 Under -- on section 11.E under netting, the
25 operator shall ensure that a permanent pit or permanent

1 open-top tank is screened, netted or otherwise rendered
2 nonhazardous to wildlife, including migratory birds.

3 I'm wondering, do we need to introduce the
4 concept of livestock in there.

5 COMMISSIONER BAILEY: I think that was part of
6 our discussions.

7 CHAIRMAN FESMIRE: Was it?

8 COMMISSIONER BAILEY: I believe I remember that,
9 but I think that it should be included.

10 COMMISSIONER OLSON: Isn't that the -- I guess
11 the purpose of the fencing is for livestock. I mean,
12 you're supposed to keep the -- you essentially have an
13 enclosure with fencing to keep livestock out, because I
14 don't think you could make a net that a 2000-pound cow is
15 going to step on go into a pit, so...

16 COMMISSIONER BAILEY: And D.(3) does specifically
17 say livestock.

18 COMMISSIONER OLSON: Right.

19 CHAIRMAN FESMIRE: Okay, so you don't think
20 it's --

21 COMMISSIONER OLSON: We changed D because D
22 originally was fencing, if I remember correctly, on
23 wildlife and livestock, and we had changed that back to
24 just livestock, because we had concerns about, you know,
25 are you going to be able to keep mice out with fencing?

1 You're not going to be able to do that, so to what extent
2 you're considering wildlife, we reduced it back to just
3 livestock.

4 CHAIRMAN FESMIRE: I'll withdraw that suggestion,
5 then.

6 In the next sentence, where netting is not
7 feasible, can we put netting or screening is not feasible?

8 COMMISSIONER OLSON: That seems appropriate. The
9 prior sentence talks about screening.

10 COMMISSIONER BAILEY: Uh-huh, it says screening
11 and netting in the first sentence, so --

12 COMMISSIONER OLSON: Uh-huh.

13 CHAIRMAN FESMIRE: Yeah.

14 COMMISSIONER BAILEY: -- that's fine.

15 CHAIRMAN FESMIRE: The next question I had is
16 under F.(9).

17 The operator shall design and construct a
18 temporary pit to prevent run-on of surface water. A berm,
19 ditch or other diversion shall surround a temporary pit to
20 prevent run-on of surface water. During drilling
21 operations, the edge of the temporary pit adjacent to the
22 drilling rig is not required to have run-on protection if
23 the operator is using the temporary pit to collect liquids
24 escaping from the rig -- and I would propose that we add
25 the phrase, and run-on will not result in a breach of the

1 temporary pit, to make sure that if the pit is -- that the
2 design is such that, while they can have run-on from under
3 the rig, we're -- it's still a problem -- the design has to
4 be such that run-on from the -- you know, any additional
5 run-on will not breach the temporary pit, is what I was
6 trying to say there.

7 COMMISSIONER BAILEY: I have no problem with
8 that.

9 COMMISSIONER OLSON: That sounds find.

10 CHAIRMAN FESMIRE: The next one, we talk several
11 places, or at least a couple places in here about the size
12 of the temporary pit. I'm thinking that we ought to
13 clarify that and use, the volume of the temporary pit shall
14 not exceed 10 acre-feet, including freeboard.

15 COMMISSIONER BAILEY: I'm glad you've made those
16 changes.

17 COMMISSIONER OLSON: Yes, that is a volume, 10
18 acre-feet is a volume.

19 CHAIRMAN FESMIRE: The same thing in G.(10), the
20 volume.

21 And down in H.(3).(c), berms that prevent run-on
22 of water or fluids, reading H.(3), An operator of a closed-
23 loop system with drying pads shall design and construct the
24 drying pads so as to include the following: (a) appropriate
25 liners that prevent the contamination of fresh water and

1 protect public health and the environment, (b) sumps to
2 facilitate the collection of liquids derived from the drill
3 cuttings; and (c) berms that prevent run-on of water or
4 fluids.

5 And the specific reason for this is to
6 differentiate it. In a drying pad, I don't think we want
7 the -- you know, escape of rig fluids or anything else
8 inside that berm, and so I'm asking that we make it a
9 little more general, the run-on of water or fluids, and
10 scratch the word "surface".

11 COMMISSIONER BAILEY: Otherwise, the whole point
12 is defeated.

13 COMMISSIONER OLSON: Right.

14 COMMISSIONER BAILEY: Yes.

15 CHAIRMAN FESMIRE: Commissioner Olson?

16 COMMISSIONER OLSON: I'm just reading it again to
17 try to...

18 Well, it seems to me the purpose of the berm is
19 just -- is more to keep the run-on from coming onto the
20 pad, which would be just surface waters, wouldn't it?
21 Or -- I guess what other fluids are -- maybe -- Go over
22 that again, I'm -- maybe I'm a little confused.

23 CHAIRMAN FESMIRE: Okay. An operator of a
24 closed-loop system with drying pads shall design and
25 construct the drying pads so as to include the following:

1 (c) berms that prevent run-on of surface water or fluids.

2 You know, sheet flow -- It seems a little too
3 specific. For instance, your berms -- you want to prevent
4 run-on of -- you know, if something goes wrong, you lose a
5 hose, you don't want the drilling fluids to run onto the
6 drying pad, you want the berms to prevent that -- design to
7 prevent that too.

8 COMMISSIONER OLSON: Okay, I see what you're
9 saying.

10 CHAIRMAN FESMIRE: Commissioner?

11 COMMISSIONER BAILEY: I have no problem with
12 that.

13 CHAIRMAN FESMIRE: Okay. And those were all the
14 changes that I had that I thought the Commission needed to
15 address on that specific.

16 There is one major issue that we need to address.

17 MS. BADA: I have one question before we -- just
18 a point of clarification. At the last deliberations, you
19 had asked for a mixing ratio of 3-to-1, and I just need to
20 clarify if that was only the trench burial, or if it was
21 also for in-place burial. So I just need to know the
22 Commission's intent on that.

23 COMMISSIONER OLSON: I thought it was for both,
24 but --

25 CHAIRMAN FESMIRE: That was my impression also,

1 that the sampling limit for the in-place burial, your
2 solidification, it may take a greater -- although I doubt
3 it, it may take a greater mixing ratio to get
4 solidification. But the sampling should be done with the
5 3-to-1, shouldn't it?

6 MS. BADA: That's just what I need to know, what
7 your intent was.

8 CHAIRMAN FESMIRE: Commissioner?

9 COMMISSIONER BAILEY: I think we have to have
10 some sort of standardized testing ratio so that we have
11 consistency in application of the rule. And if we have it
12 applying to both, then we are being consistent in how we
13 want things tested, how we want things to be emplaced,
14 whether it's a pit or a trench.

15 I think it has to apply to both.

16 MS. BADA: Okay.

17 COMMISSIONER OLSON: Yeah, because my concern
18 was, I think, the same as Commissioner Fesmire's, that the
19 idea -- otherwise you might have somebody just -- what are
20 they going to do, a 100-to-1 dilution and make just massive
21 volumes of waste out of something that was originally a
22 smaller volume?

23 So it's kind of going against the whole idea of
24 waste minimization, you're essentially creating larger
25 volumes of wastes, even though they have an overall lower

1 concentration across that whole volume.

2 So I think -- I just want to make sure that we
3 don't create large-scale, essentially pit volumes that
4 would be used solely just for diluting the waste --

5 CHAIRMAN FESMIRE: -- prior to closure and --

6 COMMISSIONER OLSON: -- prior to closure, right.

7 CHAIRMAN FESMIRE: Okay.

8 COMMISSIONER OLSON: That was the same thing I
9 was thinking with -- that's what I was thinking with the
10 trench burial, where we don't create these humongous
11 trenches to accommodate what was originally a smaller
12 volume, so...

13 COMMISSIONER BAILEY: So a site doesn't grow from
14 two acres to 14.

15 COMMISSIONER OLSON: Right. Right, because
16 otherwise, that potential is there. Not that folks would
17 want to do that, I think, because the expense would
18 probably start to outweigh the, you know, maybe disposal or
19 some other options. But I still think there can be
20 potential for it if it's not clarified.

21 CHAIRMAN FESMIRE: Counsel, is that sufficient?

22 MS. BADA: (Nods)

23 CHAIRMAN FESMIRE: Did you have any other
24 questions?

25 MS. BADA: No, I didn't.

1 CHAIRMAN FESMIRE: And can we finish the
2 drafting, do you think, with what we've got here?

3 MS. BADA: Yes.

4 CHAIRMAN FESMIRE: Okay. With the exception of
5 the one issue that we've got to address yet, the Small
6 Business Regulatory Relief Act.

7 In 14-4.A, -4.B it says, Prior to the adoption of
8 a proposed rule that the agency deems to have an adverse
9 effect on small business, the agency shall consider
10 regulatory methods that accomplish the objectives of the
11 applicable law while minimizing the adverse effect on small
12 business.

13 I think this is -- we've been -- I at least have
14 been aware of this and made those considerations on just
15 about every issue that we've addressed. Is there a cheaper
16 or a less binding way to accomplish the same objectives?

17 One of the things that we need to remember is the
18 cost, especially the cost effects on small business, and
19 I -- from the testimony available and from my experience, I
20 do not know of a cheaper way to accomplish this. I go back
21 to the testimony of Mr. Mullins and -- was it Mr. Long?
22 No, Mr. Scott, I'm sorry, talking about the costs -- the
23 increased costs associated from these regulations and the
24 effects that it would have on their companies.

25 Mr. Scott testified that it would increase the

1 cost in deep Morrow production on at least one of his --
2 the example that he had, by 8 percent on a deep Morrow well
3 in southeast New Mexico. But I know of no way to
4 accomplish these objectives without incurring at least that
5 cost.

6 Mr. Mullins testified that would increase the
7 cost in a shallow well in the Four Corners area by
8 approximately \$35,000, which was -- I believe he testified
9 14 percent, although I'm not exactly sure about the number,
10 but he did testify -- the percentage, but he did testify
11 that it would increase the cost of about \$35,000 per well,
12 and that that would -- that cost increase would reduce the
13 rate of return on a typical project that his company did
14 from 29 percent to 24 percent, this kind of cash flow rate
15 of return.

16 Again, looking at these numbers and the other
17 testimony, I found -- I know of no less onerous way to
18 accomplish the objectives that we're tasked by law to --
19 the protection of -- the prevention of waste, protection of
20 correlative rights and the protection of human health and
21 the environment, with -- I know of no way to do that
22 without putting this burden on the companies.

23 Commissioner Bailey, did you --

24 COMMISSIONER BAILEY: I think the contrast
25 between the proposed rule that was first presented to us by

1 the Division, which was a result of meetings with
2 stakeholders, and the final order is the difference between
3 night and day for its impact on small businesses. I think
4 that we have looked and made as many changes in that
5 original proposal as we possibly could, eliminating such
6 things as the 100-mile haul and the impact on roads.

7 I think that the final order is a reflection of
8 our concern for its impact on small businesses, as well as
9 the overriding knowledge of what the costs would be, should
10 there be damage to the water table, to the groundwater
11 supplies. I think that our order will be protective of
12 both the surface and the waters, without allowing small
13 businesses to go bankrupt because of the costs of
14 remediation.

15 CHAIRMAN FESMIRE: Commissioner Olson, do you
16 have anything to add?

17 COMMISSIONER OLSON: Well, I think I'd echo both
18 of your comments that, especially in what you're bringing
19 up on these cost estimates, were based upon the original
20 order that was proposed by the Division, which included the
21 100-mile radius, which essentially was a prohibition on
22 burial in a 100-mile radius area. That change alone was a
23 major concession to small business, to allow some burial on
24 place.

25 We did allow the in-place burial, we've allowed

1 the trench burial in certain circumstances, which would not
2 have been allowed under the Division proposals, as well as
3 the changes that we had done to accommodate small business,
4 especially, I think, you know, Dugan and some of the other
5 smaller operators were in talking about the below-grade
6 tanks that they had retrofitted before under the prior
7 rule, and we allowed a concession to grandfather in some of
8 those types of systems.

9 So I think we've made large concessions to
10 accommodate small business, while at the same time making
11 sure that the rule is going to achieve the purposes that we
12 are mandated to by statute for protection of water quality.

13 And I think Commissioner Bailey hit on a major
14 point, that this is also balancing off the cost benefits of
15 pollution versus prevention of contamination, that the
16 purpose of this rule is to prevent contamination of water
17 quality.

18 And I think, you know, we've had testimony
19 through here that the costs of remediation are, you know,
20 in the hundreds of thousands to, typically, millions of
21 dollars. And there's a huge cost benefit to business to
22 prevent pollution versus us allowing them to pollute water
23 and then come back and require them to clean it up. I
24 think that's really a disservice to industry, not to help
25 them prevent that from occurring.

1 So I think that we've made -- we have definitely
2 considered small business impacts in this rule, and I think
3 we have done our best to accommodate them while also still
4 meeting our statutory mandates.

5 CHAIRMAN FESMIRE: Counsel, do you think we need
6 to cover anything else with respect to the Small Business
7 Regulatory Relief Act?

8 MS. BADA: No.

9 CHAIRMAN FESMIRE: With that, hopefully counsel
10 will be able to draft a rule, circulate it to the
11 Commissioners and get the approval of the Commissioners,
12 and release that rule -- possibly by the end of the month?

13 MS. BADA: I would think so, yes.

14 CHAIRMAN FESMIRE: This is not the way we usually
15 do it, but we're attempting to accommodate the companies'
16 requirement for regulatory certainty.

17 I need to emphasize, and the record shall reflect
18 that I'm emphasizing, that until the Commission votes on
19 the rule it is not a final rule.

20 But once the Commissioners have agreed that that
21 is the -- their interpretation of what we agreed to and get
22 back to counsel, we will post on our website a draft of the
23 final rule, that is not going to be the final rule until it
24 is voted on by the Commission.

25 Hopefully, that -- getting that in place, and

1 then counsel having the time to finish her order, we will
2 continue this case until the May 9th Commission meeting, at
3 which point we will bring -- re-op- -- reconsider the case
4 -- I guess that's a proper word, I'm not sure -- and vote
5 on the rule and the proposed order --

6 Commissioner?

7 COMMISSIONER BAILEY: I'd like to ask --

8 COMMISSIONER OLSON: Well -- Yeah, that was my
9 question too, so go ahead first.

10 COMMISSIONER BAILEY: -- is the record still
11 closed after you closed it --

12 CHAIRMAN FESMIRE: Yes --

13 COMMISSIONER BAILEY: -- on --

14 CHAIRMAN FESMIRE: -- yes, the -- publishing that
15 is not for comment, it's simply to inform --

16 (Laughter)

17 CHAIRMAN FESMIRE: Let the record reflect that
18 Mr. Huffaker was a little disappointed.

19 It is not for comment, it is simply to inform the
20 regulated community of where the Commissioners have agreed
21 to that point that the rule should be.

22 I'm going to emphasize one more time, it is not a
23 final rule until it is voted on by the Commission, and that
24 voting will not take place until the next regularly
25 scheduled Commission meeting, which will be May 9th.

1 We're putting -- This is not something that we
2 usually do.

3 Counsel?

4 MS. BADA: I would add one more thing, it's not
5 effective until it's published in the *New Mexico Register*.

6 CHAIRMAN FESMIRE: Absolutely, absolutely.

7 COMMISSIONER BAILEY: Well, if we're going to
8 meet again on May 9th, what's the point of having it out
9 there for nine days when it's not --

10 CHAIRMAN FESMIRE: Well, hopefully we can get it
11 done before that. We're setting a minimum there.

12 COMMISSIONER BAILEY: I just don't understand the
13 reasoning or the need for it to be out there until we've
14 signed it.

15 CHAIRMAN FESMIRE: Commissioner?

16 COMMISSIONER OLSON: Well, I was kind of
17 wondering -- that was my first question, was going to be
18 until Commissioner Bailey started, was what was the
19 purpose, then, of just putting it out there? Unless it's
20 out for comment --

21 CHAIRMAN FESMIRE: No, it --

22 COMMISSIONER OLSON: -- I don't know that it's
23 necessary myself, but --

24 CHAIRMAN FESMIRE: We -- The reason that I was
25 proposing it is so that the industry would have a chance to

1 look at it and, you know, have a little more time to adopt
2 it and understand it, because a lot of the companies are
3 already making changes. And while the rule is not going to
4 be effective at that point, the changes that they're
5 making, this rule would give them the opportunity to, you
6 know, get a jump on making those changes.

7 COMMISSIONER BAILEY: It's a matter of days
8 rather than a year. This has been in the makings for over
9 a year, and it's a matter of days between when counsel will
10 have all of our changes and the next time we meet so we can
11 sign it. I don't see the need for this to be out there
12 when we have representatives here who can explain to their
13 parties.

14 CHAIRMAN FESMIRE: The reason I proposed it,
15 Commissioner, is, there are parties out there who are
16 already giving symposiums and making statements about what
17 they think the rule will be.

18 And what we need to do is get that out -- get the
19 rule out there as early as possible to -- in what is
20 probably the final form, but not guaranteed, but probably
21 the final form -- so that we can correct some of the
22 misstatements that are being made and address some of the
23 problems that are maybe introduced by further promulgation
24 of these statements that, you know, probably don't comport
25 with what the rule is going to say.

1 COMMISSIONER BAILEY: Than we'll look very
2 foolish when we sign it, won't we?

3 (Laughter)

4 CHAIRMAN FESMIRE: Let the record reflect there
5 was a long pause there.

6 And granted, you know, maybe it's only two weeks,
7 but I think it would help. There are some things being put
8 out that are not correct, and people are beginning to look
9 at and make plans on, and the sooner we can get something
10 out there, the more certainty we would add to that. And
11 like I say, it will not be posted until all Commissioners
12 have agreed that that is the final form the rule should
13 take, is not what we voted on, but it will be final -- you
14 know, it will be each Commissioner's opinion at that point
15 in time what the final rule should say.

16 COMMISSIONER BAILEY: As long as there's an
17 understanding that there are no comments --

18 COMMISSIONER OLSON: Right.

19 CHAIRMAN FESMIRE: Right.

20 COMMISSIONER BAILEY: -- to be considered, no
21 additional information to be submitted as part of the
22 record and no outside influence that would be allowed to be
23 part of the deliberations, should there be any --

24 CHAIRMAN FESMIRE: No.

25 COMMISSIONER BAILEY: -- otherwise.

1 CHAIRMAN FESMIRE: No, and the Commission
2 secretary will take no comments and will not, you know,
3 respond to comments, will not respond to proposed changes
4 or anything else. It will be -- although it is not
5 official, it will be the Commissioners' intent, and each
6 Commissioner before it's posted, will agree that that's the
7 final form the rule should take. That's -- Okay?

8 COMMISSIONER BAILEY: Under those conditions, I
9 can accept that. I wonder about precedent, though.

10 CHAIRMAN FESMIRE: It is a precedent that we will
11 not follow in the future. But due to the special
12 circumstances that are occurring now and the need to get an
13 early jump on the drilling season, I'm asking that we do it
14 this way.

15 COMMISSIONER BAILEY: Okay.

16 CHAIRMAN FESMIRE: Commissioner?

17 COMMISSIONER OLSON: Yeah, I guess as long as
18 it's very clear that this is not for comment or --
19 essentially, and it is still not final at that point, I
20 think that's fine.

21 I just -- I know in terms of precedents, at the
22 WQCC they have done in the past, putting out the draft of
23 the proposed rule, and they still -- they would allow
24 comments, then, at that point by the parties, but I don't
25 want to get into that at all --

1 CHAIRMAN FESMIRE: Yeah.

2 COMMISSIONER OLSON: -- you know? We've spent
3 enough time on this hearing.

4 But there are some things that we do have in the
5 rule that -- where we directed counsel to draft up, but I
6 think when we do our final discussion it might be helpful
7 if somebody -- if the parties were all looking at the same
8 thing we're talking about, instead of just trying to follow
9 it verbally, because some of those changes are, you know,
10 the language that we had directed counsel to draft at that
11 point.

12 So I think it might be helpful for them, for
13 informational purposes, to follow that final deliberation.
14 So for that purpose I don't have a problem.

15 But I want to -- yeah, I agree, I would be real
16 clear that we're not looking at comments to influence the
17 direction of the Commission at that point, so...

18 CHAIRMAN FESMIRE: So -- Well, I'm going to ask
19 the secretary that she draft a header for the announcement
20 that clearly states the conditions under which that's being
21 presented and that that be approved by each one of the
22 Commissioners before they -- the rule is posted on the web.

23 COMMISSIONER OLSON: Okay, and that's just the
24 proposed rule, not the order?

25 CHAIRMAN FESMIRE: Just the proposed rule, not

1 the order. I don't know that -- We'll have the proposed
2 rule done before we have the order done, I believe, won't
3 we?

4 MS. BADA: I would think so. I would hope so.

5 CHAIRMAN FESMIRE: Okay. With that, we will
6 continue Cause Number 14,015 to the regularly schedule May
7 Commission meeting which will be held May 9th beginning at
8 nine o'clock in this room.

9 (Thereupon, these proceedings were continued at
10 9:45 a.m.)

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