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:

ORIGINAL

APPLICATION OF THE NEW MEXICO OIL CONSERVATION DIVISION FOR ADOPTION OF AMENDMENTS TO RULE 19.15.17 (THE PIT RULE); STATEWIDE

CASE NO. 14292

REPORTER'S TRANSCRIPT OF PROCEEDINGS

COMMISSIONER HEARING

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

April 2, 2009

Santa Fe, New Mexico

This matter came on for hearing before the New Mexico Oil Conservation Commission, MARK E. FESMIRE, Chairman, on Thursday, April 2, 2009, at the New Mexico Energy, Minerals and Natural Resources Department, 1220 South Saint Francis Drive, Room 102, Santa Fe, New Mexico.

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CHAIRMAN FESMIRE: At this time, we'll go on the record. This is a special meeting of the New Mexico Oil Conservation Commission. The date is Thursday, April 2, 2009.

The purpose of this Commission meeting is to address an issue that's come up in the Pit Rule, which is Case No. 14292.

Before we do that, we do have a couple of housekeeping matters, the first of which is the minutes of the prior meeting held on March 12, 2009. The record should reflect that all three commissioners are present, Commissioner Baily, Commissioner Olson, and Commissioner Fesmire. As such, we have a quorum.

And with that, I'm going to ask the Commissioners if they've had an opportunity to look over the secretary's preparation of the minutes of the March 12, 2009 meeting.

COMMISSIONER BAILEY: Yes, I have, and I move that we adopt them.

COMMISSIONER OLSON: I'll second that.

CHAIRMAN FESMIRE: All those in favor of adopting the minutes as presented by the secretary of the March 12, 2009, meeting signify by saying aye.

COMMISSIONER BAILEY: Aye.

COMMISSIONER OLSON: Aye.

CHAIRMAN FESMIRE: Aye. The record should reflect that the adoption was unanimous. The minutes will be signed by

the Chairman and conveyed to the secretary.

At this time, the Commission will call Case No. 14292, the Application of the New Mexico Oil Conservation Division for Adoption of Amendments to Rule 19.15.17, the Pit Rule Statewide.

Before we begin in this case, the record should reflect that the Commission may and probably will take notice of all prior proceedings before the Commission in this matter and the notice of the record in this matter.

Also, before we begin, we do have a housekeeping matter. But before we do that, I'm going to ask the attorneys to enter their appearances, please.

MR. BROOKS: May it please the Commission, I'm David Brooks, assistant general counsel, Energy, Minerals and Natural Resources Department of the State of New Mexico, appearing for the New Mexico Oil Conservation Division.

CHAIRMAN FESMIRE: Thank you, Mr. Brooks.

MS. FOSTER: Karin Foster, on behalf of the Independent Petroleum Association of New Mexico.

MR. CARR: May it please the Commission, my name is William T. Carr from the Santa Fe office of Holland & Hart, LLP. We're entering our appearance today for the New Mexico Oil and Gas Association, the Industry Committee, which is comprised of Burlington Oil and Gas Company, LP, Chesapeake Operating, ConocoPhillips Company, Devon Energy

Corporation, Dugan Production Corporation, Energen Resources Corporation, E. J. Simmons, Inc., Williams Production Company, and XTO Energy Inc.

I also want to note a separate appearance for ConocoPhillips because I intend to call one witness for Conoco.

MR. HISER: Mr. Chairman, members of the Commission, Erick Hiser with the firm of Jorden Bischoff & Hiser, co-counsel on the Industry Committee, which I will not reread.

CHAIRMAN FESMIRE: Welcome back, Mr. Hiser. We thought we had seen the last of you.

MR. CARR: We were hoping that was his last appearance.

CHAIRMAN FESMIRE: Are there any other appearances?

MR. FREDERICK. Good morning, Mr. Chairman, Commissioner. My name is Bruce Frederick. I'm here with the New Mexico Environmental Law Center. We represent the Oil and Gas Accountability Project.

MS. BELIN: Good morning, Mr. Chairman, members of the Commission. My name is Letty Belin. I'm here on behalf of the New Mexico Citizens for Clean Air & Water. But I'm unable to -- I will be in and out today. I can't be here during the whole hearing.

Dr. Neeper is here, so I just want to confirm that he has written authorization, and he has before cross-examined, and I expect him to do cross-examination today.

CHAIRMAN FESMIRE: Okay. The record should reflect that your pre-hearing statement contained the necessary authorization for Dr. Neeper to act for the organization.

MS. BELIN: Thank you.

CHAIRMAN FESMIRE: Are there any other appearances?

Okay. With that, we do have one housekeeping matter.

Ms. Foster, you filed your proposed changes with your pre-hearing statement, which was five days late. Do you have a reason that that occurred?

MS. FOSTER: No, I don't.

CHAIRMAN FESMIRE: With that, we're going to have to strike your proposed changes in the pre-hearing statement. It was correctly filed, but your proposed changes were five days late, so we're going to strike that.

MS. FOSTER: It is part of my pre-hearing statement.

CHAIRMAN FESMIRE: But the record should reflect that it was not filed in a timely manner.

MS. FOSTER: Okay.

CHAIRMAN FESMIRE: Mr. Brooks, do you have an opening statement?

MS. FOSTER: Actually, before we move on, Mr. Chairman, I have a question on a statement you made earlier.

You stated that this case number is 14292. And you made the statement that notice of prior -- that you were

advising the parties that prior proceedings in this matter would be part of the case. And I just want to make sure that I understand. The Pit Rule is under a different case number, which in that case is in litigation. And there was quite a bit of testimony in that case that could be possibly relevant to this case since this is an amendment to that rule.

CHAIRMAN FESMIRE: The Commission has the ability to take notice of any prior proceedings. And what we were doing is notifying the -- we do have the ability to do that, and we may be required to do it.

MS. FOSTER: Okay. And if, in fact, you decide to take notice of any of the prior proceedings, meaning under the different case number, will the attorneys be notified of which portion of that prior case should be taken into consideration as part of this case?

CHAIRMAN FESMIRE: The attorneys are being notified now that we take notice of any or all of the prior proceedings in this matter.

MS. FOSTER: Okay. Thank you.

CHAIRMAN FESMIRE: Mr. Brooks?

MR. BROOKS: Mr. Chairman, members of the Commission, I will make a brief opening statement.

One housekeeping matter: The rule 3.12. -- no -- rule, yes. Rule 3.12.C(1) requires that additional copies of the exhibits be made available at the hearing. Unfortunately,

I forgot about that rule until about 8:30 this morning, so the members of the Environmental Bureau are upstairs making additional copies of the exhibits. So I do not have the exhibits ready to start the proceeding until they finish. I thought they would be through by this time. Their instructions are to bring them down as soon as copies are made.

Subject to that, I will proceed with my opening statement. And hopefully, since my opening statement is going to be very short, hopefully, other people will have opening statements to fill the time until the exhibits arrive.

CHAIRMAN FESMIRE: Mr. Brooks, will the exhibits be available on the projector?

MR. BROOKS: Some of them will. And what we can do is if we want to go ahead with Mr. Jones' testimony -- his testimony is on the PowerPoint on the slides -- if we have to do that, I will call Ms. Duran-Saenz on some preliminary matters.

And I only have paper copies of the exhibits that I will introduce through her. But her testimony can be taken at any time if it pleases the Commission.

CHAIRMAN FESMIRE: Okay. Well, let's proceed with your opening statement, and we'll see if the others want to give their opening statements or reserve it. And then we'll cross that bridge if we have to.

MR. BROOKS: Very good. My opening statement is

going to be extremely brief.

Mr. Chairman, members of the Commission, this is going to be, hopefully, a much briefer proceeding than the ordeal we went through back in 2007 and the early part of 2008 about pits. And I am sure you remember well how difficult it was to listen to and digest all that testimony and come up with a rule that we could operate under in New Mexico.

That rule went into effect on June the 16th of 2008. We have had almost a year's experience with that rule since then. And, of course, as one might, I think, reasonably expect with anything that extensive and complicated, we have come to the conclusion after working under that rule for almost a year that in certain respects, perhaps, it is somewhat stricter than it needed to be in order to protect the environment.

The Division remains wholly committed to the protection of New Mexico's fresh water and other environmental resources; however, I believe the testimony we intend to submit this morning will support the proposition that relaxation of certain provisions of Part 17 as it was adopted in 2008 will continue to be supportive with those relaxation of those provisions. It will continue to be supportive, protective of freshwater and the environment.

Now, not all of the provisions are relaxations. That's the main tone of it; however, there are certain things that have been tightened up, specifically, in regard to

below-grade tanks. We have agreed that certain -- the thrust of our provision about below-grade tanks is that some categories of below-grade tanks, according to some existing designs that are in use in the industry, do not have to be retrofitted within five years as provided in the rule, but may continue to be used so long as they demonstrate integrity. Mr. Jones' testimony will give you the details.

However, on the other hand, we have decided that an operator who is selling a facility or transferring a facility to another operator will have to retrofit or replace or close any nonconforming below-grade tanks at the time of that sale or transfer. This was not a provision that is found in Part 17 as it currently exists.

So on the one hand, we are allowing a defined category of nonconforming below-grade tanks to go past the five years provided in the existing rule. Others still remain under the five-year rule. It depends on the design of the tank.

And as I say, Mr. Jones will explain all that. I don't understand it myself, even though he's explained it to me three times. Maybe you all are more technically competent than I. So hopefully you'll understand it.

There's some categories of nonconforming below-grade tanks that, instead of being required to be retrofitted within five years as the current rule provides, will be okay to leave as long as they provide integrity until the sale or transfer of

the facility. There are others that remain under the five-year restriction.

But all below-grade, all nonconforming below-grade tanks regardless will have to be retrofitted or replaced at the time of sale of a facility. So there's some loosening, some tightening. This is an adjustment.

Present rule requires that on below-grade tanks that records be kept for five years on below-grade tanks; test records. This will be extended. Now, under the proposed rule, the records must be kept for the life of that tank. This applies not only to tanks that are grandfathered as I described, but it also applies to conforming tanks and new ones that are constructed.

There is also a change in certain transitional provisions. Some nonconforming facilities, provided they are registered with OCD, the time to apply to have them permitted or to have their permits modified as the present rule requires is going to be extended under the proposed rule if it is adopted.

Those are the provisions that, I think, are probably not the biggest focus of interest here, the ones I've described so far. I wanted to describe those first, though, to get them out of the way. They're more complicated.

But the biggest provision we're looking at today is probably going to be the focus of most of the discussion, and

that is the change in the chloride limits. Now, the chloride limits have a rather interesting history. Because the Oil Conservation Division proposed a much higher chloride limit for deep-trench burial at closure of tanks that the Commission ended up adopting, there was a tradeoff there because the Division also proposed that deep-trench burial be prohibited except in areas within 100 miles -- or that are more than 100 miles from a disposal facility.

The Commission decided not to adopt the proposal that deep-trench burial only be allowed more than 100 miles from a disposal facility, but, presumably, there's some sort of a tradeoff for that. The Commission also adopted a much stricter chloride standard for the waste contents that could be included in the deep-trench burial.

We are asking the Commission to revisit the waste deposal standard for waste -- or the waste content standard for chlorides in deep-trench burial. We are not asking the Commission to revisit the other waste criteria for waste that can be deposed of for deep-trench burial, only the chloride standard.

And we are asking, basically, to go back to what the Division originally proposed without the 100-mile radius limitation. We believe that although the evidence will support -- although the evidence will suggest that the standard we propose will not exclude forever the possibility of some

contamination of groundwater, we nevertheless believe we're talking in the range of thousands of years, and we think the evidence will support that. And we believe that uncertainties involved in thousands of years are such that we can say with confidence that the standard that we are proposing now will protect groundwater in New Mexico for the foreseeable future.

Thank you.

CHAIRMAN FESMIRE: Ms. Foster, do you have an opening statement?

MS. FOSTER: I do. Members of the Commission -- actually, would you like me to stand?

CHAIRMAN FESMIRE: Sure.

MS. FOSTER: Members of the Commission, on behalf of the Independent Petroleum Association, I'm here on this case. And first and foremost, I'd like to thank the Governor and the Commission for taking the time to review this case and to consider amendments to this case.

As you know, we did go through a rather lengthy hearing process, and you deliberated for many days. After the last hearing, Mr. Brad Jones and Mr. Wayne Price and Commissioner Fesmire traveled around the state and did several training sessions for operators on the Pit Rule. Those presentations took a whole day to review the Pit Rule and to talk to operators and industry concerning the implications of the Pit Rule.

Since that time, there have been many revisions or guidelines that have been issued by the OCD staff to industry as it pertains to trying to follow the requirements of the Rule 17 that was passed last year. We are very grateful that we're here for these amendments and to talk about these changes; however, and as indicated in my pre-hearing statement, which was not accepted by the Commission because I did file it late --

CHAIRMAN FESMIRE: Ms. Foster, can I correct you? Your pre-hearing statement, insomuch as it conformed to the rules, was accepted. What wasn't accepted and what was stricken was the proposed changes to the rule.

MS. FOSTER: Okay. But the document that I submitted was pre-hearing comments.

CHAIRMAN FESMIRE: Okay.

MS. FOSTER: So if I could ask for the indulgence of the Commission, I'd like to put those on the record at this time as just comments on my review of the rule and where I think that we should go based on the Governor's press release and the specific statements that he made and the intention of where he thinks that the Oil Conservation Division and Commission should go with this rule.

Specifically, the Governor made a statement and a recommendation that he would like to assist industry, specifically, on the chloride levels, in order to allow for

on-site deep-trench burial. And the request that I would make is that if there is an exponential change in the chloride levels based on the HELP model and the MULTIMED model as we're going to hear in this testimony, then I would ask the Commission, respectfully, to also consider whether there should be a change in some of the other constituent levels; specifically, the WQCC 3103 standards.

If those remain at the standards that you imposed in Rule 17, then the change in chloride levels does not assist the operators in the way that I think the Governor intended. I would also respectfully ask for the Commission, since there was discussion off the record with OCD staff that industry had not asked for exceptions or taken the opportunity to come before the Commission or the Division do ask for exceptions under Rule 17, for you as a Commission to look at the reason why those exceptions have not been requested.

And I would submit that the reasons that those haven't been requested is because the standards are just too high. There's really too much of a time period delay for operators. There's too many administrative-type burdens that are put on operators in the exceptions process that is currently in the rule.

And, again, I would respectfully ask that you look at the exceptions process, and, again, since the Governor did state in his press release that he would like to have operators

and the OCD work with operators to ask for those exceptions so that we can continue to operate under the rule, that you consider those exceptions.

And then, finally, I would ask that since there had been quite a bit of guidelines that had been released by the Division concerning specifically the below-grade tank issue up north, that the guidelines that had been released by the Division be absorbed into the amendments to this rule so that everything is consistent.

Having an operator operate under Rule 17 with guidelines that might stay contrary -- be a contrary direction to operators really doesn't make sense in terms of a policy decision. And as the Commission, you are being asked to make a policy decision.

All I would ask for is that, you know, the guidelines and direction that's been offered by the OCD to industry be absorbed into this rule, since we are taking the time to amend the rule to make it as equally protective of the environment, but also so that operators can continue to operate in New Mexico.

Thank you.

CHAIRMAN FESMIRE: Mr. Carr?

MR. CARR: I'm going to reserve my opening statement.

CHAIRMAN FESMIRE: Mr. Hiser?

MR. HISER: He speaks for both of us.

CHAIRMAN FESMIRE: Okay. Bruce?

MR. FREDERICK: I don't really have an opening statement. I just want to, on the record -- to the extent Ms. Foster is asking the Commissioner to consider settlement conferences or the Governor's desire here, I would object to anything like that being entered into the record except to show that the decision is arbitrary and capricious and not based on science and data.

We just heard that the camel's nose is in the tent, so to the extent that you want to do away with chloride standards, you are going to be asked shortly, and maybe in this hearing, to do -- also do away with 3103A standards as well and probably more standards.

Thank you.

CHAIRMAN FESMIRE: Ms. Belin?

MS. BELIN: Mr. Chair, members of the Commission, New Mexico Citizens for Clean Air & Water doesn't have an opening statement. I just wanted to note that one concern we had, which was that we haven't been able to see any pre-hearing statements other than the one by OCD. And Dr. Neeper went up to OCD today to look at the pre-hearing statements and was told that he wasn't able to do so. And we object to that process because it makes it difficult for us to participate without having seen people's pre-hearing statements.

MS. FOSTER: For the record --

CHAIRMAN FESMIRE: Hang on.

Thank you, Ms. Belin.

Ms. Foster?

MS. FOSTER: Just for the record, I did mail it to Ms. Belin as well as Dr. Neeper. And I can provide my Affidavit of Service, if necessary, to the Court. I understand Dr. Neeper did accept it. But, again, counsel did have copies of those statements. So they were aware that I was going to be putting this in the record.

CHAIRMAN FESMIRE: Mr. Brooks, do you have a couple of witnesses that need to be sworn?

MR. BROOKS: I have three witnesses to be sworn.

CHAIRMAN FESMIRE: If you would ask them to stand?

[Witnesses sworn.]

CHAIRMAN FESMIRE: Mr. Brooks, would you call your first witness, please.

MR. BROOKS: Yes. I believe someone brought a pile of paper. I believe that was probably my exhibits. Where are they?

THE WITNESS: They're back there in the back.

MR. BROOKS: If members of the public want to have them, there are extra copies here.

And for the record, Dr. Neeper and Ms. Belin, I will at the first break give you an opportunity to review the copies of the other pre-hearing statements from my file.

Well, since I do not seem to have here the exhibit for Ms. Duran-Saenz' testimony, we'll take that up in a minute or at a later time. At this time, I'll call Brad Jones.

CHAIRMAN FESMIRE: Okay. Mr. Jones, you've been previously sworn.

THE WITNESS: Yes.

BRAD A. JONES

after having been first duly sworn under oath,

was questioned and testified as follows:

DIRECT EXAMINATION

BY MR. BROOKS:

Q. Good morning.

A. Good morning.

Q. Would you state your name, please, for the record.

A. Brad Jones.

Q. And how are you are employed?

A. I'm an environmental engineer for the Oil Conservation Division Environmental Bureau.

Q. And were you one of the people who was involved in drafting the proposed rules that have been submitted as Exhibit No. 1 in this proceeding or the proposed rule changes that have been submitted as Exhibit 1 in this proceeding?

A. Yes.

Q. Have you made a study of these rules and the

implications of the proposed changes?

A. Yes.

Q. And, Mr. Jones, have your credentials been submitted and made a part of the record in Case No. -- well, I don't have the case number right here before me, but in the previous Pit Rule hearing that occurred in 2007?

A. Yes.

MR. BROOKS: Mr. Chairman, and members of the Commission, in the interest of time, I will submit Mr. Jones.

Since you have indicated that you will take administrative notice of the previous record, I'll submit Mr. Jones as an expert based on his previous qualifications.

If you wish me to take him through his education and experience though, I will do so.

CHAIRMAN FESMIRE: Ms. Foster, do you have any objection?

MS. FOSTER: No objection.

MR. CARR: No objection.

MR. HISER: No objection.

MR. FREDERICK: No objection.

MS. BELIN: No objection.

CHAIRMAN FESMIRE: Seeing no objection, Mr. Jones' credentials will be so accepted.

Mr. Brooks?

Q. (By Mr. Brooks): Okay. Mr. Jones, is Exhibit

No. 4 -- no, 5, I believe it is -- is Exhibit No. 5, which has been offered in this case, is that your resume?

A. Yes.

Q. And is that a current and correct history of your education and experience?

A. Yes, it is.

Q. Okay. Very good.

Mr. Jones, you are aware from the previous proceeding of how we have generally operated in these proceedings. Instead of going through everything by question and answer, we ask the witness simply to make a presentation, subject to being interrupted from questions by myself or from members of the Commission as the case may be.

So with that, are you prepared to present the materials that you have prepared with regard to this rule?

A. Yes, I am.

Q. You may proceed.

A. I guess today I'm going to be speaking about these proposed amendments that we're making changes to the current rule, 19.15.17, of the administrative code.

MS. FOSTER: Mr. Commissioner, I'm sorry. Is this an exhibit that you're referring to?

THE WITNESS: Yes.

MS. FOSTER: I don't have a copy of that exhibit, Mr. Brooks.

MR. BROOKS: Which exhibit is that?

MS. FOSTER: The PowerPoint presentation Mr. Jones is working off of right now.

MR. BROOKS: May I approach counsel?

CHAIRMAN FESMIRE: You may.

MS. FOSTER: Exhibit 6. Thank you, sir.

Q. (By Mr. Brooks): Before you start your presentation though, I did forget to -- I mentioned that Exhibit 1 is -- I believe I asked you about Exhibit 1. Is Exhibit 1 the proposed changes that OCD wants to make to the existing rule?

A. Is it part of the application?

Q. Yes.

A. Yes.

Q. And is Exhibit 2 a copy of the entire rule with the proposed changes red-lined or lined?

A. Yes.

Q. Okay. You may -- and Exhibit 6 is your PowerPoint presentation, correct?

A. Yes, it is.

Q. You may proceed.

A. The three concepts I'm going to discuss today, and Mr. Brooks already kind of summarized some of these, are listed up on the board here.

The first one is going to be addressing below-grade

tanks that existed prior to the effective date of the rule, which was June 16, 2008, and our proposed amendments to address those below-grade tanks so that they may be retrofitted or closed upon filing a closure, sale, or transfer, and there's going to be also some additional things about reclassifying those tanks.

The second concept I'm going to be discussing today just briefly, and Mr. Hansen will be providing the details to, will be the change to the chloride standards for onsite trench burial and the use of back concentrations with that.

The last concept would be the proposal to extend the submittal dates for permit or permit modifications to existing below-grade tanks and lined permanent pits.

So the first concept is -- seems like a simple one by looking at this. But in order to make a change that would allow most below-grade tanks nonconforming tanks that existed prior to June 14 to retrofitted or closed upon final closure or sale or transfer, in order to make that change throughout the rule, there's multiple changes that are required to address the issues with this proposal.

One of the things we have to do is reclassify and identify which below-grade tanks would be granted at a longer time for use. Since we currently have two nonconforming classifications in the rule, which are identified in Paragraph (5) and (6), Subsection I of Section 11 of the rule,

we had to reclassify these and reidentify them.

So it allows certain operators of below-grade tanks to continue to use their tanks instead of them being required to close them or retrofit them within the five-year time frame that currently exists.

Q. Okay. Now, when you say "certain operators," actually, it's operators of certain types of tanks. It's not a category of operators, it's a category of tanks.

A. Well, it is a category of tanks, and it would apply to those operators.

Q. Okay. Go ahead.

A. So these are the proposed amendments. The current language for Paragraph 5 of Subsection I of Section 11 only address those below-grade tanks that had sidewalls open for visual inspection placed upon a non-specified geomembrane.

We've struck that language because we're going to be including certain other tanks. And our clarifying part is going to be in Paragraph (6) of what those tanks are. We added some additional language just for clarification that if you do have one of these nonconforming tanks that you should be complying with operational requirements.

We just want to make sure that's clear to ensure that operators understand that.

Q. Let's put this a little bit in context, Mr. Jones. Paragraphs (1) through (4) of Section 17.11 -- of

Section 11 of Rule 17 -- now, I'm not going to say the 19.15 because we all know that every part of the OCD rules is 19.15 point something. And I'm not going to say the 17 today because the Pit Rule is all Part 17, correct?

A. Yes.

Q. Okay. Now, Section 11, we're dealing with Paragraphs (1) through (4) in Section 11. Do those paragraphs describe the criteria that a below-grade tank must meet to be a conforming tank?

MS. FOSTER: Mr. Brooks, I'm sorry. Rule 11 has Parts A through I. What section are we talking about?

MR. BROOKS: Section 11 of Part 17.

MS. FOSTER: That's right, but below that Part A is general specifications; B is topsoil. Are you specifically talking about the below-grade tank section that would be Section I?

MR. BROOKS: Yes.

MS. FOSTER: Okay. Thank you.

Q. (By Mr. Brooks): Okay. Paragraph I -- Paragraphs (1) through (4) of Subsection I, are those the specifications that a below-grade tank must meet, generally, to conform to the rule, Part 17?

A. Yes. They address such things as the material in which the tanks should be made out of, proper construction of a subgrade, mechanisms to prevent overflow or collection of storm

water run-on. And then, of course, (4) gives more details on how those tanks have to be constructed.

Q. Okay.

A. So these would be an approved design under the rule, and you would have to have all of those features.

Q. In other words, to be an approved design, it has to comply with Paragraphs (1) through (4) of 11.I?

A. Yes.

Q. Now, do Paragraphs (5) and (6) state exceptions for certain types of existing below-grade tanks?

A. Under the current rule?

Q. Under the current rule.

A. Under the current rule, it does specify certain exceptions of operations or what time to close or retrofit.

Q. And that would be still be true under the new rule, but the criteria will be different, correct?

A. Yes.

Q. So you can -- if you have an existing below-grade tank, you have to meet (1) through (4), unless you're taken out of (1) through (4) by either (5) or (6), correct?

A. Yes.

Q. And that would still be true under the new rule?

A. Yes.

Q. But under the new rule, the criteria for meeting (5) and (6) will be somewhat changed?

A. Yes. There would be tanks that are currently under (6) that will be placed up under Paragraph (5).

Q. Okay. Go ahead with your presentation.

A. And just for clarification, Subsection A of Section 11 are general requirements; some do apply to below-grade tanks. They still will apply to those below-grade tanks.

So currently under Paragraph (5), we've struck this to not limit the application of this nonconforming tank, the description to apply to only those with sidewalls open for visual inspection and placed upon an unspecified liner.

We do have to add a clarifying statement under the new Paragraph (6). Paragraph (6) used to state that it didn't comply with (4) -- or Paragraphs (1) through (4), which are, you could say the conforming designs or approved designs do not comply with Paragraph (5). Now that we've generalized (5), we're specifying in (6) what it applies to.

So what we're specifying for the ones that would require to be retrofitted or closed within five years would be a single-walled tank where any portion of that sidewall was below the ground surface and not visible. And that would be visible for inspection.

Once again, we have added language to notify these operators that they should be complying with operational requirements.

Q. Okay. Now, Paragraph (6) is the paragraph that requires closure within five years? Closure or retrofit within five years?

A. Yes. Under the current rule, it requires that, and under this provision, it would also.

Q. Yeah. And Paragraph (5) does not require the closure within five years. It only requires that they remain -- that the integrity be maintained, correct?

A. Yes. Paragraph (5) allowed operators of these nonconforming tanks to continue to operate until integrity failed with that tank. And at that time, they would be required to retrofit.

Q. So there is a category of below-grade tanks that under the existing rule has to be closed within five years, but under the new rule does not have to be closed within five years, correct?

A. Yes.

Q. And what is that category of tanks? How do you describe those?

A. Well, I'll get to that in my presentation here.

So to give some background -- well, if you don't mind, I'll get to that.

CHAIRMAN FESMIRE: A good witness should always control his lawyer.

THE WITNESS: It's in the presentation. So, you

know, the question is, what does all this mean?

Once again, operators of below-grade tanks constructed and installed prior to June 15th, which was the effective date of the rule, and have sidewalls open for visual inspection may continue to operate until the integrity fails or until a sale or transfer, at which time the operator shall retrofit that below-grade tank.

They don't necessarily have to close it if they have it retrofitted -- just for clarification.

Q. All right. And unlike the present rule, they don't have to have it lined?

A. There's not a limitation to a liner being present up under those tanks.

Q. And under the present rule, they would have to have a liner, or they would have to close it within five years?

A. Yes. There would be an unspecified liner beneath those tanks.

Q. Okay.

A. It also means that only operators of below-grade tanks constructed and installed prior to the effective date that have single walls and have a portion of the tank sidewalls below the surface and it's not visible would be required to retrofit the tanks to comply with an approved design or close that tank within five years, or if integrity fails, or until sale or transfer, whichever occurs first.

Of course, the language that we put at the bottom of each of these paragraphs, those provisions also specify that the operator must comply with operational requirements.

Q. Now, the difference between (5) and (6) under the new rule is basically going to be whether or not any portion of the sidewall is visible? Whether the entire sidewall is visible for the inspection or whether a portion of it is obscured; is that correct?

A. Yes, that would --

Q. If all of the sidewall is open for inspection, then you're under (5)?

A. Yeah.

Q. If a portion of the sidewall is obscured, then you're under (6) --

A. Yes.

Q. --with a nonconforming tank. And, of course, if you --

A. Well, let me clarify. It would have to be a single wall tank.

Q. If it's double-walled with leakage protection, it's a conforming tank --

A. Yes.

Q. -- so it's not under either (5) or (6), correct?

A. Exactly.

Q. Okay. So you have a nonconforming tank, all of

the sidewalls are visible, you're under (5), you do not have to close within five years, correct?

A. Yes.

Q. If you have a nonconforming tank, any portion of the sidewall is obscured by the dirt coming up against it, then you have a nonconforming tank -- if it's a nonconforming tank, single wall nonconforming tank, and you're under (6)?

A. Yes. Or new proposed (6), yes.

Q. And you do have -- this is under proposed rather than actual, then in that case, you do have to close within five years?

A. Or retrofit it.

Q. Right. And in either case, you have to close sooner if the tank demonstrates a lack of integrity?

A. Absolutely.

Q. Okay. Continue.

A. Just for some background, I know we've gone through the Pit Rule before, but I just wanted to get to this thing.

We talked about conforming, nonconforming, or approved designs type things. I wanted to give some examples of what is an approved design and what is not.

Under the current rule, there's certain things that have to be complied with. The general design aspect is addressed under Paragraph (4). There's what we refer to as the

(4)(a) design, and the (4)(a) design says you have this whole sidewalls -- it can be a single-walled tank.

There's a six-inch lift that's required, an automatic shutoff that's required, and a manual shutoff. And there's a specified liner beneath. That specified liner has to be either 30 mil flexible PVC or 60 mil HDPE, which is a High Density Polyethylene liner or equivalent.

You can have gravel underneath to raise that tank, but the big thing is that you have to have your liner installed in such a manner that you can see if it's leaking, which means it would collect water at one end.

The other factors here that have been shown here is that there should be a proper subgrade right here, a foundation so you don't puncture that liner. You also have the surface run-off, run-on controls, which would prevent surface water from coming into and being collected in this area. The automatic shutoff itself would control overflow. And, of course, you know, we didn't put any specs on the tank, but the tank would have to be resistant to what it's holding, plus the resistance to damage from sunlight.

Another version of this would be the use of I-beams to achieve the six-inch lift here. Once again, the automatic shutoff, the manual shutoff, the run-on controls, the specified liner, and the visible sidewalls, this is what we consider examples of the (4)(a) design.

There's another approved design, which is the (4)(b) design, which is the double-walled tank with leak detection. So this is just an example of a form of leak detection where you may have a sensor down at the bottom and an alarm that may go off. I always laugh at this because this is the best below-grade tank you can have because there's no pipes going to it, so nothing can get into it. So it'll never leak.

This is another example of what could be considered a (4)(b) design, and that's a tank within a tank-type of design. Once again, you would have the outer tank, and then you would have the primary tank. In this case, they raised the primary tank off the bottom so if it did leak from the bottom that it could be determined that it was leaking.

Once again, it's at the point where it's above the existing grade somewhat so surface run-on is not an issue, and then it would have some type of screen at the top.

Q. Now, all these designs are conforming designs.

A. These are conforming designs under the current rule. This part is not going to change. These are examples of what possible tank designs could be submitted for compliance.

Q. Okay.

A. So the current I(5) design, which we're proposing to change here, once again, this is the current conditions. We're looking at the sidewalls open for visual inspection. It's placed upon a geomembrane liner. Once again, that

geomembrane liner is non-specified, so it could be a 20 mil, low linear density polyethylene or any type of geomembrane liner. It doesn't have to meet the 30 mil flexible PVC or the 60 mil HDPE requirements.

And, once again, it wouldn't satisfy those approved designs, the conforming designs, and currently the operator is not required to equip or retrofit that below-grade tank as long as it demonstrates integrity.

Q. And here we're talking about a tank that has the sidewalls visible and has a liner?

A. Yes. Once again, they wouldn't have -- once again, if the tank doesn't demonstrate integrity here, that they would have to remove that tank and replace it with one that does conform with the approved designs.

And, you know, there's a statement here -- and this will go back into some of our other changes -- but some of these tanks currently may not be permitted. Well, at the time of the rule, they probably wouldn't have been permitted because we changed the definition of a below-grade tank. So some of these tanks may require a permit.

Some may have been permitted but do not meet the conforming designs, so they were required to submit a permit modification to bring up the design. So when the integrity does fail, they have that design approved so they can make that retrofit. Once again, these are examples of this, what I refer

to as an interim design. Because you can continue to operate this -- and this is under the current rule, for clarification here -- you can continue to operate this until you have an integrity issue.

So, once again, visible sidewalls, nonconforming liner, it could have features of an approved design or a performing design, but if it doesn't have them all, it doesn't qualify. So there could be a six-inch lift with an unspecified liner, but if it didn't have the automatic shutoff and other feature, manual shutoff, it wouldn't be an approved design.

Under our current rule, the change that would occur here that would make it different is that those two designs would still exist. What it would to is add other types of tank designs that are currently under (6) now, and that would be a tank with visible sidewalls but no liner.

Once again, visible sidewalls, maybe a six-inch lift, no liner, it would include other variations of that. The key thing is the visible sidewalls.

Q. Okay. If it has visible sidewalls and it has a liner, it's under (5) now?

A. Yes.

Q. If it has visible sidewalls and it has no liner, it is under (6) now, but will be under (5) under the new rule?

A. Yes.

Q. And that is the criteria I was asking about when

you stopped me a minute ago. Those are the category of tanks that has visible sidewalls and no liner --

A. Yes.

Q. -- moves from (6) to (5)?

A. Moves from (6) to (5).

Q. The effect of moving from (6) to (5) is what?

A. I'm sorry?

Q. The effect of moving it from (6) to (5) is what as to those tanks?

A. The effect of moving it? It would allow operators to continue to operate these tanks until they have an integrity issue or until they plan to sell or transfer those.

Q. Whereas, under present rule under (6), they'd have to close or retrofit in five years?

A. Yes.

Q. Thank you.

A. So the current I(6), which Mr. Brooks was getting at, the current rule (6) said, well, it wasn't an approved design or a conforming design, and it wasn't one of these designs proposed under the original Paragraph (5), which would be that visible sidewalls and nonconforming liner underneath, once again, the current I(6) says, well, you got to retrofit these or close them within five years of the effective date, which is June 16, 2008.

And, of course, if they don't demonstrate integrity,

you would have to either close or retrofit at that time. Once again, a lot of these tanks were not permitted under the previous Rule 50. They are required to be permitted now. Some of them may just require a permit modification.

So under the current rule, once again, you'll see this design here will be going to the new (5) under the current rule, if considered it's one of those tanks, that something has to be done within this five-year time frame.

Once again, this is another one where there's visible sidewalls that shows that these are designs currently under the I(6). And, of course, you have the single-wall design where unfortunately sidewall is not visible which is there now, and that will remain under the proposed change.

Q. So the top two diagrams are examples of tanks that we propose to move from (6) -- from (6) to (5) --

A. Yes.

Q. -- correct?

A. Yes.

Q. And they don't have to -- under our proposal, they would not have to be closed in five years?

A. Unless there's a sale or a transfer or if integrity fails, no, they wouldn't.

Q. Exactly. Now, the bottom diagram is one that will stay under (6) under our proposal, right?

A. Yes. I was going to show that in the next slide.

Q. It will have to be closed in five years in any case?

A. Yes.

Q. And may need to be closed sooner, but never longer than five years?

A. Closed or retrofitted.

Q. Right.

A. So this is the example of -- and there may be more if we've got single-walled tanks with double bottoms. They're still single-walled. There's variations of this design that could fall up under this, but this is the simplified version of it. This will remain in (6).

And what I've done, all these slides are over here just for reference. The top two -- or the top four are the approved designs. Once again, this one right here is the current design for I(5). This shows you what that change will do and include. This is the current for (6), and this shows you the proposed language will reclassify that and leave that one type of design left.

So that's just something to look at. These are slides we just went through, so just sometimes it's easier to see them all up front in one viewing.

So, you know, the question is: What's the intent behind this amendment? Well, what we're trying to do is allow these operators that were proactive in installing a design that

allows a larger portion of the tank to be inspected the opportunity to continue to operate these tanks until either the integrity becomes an issue or they have a sell or transfer of these tanks.

The benefit of this is that allows them to defer these costs instead of having to make plans to address these tanks within a five-year period. They can defer these costs by continuing to operate them until action is required under the rule. So that should assist them in accomplishing this task but also to be able to do better planning on the retrofit of these tanks and take care of them as time permits.

Of course, we have these other tanks that make it -- you could say they were designed and constructed to -- well, either they didn't obtain the permits or they were installed in such a manner that they didn't comply with the existing rule, Rule 50. Rule 50 only had one design. The design was that it was secondary containment and leak detection.

If these tanks are single-walled, they may have a double bottom, but it's still not secondary containment because if the sidewalls leaked, the bottom containment would not capture any leaks from the side of those walls. So we're trying to get these tanks up to speed because there's more of a chance of release from these tanks if integrity fails.

So, once again, we're leaving them under the (6) that they were originally placed up under when the Commission

established the rule. So we're not really -- what we're making sure is that those tanks get addressed.

So with this change, with this reclassification of these tanks, there are things that need to be considered. And part of this was the monthly inspection recordkeeping. Since we have tanks that could be in operation for 20-plus years because they don't have an integrity issue and the operator has not come to a point where they want to sell or transfer these tanks, we need to extend the recordkeeping requirements to see what issues exist with the tanks.

So what we've done is extended the recordkeeping part with the monthly inspections to the life of each tank. And if you notice here, it used to be five years. Now we're saying -- we're linking it to the life of that tank.

Q. Now, Mr. Jones, does this apply to conforming as well as nonconforming tanks?

A. Yes, it does.

Q. So it applies to the tanks that are defined in 11.I(1) through (4) as well as those in the 11.I(5) and 11.I(6)?

A. Yes.

Q. Okay.

A. So what does this mean? Once again, the recordkeeping period will be linked to the life of the tank instead of a five-year period. As Mr. Brooks just stated,

these conforming tanks, the operators of these conforming tanks and nonconforming tanks would also have to -- it would be linked to both scenarios, meaning that you have the approved design or the nonconforming design, you will still have to do that, to maintain that record.

Now, for the nonconforming designs, this monthly inspection record would have to be kept until that tank is replaced or properly retrofitted or closed. And at that time, of course, that recordkeeping linked to that tank would not have to be maintained because the tank doesn't exist anymore. And if you did replace a tank, the recordkeeping would begin a new record for that new tank.

The intent of this is that what we want to do is make sure that we want to address this category of below-grade tanks that the operator was originally required to retrofit or close within the five years that now have the potential to be active and remain in service until integrity fails. We want to make sure that we are able to assess this tank through its life in case there's issues that develop through that time.

What it does, it creates a history with that below-grade tank. And the importance of this history is that if this tank demonstrates issues where there's multiple failures -- let's say they have integrity issues. Right now they can't. And if they have integrity issues, they have to replace it.

But let's say it's a new tank or kind of a nonconforming tank where they want to repair something and reuse it. If it has a history of multiple repairs being performed in the same place at the same time or periodically, and they're making the same repair to the same tank, we can come in and say, "You know, it's time to replace that tank."

We'll have that history. If you keep it for five years, you may miss that opportunity to make that assessment with that tank. And it goes with the conforming tanks that we have in the ground now that may have already been in operation since the previous rule or prior to that. I mean, we've had tanks out there for several years now.

Now we're going to be able to assess the history of that tank and to see if it is time for that tank to be replaced. Because the failure is occurring in the same place. And you're making the same repair every time. And so, if we think it's creating some type of imminent threat or danger, under the current rules we have an option to say it's time to replace that tank and put a new one in because the repairs aren't cutting it.

So we want that option. And the only way we can do that is to have a history, a recorded history. If we link it to five years, that puts limitations on two failures that occurred during the previous recordkeeping and is not documented anymore. Those records could be gone. But if we

required them to continue to keep that record, we'll know every failure that occurs with that tank.

So another thing that goes back to this recordkeeping portion and the change of the reclassification of those tanks is that we want to make sure it's clear that the operator understands what they need to do to address issues when there is an integrity failure or release associated with a below-grade tank that doesn't comply with the conforming designs.

So we put language inside there, and this creates a multitude of things. We created two provisions: One would be the new Paragraph (5) under 12.D. This is operational requirements for below-grade tanks. This basically states that if you don't meet the conforming design and you discover that it doesn't demonstrate integrity or that develops any of the conditions identified in (5)(a) of 12, which means, basically, there's been some type of leak or penetration that has occurred below the fluid surface or the fluid level of the tank, that you need to close this below-grade tank pursuant to closure requirements prior to installing the new below-grade tank that complies for your retrofit.

What we're meaning with this is that you address that release under the closure provisions. It deals with removal of the fluids and any type of sludge material that may be present in there, proper disposal of that, proper disposal of the

existing tank if need be. It could include the testing protocols that are identified in Section 13 under the closure requirements. And the reporting of that, we just want to make sure that a proper assessment has been done beneath the tank, and we know that the integrity has failed or a release has occurred.

We also want to make sure that there's proper tracking of a closure report that had been linked to this tank to show that it was officially closed -- or closed out before they put the new one in.

Q. Now, under this rule is it true that once the integrity fails, the operator no longer has the option to retrofit that tank? They've got to close it?

A. They might be able to utilize the tank in the new retrofit design. What we don't -- and what I mean by that is let's say that tank's integrity fails. They could probably repair that tank to the extent that they could maybe use it as a secondary tank for a two-tank design.

But what we want to make sure is that they pull that tank up and address the release underneath, not to leave it in place and continue to operate and not address any type of spill or release caused by the original tank.

Q. Whereas, if they chose to -- well, you'll go through that anyway. I'm sorry. Go ahead.

A. So we want to make sure that if a release does

occur, it's addressed under this condition. So I kind of went through this already.

What does it mean? We just want to make sure that the operator is required to assess and address a release prior to initiating the below-grade tank retrofit replacing of the existing below-grade tank. We want to make sure that they follow the provisions identified within the closure requirements to make sure there's proper closure and assessment and some type of notification as in a report that it was addressed in that fashion prior to initiating the retrofit or replace.

You know, they may not be allowed right now under the operational requirements under that -- I'm trying to make sure I've got it here -- but under the operational requirements under Subsection A -- I think it's number (5) -- it says that you can repair a tank or replace it if there's a leak.

Well, the things that you need in place, you need that replacement design approved by us before you install it. But we just don't want parties going out there and putting in tanks that aren't approved. And the current rule addresses that later on with some of the transitional provisions about submitting a permit or permit model for those to address that new retrofit design.

So what we want here is to make sure that they're not just repairing these nonconforming tanks and continuing to

operate it, because the rule says if you have integrity failure, you're supposed to retrofit and bring it up to the new design.

So what we're trying to do is make sure that occurs. Now, it's not to say, as I just mentioned to Mr. Brooks, that you can pull that old tank, repair it, and use it in your new tank design if it's applicable. Meaning that if that tank, if there was some type of leak that formed from it, you pull that tank, and you repair it, and you can use it as a tank within a tank design and use it either as -- it would probably be more recommended to use it as a secondary containment rather than primary containment.

So there are options to reuse the tank if it's not too damaged to the point where it can't be used. So there's nothing saying they can't use that. I just wanted to make sure it's clear that they do have -- they may be allowed to repair it and reuse it in their new design.

So the intent of this amendment is to make sure that to inform these operators of these below-grade tanks that were installed before the effective date that do not comply with the conforming design or the approved design, of their responsibility to address issues if the tank integrity fails.

It also informs them that if they discover a leak that they shouldn't be just repairing that tank, that they should be addressing that release and doing the proper

retrofit. And, of course, what we're trying to do with this is we're looking at, now, tanks that would have been either retrofitted or closed within five years addressed in some form or fashion.

We're making sure that we provide some type of environmental balance that makes sure that these tanks, these operators of these tanks are required to either install an approved design or address that release prior to the tank retrofit or replacement. We're not -- the idea is not to transfer the burden of a release to the next operator when they go to close that tank.

So we don't want operators not addressing it, and then when the new operator through sale or transfer obtains it ends up with a contaminated area. So you shouldn't be transferring your liability over to the new operators.

Q. Okay. What you've been talking about so far is Paragraph (5) of 17.12.D, right?

A. Yes.

Q. And that applies when integrity failure is discovered, correct?

A. Yes.

Q. Now, there are different requirements if you repair or retrofit -- if the operator chooses to repair or retrofit prior to discovery of an integrity failure.

A. Yes. And that's the next provision that we're

getting.

Q. And that's Paragraph (6) of 17.12.D?

A. Yes.

Q. Okay. Go ahead.

A. What we're proposing is a provision that if an operator is proactive and they discover a release that has occurred at some point from previous operations maybe under previous rules, that we only require them to repair that tank at that time and not address that release -- to address that release in a different fashion.

If they are being proactive in doing a retrofit or replacement prior to a new release occurring -- and that's what the language here is addressing. What we've got here is operators of below-grade tanks constructed and installed prior to the effective date. These are nonconforming tanks. When the operator equips or retrofits that existing tank to comply with the conforming designs or the approved designs, they're doing this in a proactive stance.

It's not where they are responding to a release, but they're just upgrading their tanks to meet the current standards, we're saying that, yeah, they need to visually inspect beneath that tank during the retrofit. They need to document if they're observing evidence of a potential release. And we specify the mechanism for that documentation be on a C-141.

Then they have the opportunity to demonstrate to us if they think that this evidence of contamination indicates some type of imminent threat or not. And if they can do that, then they can -- if they demonstrate that doesn't create some type of imminent threat, then they can continue with the retrofit if it does. And this goes back to these are nonconforming tanks that currently may not have to meet all the siting requirements.

Meaning that the siting requirements really, currently, apply to new tanks. It's the way the language is written in the rule. Because it says, "You shall not locate a below-grade tank in these areas."

These tanks already exist, are already located. So certain things like setbacks from water course and all that may not be -- they may not meet the 200-foot setback from a water course or a 300-foot setback from a continuous flowing water course or have to make the 50-foot separation of groundwater. But if groundwater is five feet below this tank and they discover this contamination, then we may make them, you know, close that tank under the closure requirements because it does create an imminent threat to fresh water, public health, and the environment.

If it's in a flood zone, a 100-year flood zone, and prone to flooding, we may make them close that tank at that time because it has had a release. Usually, if it's in a

floodplain, it's probably close to groundwater as well. So those things, this imminent threat characterization that they need to demonstrate to us, there may be siting issues that make that determination if it is an imminent threat or not.

So we may require closure to those tanks if that is necessary. If not, and it doesn't seem to create an imminent threat, then we would allow them to continue their retrofit or replacement to bring it up to the current approved design.

So what does this mean? I just kind of went through all this. This applies to operators that are operating nonconforming tanks. They are initiating the retrofit or replacement prior to any type of integrity failure or release, so they are being proactive. But we're requiring them to look under those tanks, those existing tanks, to see if there's any issues that need to be addressed or have concerns with us prior to initiating that retrofit or replacement and installing the new design.

We're also requiring those operators if there is any evidence of a release to document that and then demonstrate to us if there's any type of imminent threat from that release. And then if that evidence does demonstrate or the operator or the Division determines that it poses some type of imminent threat, then we're going to require them to close that tank and address that contamination prior to initiating some type of retrofit or replacement.

So the intent here is to make sure that operators of these nonconforming designs investigate beneath their tanks, make assessments, and probably address contamination beneath those, if there is contamination prior to initiating any type of retrofit or replacement of that existing tank.

We're also allowing operators that are proactive in doing those retrofits before a failure, integrity failure, issue, or release occurs, we're allowing them the opportunity to investigate underneath these existing tanks and address any contamination discovered -- maybe you could say in a less stringent manner because it's not currently releasing.

It may be preexisting, and we would look at different -- you could say looking at it a little bit differently of what may pose it to be a imminent threat or under those type of conditions rather than a cleanup standard condition. We would be assessing with a holistic view on this to determine if there's cause for concern or not and how it should be addressed.

Another thing that comes about with the change of reclassification of the below-grade tanks is that it creates a new classification in which we have to identify under the closure timelines for below-grade tanks. And with the general concept that closure could be linked with sale or transfer of ownership, we need to address that under the closure timeline requirements of Section 13.

Q. Okay. Mr. Jones, is there any requirement under the present rule that a nonconforming tank be retrofitted and replaced at the time of sale or transfer?

A. No.

Q. So this is a new requirement?

A. This is a new requirement.

Q. Does it apply to all nonconforming tanks or just some nonconforming tanks?

A. It applies to all nonconforming tanks.

Q. So if you have a tank that's under I -- 11.I(5) or under 11.I(6), and it is required to be closed -- and accordingly is required to be closed within five years, does it have to -- or closed or retrofitted -- does it also have to be closed or retrofitted prior to a sale or transfer if that sale or transfer occurs in less than five years?

A. Yes.

Q. And if you have a tank that's under 11.I(5), and it can continue to operate beyond the five years, does it still have to be closed or retrofitted prior to a sale or transfer?

A. Yes.

Q. Continue.

A. So this provision here, as Mr. Brooks was trying to get at, we already have a provision. I think it's Paragraph (4) right now under the current rule that addresses tanks that are required to be closed within five years as

they're identified under I(6), that we already have that provision addressing those tanks.

So the fact that the classification of those tanks changes by pulling certain tanks out of the I(6) design, that provision really didn't need to be changed because it addressed those under the current and the proposed I(6) -- yeah. I -- I'm sorry. I want to make sure I've got this right.

Q. 11.I(5) and 11.I(6).

A. Yes. 11.I(6) tanks. What we're trying to do here is clarify that if you have any type of nonconforming tank, when it comes time to sell or transfer that and if they're not retrofitted, then you're required to close them.

You have the option to retrofit prior to closure, but if you do not implement that, then you're going to be required to close them. And what this does is prevents the transfer of this liability to the next operator. You address it as the current owner, and you address those issues linked to that tank instead of selling them off to someone for someone else to deal with to comply with the rule.

The rule has been in effect since June of 2008 already. What we're trying to do is make sure that when the next operator gets these, they're in compliance. Because other than that, people can sit on their tanks, not comply with the rules, sell them and sell that liability with them, and put that burden on the next operator. So we're trying to address

that here.

So what does it mean? Once again, if you've got a nonconforming tank that doesn't meet the approved design and the operator has not retrofitted or replaced the existing tank to an approved design, they would be required to close that below-grade tank prior to any sale or transfer.

What is the intent of this amendment? It's to identify the closure timelines of operators of these existing below-grade tanks that do not comply with the current approved designs and to prevent an operator of below-grade tanks constructed and installed prior to June 16, the effective date of the current rule, that do not comply with those requirements to bring it up to the approved design from transferring their environmental liability related to that existing below-grade tank operations to future operators through sell or transfer.

So what we're trying to do is say, "You know, you've operated these. You've owned them. And at this point, under the current rule, you're supposed to get them permitted.

"They're already supposed to -- the permit applications should have already been submitted. A retrofit design should have been submitted with that. And under the current rule, you're supposed to either close or retrofit those within five years, and you haven't done any of that.

"So now we're saying you either retrofit or close it upon sale or transfer to make sure the current operator is in

compliance."

What we don't want is un-permitted below-grade tanks be sold and transferred but nothing done and put that current new operator in a position where they're not in compliance because the previous operator ignored that rule and put that burden on them.

So in order to address this issue of sale or transfer linked to these nonconforming tanks, we had to modify the transfer provision under the current rule. And this is a change to -- this would be changes to Section 16.

So under the current transfer provision under Section 16, operators that had applications in for transfer of some type of well or facility, if the OCD had granted approval of those facilities, it meant an automatic transfer to anything linked to that facility.

Since we're changing this language, that would exempt or would not include -- it would exclude these below-grade tanks that do not comply with the current approved design. So what we're doing is limiting that approval of those applications, and it would exclude below-grade tanks that do not comply with the approved design. They would not be able to be automatically transferred for that facility if they haven't been closed or retrofitted.

Q. And, in fact, they can't be transferred except possibly under the exception provision?

A. Yes. So we had to clarify that those would be excluded in that provision. And we also identified that we were going to be requiring these operators of these nonconforming tanks to close the existing below-grade tanks pursuant to the closure requirements or complete the appropriate retrofit of that existing tank to comply with the approved design prior to any sale or transfer of ownership.

So these are the changes that we've made. We pulled the -- we made an exception here for this general approval process; meaning, that if you have these below-grade tanks that do not comply, then you cannot get a general approval linked to the transfer of a well or facility.

And then we've identified that if you have the below-grade tanks that were constructed and sold prior to the effective date that were nonconforming, that you would have to either enclose those or retrofit them in order -- prior to any sale or transfer of ownership.

So what does this mean? Once again, operators of these nonconforming tanks will be required to either close existing below-grade tank or retrofit or replace for their approved design in order to sell or transfer the ownership of those tanks. And then the approval, the Division's approval of the sale or transfer of a well or facility will not constitute the approval of a sale or transfer of below-grade tank associated with that facility if it doesn't comply with the

approved design.

Very straightforward on that.

CHAIRMAN FESMIRE: Mr. Jones, before we start into transfers, is there a need to take a break?

MR. BROOKS: That would be acceptable.

CHAIRMAN FESMIRE: Okay. Brad, why don't you go ahead and finish the transfer, and we'll take a break before you start into closure. Okay?

THE WITNESS: Okay. So the intent of this change here is to require the operators of these nonconforming tanks that were installed prior to the effective date to bring the existing tank into compliance or close it pursuant to the closure requirement prior to the sale or transfer.

This also prevents such operators from transferring, once again, their environmental liabilities related to that existing below-grade tank in operation and noncompliance issues to future operators through sale or transfer.

And that's it for the transfer part.

CHAIRMAN FESMIRE: Why don't we take a 15-minute break, and report back at about 13 till, by that clock.

[Recess taken from 10:27 a.m. to 10:46 a.m., and testimony continued as follows:]

CHAIRMAN FESMIRE: Okay. Let's go back on the record.

Let the record reflect that this is the continuation

of Case No. 14292. The record should also reflect that all three Commissioners are still present.

I believe, Mr. Brooks, you were finishing up your direct examination of Mr. Jones?

MR. BROOKS: Yes.

Q. (By Mr. Brooks): And Mr. Jones, I believe you had concluded with the requirements regarding closure or retrofit and transfer of below-grade tanks, and you were ready to go into another subject; is that correct?

A. Another section, but it goes back to that transfer of ownership.

Q. Okay. Go ahead and continue where you broke off.

A. Okay. To complete the full circle to address this issue of these nonconforming tanks and them being linked -- to the closure being linked to their sale or transfer of ownership, we have to address the transitional provisions of Section 17 of the rule to clarify what the responsibility of the operators are.

So we're proposing to require that the operator of a below-grade tank that's nonconforming that was constructed and installed prior to the effective date to submit a closure plan to the Division prior to requiring a permit transfer for or to close the existing below-grade tank pursuant to the closure requirements prior to any sale or transfer of ownership if that operator has not completed the appropriate tank retrofit or

replacement.

So we had to add some additional language to the current Subsection B of Section 17 requirement here addressing when operators are required to submit their closure plans. We had to include some additional language.

Our additional language is underlined up here: "An operator of an existing operation that is required to close pursuant to Paragraph (5) of Subsection A" -- and this would be a new closure timeline requirement of Section 13 that we previously discussed and went through -- "shall submit a closure plan pursuant to Subsection C of" -- Section 9, which is the closure requirements under the application section of the rule -- "to the Division prior to the time of requesting a permit transfer.

"The Division must approve the closure plan, and the operator must complete closure activities pursuant to the closure requirements of" -- Section 13, which are the closure requirements -- "prior to any sale or transfer of ownership, unless otherwise approved by the Division."

So what does this mean? This new language? We just want to make sure that these operators with existing below-grade tanks that are nonconforming that have not completed the appropriate retrofit will be required to submit the closure plan, complete the closure activities based upon an approved closure plan prior to any sale or transfer of

ownership.

And the operator would be required to submit the closure plan to the Division prior to requesting that transfer.

The intent behind this is to remind operators of their responsibilities to submit a closure plan and complete closure activities prior to any sale or transfer of any existing below-grade tank that's nonconforming.

And in the situation where the operator has decided not to complete that appropriate retrofit, the intent also is to prevent these operators of these nonconforming tanks from transferring their environmental liability related to the existing below-grade tank operations and nonconformance issues, if there are such, to future operators through the sale or transfer of ownership of such tanks.

All that was to address reclassifying the tanks and linking the closure or retrofit of those tanks to a sale or transfer.

Another amendment concept that I had mentioned earlier, the second one, was our proposal to increase the content burial standards for chlorides in relationship to on-site trench burial closure method and allowing a comparison to background concentrations of the site for those chlorides.

Once again, Mr. Hansen is going to talk about this in greater detail. Mine is more a general approach on this to address it.

So there are proposed amendments to Subparagraph (c), Paragraph (3), Subsection F of Section 13, which addresses onsite closure using the onsite trench burial method. We made a couple of changes here.

We made a clarifying statement because somehow it got lost in the process of the construction of the original rule, even though it's in all the other language. Up at the top up here, we made a clarifying correction because it conforms with the rest of the language within the rule. Somehow it got left out.

But we just want to make sure it's understood that when the operator obtains their sample of the contents, the contents of the drying pad, especially associated with the closed-loop systems or the temporary pit, meaning that it's not the content of a drying pad associated with a temporary pit, necessarily; that it's either with a closed-loop system or the temporary pit itself.

And we just -- the rest of the regulatory language that we have under closure addressing this identifies that they are two separate things. You have the drying pad, and you have a temporary pit. We just want to make sure that if you're addressing one or the other that it applies to one or the other, not a drying pad that's linked -- only a drying pad that's linked to a closed-loop system or a temporary pit. It's either a drying pad or a temporary pit-type thing.

But the other thing we did is we proposed to increase the chloride standards from 250 to 3,000 mg/L, and this is utilizing the leaching procedure, the SPLP leaching procedure, and also allowing the operator to consider what the background concentration may be at that site and utilize that if it's prudent. So whichever greater of those two would be applied.

So what does this mean? Well, we're proposing an increase to the chloride waste content burial standards. And this is only for on-site trench burial. There's two types of on-site closure methods; there's in place, and there's on-site trench burial. This is only to the on-site trench burial content burial standard.

And we're proposing to increase that chloride concentration from 250 mg/L to 3,000 mg/L. Mr. Hanson will be providing additional -- or more detailed information on the justification of that.

We're still expecting that -- we didn't change anything about the test methods. So the testing for those chloride concentrations should be based upon using the method 1312, which is the Synthetic Precipitation Leaching Procedure and EPA method 300.1.

We're also going to allow the operators to compare whatever their content concentration is to the natural background concentration of chlorides present at the site and do a comparison to that in case, for some reason, the site may

have higher concentrations present. They should be able to. It wouldn't mean that if the concentration of the waste is lower than that of the concentration that's naturally occurring at the site, there shouldn't be an issue of burying that waste if it meets all the other parameters and the chloride concentrations are below the natural concentrations at the location.

We currently allow that in an in-place burial. We're just -- it was kind of missed here. It should have been applied here as well. But our expectations of obtaining that background concentration would be using the same methods that you achieve in testing the chloride in the pit content or the drying pad content itself. So we want like-for-like assessments done. The same methods apply for both of those.

The intent of this is to propose some type of like a practical limit and environmentally protective limit, which Mr. Hansen will talk about, for the chloride burial standards that allow the operators an opportunity to satisfy the chloride standards for on-site trench burial.

However, we feel confident that our baseline requirements, such as siting requirements, for the location to be able to implement this method, such as the 100-foot separation of groundwater from the bottom of the trench, the design construction specifications for on-site trench burial, such as the subgrade prep, the liner specifications, the type

of seams that you have to install on these, and those type of requirements and the placement of the seams requirements and the other additional testing methods, such as the 3103 constituent testing.

In addition to site reclamation, the soil recovery requirements and the re-vegetation requirement, the combination of all these things are already established that we didn't have last time when we talked about on-site trench burial. We didn't know what the liner specification was going to be. We didn't know what the siting requirements were going to be.

Now that we are established within the rule, we feel confident that with that baseline requirements that we can propose this standard, and it will still be protective of fresh water, human health, and the environment.

Q. Now, are we recommending any changes in any of the other requirements other than the chloride standards?

A. No. And that's this baseline foundation I'm talking about that we have established now under the current rule that we didn't have before, and we didn't know what the outcome was going to be in the original Pit Rule that now we can have some confidence in that not changing to create this baseline to repropose the different standards.

Q. Okay. Thank you.

A. And, of course, this will allow the operators the opportunity to compare that chloride concentration of the waste

material to those of unimpacted background concentration from the site. That would allow a proper determination of on-site trench burial. And this background is only for chlorides. It's not for other 3103 constituents and so forth. That wouldn't be a proper use of background. So that could show that there's preexisting contamination, which we couldn't consider that natural background.

Q. Okay. I'm a little confused there. You first said you were talking about chlorides, and then you said something about 3103 constituents. And then you made a distinction between prior contamination and natural background.

And when you say "background," when the rule says "background," for purposes of chloride standards, do you construe that to be limited to natural background?

A. Well, yes, to that natural background.

Q. I'm sorry?

A. Yes, to natural background.

Q. In other words, if there had been prior contamination at the site that has raised the chloride level, that would not be natural?

A. That may not be an appropriate assessment. I guess what I'm getting at is that during our Pit Rule training, we were asked if background applied to BTEX, to benzenes, toluenes, to ethylbenzene, and xylenes. That would not be naturally occurring at the site.

Q. The rule does not allow one to compare anything except as chloride as a background as the rule is proposed?

A. Exactly. And that's what I just want to make a clarification. Background is only to the chloride concentrations only.

Q. So when you were talking about other contaminations, you weren't saying that the rule limits -- in other words, the rule requires -- you weren't saying anything about what the background -- specifically, you weren't talking about what background means as applied to chlorides?

A. No.

Q. And the proposed rule, does it specify anything, or does it just say background?

A. It just says background.

Q. Thank you.

A. The third concept that we were trying to address here are the transitional provisions regarding the submittal dates for permit or permit modifications. This is pertaining strictly to existing below-grade tanks and lined permanent pits.

We're proposing that these submittal dates be extended two years from the effective date. Currently, if I'm not mistaken, on below-grade tanks you were required to submit those permit or permit modifications to us 90 days from the effective date. And for the lined pits, lined permanent pits,

it was 180 days. So we're proposing to extend those.

In addition to that, in order to make sure that we have an understanding of how many of these that we would be having to address, we're asking those operators to register those existing below-grade tanks and lined permanent pits with us within one year of the effective date prior to submitting the application. This way we have anticipated -- we can anticipate how many we're going to have to be addressing.

Q. Okay. To clarify, when you say -- you said they must register within one year? Register these facilities within one year of the effective date?

A. Yes.

Q. And by the effective date, you mean the effective date of Part 17 as it presently exists, not the effective date of the amendments being considered today?

A. Yes.

Q. And what is that date?

A. That date is -- that would be June 16, 2009.

Q. Does that mean then that they have to register these facilities prior to June 16 of -- no, wait.

The effective date is June 15, 2008, correct?

A. Well, the effective date is --

Q. June 16, 2008?

A. Yes.

Q. So these facilities have to be registered, then,

by June 16, 2009?

A. Yes.

Q. Thank you. And how long does it provide for them to submit the permanent application if they register?

A. It would be two years from the effective date. So they would have two years.

Q. So that would be June 16, 2010, then, they would have to submit the permit or modification application?

A. Yes.

Q. Continue.

A. So once again, the first provision of the transitional provisions of Section 17 -- that should be Subsection C up there. I apologize for that -- Section 17.

So what we had to do is add language inside here that would say within one year of June 16, 2008, the operator of an existing lined permanent pit -- and this addresses lined permanent pits only -- should submit a list of the lined permanent pit or pits which the operator is required -- the operator that required permit or permit modification to the Division for registration. So we want this registration in place.

Currently, under the current rule, these were required to be submitted -- or, actually, the applications were required to be submitted to us 180 days from the effective date, which was June 16, which has already passed. That would

have been December of last year.

So as it currently stands, operators that haven't notified us of these are currently in violation unless something has -- some other mechanism has been established. The registration should list -- the registration list shall include the operator's name, the name of the well or facility which the lined permanent pit is associated, the API number of the facility or the facility name, a legal description, global positioning coordinates to the sixth decimal point, the number of lined permanent pits associated with the site, and a determination of the permit or permit modification is required.

So we added this language to adhere to -- had them notify us of what to anticipate to be submitted to us that currently would be outstanding with us under the current rule. We also changed that 180 days of the submittal dates for those permit or permit modifications to two years from the effective date. Once again, that would throw us into 2010 for those to be submitted, rather than the current requirement, which was December of 2008.

So we're -- our goal on this is to get these parties into compliance and give them ample time to do the work. So our extension on this is to address those issues. Once again, for the below-grade tanks -- that should have been Subsection D up there of Section 17. I apologize for that.

Once again, we're requiring the operators of those

existing below-grade tanks that require a permit or permit mod to register with the Division within one year of the effective date, which was June 16 of 2008. And we specify the exact same language for the lined pits for those so we would know where and how many we have and what we expect, be it a permit or a permit modification for those.

And once again, we have extended below-grade tank, permit, permit modification, application submittals -- it's only the submittals -- we've extended that to two years after the June 16, 2008.

Now, once again, we have this issue about below-grade tanks that are nonconforming that have issues with either having to deal with integrity issues or being retrofitted upon sale or transfer. We did have to add some additional language and clarify some things.

So the last provision we had to modify is that an operator of an existing below-grade tank shall comply with the construction requirements, which would then be the design requirements of the rule, upon discovery that the below-grade tank does not demonstrate integrity prior to any sale or transfer of ownership.

So once again, we're notifying the operator that they have to address this issue. And that conforms with the other changes that we've made throughout the rule.

So what does this mean? Well, we definitely are

going -- we're proposing that the operator would be required to register their existing below-grade tanks and lined permanent pits. And these would only apply to the ones that require a permit or permit modification under those transitional provisions. And this should be done within a year of the effective date.

Operators that currently have established what we called an Agreed Scheduling Order with the Division, they've already satisfied this requirement. So we're not going to make them reregister with us, because through their Agreed Scheduling Order they have addressed this issue.

Such operators will be required, though, to register any other existing below-grade tanks or lined permanent pits that they currently have not identified under their Agreed Scheduling Orders.

And then operators will be required to submit a permit or permit modification application within two years of the effective date of the rule for existing below-grade tanks and lined permanent pits that require such submittals to continue to operate. Once again, the rule states you have to have a permit in order to operate, so that's why these things are required.

The current rule requires -- the current rule requires such operators to submit the permit or permit mods for existing or registered permanent pits within 180 days from the

effective date, which was June -- I'm sorry -- December of 2008. And if you had an existing below-grade tank, that was due in September of 2008.

What we wanted to do is -- these are existing operations. We want the operators of these operations to come into compliance with the rule. So we're trying to assist them to do this, but also remain in compliance of submittal dates, and give them ample time to address it. Since they're currently operating, we just want to give them ample time to get the proper information in to us so we can either permit or address their future retrofits.

So the intent on this, once again, we want the operators to identify which existing tanks or lined permanent pits require some type of permit or permit modification. It'll give us -- provide the OCD some notice of the number that we're going to be dealing with and identify which ones are outstanding that would require some type of action by the operator.

It also gives them ample time to put that together so they can go out and do their assessments and make that determination as well. This would also allow the operators ample time to create and submit an appropriate application without having to request any type of exception to extend the submittal dates or establish some type of Agreed Scheduling Order.

It will also allow the operators an opportunity to work with us. This is what we've been doing in these situations is create templates regarding the operation and maintenance, the design of construction, the closure requirements, that they can place in the application packet. And if we come up with some type of template form that they can demonstrate that it complies with all the regulations, then when it comes time to submittal and our review, the Division's review, we can expedite those reviews without having to assess each one to see if they comply if we'd already agreed upon the structure of the template and it has the appropriate information.

We really wouldn't need to look closely at those templates for an operation and maintenance plan, a design construction or a closure plan, if we've already worked those out in advance. So it would allow us to expedite the review and get those approvals back to them so they would have the appropriate permit or permit modification in place.

And that was it.

Q. Okay. Mr. Jones, would you look at the stack of papers that are fastened together with a fastener there.

A. Yes.

Q. And the first one is our pre-hearing statement. Behind that is Exhibit No. 1. So I want to call your attention to what's been marked as Exhibit No. 1. Is Exhibit No. 1 the

proposed amendments that the OCD is proposing in this proceeding?

A. Yes, they are.

Q. Okay. And is Exhibit No. 2 a copy of the entire Part 17 of OCD rules showing the proposed amendments, their underlining and strikeouts?

A. I'm just making sure it has that in here. Yes, it is.

Q. Okay. Now, is Exhibit No. 5 a copy of your resume?

A. Yes, it is.

Q. Is Exhibit No. 6 a copy of the PowerPoint presentation we've just seen?

A. Yes.

MR. BROOKS: Mr. Chairman, I submit Exhibits 1, 2 5, and 6.

CHAIRMAN FESMIRE: Any objections to Exhibits 1, 2, 5, and 6?

MS. FOSTER: No objection.

MR. CARR: No objection.

MR. HISER: No objection.

MR. FREDERICK: No objection.

DR. NEEPER: No objection.

CHAIRMAN FESMIRE: We'll go ahead and admit them, then, in that order.

[Applicant's Exhibits 1, 2, 5, and 6 admitted into evidence.]

MR. BROOKS: Okay.

CHAIRMAN FESMIRE: Ms. Foster?

CROSS-EXAMINATION

BY MS. FOSTER:

Q. Mr. Jones, thank you for taking the time to go through this exhibit. That was actually very informative.

But I have a couple of questions relating -- I think I understand the retrofitting part of the changes as it relates to below-grade tanks. But I do have a question about the siting. Specifically, you know, what happens if you have an existing below-grade tank that does meet the design and construction specifications of Rule 11, I believe it is, but does not meet the siting requirements of Rule 10?

I guess we're calling it Section 10 of the rule?

A. What happens to it?

Q. What happens? Is the operator required to have to relocate that tank?

A. Not necessarily. The first question that should be asked is, does it have a permit or not? And that's crucial, because the rule states that a permit is required to operate a tank for that type.

So under Section 8 of the rule, a permit is going to be required for that. Once again, that's why in the

transitional provisions, the last ones I just went through, if we could go back, some of these changes -- I believe this is Subsection -- it should be Subsection D of Section 17 -- requires that that operator submit a permit or permit modification.

Permit -- the reason you would submit a permit is because you didn't have one. The reason you would submit a permit modification is because it didn't conform with the conforming design or the approved design, and you would to have retrofit it.

So in that scenario, the first question is, do you have a permit or not?

Q. Okay. So let me ask you this question then: So prior to the other Pit Rule, when the Rule 50 Pit Rule was in place --

A. Uh-huh.

Q. -- and operators did not have to register or permit their below-grade tanks --

A. That's not a correct statement.

Q. Okay. Correct me.

A. Under Rule 50, based upon the definition of below-grade tanks, those were required to be permitted.

Q. Okay.

A. We have a new definition.

Q. Of permitted?

A. No, of below-grade tanks. So the new definition captured tanks that were installed that were never permitted by the State under Rule 50. And they were installed during the time Rule 50 was in effect.

Q. Right. So there's a new definition of below-grade tank in Rule 17 --

A. Yes.

Q. -- that captured additional tanks that might not have been permitted or registered prior to the promulgation of Rule 17?

A. Yes. There was no registration of below-grade tanks in prior rules. There was only permitting.

Q. Right. So, again, if you have a tank that gets pulled into the rule that was not previously permitted but does meet the design and construction specifications but does not meet the siting requirements, what is the operator to do? Do they need to do a relocation of this --

A. They need to get a permit. In order to get a permit, you must submit a permit application. And that's identified under Section 9.

And what we're specifying in that is that the rule itself speaks about what needs to be in that application. I don't have a copy of the rule to throw up, but it includes things like the operational maintenance, design construction, closure requirements or a closure plan. And it also includes

things like the hydrogeologic report for a below-grade tank, which includes siting demonstrations in there.

But when you look at the language of the rule for siting requirements, it states that a below-grade tank, or in this case, a temporary pit -- being clear on that -- shall not be located in certain areas. "Shall not be located" means that it doesn't exist.

Q. Okay. So if I'm hearing you correctly, the short answer to my question is: If you can't get a permit because of the siting requirements, even though you do meet the design and construction specifications, you're going to have to relocate that tank?

A. No. You didn't let me finish, and you made assumptions.

What I'm saying is that if it says you shall not locate something, that means it currently doesn't exist. The tank that you're talking about currently exists. It's already located, meaning that the siting wouldn't necessarily apply.

Now, the reason we're asking for the siting demonstrations is because -- just because this tank is currently existing and they didn't consider anything related to the previous Pit Rule, Rule 50, that none of those siting issues that were identified under that rule were even considered.

So what we want to do is make sure there's no

imminent threat linked to this below-grade tank; such as, is it placed in groundwater? If it's placed in groundwater, more than likely we're going to say, you know, it creates some type of imminent threat. Because as soon as it leaks, it's going to impact groundwater. And under Section 13 under closure requirements and the general language of 13A, we have the authority under that provision. If that below-grade tank or any operation creates an imminent threat, we can require closure.

So if that were the case, we would request not to permit that and to close it.

Q. Okay. Now, you participated in the training sessions after the Pit Rule, correct?

A. Yes.

Q. All right. And you did answers to frequently asked questions that were submitted by industry both during the training sessions, I believe, in writing as well?

A. I participated in those, yes.

Q. All right. And those frequently asked questions were actually posted on the OCD website --

A. Yes.

Q. -- for whomever? The public, right?

A. Yes.

Q. And did you work with Mr. Wayne Price at the time of promulgation of the Pit Rule?

A. Yes.

Q. And did you draft any of those questions or participate in the drafting of any of the responses to those questions?

A. Yes, I did.

Q. And, specifically, as it pertained to the below-grade tanks, did you write any of the responses to the below-grade tanks questions?

A. It was collaborative. I mean, we all did. But, specifically, me just writing it, probably not. But it was a group effort.

Q. All right. And did you speak to operators who might have had a specific question about existing below-grade tanks and whether they needed to relocate?

A. Yes. And that's why we came up with the FAQs -- is what we refer to them -- to provide clarification of those issues.

Q. All right. I have an answer to a frequently asked question: Does the siting requirement in 19.15.17.10 NMAC apply to existing below-grade tanks?

And at the bottom, there is an answer, and the bottom says, please contact Wayne Price at a phone number and e-mail address or Brad Jones at your phone number and e-mail address.

Would that mean that you participated in writing this question and would be familiar with the question?

A. I believe so, yes.

MS. FOSTER: Rather than reading this into the record, Mr. Commissioner, might I just show him this question so we can discuss it? Or would you prefer that I read it into the record?

CHAIRMAN FESMIRE: I would prefer that it be read into the record.

MS. FOSTER: Okay. The question states:

"Frequently Asked Question: Does the siting requirement in 19.15.17.10 NMAC apply to existing below-grade tanks?"

Answer: "19.15.17.17D NMAC requires operators of existing below-grade tanks to apply for a permit within 90 days after June 16, 2008. Existing below-grade tanks do not have to be relocated to meet the siting requirements in 19.15.17.10 NMAC but must meet the design and construction requirements in 19.15.17.11 NMAC.

"The operator must still supply the information required in 19.15.17.9 NMAC, and the siting criteria applies to below-grade tanks located after June 16, 2008."

A. Yes. I think that's what I just explained to you in our discussions, yes.

Q. So for purposes of clarity, an operator would have been required to ask for a permit?

A. Yes.

Q. If they did not meet the siting requirements, then they would not have been able to get a permit?

A. I'm not saying that. What I'm trying to say is that we would assess, based on the information in the application, which would include the siting information in there, if they pose an imminent threat or not. If they pose an imminent threat, such as if they're placed directly in groundwater, we would probably not permit those because of the potential if there was any type of failure, integrity failure, that would have a direct impact on fresh water, which the whole provision is to protect fresh water, human health, and the environment.

So if it was placed in two feet of water, we would probably say we would deny that permit application. We've asked operators on top of that to make those assessments up front prior to submitting permit applications to determine if they should submit a permit application or a closure plan because if they do create such a threat, more than likely we would assess it as such and not permit them.

Q. Okay. And this assessment of imminent threat, is that based -- what is that based on?

A. Well, I gave you a very good example. If you know these are tanks, these are nonconforming tanks that require permit or permit modification, if they were to fail, they would have a direct impact.

So, I mean, it's all case-by-case, because there's so many different scenarios. Another example could be if your tank was located in a 100-year flood zone that was subject to flooding, that's probably not a good idea to permit such a below-grade tank to continue to operate if it doesn't currently have a permit.

Once again, we would probably ask for a closure plan on that instead of a permit application.

Q. And who makes that subjective determination? Would it be you as the Environmental Bureau here in Santa Fe, or is it the local district office?

A. Well, in this case, for these right here, what we've done to assist the district offices right now, currently, what we're doing is that any of these type of applications that would be coming in, we're asking that they be sent to Santa Fe so the district office wouldn't be flooded by them and be bogged down. So they could continue all the new operations that need to be permitted for them to assess those as it's written in the rule.

Q. And are you familiar with all the areas geographically in New Mexico that an operator might be seeking to locate a below-grade tank or a location or have an existing location? I'm sorry.

A. Are we aware of all of them?

Q. No. You, personally, since you're reviewing

them, do you have expertise in the geology and topography and everything that is necessary to make a scientifically based decision as to whether there's an imminent threat?

A. Once again, as you read out of the FAQ, and as I stated earlier, you're required to submit a permit application which includes the hydrogeologic report provided by the operator of their assessment of surface and subsurface water being present at the site plus geology plus siting demonstrations. We would be basing it upon the information that they provide us for their permit.

Q. All right. Now, you talked a lot about -- in your direct testimony -- about responsibilities that an operator might have upon the sale or transfer of a below-grade tank.

What exactly do you mean by a transfer?

A. Well, transfer of ownership. Let's say I'm company number X, and I create company number X squared. They're a subset of my company, and I want to transfer. I don't want to sell those. I want to transfer ownership to my X squared company. That would be a transfer of ownership. That wouldn't necessarily involve a sale at all.

Q. Okay. So could that be an internal transfer within a large company with many subdivisions?

A. It could. But as I've seen in the years I've been here, a lot of those get sold off eventually to other

companies.

Q. But if it doesn't get sold off and it gets absorbed within another division of a large company, you would consider that a transfer for purposes of this amendment to the rule?

A. Yes.

Q. All right. And what about in the situation where you have a Joint Operating Agreement and you have several operators under one legal agreement, and there's a different operator who steps up and decides that he wants to be the operator of the location?

In other words, there's a transfer of operations of the location. Would you consider that a transfer?

A. Well, I guess the rule speaks for itself, because the rule identifies certain things such as the signage for -- any type of permit activity under the Pit Rule requires you, as an operator of that operation -- be it a temporary pit, below-grade tank, permanent pit, if you're not the operator of the well associated with that, you have to put your sign out there and identify who you are.

So there are provisions that already address that type of scenario because that would have to be decided at that point. So either you own the well or the facility that's associated with that below-grade tank -- in this case, let's say it's a below-grade tank -- or you don't.

And you would already have to identify yourself as part of that below-grade tank under the current rule.

Q. But there could be multiple owners of a location.

A. There could be.

Q. And?

A. It would depend on how you address the sale or transfer. So right now, if both parties are owner/operator of a below-grade tank, then that's, you know, that's between them to determine how they want to assess that.

Q. Right. And it's between them as a private contract between the two parties as to whether they're going to transfer that between the two of them.

A. Uh-huh.

Q. And these changes seem to imply that OCD now can step in and impact that transfer if certain parameters are not met.

A. Yes. Well, impact that transfer? I would say indirectly it would impact that transfer, but directly the parties need to be notified if there's compliance issues related to the existing operation and the liability with that. So we're making sure those are addressed so they are a nonissue.

Q. Okay. How long have you been with the OCD?

A. Almost three years.

Q. All right. And during that three years, have you

seen instances where a new company might come in and purchase wells at existing locations from another operator?

A. Yes.

Q. And in those transfers, have you seen a situation where the new owner might agree to do some remediation that might be necessary on a location or maybe even clean up a legacy site?

A. No. Well, I haven't been directly involved in that, but what I have been directly involved with is under this current Pit Rule where an operator acquired properties from another operator that they did not meet the stipulated deadlines for permits for those below-grade tanks.

They did not submit a permit application in time. It was -- five months had already passed, and they had sold those to another operator without even having a permit -- permitted below-grade tank by rule when they were supposed to submit the application in.

So what -- I guess what I'm seeing is something more real and prudent to what we're dealing with under the Pit Rule is that they're transferring those liabilities and also selling operations to other operators that aren't even in compliance with the rule. And we're trying to address that.

Q. So when there's a transfer or sale of an oil and gas company or even just a below-grade tank, isn't the buyer responsible to do his own inspections and do whatever he feels

he needs to do in order to do that sale?

A. A prudent operator would. What we're trying to do is, the party that operated these during the five- to six-month interim that failed to do anything, we're not cutting them loose of their responsibility. They were actually in violation of the rule at the time -- if we really wanted to push it, and we're not. But what we're trying to do is hold them liable to what they should be addressing and they failed to address when they were required to under the rule.

Q. Okay. And you're aware that the retrofitting for even possible relocation of tanks is going to cost companies money?

A. Yes. And if you notice, we reclassified a lot of these. And the reclassification itself really gave a break to the operators that fell out of the previous definition. But it didn't give a break to the operators that would have fallen under the previous Rule 50, and there's a reason for that.

Because Rule 50 was in place, and basically Rule 50 said a below-grade tank required secondary containment and leak detection. So we're holding those people to the fire, so to speak, and making them address those because they blatantly disregarded the requirements of Rule 50 when they installed those tanks.

Q. Okay. Now, with the new approved below-grade tank designs here that you have, would it be possible, do you

think, for a company to have a permitted location that might not meet the new siting requirements of Rule 50?

A. A permitted -- yes. Yeah.

Q. Okay. And if they don't meet the siting requirements of Rule 50 but they're being brought in under this new amendment, will they have to relocate that tank?

A. Not necessarily. The reason why is, once again, for some particular reason, if they put it in a place that may be prone to flooding, as we discussed -- these are just two general examples -- but if they're being flooded, then the problem they have is that they may not even be able to comply with the conforming factors. Because you're supposed to control surface run-on. If that area is three feet under water, you can't comply with that. So it's really not conforming.

The other thing, if it's placed, once again, in groundwater, that may be an outstanding issue that we have concerns about, especially with the visible sidewalls more so than the double wall design. Because as soon as that leaks, it impacts groundwater.

Q. So then the answer to this frequently asked question actually needs to have a statement in there, depending on whether there's an imminent danger to groundwater, human health, and the environment?

A. Everything's got to be assessed on a case-by-case

basis. That's all we're asking for, the permit application that will give us the information to make that determination.

Q. Okay.

A. Because there may be other things that may come out of this that we need to assess.

Q. Right. On your transitional requirements for below-grade tanks, you stated that there's a new requirement of GPS to the sixth decimal point. Is that actually the center of the tank? Is that the coordinates of the location? Do you need four point coordinates? What exactly do you need there?

A. Well, with this you should be identifying on your C-144 what your tank dimensions are, so you could take that from the center. You could notify us which corner you're taking it from because there's maps required for that.

So if you identified where you're taking your coordinates, that would be appropriate.

Q. Now, you discussed that there's the possibility of an integrity issue with the tanks, and -- well, let me back up.

If an operator is being proactive and decides to retrofit tanks, not because he needs to, because he's being proactive, he is required to look under the tank, correct?

A. Yes.

Q. And if there's evidence of a release, then he moves on to a different standard. He's required to close that

location?

A. Well, it depends. What we're trying to do is for the proactive operators that are addressing tanks that are not currently leaking or have integrity issues, those operators that just say we're going to upgrade to the new design because we want to come into compliance with that, it's a nonissue. If we sell or transfer, it's already done, it's dealt with. We can make that happen.

We're requiring them to look underneath the existing tank to see if for some particular reason -- let's say they did have an integrity issue prior to Rule 17 coming into effect under Rule 50, and they repaired that tank. That's all they did. They didn't address the contamination that occurred at that time. We're having them to assess that and take a look at it.

Q. Are you familiar with Rule 116?

A. Yes. I think it's referred to as Rule 29 now.

Q. Right, under the -- the spill rule?

A. Yes.

Q. If there's a release, wouldn't that operator get it pulled for cleanup purposes under the spill rule?

A. It would depend on how much released. If it was under five barrels, it wouldn't.

Q. Okay.

A. So there would be no documentation.

Q. But in this instance they would have to document --

A. Yes.

Q. -- if they found something, regardless of what they think the amount was?

A. Absolutely. The current rule also addresses under the general provisions if there was a puncture to the tank that created some type of release, you would have to notify the Division of that. There's no quantity; there's no volume to that release. Once again, it's not a Rule 29 release standard. It means you notify immediately if there's a release.

Q. So it's a different standard for a spill because it came from a below-grade tank under this rule?

A. Absolutely.

Q. All right. Now, does the OCD do approvals of transfer of any part of a location? Or will it only be in relation to transfer of a below-grade tank -- transfer or sale of a below-grade tank?

A. Can you clarify your question? I just want to make sure I understand it.

Q. What we talked about earlier is that if there was a transfer or sale of a below-grade tank, you're going to basically require that the sale can't occur or transfer can't occur until that tank is retrofitted?

A. Or closed if it is nonconforming.

Q. Right. Now, do you do that with any other parts of a location? Do you do it with above-grade tanks? Do you do it with the wellhead? Do you inspect anything else and prevent the sale or transfer if it doesn't meet your requirements?

A. As far I know, we don't permit the above-grade tanks unless they're under the Water Quality Control Commission discharge-type permit, which would fall out of this rule any way. It would apply for any tanks linked to that that are identified under that rule.

So I'm kind of confused by your question. The way the rule is currently read -- and it states that if you do have a below-grade tank that's permitted under Part 17, and you do grant the transfer of that facility or well, that that tank or below-grade tank, temporary pit, permanent pit, can be considered approved to go with that. That's why we made this exception for these because they're nonconforming.

Just for another clarifying statement. Other type of operations, be it the lined permanent pits or the temporary pits, temporary pits are required to close after use by a certain amount of time. So those type of things, that should not be a prolonged use of that. Even for the lined permanent pits, they're required to complete their retrofit within a specified timeline already.

So those type of things are already -- should be

already addressed under the rule.

Q. Right. What I'm concerned about is things like condensate tanks that might be surrounded by a berm that I know you have other sections of the rule on --

A. Are you talking about sumps? Or --

Q. -- the big tanks that you have on location at the tank batteries --

A. Yeah.

Q. -- those are steel tanks. They're the same type of tanks that you would probably be using for your below-grade tanks, and yet you have a different standard for transfer or sale.

A. Well, no, we don't. You're talking about the above-grade tanks that are present. These are buried, and you can't even see the sidewalls. So there's a huge distinction of an above-ground tank where you can visually inspect around it to see if it's leaking compared to one that's buried that you can't see at all. So there's a huge distinction between the two.

Q. Okay. And you mentioned that the reason that you're extending the time from 180 days to two years is to allow operators time to create templates?

A. Well, it grants the opportunity for that. This is the method that we're currently working with the operators. Because we'd rather get the appropriate type of application

than a lot that we have to return back and say, you know, it doesn't even meet the requirements of the rule, or you misunderstood a portion of the rule and made certain assumptions that the rule doesn't grant, or you decide to modify what's required in the rule to make it work for you, but it's contrary to the rule.

So what we tried to do is work with these parties, get templates that are put together for these that are general enough that they can put in any type of permit application, be it for a retrofit or existing or even to be applied for a new one.

I mean, it actually creates a working tool for them to be used for future submittals, for new operations.

Q. And what companies have you created templates with?

A. ConocoPhillips, Devon -- well, we're working with Devon now -- Dugan. We're working with BP. We're working with -- well, we dealt with -- I'm trying to think of all the -- Williams. I'm trying to think of some of the other ones. Huntington Resource, Huntington, we're working with them. There's at least a dozen. I can't remember them all.

Q. Okay. And each time that you work with a company, you're starting with a brand new template? Or do you transfer the template that you used with ConocoPhillips to Williams and use that format?

A. We're working with each company and what they propose to do. Each company operates differently. To make the assumption that all companies have the same issues, the same type of tanks, and that they do the same operations, it's not appropriate. So we ask each company to send us a draft application, and we work through that.

Q. Okay. And how do you work with a small operator that might come to you once every couple of years that might have an issue? Do you have to make them create templates as well?

A. We ask for -- well, Huntington is kind of a small one. I was trying to think of the other one. J Management is kind of small, I guess, because, you know -- so, yeah, we're asking them to tell us what they do. We don't know what they do.

We can't make the assumption of what Conoco does is what a small operator does. So we need to find out how they operate in order to address the templates.

Q. Right. So is there anywhere in this rule that talks about being required to create a template with you prior to actually getting approval of a permit?

A. As it currently stands, no, but this leads to a different subject. The different subject is that we're addressing these under Agreed Scheduling Orders in which that's what we're asking them to do. So they're agreeing on that.

Q. Under an Agreed Scheduling Order?

A. Yes.

Q. Okay. In relation to the increase of the chloride levels, you mentioned that you're going to allow comparison to background.

A. Yes.

Q. What are you talking about in terms of background? Are you talking about the surface? Are you talking about the bottom of the trench where they're going to do on-site burial? Where is that measurement supposed to be taken for background?

A. Well, it would be prudent to do it -- let's say you have -- you're working a temporary pit. Because temporary pits and drying pads are what this only applies to under the rule, the closure of such activities, it doesn't apply to below-grade tanks. It doesn't apply to permanent pits.

So if you're constructing a temporary pit to be used on-site, it would be prudent to take your sample at that time in the excavated area.

Q. Right.

A. That would be prudent.

Q. And when you take that sample at that time, is that by a field test or a lab test?

A. Well, once again, we specify, or I clarify, that we're looking that if you're going to compare the background to

the contents, we want like-for-like results, which means we want the same type of analytical results done on each.

Q. So you could use a field test on both?

A. No. Because the closure standards aren't based on a field test. They specify that pit content standard, burial standard, has a specified method.

Q. All right. Is there with the relation to background testing or the testing that's necessary on-site any time an operator can use a field test instead of a lab test?

A. Currently, no.

Q. Under the proposed amendment?

A. Under the proposed amendment? Currently, no.

Q. All right.

A. We specify the test methods in the rule.

Q. All right. Now, the SPLP is going to be 3,000 mg/L, correct?

A. Yes.

Q. And mg/L is a measurement for a wet substance?

A. It's actually for a liquid.

Q. Liquid, right.

A. Yes.

Q. And if you're going to do a comparison to the background, you're comparing a solid material?

A. Well, once again, yes. The initial is a solid. The 1312 method is a leaching procedure that creates a

leachate, which is a liquid. The 300.1 is a test for liquids that you determine what the chloride is. You're actually testing for chloride. So it starts out as a solid. You use the leaching feature on it to create a leachate which is a liquid, and you test the liquid.

Q. All right. But the material that's going to be in your pit will have been stabilized, correct?

A. It should be.

Q. On a 3:1 ratio?

A. Yes.

Q. And your background is not stabilized on a 3:1 ratio?

A. I don't understand the question. That doesn't --

Q. Well, I'm trying to compare apples to apples in terms of numbers. You have your background, you're taking it from the surface, right?

A. Yes.

Q. You are taking a solid. You're going to do a leachate test on it that you're going to end up with a mg/L number, right?

A. Yes.

Q. Okay. What's in your pit that you're going to be required to test is also going to be a leachate test, right, but that is stabilized 3:1?

A. Yes.

Q. Is that comparing --

A. We're talking apples to apples and results based upon testing methods. To stabilize the naturally occurring soils, they're already stable. I don't understand what we're stabilizing. With stabilizing, what would be background?

Because we're talking about natural soils in places that could be undisturbed because you just dug into the ground, and that's where you're going to -- you know, they're already stabilized. They're holding up the surface.

The pit contents itself would not necessarily be that because it's going to have drilling muds and fluids just recently pulled off. It's going to be mucky muck-type of material that needs to be stabilized in order to hold a four-foot cover on top of it. So there's a different stabilization to currently stable soils. That's where I'm confused by your question.

Q. All right. So your surface is not going to be stabilized soils, but where you're putting your waste is going to be in a pit which is several feet down from the surface, correct?

A. I would hope that the soils would be stabilized -- be stable because you can't put an on-site trench burial in an unstable area.

Q. Right.

A. That's a siting requirement.

Q. But when you're putting on-site -- when you're doing an on-site deep trench, it's a deep trench. You're not burying on the surface; you're burying in a trench?

A. Yes.

Q. Which is several feet from the surface, correct?

A. It could be, yes.

Q. All right. Is there a vadose zone level between the surface and the bottom of the pit? The trench?

A. There should be, yes. Or else there wouldn't -- there would be nothing there. It wouldn't be a trench. Yes.

Q. Okay. And chloride levels are going to be different versus the surface versus beneath that vadose zone or at the bottom of your trench?

A. Possibly.

Q. Okay.

MS. FOSTER: Thank you. I have no further questions.

CHAIRMAN FESMIRE: Mr. Carr?

CROSS-EXAMINATION

BY MR. CARR:

Q. Mr. Jones, in your proposed amendments to the operational requirements for below-grade tanks if your amendment is adopted, it provides an operator shall inspect a below-grade tank at least monthly and maintain a written record of the inspection for the life of the below-grade tank.

A. Yes.

Q. My question is: What would you anticipate a written record of each inspection to look like? What information is on this?

A. It's interesting you asked because that's why operations, when they get to their templates -- once again, this goes back to Ms. Foster's question of why the templates -- because each operator looks at something different.

So what I've been told by operators -- I'll tell you what I've been told by operators -- they go out to check -- and another thing is the -- and I'm trying to think of the correct term for operations, but it's something about removal of oil off the surface and so forth -- they inspect for that.

They also inspect the sides of the tank. They also inspect the berms around the tank because they're supposed to control for surface run-on, if they've eroded, if there is the potential of water coming and accumulating in that tank. They inspect those type of things.

If they have automatic shutoffs, they inspect those to see if they're working properly.

Q. Are all of those things established in the template with the agency?

A. What the operator proposes.

Q. And that's approved before these inspection reports are prepared?

A. Actually, it's interesting, because they give us

what they're currently doing and give us an example. They go, well, we already have an inspection sheet. I go, great, give me a copy of your inspection sheet.

So they currently do it. They have to, based upon the rules -- on the other provisions for the rules that they comply with the operational requirements.

Q. If I understood your testimony, you think it's important to have this information even when the information may be more than five years old.

A. Yes. And the reason why is let's say you operate a tank that you permitted under Rule 50. Okay? That, in the previous Rule 50, I don't think there was any recordkeeping requirement at all. Okay?

Let's say that tank has had multiple integrity issues, and they just keep putting a weld seam in the corner of the tank in the same place. Let's say under the current rule you do ten of those in the next five years, and it continues to the sixth or seventh year, we may want to address that and say, you know, it's time. That weld is just not working.

Q. Is that record submitted to you?

A. No, it is not. It is for the operator to maintain. So if we go to request that, we can make that assessment.

Q. You wouldn't actually even know if they had been out welding or anything like that on the tanks, so you could

say it's time to look at it?

I just don't understand what information this would give you five, six, eight years ago that isn't really falling under the category of old, unnecessary, and probably irrelevant information.

A. Well, see, I disagree with that because the current rule requires you to notify us when there's an issue with a tank. So let's say we get notified two or three times, we may say, "Where's your record? We want to look at your inspection record."

Then it would be prudent because you as the operator would have that, and we could make that assessment. But the rule currently requires you to notify the Division of any type of failure that occurs, and we'll be documenting that, absolutely.

Q. And a 19-year-old record you think would be helpful to you in addressing something?

A. After 19 years, it might be prudent to replace that tank that's had multiple failures? Absolutely. Absolutely.

Q. When you proposed an amendment to regarding permit modifications and the submission of the registration list, you are asking for various kinds of information including global positioning coordinates to the sixth decimal point.

My question is: Why do you need that much detail,

and how do you get to the sixth decimal point?

A. Well, my understanding, based on the Galisteo Basin rule. I was a party up there as well. That's the capability of the current global positioning devices that we have, the GPS units that are --

Q. How close is that? How close does that get you?

A. Well, you know --

Q. Inches, feet?

CHAIRMAN FESMIRE: Tens of feet?

THE WITNESS: Yeah. I was going to say tens of feet. So the less accurate it is, the further away it could be. So, you know, it's what we're using. And this has been confirmed by parties that use these devices.

Q. (By Mr. Carr): Let me ask you about your amendments to the design and construction specifications where you require retrofitting of the below-grade tank when there's a transfer.

In the industry now we're seeing a number of mergers, combinations of companies, Burlington, Conoco, Pecos and those kind of things. Is that kind of merger a transfer that would trigger the obligation to retrofit these below-grade tanks?

A. Well, I guess you would have to look at how it would take place. I'm trying to think of a scenario that the merging company -- well, I guess when you look at that, because I've looked at merger papers and so forth, and companies get

absorbed into other companies or a portion of a company. That's why I did the X squared gets absorbed into a different company.

Yes, that would apply.

MR. CARR: That's all.

CHAIRMAN FESMIRE: Mr. Frederick?

MR. FREDERICK: Mr. Chairman --

CHAIRMAN FESMIRE: Oh, Mr. Hiser. Okay. Let's establish some rules here. When do I treat you as individuals?

MR. CARR: Well, I was just asking questions for Conoco.

CHAIRMAN FESMIRE: Okay. So the next question should be for the Industry Committee from Mr. Carr?

MR. CARR: No.

CHAIRMAN FESMIRE: From Mr. Hiser for the Committee?

MR. HISER: It's confusing, I know.

CROSS-EXAMINATION

BY MR. HISER:

Q. Mr. Jones, if the tank is transferred -- let me back up.

You had started off by saying that a large part of what the Division is seeking to do in this rule is to ensure that an operator does not transfer their liabilities onto a subsequent operator, and that, therefore, you want to tie up all the issues as best as you can once the transfer or sale of

property occurs; is that correct?

A. Yes.

Q. Now, if the tank is transferred from one operator to another, is the sequential operator going to be responsible or not responsible if the prior operator missed inspections or doesn't have records for inspections for the life of the tank?

A. No. Because it says the operator must maintain those records. If you become a new operator, then you start a new record. You could. It would be prudent to get the preexisting records so if you had concerns, you could address those issues.

Q. But at this time, the Division's requirement is that the life of the tank is the life of the tank with that operator?

A. That would be the best way -- that's the way the language speaks, yes.

Q. Now, is there a distinction in the Division's mind as it's looking at these rules between a retrofit and a replacement of a tank?

A. I would say yes, and the reason why is because you may have a permitted tank that was permitted under Rule 50 that is current with everything, even current in design that may need a replacement because of an integrity issue, that they chose to go in and replace the tank instead of repairing it.

And then you may have a tank that's a nonconforming

tank that was not permitted that has an integrity issue that may need a retrofit or replacement. So, yes, there are two different distinctions.

Q. Okay. Now, accepting that there's a distinction in the Division's mind between a retrofit and a replacement, from your discussion with Ms. Foster, it seems that the Division's position is that in the case of a retrofit that, in general, the Section 10 siting requirements do not apply unless you look at it and determine there's some sort of imminent substantial endangerment, in which case you may refuse to grant the permit, which would effectively have the effect of requiring relocation of that tank; is that right?

A. Potentially.

Q. Is that a summary of what you said?

A. Yes.

Q. Now, in the case of replacement, are you intending to use the same approach as was done for the retrofit? Or are you saying that if it's a replacement that the Rule 10 requirements always apply, and so at the time of the replacement I would need to relocate the tank to a new location if it didn't meet the siting requirements?

A. Well, the rule allows us. Under Section 13A, it states that if the operation poses an imminent threat to freshwater, human health, and the environment, we have the right to require closure of that tank. And it doesn't mean if

it's conforming or nonconforming. It's anything. It could be an exception of something that we required, and then we figured out later that it's creating this issue.

We always have the authority to come in and require closure of that.

Q. And my question doesn't go to your authority for that. My question is the matter of practice. If I replace that tank with a new tank, do I have to then comply with the Section 10 standards if I'm putting it into a place where an existing tank already was? Putting aside questions of imminent and substantial danger, which I accept your explanation of.

A. And -- yeah. And I guess you're generalizing one thing. So it's hard to answer because each one has to be looked at case-by-case in order to make that determination.

So as a general thing, let's say it's a conforming tank, and you're going to replace it, and there are no outstanding issues that create imminent danger, then you would just replace it instead of repairing it if there was a leak. Yes.

Q. Okay. Thanks. One question that arises is that under existing Rule 17, operators were required to submit permit applications and closure plan for a number -- in some cases, a great number of below-grade tank and to some extent temporary pits.

Now, we're proposing to make a change in the due

dates for when certain of those changes have to occur. Is it the Division's opinion that operators would either submit all of those multiple thousands of applications and permit applications to reflect these changes in the rules? Or is the Division going to address that administratively?

A. I'm not sure if I understand your question.

Q. A lot of the closure plans had specified the closure date, which was the date specified in the previous rule. And so there's a closure plan saying it has to be closed by such and such a date. The Division is now proposing to relax that requirement by switching out to the date of a sale or transfer.

But that leaves the question, because there's still a closure plan that for exists for that tank, that below-grade tank, that says it's going to close by such and such a date? Is the Division envisioning that the operators will have to come back in and file amendments on all the plans that were filed under the existing Rule 17 to change that? Or are you going to address that administratively?

A. Well, I guess there might be some confusion on your part. Because there's different types of scenarios. Each one is a little bit different.

For the below-grade tanks -- a good example is that certain below-grade tanks under the current rule are required to submit those closure plans -- and I believe it was within

six months of the effective date, which would have been December -- because they were required to close under the current rule allow these tanks that are existing under I(6), the proposed I(6), are still those tanks.

If they submit a closure plan, that meant that they weren't going to continue to operate, and they were closed by then. I think with our FAQ we clarified what needed a closure plan and what didn't when we clarified the distinction about the concerns about relocating tanks and siting.

So the other part is that if you have this below-grade tank, you need a permit or permit modification. You would qualify under that category because you didn't meet the design requirement. The rule stipulates you have to have a permit to operate. And it's stipulated you have to get that permit or permit modification within 90 days of the effective date.

So really, the part about the registrations to address those that need a permit that currently are operating without one, this is to get them on track to becoming compliant with the rule. Because the rule states in Section 8 that you have to have a permit to operate it.

So I'm kind of confused about your question because there's tanks that are required to be closed and not permitted. There's tanks that require a permit, and if you require a permit, you're required to submit a permit application, which

includes a closure plan. And then you have a scenario where if you're going to now transfer or sell those, you may have to bump up that timeline and submit that closure plan.

That's what we're addressing. If you're in a situation where you don't fall into the other realms which specify it, then you need to move up your timeline and submit it in a timely manner for it to be approved so you can implement closure.

Q. So the bottom line is that the response is that each operator will need to go back through and individually reevaluate all its below-grade tanks, see where it is, and file conforming paperwork with the Division staff?

A. Well, as the rule currently states, if you had to close your below-grade tank, if you were in the current I(6) criteria and you need to close it, we should have already had those closure plans by December 2008. They would already be with us.

So if you were in the current I(5) design, you would try to get it permitted. The rules stipulated that by September of last year you should have given us a permit application that had the closure plan in it. So I don't know where there's anything to change. You're required to give it to us.

All we're doing is prolonging the submittal dates now for those permit applications to two years instead of 90 days.

But we're saying if that time comes up for sale or transfer and you need to close it because you haven't retrofitted, then you need to give us a closure plan.

Q. Okay. I guess the last question goes back to the discussion about liabilities from operator to operator.

What is the Division's position, then, if we're trying to adopt this closure and transfer rule on the liability of a subsequent operator for preexisting contamination from a prior operator?

A. We're trying to prevent that. I think I made that very clear in my testimony. If you want to sell or transfer something, you either close it or retrofit it. If you close it and discover contamination, under the closure requirements, it gives you steps to address that.

Q. Okay.

MR. HISER: I have no further questions.

CHAIRMAN FESMIRE: Mr. Carr, you got any other clients?

MR. CARR: I'm trying to think if I have any other questions. I do have other clients.

CHAIRMAN FESMIRE: Mr. Frederick, can you get me out of this? Will you?

MR. FREDERICK: You know, I'm going to take about a half hour, maybe more. And I'm wondering if you want to break for lunch now and do it after lunch or what you would rather

do.

CHAIRMAN FESMIRE: Okay. This is probably a pretty good time. Before we break for lunch, though, it's been our custom to take public comment.

So at this time, is there anybody who would like to give a public comment? And we can do it under our rules one of two ways. We can either give it sworn nontechnical testimony, or an unsworn position statement.

Is there anybody who would like to make a statement at this time?

Mr. Boyd?

MR. BOYD: Yes, sir. And I would like my statement to be an opinion statement because it will be my opinion and my observations.

CHAIRMAN FESMIRE: Okay.

MR. BOYD: I'd like to thank the Commissioners and the whole audience for allowing me to make this statement.

For you-all that don't know me, I live south of Eunice. I live on my grandad's homestead. It's not big enough to make a living. I work in the oil fields. So I live on both sides of the fences.

And this slowdown, it's affected myself, my family, and the people that I work with from the industry. And, you know, we hate to see slowdowns. And they have happened multiple times during my lifetime. And, hopefully, this won't

be one of longevity.

But, you know, one of the things that I'm scared of is if we start gnawing away at this Pit Rule, we'll lose it. And I like the Pit Rule. I was involved in the pit work group when Roy Roddenberry, before Mark was here, set up a work crew. And I came to multiple, multiple meetings. And then in the latter work group I attended one and made a statement.

But, you know, it would be tremendous if the industry had to work under the same rules as us individuals. You know, if us -- as an individual, if we take somebody else's property, it's our obligation to try to return it to its previous state the best that we can. It's probably never feasible to do it like new or like virgin soil or whatever, but we're expected to do that. And when they have a leak, to me, it would be only right if they cause contamination to return that to the best of their ability to meet background of undisturbed area or uncontaminated.

You know, everybody is aware of economics. And sometimes it's just a problem that can't, you know, can't be done. But another thing is, you know, I've been listening, and I haven't even thought about -- this is -- you-all are talking about transferring properties from one ownership to another or one name to another, even though the same individuals may own it.

You know, my son's trying to sell a house right now.

He's got to have a roof inspection. He's got to have a septic inspection, you know, the inspections that go when they sell properties. You-all are talking along the same lines. You know, you're not wanting somebody to transfer their problems to somebody else unknowingly.

I can see another benefit to this because some companies are finally able to clean up their facilities. But they're liable to transfer it to somebody else, say me, and I say, well, there's some potential in this well. I would sure like to try to produce it. And I don't have the production that this big company would have to have for it to be profitable to me. And you got guys that go in there and buy this stuff and they're learning. With that, they buy the responsibility, and they're bankrupt. And us, as citizens of New Mexico, will be obligated to clean it up.

And I can see that's what you-all are looking to try and prevent. And there's been a discussion for a long, long time; those that make the cream off the milk need to be able to participate in keeping it clean. And, you know, one of the things that you-all have done -- and I want to commend you-all on it -- you-all are working for prevention. And there's nothing that we can do that is totally foolproof.

We can do stuff with our best intent, you know, and 20 years from now we'll be laughed at. Stuff that my dad and my granddad done and even stuff that I've done, it's

unacceptable now because there's new technology. And if we don't use that new technology to prevent problems that are arising, you know, why did we take history in school?

We've got a super, super history lesson in Southeastern New Mexico where I live. And I can't speak for the northwestern part of the state or any other part, just where I live, where I see, and where I work every day. And it's -- this Pit Rule to me is really a step forward.

I've had several ranchers call me and say, "Irvin, are we going to lose the Pit Rule?"

In the newspaper in Hobbs, we're always seeing articles, and most of them are printed and put out by Bob Gallagher. His name is on them. And, you know, if you live there and you know what's there, they're half-truths. He doesn't state the full list of contaminants or full ramifications of what's there.

He's working for the industry, and he's trying to prevent the industry from having to spend a super lot of money to clean up stuff. I have seen two articles in our paper put out by Joanna Prukop. And the first one was not nearly as in-depth as the second one. And the second one, she listed a lot of items. Boy, I got lots of calls. Boy, that's a pretty good article. That's an eye-opener.

And I feel like that you Commissioners are entrusted to protect and serve the public. Also, you guys, you've got

the responsibility to keep the economics so we can have the industry. Because every one of us needs the industry -- I mean every one of us, whether we know it's there or not. We need it.

If you guys can make decisions on what's really there on the real evidence, and you can make your decisions without political ramifications, you guys will be protecting us all.

Now, I'm pretty bad about losing my train of thought. You know, we've got everybody that in my world of ranchers, especially, that if you pull up on a location -- and, boy, it sure is nice to see a location with a closed-loop system -- we're not going to have a huge pit here.

You know, even if you dig out contaminants and haul them off, chances are you won't get them all. But if you've got a caliche location there -- and, usually, to operate a closed-loop system, that caliche pad is a lot larger. So we lose more acreage to that.

But once the well is completed and operational, you don't have a huge contaminated area there, nor whenever that well is completed and plugged, you can remove that caliche and, hopefully, there's not been a lot of spills from the batteries and so forth -- what you guys are trying to prevent -- and that area is pretty clean, it could go back into public use.

But if you've got an area there where there's an old pit, the only use that I can see for that area would be for

forage for livestock or wildlife. Because there's -- nobody wants to build a house on there or build certain improvements on it. Because you don't know what's there, and this stuff has already come up and bitten a lot of people. For instance, in the age of Hobbs -- and it's like I'm saying. It's a history lesson. We need to try to work together.

Now, I've been to lots and lots of meetings. If the people that come to these meetings could use their education and say, we've got a problem, let's sit down at the table, and let's see how we can prevent this problem, not cover up problems, it would be great. But then, you know, we're looking at economics.

But, you know, one of the ways that I know that the pit rule is working, I've got three different friends that are all competitors that have environmental companies in Southeastern New Mexico. All of them has told me their work has dropped from 40 to 50 percent since the closed-loop system has come in. And it's even been contemplated that they needed to close down. They sure needed to diversify their operation. You can't just come in and clean up.

So if these closed-loop systems is preventing that much contamination, boy, howdy, they're working. They're really working. And, you know, if you get contamination -- we're not only talking about water contamination. That is the most important. But you look at your surface. That's

environmental contamination. Your subsurface, it -- you know, your subsurface, once you get in that vadose zone, it travels around, and you've got surface contamination and possibly water contamination.

I've heard of reports where it would take 70 years for water to get down or contamination to get down 60 or 70 feet. Well, I've experienced on my place that it doesn't take but a few months. Those cases are here being worked through the OCD. Now, I'm sure that in the right ground situation, there being clays there and so forth, it might take 70 years. But I've been affected by it personally.

And, you know, if everybody that was here was like me, whenever I go home tonight I'll need to wonder if we can get good water. Because my water is gradually going bad. And it's not solely because of pits. It's not solely because of the industry. A lot of it is because we don't have enough rain. And, you know, we need more rain.

I've sat here listening to him talk about the placement of sumps. You know, if you place a sump in a low-lying area, it's going to pond and possibly overflow into your below-grade tank. The industry wouldn't want that. They don't want that. And, you know, these guys out in the field, they got to be really, really careful because if they support what's going on -- and I've been told -- they say, "Irvin, how come you let them guys do that out there on your place?"

Well, oil and minerals takes precedence, and you don't get everything you want.

"Well, I wouldn't let them do it on mine."

And these guys are the ones that are operating in th field. You know, they see the problems. But if they go up and voice those problems, and it's going to cost the industry money, then they'll be looking for a job.

And, you know, if the industry had to do the same thing as it does to us as individuals, like I said, if they had an incident or a spill and they had to return it to background, they would want to prevent all they could. And I know they want to prevent it now, but they're scared about what's already out there. And it's another example.

I have an easement on a well location, and it stays in that easement. Whenever the pit area is dried and completed, then the cuttings and the contents of the pit with the liner shall be removed. Well, sometimes that's pretty hard to get people to do. But whenever they come in and they plug that well, and that well is totally completed, I called this company.

I said, "You-all are under obligation to remove this."

"Oh, we don't want to do that."

I said, "Well, it's stated right here."

And they said, "Well, okay, if it's in the contract,

we'll do it."

Well, we've negotiated and negotiated, and in order for them to clean up another mess that was terrible that they cleaned it up partially, for them to reopen that, I allowed them to put a cap over this existing pit, which if they don't open that pit, I don't think it falls under the rules of the OCD. So I have allowed them to cap this pit and close the top of it. Because right now, the wind blows across it, and it's blowing chlorides out. It's already caused flowline leaks where it rusted the flowlines. There's adjoining pipelines, and it rusted out the pipelines, and they've had leaks. And I'm trying to stop that.

But the point I want to make on that is, this company had agreed to dig this out and remove all of the contents like the contract said until one of their personnel said, "Hey, when you open that pit up, then you need to chase the contamination."

And they said, "Irvin, we figure it'll cost us about $100,000 to do what the contract says."

Now, I can't exceed the contract. It's rules and regulations that take over.

They said, "It's very possible that we might have to spend a million dollars to clean up this old pit."

An old drilling pit, that was no different than hundreds of them that are out there now. But the difference

was is I have a contract that they would.

They don't want to do it because they know it's these contaminates, and these chlorides, they don't stay where they're put. You know, you guys are preventing this. And if the companies had to clean this stuff up, then they would want to be right behind you 100 percent.

And like I'm saying, I feel like if you guys can take and drill down two miles down in the ground, put stock over, and drill another mile underground horizontally picking up different pays and stuff, you-all have got the minds to be able to develop ways to refine your drill cuttings and your muds and your contaminants.

And one of my desires is that we work with the Commissioners. We present the public with the truth, not half-truths. Because whenever you tell the public, this drilling pit contains freshwater muds and fresh water and barks and maybe cottonseed hulls, and you stop right there, and you don't say anything about the chlorides it's brought up --

You know, I'm not so scared of hydrocarbons, but of the chlorides and the scale inhibitors and the rust inhibitors and the different chemicals that it takes to keep the integrity of your mud there.

And, you know, if everybody would take that into consideration -- but these guys that operate out of Houston or Oklahoma or wherever it is, they don't have to worry about

going and getting a clean drink of water without having to go to the store and buy bottled water and set up some kind of a filtration system. You know, that's -- they don't mind that. What they're looking at is, it may cost me another condo or it may cost me another yacht to be a good neighbor to the people in New Mexico.

And, you know, how would I be a good neighbor -- I can save money on my operations, and anybody probably in here could save money if they don't have to pay a garbage bill and they could just take their waste out and put it at the neighbors or somebody else, you know. And we could not have to pay that. And to me, this is the same type situations. I realize it's a greater deal, but I think with the knowledge and the intelligence that these people can acquire, we can solve these problems without being so detrimental to the people that live on the land and want to use the land and our grandchildren and so forth.

But I appreciate you-all's time, and I think I preach this every time I see you.

CHAIRMAN FESMIRE: Thank you, Mr. Boyd.

Commissioner Olson?

COMMISSIONER OLSON: Can I ask him a question?

CHAIRMAN FESMIRE: Mr. Boyd, do you mind if Commissioner Olson asks you a question? You don't have to answer. You're not under oath.

MR. BOYD: I may not be able to.

COMMISSIONER OLSON: Well, I'm just curious. You say you have a contract as a surface owner with companies, and you're saying your contracts or easements require pits to be removed?

MR. BOYD: Contents of the pit to be removed. That's the old ones. I've gone now to a closed-loop.

COMMISSIONER OLSON: Have you had companies that have declined to do that?

MR. BOYD: Yes.

COMMISSIONER OLSON: And so they have gone, then, and buried contents on your property without your permission?

MR. BOYD: Yes. And this, you know, it's kind of like what you-all are talking about, other companies taking over. My dad ran the ranch from my granddad. And my dad passed away. Well, I've taken over and operated it.

And, you know, through the years we've taken a history lesson. I've seen things that has happened to my granddad. And I've seen things that my dad's -- happened to him.

The hardest thing about this stuff is a lot of times I go out, and I visit with these guys that I've gone to school with. I played football with them, and we have kids that have grown up together. And, you know, and I have to make a stand against them.

But, yes, I do. In my easements, from probably the early '90s, stated that whenever the drilling operation was completed, whenever the pit contents was dry, then the contents and the liner had to be removed. And they've done that multiple times.

Now, previously, they have to have samples underneath the liner when they removed them. When they first started doing this, they weren't required to have those samples. And I can tell you that nearly every one of these pits, since they have to be sampled, the liner has no integrity, and they're leaking.

These companies, these environmental companies, that I was telling you that they no longer have pits to clean up since they've gone to closed-loop, they said, "Irvin, we can't say this out loud. We can't tell these people that. But we have never not been in one pit and cleaned it up that there wasn't a certain amount of leakage. Some of them have the water, and some of it's just very minimal." But they say, "There's never been a pit that we have been involved in cleaning up there that there hasn't been a little bit of liner leakage."

COMMISSIONER OLSON: I was going to say it sounds like in some cases you have allowed burial on your property.

MR. BOYD: They told me minerals take precedence. They said -- and these guys that have done this have

voluntarily done it. I have not gone through attorneys to do this. But for years and years that was the only procedure. Before my time -- and I've got pit areas that, you know, were done when my dad was a kid, and they're barren. They're still salts blowing out of them and affecting the connecting areas. But they've probably started in the early '90s hauling this stuff out for me.

COMMISSIONER OLSON: Well, as a surface owner, would you allow a deep-trench burial on your property?

MR. BOYD: No. I don't agree with that. And one of the things is that the water table in my area is between 40 and 60 foot. Sometimes water sands are closer than that.

But deep burial, to me, that's just storing your waste on somebody else's property, be it the public's or their state land or BLM. And, you know, I feel like if you bury something like that there, then that ceases any further use of that area.

And I've seen some markers now warning clay-capped area, or something like that, do not cut.

So, no, I would not want -- even if the water table was 200 feet or 300 feet or whatever, I would not want to store somebody else's waste on my property. And I don't feel like that, you know, it ought to be stored there forever. I think that nature will, you know -- whether it's rodents that cut your barriers or whatever, I just feel like the integrity of

the barriers won't last forever.

COMMISSIONER OLSON: Okay. Thank you.

CHAIRMAN FESMIRE: Thank you, Mr. Boyd.

Anybody else want to -- yes, ma'am. Would you state your name for the records, please.

MS. VICKERS: I'm Sara Vickers, and I'm from Hobbs, New Mexico -- actually Lea County. My family moved there in 1967, and our economy in Lea County, as everybody knows, is based on the oil and gas industry. And I love them. I like them. They provide a living for my family.

I primarily, myself, am a nurse and a farmer. And as being a farmer, I'm a steward of our soil and our water and our air quality. As a nurse, I've been a nurse for 35 years. I hate to tell you guys that. But I ran our operating room there in Hobbs for 15 years. It's a multimillion dollar operation.

And what I wanted to say is as oil and gas producers, you guys run multimillion dollar operations. And in my farm, my farm is not that wealthy, unfortunately. But I've found in doing business that whenever you come up against issues, it's pay me now or pay me later.

And my personal experience has been it's much easier to pay as you go and pay up front instead of waiting for a mess to be developed and go behind and clean it up. I just would urge this Commission to really reconsider loosening up the pit rules.

My son works in one of those environmental companies that this gentleman is talking about. They have diversified. They have developed a closed-loop system that they had out there, and they got working, and it does work. I do know that there's other oil companies that have been in Lea County and have been using closed-loop systems now for about three years. One of my friends, Harold, with Apache, they do it. It can be done. You can still make money. You can be good to the environment. You can be good to everybody that lives here.

And I just would again, urge you, ladies and gentlemen, please not to think about loosening up on these rules. And thank you for your time.

CHAIRMAN FESMIRE: Mr. Boyd?

MR. BOYD: Mark, I'd like to say one other thing. You know, we've got so many companies that really put out the effort. Chesapeake came to our area, and they bought out a company that elected to leave New Mexico rather than to clean it up. I mean, Chesapeake up until about six months ago was on my place. When they had problems, boy, they jumped in and went to work. And I felt like they done good.

Then something come up, and they decided it would be cheaper, and we'll cover it up. And that's one of those things that I was talking about they didn't clean it up.

But these guys that are out there in the field and are really making the effort -- and they're working to clean it

up. And we all know that these problems didn't develop yesterday. It took 80 years for that stuff to happen. We can't expect it all to be taken care of tomorrow.

If we work together, that'll help them. And if you guys could just give them more and closer places to dispose of their materials, that is one of the big things. And I hear this from the guys out in the industry all the time. If they've got to truck it a long ways to an approved disposal site, that really hurts.

And that would really, really go a long ways in helping the industry to want to work with us. And I feel like I want to say this. The main disagreement I have with the proposed rule changes is the chloride levels. The chloride levels, you know, you couldn't grow anything where you have that high chloride concentration. You know, you could pass water through that dirt, and there's plenty there to go ahead and contaminate a large area around it. I feel like I would love to see it at background level, but we don't get everything we want.

So I just -- I wish you-all would consider those two things. Thank you.

CHAIRMAN FESMIRE: Anybody else? Gwen?

MS. LACHELT: Mr. Chairman, members of the Commission, I'm Gwen Lachelt with The Oil and Gas Accountability Project, and I've been asked to read into the

record the comments of Candace Head-Dylla with the Bluewater Valley Downstream Alliance. And here are her comments:

"Last year we applauded New Mexico's efforts to adopt oil pit rules that might protect New Mexico's environment and the health of its citizens.

"Now we are very concerned that those progressive efforts will be lost as a result of the new regulations that are being proposed.

"We are a working-class community whose members cannot get off work to attend all of these hearings, but please know that we are very concerned about this issue and will be waiting to hear what your commission decides.

"As people who live next to a uranium mill tailings pile, we know what happens when regulators do not have the tools or the authority to protect our health and environment. In our case, citizens are exposed to toxic contaminants in the air and water, and New Mexico's precious groundwater resources are destroyed. In the case of those living next to oil pits, citizens are exposed to carcinogens, such as benzene, toluene, ethylbenzene, and xylenes, and more of the State's surface and groundwater resources are threatened.

"New Mexico's future depends on healthy citizens with clean water to drink and clean air to breathe. We hope you will act to protect the interests of the citizens who work hard every day for this state and deserve to live in a clean and

safe environment."

CHAIRMAN FESMIRE: Thank you, ma'am.

We'll have another opportunity before we adjourn this afternoon. Is there anybody who can't make it then who needs to say something on the record today?

Okay. Why don't we break for lunch and come back in an hour. I'm going to fix the clock, so come back in an hour by your watch. Okay?

[Noon recess was taken from 12:38 p.m. to 1:51 p.m.]

CHAIRMAN FESMIRE: Okay. At this time, we'll go back on the record. Let the record reflect this is a continuation of Case No. 14292. The record should also reflect that all three commissioners, Commissioner Bailey, Olson, and Fesmire are present.

I believe, Mr. Frederick, you were about to begin your cross-examination of Mr. Jones.

MR. FREDERICK: I was, Mr. Chairman, and I was going to ask if Mr. Brooks could temporarily let me use the table.

CHAIRMAN FESMIRE: I think he would be glad to do that. While they are getting ready to do that, I would like everybody to note that the clock is reading the correct time.

CROSS-EXAMINATION

BY MR. FREDERICK:

Q. Good morning, Mr. Jones. How are you?

A. I'm doing all right.

Q. I'm, by the way, Bruce Frederick with OGAP. And a lot of my questions probably are going to be for Mr. Hansen, but I want to try out a few of them out on you first.

A. Okay.

Q. First off, and this one definitely is for you, am I correct in assuming that the purpose of the Pit Rule in general is to prevent groundwater contamination and surface water contamination?

A. That is the goal that we would like to achieve with that.

Q. And when I say prevents contamination, is it true you're trying to prevent exceedence of groundwater standards for one thing?

A. I guess you could look at that, or you probably wouldn't want to look at limiting it just to that. It's overall perspective of prevention, be it vadose zones or saturated zones.

Q. But if you are -- and thank you for that answer.

If you get -- if there's a release and you have to invade the vadose zones, for example, you're not doing that as an end in itself, right? You're doing do it prevent groundwater contamination in excess of what we're calling the 3103 standards?

A. I would say further contamination because your saturated zone could be at such a depth it would take a long

time for the contamination in the vadose zone to reach groundwater.

So it goes beyond just groundwater contamination. That's why we have testing as we do closure beneath the existing operation. That's not at groundwater. It may be a significant depth to groundwater.

So it's a preemptive cleanup.

Q. Preemptive cleanup. What are you preempting?

A. We're trying to prevent further contamination being -- at the site, just being present.

Q. Further contamination of what?

A. Any type of constituents that may seep through existing operations.

Q. Do you have any standards for the vadose zone? I mean, do you have a standard. Is there a WQCC standard for vadose zone that isn't related to preventing groundwater contamination?

A. Well, we use landfarm standards for testing beneath temporary pits.

Q. Okay. Let me back up. If groundwater is contaminated above standard, above 3103 WQCC standards -- and what I mean by WQCC is Water Quality Control Commission standards -- what would the cleanup requirement be if there weren't any variance?

A. Well, if there was contamination such as that, it

would fall under the Pit Rule and would fall up under Rule 29 and possibly Rule 30.

Q. Right.

A. So there are no standards, once again, in the Pit Rule for cleanup. It's only to determine if a release has occurred or not.

Q. Okay. Under Part 30 of your regulations, what would be the standard for groundwater abatement?

A. I don't have it in front of me, so it's --

Q. What I'm trying -- really, all I'm trying to get you to say is you are trying to -- I'll be right out about it.

CHAIRMAN FESMIRE: As we said, a good witness always controls his lawyer.

Q. (By Mr. Frederick): It's going to take a lot longer, I guess.

Is the purpose of the Pit Rule to allow an exceedence of 3103 standards?

A. To --

Q. Allow an exceedence of 3103 standards? Is that the purpose of the Pit Rule?

A. Exceedence to groundwater?

Q. Groundwater standards, yeah. That's all 3103 is.

A. I would say yes and no, and the reason why is we're still cleaning up the vadose. We're still determining after a release has occurred.

Once again, you may have a remediation plan to remove certain levels of contamination within the vadose zone that would never get to groundwater that need to be removed to remove the contamination itself. It could go further into a vadose -- well, it could lead to a remediation plan for the prevention of contamination of groundwater, or it could go to an abatement plan that addresses contaminants.

There's different levels depending on the scenario. To say, specifically, it's only for protection of groundwater, I would say no.

Q. I'm not saying it's only for protection of groundwater. What I'm asking you -- and you just said the Pit Rule is partly to allow exceedence of groundwater standards, and what I mean by that is 3103 standards. What part of the Pit Rule allows an exceedence of a standard, a groundwater standard?

A. I don't think any part of the Pit Rule allows exceedence of the -- well, maybe I'm starting to understand what you're trying to ask.

Right now, only for on-site trench closure, the pit contents -- what we're proposing for chlorides would exceed a 3103 constituent level. But that's a pit content that's also wrapped up in a 20 mil liner. We're not talking about exceeding -- you know, we're talking about our part is to determine if a release has occurred under the Pit Rule.

So I don't understand where we would allow exceedence when we're just delineating --

Q. I thought you just said part of the Pit Rule is to allow exceedence of the groundwater standard. I heard you say that in your answer; and that's not true, is it?

A. Maybe that was misunderstood. I don't know where I said that and how that was taken out of context.

Q. I don't think it is. But I just want to give you a chance to say, no, the Pit Rule is not about allowing exceedence of groundwater standards.

A. I guess what I'm trying to get at is that the Pit Rule doesn't address exceedence of groundwater standards.

CHAIRMAN FESMIRE: Mr. Frederick, since this isn't your witness, you can lead him.

MR. FREDERICK: I'm trying to lead him. I really am trying.

THE WITNESS: I'm missing the boat here then.

Q. (By Mr. Frederick): I opened this question with: One of the purposes of the Pit Rule is to prevent groundwater contamination; isn't it?

A. That's one of the purposes.

Q. Okay. Groundwater contamination can be defined as an exceedence of 3103 standards; can it not be?

A. It can be.

Q. Okay. So one of the purposes of the Pit Rule is

to prevent 3103 standards from being exceeded in groundwater; is that not true?

A. That's where I think you're taking a stretch on this. Because it doesn't directly address exceedences to groundwater because there's not a provision that directly addresses that. Generally, that's the goal, but does it directly address it? Absolutely not.

Q. So your vadose zone standards, for example, where you determine whether or not there's been a release from a temporary or permanent pit -- you have vadose zone standards, right?

A. We have a standard to determine if a release has occurred, period.

Q. Right.

A. Period. Not if there was an exceedence to groundwater -- if there was the potential of exceedence to groundwater.

Q. I'm just trying to figure out why you came up with certain vadose zone standards. Is it not true that part of the reason is you're trying to prevent contaminants in the vadose zone from migrating down to the groundwater?

A. I would say yes to that.

Q. And if the contaminates migrate down in the groundwater and it doesn't exceed a 3103 standard and there's no danger that it will, is there contamination, technically,

under your regulations?

A. Say that again? I'm just trying to make sure I understand. Because you took a further leap than what the rule addresses, and that's what I'm trying to point out.

If the vadose zone testing, I guess you would call it -- which is right beneath the pit -- which is part of the vadose zone or below-grade tank, it may be. If you're to test right there where it preexisted, we're just determining if a release occurred right there. We're not testing 25 feet below that. We're not testing 50 feet below that, 100 feet, or even down to groundwater.

We don't know what -- we're not addressing the potential of that leaking all the way down to groundwater under the Pit Rule. There's other rules that would be applied to that. And we're talking about the Pit Rule today, and so that's why I'm limiting this only to the Pit Rule's application.

To say that we're testing the vadose zone and it would prevent exceedences of groundwater under the Pit Rule, that's not appropriate.

Q. I didn't ask that question. I didn't ask that question.

The Pit Rule references Parts 29 and 30; does it not?

A. It does, and the standards in the Pit Rule are only to be applied as they're presented in the Pit Rule.

They're not standards --

Q. What does that mean?

A. Because you had mentioned about the standards for testing under the Pit Rule. They're not the same that would be applied if it went under 29 or 30. They are not closure standards. They are not closure standards, by any means, for determination --

Q. When you say "they," what are you referring to?

A. Any standard that is listed to determine if a release has occurred or not are not closure standards, meaning that you would not have to clean up to those standards to close out that contamination. That's what this rule is about.

Q. Okay. I'm going to move on.

If there is a release from an on-site trench -- and most of my questions are going to be regarding on-site trenches --

A. Okay.

Q. -- if there is a release from an on-site trench, the Pit Rule requires the operator to report and abate the contamination caused by that release under Parts 29 and 30; is that correct?

A. Well, the release of on-site trench would mean that as you're excavating the temporary pit, you breach that trench.

I'm kind of confused, because the testing of the

release that occurs is either a drying pad associated with a closed-loop system or -- well, actually, what the plan is just applies to a temporary pit. You would be testing beneath the existing temporary pit that you're digging up and putting in a brand-new lined trench. So I'm --

Q. Let me back up then. I'm sorry. I kind of misled you by saying -- although all my questions do relate back to on-site trench disposal.

We'll branch out a little bit.

A. Okay.

Q. If there's a release, say, from a temporary or permanent pit, and this is in the process of closing one of those pits in preparation to take maybe the contents and bury it in an on-site trench, you require -- first off, you require the operator to test the soils underneath the pit, right?

A. Yeah. So it would only be temporary pits that would apply to on-site trench burial. So they would test underneath the existing -- once they dig it up -- the existing temporary pit.

Q. Okay. And if the soil contents exceeded certain standards that are set out in the rule, the operator would have to abate the contamination caused by that release pursuant to Parts 29 and 30; is that correct?

A. Yes.

Q. Okay. Now, if that release got down to

groundwater from a temporary pit, if the release got down to groundwater, contaminated groundwater, the operator would have to abate that contamination under Part 30, correct?

A. Yes.

Q. Do you know what the standard the operator would have to abate to under Part 30? That's okay if you don't know.

A. I don't.

Q. And you don't know, do you, in the context of having to clean up groundwater, whether the operator would have to clean up -- have to address all of the 3103 standards that groundwater might be contaminated by? Do you know that, or do you not know that?

A. I don't know that.

Q. Do you happen to know what kind of contaminants are within oil field waste, typically, in a temporary pit?

A. It can vary. Chlorides being one of them, BTEX being another, but there's also certain metals, barium, mercury, lead, iron, so forth.

Q. Manganese?

A. Manganese. Probably selenium.

Q. Sulfates?

A. Sulfates, yes.

Q. TDS? Total Dissolved Solids?

A. Yes.

Q. Nitrates?

A. Nitrates, yes.

Q. Okay. In all of those -- and I'm primarily going to be asking about inorganic constituents, which is chloride -- all of those inorganic contaminants that we were just talking about, those have the potential to leach out of that waste and contaminate groundwater; is that correct?

A. They definitely have the potential of leaching out of the waste. Once again, if you're referring back -- and I believe you prefaced all your questions are about on-site trench burial -- they would be placed in a newly-lined trench. So with that in mind, there would be less of a potential for it to release to migrate down through the soils.

Q. All right. Now, under the current rule, and actually under the proposed amendment, before you could take the pit contents out of the pit and put it in a trench, in a lined trench, you would have to show that the leachate from those contents met all of the 3103-A constituents.

And I can give you a copy of the 3103 list if you'd like.

A. Yeah, I kind of have an idea of what that is -- arsenic, aluminum, so forth, boron -- maybe not boron -- barium.

Q. So, for example -- and we're talking about the Synthetic Precipitation Leaching Procedure, the SPLP, right?

A. Yes.

Q. And so if nitrates came out at over 10 mg/L, and that exceeds the WQCC standard, those contents could not be disposed of in a pit -- in a trench? I'm sorry.

A. Not necessarily. The flip side of that is there's also -- you need to stabilize that material. And you can mix that up to 3:1 with other material to do that.

Q. Right.

A. So to say the initial pit contents not meeting the standard, they have the potential after that.

Q. But if you take the pit contents and you mix it 3:1 and it still doesn't meet the nitrate standard, 10 mg/L, you can't dispose of that material in a trench; is that correct?

A. You do have an option to request by exception.

Q. A variance?

A. Well, exception is the term we use, not a variance, because there's a process to it.

But they could ask for exception to that standard.

Q. Right. But the general rule --

A. The general rule --

Q. -- the rule as it's written, if you go ahead and mix the waste and you stabilize it, and you run the SPLP test on it and you get 10 mg/L or you exceed any other 3103A standard, you can't dispose of that in an on-site trench unless you get an exemption?

A. Exactly.

Q. All right. Why is it important to not exceed those standards? Why was that important?

A. Well, if I'm not mistaken, I think the Commission came up with these. We had proposed 3103 with only one type of on-site closure in the original rule.

The importance of this is that we were looking at that time a 50-foot separation to groundwater and a 5,000 mg/L proposal for chlorides also. We realize that chlorides are more mobile, and they are a very good indicator of what may be following. Some of the other constituents might bind up with other things within the soil and not migrate as fast or move down to the point where it would reach groundwater. But we still wanted to include those.

Now, if you notice under the current rule, everything requires sampling for BTEX. If you notice on on-site trench burial, there is no BTEX because BTEX is part of the 3103A constituent. And that's another reason.

Q. Why is it important? I'm going to ask you the same question, because I don't think I got an answer.

A. Okay.

Q. Why is it important that the leachate from the stabilized waste meet 3103A standards? Why is that important?

A. I'm going to let --

Q. If you don't know, you can say, no, I don't know.

A. Well, I think Mr. Hansen might be able to answer that more eloquently than I would.

Q. All right. That's fine. Now, under the current rule, the leachate has to also meet the standard for chloride, right, the 3103B standard for chloride under the current rule, not as you're amending it or proposing to amend it?

A. They are the same standard; 250 mg/L, if I'm not mistaken or the same standard.

Q. And why was it important in the old pit hearing to make sure that the leachate didn't exceed the 3103B standard for chloride? Why was that important?

A. That was something the Commission proposed and actually decided on separate of what OCD was proposing at the time. So we were defending 5,000 mg/L at the time.

Q. All right. And I'll ask you some questions about that, as well, in a bit.

But do you know -- in your opinion, why was it important? Why did the Commission come up with the 250 mg/L standard for the leachate?

MS. FOSTER: Objection. Unless Mr. Jones can read your mind, I don't know that he can answer that question.

MR. FREDERICK: I just asked him if he has an opinion about it. I'm not saying he can read your mind.

CHAIRMAN FESMIRE: Okay. Rephase your question and make sure that's what he's interpreting.

Q. (By Mr. Frederick): In your understanding -- what's your understanding of why the Commission came up with a 250 mg/L standard for chloride?

A. I think Mr. Hansen can answer better than I can.

But there were things that developed out of the Commission's decision to create standards, such as the 100-foot separation and the determination of the mixing zone and what was appropriate.

So I think, based upon their determination of what was appropriate for that, they looked at both Mr. Hansen's and Dr. Stephen's testimony to come up with this concentration. That's my understanding.

Q. Okay. Now, oil field waste, I think, as you've already testified -- and, again, I can give you a list.

MR. FREDERICK: May I hand the witness a 3103 constituent list? And I can hand it to other people, as well, if they'd like copies.

CHAIRMAN FESMIRE: Yeah. You can approach the witness and distribute it, Counselor.

MR. FREDERICK: All right. Thank you. So what I want to get at is there's other -- if you look at 3103B, which I think is on page 3 of that thing -- and what I've handed the witness is just a printout from Lexis of 3103.

Q. (By Mr. Frederick): Now, there's a lot of other contaminants, other 3103B contaminants in oil field waste

besides chloride, correct? If you go through that list?

A. Yes.

Q. And do you know why chloride is the only one that's tested for?

A. Well, once again, I think during the Pit Rule hearing it was discussed in great detail about the movement of chloride from soils and its potential to contaminate more so than a lot of these other constituents that are listed here.

And that was the -- it was a good indicator. It was an excellent indicator to determine, number one, if there was a potential release from the existing operation. And it was a very reasonable indicator for any type of operation across the board.

Because if you notice, be it below-grade tank, a permanent pit, a lined permanent pit, and so forth, we're asking for chlorides for all of those.

Q. Okay.

A. So it's an upfront indicator, a constituent indicator to make that determination.

And, once again, under the Pit Rule, that's what we're trying to make a determination. Was there a release?

Q. All right. And if you see that chlorides are elevated above the standard, let's say 3,000 mg/L above the standards, is that an indication that other 3103B constituents are also going to be above standards?

A. Not necessarily. But the 3,000 mg/Kg, once again, is for a burial standard, not a release standard. So I just want to clarify that up front.

We're talking about burying the material on place in a newly lined trench compared to checking to see what the existing operation did. Was that prolonged use of this lined area subject to some type of breakage or penetration through the liner that caused the release, or a poorly seamed area that during that prolonged use had a release?

There's two different --

Q. Let me rephrase it. Because it's not answering my question. Or maybe it is, but I didn't ask it right if that's the answer.

A. Okay.

Q. If the leachate contains 3,000 mg/L chloride and it's from oil field waste, is there a good chance that that leachate contains other 3103B standards -- the other 3103B constituents -- above standards?

MS. FOSTER: Objection.

CHAIRMAN FESMIRE: B or A?

MR. FREDERICK: B.

CHAIRMAN FESMIRE: Okay.

MS. FOSTER: I don't think that Mr. Frederick has established that oil field waste contains these 3103B standards. He's making the assumption that it does, but I

don't think that he's established that by any other piece of evidence. And the question is much too vague for the witness to answer the way it's questioned.

CHAIRMAN FESMIRE: Why don't you rephrase your question. I'll go ahead and overrule the objection, but ask you to clarify the question.

MR. FREDERICK: All right. Sure.

Q. (By Mr. Frederick): If the leachate -- from typical oil field waste, if the leachate contains 3,000 mg/L chloride, is that an indication it may also contain other contaminants that are mentioned in 3103B at levels above those standards --

MS. FOSTER: Objection.

Q. (By Mr. Frederick): -- for example, TDS?

MS. FOSTER: Objection. Again, there's been no clarification as to what typical oil field waste is and what constituents are typical of the waste.

If Mr. Frederick would like to put some science as to what oil field waste contains, then maybe his question might make some sense.

MR. FREDERICK: Let me just answer that, if I may.

CHAIRMAN FESMIRE: You can respond to the objection.

MR. FREDERICK: May I respond to the objection? I did ask the witness what typical oil field waste contains, and he listed several constituents. 3103B standards were among

them. This is an expert Commission here. They know what oil field waste contains. Let's not play hide and seek here.

CHAIRMAN FESMIRE: Okay. I'll overrule the objection. Go ahead.

Q. (By Mr. Frederick): Please don't make me repeat that question.

A. Well, in all honesty, once again, due to the nature of waste, I'm sure it is going to have TDS in it.

Q. You better say that.

A. I can say that with some absolute confidence in that. So would it exceed? I'm not going to answer that because it depends on the potential of how they want to stabilize the waste and what they choose to do that with. There is a potential of using -- they could solidify it if they wanted to.

Q. If they solidified it, would you have 3,000 mg/L chloride coming off it?

A. They would still have to test it. It may not have any TDS. It may get tied up.

Q. When I'm talking about -- chloride would make up TDS, of course, Total Dissolved Solids?

A. Well --

Q. If chloride is in the dissolved constituents, that would --

A. Yeah.

Q. -- and if there was nothing but chloride, it would still exceed the TDS standard, correct?

A. Well, to say that they correspond accordingly, I don't think that's necessarily true. It really depends.

Q. What's your background?

A. Well, environment health science.

To say that one represents the other equally is what I'm getting at.

Q. No. I never asked -- what I'm getting at is you-all have a test for chloride that's one of the 3103B constituents, and you thought it was important to test for chloride, and you ruled out all the other ones, and there's standards for the other ones as well. And I'm trying to figure out if there's a rational reason for ruling out -- for not -- chloride must have some kind of surrogate character to it. It must have some kind of -- it must be indicative of the nature of that waste; otherwise, you'd have to sample for all the other constituents, wouldn't you?

MS. FOSTER: Objection.

CHAIRMAN FESMIRE: Mr. Frederick, why don't you -- you finally got to a question there at the end. Why don't you make it one succinct question?

MR. FREDERICK: Sure. I'm going to move on, actually.

Q. (By Mr. Frederick): If the leachate met the

chloride standard -- if the leachate met the chloride standard, does that indicate it meets other 3103B standards?

A. No.

Q. No?

A. No, it doesn't mean that.

Q. Okay. Do you know how the mobility of chloride compares -- and I'm talking about the vadose zone -- how the mobility of chloride compares to nitrates in the vadose zone?

A. I'm going to let Mr. Hansen answer that question.

Q. Okay. That's fine. And, in your opinion, does the existing Pit Rule prevent on-site trenches from contaminating groundwater above standards?

A. Can you say that again?

Q. In your opinion, does the existing Pit Rule with the 250 mg/L standard for chloride, does the existing rule effectively prevent contamination of groundwater, assuming it completely complies --

MR. BROOKS: Mr. Chairman, again, I don't know that I object to his asking the witness that question, but Mr. Hansen is our hydrologic expert, and I think he would be the appropriate person to address that question to.

CHAIRMAN FESMIRE: Then I think it would be incumbent upon Mr. Jones to point that out in his response.

THE WITNESS: I was just about to do that. I would defer that to Mr. Hansen.

Q. (By Mr. Frederick): Under your proposed amendment, you would now propose that the leachate be able to exceed -- and I'm talking -- when I say leachate, I mean from the SPLP test -- the leachate would exceed the groundwater standard for chloride by 250 times -- by 12 times, up to 3,000 mg/L, correct?

A. I haven't done the math, but if you've calculated --

Q. I can get you a calculator if you want.

A. I will agree if you've calculated it.

Q. Okay. And you don't know -- and this may be a question for Mr. Hansen. If the leachate is 3,000 mg/L of chloride, you don't know how the other 3103B standards would be coming out because they aren't tested for?

A. No.

MS. FOSTER: Objection.

Again, each location is going to have different constituents in it, so answering a question -- linking a question like that really --

CHAIRMAN FESMIRE: It's already been asked and answered, so --

MS. FOSTER: I think that's the fourth or fifth time he's asked that question.

Q. (By Mr. Frederick): And you say background, it can be 3,000 -- or chloride can be 3,000 mg/L or background,

whatever is greater, correct?

A. Yes.

Q. All right. You don't say where background is collected from in the rule?

A. No.

Q. So I think I heard you give some guidelines, but how is that enforceable?

A. Well, it would have to be in the vicinity of where you're going to be burying it, meaning that you wouldn't be going a mile away and call that background. That's not even practical to consider that background at the site where you plan to bury it.

Q. Well, what if I take background from where my car leaked oil, take background there, and where I, you know, did whatever?

CHAIRMAN FESMIRE: Mr. Frederick, why don't you let him answer the first question.

MR. FREDERICK: Sure.

THE WITNESS: So there has to be some practicality to it, meaning that you wouldn't be testing where you're removing the old pit and consider that background because it could be potentially contaminated already, which you're supposed to assess.

Under the current rule, background is not a comparison for on-site trench burial. We're proposing that as

being something new. As we described for other types of backgrounds under the Pit Rule, while you're excavating that area to make your pit, you would take some type of representative sample. And we're not going to specify what someone considers that. They may want to take one sample. They may want to make a composite of 100 samples.

It's up to them to make that determination. But once they've established that, then they would be using that for their background concentration for chlorides only.

Q. (By Mr. Frederick): All right. Is there any definition for background in this context?

A. Not in our regulations, no.

Q. Does it say it has to be background of the soil or background of the groundwater that is potentially affected?

A. If I'm not mistaken, we're looking at soils being tested and the area in which you're proposing to put this, so we're discussing soils, not groundwater.

Q. So are you asking in this rule -- does this rule require the operator to say how he collected background or where he collected background? Does it expressly have any provision for that?

A. No.

Q. All right. Now, when you take a composite sample of say -- when you're characterizing pit contents, you have to take five samples, and you have to composite them, and I assume

they have to be representative of the pit contents?

A. Potential, yes. We hope so.

Q. Wouldn't that be important to make sure that, you know, you're getting background that's representative and not background that's maybe isolated?

A. Well, you start out talking about pit contents, and then you're asking about sampling for background.

Q. Now I'm talking about trench, when you're trying to figure out the background for how much, how high your leachate concentration can be in a trench burial. Okay?

A. Okay.

Q. And wouldn't it be important for you as a regulator to know how the background was determined? Where those samples were taken? How many were taken and so forth?

A. Well, I don't see where we would have any say in how many are taken, necessarily. A prudent operator would take multiple samples to make a composite. To say when a sample is a composite, it's not -- and I'm referring to background only.

Once again, in order for the pit contents to be considered for burial, more than likely they're going to be required to be stabilized because of the nature of the waste that it's in. It's going to be muddy, mucky, and it's got to be stabilized to hold the 4-foot cover.

So there's going to be a lot of mixing involved at that point. And that's why we want a composite sample of this

mixed material to be tested.

Q. Composite of what? What are you talking about?

A. Of the pit contents.

Q. So you're talking about the pit contents?

A. Yeah. So with that, that's different than creating a background composite. We're going to leave it up to the operator to make their determination of how many samples they want to determine that background.

If you're a prudent operator, you would take a multiple to get a better representative idea.

Q. And why would the prudent operator do that?

A. You would have a more representative idea of what the chloride concentrations are within the vicinity of that trench.

Q. Now, you don't specify the method of background either, although you are testifying you would expect them to be SPLP, but you don't specify the method in the rule, correct?

A. Well, if you look at -- I would beg to differ on that, because it talks about running tests for chlorides and the concentrations prior to that, and it identifies the methods to make that determination. And it identifies background, a comparison to background.

I don't see where it's a great leap to think that those same testing requirements do not address background when it lists that limit and it identifies it would also apply to

background.

Q. Okay. It's your interpretation that the rule does require SPLP--

A. Absolutely.

Q. -- to be run on background. And the operator is the one who determines how background is determined?

A. Yes.

Q. Now, on-site trench disposal is designed to be permanent?

A. I guess in some sense, yes.

Q. In what sense is it not designed to be permanent?

A. If an operator chooses to have another pit in that location and, in doing so, they dig into that existing on-site trench, it may create issues for them.

Q. Aside from something like that, is an on-site deposal -- trench disposal -- designed to be permanent as in, it's supposed to stay there forever?

A. Yes.

Q. Unless somebody -- and unless there's special circumstances and somebody wants to remove it?

A. Yes.

Q. Now, will the waste in the trench become less toxic over time?

A. No.

Q. What's the useful life of a liner?

A. That's a good question, because there's various different people that have different opinions about that. I don't think there's any set rule on that. I've heard up to 250 years.

Q. All right. Now, several installations of liner -- installation errors -- can cause the liner to fail or not perform optimally; is that correct?

A. To a certain level, yeah. There's certain -- I mean, Mr. Hansen is going to talk about the defects that he puts into his modeling for pinholes and so forth just from the manufacturing aspect.

But, once again, the thing to consider when you have a trench burial, it's not an active trench, meaning that you're going to have four feet of soil on top of that. So any external impacts that are done outside and around it should not penetrate it, should not create a point where there's further defects.

Q. The trench has to be prepared correctly, though, right -- you may not be the right witness for this -- to ensure that the liner isn't damaged during the installation?

A. Yes. There's -- once again, you have to prep the subgrade. You may have to use geotextiles to make sure that before you place the liner down that by installing that liner there won't be further damage to that liner. There's a lot of care with that.

Q. And the seams have to be placed correctly; is that right?

A. Yeah. The idea of the seams is that they would -- and I'm trying to remember the terms -- but it was perpendicular to the largest slope, I think, is the concept; meaning, that if you had a trench with sidewalls on it, direct sidewalls and then in order to dig out that trench, you'd have sloping ends.

The idea is that you would not place those seams running up and down those extreme sidewalls, but against the lower or more easing slope that's developed there. So when you put the pit contents in, it would put additional stress on those seams.

Q. Right.

A. And we address that in the rule.

Q. And it's important for the foundation to be done just right so it doesn't have rocks in it or other irregularities that might cause stresses on the liner?

A. Yes. And that's why I was saying earlier, you may also have to implement the installation of geotextile material to create that environment and reduce the stresses on the liner.

Q. And then you have to overlap liners when they go in? You're going to put in multiple liners and overlap them in the right way; is that right?

A. I don't quite understand your question. The liners have to be sewn together by thermal seams, welded seams. So, yes, they are overlapped to make that happen, but then they are thermally heated in order to create a seam that is sealed. So that goes back to the seaming.

Q. Okay. And then can run-on also cause liners -- you've got to make sure that the run-on to that trench area is controlled so you don't have undercutting and things like that?

A. Well, the trench itself, once you construct the trench and you put the waste material in it, you overlap the liner material. And then you place another geomembrane on top, which would be somewhat sloping to divert water. Then you're required to put a 4-foot cover on top of that.

It's not supposed to be installed in a manner that would collect water. So run-on control, the design of the soil cover addresses that. Of course, it has to be revegetated as well, which would assist in --

CHAIRMAN FESMIRE: Mr. Frederick, these are issues to be raised in deep-trench burial, and that's not one of the proposed changes in the --

MR. FREDERICK: It goes to -- I think this will become apparent with my next question.

CHAIRMAN FESMIRE: Okay.

Q. (By Mr. Frederick): Who's going to be installing these liners? Specifically, I want to know what training, what

education, what experience, any certifications, things like that.

A. The rule doesn't specify that.

Q. Okay. And does OCD supervise the installation?

A. Well, there is notice required prior to any type of closure, especially if you're dealing with a trench, anything that involved on-site closures, specifically. There's 72-hour notice which give the district office an opportunity to come out and observe those if they wish to.

Q. If they wish to. Do you except them to get out to a lot of trench closures, on-site trench burials?

A. I haven't asked what they do.

Q. There's no inspection requirement, though, is there? You know, after you put in your liner and everything, and you've got it perfect and ready to put the waste in, you don't have to call up OCD and say, "Hey, can you come and inspect my trench?" -- like you would a building inspector?

A. Depending on the district, they may require that. I don't know if they do or not. I know that at one time the Artesia office was requiring them to notify them so that they could some out. I don't know if they're continuing to do that. We were allowed to put that within closure plans that could allow that under the rules, additional condition.

Q. The current rule doesn't allow for it and doesn't require it?

A. It doesn't require it, no.

Q. Okay. And after you get the liner in, the waste in, and everything's perfect, is there any leak detection system installed?

A. No.

Q. All right. Now, the liner, I think you testified that you think the liner can last about 250 years?

A. That's what I've heard testified before.

Q. So the contents of that liner, if you got a perfect installation and a perfect liner, the contents are going to leach out after that --

MS. FOSTER: Objection. The witness stated that he had heard another witness talk about the 250 years.

THE WITNESS: And I don't know under what conditions.

CHAIRMAN FESMIRE: Will the objection be hearsay?

MS. FOSTER: Yes.

CHAIRMAN FESMIRE: I'll sustain that objection.

MR. FREDERICK: Well, it's an objection to a question I got answered quite a while ago.

Q. (By Mr. Frederick): All right. So you don't know how long the liner lasts?

A. Personally, I don't know. You know, the party that said 250 years, I don't know under what conditions those were set. I would make assumptions they were for landfills, which the liners is exposed to the open environment and

external conditions, compared to one that's buried completely.

Q. The liner on the bottom of the landfill is exposed to open --

A. Well, if you know about construction of landfills and how they operate them, the liner material can be exposed in certain areas. I don't know how they assess their liners. Once again, it was -- I don't know how they came up with their 250 years, under what conditions.

Q. All right. Now, have you ever worked with the discharge plans at OCD?

A. Yes.

Q. Is there any -- are you aware of any discharge plan that allows the operator to discharge 3,000 mg/L chloride into a trench or anyplace else?

A. Am I aware of any?

Q. Are you aware of any existing discharge plan like that?

A. No. But it doesn't mean that it can't go in front of the WQCC and ask for a variance of that limit.

Q. Sure. Let's just assume that everything is variable, that you can come to whatever authority it is and ask for a variance.

CHAIRMAN FESMIRE: That would be the OCC.

MR. FREDERICK: Would it? Yes. It sounded like a more general answer than what we're dealing with here.

CHAIRMAN FESMIRE: Okay.

MR. FREDERICK: All right. I'm just trying to figure out what's an appropriate question for Mr. Jones here. And if we took a little time here, maybe I can save us some time.

Q. (By Mr. Frederick): Now, when an operator closes a temporary pit, he has to demonstrate that the soil doesn't contain more than 500 or 1,000 mg/Kg chloride depending on the depth to water, correct?

A. When they close -- by which method?

Q. And when they're going to just close a temporary pit, they're going to verify whether or not there's a release under that pit?

A. Yes.

Q. And the threshold number is 500 --

A. Or 1,000.

Q. -- or 1,000 mg/Kg depending on depth to water?

A. Yes.

Q. Okay. If the results exceed those standards, what does the operator have to do?

A. They have to comply with Part 29 and 30.

Q. Okay. And I noticed also that to qualify for in-place burial of pit waste, you basically have to meet those same standards, 500 and 1,000 mg/Kg of chloride, again, depending on depth to water?

A. Yes. The limiting factor to that would be, I

guess, for on-site trench burial or any type of on-site closures, could you make the groundwater separation for on-site trench burial.

Q. Right. Assuming all the other things are -- and the parallel I'm drawing here is to determine whether there's been a release from a pit, the closure standard -- or the chloride threshold, whatever you want to call it -- is the same for determining whether you can bury waste in place in terms of chloride. And is that a coincidence? Why is that?

A. Can you state that again? I'm not sure if I'm understanding it.

Q. Sure. When you're characterizing your pit waste to determine whether you can dispose of it in an in-place burial.

A. Oh, in place.

Q. I'm not talking about a trench, in-place burial, all right? You've got to show that, depending on depth to water, that chloride in the leachate -- I'm sorry -- not in the leachate, actually, in the solid -- is 500 mg/Kg or 1,000 mg/Kg, depending on the depth to water, right?

A. Yes.

Q. All right. That's the same standard for determining whether there's been a release from a temporary pit, isn't it?

A. Yes.

Q. Now, why is that? Is that coincidence?

A. Well, once again, the Division did not promote that concept at the Pit Rule. That evolved through the hearing process through the Commission.

Q. Okay. But that's not being changed today? You're not proposing to change that?

A. No.

Q. So do you know -- I mean, do you have any idea why those are the same numbers?

A. If I'm not mistaken, I've read some documentation that might allude that they opted to use the landfarm standards under Part 36 for those standards.

Q. And in-place burial, that has a liner, doesn't it?

A. It does.

Q. Okay.

A. It's actually -- my understanding also is that that would address more types of pit closures in the northwest and the southeast because of the chloride concentration of the waste material, the difference in that material from different locations.

Q. All right. And if you look at in terms of both in-place burial and deep-trench burial, like we said, that's supposed to be a permanent disposal site, correct?

A. Yes.

Q. So isn't it just a matter of time before the contents leach out of either in-place burial or the trench?

MS. FOSTER: Objection. Objection. That would call for witness's opinion.

MR. FREDERICK: That's what I'm asking for.

MS. FOSTER: No. You didn't ask for the witness's opinion.

MR. HISER: A better objection is assuming facts not in evidence.

CHAIRMAN FESMIRE: That would be a good objection. Sustained.

MR. FREDERICK: I guess I'm not sure what fact I'm assuming; that the pit liner is going to fail some day?

CHAIRMAN FESMIRE: That it would fail.

MR. FREDERICK: I guess I would ask the Chairman to take notice -- and it's an expert Commission here -- and ask you to take administrative notice that liners do not last forever. Liners have a finite life. We all know it.

CHAIRMAN FESMIRE: Okay.

MR. HISER: If I may respond to that, Mr. Chairman?

You would also need to take notice, then, that we don't know how the liners fail, how they would release, and whether that has any real impact upon the groundwater concentrations below it.

So it's still assuming facts not in evidence.

CHAIRMAN FESMIRE: Based on the evidence from the prior hearing, then, we'll take it into account. There was some evidence -- and the validity of that is up to the Commission -- but there was some evidence that liners would fail.

And on that basis, I'll allow him to go a little bit farther in this line of questioning, but not much.

MR. FREDERICK: All right.

Q. (By Mr. Frederick): Let me just -- why don't you assume that the liner will fail within 250, 270 years.

A. Okay.

Q. Isn't it then just a matter of time, if the liner fails, that the contents of the trench or the pit will leach out?

A. Well, it depends on what fashion that it begins failure.

Once again, we've got a wrapped burrito with a cover on top, a geomembrane cover on top, that's equivalent with what's it's wrapped in. There's an important factor of having that in place, because it's to divert water from the burrito itself and prevent it from collecting water.

You're under the assumption that it's collecting water all the time so it's automatically going to start leaching. What I'm saying is that it should be stabilized to the point -- because it still has to pass the paint filter test

that it's not going to be coming in contact with water for 250 years.

Something would have to degrade in multiple layers in order for it to take on water to create the leachates to begin with and then reach that point of where that failure has occurred in order to leach out. It won't be a flowing-type release either.

Q. So it sounds like you're assuming that the installation was perfectly -- was done perfectly, and for 250 to 270 years the surface doesn't change at all?

A. I'm not saying that. I am just saying there's a multitude of things within the construction and installations of that trench that creates multiple layers of protection. So there's not a complete failure. It just does disappear one day, and water comes in contact with it, and then leachate is generated from that waste material. It's not just going to disintegrate on one day.

Q. It'll disintegrate over time, I assume?

A. Yes.

Q. And will it start disintegrating the moment it's put in the ground?

A. I would assume everything has a life to it. Before you even put it in the ground it's probably disintegrating to a certain extent, but to what extent we have no idea.

Q. So are you saying that you can't -- say after 250 years or longer -- you can't foresee the contents ever leaching out?

A. No, I'm not saying that at all.

Q. Can you foresee the contents leaching out?

A. It has the potential to leach out.

Q. How?

A. But in order to get a leachate, you have to have contact with water, which means water has to infiltrate the trench burial itself. And I guess that's what I'm trying to get at. There's going to have to be a lot of factors for that to occur.

Q. Right. You'd have to have maybe an improper installation or the cover being partially removed, say, over a period of time, say 100 years. Is that possible that that happens?

A. Well, it could happen.

Q. You're assuming everything is going to be stat, right, if everything is done perfectly?

A. I'm not saying that. I'm saying you may have manufacturer defects, pinhole defects. But what I'm getting at is that with that, once again, the initial material that goes into that trench burial has to pass the paint filter test, which means it can't have any free liquids in it.

That's part of the requirement for that to go in,

which puts it at a different state than something that's totally saturated with free liquids that would be leaching as soon as it's buried.

Q. Right. If the top cover, though, were defective for any reason and it allowed water to collect over time in the trench, that could build up a head of water in the trench; could it not?

A. Oh, absolutely.

Q. And that would probably make infiltration -- if there was, then, failure at the bottom liner, that would make infiltration more rapid?

A. Yes. And that insulation would be in violation of the rules too.

Q. Sure. I want to talk now about the 5,000 mg/L standard that you guys proposed in the initial pit -- and "you guys" being OCD -- in the initial pit hearing.

You did propose 5,000 mg/L for the leachate. But that was coupled with a couple of other things. For example, it was coupled with the 100-mile rule that you couldn't dispose of anything on-site if there was a facility within 100 miles.

You also proposed that the operator get landowner approval before anything was disposed on the landowner's land, correct?

A. I believe so, yes.

Q. Now, both of those -- am I correct in reading

your testimony -- and, actually, it says this directly in a few places -- that you were attempting to minimize on-site disposal last time around in the Pit Rule?

A. Yes. And I think the changes that the Commission made also served the same purpose. Once again, we were also suggesting a 50-foot separation of groundwater from the bottom of the pit. The Commission came up with 100-foot separation. That, within itself, in certain areas will prevent or restrict the area in which it can be utilized for this method.

Q. All right. Right. And you actually anticipated my next question.

The Commission did not adopt the 5,000 100-mile rule for the landowner approval, but they instead adopted this 250 mg/L standard for chloride in the waste leachate?

A. And 100-foot separation from groundwater.

Q. And 100-foot separation. Now, with that change, does the current Pit Rule still minimize on-site disposal with those requirements in place?

MR. BROOKS: Objection. The word "minimize" is, I think, ambiguous here because the minimum would be zero, so I don't know what he means by minimize.

MR. FREDERICK: You know, I'll -- with the next witness, I'll put out a slide that he has that says the object is to minimize on-site deposal. So they must have discussed this. If he has an understanding of what minimize means, I'd

like to know what it means. I don't want to define it for him. I'd like to know what they meant by minimizing on-site disposal.

CHAIRMAN FESMIRE: On that context, I'll overrule the objection.

THE WITNESS: I would say it would. Under a previous discussion under the Pit Rule, we were talking about the accumulative effect of things. That's why we had the 100-mile radius and so forth. We were saying that if we could reduce the number of type of trench burials out there that it would reduce the accumulative effect.

By coming up with a 100-foot separation, when you look across the state where the oil and gas activity is occurring, that, in itself, which the Commission came up with restricts -- puts a restriction on where they can consider to put it in the first place. And it's quite a considerable restriction.

Q. (By Mr. Frederick): Now, with the landowner, your initial proposal with the landowner getting landowner approval for on-site burials, the landowner could veto on-site burials completely under your proposal, right?

A. Yes.

Q. Now, you have a setback distance for the distance between a well, an existing well, and a trench, correct?

A. Yes.

Q. And what is that?

MS. FOSTER: Objection. I don't know if this is the matter before us. He seems to be asking questions from the last hearing. This proceeding, this amendment, is not -- these matters do not pertain to setbacks at all.

CHAIRMAN FESMIRE: Mr. Frederick?

MR. FREDERICK: I am going someplace with it. I am actually going someplace with it to relate it to this current rule.

Basically, you're going to have contents in the pit that now exceeds standards.

CHAIRMAN FESMIRE: I'll overrule the objection, but keep in mind, she might come back with it again in the near future.

MR. FREDERICK: I'm keeping in mind -- I'm trying to get done as quickly as I can. I really am.

Q. (By Mr. Frederick): What -- do you remember the question? What's the setback?

A. It could be anywhere from 500 to 1,000 feet, depending on the nature of well.

Q. Okay. There's no restriction on after the trench is in place with the contents now? There's no restriction on a landowner drill within 50 feet of that trench, right, down gradient, is there?

A. Once it's in place, no.

Q. Is there any requirement to demarcate the exterior boundaries of that trench once it's in place?

A. There is a still marker that would be placed above the ground that's required.

Q. That's one pole in the ground at the center of the trench?

A. And my understanding also is that they have to put on a plat the location of the previous temporary pit, if they're closing a temporary pit. They also have to survey that out on to a plat to indicate the presence of that.

Q. But -- and I think this has already been answered, so I'm going not going to ask it again about anybody can be drilling a well anywhere they want. There's no restriction against drilling a well within that setback area, correct?

A. Under our rules?

Q. Under our rules.

A. No.

Q. Do you know of any other restriction on it?

A. (Witness shakes head).

Q. Was that a no?

A. I don't know of any, not to say that there's not any.

Q. Okay. A pit can be 10-acre feet, a permanent pit -- I'm sorry -- a temporary -- any kind of temporary or

permanent pit, they have to be 10-acre feet?

I'm sorry. I'm getting a little punchy here.

A. Minus, yeah. They can be constructed up to 10-acre feet, and they can't exceed it. But that also includes the freeboard.

Q. The freeboard.

A. Which means that area withholds any fluids.

Q. So if you had a pit that was an acre in aerial extent and it was 10 feet deep, 3 feet would be -- there would be 3-acre feet devoted to freeboard?

A. Yes.

Q. Okay. And so you can take the contents of that pit and add 3:1 soil, clean soil, and then put it in a trench, right?

A. Yes.

Q. So that, theoretically, means the trench can be taking freeboard into consideration with something like 21-acre feet?

A. Well, the reality of this is that if you have a temporary pit, you're going to have fluid in it. You have to have room for your fluids. That includes maintaining that freeboard part of it.

So the assumption that there's greater than 7-acre feet of solids is not a practical assumption. So that's where that issue, I guess, isn't clear in your question. So the pit

design, the temporary pit design, would include the ability to hold both solids and fluids and maintain that freeboard requirement.

Q. Right. So do you have a -- have you got data on how much solid that would include in the pit on an average basis?

A. It depends on the depth of well that you drill. It really depends. There's a lot of contributing factors.

Q. Well, what I'm asking is: Do you have hard data on this? What's the range of solid contents in a pit that you're later going to mix 3:1 and then put in a trench?

A. Once again, that depends on how deep you drill.

Q. Well, what ranges are we talking about? I'm not asking you to say this is the way a pit always is. I'm asking you for ranges.

A. What -- if I remember correctly at the Pit Rule, the assumption is that you use a conventional pit due to the description of that with muds and so forth --

MS. FOSTER: Objection. If I could just object to this witness's testimony.

Unless he testified to it at the Pit Rule and he's personally -- he understands the amount of solids that can actually be in the pit based on his experience, I don't think that he's qualified to answer this question.

THE WITNESS: It's actually my assessment of

Mr. Small's exhibit that was submitted by --

CHAIRMAN FESMIRE: Okay. Let me rule on the objection.

I'll overrule the objection. Why don't we maintain a running objection for, you know, to speed things along. Is that satisfactory?

MS. FOSTER: That's fine, as it pertains to any testimony that came in the prior hearing.

CHAIRMAN FESMIRE: I'll overrule the objection, Mr. Frederick. Continue.

MR. FREDERICK: Okay. Thank you, Mr. Chairman.

Q. (By Mr. Frederick): So I'm just trying to get whether you know. And if you don't, just say you don't know.

A. Okay.

Q. Do you know what the range of pit contents and solids -- is what I'm dealing with -- because your rule allows up to 10-acre feet, correct?

A. No, it doesn't. That's for the design of the pit, not for the amount of the solids.

If you design a pit for 10-acre feet only for solids, you would have no fluids in it. You wouldn't even meet the freeboard requirements. You would be in violation of operation of that pit.

So, no, 10-acre feet is not for holding solids and fluids. It is the maximum size by capacity.

Q. Okay. So then do you know what range of solid material in terms of acre feet we're talking about?

A. Once again, it depends on how deep you drill because that determines how much fluid you may use and how much solids you may extract from drilling the holes with the mud that you use. And it could be in a central system that half your material could be solids in a convention system.

But does it give you a volume? That's not a practical answer.

Q. So you don't know.

No, you don't know what the range of solid material is? Was that the answer?

A. I don't think it's a practical question I can answer because there's so many variations.

Q. What I'm trying to do is figure out -- what I'm trying to do is figure out --

A. I understand what you're trying to do.

Q. -- what the volume of solid material after the 3:1 ratio, what volume is going in that trench? I would like to know what the minimum volume is and what the maximum volume is, if you know.

A. Four times its original volume.

Q. What's four times its original volume?

A. When you mix it 3:1, you end up with four times what you originally started out with.

Q. Okay. Do you have an idea what the pit contents in terms of volume would be then? Just give me a range.

A. I can't answer that question.

Q. That's fine. That's all I need to know.

A. That's not a practical question even to ask.

Q. I want to know what the pit contents are.

A. If you drill a well to 7,000 feet or to 4,000 feet, those are going to be different volumes. Anything in between is going to be different from those two.

That's why I'm saying it's not -- I can't give you a number because each one depends on how big of a hole you start out with and what you end up with at the bottom.

Q. I really want to get out of here, but I'm just going to take the bait.

If you drilled a 7,000-foot hole, and it was a maximum diameter --

CHAIRMAN FESMIRE: Mr. Frederick, I think that's been asked and answered.

MR. FREDERICK: I'm just trying to get what he -- I'm trying to get, does he know how much volume of solid content there is.

MR. BROOKS: Mr. Chairman, I think he said he didn't.

CHAIRMAN FESMIRE: I think he has too. So asked and answered. Move on, Mr. Frederick, please.

MR. FREDERICK: Well, I'm done. Thank you.

CHAIRMAN FESMIRE: Dr. Neeper?

DR. NEEPER: Yes. I have just three questions.

CHAIRMAN FESMIRE: Why don't you have a seat?

DR. NEEPER: And I feel confident this witness knows at least an immediate answer to these.

CROSS-EXAMINATION

BY DR. NEEPER:

Q. Mr. Jones, in response to a question from Mr. Brooks, I understood you to say that the background chloride level for a trench burial was to be the natural background.

Did you mean natural as left by nature, or did you perhaps mean natural as left by a previous industry, such as mining?

A. We would consider that natural because it's the natural application of that operation. So we would consider both of those being prudent. Depending on where you are, if there is no industry, then natural would mean natural at the site.

But if you are in a potash mine area where it's displacing water out to the surface for long periods of time and they discontinue that, and you're utilizing a trench or a pit and you want a deep-trench burial, we would consider that natural for that area.

Q. Thank you. The second question: I know that

trench burial has become the question here in the last few minutes. I hope I can clarify it with some questions.

Could you simply say in a sentence or two what is the required subgrade preparation for a trench burial? I know there's many words in the rule, but instead of an example, perhaps you could say, "We require" --

A. Well, we require that the operator make sure there's no rocks or things that could penetrate the liner. So it's going to be a foundation that once the liner is placed, if you put material into it and you're putting any type of stress on that liner, there's also further requirements. If you can't achieve that, then you should be using certain geotextiles to synthetically create that environment to protect that liner.

Q. All right. Thank you.

My third question: Let us suppose that a trench burial has been made and some time has passed. If I were an enthusiastic environmentalist, I might rent a drill rig and come out and slant drill underneath that trench burial. If I found very high chlorides under the trench burial, would that be a release?

A. Well, I guess there's two samples that need to be taken; one to determine what background is, and one to determine if what you're seeing is natural or not. You need to do a comparison. Just having one doesn't always mean there's a release.

Q. Very good. If the natural were quite small, like I say, 10, and what you found were several thousand in the sample beneath the burial unit, would that constitute a release?

A. That would definitely constitute a concern.

Q. A concern. But "release" is a word of regulation in this community. Would that be a release?

A. I guess so.

Q. Thank you, Mr. Jones.

CHAIRMAN FESMIRE: Commissioner Bailey?

EXAMINATION

BY COMMISSIONER BAILEY:

Q. Let's switch gears a little. Let's go back to the OCD not approving change of operator under certain circumstances. And the question was asked: Why does it matter who the owner is if the tank shows integrity and has shown integrity and does not have a history of repeated fixes? If the tank shows integrity, why does OCD care who the owner is?

A. Well, the Pit Rule came into effect June 16th of last year. Prior to that, there was no recordkeeping requirement under Rule 50 so there is no documentation. There is no knowledge of repairs or fixes because there was no provisions to address those under the previous rule.

So I can't make that assumption. I honestly cannot say nothing did occur and that it's been okay all this time,

because I have no knowledge of it. There's no documentation that exists to demonstrate otherwise.

So I can't assume that there's not an issue.

Q. If a company has been keeping their own records, as I assume some of the larger independents do, and can show you that their inspection records indicate a clean record for a tank, for the life of that tank, could an exception be granted by the Santa Fe office?

A. An exception can always be granted to any provision rule that's allowed. Of course, you can't get an exception to an exception or an exception to a permit. But you can get it -- well, you can't get an exception to the transfer provisions either because they are protected under that Section 16, I believe.

So the problem that we got with this, this really applies to nonconforming tanks, once again, which at some point will have to be retrofitted. So we're dealing with this other compliance issue of bringing them up to the current approved design. We think it would be prudent for the new operator to have that opportunity of not having that responsibility.

Q. You're putting OCD in the role of Big Brother, which I assume has not been granted by the legislature to be Big Brother. So the question is -- the answers that I come up with is that with OCD not approving these transfers, it would be a means of removing liability from OCD for tacit approval of

sites where there has not been any testing or examination of subsurface.

So I'm thinking along the lines of, well, it's OCD's motivation to prevent or remove liability which could be incurred by approving transfer of these tanks. Then is OCD impeding business and contractual warranty that may occur between two consenting companies?

A. I don't know if I'm capable of answering that. Because I don't know about such contractual warranties. I don't know about that mechanism. I've never seen those. There might be something out there like that. So I'm unaware, so it makes it difficult for me to answer your question.

Q. I'm just concerned that any order coming from this hearing would be thrown out of court because of OCD overstepping its authority. And, of course, I want to prevent that. So my question has to do with the lawyers.

Would that -- could that be handled in a different way, such as certification on the application for transfer, that there is no contamination and any that would be discovered would be handled appropriately?

MR. BROOKS: Mr. Chairman, I was wondering if Commissioner Bailey, since she said "for the lawyers," and she was looking at me, I was going to ask Mr. Chairman and Commissioner Bailey, are you asking for a response from Counsel? Or are you asking for a response from the witness,

who I believe is not a lawyer?

CHAIRMAN FESMIRE: Well, I think we have to treat that more of a statement if Mr. Jones can't answer the question. We're not allowed to interrogate the lawyers and they're not under oath. So I think we better stick with questioning the witnesses.

THE WITNESS: I guess our intent is to prevent a scenario where, let's say, there was the mechanism, and a company did certify that there was no contamination. And then that tank was one of the I(6) tanks that needed to be retrofitted within five years, and they sell it at four years after the effective date, and they make that certification statement.

Then the other party has to come in and bring it up to speed, bring it up to an approved design, and they discover contamination. The argument is going to come into, who created the contamination? We're trying to solve that up front by requiring them to assess those issues prior to sale or transfer.

Because they can certify all day that there's no contamination, but until someone replaces that tank -- it could be 10 years later, it could be 20 years later -- if contamination is present, then they're going to go back to that company and say, hey, this is yours. And they're going to go, no, it's not. We certified that it's not.

Even though they didn't test and confirm it, they certified that it's not. And then that creates a bigger issue of who do we go after to make sure it's addressed properly, instead of having it drawn out even further of addressing that contamination.

So we want to resolve these issues up front. If there's no contamination, there's no issue, and it's confirmed, and it's documented.

Q. But it still impedes a business transaction.

A. Only for the below-grade tanks associated with the activities. It doesn't prevent transfer of ownership of the well or the facility. It's only the below-grade tank itself.

Q. It also occurred to me that since OCD can't assess any penalties anymore that this is a method OCD might be looking at to ensure compliance from bad actors or else they're stuck forever with their property.

A. If I'm not mistaken, these concepts were proposed and generated before the decision ever came from that judgment from the Supreme Court. So it preceded us even having any knowledge of the outcome of that hearing. It was not written with that intent at all.

Q. To require companies to maintain the inspection records for the life of the tank, how many permitted tanks do you think there are in the state?

A. I have no knowledge. Several, I'm sure --

Q. Hundreds? Thousands?

A. -- or else this wouldn't be a big issue.

Q. My question is: How often and under what circumstances would OCD require production of those records?

A. How often? Well, under the current rule and under the current proposed language, we're not asking that these records be provided to us on any interval basis. We're just asking that they be available and maintained by the operator.

Right now, the below-grade tanks that are currently out there, they're required to keep those for five years, and then they continue to keep those for five-year periods, same below-grade tanks, same number of below-grade tanks. But that's what the current rule requires. All we're asking is that they maintain it for the life of that tank for the same tank.

Q. But the question is: Under what circumstances would OCD want to look at those records?

A. I think I had discussed this earlier. Wherever you have under the general provisions of operation, and I think it's Section 12A(5) that talks about -- and A(4) indirectly addresses it too -- but A(5) specifically addresses below-grade tanks.

If you have a penetration to the tank or a puncture

to the tank that creates the potential for a release, you're supposed to notify the Division within 48 hours of this and correct that situation. It could mean repair. It could mean replacement.

If it's a tank that is currently nonconforming, you don't get the option to necessarily repair it and continue to use it because that's an integrity issue. That means you have an integrity failure, and the rule currently says if you have that with a nonconforming tank, you need to bring it up to speed, being retrofit or replacement with an approved design.

So at those moments when these events occur, we'll be notified. And if we realize we're getting the same notification on the same tank, we might want to look at this record to see how many times in the past this has occurred, and is there a concern to require this tank to be replaced.

Q. But OCD doesn't maintain any kind of record of repairs for all the tanks, right?

A. Not with repairs, but since they're going to have to notify us within 48 hours, that's going to be something that would be documented to go into the file. So when -- let's say I had one last year that someone reported, and it's one that's conforming. It meets the approved design.

Let's say it's a single-walled tank with visible sidewalls, and they repaired that tank. And then the next year I get another one, and that's this next document I'm

submitting, and it shows on the record. I can say, well, this is the second time this has occurred.

Q. You maintain that with the well files?

A. Absolutely. And so there will be a paper record that we will have of the releases. They're linked to that. So those would prompt us to look at the inspection records to see if all this is occurring in the same location, the same issue.

Q. You've talked about imminent threats.

A. Yes.

Q. Imminent threats are not always huge amounts of oil sitting or pooling in a particular spot.

A. No.

Q. Sometimes it's a very subtle experience, very subtle indication --

A. Yes.

Q. -- that there is imminent threat to the water.

A. Oh, yes.

Q. How is an operator and how is the Division supposed to see that difference when it is one of these subtle indications?

A. Well, we're going to have to assess this on a case-by-case basis. When I was using the imminent threat description, the consideration of that, I was talking about permitting below-grade tanks that aren't currently permitted or were not considered to be permitted under Rule 50, which are

now today.

We are looking at those considerations such as -- and a good example of what you're getting at would be a tank sitting in groundwater that may not even be leaking, but if it does leak it's going to have direct contact. That is something that we would be concerned about. And we may consider the siting of that to be an imminent threat because any release would be a direct contamination of groundwater.

Q. Yes. Because that's not a very subtle event to have it sitting in groundwater. But there are some that have a very small indicator on the surface.

A. Yes. The other thing would be, let's say, the groundwater was two feet below that tank. That might be of great concern, knowing that the soils beneath that are sands, poly-permeable soils. Once again, another type where it's somewhat subtle.

Q. You said that chlorides were the only constituent of 3103 where discharges variance would be up to 3103 or background, whichever is larger, right?

A. I don't know if I understand your question.

Q. Chloride is the only constituent that can be used for background?

A. Yes. The chloride standard, we specify it separate of the 3103 standard, which indicate it's separate from that, and we also would consider background for that, yes.

Q. And the example you gave were organics. I believe you mentioned BTEX. However, 3103 also has standards for inorganics, as Mr. Frederick discussed, and there are also areas of New Mexico in which those standards are exceeded naturally. But yet you won't use those backgrounds in those particular areas.

I mean, we've heard about arsenic north of Albuquerque and mercury out of Pecos, very well known areas of background levels of higher areas on 3103. Why couldn't an operator demonstrate that in those areas where selenium in the Dakota is way above standard? They could not use those same backgrounds?

A. I guess because the 3103 constituents include organics as well as inorganics. A lot of the organics would not be naturally occurring. BTEX, benzene, xylenes, toluene, all of those type of things should not, would not, be a naturally occurring type constituent.

Q. I'll agree with that.

A. So what we don't want to do is create confusion by saying if we do apply background for the 3103 that any existing contamination could be considered natural background for those constituents, especially the organics.

Q. But strictly looking at inorganics in 3103 -- I'm not talking about organics in any shape or form -- looking at the inorganics that are naturally occurring at a level higher

than 3103, if an operator has that information, why can't they use that --

A. Well --

Q. -- as a reference?

A. The reason why is because the rule isn't written that way. Would it be prudent for something like that to be applied? That's not the language that we have to deal with. It doesn't talk about utilizing background for the inorganics that you're referring to.

Q. But would you object to inserting that language?

MR. FREDERICK: I don't want to object. I just want to clarify. Are you talking about groundwater background? I'm just asking for clarification.

COMMISSIONER BAILEY: I'm talking about vadose zone.

MR. FREDERICK: Vadose zone? In which case, there's no standard for vadose zone in 3103?

COMMISSIONER BAILEY: Right. Because 3103 applies to groundwater.

Q. (By Commissioner Bailey): But we've also discussed how chlorides are the only background levels that it can be compared against?

A. Yes.

Q. I'm questioning why can't we include other inorganics.

A. I think when you look at it -- and you're looking

at your cation and your anions -- I think that would be prudent to compare background to.

Q. Okay. That's all I have.

CHAIRMAN FESMIRE: Why don't we go ahead and take a 15-minute break before Commissioner Olson begins his cross-examination.

We'll return at 20 to 4:00.

[Recess taken from 3:25 p.m. to 3:43 p.m., and testimony continued as follows:]

CHAIRMAN FESMIRE: Let's go back on the record. The record should reflect this is the continuation of Case No. 14292. The record should also reflect that all three Commissioners are present. We, therefore, have a quorum.

I believe, Commissioner Olson, you were going to skewer Mr. Jones.

COMMISSIONER OLSON: I was just going to ask him a few questions. Some of it is going to be some -- I'm still trying to clarify a few issues, I think, that came up earlier. Maybe I'll just start with a more broad one.

EXAMINATION

BY COMMISSIONER OLSON:

Q. Mr. Jones, I'm just curious. Were these proposals reviewed through with industry and public like they were in the last round? Or is this just coming forward as an OCD proposal at this point?

A. I honestly don't know who was involved in the process of discussing these. I know we had put together proposals of certain concepts and ideas to be discussed by various parties, and I was not present at any of the discussions.

But based upon direction by the Governor's Office to our secretary, it was recommended that we would present certain regulations that would address certain issues, and we did put those together without discussing it with industry.

Q. Or the public? So it didn't go through the whole stakeholder process like that lengthy process you had last time?

A. No.

Q. Okay. Then maybe I'll just start on the below-grade tanks just because I think I'm maybe still a little confused.

And this is coming back to things that are, I guess you would call them grandfathered in, and some of the things that are not. For example, on the below-grade tanks, if the sides are buried, is it possible that the operator can come back and open them back up so that they can be observed without replacing -- essentially, make it into one of the interim systems and pull it back?

A. Well, the interim designs? No, they cannot. The reason why is because the rule is very specific. If you're

required to retrofit, you're required to retrofit to have an approved design. And if you go to an approved design, that means you're going to have to remove the tank from that area even if you made the sidewalls visible. You would have to remove it.

You would have to install a specified geosynthetic liner, 30 mil flexible or 60 mil HDPE, and it would have to be raised six inches off the ground, it would have to an automatic shutoff, manual shutoff, all these different things, which means removal of the tank in order to do that. That's why we're saying you need to assess it underneath.

Q. But the tanks in good shape, I guess they could retrofit the tank to meet those purposes then?

A. They could. And that's why I'm saying they may be able to use these tanks during their retrofits, but they're still going to have to remove the tank to go to an approved design as it's specified within the rule.

Q. And not the interim?

A. No. Interim is still a nonconforming design. It's not an approved design by any mean. And the current rule doesn't even allow you to do what you've asked for -- presented that scenario. The current rule doesn't even allow that.

Q. Okay. And, I guess, one thing I didn't see in your design -- which I know there's a lot of tanks out there, and you mentioned this -- was the double-bottomed tanks. So if

there's a double-bottomed tank -- and these were tanks that were put in before to comply with prior rules.

So if there's essentially a double-bottomed tank but it has single walls and the walls are exposed so that you can visually inspect it, does that fall within one of the interim designs? Because I didn't see that in your schematics.

A. Yeah, it would. And I guess I'm kind of confused by the statement that it would comply with the old Rule 50. Rule 50 says secondary containment for leak detection. It didn't just say secondary containment from the bottom. It said secondary containment for the tank.

So that's where I think -- that's what we're looking at. We expect secondary containment for the whole entire tank. But in the case where you would have a single wall tank with a double bottom, it could, under our proposal -- and it has visible sidewalls -- it would become the new I(5) design or grouping.

Q. So it would meet one of the interim designs?

A. Under our proposed rules, yes.

Q. Okay. Because I was concerned because the Division had approved those in the past as allowable for, essentially, having leak detection. And it seems to me that you would be penalizing the operator now for complying with Division rules in the past when they've now changed.

A. Well, if it had visible sidewalls, under the old

rule it wouldn't be a below-grade tank. That's why we changed the definition of a below-grade tank.

Q. Okay. And I guess I'm a little confused by some of the things that you were saying about repairing the tank. Can you have -- under the rules as proposed, can you have a below-grade tank failure and repair it, but not replace it?

A. I guess.

Q. You mentioned a tank that had kept getting repaired, say, it's been welded.

A. Yes. I guess there's two distinctions there. Is that a conforming tank? Meaning, does it have an approved design or doesn't it? If it's a nonconforming tank, the rule is very clear. If you have integrity failure, you have to retrofit or replace it or close it. These are your options.

So to repair that one, you may be able to repair to use it in your new retrofit or replacement if that's prudent. But if that's not a practical thing then, you know, there's no need to repair it and keep it in operation. Because the rule tells you that you're supposed to, if you have integrity failure, which is that's what that is going to amount to, that you're supposed to retrofit it or replace it with an approved design.

Q. Thank you. I think I was a little confused on that.

A. Okay.

Q. And then I'll come back to an issue that was brought up, and maybe we won't go quote as lengthy, hopefully. But I'm just a little confused when you need to meet the siting requirements on a retrofit. Can you come back? And I know you gave an example of, say, a tank that's sitting in groundwater. Obviously, I see that's a little different. But I think most of them are probably not like that because that causes them a lot of problems too in terms of corrosion, et cetera.

So if they need to retrofit those, under the rule can they -- do they need to meet the siting requirements? Say, it's such a distance to the San Juan River or --

A. Not necessarily. And that's what I was trying to get at. We have to asses each one on a case-by-case basis. The FAQ, the Frequently Asked Question that we put out was to clarify that you still need to demonstrate the site criteria. Not necessarily demonstrate compliance, but demonstrate it so we can make proper assessment.

One of the examples I brought up was, say it is in a 100-year floodplain, and it's on the inner portion of that prone, more prone, and subject to flooding than the outer edges, then we may consider that a concern, and permitting may have nothing to do with groundwater separation there, but the fact that it's prone to flooding.

It would create some issues for operation which they have to control the run-on of surface water. They would not be

able to comply with that portion of the operational requirements during a 100-year flood event. So we're going to have to look at those things to make that assessment.

What we're also trying to do is inform the operator you need to be prudent and make these assessments up front before submitting a permitting application to kind of cull those out and submit closure plans for them if you think that they are something that would create that imminent threat situation.

Q. So if they -- I know I've seen a lot in the past that have been -- especially up on the San Juan River that are in the 100-year floodplain. It seems to me that in that kind of circumstance, you couldn't have a below-grade tank at all then.

A. It may definitely create issues with that. Because there's so many relating regulations within the rule pertaining to operation that would prevent you from operating that to be compliant with the rule.

Q. So what would be the solution in that case? Would they have to go to an above ground tank?

A. Absolutely.

Q. Sticking with the below-grade tanks, I'm looking at the rule that's proposed in the new language in -- what is it? 17.12.5 -- I'm sorry. D(5) on page 10 -- I'm sorry. D(6). Excuse me.

And in the center of that paragraph, it talks about the operator demonstrating whether evidence of contamination indicates an imminent threat to fresh water, public health safety, and the environment. But I notice that it seems like when you're doing these retrofits, all you have to do is visually inspect the area beneath the tank; is that correct?

A. That's the initial part of that. It's not to say that the visual inspection itself is demonstration if there's an imminent threat or not. And we're trying to grant some flexibility in how that can be approached by the operator.

The visual inspection is the first notation that there are signs of a potential release. In order for the operator to demonstrate if there's an imminent threat or not, we would take further steps to demonstrate that to the Division. Things that we're looking at, this only applies to existing nonconforming tanks.

So things like the siding may come into play on that. Separation of groundwater may come into play on that, those type of concerns. Locations of wells and proximity of that operation may come into play. Those are things we'll have to assess on a case-by-case basis in which the operator will be responsible in coming up with a proper demonstration to us.

We're not going to dictate what that demonstration is. They'll have to demonstrate that to us.

Q. Well, I guess I was looking at Item 5 up above,

and it talks about if the tank doesn't have integrity, then you close it out pursuant to the closure requirements of Section 13. Why wouldn't you follow the same type of procedure? It seems to me like you would need to take samples from beneath the tank if it's discolored or wet at that point, which is what's in the closure requirements in Section 13.

A. Yes. And the reason that's a distinction is because in that scenario you know there's a release. You know when it occurred and potentially how much water, or you know water that the tank was holding may have been released from the tank.

The other scenario is we don't know when it occurred. We don't know how much was released, and it could have been based upon a tank repair-type thing. We just have no knowledge of that.

In the other case, it's something that was occurring at the moment, which we know for a fact that a release did occur from that tank, exactly from that tank. In the other case, it could be a release or some staining from other activities not related to the tank itself. We just don't know.

But in the case for Paragraph (5), it's very clear that's a time that a release has occurred, the integrity has failed with that tank, and it is creating an impact at that moment.

Q. But I guess I'm confused. Isn't the same thing

happening in (6)? You remove the tank, and you see that it apparently didn't have integrity at that point?

A. Well, no, there's a distinction between the two. One is where (5) is addressing when it does occur. When a release has occurred, you're required to notify when the tank integrity fails or that puncture occurs below the liquid line, and you're having to report it.

All these things have to be reported by rule, and you're addressing that release. In Paragraph (6), this is for prudent operators that are saying, we just want to go ahead and upgrade our tanks, and we're going to look underneath to see if there's any issues. Those tanks may be perfectly fine that they are retrofitting, but they are checking to see if past practices -- there may be some contamination from past operations prior to the Pit Rule.

Q. I guess I'm just not seeing the distinction because I had also -- it seems to me that it just seems pretty broad. It doesn't seem to have a lot of clarity for the operator as to what they need to do at that point.

When it just says it's a demonstration, if I was the operator, I would just say, well, what am I supposed to do then? There's no real -- it doesn't seem to be particularly clear versus the requirements of following the closures in Section 13.

A. Yeah. I guess, once again, we wanted to give the

operator the opportunity to demonstrate on their own what they thought was prudent to make this assessment. In these cases, these are going to be below-grade tanks that may not meet all the siting requirements. It would be grandfathered in to a certain extent.

They may be in situations where if they do some testing underneath that from the siting of that tank, it may not be an imminent threat. The difference is, was there -- on the other one we know there's a release. We're addressing the release and the cleanup of that release.

On this one, we don't know what the potential source would be. It could be a source other than the below-grade tank. We're looking at a different level of protection. We're looking at something that would have an immediate impact, an imminent threat to fresh water, public health, and the environment. So we want to consider this immediate threat and have it addressed if it is such a scenario.

Q. But I guess you would agree it doesn't give a lot of clarity to the operator as to what would be required in those circumstances?

A. No, it doesn't. We're trying to give them the opportunity to provide that demonstration and let them come up with what they think is prudent, and then we will assess it.

Q. Well, you'll have to excuse me, because after just going through the session and getting repeatedly beat up

from industry on not having clarity in rules, this to me is something that should be clarified.

A. That would be good. You know, this was all during the session. All this development came about, and the language we proposed came up during the session. So if that is something that you got from that, I think it would be appropriate to address it -- for the Commission to address that.

Q. Well, I guess, would it be appropriate for it to be -- to look at the contamination the same way as to a closure where you have to come in and sample it, determine what you actually have? If you have nothing there from sampling it, then I think you would know you didn't have an imminent threat.

It seems to me that -- would it be appropriate to apply the requirements of Section 13 as the guide for how you would go forward in determining what's an imminent threat?

A. It would be recommended from us that those would be the appropriate steps to start that assessment and apply those to make that determination. So they would be appropriate.

Q. Maybe I'll move just for a second to the deep-trench burial. Isn't deep-trench burial similar to our requirements for landfills? Isn't that essentially similar to landfilling?

A. For landfilling or landfarming?

Q. Landfilling within the Surface Waste Management rules?

A. Can I clarify by asking in what regards are they similar?

Q. In that you're burying waste below, you know, within a lined system under the ground.

A. Yes and no. Yes, they are a lined system. The difference in the lined system is that a landfill would have -- it would be double-lined for leak detection. So there is a difference.

There's the potential for groundwater monitoring under Part 36 for a landfill. And so there are some differences in that. Of course, there's no testing of what goes into the landfill, as in waste. There are no testing parameters for drilling waste.

Q. But aren't your contaminant concentrations that are going to be going in here, at least in terms of salts, will be fairly comparable, essentially 60,000 mg/Kg of chloride as to what would go into a landfill?

A. It could be. It could be even higher for a landfill.

Q. So then why is trench burial requirements different than landfilling?

A. Once, again --

Q. I only bring this up as a concern because of the

change in the chloride level that's looked at now is something that seems to me to be more approaching what concentrations that we now look at for landfills.

A. There's no concentration limit to what can go into a landfill. It could be 200,000 mg/L if you wanted it to be, as long as it's a solid and passes the paint filter test.

But, once again, landfill is double-lined with leak detection. This is single-lined. Once again, you could have a groundwater monitoring system required for a landfill the way the rules are read for that.

So, there are differences in design and operation waste acceptance that are different for landfills compared to a deep-trench burial. And there's fewer landfills than there would be the potential for on-site trench burial.

Q. Well, I guess the scale is a little bit different too.

A. Absolutely.

Q. Okay. I heard you mentioning that it's your understanding that some of the changes that the Commission had instituted in the rule over what the Division had proposed last time was because the Commission was looking at some consistency between rules such as those with the Surface Waste Management rules; is that correct?

A. Yes, that was my understanding.

Q. And do you believe that it's good to have

consistency between rules?

A. Absolutely, if they're applicable. Let me clarify that.

Q. And I guess this brings me back to an issue that was, you know, brought up earlier with Mr. Boyd today, then, on surface landowner issues.

We have requirement for small landfarms in the Surface Waste Management rules that it requires surface landowner approval for a small landfarm; isn't that correct?

A. I believe so. But small landfarms are excluded from taking drill cuttings also.

Q. And they are excluded from having high levels of chlorides, correct?

A. There is a restriction in their waste acceptance, yes.

Q. So I guess it makes me wonder why, if we have something that's considered a relatively more benign material that can be landfarmed and left on the surface, whereas that requires surface landowner approval, and we now come to landfilling on someone's property, why that would not require landowner approval?

A. Well, I think the difference is, once again, the small landfarms are not -- you're prohibited from taking drill cuttings. And we're talking about the disposal of drill cuttings. So you wouldn't be able to have a small landfarm to

accept or remediate drill cuttings anywhere in the state just by the way our regulations are written under Part 36.

When you're talking about a landfarm as it's defined under Part 36, that's different. Actually, the 3103A and B constituents are part of the closure standards for those landfarms. So when we're looking at those, we're looking at TPH-DRO or GRO chlorides and 3103A, B 3103 constituents.

Q. Well, I guess I'll come back. I was just talking about the small landfarms because if you're looking at the large landfarms, it's my understanding that the operator owns those facilities, so it's not an issue as to having landowner approval on those. But for the small landfarms, typically, they will occur where the spill occurs, which may be on someone else's land.

A. And I guess what I'm trying to make a distinction of is, the intent or purpose of those landfarms is not the same as burying drill cuttings at the site because they are prohibited. These are smaller remediate landfarms for other type of materials, petroleum hydrocarbon type materials for remediation. And I guess what I'm trying to get at is that they're not the same for comparison by the waste treatments.

Q. But, I guess, it seems to me you're making my point. Aren't those smaller more benign-type systems? Isn't that correct?

A. Yes.

Q. And they require landowner approval in the rule, don't they?

A. Yes.

Q. So why wouldn't we, for something now that we're burying high levels of waste potentially on someone else's property, why would that not require landowner approval?

A. I think if I remember correctly under the Pit Rule hearing, there was concerns about conflict with the Surface Owners Protection Act and the OCD trying to implement the Act that we don't have the authority to implement. And those are agreements between surface owners and the operators on the activities that occur.

I think we started to steer away from that under the Pit Rule hearings about that approach because of the conflict with that and our authority to implement those agreements and have some impact in those agreements.

Q. I know. But I guess if I look at the Surface Waste Management rules in 19.15.36.16A(1), it doesn't talk about anything about surface owner agreements. It just talks about the operator shall furnish with his Form C-137-EZ its certification it has a written agreement with the surface estate owner authorizing the site's use for that proposed landfarm.

A. Yes. And, once again, that's a Surface Waste Management facility. We're talking about on-site disposal of

drill cuttings occurring through the exploration and development within that site.

This right here requires a permit from that specified facility. I think it has a life span of so many years. Once again, these drill cuttings are prohibited from going to those. It serves a different purpose.

You know, I guess I'm not quite getting the link because I think they're two extremely different subjects.

Q. Well, I guess I'll just come back again. This is something that's relatively benign in comparison to 60,000 mg/Kg of chloride; isn't that correct? In a disposal?

A. Yes. And, of course, that concentration of chlorides would never be accepted at such a facility.

Q. Right. But at the same time, it has very -- this is relatively benign-type material that requires landowner approval.

A. It's my understanding it's more benign than what we're looking for on the on-site trench.

Q. Right. And then as proposed, the on-site trench does not require landowner approval?

A. No.

Q. I guess I'll come back to this issue. And this comes back to the question Dr. Neeper was asking. He was getting into this idea about background concentrations. And I know that's the way you have this written at the moment, or the

Division has this written at the moment, is that the new requirement would be 3,000 mg/L of chloride in the leachate or the background concentration.

And, I guess, have you ever seen a background concentration approaching 60,000 mg/kl of chloride?

A. Well, one of the other things Dr. Neeper asked was how would this apply to certain areas like potash areas. And in those areas, they would have the potential, and this would be a natural use for that area for their natural operation. So they could have the potential of having such high chloride.

Q. And that would be in an area where there is direct discharges from the potash?

A. Well, you know, if you're in an area that's holding water, you wouldn't be able to get a pit out there anyway. You wouldn't meet the siting requirements, so there's other issues. This would have to be a previously used area that was used for that, if that was the case for that discharge.

Q. So this doesn't sound like this provision would really be used in a lot of circumstances. I guess I was just confused as to why that was in there.

A. Well, we thought we would address it because we actually utilize it for in-place burial. It was background -- you're able to utilize that for background for in-place burial.

So we thought it would be prudent to address that just in case there is a scenario that there is a high background that it could be used for.

It wouldn't make sense if the natural occurring soils exceed the 30 mg/L, and you couldn't bury it there because you also exceeded up to that same level.

Q. Well, I agree. But the other thing I come back to is Commissioner Bailey's question earlier that there's other things that are naturally high in background, some metals, especially. It depends on where you're at in the State. Some areas have high aluminum; some, high selenium; some have high arsenic.

Different things occur in different areas, and here it seems to be that the background concentration only applies to chloride and not to other metals that may be out there, for example.

A. Yes. And, you know, I don't think we would have an issue utilizing certain constituents under the 3103. The ones that are not naturally occurring, we would have issues utilizing an existing background for those though.

Q. So that's such as the organics. But, I guess, the Division wouldn't have a problem with applying background concentrations to natural occurring metals, for example?

A. No, we wouldn't have a problem with that.

Q. Okay. I'll follow up on another one of

Commissioner Bailey's questions.

It seemed to me you were saying that -- I guess I'm a little confused. Because it seemed to me you were saying the Division is keeping records of when there's releases from a tank, correct?

A. Well, under the current Pit Rule, the operator is required to notify us when there is a release. So, yes, there would be documentation of that.

Q. So, I guess, why the need to keep the monthly records, then, if a release occurs and they have to report it to you? Why not just have a requirement in the rule that they inspect them on a monthly basis?

And I guess you just want to see some way to have a record that they're actually conducting the activities that are required?

A. That definitely re-ensures that they are complying with that part, the documentation of it. Because we may run into a scenario where they skipped a month, and they go out and they see it's holding a new fluid, and there's some type of integrity issue with the tank.

At that point, there's been discharge into the tank for approximately two months or more. That would be of grave concern to us, and we would need to know that.

Q. I just have a couple of others.

When you came around to the language that's proposed

in 17.17 in the transitional provisions on page 19 of Exhibit 2, there's certain language that appears in both Items (c) and (d).

A. Yes.

Q. And at the end of the new -- towards the end of the new language, it talks about the registration. And I'm assuming this is information that's coming from the operator; is that correct? This registration list that's got all this information?

A. Yes. Actually, the language states the operator shall submit.

Q. And at the end here, it talks about a determination if a permit or permit modification is required.

Wouldn't it be the OCD making any determinations as to whether a permit modification or permit is required, not the operator?

A. Well, actually, it would be the operator who would be demonstrating that to us. And the reason why is because the operator should know if they currently have a permit for that tank or not.

Q. Well, I guess, to me, maybe it's the word "determination." It sounds to me that's a final thing. It's a final decision made. When you say "determination," it sounds like that decision is made by the operator.

Would it be more appropriate to say that it would be

an evaluation of whether a permit or permit modification is required?

A. That would be -- that would clarify that, yes.

Q. Then the Division would make that final determination whether something was required?

A. Yes. What we were trying to do is actually have them establish some type of status of that tank, that below-grade tank or lined permanent pit. So they would give us what they -- I guess evaluation would be more appropriate for that.

Q. Okay. I think that word was my main concern.

A. That would be -- evaluation would be a perfect replacement for that.

COMMISSIONER OLSON: I think that's all I have.

EXAMINATION

BY CHAIRMAN FESMIRE:

Q. Mr. Jones, talking about the provision in 17.13A(5) on the transfer of ownership, the merger of two companies would be a transfer of ownership that would require -- that would trigger the requirement that they address these grandfathered tanks? Nonconforming tanks?

A. Well, I think Mr. Brooks clarified some things. We're dealing with the operator, not the entity, necessarily. Entity could be multiple parties. So it would only apply to the operator of those below-grade tanks.

Q. So, for instance, when Texaco and Chevron merged, if this provision had been in place and Chevron had several nonconforming wells that were under this provision, that merger would trigger the requirement?

A. If Texaco is still part of that party of being an operator, the operator would remain the same to a certain extent, meaning that -- let's say, currently, you've got Conoco Burlington as the operator. Let's say Burlington separates from ConocoPhillips. Conoco still maintains the operation of those tanks. Conoco was originally part of the operator. They still remain the operator. There is no change of operator at that point.

Q. Okay. Now, you were talking about that there was testimony in the prior hearing about the effective working life of a liner, and you said somewhere between 70 and 250 years?

A. I know I said 250, but maybe 70 to 250. It varies from different parties.

Q. But you indicated that it wouldn't be an instantaneous failure; it would be a failure over time?

A. Yes.

Q. And wouldn't that failure control the max flux of the chlorides to the water table?

A. Oh, absolutely.

Q. So that lack of an instantaneous failure, not only are liners valuable in the short term for preventing

escapes, but in a situation such as a deep-trench burial, they're actually a regulator of the dissemination of the contaminant?

A. Yes. They would create some type of delay mechanism of total concentrations being released.

Q. And the purpose would be to keep that release down to a manageable level, right?

A. That's the idea.

Q. Okay. Now, you mentioned -- I forget who was asking the questions, but they started talking about under the transfer of ownership provisions, financial assurance, and contractual warranties and certification -- but the State of New Mexico is not the recipient or not the beneficiary of a contractural warranty between two other parties to indemnify themselves on the costs of addressing these tanks; is that correct?

A. Not that I'm aware of.

Q. Okay. So I guess what I'm saying is A sells to B. A indemnifies B for his environmental risks in acquiring the tanks. But then B walks off and leaves the State with nobody to address, right?

A. Yes.

Q. So the purpose behind the idea that they had to address these tanks upon transfer of ownership was to minimize the risk to the State that these would become orphan sites to

which the State has the responsibility of remediating, right?

A. Absolutely, yes.

Q. So while the proposal does, in essence, stretch out the costs to the operator, this provision -- which would, in turn, increase the risk to the State -- this provision minimizes or mitigates that risk to the State; is that correct?

A. That is correct.

Q. Now, I think both the other Commissioners asked you this, and I didn't quite follow it.

The record's provision on these nonconforming tanks where we're going to have to keep records for the life of the tank, I'm a little confused. Why would we need to keep those records if upon an integrity failure and an integrity issue we have to replace the tank?

If we're looking for those integrity failures, isn't the first recordable event the trigger that makes us pull that tank and replace it?

A. Yeah, that is true. Maybe I didn't clarify that. If you have a nonconforming tank and you have an integrity failure which required you to retrofit and replace that tank, that new design becomes your new tank in which you would start a new record on.

So, once again, now you would have a conforming design which we would want to monitor to make sure that if there's other tank failures based upon this conforming design

that we can address those in the same fashion for tank replacement.

Q. Okay. And I can see the value of that. But what concerns me is the idea that we have a nonconforming tank, that upon its failure, upon its first integrity issue, we're going to replace, why would we need to keep a record on it?

A. Well, in that case, you could say that record almost ends on that tank because you're replacing it. That's what we're trying to get at.

Q. Right.

A. Right now under the current rule, you would be required to keep that record for five years. What we're stating is that you would start a new record for the new tank. You would need to keep the record for the old tank that you replaced or retrofitted.

Q. Okay. But the question is: Why, if we're going to replace that tank on the first integrity issue, why do we need to maintain a record on the nonconforming old tank?

A. We're not saying that. We're saying the life of the tank, life meaning the operation life. So your old tank that you're saying is nonconforming, that has an integrity failure --

Q. Right.

A. -- when you have to address that to bring it up to an approved design, to a conforming design, that old tank

goes.

Q. But doesn't this rule require us to keep records on any of those tanks?

A. No.

Q. Inspection records?

A. Let me find the language. It should be for the life of the tank, meaning that if that tank is replaced with a new tank, that's a new tank with a new life.

Q. But that's not the question. The question is: We have an old tank that's a nonconforming tank. We have to maintain a record on it, right?

A. Yes.

Q. But the first time it fails an inspection, we have an integrity issue, and that's the trigger to replace it, right?

A. Yes.

Q. So why keep the record?

A. We're not saying that. We're saying that when you go to replace it, it starts a new record process for the new tank. We're not saying you continue to monitor a tank that's nonexistent that's been retrofitted.

And maybe I'm -- what I'm saying is that the recordkeeping requirement for that nonconforming tank that you just replaced, it ends when you replace it.

Q. Okay. Okay. Now, that's the question I'm

asking. Why, if it is going to end upon the first failure, do we need to maintain that record?

MR. SMITH: Prior to the failure?

THE WITNESS: Oh, prior to the failure. I thought you meant continued.

Q. (By Chairman Fesmire): No.

A. Okay. Why would you need to do it? Once again, it comes back to demonstration that the proper inspections are being done on a monthly basis as required in operational requirements. What we don't want is someone to arbitrarily say, we want to check it every couple of months or whenever we get out to it and then find the integrity failure occurring and say --

Q. So the purpose of the record is not to maintain a history of the failures, it is simply to maintain the inspections.

A. That's part of it. The thing is is that this recordkeeping requirement applies to both conforming and nonconforming tanks. For the conforming tanks, it definitely creates a record history for those.

Q. Right. Right. And I'm not saying that.

A. Yeah.

Q. Okay. So like I said, what's the purpose? The purpose is to?

A. To ensure proper inspections.

Q. To document the inspections, not to document the failures?

A. Yes.

Q. Now, you got into a discussion about small landfarms and the requirement under landowner notification. Small landfarms are a temporary surface occupancy, aren't they?

A. Yes.

Q. The deep-trench burial that we're talking about, even with the design that is going to be required here, that's not a permanent surface occupancy, is it?

A. It is a permanent -- well, surface? It's subsurface.

Q. It's a permanent subsurface occupancy. The question is: It is not a permanent surface occupancy?

A. No, it's not.

Q. Okay. So there's a major difference right there; is it not?

A. Yeah, that is a difference.

Q. Okay. The small landfarm, you're asking that landowner to use a part of his surface for a specific period of time, whereas the deep-trench burial is a permanent occupancy of the subsurface, which should not interfere with the -- if it's done right -- should not interfere with the surface occupancy?

A. Correct.

CHAIRMAN FESMIRE: Okay. I don't have anything else.

Mr. Brooks, do you have any recross?

COMMISSIONER OLSON: Can I follow up on that? Sorry. I can't resist.

So you're saying a deep-trench burial doesn't interfere with the surface occupancy, but can I build -- my well is plugged and abandoned, can I build a house on it? Can I build a barn? Can I put a --

THE WITNESS: You can through the exception process. The rule allows you to request an exception for that. There's going to be a permanent marker at the surface, which parties could ask for an exemption for a subsurface marker of some sort.

There are exceptions to those provisions that would allow landowners or operators to request those alternatives.

COMMISSIONER OLSON: But the landowner didn't put it there. I mean, what's -- I guess, what would prevent the landowner from coming through and digging a trench right through the middle of it to lay a water line or electric line or something like that?

THE WITNESS: Well, we're hoping that -- in this case, let's say it's done by rule, which means there's going to be a four-foot marker, steel post marker sticking out of the ground. We would hope that they would realize that's going to represent something and investigate it since it's required to

have specific information pertaining to its activities marking that marker, and they would inquire about that.

COMMISSIONER OLSON: But there's no binding agreements that the landowner can't come through and put something right through the middle of it, is there?

THE WITNESS: No, there's nothing.

COMMISSIONER OLSON: Okay. That's all I have.

CHAIRMAN FESMIRE: Mr. Brooks, do you have any redirect?

MR. BROOKS: A couple of questions, Mr. Chairman. You did a pretty good job of rehabilitating my witness. I do have a couple of questions.

REDIRECT EXAMINATION

BY MR. BROOKS:

Q. First of all, on this transfer of ownership provision -- relevant to this transfer of ownership provision, does the Pit Rule, Part 17, contain any financial assurance requirements?

A. No, it doesn't.

Q. In other words, there may be financial assurance requirements involved with the transfer of a well, but there's nothing involved in a transfer of a pit or tank?

A. That's correct.

Q. Okay. Now, we've talked a lot about background. All the explanation you gave about the natural use of the land

and so forth, none of that is in the proposed rule, correct?

A. No.

Q. Is the term "background" standing alone, as it does in the rule, is it somewhat ambiguous?

A. Yes.

Q. Does the rule give you any guidance as to where you take the background samples?

A. No.

Q. And does the rule give you any guidance as to whether it's the background that would exist if there had been no prior contamination of the site or whether it takes into consideration prior to contamination of the site?

A. From previous testimony, it would be no contamination of the site.

Q. That would be your recommendation, correct?

A. Yes.

Q. But would you agree with me that that's not necessarily inherent in the term "background"?

A. No.

Q. You would not agree?

A. I would agree that it's not. I'm sorry.

Q. Okay. Given those considerations, would you tend to recommend -- would you or would you not tend to recommend that perhaps the Commission either request us to, the Division to, or itself, with the assistance of Commission counsel, craft

a definition of background if they choose to adopt this provision of the rule?

A. Yes, that would be a good recommendation.

Q. Thank you.

MR. BROOKS: I believe that's all I have, Mr. Chairman.

CHAIRMAN FESMIRE: Ms. Foster, do you have anything about background?

MS. FOSTER: No, but I have questions about transfer of ownership --

CHAIRMAN FESMIRE: Okay.

MS. FOSTER: -- since that was asked on redirect.

RECROSS-EXAMINATION

BY MS. FOSTER:

Q. I just want to make sure, Mr. Jones, that I understand the question of transfer of ownership. I believe you responded to Mr. Fesmire's question that if Texaco and Chevron owned a location, they would have to be continually operating together in order for that not to be considered a transfer.

A. I don't think I made that statement. I think what I was getting at is that if Texaco and Chevron were dual owner/operators -- or operators, because the rule specifies operator -- operator of a below-grade tank and they split and Texaco remained the operator, the operator really didn't change

because Texaco was the original operator. So there would be no transfer of ownership per se to a new operator that is not Texaco or Conoco.

Q. Or any division of Texaco or Conoco? Internal division?

MR. BROOKS: May I ask that Ms. Foster clarify? I think she attempted to with the term "internal," but distinguishing a mere subdivision of a given corporate entity versus a subsidiary corporation.

MS. FOSTER: Yes, I'm sorry. I will clarify.

MR. BROOKS: Because the witness is not a lawyer.

MS. FOSTER: Yes.

CHAIRMAN FESMIRE: But he plays one regularly. Why don't you re-ask the question then and clarify that.

MS. FOSTER: I will. Thank you.

Q. (By Ms. Foster): You have this situation where company A is the operator of a below-grade tank. Company B comes in and purchases company A, takes over company A. Company A disappears. Company B now owns that tank.

That is a transfer, correct?

A. Yes.

Q. Now, if company B has several divisions, internal divisions, and they transfer that from the Northwest division to the Southwest division internally within company B, is that considered a transfer?

A. As long as -- I guess it depends on how they decide to permit -- identify themselves linked to that operation.

And the reason I state this is we've seen certain companies have X company and then X company field services, and they're not related at all. And they separate at some point, and they're no longer the same entity.

So it -- if they were up under company A and company -- their little subset is still up under company A and always up under company A, then that would not necessarily be a transfer. But there are distinctions where at some point they do separate, and that is a true transfer.

Q. Okay. When they separate?

A. When they are no longer the same entity or linked as such.

Q. Okay. I don't believe I have any further questions. Thank you, Mr. Jones.

CHAIRMAN FESMIRE: Mr. Carr?

MR. CARR: No, sir.

CHAIRMAN FESMIRE: Mr. Hiser?

You notice I went straight to Mr. Hiser?

MR. HISER: I appreciate that, Mr. Chairman. No, I have no questions.

CHAIRMAN FESMIRE: Mr. Frederick?

MR. FREDERICK: Mr. Chairman, I just have a couple,

and it has to do with Mr. Jones' response to one of Mr. Olson's questions.

RECROSS-EXAMINATION

BY MR. FREDERICK:

Q. Did I hear you say the Governor's Office is the reason that the Division is proposing this rule change today?

A. I can say our recommendation for the changes are from our secretary. So that's where I get my instruction from. So the Division, as itself, is representing the recommendations from our secretary.

Q. And did I understand you to say you don't know why -- and maybe I just heard wrong -- that you don't know where the 3,000 mg/L standard came from?

A. No, I didn't say that.

Q. Where did that come from?

A. As I stated earlier, we were told to make recommendations to be discussed outside of our preview. And we made those recommendations.

Q. So the Division came up with the 3,000 mg/L on its own? There was no meeting with industry about that?

A. We made that recommendation, yes.

Q. With no meeting with industry?

A. We do not meet with industry ourselves, no.

Q. Okay. All right.

CHAIRMAN FESMIRE: Dr. Neeper?

DR. NEEPER: I'll ask just one question for further clarification.

Did you meet with members of the public either?

THE WITNESS: No, we did not.

DR. NEEPER: Thank you.

CHAIRMAN FESMIRE: Mr. Brooks, anything else we need to address with this witness?

MR. BROOKS: Not with this witness, Mr. Chairman. I was going to mention that we have another witness who has been waiting all day and we can dispose of in about ten minutes.

CHAIRMAN FESMIRE: Can we use phraseology other than "dispose of"?

MR. BROOKS: We can conclude with.

CHAIRMAN FESMIRE: Thank you, Mr. Jones.

Mr. Brooks, why don't you call your witness.

MR. BROOKS: I will call Theresa Duran-Saenz.

CHAIRMAN FESMIRE: Ms. Duran-Saenz, have you been sworn in this case previously?

THE WITNESS: Yes, I have, sir.

THERESA DURAN-SAENZ

after having been first duly sworn under oath,

was questioned and testified as follows:

DIRECT EXAMINATION

BY MR. BROOKS:

Q. Ms. Duran-Saenz, would you state your name,

please, for the record.

A. Theresa Duran-Saenz.

Q. And by whom are you employed?

A. The Oil Conservation Division.

Q. And is one of your duties with the Oil Conservation Division to attend to the mechanics of giving notices of commission hearings?

A. Yes, it is.

Q. If you will look at the group of papers that is fastened with a fastener there in front of you, and if you would page through it to OCD Exhibit No. 3.

Now, turn beyond the cover to what is marked as page 1 of OCD of Exhibit No. 3, and would you identify that, please.

A. This is an e-mail I sent out March 2, 2009, to Vickie Ortiz of the New Mexico Register.

Q. And what was the purpose of sending this e-mail?

A. To request publication of today's public hearing in the New Mexico Register, specifically, Volume 20, Issue No. 5.

Q. And is that the issue -- what date was that issue published?

A. The notice was published on March 6, 2009.

Q. Now, is page -- now, would you look at page 3 of Exhibit 3? Is page 3 of Exhibit 3 a true copy of the notice as

you delivered it to Ms. Ortiz?

A. Yes.

Q. Now, would you look at page 4? Is page 4 a true copy of the notice that was published in the New Mexico Register?

A. Yes.

Q. Okay. Now, Ms. Duran-Saenz, would you look at page 5 of Exhibit No. 3, and tell us if you can identify page 5.

A. This is an e-mail I sent out on March 2, 2009, to the legal division of the Albuquerque Publishing Company regarding the notice of publication in Case No. 14292.

Q. And would you look at pages 6, 7, and 8, and tell us whether or not they are copies of attachments that were sent with page 5?

A. Yes. Page 6 is my cover sheet requesting the notice be published in their newspaper. Page 7 and 8 is the actual notice that was attached to my March 2 e-mail.

Q. Thank you. Now, I will call your attention to Exhibit No. 4. And would you look at pages 1 and 2 -- or page 1 of Exhibit No. 4, and tell us what that is.

A. This is an e-mail I sent out on March 2, 2009, to parties who expressed an interest in receiving notice of public hearings, as well as parties who have requested notice of proposed rule changes, and with that was an attachment of the

actual notice.

Q. Okay. Do pages 2 and 3 constitute a true copy of the attachment?

A. Yes, it does.

Q. Now, look at page 4, and tell me what that is.

A. Page 4 is an e-mail also sent out on March 2, 2009, to parties who have requested a copy of the notice of hearing, as well as parties who have requested notice of any proposed rule changes. And with this e-mail was attached a copy of the application, as well as the proposed rules provided by the Division.

Q. Okay. And, finally, I'm going to ask -- now, I believe you did testify to this. Was a copy of the application filed in this Case No. 14292 by the Division attached to the e-mail that is page 4 of Exhibit 4?

A. Yes, sir.

Q. Now, I will ask you to look at page 5 of Exhibit 4, and tell me if you can identify that.

A. Page 5 is a letter dated March 2, 2009, to the Small Business Regulatory Advisory Commission, the Economic Development Department, from OCD attorney David Brooks, regarding the application of the Oil Conservation Division for rule amendments notifying them of the April 2, 2009, hearing.

Q. Now, was page 5 sent to -- did you cause page 5 to be sent -- to be mailed?

A. I personally hand delivered it to their Division.

Q. Okay. When did that occur?

A. That occurred on March 2nd.

Q. Now, looking again at the notice, which is pages 2 and 3 of Exhibit No. 4, did you post a copy of that notice on the Oil Conservation Division website?

A. Yes.

Q. And on what date did you do that?

A. March 2, 2009, the same day that I distributed to the parties who have expressed an interest. It's automatic procedure that I post it on the web that same day.

Q. Did you also post a copy of the application filed in this case, Case No. 14292, on the website?

A. Yes.

Q. And did that also occur on March 2nd?

A. Yes.

MR. BROOKS: No further questions. I pass the witness.

Oh, and I tender Exhibits 3 and 4.

CHAIRMAN FESMIRE: Any objections to Exhibits 3 and 4?

MS. FOSTER: No objection. However, I would like copies, particularly the Small Business Advisory Commission notice.

MR. BROOKS: Okay. We will see to it that you get

that.

MR. CARR: No objection.

MR. HISER: No objection.

MR. FREDERICK: No objection.

DR. NEEPER: No objection.

CHAIRMAN FESMIRE: Okay. Exhibits 3 and 4 will be admitted into the record.

[Applicant's Exhibits 3 and 4 admitted into evidence.]

CHAIRMAN FESMIRE: Any cross-examination of this witness?

MS. FOSTER: No, thank you.

MR. CARR: No, sir.

MR. HISER: No, sir.

MR. FREDERICK: No, sir.

DR. NEEPER: No, sir.

CHAIRMAN FESMIRE: Any questions from the commissioners?

COMMISSIONER BAILEY: No questions.

COMMISSIONER OLSON: No questions.

CHAIRMAN FESMIRE: Okay. With that, Ms. Duran-Saenz, thank you very much. You get off easy.

THE WITNESS: Thank you.

CHAIRMAN FESMIRE: Being that it's ten minutes to 5, and we're not going to finish today, we are thinking that we

will go ahead and adjourn and reconvene tomorrow morning at 8:30 in this room.

Ms. Foster, you look like you might have a problem with that.

MS. FOSTER: I do. I have a dentist appointment for my children. I'm a single mom, and I need to take them to the dentist and then to school. The appointment is scheduled at eight o'clock in Albuquerque.

CHAIRMAN FESMIRE: Well, I hate to be hard about this, but I don't know -- is there anybody from your organization that can cover for you while you're gone?

MS. FOSTER: I am a single-person organization, Mr. Chairman.

MR. FREDERICK: Mr. Chairman, would it work to start later in the day tomorrow? It sounds like Mr. Hansen is not going to take that long.

MS. FOSTER: I could probably be here by 10:00 if I rush it.

CHAIRMAN FESMIRE: That's going to make for a long afternoon. Mr. Carr?

MS. FOSTER: Could I step out? Maybe I could make some arrangements with my next door neighbor or something.

CHAIRMAN FESMIRE: We'll just wait for you.

[Discussion off the record.]

CHAIRMAN FESMIRE: We will reconvene tomorrow morning

at 8:30 in this room. And with that, we're adjourned for the day. Thank you.

MR. BROOKS: Point of order.

CHAIRMAN FESMIRE: I'm sorry. Are there any other public -- before we leave, as is our custom, we're going to open the record for public comment. Is there anybody who would like to make a public comment?

Going once, twice, gone. Let's go home, and come back tomorrow morning.

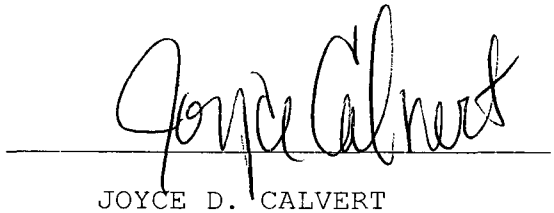
* * *

REPORTER'S CERTIFICATE

I, JOYCE D. CALVERT, Provisional Court Reporter for the State of New Mexico, do hereby certify that I reported the foregoing proceedings in stenographic shorthand and that the foregoing pages are a true and correct transcript of those proceedings and was reduced to printed form under my direct supervision.

I FURTHER CERTIFY that I am neither employed by nor related to any of the parties or attorneys in this case and that I have no interest in the final disposition of this proceeding.

DATED this 2nd day of April, 2009.



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STATE OF NEW MEXICO)
)
COUNTY OF BERNALILLO)

I, JOYCE D. CALVERT, a New Mexico Provisional Reporter, working under the direction and direct supervision of Paul Baca, New Mexico CCR License Number 112, hereby certify that I reported the attached proceedings; that pages numbered 1-242 inclusive, are a true and correct transcript of my stenographic notes. On the date I reported these proceedings, I was the holder of Provisional License Number P-03.

Dated at Albuquerque, New Mexico, 2nd day of April, 2009.

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