

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

PROPOSED AMENDMENT OF 19.15.39 NMAC TO ADD CASE NO. 14255
TWO NEW SECTIONS SETTING OUT SPECIAL
PROVISIONS FOR SANTA FE COUNTY AND THE
GALISTEO BASIN; PROPOSED AMENDMENT
19.15.39.9 NMAC, AND PROPOSED AMENDMENT
19.15.39.10 NMAC.

CASE NO. 14163; CONTINUED TO FEBRUARY 2009
CASE NO. 14106; CONTINUED TO FEBRUARY 2009
CASE NO. 13957; CONTINUED TO FEBRUARY 2009
CASE NO. 14149; CONTINUED TO FEBRUARY 2009
CASE NO. 14150; CONTINUED TO FEBRUARY 2009
CASE NO. 14124; CONTINUED TO FEBRUARY 2009
CASE NO. 14145; CONTINUED TO FEBRUARY 2009

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

COMMISSIONER HEARING

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

January 15, 2009

Santa Fe, New Mexico

This matter came on for hearing before the New Mexico
Oil Conservation Commission, MARK E. FESMIRE, Chairman, on
Thursday, January 15, 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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INDEX

Examiner Hearing
CASE NO. 14255

PAGE

APPEARANCES

3

APPLICANT'S WITNESSES:

BRAD A. JONES

(CONT.) CROSS-EXAMINATION BY MS. FOSTER	7
(CONT.) CROSS-EXAMINATION BY MR. HALL	45
EXAMINATION BY COMMISSIONER BAILEY	46
EXAMINATION BY COMMISSIONER OLSON	70
EXAMINATION BY CHAIRMAN FESMIRE	111
REDIRECT EXAMINATION BY MS. MACQUESTEN	114
RE CROSS-EXAMINATION BY MR. HALL	142
RE CROSS-EXAMINATION BY MS. FOSTER	145
FURTHER EXAMINATION BY COMMISSIONER OLSON	160

GLENN VON GONTEN

(CONT.) CROSS-EXAMINATION BY MR. HALL	171
CROSS-EXAMINATION BY MS. FOSTER	181
EXAMINATION BY COMMISSIONER BAILEY	195
EXAMINATION BY COMMISSIONER OLSON	202
EXAMINATION BY CHAIRMAN FESMIRE	206
REDIRECT EXAMINATION BY MS. MACQUESTEN	209
RE CROSS-EXAMINATION BY MS. FOSTER	217

Administrative Notice of OCD Rules Part 4, Section 13 and Part 4, Section 14	116
---	-----

MARITA NOON

Sworn Citizen Statement	228
-------------------------	-----

Noon Recess	114
-------------	-----

Closing Statements Begin	236
--------------------------	-----

REPORTER'S CERTIFICATE	263
------------------------	-----

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1 CHAIRMAN FESMIRE: Let's go on the record. Let the
2 record reflect that we are in the process right now of
3 convening the regular Oil Conservation Commission meeting
4 scheduled for Thursday, January 15, 2009. The record should
5 reflect that Commissioners Bailey, Olson, and Fesmire are
6 present. The secretary for the Commission is in the process of
7 making some changes to an order, so for the time being, we will
8 not address the adoption of the minutes until she gets back.

9 What we will do is begin with the continuation of
10 Case No. 14255, the Application of the Oil Conservation
11 Division for Orders Regarding Santa Fe County and the Galisteo
12 Basin. This is a continuation of that hearing. Due to the
13 holidays and travel schedules, we had a little trouble
14 scheduling witnesses.

15 But I believe, Ms. MacQuesten, you're prepared to
16 offer Mr. Jones for a continuation of his cross-examination by
17 Ms. Foster?

18 MS. MACQUESTEN: That's right, Mr. Chairman.

19 CHAIRMAN FESMIRE: Just to renew the record, let's go
20 ahead and re-enter the appearances by the attorneys.

21 Mr. Hall?

22 MR. HALL: Mr. Chairman, Commissioners, my name is
23 Scott Hall with the Montgomery & Andrews law firm in Santa Fe,
24 appearing on behalf of Approach Operating, LLC.

25 MS. FOSTER: I'm Karin Foster representing the

1 Independent Petroleum Association of New Mexico.

2 MS. MACQUESTEN: Gail MacQuesten representing the Oil
3 Conservation Division.

4 CHAIRMAN FESMIRE: Ms. Foster has asked that
5 Mr. Jones be re-sworn.

6 Mr. Jones, would you raise your right hand to be
7 re-sworn, please.

8 MR. CARR: Oh, Mr. Chairman, I'd like just the record
9 to reflect my appearance. I'm William F. Carr of Holland &
10 Hart, and I'm entering my appearance on behalf of the
11 New Mexico Oil and Gas Association.

12 CHAIRMAN FESMIRE: Thank you, Mr. Carr.

13 MR. FREDERICK: Mr. Chairman, since Mr. Carr is
14 noting his appearance on the record, I should note mine as
15 well.

16 I'm Bruce Frederick with the New Mexico Environmental
17 Law Center representing Drilling Santa Fe. I'm only here to
18 talk about our notice of recommended changes.

19 CHAIRMAN FESMIRE: Okay. Mr. Frederick, since I
20 don't think you've appeared since we've changed court
21 reporters, you may want to spell your last name for the court
22 reporter.

23 MR. FREDERICK: My last name is Frederick,
24 F-r-e-d-e-r-i-c-k.

25 CHAIRMAN FESMIRE: Before we continue with the case,

1 the secretary has returned, and at this time we will take up
2 the issue of the minutes from the December 11th, 2008, meeting.

3 Commissioners, the secretary has presented the
4 minutes from the last meeting. Have you had a chance to review
5 those minutes?

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

8 CHAIRMAN FESMIRE: Is there a second?

9 COMMISSIONER OLSON: Second.

10 CHAIRMAN FESMIRE: All those in favor signify by
11 saying "aye."

12 COMMISSIONER BAILEY: Aye.

13 COMMISSIONER OLSON: Aye.

14 CHAIRMAN FESMIRE: Aye.

15 Let the record reflect that the minutes have been
16 adopted by the Commission. They will be signed by the Chairman
17 and conveyed to the secretary.

18 Now we will continue with Case No. 14255. We'll take
19 up the Pecos case as soon as there's a break in the flow in the
20 case. Okay?

21 We were trying to swear in Mr. Jones.

22 Mr. Jones?

23 BRAD A. JONES

24 after having been first duly sworn under oath,
25 was questioned and testified as follows:

1 CHAIRMAN FESMIRE: Ms. MacQuesten, may Ms. Foster
2 begin her cross-examination?

3 MS. MACQUESTEN: Yes, sir.

4 CHAIRMAN FESMIRE: Ms. Foster, please proceed.

5 MS. FOSTER: Thank you, Mr. Chairman.

6 (CONT.) CROSS-EXAMINATION

7 BY MS. FOSTER:

8 Q. Mr. Jones, it's been a few weeks since we heard
9 your direct testimony, so I'm going to probably -- the first
10 couple of questions I'm going to ask you are going to be
11 foundation questions so we are all on the same page in terms of
12 what we're asking. Is that okay with you?

13 A. That's fine.

14 Q. Okay. Thank you. When you were talking on
15 direct testimony, the overall or the arching -- if you could
16 tell me what the overall arching purposes of the Exploration
17 and Development Plan that would be required in Santa Fe County
18 pursuant to new rule.

19 A. I guess the overall purpose of the plan is to do
20 a multitude of things. It's to have a true understanding of
21 what's being -- the activities that are being proposed in the
22 area that are linked to oil and gas exploration.

23 To take a look at those, if you look at the
24 requirements within the -- or the information that's required
25 under the plan, certain concepts, such as reducing footprint,

1 would be a goal-oriented type or purpose behind this. It would
2 also create a forum that would involve public comment of items
3 that may not be available -- or information unavailable -- to
4 the applicant that they're aware of -- or OCD.

5 It's also -- since there's quite a bit of unknown in
6 this area that we're trying to address, it would also create a
7 mechanism in order to ensure that certain items, such as ground
8 water, be protected in that area. It would also involve the
9 participation of other agencies, such as the Historic
10 Preservation Office. Those are some of the purposes.

11 Q. Okay. Thank you. That gives us a good outline.
12 Let's talk about the public comment portion of what will be
13 required. How is it that you envision under this proposed rule
14 the hearing will work? My understanding is that an operator
15 will submit an Exploration and Development Plan to the OCD that
16 will be released for public comment, and then there will be a
17 hearing, correct, on the first time there's an Exploration and
18 Development Plan proposed?

19 A. They would submit an application to the OCD. The
20 OCD would take that opportunity to see if they comply with
21 what's required to be submitted with that application. If it
22 seems to have the information as required by this regulation,
23 then a copy would be disseminated to the State Historic
24 Preservation officer for their input.

25 There was also a draft notice that's supposed to be

1 submitted in the application as part of the application. If
2 that complies with the requirements, then OCD would approve
3 that to go out to be published. And at that time, there will
4 also be a hearing date established in which that would be
5 included with the notice of, with instructions on how to
6 provide comments or requests for hearings and so forth. In
7 this case, there would be a hearing for a new application.

8 It seems from the time lines that are specified, it
9 would be at least a 60-day window for the hearing clerk to
10 receive comments during that time.

11 Q. Okay. But who, actually, would carry -- I guess
12 burden of proof is probably not the right word, since this is
13 not a criminal case -- but, basically, what is the role of the
14 operator in that hearing? Is he expected to respond to the
15 public comments that are going to be given? Or is
16 Ms. MacQuesten, as the attorney from the Division, going to be
17 carrying those comments from the public? I mean, what is the
18 responsibility of the Division and the operator in that
19 hearing?

20 A. Well, the responsibility of the operator is to
21 provide appropriate information. If there's limitations on the
22 sources that they choose to use, the public comment part of it
23 of maybe surface owners or other organizations or so forth have
24 knowledge of the area that they're proposing to have activity
25 in would be divulged during that time, during the public

1 comment, and discussed. So, you know, the plan itself, the
2 application for the plan, is the responsibility of the operator
3 to defend what they propose or to justify it.

4 A good example would be if they did the mapping and
5 indicated where all those structures were, infractures, and so
6 forth, and they decide to use satellite or aerial photos that
7 are dated. The surface owner comes in and says, "You know, I
8 built a house here two years ago, and you're proposing your
9 well in the middle of my house."

10 That's something that needs to be discussed at
11 hearing and resolved. That's why the public comment period is
12 very crucial and public participation in the hearing process.

13 Q. I understand that, but let's take that example
14 that you've given. You have a citizen of Santa Fe County who
15 is saying, "You know, this oil well is going to end up on my
16 property or maybe even in the middle of my house."

17 Is that person supposed to go to the OCD attorney who
18 is going to present that information? You know, "Here's the
19 plat of the house. Here's where the house is actually
20 located?"

21 Is that going to be Ms. MacQuesten's responsibility,
22 the OCD attorney? Or is that going to be a member of the
23 public who is standing up and saying, "My house is located
24 here, and I don't want to have an oil well here"?

25 A. Well, it becomes part of the record for the

1 hearing, so it would have to be assessed. So, you know, the
2 Hearing Examiner would have this information. All parties
3 would have access to this information.

4 It would be one of those questions that would come up
5 during the hearing process to the applicant of, "Why are you
6 proposing this? Why didn't you go out and do a visual
7 inspection to clarify this prior to submitting it?"

8 Q. Okay. So the OCD attorney is basically
9 representing any member of the public who comes in to say that
10 they have a problem with the plan?

11 A. I didn't say that. I don't remember mentioning
12 or hearing -- or attorneys being involved in that process.

13 Once again, it's a public hearing that involved a
14 hearing examiner with comments that are submitted, just like
15 any other hearing, that would be considered for a
16 decision-based type approval just like this hearing here.

17 Q. Okay. I guess what I'm asking is in terms of how
18 the hearing is going to work. Currently, we have hearing, for
19 example, on this rule making. The OCD attorney is the one who
20 prepares the rule and says -- and presents it to the OCC, and
21 we as industry have the opportunity to respond to it. Okay?

22 The hearing that we're going to be having pursuant to
23 Exploration and Development Plan is a little bit different.
24 Because we are the ones that are proposing the Exploration and
25 Development Plan, and the public is coming in and making

1 comments on it, right?

2 So where's the role of the OCD in terms of running
3 this hearing?

4 A. Well, the OCD would be running it as the hearing
5 examiner would have it. Our involvement, such as the
6 Environmental Bureau, if there's concerns that we may see in
7 the general plan, we may attend the hearing and comment on
8 those and suggest conditions. So that would be our part.

9 Q. Okay. And you're saying that -- would the rules
10 apply -- what sort of rules would apply to that public comment
11 in order to give industry adequate time to respond to a public
12 comment? In your direct testimony, I think you mentioned that
13 the public was going to be able to come in and comment even at
14 the hearing itself.

15 A. No. I said there was a 60-day window that will
16 grant comments and be received to the hearing clerk.

17 Q. Okay. So will there be a rule? Or are you
18 envisioning that the only public comment that comes in during
19 the public comment process are the allegations that industry
20 would be forced to have to respond to or defend against?

21 A. I don't know what the nature of all those would
22 be to justify having to respond to them all. Currently we take
23 recommendations, written comments from various parties that are
24 never discussed during the hearing, such as this one here. But
25 they are written comments that are considered by the Commission

1 to make a determination on. And they consider those.

2 So not all written comments have to be discussed as
3 it currently stands -- and even in this rule making.

4 Q. Right. But in the instance of the Exploration
5 and Development Plan, basically the industry or the person
6 submitting the Exploration and Development Plan should be given
7 the opportunity to respond to every comment that is given,
8 correct -- or allegation that's given?

9 A. If they choose to. I don't see what would
10 actually prevent that.

11 But I think for the hearing examiner, what is
12 substantial, what will be of concern, what would conflict with
13 what's in the application itself -- meaning that if someone has
14 a well on their property, and it's not identified on the map --
15 that would be something to consider in relationship to the
16 activities.

17 If someone has knowledge, such as SHPO, of certain
18 areas that will be protected under the Cultural Properties Act,
19 would that be crucial that it be brought on hearing?
20 Absolutely. So there's going to be those type of issues that
21 will be brought and discussed, most likely, during the hearing
22 process.

23 Q. Right. But what I'm getting at is giving us the
24 time to adequately respond since the public will be asked to
25 give comment, but the public will also have the opportunity to

1 come to the hearing and make allegations. And obviously, in
2 the hearing setting, we don't have the opportunity to defend
3 against, you know, a member of the public who comes in with a
4 map that we've never seen before or something that we've never
5 discussed before in front of a hearing officer.

6 A. Well, this goes back to the application itself.

7 Q. The application or the Exploration and
8 Development plan?

9 A. The application submitted, the initial
10 application, it should be comprehensive, meaning that you
11 should look at all venues. You should make sure it's complete
12 and it has as much information as possible. Because when you
13 don't -- if you do as little as possible to submit your
14 application, meet the minimum requirements, you're doing
15 yourself a dis-justice, because when you come to hearing, these
16 questions are going to arise.

17 It may lead to the hearing examiner saying, "There's
18 not enough information in the Plan, the application, to be
19 considered. Does it protect or prevent waste, protective
20 correlative rights? Does it protect fresh water, human health,
21 and the environment?"

22 So they'll probably deny such an application. That's
23 why the applicant needs to make sure they do a comprehensive
24 application when they submit it.

25 Q. Okay.

1 A. That would prevent a lot of these topics from
2 coming up at hearing.

3 Q. All right. Then I want to make sure that we're
4 all on the same page in what you mean by a "comprehensive
5 application."

6 It's my understanding from the testimony -- I believe
7 it was the direct of Mr. von Gonten, and I believe you on your
8 direct testimony -- that a comprehensive application is going
9 to include the entire acreage that an operator has for that
10 proposed development plan.

11 A. Yes. Plus it should also involve a half-mile
12 radius or buffer from the outer edges of that boundary.

13 Q. But when I say the "entire acreage," if you have
14 a company that comes into Santa Fe -- and as we know, there's
15 only 32 dry holes plus the one marginally operated well that's
16 now owned by Tecton -- if they come in, and they say, "Okay.
17 We want to a drill a wildcat well," just giving you the metes
18 and bounds or the specific location around that one well is not
19 adequate for your comprehensive plan; is that correct?

20 A. Well, the application requires you to include the
21 infrastructure that linked to that well. You're just talking
22 about the well. So absolutely not.

23 Q. Okay. So let's talk about that. If you have an
24 operator that comes in and, say, buys 50,000 acres, but because
25 there has not been a successful well in Santa Fe, what exactly

1 are you requiring in terms of your information for a
2 comprehensive plan for that single wildcat well?

3 A. Well, there's multiple things that need to be
4 done. I don't know what they plan to do. I can't -- you know,
5 this is such an extreme hypothetical, you can't address it.

6 Because, are they proposing -- looking at this, are
7 they proposing the whole entire area? Are they going to have
8 infrastructure throughout the area? I don't know the answer to
9 those questions. Do they plan to put a waste disposal facility
10 in that area? I have no idea. I mean, there's so many things
11 to consider, it's impossible to answer that question.

12 Q. Okay. But from a business prospective, you
13 understand that businesses, you know, they come in and they try
14 and get lease acreage in blocks, right?

15 A. Yeah.

16 Q. So they're going to buy more than three acres or
17 four acres it would take to actually have one well. They
18 usually try and look ahead, right? So as part of your
19 comprehensive plan which you would require would be
20 information, your arch information, your topography, geology,
21 hydrology, or the acreage, the entire acreage, that they end up
22 buying?

23 A. I don't think the rule states that. It mentions
24 nothing about lease acreage.

25 Q. Okay. Well, I'm just trying to get an

1 understanding of what you intend for operators to submit as
2 part of your comprehensive plan so that we overcome your
3 completeness hurdle.

4 A. Well, nothing states that they have to -- if they
5 buy all this acreage and they have leases to it -- they have to
6 address all of it up under one plan. That's what I'm getting
7 at.

8 Q. Nothing says that?

9 A. I don't see anything in this rule that states
10 that.

11 Q. Okay. Well, then, what you're saying, then, is
12 even though an operator comes in and buys multiple leases,
13 multiple acreage, would it be enough for them to come to you
14 and say, "Here's a plan for our first well. We don't know what
15 it's going to come up with. It might be a dry hole, but we are
16 just going to give you the geology, the topography,
17 archaeology, on the acreage for that one single location"?

18 A. Once again, there's going to be an infrastructure
19 linked to that well. There's going to be utilities, there's
20 going to be roads. There may be a disposal well to produce
21 water that they generate. All these things are required to be
22 addressed. Waste management is required to be addressed in
23 this plan.

24 When you drill a well, be it a dry hole or what,
25 you're still going to be generating waste, so you're still

1 going to have to address that. There's contingency plans.
2 There's a lot of information that's required that would go
3 outside the bounds of just that single location.

4 Q. Okay. But would you or would you not make the
5 operator responsible for giving you all the information for the
6 rest of their acreage?

7 A. If they're going to utilize it to create
8 infrastructure, absolutely, if that's what they have to do. If
9 it's out in such an isolated area that there are no roads, and
10 they are 100 miles from the nearest road, they're going to have
11 to construct a road out there. That's part of this
12 application; that's part of the infrastructure they're going to
13 have to construct.

14 Q. Are you familiar with the Santa Fe County
15 ordinance that got passed?

16 A. I just know it got passed. I know no details
17 about it.

18 Q. You didn't read any details?

19 A. No.

20 Q. Okay. All right. Part of the requirements of
21 the program -- of the new rule -- is a complete mud-logging
22 program, right? And that is to occur while you are actually
23 doing your drilling, right?

24 A. I'm not sure if I understand your question.
25 Could you rephrase that?

1 Q. One of the requirements for an operator under
2 this new rule is that they're going to have a mud logger on
3 location while they're drilling the hole.

4 A. Okay. It's a condition once you get an APD and
5 you get an approved plan, yeah.

6 Q. Right, right, right. But that is something that
7 up front we have to commit to, that we're going to have a
8 mud-logger on locations?

9 A. Well, the rule states you have to have a
10 mud-logging program and it specifies what's in that program.

11 Q. All right. And what does it specify in that
12 program for a mud-logger?

13 A. Well, if you could pull up Exhibit 22.

14 Q. I believe that's under Section 10.

15 A. No. It's actually under Section 9B(7), if you're
16 talking about the application and the plan. Right here. And
17 it's (7)(b) -- or it's (7)(c) -- I'm sorry. Right here.

18 So for the application, this is what you have to
19 provide. So for, "a mud-logging program, including a copy of
20 the mud log sheet, a description of the mud-logger's daily
21 report, which shall include at a minimum the total depth for
22 each, the footage drilled in the preceding 24 hours, oil and
23 gas intervals, fresh water zones and mud" -- "including mud
24 weight, chlorides, funnel viscosity, and filtrate properties."

25 That's what's required in the application.

1 Q. Okay. That's what's required in the application,
2 what the operator is committing -- the information the operator
3 is committing to getting you during the program, during the
4 drilling?

5 A. Well, they need to include those sheets and a
6 description of a daily report that would include those items.

7 Q. And do you understand, or could you explain to us
8 the purpose for all that information to the OCD? What is the
9 OCD intending to do with all that information?

10 A. Well, it goes back to certain things, such as,
11 say, the casing. You have to know where the fresh water zones
12 are in order to set a proper casing. If you go into an area
13 that ground water is unknown, and you're making certain
14 assumptions, and let's say you propose -- even though the
15 requirement, one of the conditions, is a closed-loop system,
16 another condition that would be placed on such an APD would be
17 that there's no onsite burial.

18 Let's say you ask for an exception to that, and you
19 want to do some type of onsite burial. Through this program,
20 if you encounter a shallow freshwater zone that doesn't allow
21 that under Part 17, then what you've requested may not be
22 viable.

23 Q. Okay. When you say a "shallow freshwater zone,"
24 does that include perched water?

25 A. Perched water can be rechargeable, so there's

1 different aspects of perched water. There's perched water that
2 doesn't recharge, and it's isolated. There's also perched
3 water that recharges. So if you use perched water, I would say
4 yes.

5 Q. Another requirement is the monitoring wells,
6 correct?

7 A. Yes.

8 Q. And are you envisioning -- how many monitoring
9 wells are you envisioning? Again, what I'm trying to do here
10 is have an outline for operators before they start, and if they
11 know that they have to do -- that they have to have the cost of
12 a monitoring well for every well, then that's a fixed-cost type
13 of thing. Can you explain that for me? Is that a requirement?

14 A. Well, I think there's some confusion on some of
15 the terminology that we use in this rule, and I'd like the
16 opportunity to -- because there's a line of questioning that
17 Scott went on as well asking what our expectations are for the
18 review process.

19 So I think part of our confusion -- if you could
20 scroll down to the bottom of this page -- is maybe the use of
21 the term "administratively complete." It's the next page. I'm
22 sorry. It's page 3.

23 I'd like this opportunity to maybe recommend to the
24 Commission that we change that term. Because we use this
25 "administrative completeness" determination in other

1 regulations like Surface Waste Management in WQCC. Usually,
2 that involves some type of preliminary review with a technical
3 review with a recommendation. That's not what this is about.

4 We're not recommending approval of this plan when we
5 do the review. It's not comprehensive. It's about does this
6 plan have the items listed in 9B of this -- and I think it's
7 1 through 13 -- does it have those items? We're not looking to
8 see if they're complete or comprehensive. We're not going to
9 compare them to existing data. This is the application of the
10 operator for them to defend. If other information is divulged
11 during the hearing process, it'll be addressed during the
12 hearing process.

13 But when we use this term in other regulations, like
14 WQCC and for Surface Waste Management, we're reviewing it, and
15 then we recommend approval or disapproval. We're not doing
16 that in this process. We don't want to create this confusion.
17 That's why this line of questioning, when we get it -- what are
18 we expecting? It's up to the applicant to provide it. It's
19 for them to determine if it's sufficient or not, and can they
20 defend it.

21 So my recommendation is to call it "application
22 completeness." Is the application complete? Does it address
23 1 through 13 of B of 9? You know, does it have enough
24 information? Does it qualify to have either those plans or
25 what's specified within the plan and only that?

1 Q. Now, are you going to -- let's go down this
2 administrative completeness -- or the application completeness
3 requirement. You have your rule, but there's nowhere currently
4 a list of actual documentation and information that you
5 actually want like there is in the Santa Fe ordinance that
6 would tell an operator what they actually have to come up with.

7 It sounds very subjective to me. I understand that's
8 not a question. But are you planning to come up with
9 guidelines?

10 A. Absolutely not. Because we're not going to tell
11 the applicant what they need to do. It's going to be up to the
12 applicant to express what they plan to do. If they think that
13 there's enough ground water data that they don't need to have a
14 monitor well, they can argue that at the hearing.

15 If they think for -- a good example would be the
16 contingency plan. Let's say they think their contingency plan
17 is that they'll have no contingency. Will they be able to
18 defend that at the hearing? Is that practical? Or should they
19 address all scenarios that might occur out at the site?

20 It's going to be up to them to decide how they want
21 to present it and how they want to defend it. That's the way
22 you should be looking at this.

23 Q. But they have to defend it against the general
24 public. They don't know what questions are coming in, and the
25 operator is not going to be told ahead of time what they have

1 to defend against.

2 A. The way I would look at it is it's kind of like
3 our rule making. We have to state the intent and the purpose
4 of every provision in our rules. That's what we have to do.
5 And we are subject to the same line of questioning that you're
6 referring that you would be subject to, or your possible
7 clients would be subject to, at this hearing.

8 Now, the question would be -- is if you thought ahead
9 and if you planned ahead, and you thought about all the
10 possibilities, then there will be very few questions --
11 meaning, such as a contingency plan. If you addressed all the
12 contingencies, then there would be very few questions on the
13 contingency plan.

14 Q. I understand what you're saying, but my comment
15 is that we are responding to the public.

16 A. No --

17 Q. The OCD is really not part of the Exploration and
18 Development Plan hearing. I understand that you want us to
19 defend, but you're not telling us what our parameters are.
20 You're telling us that if we want to go out there and drill, we
21 give you what we think is adequate information, but we're not
22 getting a response from the OCD as to whether you think that
23 information is adequate.

24 We're going to be going into a hearing, and then
25 we're going to find out at the hearing that the information is

1 inadequate, that we have to come up with additional information
2 to defend on. Is that what you're saying?

3 A. The hearing may continue to obtain that
4 additional information. The reality is that the reason that
5 we're not going to comment on it is because there's rules with
6 another hearing process for applications. That's why we can't
7 assess it.

8 A good example was your initial view of a large area.
9 Let's say you have 1,000 acres that you're assessing that
10 you're going to be doing activities in. Well, for the
11 Environmental Bureau, we're looking at surface waste
12 management; we're looking at the Pit Rule application, and so
13 forth. It's not going to have the site-specific information
14 for those activities because it's going to be a broad-brush
15 type addressing-type thing.

16 We're not going to be looking for the siting
17 requirements for those well locations, because they're also
18 subject to change. That's what the Pit Rule is for. That's
19 where you get your permit, and then you do that assessment.

20 Q. So if an operator were to give you complete
21 information, would you not require site information so that we
22 can give you the hydrology and the topography and everything?
23 I mean, we heard from the Office of the State Engineer that
24 Santa Fe County is very variable in terms of hydrology.

25 A. Absolutely.

1 Q. That's why he doesn't like monitor wells.

2 A. Absolutely. And when you apply for that pit
3 permit --

4 MS. MACQUESTEN: Objection. I think she misstated
5 his testimony about monitor wells. I'd like the testimony to
6 stand for itself.

7 CHAIRMAN FESMIRE: The testimony will stand for
8 itself. I'll overrule the objection.

9 THE WITNESS: When you apply for that permit under
10 the Pit Rule, that's when we'll assess that information. This
11 process right here is not for a permit. This is for approval
12 of a plan.

13 Q. (By Ms. Foster): But what I keep hearing you say
14 is you want to have as specific information as possible so that
15 we can stand up to a public challenge, so that we can come to a
16 hearing officer and say, you know, we have all the information
17 that's necessary.

18 And yet, you're not going to require us to give you
19 the specific location of where we plan to drill a well and all
20 the hydrology, geology, topography for that one specific well
21 location as part of the Exploration and Development Plan.

22 A. When you look at the information, what's
23 required, you're covering the area that you're going to be
24 doing work in. And that's what's required to be addressed. It
25 never says site-specific information anywhere in this

1 regulation.

2 Q. Okay. So now you're saying we don't need to give
3 you site-specific information?

4 A. You need to provide sufficient information.

5 Q. Okay.

6 A. And that would be up to you to make that
7 determination. The problem that you run into is that -- I
8 mean, it talks about locations of wells. So if you do your
9 search and look for, you know, wellhead protection areas, then
10 you're going to be locating domestic wells during that process.
11 So you'll be using that information.

12 Now, is it all current? We don't know this. That's
13 why public comments are going to maybe assist someone. Someone
14 may have certain wells that are out there that are being used
15 that were never registered with the Office of the State
16 Engineer because it was prior to them coming into effect and
17 requiring permits and documentation on them. So that will be a
18 crucial thing to address.

19 Q. Okay. Let's move on. Let's talk about the
20 public notice -- the legal notice provision. There's a
21 provision in there that requires that we notify all leaders of
22 tribes, counties, and nations. Is that leaders -- tribes,
23 counties, and nations only in Santa Fe County, or is that
24 statewide?

25 A. That's statewide.

1 Q. Statewide. Okay. And what is the required nexus
2 to the State for a tribe, for example?

3 A. I don't understand your question.

4 Q. Does the tribe actually have to be physically
5 located in the State of New Mexico, or can it have a
6 substantial presence in New Mexico in terms of populace?

7 A. I think any of these that have any presence would
8 have to be notified.

9 Q. Okay. So, for example, the Navajo Nation?

10 A. They have a huge presence in this State.

11 Q. But they're not headquartered in New Mexico.
12 They're in Arizona.

13 A. Absolutely not. You know, this line of notice is
14 also required by the Environment Department. Actually, they --
15 they actually notice all chapter houses over there for public
16 notice.

17 Q. Okay. And that's for every well that's drilled
18 in the State?

19 A. No. I'm saying the Environment Department
20 doesn't do oil and gas and wells --

21 Q. Yeah, you're right, but any environmental
22 project -- so, for example, if you're doing a surface waste
23 management project that you're trying to get permitted under
24 the Environment Department, say, in Southeast New Mexico, you
25 still have to notify the chapter houses of the Navajo Nation?

1 Is that what you're saying?

2 A. Yeah, absolutely.

3 Q. So that would be a requirement?

4 A. I'm not saying chapter houses. We specify the
5 head of the tribes.

6 Q. The head of the tribes. Are those notifications
7 to be done in English or their native language?

8 A. It doesn't specify that it has to be in their
9 native language, so I assume it's English.

10 Q. You assume that's in English?

11 A. Yes.

12 Q. Okay.

13 A. Because we don't specify. Usually, if we're
14 requiring something in Spanish, we would specify that it's in
15 English and Spanish.

16 Q. Okay. And in terms of the legal notice and
17 publication in newspapers, do we need to -- is there a
18 specification as to which newspapers we have to publish in?

19 For example, would a free weekly newspaper be
20 adequate?

21 A. Well, it goes back to H, to public notice. Your
22 legal notice tells you the information that you're required to
23 put in it. Okay? And the legal notice is F. But public
24 notice tells you how to do the public notice. Legal notice is
25 just the format. Public notice is how you provide your -- do

1 your legal notice as in implementing it.

2 Q. Okay. Public notice -- a free weekly newspaper.
3 Is that adequate?

4 MS. MACQUESTEN: Objection. She's asking for a legal
5 conclusion. We can't rule on what is required for publication.
6 Whether a particular publication needs those rules is a legal
7 issue.

8 CHAIRMAN FESMIRE: I'll sustain the objection.

9 Q. (By Ms. Foster): Part of Santa Fe County -- I
10 mean, part of the Galisteo Basin goes into Sandoval County;
11 does it not?

12 A. Yes.

13 Q. And Sandoval County is covered by which
14 newspaper?

15 A. Personally, I don't know, because I've never done
16 a public notice.

17 Q. You've never done a public notice. Who takes
18 care of public notice?

19 A. It depends on -- like I implement WQCC activities
20 that do public notice. If I have a project in that area, then
21 I would do that.

22 Q. But in this instance for the Exploration and
23 Development Plan hearing, the public notice responsibility is
24 on the operator?

25 A. Absolutely.

1 Q. Okay. Is there a notice provision in there for
2 how many times we actually have to prove notice, or is it the
3 other set of rules that Ms. MacQuesten referred to that the
4 operator is going to be responsible to?

5 A. To prove notice?

6 Q. Public notice -- how often, which newspapers, all
7 that. I believe Ms. MacQuesten referred to another rule.

8 A. Yeah. I'm not too sure which rule she's
9 referring to. Because she had made that comment.

10 Q. I think it's the rule that --

11 A. Since this is part of the process, it would be
12 wise for the applicant to come in. That's why we ask for
13 things like certified mail receipt for certain parties to
14 demonstrate that.

15 If you did run your ad, if there was any question to
16 the extent that someone said, "Well, we didn't see your
17 published ad," if you brought it to hearing and submitted it as
18 evidence, that would support that.

19 Q. Okay. What I hear you saying is that we would
20 deal with that issue at the hearing.

21 A. Absolutely.

22 Q. Now, in terms of the Exploration and Development
23 Plan that the operator is supposed to submit, our duty would be
24 the protection of correlative rights and prevention of waste;
25 is that correct?

1 A. Say that again. I'm sorry.

2 Q. In terms of the goal for the plan, we would have
3 to meet the requirements of protection of correlative rights
4 and prevention of waste.

5 A. And protection of fresh water, public health, and
6 the environment; those also, yes.

7 Q. Okay. And protection of fresh water, human
8 health, and the environment, is that part of your statutory
9 mandate -- the OCD's?

10 A. Yeah.

11 Q. Okay. It is?

12 A. Enumeration of powers, yes. Oil and Gas Act,
13 absolutely.

14 Q. Under the Enumeration of Powers Section, yes?

15 A. Yes.

16 Q. All right. I believe that was one of your
17 exhibits. Can we pull that up?

18 Okay. And looking at the Enumeration of Powers
19 Section, where does it actually say that you have the
20 responsibility of human health and the environment?

21 A. It's public health and environment; it's 21 and
22 22.

23 Q. Okay. So your B, Subsection 21 and 22?

24 A. Yes. B.

25 Q. Okay. Looking at Subsection 21, that enumerates

1 your powers with the authority to regulate the disposition of
2 non-domestic waste, correct?

3 A. Yes.

4 Q. And looking at Subsection 2, that gives you the
5 authority to regulate the disposition of non-domestic waste --
6 I'm sorry. That looks like a repeat. One of them is produced
7 water, and the one is waste.

8 A. No. Produced water is 15, and that's protection
9 of fresh water.

10 Q. Okay. So Section 21 does give you the authority
11 to regulate and protect human health and the environment with
12 the disposition of non-domestic waste; is that correct?

13 A. Yes.

14 Q. And 22 gives you the authority to protect -- that
15 doesn't say anything about human health and the environment --
16 public health and the environment.

17 A. Yeah, it does. 22: Protect the public health
18 and the environment, including administering the Water Quality
19 Act. Absolutely.

20 Q. Yes, yes, yes. And then other than Section 15,
21 is that provision in there, protection of human health and the
22 environment under the Enumeration of Powers Section?

23 A. 15 talks about protection of fresh water. We
24 could pull it up.

25 Q. Okay.

1 A. Or protection against contamination. Let me do
2 that, contamination of freshwater supplies.

3 Q. All right. Now, if we could read the subheading
4 on B that covers numbers 1 through 22. If you could just
5 scroll up, please?

6 Does that section talk about protection of fresh
7 water, human health, and the environment as the overriding
8 section header?

9 A. No, it doesn't.

10 Q. It does not. Okay.

11 A. These activities under 21 and 22 and 15 are
12 activities that would be addressed in the plan. There's waste
13 management that must be addressed.

14 Q. Right.

15 A. And more likely, if you're going to have a well
16 that goes into production because this is an Exploration and
17 Production Plan, you have produced water as well.

18 Q. So in our plans, when we're trying to write up
19 our plans, we need to specifically address the responsibilities
20 of protection of human health and the environment as it relates
21 specifically to the disposition of produced water, and only
22 that?

23 A. No.

24 Q. No?

25 A. I believe the Pit Rule also covers -- we have

1 other rules that are based upon this act that Surface Waste
2 Management Rules also grant.

3 Q. Okay. Surface waste management I understand
4 because that is taking care of waste.

5 A. Uh-huh. And the Pit Rule is also handling waste.

6 Q. The Pit Rule is handling waste in pits and the
7 disposition of produced water?

8 A. Not disposition of produced water, but handling
9 produced water as a waste. When you drill, you're going to
10 have drilling muds, and you're going to have produced water,
11 and you may produce into that as well -- not crude, but
12 produced water into it. So you are going to have produced
13 water. You may have a permanent pit there under the Pit Rule,
14 which would also have produced water in it. So you would be
15 managing waste at that time.

16 Q. So it's your position that any time that we
17 use -- we have produced water from anything, then we have to
18 worry about protection of human health and the environment?

19 A. That's one of the items. Produced water is one
20 of the items.

21 Q. And solid -- and waste, non-domestic waste?

22 A. Well, you've got -- if I'm not mistaken, this
23 also includes -- if you go back to 22, 22 also includes the
24 transportation of crude oil, natural gas, the treatment of
25 natural gas, and the refinement of crude oil. There's a lot of

1 activities that are associated with that.

2 So let's say you have natural gas, and you have to
3 plug that well until you get your lines in to transport it,
4 then, once again, there's other activities other than waste
5 activities that are associated with those.

6 Q. Okay. But other activities that are not
7 associated with waste activity should not, under the
8 Enumerations of Powers Section, come under the responsibility
9 of protection of human health and the environment?

10 A. You're contradicting what I'm just saying.
11 You're saying they shouldn't. I'm saying that the rule
12 actually states they should. 22, Transportation of Crude Oil,
13 has nothing to do with waste. It has to do with product.

14 Q. It's the disposition of non-domestic waste?

15 A. That's non-domestic, absolutely.

16 Q. Okay. What's considered non-domestic waste,
17 then?

18 A. Well, there's regular exempt and regular
19 nonexempt, and we address in our definitions under -- I believe
20 it's Part 2 now, Section 7. In our definitions, we define what
21 those wastes are.

22 CHAIRMAN FESMIRE: Ms. Foster, would you like the
23 Commission to take administrative notice of the enabling
24 statute, 70-2-12?

25 MS. FOSTER: I believe that was an exhibit that

1 Mr. Jones put into the record. I believe he already did.

2 CHAIRMAN FESMIRE: Okay. Is there any way to perhaps
3 speed this up a little?

4 MS. FOSTER: I'm trying, yes. Thank you.

5 Q. (By Ms. Foster): Okay. When it comes to the
6 cultural resources question I understand that you want us to
7 have more participation or work more closely with SHPO, the
8 Office of Historic Preservation, correct?

9 A. Well, it's more of us complying with their act,
10 the OCD complying with their act.

11 Q. Okay. So the OCD wants to comply with their act;
12 and, therefore, that's why they have the opportunity for public
13 notice on the Exploration and Development Plan?

14 A. Based on their requirements, we're complying with
15 their requirements.

16 Q. All right. And what about complying with the BLM
17 requirements? Do you currently have a memorandum of
18 understanding or requirement that you have to work with the BLM
19 on these issues?

20 A. Well, which specific one are you referring to?

21 Q. Well, I'm looking at the instance where you have
22 an operator who might be trying to extract federal minerals,
23 and you have either private fee surface or State trust fee
24 surface. And obviously in each instance, the practice in the
25 past has been that we get the BLM approval, and then we come to

1 the OCD for approval as well.

2 A. Okay. I'm still confused because the Cultural
3 Properties Act requires OCD to do something. So we're
4 complying with that.

5 Q. Right.

6 A. What I'm trying to understand is, which statute
7 are you referring to? Which act are you referring to that
8 requires us to do something?

9 Q. It's not really the statute. I'm just trying to
10 be able to direct operators in terms of who do they have to
11 work with -- the BLM, the OCD or the SHPO -- and in what order
12 in order to get your approval? Because the Exploration and
13 Development Plan happens before you even go out for APDs.

14 A. Yeah. You're absolutely right. This is a plan.
15 This is not a permit issued by BLM. Once again, this is not
16 for permits. This is a plan. And in order for -- and the
17 reason that it's different with SHPO than BLM is because SHPO's
18 going to be commenting on items that they're aware of that are
19 confidential and wouldn't be available to the operator or the
20 general public, necessarily.

21 Q. Right.

22 A. So they would be providing comments on your plan,
23 your Exploration and Development Plan based upon what you're
24 proposing or activities or the areas that there may be some
25 type of impact.

1 Q. Okay. As part of your overall Exploration and
2 Development Plan approval, would the operator need to go and
3 get approvals from the BLM or any other agency when they come
4 to you with their Exploration and Development Plan?

5 A. Once again, my understanding from your earlier
6 question is about permitting. In order for you to get a
7 permit, you must go through BLM. That's what you were saying
8 earlier. Once again, SHPO is different in the way that the
9 items that you're looking at -- because you're not getting a
10 permit necessarily from SHPO.

11 Q. No, I understand that. But you are getting some
12 sort of approval from SHPO.

13 A. Not necessarily. Because based upon the review
14 of some of their rules, if you encounter things, you may have
15 to go back to them to get permits for approvals for that
16 process.

17 Q. Right.

18 A. So I wouldn't call it approval. It would be a
19 recommendation from them of their concerns.

20 Q. Again, I'm just trying to get clarity on what you
21 expect an operator to submit as part of the Exploration and
22 Development Plan. If you are dealing with multiple agencies,
23 for example, permits including other questions, other
24 involvement with federal agencies, would you require that
25 involvement from federal agencies or approval from the other

1 agencies before you actually can move forward with an
2 administratively complete Exploration and Development Plan?

3 A. I believe if those agencies decide to look at the
4 application -- because it'll be posted on our website -- and
5 they have concerns, then they can show up at the hearing and
6 provide comment.

7 Q. Okay. And responsibility for cultural resources,
8 is that part of your statutory authority?

9 A. No. We're complying with another statute. We're
10 complying with their statute.

11 Q. Okay. Under Rule 10, Subsection 5, I believe,
12 you talked about an operator isolating all freshwater zones and
13 aquifers throughout the vertical extent with at least two
14 cement casing strings. It's under Rule 10.

15 A. It's under Exhibit 22.

16 Q. And in your written testimony as produced in this
17 section, you actually state, "The OCD proposes this change to
18 broaden the protection of fresh water."

19 A. I'm sorry. To do what?

20 Q. In your written testimony --

21 A. Yeah.

22 Q. -- you state in response as your explanation for
23 this in Subsection 5 that, "The OCD proposes this change to
24 broaden the protection of fresh water."

25 A. Okay.

1 Q. Okay. Is that relating to your definition of
2 what a zone is supposed to be?

3 A. I don't think we have a definition for a zone.
4 When I say "broaden," I guess the things that we're looking at
5 is that fresh water, there's not a volume associated with the
6 determination of fresh water. There's only a quality standard,
7 and it's based on the TDS concentrations and also the depth,
8 the limitations of depth.

9 But what we're trying to do is, based upon that, we
10 want to make sure it's clear that an operator doesn't go out
11 there and makes their assumptions based on high-yielding water
12 formations only.

13 Q. All right. There was some testimony previously
14 that one of the reasons why Santa Fe County needed these
15 additional protections was because there wasn't very much
16 drilling currently that has occurred in Santa Fe County. Would
17 you characterize this rule as applying mostly to wildcat areas?

18 A. No. Because my understanding of wildcat areas is
19 based on the formation of which you're extracting from. So you
20 could be in a heavily populated -- like the southeast part of
21 the state, and they're below existing known formations or pools
22 and create a whole new wildcat formation.

23 I think it's more on just lack of knowledge of
24 everything from -- we know there's no infrastructure out there,
25 so we know there's going to be impact. But we also know very

1 little about ground water as well. There's so many unknowns in
2 this area because of the lack of drilling, as you said, that we
3 need to assess it as we move along.

4 You know, the idea -- what I would like to see is
5 years from now we wouldn't have to have this rule because we
6 would have enough to address as we do with the rest of the
7 State. But we need to obtain that information in order to have
8 that confidence in order to do that.

9 Q. Wasn't there a comprehensive study done of the
10 San Juan Basin in terms of hydrology and geology in the late
11 '90s?

12 A. I don't know.

13 Q. That wasn't referred to by the Office of the
14 State Engineer in their report?

15 A. It might have been. I didn't read that report.

16 Q. So you're not familiar with that information?

17 A. Not offhand, no.

18 Q. Okay. So it sounds like if you have two
19 operators that decided that they want to come in and operate in
20 Santa Fe County and under this proposed rule, they technically
21 could offer you very different information.

22 A. They could be in two total different areas.
23 Absolutely.

24 Q. Right. But they're still within Santa Fe County,
25 and they just offer you the information that they think is

1 enough to get them over the hearing hurdle, right? So it all
2 depends on who their hearing officer is; it depends on which
3 people come in for public comment that day at that hearing in
4 terms of whether that's going to get granted or not?

5 A. That's the way all hearings are done.

6 Q. So there's no consistent rule. There's nothing
7 like the Santa Fe ordinance that says you have 28 things you
8 have to actually do in your rule, is there?

9 A. No. Ours state that you have to provide
10 everything in 9B, 1 through 13.

11 Q. Okay. Information that you believe is adequate?

12 A. The hearing officer would make that
13 determination, yes.

14 Q. Okay. All right.

15 A. That decision is going to be for them to make a
16 decision or approval or disapproval based upon does that plan
17 prevent waste, protect correlative rights, enough information
18 to make those decisions -- protect fresh water and public
19 health and the environment.

20 If there's not information in the application to make
21 that determination, then more than likely it will be denied or
22 postponed to gather that information.

23 Q. Are all these hearings going to go through the
24 same hearing officer?

25 A. I have nothing to do with hearing officers or

1 examiners or the determinations. I don't know.

2 Q. Okay. But what you're saying is that
3 subjectivity definitely comes into this depending on who the
4 hearing officer is and how much public commitment there is?

5 A. It's my understanding the same applies for APDs.

6 Q. But the APD process, there's actually -- you have
7 provided us with extensive guidelines on what we have to
8 require for the APD process.

9 A. But the subjectivity of the hearing officer is
10 subject to who's hearing officer that day.

11 Q. Right. For the Pit Rule, did you not have
12 training sessions around the State?

13 A. Yes.

14 Q. Did you not provide a lot of documentation to
15 operators concerning your interpretation of the Pit Rule?

16 A. Yes, because that's for a permit.

17 Q. Okay. But is this not the same?

18 A. No. This is not a permit. This is a general
19 plan. It does not grant you any permits.

20 Q. Oh, I understand that. It's an additional layer
21 before you can even go and ask for a permit, right?

22 A. Absolutely.

23 MS. FOSTER: Okay. I have no further questions.

24 Thank you.

25 CHAIRMAN FESMIRE: Mr. Hall, do you have anything you

1 want to add? And I realize you've already questioned this
2 witness, but it's been awhile.

3 MR. HALL: Thank you.

4 (CONT.) CROSS-EXAMINATION

5 BY MR. HALL:

6 Q. Did you have an additional opportunity -- one
7 question, Mr. Jones. When we looked at your Exhibit 2, your
8 affidavit that you submitted on page 9 of that, at line 216,
9 you say, "Depending on the proposals presented in the
10 Exploration and Development application and the outcome of the
11 approved plan, the operator may have to pursue a permit for a
12 surface waste management facility pursuant to the permitting
13 requirements in 19.15.36 NMAC."

14 Let me ask you about that. Do I understand correctly
15 that in the course of the approval of the APD that Division
16 staff would be authorized to place as a condition on the
17 approval of the APD that the operator applied for a surface
18 waste management facility permit?

19 A. No, huh-uh. This goes back to the plan. The way
20 it works is that you get your plan approved, then you pursue
21 your APDs. If you suggest that you're going to have a landfill
22 or a land farm that requires a permit under Part 36, you would
23 apply for that under Part 36.

24 There's nothing that states that you're going to be
25 held to everything that you've put into the plan. You could

1 say, "I'm going to put six wells out here. I'm going to have a
2 landfill over here. I'm going to have a pipeline over here."

3 And you have five years to see if you want to do it.
4 You can sit on that plan for five years and do absolutely
5 nothing. You're not obligated to do anything under the
6 approved plan.

7 Q. So if there were no surface waste management
8 facilities, say, within 150 miles of an E&D Plan area, the
9 division staff would not impose a condition on that applicant
10 to obtain permit for solids?

11 A. No. But what we would want to know is where
12 you're taking it. Because part of the plan is if you propose
13 to build one and take your waste there, and that's your only
14 proposal, then we're going to say you need to amend your plan
15 and tell us what you're doing with that material. We would
16 request that.

17 Q. Okay. And the new proposed rule does not
18 prohibit permitting solid waste management facilities anywhere
19 within Santa Fe County, does it? An operator can do that?

20 A. If it meets the requirements under Part 36.

21 MR. HALL: That's all I have, Mr. Chairman.

22 CHAIRMAN FESMIRE: Commissioner Bailey?

23 EXAMINATION

24 BY COMMISSIONER BAILEY:

25 Q. Are these plans transferrable?

1 A. No. My understanding is that they're not. The
2 reason why is because things may change. It probably wouldn't
3 be prudent for one operator that proposes to do certain things,
4 such as let's say, management of waste, what they specify to
5 put that burden or obligation on another party. So my
6 understanding, if I'm not mistaken -- let me double-check -- we
7 do not have a condition in which they could be transferred.

8 That new party would have to come in -- the main part
9 of this -- and the reason why is because they have to -- part
10 of the consideration of approval of the plan is, are they
11 compliant with the enforcement rules? Are they in good
12 standing with us? Do they have any outstanding issues?

13 So to transfer a plan to a party that would be one of
14 our bad actors, so to speak, wouldn't be prudent on us to make
15 that transfer available.

16 Q. But can you make allowances for approval of the
17 OCD for transfer of these plans? This rule does not disallow
18 transfer. And we have seen companies, mergers, transfers of
19 operating rights assignments that are a part of a normal
20 business procedure. Why couldn't OCD have a provision for
21 approval of transfer of these plans under those circumstances?

22 A. I think part of it is Company A may have a
23 certain standard operating procedure for contingency. Let's
24 say, the contingency plan, the information provided in that,
25 the contact information, would not be the same for Company B.

1 There's so many things that would have to be kind of
2 adjusted individually. Now, could they use the information
3 that was submitted in Company A's initial application, since
4 it's public record, to take over that, but modify the items
5 that they would apply their standard operating procedures to
6 and then come in and submit for that area? They could do that.

7 Once again, the enforcement regulations -- we have to
8 look at their history with us. We have to see if they're in
9 compliance with those. Do they have unplugged wells in other
10 areas that have to yet be addressed? They may be under a
11 Notice of Violation. We need to assess those certain
12 activities prior to granting them the opportunity to create
13 more issues.

14 Q. And which would be a part of your approval
15 process, but to disallow transfer of a plan between companies
16 where the new company agrees to the obligations that have been
17 set out and approved through the hearing process, seems like it
18 would be disrupting the business practices of the industry.

19 A. Well, I would say yes and no. And the reason why
20 is because let's say I have an approved plan, and I want to
21 sell my interest. In order to sell that or to make that
22 transfer possible, I would give them a copy of my plan, my
23 original plan that was approved, and say, "This went through
24 hearing and everything is okay. Does this mesh with what you
25 do as an operator? Do you need to modify it? I think 90

1 percent of the work is already done."

2 So that would be one of the issues. Now, the thing I
3 don't know would be transfer of wells, if wells were installed.
4 I don't know how that would work; meaning, if that -- if I
5 already had three wells under my plan in operation and
6 production, and I'm three years into my plan for a five-year
7 plan, when you transfer those wells, I have no idea how that
8 would work.

9 Q. Because that's part of the normal business of OCD
10 is approving change of operators.

11 A. Absolutely. But we also consider if they are in
12 compliance with us when we make those transfers. It's my
13 understanding with the bonding issues and so forth. And we can
14 postpone that transfer. That's my understanding.

15 Q. Right. But there is a process of approval of
16 transfer of wells, and I'm just looking for a process of
17 approval for transfer of plans.

18 A. It is a possibility. I don't know what would be
19 involved. I don't know if a hearing would be required for
20 that. I don't know.

21 Q. I'm not very clear on who actually will be the
22 reviewer within OCD for approval of these plans. Is it all up
23 to the hearing examiner following the hearing, or are there
24 specific job titles within OCD that would be responsible for
25 approving or evaluating?

1 A. I think different personnel would be requested.
2 My understanding, based on the way it is presented, that it
3 would definitely go to the district office for them to look at
4 it because they have the most knowledge of the area. If there
5 were certain items like waste management, I'm sure some of that
6 would go to the Environment Bureau to look at.

7 You know, I'm sure there's -- everyone within the
8 Division would be asked to do some form or fashion to look at
9 things. I think the hearing officer would have to stay
10 separate from that process -- or hearing examiner.

11 Q. Does OCD have an expert in soils analysis?

12 A. We have Mr. von Gonten, who is a geologist.
13 Absolutely.

14 Q. But he's not a soil scientist. He's not a
15 vegetation expert.

16 A. Hum?

17 Q. There is a very distinct difference between a
18 soil scientist and a petroleum geologist.

19 A. There is. But, you know, we also -- that's why
20 we have -- I guess I'm confused on this line of questioning
21 because anything that would cause a disturbance would be linked
22 to a permit which we already have regulations and standards
23 established for those, such as, you know, for the Pit Rule or
24 Surface Waste Management rules for re-vegetation standards. So
25 I don't understand the line of questioning.

1 Q. Just the expertise of the people within the
2 Division for evaluating each one of those requirements is what
3 I'm trying to get to, whether or not the requirements are there
4 that are important and would be used or if they are simply more
5 paperwork that no one actually has the expertise to evaluate.

6 A. Well, if I'm not mistaken, you're referring to
7 the hydrogeologic and site report which asks about soils and
8 geology, I think, you know, things like that. We're looking at
9 the erosional properties of the soils, which I don't think a
10 soil scientist -- a geologist could do that. You could look at
11 certain -- if it's silty, sandy soil, you could understand what
12 may happen if there's certain topography that would create
13 erosional issues or storm water issues at that.

14 That could visually be determined on certain
15 activities. So I don't know if a soil scientist really would
16 be necessary to make those determinations. We currently do
17 that under the Pit Rule and Surface Waste Management Rule for
18 the cover designs and everything else.

19 Q. There was reference to 9(G), administrative
20 completeness, and it has a time limit there of 60 days. What
21 happens if the 60-day time limit is not met?

22 A. Well, it's -- you know, in all honestly, what,
23 you know, what we're looking at is not during this review
24 process. That's why I recommended changing it to say
25 "application completeness." It's not a comprehensive review.

1 You know, as we go through these items, are these
2 things -- is the legal description provided, or is the area
3 defined? Does it include that half-mile boundary? Does it
4 have things like surface ownership? We're going to be looking
5 just -- does it have that? You know, if they submit a report
6 such as the hydrogeologic and site report, is it going to
7 address soils geology, surface hydrology? To what extent?
8 We're not assessing that. But does it address somewhat of
9 those items, then the application is complete in that aspect.
10 If there's a monitoring well installation plan in it that
11 includes one well, that could be it.

12 We're not making a determination, recommendation of
13 approval or not. It should be a very simple review. It's
14 almost like a checkoff list and certain items specific to what
15 you have to have done. It should have those items in it.

16 Q. But what I'm trying to ensure is that industry
17 does not say, "Okay. It's been 61 days. That means that it is
18 complete."

19 A. If they pursue -- if they want to pursue that,
20 then they will have to defend it at hearing. But what -- I
21 guess what I'm getting at is that I really doubt it's going to
22 take 14 days to look at it. Now, the difference would be if
23 someone left out certain items that have to be readdressed,
24 then we would have to notify them, and that would be a delay
25 created by the applicant themselves by skipping over certain

1 items that are specifically identified. But in a checkoff list
2 fashion, you know, is your name, telephone number, e-mail
3 address, on there? That's a "check box number one" type thing.

4 Q. I just don't want the default to be that if
5 61 days comes through, then it is automatically a given that it
6 is a complete --

7 A. I've never known any regulation -- next door they
8 put time lines on us. That's never been the case. It doesn't
9 benefit the applicant to go to hearing with an incomplete
10 application because then they'll have to defend that.

11 But based on these time lines and what's being
12 requested and the fact that the review is not comprehensive,
13 we're not going to be assessing the information. It's more of,
14 well, content rather than context-type thing, meaning that you
15 have these little -- the items that are required only.

16 It should be a very simple, non-comprehensive review.
17 It shouldn't take that long.

18 Q. Let's switch gears. My understanding of the
19 State Engineer's testimony was that there was little
20 uncertainty in Santa Fe County outside of the Galisteo Basin
21 concerning the formations of the water availability.

22 The record will stand on its own concerning that.
23 But if my understanding of that testimony is correct, why
24 should this rule apply outside of the Galisteo Basin?

25 A. Are you referring to it including all of Santa Fe

1 County?

2 Q. Yes.

3 A. We pursued this based upon the executive orders,
4 the language in the executive orders. It specifically said
5 Santa Fe County and the Galisteo Basin. So when the Governor
6 asked that we consider rules on this and put together rules,
7 that's what we did.

8 Q. There's a big difference between consideration of
9 rules and promulgation of rules. I'd just like to point that
10 out.

11 Do you know if OCD reviews the plans of development
12 of oil and gas exploratory units?

13 A. I don't know. I'm with the Environment Bureau,
14 so I deal with WQCC and Pit Rule and Surface Waste Management,
15 so I'm not the person to answer that question, I guess.

16 Q. Okay. Simply because they're based on evaluation
17 of drilled wells for next steps.

18 A. Okay. I don't know how that's -- I don't do that
19 work, so I can't comment on it.

20 Q. Not your area. Okay. So am I to understand that
21 the only exceptions allowed in this rule are found in
22 19.15.39.10(B)?

23 A. Yes. Those are the only items that will allow --
24 because they're conditional provisions -- for them to address
25 to ask for an exception for them.

1 Q. So nothing within 9?

2 A. Well, 9 is the plan. We want all plans to be the
3 same with the same information. What we're doing is the
4 exceptions will be an exception based upon a specified
5 condition that would be linked to the APD once you get past the
6 plan aspect.

7 So we would expect all the information, the
8 contingency plans, all that information be the same for every
9 applicant. But these conditional things are linked to the APD,
10 not the plan -- the APD that they would be applying for in this
11 area. Those are the things that we're opening up to
12 conditions -- or for exceptions. I'm sorry.

13 Q. OCD has imposed a time limit for its evaluation
14 of completeness, but do any of the other consulting agencies
15 have such time limits, like SHPO or Fish and Wildlife or
16 whoever else, other agencies, that would be commenting? So can
17 this go into limbo forever until there's a response from these
18 other agencies?

19 A. Well, I -- you know, that's why we have the
20 comment period. We have a 60-day comment period, a window of
21 time. And the -- Exhibit 25 for the part of -- let's see.
22 Under 4.10.7.3, the statutory authority, this section -- okay.

23 I apologize. Can you click here? There. Okay.
24 That last sentence down there talks about as an agency, we have
25 to afford the Historic Preservation Officer a reasonable and

1 timely opportunity to participate. But they're going to have a
2 60-day window to look at this because when we deem it complete,
3 the application complete, we're going to give them a copy of
4 it. So they'll have 60 days to review this. And if they have
5 any comments, they can bring those to hearing.

6 Q. And if there are no comments, then time's up?
7 And if they don't get a response?

8 A. Their statutes don't state that. What they can
9 do -- and their regulations specify it, especially. Let's say
10 we approved a plan, we go ahead and approve it, and the
11 operator is putting in some type of transportation line or a
12 road, and they encounter something. They have rules that if
13 you encounter something, you have to address. So that doesn't
14 kick them out at all. That kicks their rules into play. So
15 there are provisions to address those type of scenarios.

16 Q. For SHPO. But for the other participating
17 agencies --

18 A. Well.

19 Q. -- that do not necessarily have that continuing
20 authority by regulation?

21 A. Well, it's -- they would operate as they operate
22 now when we approve APDs and the activities that we currently
23 approve.

24 I guess I'm not understanding. We currently allow
25 wells to be drilled, and those parties have a right to provide

1 input and implement their regulations at that time.

2 Once again, this is a plan. This is not a permit.
3 Most of those parties are involved in the permitting process,
4 is my understanding.

5 Q. Let's talk about the five-year wait for approval.
6 If there are multiple operators and multiple plans, would there
7 be multiple pool rules? Because according to the proposal
8 here, the pool rules would be specific to the operator's plan.

9 A. Yes and no. If the operator that establishes the
10 first pool, the nomenclature, the name would be the same as
11 pools are established today. It wouldn't be named necessarily
12 after the operator and linked to the operator. It would be
13 linked to that formation in which they established the pool.

14 Another party could, after the implementation of a
15 five-year E&D Plan, could potentially become part of that pool,
16 but those conditions are specified upon that special pool.

17 Q. So they would not have to apply for special pool
18 rules even though they come in three years after somebody else?

19 A. They would still have to implement their E&D Plan
20 for five years. Not all of their wells may end up in that same
21 pool. They may establish a new pool.

22 Q. What is the basis for the five-year wait? How is
23 that not an arbitrary number?

24 A. Honestly, I don't know, because I didn't write
25 these regulations. I don't know. I would assume it would be

1 ample time for us to gather information if there's any drilling
2 involved. Five years is not a guarantee that you would go into
3 a special pool order, because you may only drill one well. You
4 may drill no wells in five years under this plan and then
5 decide to drill one in the sixth year. So I honestly don't
6 know where the number came from.

7 Q. So there's been no testimony to justify five
8 years.

9 A. No.

10 Q. I was intrigued by this provision, and so I
11 looked at the current OCD rules for requesting creation of a
12 new pool, and it's pretty vague. It really doesn't say a whole
13 lot.

14 So then I went to the latest OCD hearing examiner
15 rules, cases, for development and pool creations of new pool
16 rules. And two months ago an order was signed in Case
17 No. 14160, and the pool rules were based on geologic and
18 engineering testimony for a well that had been completed in May
19 of 2008, and the hearing was in August of 2008.

20 So in this wildcat area and a new pool being
21 established, there was simply a two-month wait before the pool
22 rule could be heard before an examiner and an order issued.

23 A. That is probably true because the thing I don't
24 know -- I don't know about this case. If it was in the
25 Southeast, something would tell me that the pools that were

1 established above that, the geology, the hydrogeology of that
2 area above that formation is probably already established.
3 That would be my assumption. I don't know, because I don't
4 know which case you're referring to.

5 In this area, this is not a case. In this area, we
6 don't have that information. That's why we're establishing
7 these provisions to do an E&D Plan, because if it is in another
8 part of the State that's more developed, other pools are
9 established above that new pool that you're referring to. The
10 infrastructure is in place as well. None of that is here in
11 this area that we're addressing today.

12 Q. But the infrastructure is not normally a
13 condition or even a factor in developing special pool rules for
14 OCD.

15 A. Absolutely. What we're getting at, though, is
16 that the geology and the hydrogeology has already been assessed
17 in those areas. It's not in this. And the reason I mention
18 infrastructure is because in this area we still don't even know
19 about ground water. Infrastructure would include the potential
20 of pits, onsite burial -- because you can get an exception to
21 the condition of a closed-loop.

22 There is, once again, infrastructure including
23 surface waste management. Once again, geology, ground water,
24 would be an issue that needs to be considered with that, which
25 we really don't have a lot of information on.

1 Q. Well, the statewide rules for Surface Waste
2 Management for use of closed-loop drilling cover the State as
3 well as this particular case. And this case does involve a
4 discovery well for the new pool. It just seems that five years
5 is an arbitrary, unsubstantiated number.

6 A. I honestly don't know where the number came from.

7 Q. So many of the statewide rules are being changed
8 or adapted or ignored for this particular proposal. This
9 Commission sat just a couple of months ago listening to many
10 months of testimony for Pit Rules, for use of closed-loop
11 systems, for onsite burial. We listened to hours of technical,
12 scientific testimony, and we had careful deliberations.

13 But yet the OCD is now proposing to throw away all of
14 that work that was put into each and every one of these
15 statewide rules without sufficient technical scientific
16 testimony as to why they're not working or giving examples of
17 what has not worked.

18 It's very frustrating to sit through so many days and
19 then to have, "Oh, well, we don't have any basis for five
20 years, but it sounds like a good number," without any testimony
21 to contradict the work that we've already done. And it just
22 seems so peculiar to me, where reclamation is one of my very
23 important issues on this Commission, that reclamation has not
24 even been addressed in this rule.

25 If I were a citizen with the view of a well pad and

1 an abandoned -- temporarily or permanently -- abandoned well,
2 and there were no specific regulations for reclamation or
3 re-vegetation, I would say that the environment wasn't being
4 handled very well. Why were no reclamation provisions put into
5 this rule?

6 A. Well, I'd like to comment on a couple of things
7 about what you stated. For reclamation -- once again, this is
8 a plan. It's not a permit or rules, such as the Pit Rule.
9 They do have reclamation standards in them, and you guys saw to
10 that, and I commend you on that.

11 So when they seek these activities and seek the
12 permits under the plan, the plan is just a plan; it's not a
13 permit. The regulations such as Part 17 and the reclamation
14 standard specified within Part 17 would apply. So those rules
15 are working. Those rules create a baseline is what they do.
16 They create a foundation which we work upon.

17 The reason that we're looking and looking at these
18 special rules for this area is because there are so many
19 unknowns. We don't know about ground water in this area. As
20 Mr. Morrison has stated, there was -- it could be different ten
21 feet away. There's so much diversity that they don't even
22 understand about the complexity of this area. So we're taking
23 the precautionary step of moving into this area and doing
24 development. So I feel like we're doing our environmental part
25 of that.

1 The other factor is recognition from the
2 U.S. Congress and SHPO of the -- you could say, the impact of
3 cultural properties of this area, the significance of it, the
4 amount of area that's impacted by it. This is another thing
5 that we're looking at within this as well, by including them to
6 participate in this process to distinguish those so we do not
7 create an environment that would circumvent a statute and
8 regulations that operators must comply with and promote that.

9 So we want to promote -- do our part to make sure
10 that protection is established, and let SHPO do their part to
11 ensure that.

12 Q. But you are circumventing statewide rules that
13 were developed under due process.

14 A. I wouldn't say -- I don't understand the question
15 of circumventing. In order to get the APD, you still have to
16 go through the APD rules to get the permit. The rules still
17 apply. This is a plan. It's not a permitting process. It is
18 only a general plan of action. That's all it is.

19 Q. But the plan has certain requirements that
20 contradict the statewide rules.

21 A. I couldn't say they contradict. They add another
22 layer to them, a protective layer.

23 Q. And you're relying on permitting requirements for
24 reclamation, but the reclamation only applies to the specific
25 areas disturbed under the closed-loop systems and the roads

1 developed for that, even though it's the entire well site
2 including the roads.

3 A. And that is the current standard for those
4 activities that are permitted under Part 17 as well. If you're
5 on State land or federal land, then they'll have their
6 reclamation standards apply as well. Nothing really changes on
7 reclamation that currently is required today for any other
8 permit.

9 Q. I'm just saying it's incomplete in not
10 applying -- if you're changing rules, why not go ahead and
11 expand the requirements for reclamation and re-vegetation to
12 include the entire well site as well as those reclaimed roads?
13 That's why my question of why OCD hasn't done this. Because
14 that is the environment, according to many of the residents.

15 A. That's something to consider. What we were
16 trying to do was let the current rules stand for themselves in
17 that scenario. But that could be something that the Commission
18 could consider.

19 Q. The operator needs to apply for renewal of their
20 plan every five years. What if they're not doing any
21 additional drilling, re-entry or workovers?

22 A. Well, if they're not doing any -- well, my
23 understanding, part of our responsibility is to make sure
24 they're complying with their plan. Let's say they have done
25 some activity and there may be certain things -- let's say,

1 under their contingency plan, they're not implementing their
2 contingency plan. The renewal process is to make sure they're
3 in compliance with what they stated they were going to do five
4 years ago; meaning, are they doing what they agreed upon?

5 There's -- you know, the permitting aspect will be
6 handled by the regulations that exist. The conditions -- let's
7 say, they're not logging as they were supposed to. Those items
8 may come up during this process.

9 Q. But are they required to renew if they're not
10 doing any drilling or re-entry or workovers?

11 A. Yes. Because it keeps it on track for us so we
12 don't lose track of it. Five years is a long time. The
13 hearing that would occur five years from now -- or if we had a
14 hearing today, the people that were present for that hearing to
15 make that determination that assessed it may not be present
16 five years from now.

17 It's good to touch base with the Division, once
18 again, to make sure that everyone is on track, including the
19 operator. I can tell you from personal experience dealing with
20 Surface Waste Management facilities we have several operators
21 who still didn't even understand the conditions of their permit
22 when they were issued and had difficulty complying with them.
23 And now that we have Part 36, we're trying to reeducate them on
24 that aspect as well.

25 Q. So maybe this language should be improved to

1 remove that loophole that if they're not drilling or
2 re-entering or reworking their well that they still have to
3 renew it.

4 A. Well, it's definitely clear that if they do not
5 get the application in, we can shut in activities. But yes, it
6 would be, if it's not clear, regardless if they have
7 implemented anything under the plan, that they still have to do
8 it, unless they decide not to continue under the plan. The
9 plan expires in five years. If they choose not to renew it,
10 that plan doesn't exist any more.

11 Q. But they can still produce the well?

12 A. No. They have to have a plan to produce the
13 well. Let's say if I --

14 Q. See, there's the Catch 22.

15 A. Absolutely. And there should be, because the
16 idea is that I get a plan to produce a well, and I wait five
17 years, and I do nothing, and I sit on it. And then in year
18 seven, I think my plan is still active. Well, it says you have
19 to review your plan in five years. If I haven't renewed it, I
20 don't have a plan.

21 Q. So you're saying production of the well is
22 dependent on having a plan, an approved plan, even though they
23 do not intend to do any further drilling or reworking?

24 A. Absolutely. Because what you do at that time,
25 you update your information; meaning that in my original plan,

1 I proposed to put my well over here -- or six wells. When it
2 comes time to renew, I'm going to show you which ones I
3 actually put in. I've got to update that information.

4 If I established any infrastructure, I'll update that
5 in that plan if I have a well out there. What it does is if
6 future development comes out through a renewal, and they decide
7 to, you know -- it goes back to spacing; it goes back to
8 minimizing the footprint and so forth. As they go back to
9 renew, there may be other things to consider of placement of
10 future wells, as well, to achieve those goals.

11 COMMISSIONER BAILEY: That's all I have.

12 CHAIRMAN FESMIRE: Commissioner Olson?

13 COMMISSIONER OLSON: Could we maybe take a break?

14 CHAIRMAN FESMIRE: Sure. Why don't we go ahead and
15 take a nearly 15-minute break where we can convene back here at
16 five minutes to 11:00. At that point, we probably ought to
17 take up Mr. Hall and Mr. Feldewert's Case No. 14122. I don't
18 anticipate that taking more than ten minutes, and then we'll
19 proceed with the questioning of the witness.

20 Why don't we go ahead and adjourn until -- take a
21 break until five minutes till.

22 [Recess taken from 10:41 a.m. to 10:57 a.m., and
23 testimony continued as follows:]

24 * * *

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

1 the record reflect that after the break all three Commissioners
2 are still present. We, therefore, still have a quorum.

3 At this time, we're going to take up Case No. 14122.
4 It's in the matter of the application of the Pecos Operating
5 Company for Approval of a Non-Commercial Saltwater Well in Lea
6 County, New Mexico.

7 I believe this order reflects a negotiated solution
8 to the case.

9 Mr. Hall, would you like to add something on the
10 record for that.

11 I tell you what. Why don't we take the attorney
12 appearances before we do that.

13 MR. HALL: Mr. Chairman, Scott Hall, Montgomery &
14 Andrews, Santa Fe, appearing on behalf of H&M Disposal Company.

15 MR. FELDEWERT: Mr. Chairman, Michael Feldewert with
16 the Santa Fe office of Holland & Hart here on behalf of Pecos
17 Operating Company, who is the applicant in the Division hearing
18 as well.

19 CHAIRMAN FESMIRE: Mr. Hall, do you have anything to
20 say?

21 MR. HALL: Mr. Chairman, briefly, this matter came
22 before the Commission pursuant to an application for hearing
23 de novo filed on behalf of H&M Disposal Company.

24 The Commission might recall, we earlier had an issue
25 with respect to the timeliness of the application. We overcame

1 that issue. We wanted the agency to address some of the
2 provisions in the Division's order, one having to do with the
3 requirement that my client's offsetting disposal well has
4 certain bottom hole pressure tests equipment run down it and
5 data provided to the Division within six months.

6 We also had a concern that -- had an interest in
7 requesting that Pecos or the operator of the Pecos well provide
8 some sort of notification to the operator of the current H&M
9 well if there were ever a conversion of the newly permitted
10 well to commercial operations. We've discussed that with
11 Mr. Feldewert and his client and have come to a resolution on
12 both those issues.

13 And that was the basis for the motion to amend the
14 order. We thought it was more expedient to have the Commission
15 do it rather than remand it back to the Division and re-notice
16 all of that.

17 The order, I believe, reflects the agreement of the
18 parties, and we request the Commission's adoption of the order.

19 CHAIRMAN FESMIRE: Okay. Mr. Feldewert, do you have
20 anything to add?

21 MR. FELDEWERT: No, Mr. Chairman. We are perfectly
22 happy with the order, and the only impact on us is the request
23 for notice, which we have no problem with.

24 CHAIRMAN FESMIRE: Okay. So, in essence, what we're
25 doing is issuing a Commission order on a hearing that we're not

1 going to have to settle, a disagreement that's been settled by
2 negotiation, right?

3 MR. HALL: Something like that. We have done this
4 before, Mr. Chairman, believe it or not.

5 CHAIRMAN FESMIRE: Not since I've been here.

6 MR. HALL: Well, it was before you were here,
7 actually.

8 CHAIRMAN FESMIRE: Okay. Commissioner Bailey, are
9 you comfortable with that?

10 COMMISSIONER BAILEY: I have no objection to this
11 order.

12 CHAIRMAN FESMIRE: Commissioner Olson?

13 COMMISSIONER OLSON: I have no objection.

14 CHAIRMAN FESMIRE: Okay. With that, the Chair would
15 entertain a motion to adopt the order as presented by the
16 parties in this case.

17 COMMISSIONER BAILEY: I move we adopt that order.

18 COMMISSIONER OLSON: I'll second that.

19 CHAIRMAN FESMIRE: All those in favor signify by
20 saying "aye."

21 COMMISSIONER BAILEY: Aye.

22 COMMISSIONER OLSON: Aye.

23 CHAIRMAN FESMIRE: Aye.

24 Let the record reflect that it will be signed by the
25 Commissioners and transmitted to the secretary. Is there

1 anything further on Case No. 14122? Okay.

2 With that, we will transmit the order to the
3 secretary and reconvene Case No. 14255.

4 I believe that Commissioner Olson, you were going to
5 cross-examine Mr. Jones.

6 COMMISSIONER OLSON: Thank you.

7 EXAMINATION

8 BY COMMISSIONER OLSON:

9 Q. Mr. Jones, I also want to follow up, I guess, on
10 some things that Commissioner Bailey was bringing up. I think
11 I brought this up, as well, in addition to her and some other
12 witnesses about the need for special provisions in all of
13 Santa Fe County.

14 Is the Division planning on putting on any evidence
15 for the remainder of Santa Fe County for the need for special
16 rules in those areas, such as issues with protection of fresh
17 waters?

18 A. I believe we've done all our direct. I think in
19 our direct we addressed how we came up with including Santa Fe
20 County and the Galisteo Basin through the executive orders.
21 So --

22 Q. Just through the executive orders?

23 A. I believe there will be no more direct testimony
24 on that.

25 Q. Okay. I'll admit, just in hearing some of the

1 testimony and some of the cross-examination, I guess I'm a
2 little confused, as well, on the role of OCD in this, I think,
3 because you were saying there actually is no recommendation,
4 then, for approval that comes to the hearing?

5 A. That is correct. This is an application
6 submittal for a general plan. The reason that we were trying
7 to stay away from the recommendation is that there is a
8 permitting process under a different regulation. We don't want
9 the assumption that the potential for a recommendation would
10 circumvent that whole permitting process or guarantee an
11 operator a permit. Because this is very general information.
12 It's not the same that would be required for those other
13 permits that they have to obtain.

14 Q. But I think that's why I get a little confused,
15 because it seems to me that if you don't get approval of a
16 plan, then you can't apply for a permit, I would think.

17 A. Absolutely. That is the way it is. Once again,
18 the approval of a plan is based upon the information. It
19 doesn't demonstrate that their planned activities within the
20 plan that they're proposing to do in that area doesn't prevent
21 waste, protect correlative right, protect fresh water, human
22 health -- public health and the environment.

23 That's the basis of the determination. Of course,
24 there's also the implementation of the enforcement rule of the
25 status of the operator, as well, to be considered on that.

1 Q. But then in parts of the plan it requires the
2 Division to evaluate certain affects. I guess I'm looking
3 under 19.15.39.9B(6), it talks about the hydrogeologic and site
4 report and that this is -- if I look at the last part of that,
5 it says that it's to enable the Division to evaluate the actual
6 and potential effects on soils, surface water, and ground
7 water. This is the same information that's being required as
8 part of 19.15.17, which is part of a permitting action as well.
9 So --

10 A. It is to a certain extent. The difference is
11 this would be a broader area compared to a site-specific area
12 than a pit or below-grade tank or permanent -- temporary
13 permanent and drilling -- temporary permanent pit that would be
14 installed. So that would require not only some regional but
15 also very site-specific information.

16 This could be anywhere from 100 to 1,000 acres that's
17 being assessed.

18 Q. Well, I agree. I think it's also reflected as
19 well in B(13), because there it talks about other information
20 the Division may require to demonstrate that the plan will
21 prevent waste, protect correlative rights, protect fresh water,
22 and human health, and the environment.

23 And I guess that's why I come back to what's the role
24 of OCD? It sounds like the plan is going to be written at the
25 hearing, essentially. I mean, in terms of what's to be

1 approved, the Division won't be actually making a
2 recommendation on approval. So is the hearing officer going to
3 evaluate potential effects on soils, surface water, and ground
4 water?

5 A. Well, the way we see the implementation of this
6 is that OCD may appear at the hearing to express concerns about
7 the information provided in the application and the
8 implementation, the effects that certain activities have.

9 A good example would be if they propose some type of
10 surface waste management facility in an area that clearly
11 demonstrates that it more than likely wouldn't meet the siting
12 requirements under Part 36. We could come to hearing to inform
13 the hearing examiner that we do have these concerns.

14 There's nothing to prevent an operator asking for an
15 exception to a siting requirement -- saying with Part 17 for a
16 pit or some type of onsite closure. So, you know, we can't
17 prevent an operator from their due process under the other
18 rules. That's why we're trying not to get too involved in that
19 because they do have a right to ask for exceptions. So we
20 can't prevent them from doing things.

21 But, you know, we can bring up these points and say,
22 you know, "That will probably require exception requests. Have
23 you considered that?"

24 They may want to change their approach during the
25 hearing because they realize that maybe it's not a good idea;

1 that what may be needed to ask for in order to obtain that
2 permit may not be a reasonable request.

3 Q. But there's no requirement that the Division
4 provide any comment on the rule outside of what's issued from
5 the hearing officer; am I correct?

6 A. There's no requirement that we provide any
7 recommendations, but I definitely see that we're going to be
8 party to every application that's submitted under this plan to
9 have comment, to provide recommendations, maybe recommendations
10 to the conditions to the plan.

11 A good example would be that the operator asks for
12 the exception for a condition to an APD that would allow onsite
13 closure because they think that ground water is greater than
14 100 feet, and they think that would -- the burial standards in
15 place are for onsite closure.

16 Certain activities up under that dealing -- let's say
17 they went through that process, and they got that approved in
18 their plan. We may show up at hearing while they're trying to
19 get approval and say, you know, you may want to have a backup
20 plan and make it broad-based enough to say if, for some reason,
21 while setting the casing and determining the saturated zones of
22 fresh water you encounter shallow zones that could be
23 considered fresh water at 50 feet and you don't meet that
24 siting requirement, then you will say if that happens then
25 you'll haul it away and dispose of it at an OCD-approved

1 facility.

2 There may be recommendations within the plan to make
3 the plan flexible so they would address those issues so they
4 don't have to get it amended at a later date.

5 Q. But, I guess, isn't it more efficient to have
6 that kind of exchange going on between the Division and the
7 applicant prior to the hearing to make the hearing a more
8 efficient process instead of trying to do things from scratch
9 and evaluate those things at the hearing instead of some kind
10 of back-and-forth process of exchanging information that occurs
11 prior to the hearing?

12 A. Well, from the line of questioning that I've
13 seen, there's concerns that we begin to dictate what the
14 operator can do. And we do not want to be construed as
15 dictating what they can do up under their plan that they
16 propose. So we're allowing them the opportunity to suggest
17 things to, you know, put forth what they want to do and not
18 dictate that to the review process.

19 Because there are -- like I said, there's nothing
20 that would prevent them to as for an exception under the rules
21 in order to obtain their permit. What we don't want to do is
22 be telling them that they can't apply for this when they have
23 an opportunity under a rule to obtain a permit to ask for an
24 exception to that standard.

25 Q. But it still sounds to me, though, that the

1 process that you're describing, those things will only be
2 addressed at the hearing, and they won't be addressed up front
3 when there could have been some resolution of it prior to the
4 hearing.

5 A. Well, once again, we wouldn't know, depending on
6 the available data at the time of what they can obtain. It may
7 look at that time that there could be a potential for an onsite
8 closure. We don't know. But there are certain elements within
9 this, especially the conditions that will be placed on the
10 APDs, that it could provide the review of the mud logs. It
11 could indicate that even though there could be an indication
12 that there's a shallower zone, a freshwater zone, that would
13 prevent that from occurring.

14 So we can't predict what's going to happen out in the
15 field, but we can depend on the information that we're
16 obtaining with these conditions to assist us to correct
17 something. Because under the Pit Rule, they may have the same
18 information. If there's only three wells, water wells nearby,
19 and there's nothing else, and they're high-yielding water
20 wells, fresh water wells, they may be using that for their data
21 to determine where ground water is out in the area when they
22 obtain their permit under Part 17.

23 But with the mud-logging program and the assessment
24 of the mud logs, it may be determined that there's something
25 else present that wasn't tapped into when those wells were

1 originally installed. We may have to come back in -- we could
2 grant a permit for onsite closure based upon the general
3 information during that permitting process. But when they
4 drill the well, we could come back and say, "You know what?
5 You've demonstrated that ground water is at 50 feet. It
6 doesn't meet the requirements for this. Therefore, you're
7 going to have to opt out and not be able to bury it onsite."

8 So there's -- you can say that's a form of this
9 format that makes it -- provides us better information to make
10 a better determination. Maybe it's an approval that shouldn't
11 have been approved because we didn't have the information at
12 the time to make that assessment.

13 Q. I guess it's still confusing me that some of
14 these provisions, though, seem to be requiring an evaluation of
15 the Division, and the only place that it appears that that
16 evaluation is going to occur is in front of the hearing
17 officer; is that correct?

18 A. Yes.

19 Q. And when we get to the issues of the geology,
20 hydrology, surface water hydrology, are the hearing officers --
21 do they have the expertise in that, as well? Because there is
22 no requirement that the Division actually rule on it, except
23 for a ruling from the hearing officer.

24 A. Well, once again, we can be a party just like any
25 other agency or any person from the public to participate in

1 the hearing process. It doesn't prevent us from doing that.

2 If, for some reason, they use one well to assess
3 500,000 acres for ground water, and they use the log that was
4 done by a driller instead of a geologist, we might question
5 that and say, "You know, there's not sufficient information."

6 And we would show up at a hearing and express our
7 concerns to the hearing officer based on our expertise in that
8 area.

9 Q. And I agree that you may do that, but I think the
10 concern that comes through is most of the other rules that we
11 have require some kind of an evaluation from the Division in
12 trying to resolve conflicts before we get to a hearing.

13 A. And I agree most of the rules do. Most of those
14 rules, the end result is a permit with those rules. Once
15 again, this is a general plan that there is no obligation to
16 complete, follow through, to do anything. It can be amended at
17 any time and changed. But it's a plan. It's not the same as a
18 permit.

19 Q. But it almost seems to me it's effectively a
20 permit. If they can't get a plan, then they can't drill a
21 well.

22 A. It's an approval to proceed to a permit, to apply
23 for a permit.

24 Q. Right. But like I say, if you can't get the
25 plan, you can't even apply for a permit; is that correct?

1 A. That is correct.

2 Q. And, I guess, I hadn't thought about that much
3 before either, but Commissioner Baily was bringing up that
4 issue of the renewals. If all the wells are completed and
5 they're complying with the E&D Plan, why would they need to
6 renew the plan if they don't plan on any future work?

7 A. Well, to say they don't plan on any future work
8 such as deepening a well, re-entering a well, those types of
9 things, I would find that difficult to believe. Maybe in five
10 years or ten years, maybe not. Possibly though, based upon the
11 performance of the existing wells that are out there, there
12 seems like there's a lot of issues, and that activity is
13 currently being requested. So we had to see that.

14 The thing that comes into play also with this is that
15 they do have the opportunity at that five-year period to
16 request replacement for a special pool order, which, from what
17 you're stating, if they put those wells in within the first
18 year and they're out producing, operating, and everything is
19 going fine, the question would be, why wouldn't they do that?
20 That would be -- it seems to be the logical next step to pull
21 you out of the plan.

22 Q. Well, I guess I'm thinking along the lines of
23 county land use permits. You go get a county land use permit
24 to change something and you, say, reconfigure a lot to build a
25 house or whatever. Once you get that, you don't have to come

1 back and renew that unless you do something different.

2 A. Well, you have control of that whole lot and that
3 property. The problem that we run into is these are subsurface
4 leases. So, once again, let's say you haven't put any wells
5 out there. You haven't done anything under your plan.

6 Five years from now, a new development could go in,
7 new wells. You know, domestic wells could be installed in the
8 next five years that would change the assessment of what your
9 original plan had to do, because you didn't do anything to
10 begin with. You chose not to put those wells where you had
11 proposed.

12 But now there's other things to consider that the
13 property owner has done, the surface owner has done that would
14 have to be reconsidered and reassessed at that time. That
15 would be part of -- where it says, "Update the information
16 that's required in the application," that would be part of that
17 update.

18 Q. But, I guess, if the well is already in existence
19 and there hasn't been any real changes, and somebody comes in
20 and builds a house that's already in existence, they know that
21 well was there. So I don't see how that would factor into
22 that.

23 A. Well, once again, if the well has been there --
24 let's say it's been there for five years. Let's say you
25 proposed five wells, and you put them all in. The question

1 would be, why aren't you applying for a replacement to a
2 special pool order and not be up under the plan? There is that
3 option.

4 It doesn't -- you know, the idea is that we want to
5 see you operate things over this five-year period, see how you
6 function, how you handle your waste, do you need transportation
7 lines out to the wells or not. What occurs within that time
8 frame to see the activities that take place. If you have all
9 that going, functioning, and everything is fine, the question
10 is, why would you want to continue to operate under an E&D Plan
11 when you have the opportunity to replace it with a special pool
12 order?

13 Q. But, I guess, if you could come and replace that
14 special pool order, which is effectively the same thing as an
15 E&D Plan, there's no renewals of the special pool rules, are
16 there?

17 A. No, there's not. And it's not really the same
18 thing as an E&D Plan. The E&D Plan talked about your
19 infrastructure on all these other activities. A special pool
20 order would be based on the formation that you're going into
21 and the conditions.

22 There might come things from the E&D Plan that during
23 your operation it's discovered that -- let's say, it could be
24 things related to the contingency plan and certain activities.
25 There could be minimal things that some additional conditions

1 under that special pool order that would have to apply.

2 You know, that's just like any other special pool
3 order if they have any other additional conditions. But it
4 wouldn't require a renewal at that point if you did the
5 replacement.

6 Q. Okay. Because that was one of my questions.
7 What's the difference between an E&D Plan and a special pool
8 rule? There doesn't really seem like there is one, except for
9 you just can't apply for a special pool rule under this
10 proposal until you go through a five-year period, a five-year
11 waiting period.

12 A. I wouldn't call it a waiting period. It would be
13 a production operation period to see how you operate things, to
14 see if there's -- you know, there may be discovery of certain
15 conditions like the standard conditions under 10B that we're
16 asking for here. Due to the information obtained during that
17 five-year period, we may determine that certain conditions here
18 may not need to be applied anymore. We may also determine that
19 there's additional conditions that need to be applied or the
20 things that are discovered based upon those conditions.

21 Q. But along the same lines, if you come in, go
22 through the five-year period, and then get a special pool rule,
23 there's no chance to reevaluate that in the future then, I
24 guess. Because that special pool rule carries out until, I
25 guess, they're done operating?

1 A. I would -- I don't know enough about the pool
2 rules, if you can go to hearing to request a change to a
3 condition or not. I don't know enough about those. I --

4 Q. But it doesn't have any kind of a regular review
5 like an E&D Plan?

6 A. It would fall under other provisions of the pool
7 rule, I guess. I mean, our current pools that we have and the
8 conditions that we have them under the pool rules, they're
9 subject to change. That's my understanding.

10 Q. There was some discussion in the
11 cross-examination under the statutory provisions 70-2-12, and I
12 guess I didn't hear any discussion of 70-2-12(b)(7), which
13 requires that wells to be drilled, operated, and produced in
14 such a manner as to prevent injury to neighboring leases or
15 properties.

16 I guess -- I know you're not a lawyer, but it would
17 seem to me that wouldn't that also apply to the considerations
18 that would go into the authority of the Commission to regulate
19 drilling actives?

20 A. Absolutely. I think the line of questioning was
21 related to waste or it was limited to protection of public
22 health and the environment. But for the protection of
23 prevention of waste and correlative rights, I would say for
24 correlative rights, absolutely. There's also (b)(2) that would
25 prevent crude petroleum oil and natural gas or water from

1 escaping from the strata in which it is found into another
2 strata.

3 So under the Enumeration of Powers, to me, it's very
4 expansive. It covers all of our responsibilities under the
5 act, meaning the prevention of waste, protection of correlative
6 rights, protection of fresh water, human health, and the
7 environment.

8 Q. I'll come back to another issue that Commissioner
9 Bailey was bringing up about plans being transferrable. If,
10 say, a plan is issued and the property is sold the next year
11 and the new operator wants to implement the same plan that's
12 already there, is the only consideration of the Division the
13 issue of whether or not they're in compliance with Division
14 rules and regulations for being able to conduct that new
15 activity or same activity that was already approved for the
16 same plan that was approved?

17 A. Yeah. And I'd like to apologize. I'm recovering
18 from the flu for the past two weeks. And there is a transfer
19 provision in here. I'd just like to clarify that. And it's
20 actually under Section J of 9. And I do apologize for that.

21 If you look at -- and I believe it's J(8) at the very
22 bottom. It states, "In the event another operator becomes
23 operator of record of wells subject to the Exploration and
24 Development Plan, the new operator is to be bound by the terms
25 of the applicable Exploration and Development Plan or special

1 pool order."

2 And the thing I missed -- I was trying to scan it.
3 And if you look at the top of A, Transfer, I scanned the first
4 part of the title of that section. I was looking there, but I
5 missed transfers. It includes transfers in the title of that
6 section, and that's what that provision addresses there.

7 So those are the conditions under which that transfer
8 would occur. Now, if you did have an operator that had been
9 noncompliant and so forth, and there are issues, outstanding
10 issues, we do have a provision that allows us to revoke a plan
11 as well.

12 Q. Okay. Thank you.

13 A. And I apologize for that.

14 COMMISSIONER OLSON: That's all I have on that.

15 COMMISSIONER BAILEY: Could I ask a question to
16 follow up that?

17 COMMISSIONER OLSON: Sure.

18 COMMISSIONER BAILEY: Because it says, "In the event
19 another operator becomes operator of record of wells subject to
20 the Exploration and Development Plan," if no wells have been
21 drilled yet, is the transfer approvable?

22 THE WITNESS: I honestly don't know. I don't know
23 that answer.

24 Q. (By Commissioner Olson): Well, I guess I'll
25 follow up with that, too. Is there any reason why they

1 wouldn't be able to transfer that plan just because the wells
2 haven't been drilled?

3 A. It seems like based on this, this provision could
4 be modified to include something to that extent. And if they
5 chose to not abide by the terms of the approved plan, then they
6 could ask for an amendment to that plan.

7 Q. And, I guess, this rule is applying to the
8 drilling of wells. So I guess if someone was going to locate a
9 surface waste management facility, commercial facility in this
10 area with no plans to drill wells, that would just be subject
11 to the surface waste management rule, then, and not to a
12 development plan?

13 A. Absolutely.

14 Q. I think what I'd like to do maybe next is go
15 right down through the rule and ask some specific questions on
16 the rule language.

17 And, I guess, on page 1 in 19.15.39.9A, right at the
18 end there it talks about that the Galisteo Basin includes part
19 of Santa Fe County. And I don't see what part of Santa Fe
20 County that is defined as. I see definitions for specific
21 areas in Sandoval County, but not for what the Galisteo Basin
22 includes in Santa Fe County. Is there any information you have
23 on what that would include?

24 A. Well, I think it's clarified prior to that in the
25 first complete sentence talking about this would apply to any

1 well located in Santa Fe County or the Galisteo Basin. This
2 goes back to your question, does this include the whole county?
3 We figure we didn't need to identify those boundaries if it was
4 specific to that county and those county lines.

5 Q. But, I guess, I come back to the point that
6 Commissioner Bailey and I were bringing up earlier, that there
7 hasn't been any evidence on other parts of Santa Fe County
8 that's been presented here for the need for the rule there.

9 There's been evidence here, a lot of technical
10 evidence, on why it should be applied to Galisteo Basin. So if
11 we were potentially to exclude all of Santa Fe County, how
12 would we define the Galisteo Basin?

13 A. We would have to designate that based upon the
14 footprint of the Galisteo Basin within the county.

15 Q. And we don't have that information as part of the
16 testimony?

17 A. No. We are proposing the whole county.

18 Q. Next, I want to look at 39.9B(2). It talks about
19 the area covered by the plan, including at a minimum the
20 operator's best estimate of the productive area. If they're
21 doing a wildcat, how do they know what the productive area is
22 going to be?

23 A. Well, you know, the logic behind this is just
24 like any other wildcat area. I would imagine that you would
25 have some sense of where you want to drill. A lot of people do

1 preliminary work, seismic work, and so forth to get an idea of
2 what there might be a potential for. There's some existing
3 wells, depending on the proximity of that.

4 You may have some idea where you think something
5 might be. So when you look at that, that should coincide to
6 some extent where you're placing your wells, your proposed
7 wells, which is also required under this plan. So it should
8 encompass that.

9 Q. But, I guess, maybe what kind of got me is it
10 says a best estimate instead of just an estimate. Because I
11 don't think they're going to -- best estimate could be
12 something that could be argued. I mean, why wouldn't it just
13 be an estimate of a productive area?

14 A. It could be that.

15 Q. Okay. Do you know -- in 39.9B(5), I see you've
16 deleted (c). Could you explain why that was removed? It seems
17 like you're asking for that in other places, as well, for plans
18 for those areas.

19 A. Actually --

20 Q. Could you just comment on that?

21 A. Yeah. The items under (5) are to be identified
22 on the map, the original map. What we've done is used language
23 that is compliant, that would allow or instruct the operator to
24 comply with the requirements under the Cultural Properties Act,
25 and their rules and regulations are governed up under that. So

1 that's why we changed the language to -- if I'm not mistaken,
2 to my understanding, this was recommended language that we
3 received from SHPO to include in here to clarify what they're
4 required to do to comply with their act and their rules.

5 So, specifically, it would be to address those items
6 under B(9) and instruct them of the information. The
7 regulatory reference would instruct them of the information
8 that's required under those regulations that should be
9 provided.

10 Q. So, essentially, then, you're saying you just
11 remove that from there and replace it with B(9)?

12 A. Yes. Because B(9) would provide the information
13 that SHPO needs to do their assessment.

14 Q. Okay. Then do you know on 39.9B(5), I guess, the
15 new G that you have, why did you strike all existing water
16 wells and just leave it as wellhead protection areas?

17 A. The reason that we replaced that is that wellhead
18 protection areas are consistent throughout our regulations.
19 There's siting criteria that needs to be assessed for future
20 permitting. So this would also give us information in which we
21 could make comment at a hearing on based on the proposed
22 activities under the plan.

23 But it's also defined under our regulations and
24 provides very clear assessment and understanding of what that
25 would represent.

1 Q. Well, I guess, I'm thinking on the renewals. If
2 I remember correctly, doesn't wellhead protection areas exclude
3 water wells that are drilled after an oil and gas well is
4 drilled?

5 A. By definition I don't think it stipulates prior
6 or after. I believe it provided those definitions in here.

7 MS. MACQUESTEN: It's Exhibit 29.

8 THE WITNESS: 29?

9 Q. (By Commissioner Olson): I'm just looking at the
10 definition of a wellhead protection area, and it excludes new
11 wells that may be drilled, which may give you additional
12 information on water quality and depth to water geology,
13 hydrology in that area, but they are by definition excluded
14 from the definition of a wellhead protection area.

15 So you might be omitting water quality information --
16 hydrology, geology information -- that possibly might be
17 available upon renewal of a plan.

18 A. Well, specifically, it says wellhead protection
19 areas. It does not include areas around water wells drilled
20 after an existing oil and gas waste storage treatment and
21 disposal site was established -- not the drilling of the well,
22 necessarily, or replacement of the well.

23 Q. That seems a little confusing. It almost seems
24 like it might be better to leave all existing water wells and
25 wellhead protection areas in there to reduce that confusion,

1 wouldn't it?

2 A. We could do that. That would be appropriate.
3 That was our intent, was to gather as much information that was
4 available.

5 Q. And then down on 39.9B(5)(h), it talks about --
6 identifies on the map all existing oil and gas wells. Is that
7 intended to include plugged and abandoned wells, as well?

8 A. Yes, that's my understanding.

9 Q. Would that need to be added into that, or is that
10 covered by "existing oil and gas wells"?

11 A. That was our intent to include active plugged and
12 abandoned wells. If the Commission feels that it needs to be
13 clarified, we have no issue with that.

14 Q. Let's move along to page 2 to 39.9B(9). You were
15 talking about this new language being consistent with the SHPO
16 requirements. But if I look on what you're adding for the new
17 language, it talks if cultural resources are listed in -- or
18 eligible for listing in -- the national register or State
19 register.

20 I don't see the language "or eligible for listing" in
21 the SHPO language. In looking through -- I think it's
22 Exhibit 25. It seems more stringent than the SHPO
23 requirements.

24 A. Yeah, I think this goes back, if I'm not
25 mistaken, on the determination by the Attorney General,

1 Exhibit 30, about -- if I'm not mistaken -- about the
2 undertaking and the eligibility of sites based upon the
3 undertaking and how -- if I'm not mistaken -- they interpret it
4 based upon the federal language that uses that term. They also
5 apply that standard.

6 Q. Is that in the exhibits that we have here?

7 A. Yes, it's Exhibit 30.

8 Q. Could you point that out in here?

9 A. I'm trying to find this. The initial part of
10 this addressing part of -- this argument that addresses the
11 eligibility of things is, I believe, on page 4, and it's the
12 discussion about the National Historic Preservation Act, what
13 it defines. But below that it contemplates -- if I can find it
14 here. I saw it. It says NHPA requires all federal agencies to
15 examine the effects of their actions on property, including in
16 or eligible for inclusion in the National Registry of Historic
17 Places.

18 It's been a while since I've looked at this, but I
19 know there's something in here that alludes to the State
20 applying the same or similar standard.

21 Q. Well, the reason I brought it up is because when
22 I looked at Exhibit 25 and 4.10.7.9A and B, under their review
23 procedures for SHPO, it only talks about registered cultural
24 properties.

25 A. Yes, I can't find this here right now. I guess

1 the thing that comes into play with this is that this is
2 strictly for the -- and if I'm not mistaken, under that
3 provision, if I'm reading that correctly, known cemeteries and
4 unmarked human burials located in an area proposed in the
5 Exploration and Development Plan, if they have any knowledge of
6 those, and they plan to do activities in the vicinity of that
7 area, they know there is a process in which they must do their
8 assessment of that or obtain a certain permit for that to
9 occur. So indirectly it may make it eligible in that sense.

10 Q. Like I said, I didn't have a problem with that
11 language in there because it seems that that would apply
12 anyway. It was just that idea that it's eligible for a
13 listing, and it didn't seem consistent with SHPO's own rules.
14 And if this is being done for consistency with SHPO, it seems
15 like it should be consistent with their rules.

16 A. That seems to be appropriate, then.

17 Q. I think next I'll move to page 3, the proposed
18 rule in 39.9F, number 9. This talks about instructions for
19 requesting a public hearing. There's no time frame here for
20 when somebody needs to request a hearing.

21 A. My understanding is that we have -- there is a
22 hearing or request for hearing. We do have regulations on the
23 hearing process. Our regulations have changed the numbering,
24 so currently I don't know the current reference that we have
25 for that.

1 But in order for hearings to take place and a public
2 notice, usually there's a time frame in which those requests
3 would come in. I don't have the rule book in front of me.

4 Q. Well, I guess a couple of reasons why it's kind
5 of drawn my attention is that -- I think you testified to
6 this -- is that all applications for an E&D Plan, all initial
7 applications would have a hearing. There's no request for a
8 hearing. It's required by rule to go to hearing.

9 A. Absolutely. And that's why we have all initial
10 applications do go to hearing. This would be instructions for
11 those that have not been set for hearing, meaning a renewal or
12 amendment. Even a replacement of a special pool order could be
13 included.

14 Q. Would it maybe be appropriate to clarify that to
15 say that instructions for requesting a public hearing on an
16 application to amend, renew, or replace an existing Exploration
17 and Development Plan be submitted in 30 days?

18 A. We could do that. It's not clear. That's fine.

19 Q. Then coming down to a 39.9G, under item 1, at the
20 very end it talks about an application as administratively
21 complete if it contains all the information required by
22 19.15.39.9. But I thought I heard you say earlier what you're
23 looking for is the information in 39.9B, not all of 39.

24 A. Well, B is the application. It tells you -- you
25 know, it's titled "Application for Exploration and Development

1 Plan." A talks about the area in which it applies to. So the
2 logic of including everything under 9 here would include --
3 makes sure it addresses the location as well as the items that
4 need to be addressed in here.

5 And I think the reason it's also all encompassing in
6 here, as well, is that depending on if you have an amendment,
7 you would have to do certain things under C. It's still an
8 application, an amendment application to a plan. If you're
9 doing a renewal, you would have to follow D, the items under D,
10 which is another application that would be submitted.

11 As for the replacement, E, and also the legal notice,
12 which is defined under F, is part of the application. So those
13 items would definitely -- all of those items could be applied
14 at some point in time, if not required in all cases.

15 Q. I brought it up because that was the information
16 that we're looking at. It was the information in B. Isn't
17 that what you testified to earlier?

18 A. And the reason I narrowed it down to B is because
19 B does point out the notice if you were to renew, if you were
20 to submit an initial application, you definitely have to
21 provide all the information in B.

22 If you were to renew it, you would have to update all
23 the information required in B. If you were to amend it, you
24 would have to update the information and provide the new
25 information provided under B. That's why I kind of focused on

1 B in that respect.

2 But it is all-encompassing. It's definitely -- A
3 applies, B, C, D, E, and F definitely applies, depending on
4 your circumstance.

5 Q. Well, I guess A is just where regs apply. It's
6 not information that they would provide, it's just --

7 A. It would have --

8 Q. -- the applicability of the rule.

9 A. Yeah. And the reason I pointed out A is because
10 it should cover the area that's defined under A; meaning if
11 you're addressing items in Santa Fe County or Galisteo Basin,
12 it should -- this is where this applies, this application
13 applies. So it should address only those areas.

14 Q. Okay. Move to page 4. Under -- it looks like H,
15 H(1), there's an executive order out from the Governor on
16 environmental justice that requires publication of notices from
17 the agencies in English and Spanish.

18 And I know -- I think the Division has been
19 consistent with that and some of the other rules we've done
20 recently, but shouldn't that also be adhered to as this
21 environmental -- as Executive Order 2005-056?

22 A. It definitely could be applied to this.

23 MS. FOSTER: Mr. Commissioner, does that Executive
24 Order mention in the native language, or is it only in Spanish?

25 COMMISSIONER OLSON: I believe it's English and

1 Spanish.

2 Q. (By Commissioner Olson): And, actually, what I
3 thought -- well, just, I guess, this is a comment first. That
4 in the Environment Department, we've looked at legal notice as
5 a very ineffective way to provide notice to the public. And
6 the Water Quality Control Commission adopted regulations on
7 public notice looking at publishing a synopsis of a notice in a
8 portion of the paper, not in the legal advertisement section.

9 A. Yes, I'm aware of that.

10 Q. It seems like to be effective in providing notice
11 and also complying with the Governor's Executive Order, it
12 might be appropriate to add an item to say that we publish the
13 synopsis of a notice in English and Spanish in a display ad,
14 not in the classified or legal advertisement sections in a
15 newspaper of general circulation in the affected county or
16 counties. Does the Division have any objection to that?

17 A. No, we don't.

18 Q. Coming down to H, same page, page 4, H(2)(c), you
19 have it listed as the leader of tribes, pueblos, and nations in
20 New Mexico. I think in other regulations it's usually been
21 referred to as the governor, chairperson, or president of a
22 tribe, pueblo, or nation in New Mexico. Would that be
23 appropriate to put that in as a change for consistency?

24 A. I think that would be more clarifying, yes.

25 Q. And I'll move down to 39.9I(2). In a lot of our

1 other rules, we have some kind of a basis for when a hearing is
2 held. And here we just have language that says, "Division may
3 hold a public hearing on an application to amend, renew, or
4 replace an E&D Plan."

5 On what basis would the Division make this decision?

6 A. You know, these would have to be assessed on a
7 case-by-case basis. If someone were to amend theirs to expand
8 the infrastructure, the relocation of wells that they
9 originally proposed to different locations, with that would
10 come a change in infrastructure, utilities, roads, so forth,
11 from the original plan. If it's a substantial change, it would
12 seem to warrant that a hearing would be appropriate for such
13 activity. So they would have to be assessed on a case-by-case
14 basis.

15 Q. What if no one expressed any public interest?

16 Why would there need to be a hearing at that point?

17 A. That's why we have the "may" portion. It's not
18 required. If the public didn't comment on it, there could be
19 various reasons why the public doesn't comment. It could be on
20 State land. It could be on federal land. It may not be on
21 private property. But due to some of the changes, the OCD,
22 let's say, the Environmental Bureau may have some concerns
23 based upon the information required to that amendment, and we'd
24 like to voice into that. There might be cause.

25 Q. Couldn't that be done administratively, if

1 there's no public interest?

2 A. Well, I would hope the public interest isn't the
3 only interest that we would have. We would also have
4 regulatory interests as well, not just private citizens. There
5 might be some regulatory agency that has some outstanding issue
6 or concern that would like to discuss it on a more technical
7 basis at a hearing.

8 Q. Well, it seems to me that would be part of public
9 interest, whether it's another agency or --

10 A. That's true. That's true.

11 Q. I guess I'm used to seeing it in other rules and
12 regulations where we talk about the Division may hold a public
13 hearing if there's significant public interest. And the idea
14 is that we just don't have a hearing if we don't need to. I
15 think it's additional cost for the Division, as well as the
16 applicant -- unnecessary cost -- when, if there isn't
17 significant public interest, it could be worked out through
18 administrative approval.

19 A. And I agree with you there. If you look at
20 Provision 3, it does give us the authority to do things
21 administratively, including placing conditions and terms onto
22 that plan. It also provides, if I'm not mistaken -- I believe
23 there's a mechanism in which the applicant themselves can
24 request a hearing to contest those, so 3 kind of covers that --
25 a portion of 3. But it could be more clearly defined, you

1 know, if there's significant concern expressed.

2 Q. So would the Division object to adding to that
3 that the Division may hold a public hearing if there's
4 significant public interest on an application?

5 A. No, we wouldn't object to that.

6 Q. I guess I'll move to page 5 under 39.9J(2)(d).
7 It talks about approval of the application preventing waste,
8 protecting correlative rights, protecting fresh water, human
9 health, and the environment. I guess what's not clear to me,
10 it seems that it's not clear from the way this is written. It
11 seems that the burden of proof should be upon the operator to
12 demonstrate that the E&D Plan would meet these criteria.

13 The way it's written with just saying "approval" of
14 the application seems to imply to me that the burden of proof
15 may be on the Division. Or it could be argued that the burden
16 of proof is on the Division to make a demonstration.

17 A. I think this is the basis of our approval. If
18 I'm not mistaken, in the application under the modified
19 version -- it's number B(12) -- there may be other information
20 that we require for them to demonstrate that. I think that's
21 the goal of the E&D Plan to accomplish that goal.

22 And that's why we're asking for these items to be
23 presented. So my understanding under J(2)(d) is that would be
24 the basis or consideration for approval.

25 Q. Well, you mention, though, under B(12) other

1 information, and it talks about other information that the
2 Division may require to demonstrate that the plan will do that.
3 Which to me, the way I read that is that the demonstration is
4 upon the operator from things that the Division may identify to
5 make those demonstrations. It seems like the same thing should
6 apply in J(2)(d), that the operator demonstrates these items,
7 not the Division at that point. They need to demonstrate it to
8 the satisfaction of the Division and, I guess, the hearing
9 officer in this case.

10 Because if I look at J(2)(a) and (b), it talks about
11 the operator, things that the operator is doing. And J(2)(c),
12 the operator has done things. I wouldn't see why it wouldn't
13 be consistent to say that the operator demonstrates that the
14 Exploration and Development Plan will prevent waste, protect
15 correlative rights, protect fresh water, protect human health,
16 and the environment.

17 A. I think that would definitely clarify that
18 better, because that was our intent of the information to be
19 provided so the approval could be based upon that.

20 Q. Okay. Thank you. I guess this is a point of
21 confusion for me. We talked about the issues coming up with
22 SHPO previously, that certain things are required to be
23 submitted, including the effects of the proposed operations on
24 cultural resources, but there's no criteria for that within the
25 approvals in J(2).

1 A. Yeah.

2 Q. Can you comment on why that is?

3 A. Actually, there is. If there are concerns under
4 SHPO, SHPO's regulations apply. There is a process in their
5 rules of how to address those issues, but it's under their
6 authority and their rules. We're not implementing their rules.
7 We're going to let them implement their rules.

8 They may appear at the hearing and express concerns
9 of things that they're knowledgeable about because there's a
10 lot of their information that requires confidentiality of
11 locations and so forth and things that may be there that may
12 not be available to the applicant. So they would be able to
13 address those. And once again, they do have a process within
14 their rules of how to address those issues, how to negotiate
15 the issues that are related to those.

16 So we'll let their rules take care of that process.
17 It doesn't prevent them from getting their plan approved
18 because it may end up having to amend a minor amendment, such
19 as if you have a pipeline, it may not be advisable to go
20 through this area because of knowledge of what they have and
21 their concerns of disrupting that are. So that pipeline may
22 have to move over so many feet in order to go around something.

23 But there's different mitigating procedures within
24 their rules to address that. So it wouldn't prevent an
25 approval, our approval. And the reason I say "our approval" is

1 because under our approval, under our statutes we have certain
2 things that we must apply, and we're applying those under this
3 rule. We can't make our determination based on their rules
4 when they can make their own determination -- SHPO can.

5 Q. So if SHPO comes in and objects to a plan based
6 upon cultural resources, the Division would not have to listen
7 to them?

8 A. Absolutely we would listen to them. I guess what
9 I'm getting at is that based upon reviewing their procedures
10 here, they have processes, protocols, to modify and adapt and
11 address something that would prohibit them from objecting to a
12 complete plan, but to address the issue. That's the way it
13 reads. There's a way to mitigate that in order to make things
14 right. So I don't see where you would be --

15 Q. But the mitigation is between SHPO and the
16 company and not a consideration for the hearing officer?

17 A. The mitigation process is actually between, you
18 could say -- the party to mitigate the resolution would be OCD
19 is the way the rules read -- SHPO's rules would read. We would
20 have to mitigate it between SHPO and the operator, what they
21 propose to do, and propose it to SHPO to get concurrence by all
22 parties is the way their regulations read.

23 Would that prevent us from approving a plan and
24 resolving those issues? Absolutely not.

25 Q. Well, it seems to me that the plan, if that is

1 the intent, the plan is where that should be mitigated. Or why
2 would the plan be approved?

3 A. That's why we send the whole application to SHPO
4 to assess it so we can discuss these things during the hearing.
5 Hopefully, they would be resolved during that process. Now,
6 you're always going to run into a scenario where you approve a
7 plan, and then there's a discovery that SHPO's regulations come
8 into play, and they all have to be mitigated at that point
9 because there is no prior knowledge of that. You know, that's
10 a reality of this whole process wherever you're at.

11 Q. But it can't be mitigated as part of the plan if
12 it's not a criteria for approval of a plan.

13 A. The reason we chose the language that we have for
14 approval is based upon the regulations of the Oil and Gas Act.

15 Q. Uh-huh. I understand that.

16 A. We have our limitations.

17 Q. I'm just envisioning where something may be a
18 point of dispute. This information is being required. SHPO
19 could come to the hearing and object, and the Division would
20 still approve the plan over SHPO's objections?

21 A. Well, the plan doesn't guarantee you a permit.
22 Once again, it's a general plan. If there are issues that need
23 to be resolved between the applicant and SHPO, there's a
24 process. I guess that's what I'm getting at. It's a general
25 plan. The plan can change. It's not a permit application.

1 We're not saying that you can do this by approval of this plan
2 completely. Because there are regulations that deal with the
3 permitting aspect of that.

4 Q. I'm just trying to make sure I understand,
5 though. Then I guess what the Division is proposing is that
6 the information be provided so that SHPO has appropriate
7 information on where things are going to occur, they are the
8 agency responsible for mitigating those issues, and it's not a
9 criteria for approval because the Oil and Gas Act doesn't
10 provide us that authority?

11 A. Absolutely. That's correct. That sums it up
12 eloquently.

13 Q. It took me a while to get there, mentally. I'm
14 getting close here. I think I want to move to, I guess,
15 19.15.39.10, the proposals that the Division has for this
16 section.

17 I guess one thing I'm just kind of wondering, just in
18 general, was why was this not included, just this part of 39.9
19 and done as a special section? It seems to me it confuses
20 things when we have separate rules that are also about --
21 separate rules that are also about Exploration and Development
22 Plan. Why wasn't it just included as part of the rule
23 for 39.9?

24 A. In all honesty, I didn't come up with the format
25 for the rules. I know dealing with rule making and creating

1 sections and subsections State Records sometimes puts
2 limitations on how you address certain things. I don't know if
3 that was one of these issues or not.

4 Indirectly, it's easy to have a section much like we
5 do for other rules. I think with the Pit Rule, we have
6 different sections for different topics. But under the same
7 part, that one is specifically about the approval of the plan,
8 and the other is the process of APDs linking to that plan.
9 It's much like the Pit Rule where we have closure requirements,
10 we have construction design requirements, and so forth. But
11 each one is a separate section.

12 Q. Well, I agree they're separate sections, but then
13 I'm looking, and I come back into our existing rules. And
14 19.15.39, for example, 39.8 for Otero Mesa is a stand-alone
15 rule of it own, and it's for that particular area.

16 I guess, is this intended to apply to other areas in
17 the future besides Galisteo Basin?

18 A. I have no knowledge of that, because that's -- I
19 haven't been party in putting together the language and the
20 initial determination of the full -- you know, if there's
21 something that goes beyond that, I haven't been in those
22 discussions, so I honestly don't know.

23 Q. And then it's one thing I saw missing when we
24 start looking at issues for protection of water quality. We
25 have some conditions in the Otero Mesa rule, and specifically

1 the ones I was looking at were in 39.8B(6), (7), and (9) that
2 were done for protection of water quality.

3 This is such a -- you know, the operator will
4 construct produced water transportation lines of
5 corrosion-resistant materials and pressure test them. (7)
6 refers to putting tanks on impermeable pads and proper lining
7 of berms and appropriate capacity of berming. Part 9 talks
8 about performing mechanical integrity tests annually.

9 I guess, why weren't those provisions placed in this
10 rule? I'm thinking especially for some of the ones on produced
11 water transportation lines and tanks where there's been a lot
12 of contamination that's occurred in the past in other areas of
13 the State in both southeastern New Mexico and Northwestern
14 New Mexico, why were those included as special requirements?

15 A. I guess, based upon my understanding of the Otero
16 Mesa rule, it primarily addresses those conditions addressing
17 injection wells, which is kind of different from these wells.
18 And that might be why those conditions were placed on there.

19 We're hoping your concerns about spills and releases
20 and berming and so forth -- that's why we're asking for a
21 contingency plan, a preventive as well as an active one;
22 meaning that when you implement best management practice, you
23 would hope that it would include the items you just addressed
24 to be preventive under that plan.

25 And then, of course, the response aspect. If there

1 is a release, what do you do? So indirectly we use a different
2 mechanism by requesting certain items to be in the plan itself
3 to address those items.

4 Q. Then, I guess, I come back to some of
5 Ms. Foster's questioning earlier about specificity for
6 providing direction for industry on what appropriate measures
7 are being looked at it. And we've had testimony from the State
8 Engineer's Office about the limited water supplies and the need
9 to protect these water supplies within the Galisteo Basin.

10 So if we -- if we look at applying that to Otero
11 Mesa, wouldn't it be prudent to give that kind of direction on
12 pollution prevention measures for the Galisteo Basin as well?

13 A. It definitely would. I don't know enough about
14 the Otero Mesa. I just know some generalities about it, about
15 the no pits, and the following conditions after that are
16 injection well based. I don't know all the details.

17 But there's nothing that prevents us from also adding
18 conditions, additional conditions to approval of APDs. You
19 know, we do that currently. Those could be included in this
20 list as well. I see no issue with that.

21 Q. I guess I was specifically looking at C(6), (7),
22 and (9), so that would be reasonable for consistency to apply
23 those same type conditions to the Galisteo Basin?

24 A. I don't have a copy of that regulation, so I
25 don't know which ones are -- can I look at that?

1 MS. MACQUESTEN: If I may, Mr. Commissioner?

2 CHAIRMAN FESMIRE: You may.

3 THE WITNESS: You've identified (6), (7), and (9).

4 Q. (By Commissioner Olson): I think those are all
5 areas which have historical problems for ground water
6 contamination in the oil field.

7 A. Those would seem to be appropriate.

8 Q. I want to come back to one thing, because you
9 were saying this doesn't apply to injection wells. Why
10 wouldn't this apply to -- if they're having to come through, I
11 think, as you had mentioned earlier in 39.9B, and you talk
12 about their waste disposal, why wouldn't injection be proposed
13 injection as part of your waste disposal activities? Why
14 wouldn't that be included as part of the plan, potential
15 injection wells?

16 A. Well, they would be included as part of the plan.
17 And I'm just looking over here to make sure there's -- but my
18 understanding is that we're looking at productive areas for oil
19 and gas under this plan, so the APDs that they will be applying
20 for, especially up under Section 10, would be an APD for that
21 activity.

22 The injection wells -- if we have a salt water
23 disposal well, we have regulations that govern that in the
24 permitting process and so forth that would, once again, address
25 that. But it would have to be identified as part of your waste

1 disposal facility or methods -- waste management.

2 Q. Okay. I was just getting confused by a statement
3 you said earlier that this doesn't cover injection wells.

4 A. We were also talking about the conditions under
5 Section 10, which are the APDs. In all honesty, I do not do
6 well permitting, so I know under WQCC your injection wells
7 would be permitted under WQCC. I don't know that APDs are
8 required under that process in order to obtain those for
9 injection. I thought they would be issued under -- I'm sorry.
10 I don't do well permitting, so maybe I'm not the right person
11 to answer that question.

12 Q. Well, the reason -- since you had said that, I
13 was just bringing it up because the waste disposal activities
14 is -- whether it's injection or pits -- are going to be your
15 primary sources of, potential sources of contamination. It
16 should be addressed through the plan and how they're going to
17 deal with their activity.

18 A. We ask for that. Actually, it is a plan that's
19 within the E&D Plan that should be addressed. It's up under
20 9B(7)(d), and this would be addressing waste during the
21 drilling and production processes.

22 So part of the E&D Plan would include a plan that
23 would address those items. If that involved the proposal of an
24 SWD, that would be addressed under that plan.

25 Q. Well, just coming back to the issue that most of

1 our produced waters in this State are disposed of through
2 injection, so it's probably likely that if they have any
3 significant amount of water production, they're going to need
4 to have an injection well.

5 A. They could use some of the techniques used at
6 some of our surface waste management facilities where they use
7 evaporation. But most of those try to combine that with
8 injection, as well, to expedite that process.

9 Q. And so then I come back, if we do potentially
10 have injection activities which have a greater potential for
11 ground water contamination than mostly likely than a production
12 well, then why wouldn't we have some of the same requirements
13 that we have Otero Mesa on injection wells as special
14 requirements?

15 A. That would seem to be appropriate.

16 COMMISSIONER OLSON: I think that's it. Let me just
17 check here. I think that's all I have.

18 EXAMINATION

19 BY CHAIRMAN FESMIRE:

20 Q. Okay. Mr. Jones, when you were talking earlier
21 about the purpose of B(7)(c) about the mud-logging program --

22 A. Uh-huh.

23 Q. -- would the purpose of that be to give realtime
24 data for decisions about how to protect the water sources out
25 there while drilling the well?

1 A. Yeah, absolutely.

2 Q. And the idea is to keep the OCD informed about
3 what the conditions are out there since they are so variable
4 and vulnerable?

5 A. Yes, yes.

6 Q. On down, page 3, B(7)(f), developing the area if
7 the exploratory wells are productive, including the operator's
8 best estimate and the number and location of development wells
9 and related facilities, do companies, before they drill the
10 first well, do they generally have an idea of how big an area
11 they expect to develop if they're successful?

12 A. Well, I would hope so. I'm not too involved in
13 that process. I'm probably not the person to answer it, but I
14 would hope so.

15 CHAIRMAN FESMIRE: Those are the only questions I
16 have.

17 I'm assuming, Ms. MacQuesten, that you'll have some
18 redirect for this witness?

19 MS. MACQUESTEN: Yes.

20 COMMISSIONER OLSON: Could I just ask one more thing?
21 I noticed what I had written down here.

22 This comes to an issue that I believe Tesuque Pueblo
23 brought up about addressing impacts on wildlife. We do have
24 rules for migratory bird protections on waste disposal pits.
25 And should the information on the application also provide

1 maybe some type of best management practices for mitigating
2 impacts on wildlife as well?

3 THE WITNESS: It could. I mean, hopefully, they
4 would be applying those regulatory requirements that are
5 required in order to obtain the permits for activities that
6 you're doing so that any open top tanks or pits are required to
7 have those by regulation, especially if they -- you know, under
8 Part 17.

9 So it's already required. It would be good for them
10 to identify those. But through the permitting process they
11 wouldn't be able to circumvent that unless they ask for an
12 exception and have to justify why they would need it. And
13 there is a provision through that, depending on the size of
14 your pit, that there's an option to do monthly monitoring and
15 so forth, and if there are issues, to address them through the
16 Pit Rule.

17 So to me, the Pit Rule addresses that already. Like
18 you say, they would comply with the provisions within the Pit
19 Rules for that aspect.

20 COMMISSIONER OLSON: Wouldn't that be helpful if they
21 provide some type of a protection of wildlife?

22 THE WITNESS: That would definitely help support that
23 concept, absolutely.

24 COMMISSIONER OLSON: That's all.

25 CHAIRMAN FESMIRE: Ms. MacQuesten, I assume you were

1 going to have a redirect?

2 MS. MACQUESTEN: Yes, sir.

3 CHAIRMAN FESMIRE: Why don't we put that off until
4 after lunch. Would that be satisfactory?

5 MS. MACQUESTEN: Yes.

6 CHAIRMAN FESMIRE: At this time, we're going to break
7 for lunch and take an hour for lunch. We'll convene at 1:35 in
8 this room.

9 [Noon recess was taken from 12:34 p.m. to 1:35 p.m.]

10 CHAIRMAN FESMIRE: At this time, we'll go back on the
11 record. The record should reflect that this is the
12 continuation of Case No. 14255, that Commissioners Bailey,
13 Olson and Fesmire are all present. We, therefore, still have a
14 quorum.

15 I believe that, Ms. MacQuesten, your witness,
16 Mr. Jones, was about to subject himself to redirect
17 examination.

18 MS. MACQUESTEN: Yes.

19 REDIRECT EXAMINATION

20 BY MS. MACQUESTEN:

21 Q. Mr. Jones, I'd like to go back to a line of
22 questioning brought up by Ms. Foster regarding the standard for
23 approving the Exploration and Development Plan.

24 MS. MACQUESTEN: Ms. Duran-Saenz, if you could scroll
25 down -- this is the Exhibit 22 -- if we could scroll down to

1 Section J, please.

2 Q. (By Ms. MacQuesten): And Mr. Jones, if you could
3 take a look at J(2), and walk us through what must be shown
4 before the Division can approve an application.

5 A. Under J(2), for the Division to consider approval
6 of an application, under (2)(a) the operator must be in
7 compliance with Subsection A of 19.15.5.9. If I'm not
8 mistaken, that is the enforcement rule.

9 Q. Right. Is that the rule that's been known in the
10 past as Rule 40?

11 A. Absolutely. Now, the application provides that
12 information required under this section, Section 9 -- 39.9 --
13 to see that the operator has provided the notice required.

14 I think this goes back to that line of questioning
15 Ms. Foster had about notice, that they provide -- the notice
16 required is that they would have to demonstrate that they
17 provided adequate notice to all parties pursuant to the public
18 notice requirement, and that the approval of the application
19 will prevent waste, protect correlative rights, protect fresh
20 water, and protect human health and the environment.

21 Q. And if the Division determines that the
22 application fails on any one of those points, it cannot approve
23 the application; is that right?

24 A. That is correct.

25 Q. Let's talk about how the hearing process works.

1 If an application is set for hearing, the OCD has rules in
2 place regarding the conduct of hearings; is that right?

3 A. Yes.

4 MS. MACQUESTEN: And I would like the Commission to
5 take administrative notice of Part 4, Section 13 and
6 Section 14, in particular. You're not going to see them up
7 there; you're going to actually have to look at the rule books.
8 But the rules specify how someone could become a party to a
9 hearing; is that right?

10 CHAIRMAN FESMIRE: It does.

11 Ms. MacQuesten, would you recite those parts, please?

12 MS. MACQUESTEN: It's Part 4, Section 13, and Part 4,
13 Section 14. Section 13 is the one that addresses entering
14 appearances and becoming a party to an action. Section 14
15 deals with how individuals may want to make a statement or a
16 comment at a hearing. My point is that there are processes
17 already in place for hearing allowing this.

18 MR. HALL: Mr. Chairman, just so I don't have to
19 look; are these the adjudicatory rules or the rule making?
20 Adjudicatory?

21 MS. MACQUESTEN: Yes.

22 MR. HALL: Thanks.

23 MS. MACQUESTEN: And that whole Part 4 contains the
24 rules on adjudicatory hearings as there are other rules that
25 the Commission may want to consider.

1 Q. (By Ms. MacQuesten): But if -- let's say an
2 operator proposes a plan and puts it out for public notice.
3 There are existing rules in place governing how anyone could
4 become a party to that action and participate in that hearing;
5 is that right?

6 A. Absolutely.

7 Q. And participation wouldn't be limited to
8 providing written comments or oral comments, would it?

9 A. No. It could be pre-hearing statements, it could
10 be technical testimony.

11 Q. Okay. And you've been involved in hearings
12 involving permit applications, have you not?

13 A. I have for the Environment Department.

14 Q. How about at OCD? Have you ever participated in
15 the hearing process?

16 A. Only in rule making.

17 Q. Okay. Are you aware that the OCD could become a
18 party to a hearing before its hearing examiners?

19 A. I would imagine that would be appropriate,
20 definitely.

21 Q. Or it could choose not to?

22 A. Absolutely.

23 Q. There are plenty of hearings that are held before
24 OCD hearing examiners to which the OCD is not a party
25 presenting evidence?

1 A. If I'm not mistaken, we just had one in between
2 our breaks with two attorneys present in front of the
3 Commission.

4 Q. And that was on an SWD permit?

5 A. I believe so.

6 Q. And the OCD was not a party in presenting
7 evidence in that case or entering into the agreement with the
8 parties?

9 A. We were not party of that hearing.

10 Q. If -- and I don't know the circumstance of that
11 particular case -- if there was an SWD permit application going
12 to hearing, the OCD, if it had an interest in presenting
13 testimony, could enter an appearance and participate in the
14 hearing, couldn't it?

15 A. Yes.

16 Q. Okay. Is that how it works with the Exploration
17 and Development Plan?

18 A. Those rules should be the same that should apply.

19 Q. And the concerns that Ms. Foster expressed about
20 being surprised because someone might appear at hearing and
21 present evidence or argument that she had not heard before,
22 that is a problem that is common to all matters that are set
23 for hearing, isn't it?

24 A. The hearings that I've been involved in, it's
25 always an issue. It's public comment, and it's part of the

1 process.

2 Q. And there's a process for a party to enter an
3 appearance to be able to cross-examine witnesses and present
4 evidence, and they do have some disclosure requirements there,
5 and those are in place?

6 A. I've seen that before.

7 Q. It's that pre-hearing statement that you
8 mentioned?

9 A. Yes.

10 Q. But if someone wishes to appear and make a
11 comment at the proceeding, our rules allow for that also?

12 A. Absolutely.

13 Q. And that is in any adjudicatory hearing; is that
14 right?

15 A. Yes.

16 Q. Let's talk about what's required in an
17 application for an Exploration and Development Plan. And let
18 me ask you this: Do you contemplate that each plan will look
19 the same?

20 A. In format.

21 Q. Let me ask you this. Let me put it this way.
22 Let me give you a hypothetical. Let's say someone comes in
23 like Tecton, and they have three APDs pending. Let's say
24 Tecton or another company wants to propose a plan starting with
25 three exploratory wells.

1 A. Okay.

2 Q. And they give you a plan, and they locate three
3 explorations on their map, and they describe how they plan to
4 drill those. Let's say as far as dealing with waste, they say
5 there is no infrastructure in place, and it's premature for us
6 to address the waste issue now. We contemplate that any waste
7 that is produced will be transported to an OCD-approved
8 facility.

9 A. Okay.

10 Q. Given that those are the first three wells, and
11 we haven't even seen substantial production, that proposal
12 might look very different from someone proposing a plan ten
13 years from now after production is established, and there's
14 some infrastructure in place, and they know their
15 transportation needs, they know their waste needs, et cetera;
16 is that right?

17 A. Absolutely, yeah.

18 Q. And plans introduced at a time when very little
19 information is available are, of necessity, going to be less
20 detailed than plans that are provided later when more
21 information is available; is that right?

22 A. They should be.

23 Q. We had some questions about the transferability
24 of an Exploration and Development Plan, and some of those
25 issues were clarified as more questions were asked. But,

1 again, looking at Subsection J in the title, it does address
2 transfers; does it not?

3 A. Yes. I pointed that out.

4 Q. And if you scroll down to the very last paragraph
5 down at the bottom, it says if another operator becomes
6 operator of record for the wells in the area, they're going to
7 be subject that to existing plan.

8 A. Yes.

9 Q. For those wells?

10 A. For those wells.

11 Q. The question was asked, could we deny transfer
12 from the original operator to the new operator if the new
13 operator was out of compliance with our enforcement rules? Is
14 that something that's addressed under the enforcement rules
15 themselves?

16 A. It is. If I'm not mistaken, those rules would be
17 applied prior to any type of transfer. This doesn't -- this
18 plan and the transfer of this plan doesn't circumvent
19 pre-existing rules then applicable. So that would be
20 considered, if I'm not mistaken.

21 Q. There are questions about Exploration and
22 Development Plans being replaced by special pool orders. I'd
23 like to ask you a few background questions to clarify this.
24 Before we get to moving from an exploration plan to a pool
25 rule, let me just ask you about pooling. Independent of these

1 proposed rules, there are rules and practices in the OCD
2 regarding the creation of pools, are there not?

3 A. Yes.

4 Q. And the expansion and contraction of pools?

5 A. Yes.

6 Q. And, when necessary, adopting a special pool
7 order that imposes special conditions on a pool?

8 A. Yes.

9 Q. Normally, that has been in the past used for
10 things such as spacing requirements; is that right?

11 A. Yes.

12 Q. Where the spacing for the pool under
13 consideration needs to be different from the standard spacing
14 that's applied in our rules?

15 A. That's my understanding.

16 Q. Is there anything in the proposed rules that
17 replaces or revokes any of the existing rules on creating,
18 expanding, or contracting pools?

19 A. Not to my knowledge.

20 Q. And, in fact, isn't the Black Ferrell No. 1 the
21 well that is in existence in the Galisteo Basin? Has that not
22 been given a wildcat pool designation?

23 A. I think it might be in one of the exhibits for
24 the applications for an APD. They reference it as the Entrada.

25 Q. Commonly, when a well produces, it's given a pool

1 name if it's a wildcat?

2 A. Yes.

3 Q. And, eventually later, a nomenclature case is
4 done to declare a pool, and that pool grows as wells are added
5 near that pool; is that right?

6 A. Actually, the wildcat Entrada is what is
7 referenced on the APD.

8 Q. And so if another well were drilled in close
9 proximity to that Black Ferrell No. 1, the normal pool rules
10 would apply? Normal rules on pool creation would apply?

11 A. It could. It definitely could apply if they
12 drill into the same formation.

13 Q. Right. And if it's not in the same formation,
14 the rules would say that it's a different pool?

15 A. Exactly.

16 Q. But my point is that nothing in our proposed
17 rules takes the place of that.

18 A. No.

19 Q. That process would continue naturally --

20 A. Yes.

21 Q. -- independent of what goes on with those
22 proposed rules?

23 A. Oh, yes.

24 Q. So the pooling process -- I don't want to talk
25 about pooling of interests. I'm talking about pools.

1 CHAIRMAN FESMIRE: Pools --

2 Q. (By Ms. MacQuesten): Rules that apply,
3 nomenclature, that sort of thing -- that takes place on its own
4 tract; is that right?

5 A. Yes.

6 Q. Separate from what we are proposing here?

7 A. Yes.

8 Q. There's no delay, for example. There's no
9 five-year wait until a pool name could be given to a new well
10 drilled in the Galisteo Basin?

11 A. Not for a pool name, no.

12 Q. Right. And if a determination were made that
13 special spacing requirements were necessary, that would follow
14 the normal process?

15 A. Absolutely.

16 Q. So the only thing that is added is that the
17 proposed rules include a process for moving away from the
18 Exploration and Development Plan process and replacing that
19 with a special pool order, if appropriate?

20 A. Absolutely, yes.

21 Q. The proposed rules contemplate that that special
22 pool order could contain conditions similar to the ones in the
23 Exploration and Development Plan if it was deemed appropriate?

24 A. Absolutely, yes.

25 Q. So it's a little different from our traditional

1 notion of a pool order, which commonly deals with things such
2 as spacing. This would be a recognition that the pool order
3 would address environmental issues, as well -- or could address
4 those, as well?

5 A. It has the potential of addressing those, yes.

6 Q. Now, if an operator were able to show at the time
7 of moving into the special pool order that no special rules
8 were needed, that enough was known, that our normal OCD rules
9 were sufficient to govern the drilling of wells in that area,
10 that could be addressed in the pool order also?

11 A. Yes. Those original conditions placed on the
12 APDs under the E&D Plan may not be appropriate based upon the
13 information that's obtained and the knowledge that we gain from
14 this process. So there might not be a need for those
15 conditions.

16 Q. You were asked questions about the process for
17 obtaining an amendment to an Exploration and Development Plan
18 for the five-year review process. If an Exploration and
19 Development Plan is replaced with a special pool order, the
20 operator would not have to go through the E&D process for
21 obtaining amendments?

22 A. No. Once you go into the special pool order, it
23 would fall outside the E&D Plan process, which means there's no
24 more renewals for the E&D. It's a replacement of the E&D with
25 the special pool order itself.

1 Q. So it's a recognition that the process that we
2 set out in this plan is no longer required?

3 A. Absolutely.

4 Q. So you don't have to renew it every five years?

5 A. No.

6 Q. You don't have to seek an amendment for the
7 geographic area covered by the special pool order if you want
8 to add wells going to that zone?

9 A. Yes. You wouldn't have to go through that
10 process.

11 Q. And you don't have to go through the public
12 notice process set out in this E&D Plan?

13 A. No, you wouldn't.

14 Q. So that's the difference between the E&D Plan and
15 the special pool order?

16 A. Yes, once you obtain approval of it, yes.

17 Q. Let's talk about how you get there. There was a
18 discussion that the rule requires an operator to operate under
19 an approved Exploration and Development Plan for five years
20 before he can seek to move into a special pool order.

21 A. Yes.

22 Q. The question came up, why five years? Let me ask
23 you this: If we did not have a -- I'm going to call it a
24 "waiting period" -- could an operator under this Exploration
25 and Development Plan system come in, go through the public

1 notice process, get an approved Exploration and Development
2 Plan, and immediately turn around and ask for transfer to a
3 special pool order?

4 A. If there was wasn't a five-year stipulation, they
5 could do that.

6 Q. They could ask?

7 A. They could ask. The problem that we have is
8 trying to determine the extent of that pool, the capability of
9 production, and so forth. We want to see how the company is
10 going to operate during that time frame.

11 If they're -- if all the wells that they propose are
12 all in the same formation and create a pool, then it would be
13 more of a sound decision to create that special pool order
14 based on that. But for one well, that might be somewhat
15 difficult, especially in this area where there are so very few
16 wells.

17 Q. How about the environmental conditions that would
18 be part of the Exploration and Development Plan? How would the
19 OCD be able to determine whether a special pool order would be
20 sufficient to take care of the issues if we didn't have a track
21 record of how those conditions were being used?

22 A. Well, that does raise another -- to another
23 concern of construction of infrastructure and handling such
24 activities at the surface. You have to have a feel of what
25 activities are occurring in order to make those assessments.

1 So we would be looking at those.

2 Q. And isn't it part of the process -- you had
3 testified before that part of the justification for the
4 proposed rules was that it created a procedure for gathering
5 information; is that right?

6 A. Yes.

7 Q. And you talked about gathering information for
8 the initial application, but also that the operator had to
9 update that information at certain important junctures, such as
10 five-year renewal or an amendment?

11 A. An amendment, yes.

12 Q. If we allowed an operator to move from the
13 Exploration and Development Plan immediately to a special pool
14 order, would we lose that information-gathering part of the
15 process?

16 A. We definitely would. We wouldn't know if the --
17 let's say, the external activities that would be occurring
18 during that time frame. We had discussed this earlier about
19 the renewal process or amendments. The original plan, once
20 approved, if there are changes to it, locations of wells, and
21 so forth, being relocated, there may be new developments, new
22 installations of other types of ground water wells that may be
23 present that we won't be able to assess this potential activity
24 and the impact associated with it.

25 Q. The five-year waiting period before a pool order

1 is similar to -- there's a five-year provision for renewals; is
2 that right?

3 A. Yes.

4 Q. So the rule is set up that at least every five
5 years we're going to be looking at this plan and seeing how
6 it's going?

7 A. Yes. We'll be able to take a look at that and
8 make certain assumptions and getting some confidence.

9 Q. A question was asked: Why look at it every five
10 years if the operator hasn't made any changes in five years?

11 Let's say he immediately goes out and drills his
12 three wells and then never does anything else; doesn't want to
13 re-enter them; doesn't want to add new wells; he's just
14 chugging along with his three wells. Why bother him and look
15 at this plan again in five years?

16 With a renewal application, do we look at only what
17 the operator has done? Or do we look at the circumstances in
18 the area?

19 A. That's what I was getting at earlier, the
20 external influences. There may be neighborhoods expanding,
21 change of property owners and activities that are occurring on
22 those properties. Those type of activities are other things
23 that we need to assess as the plan develops.

24 At some point, they may propose to add additional
25 wells, so we have to look at that. There are general

1 operations. I mean, we still have the infrastructure on top.
2 We still have the utilities, the roads, and so forth. The
3 handling of the waste, we're looking at that and seeing if
4 they're complying with those aspects of the plan that they have
5 proposed.

6 So we just want to assess if they're sticking to the
7 plan or if they're doing something else contrary to what they
8 had agreed upon or presented to us in the plan.

9 Q. What happens if the operator of record has
10 changed? Would this provide an opportunity for the OCD to deal
11 with a new record operator and how he is operating under this
12 plan?

13 A. Absolutely.

14 Q. What if -- I think the question was raised, what
15 if no wells were put in? Let's say a plan is approved for a
16 certain number of wells, but the operator has not yet taken
17 action under this plan, and five years have passed. Why do we
18 need to renew it if he hasn't done anything?

19 A. Well, things can definitely change, especially
20 when you're looking at the mapping, the items that need to be
21 identified in proximity of the originally proposed locations.
22 In five years, that's subject to change. Then it also may be
23 subject to being reassessed.

24 Q. What would happen, for example, if a subdivision
25 were developed in the area covered by the Exploration and

1 Development Plan? Might that be something that could be
2 addressed at that five-year renewal?

3 A. Absolutely -- or a house, you know, built in the
4 location where somebody had proposed a well but never installed
5 it.

6 Q. Would it be a consideration if SHPO had listed a
7 cultural property that had not previously been listed that was
8 in the vicinity of the proposed wells?

9 A. That could be another scenario.

10 Q. Or if water wells were drilled, either showing
11 water or not showing water, would that information be useful in
12 the renewal process?

13 A. Oh, absolutely.

14 Q. The question was raised regarding the role of the
15 OCD in the approval process. I want to ask specifically
16 about an initial application that will be going to public
17 hearing.

18 The public hearing contemplates that additional
19 information may come out at the hearing. Including in this
20 process, we -- you've spoken about the need for information
21 from the general public and the need for information from other
22 agencies. Would it be appropriate for the OCD to indicate its
23 approval for a proposed Exploration and Development Plan before
24 that information is gathered at the hearing?

25 A. I don't think that would be appropriate. We

1 wouldn't have knowledge of -- let's say, you know, Mr. Smith
2 has knowledge of a well on his property. That would come out
3 at hearing.

4 If we were to review the plan and make some type of
5 recommendation based upon the limited information that's
6 provided in the application, we would have no knowledge of
7 that, and that would be premature for us to make any type of
8 recommendation until all information is divulged. That's what
9 the hearing process is for.

10 Q. Do you contemplate that the Environmental Bureau
11 may participate in these hearings in some way?

12 A. Oh, yes.

13 Q. And would they be able to make their
14 recommendation as part of their testimony after hearing what
15 was being presented at that hearing?

16 A. I would hope so.

17 Q. Commissioner Olson asked about the provision in
18 the proposed rule defining the area to which the rule applies,
19 and it states that it applies to all of Santa Fe County. And
20 then it describes certain portions of San Miguel and Sandoval
21 Counties that are part of the Galisteo Basin; is that right?

22 A. Yes.

23 Q. And Mr. Olson asked why was the Galisteo Basin
24 itself not defined in the proposed rule. If the Commission
25 decides to apply the rule only to the Galisteo Basin and not to

1 the remainder of Santa Fe County, would we then need to define
2 exactly where the boundaries of the Galisteo Basin are within
3 Santa Fe County?

4 A. Yes.

5 Q. And would we be willing to provide that
6 information if the Commission decided that was the appropriate
7 response in this case?

8 A. Oh, yes.

9 Q. Commissioner Olson also raised the question about
10 9B(2), which is the requirement that the application contain a
11 legal description of the area to be included in the plan,
12 including at a minimum the operator's best estimate of the
13 productive area. And he questioned the use of the words "best
14 estimate."

15 Earlier -- and I'm not sure if this was a question to
16 you. It may have been a question to one of the other witnesses
17 on the day that you weren't available. But my recollection is
18 Mr. Hall asked some questions about would it be possible to
19 define the area to be included in the plan as limited to the
20 well pad?

21 A. Yes. He asked me some of those questions, as
22 well.

23 Q. Is that going to be sufficient? Would you want
24 to write a rule that would allow that limited an area to be
25 covered by the plan?

1 A. Well, the problem with that is what's to follow
2 on that. If there were such a plan submitted on one well, E&D
3 Plan, and it's followed by another one-well E&D Plan within the
4 same proximity, in the same formation, from the same applicant
5 from the previous one, and then you receive another and
6 another, are they really telling you -- using this term your
7 "best estimate," or are they just estimating that one location?

8 I think that's the difference in the term of using
9 best estimate of the productive area compared to limiting it to
10 an estimated productive area or estimate of a productive area.

11 Q. If you narrow the focus down to the well pad of a
12 particular well, do you lose the benefit of getting the big
13 picture?

14 A. You absolutely do, because what comes into play
15 is all the infrastructure that's on the surface activity that's
16 going to be linked to that well that needs to be assessed.
17 Eventually, you're piecemealing it all together, and it should
18 be in the total plan.

19 Q. I'm wondering if the concern is with the word
20 "best" estimate. If that would be read to require the operator
21 to give its most optimistic estimate, is that what we are
22 asking for?

23 A. To my knowledge, that's what we're trying to ask
24 for. We're trying to look at the big picture impact of all the
25 activities that they're planning in that area.

1 Q. But we aren't saying assume that your production
2 is going to be wildly successful and in the biggest area that
3 it could possibly be; is that right?

4 A. No.

5 Q. Would you find it acceptable to replace the word
6 "best" with "good faith"?

7 A. That could be another term used, yes.

8 Q. A question was raised about Section 9B(5).
9 That's the section that talks about the operator providing maps
10 with various pieces of information, and Commissioner Olson
11 asked why the original Subparagraph C was deleted. That's the
12 provision that talks about site boundaries and registered
13 cultural properties?

14 A. Yes.

15 Q. If you could turn to what has been admitted as
16 Exhibit 28. Is this the statute that discusses the
17 confidentiality of site information?

18 A. Yes, it is.

19 Q. Was that original provision in the proposed rule
20 deleted when we realized that we didn't want to be revealing
21 confidential information?

22 A. Yes. Our intent was not to have items from these
23 locations identified on a map showing up on eBay, I guess, you
24 know? That's why the approach that the Historic Preservation
25 Office has would address such items.

1 Q. Now, it's a delicate balance for SHPO, isn't it?
2 They want to protect items, but part of the protection is they
3 don't want to reveal the location of those items?

4 A. Absolutely.

5 Q. In case people like me go out there with their
6 cameras and run around on the ruins and take pictures and mess
7 things up, right?

8 A. Yes.

9 Q. And god forbid, pick up pieces of pottery and
10 walk away with them?

11 A. Oh, yes.

12 Q. So how do you deal with addressing these
13 confidential -- these sites if we can't talk about where the
14 sites are?

15 A. Well, that's why we referenced the process which
16 SHPO has presented in their regulations and follow it through
17 their protocols and regulations which we direct them to. If
18 I'm not mistaken, that --

19 Q. Is that in Section B(9)?

20 A. B(9), yes. So they would have to contact them
21 directly to discuss these activities with them prior to
22 submitting their application.

23 Q. Or alternatively, it will come out as we provide
24 the application to SHPO?

25 A. That's the other method.

1 Q. Now, if I can't walk in and find out where a
2 listed cultural property is as a private citizen, how do I know
3 what information to provide in my application? Do I just have
4 to identify everything I think it might be?

5 A. If there is some -- if someone is proposing
6 certain activities that may fall up under the Cultural
7 Properties Act -- personally, if it were me, I don't have the
8 expertise to determine if it's eligible or not. So the
9 conceptual idea is that you identify areas that may have
10 potential or show some signs in order for SHPO to assess them,
11 because they have the expertise.

12 So if you are out looking at areas where you want to
13 put roads or pipelines or whatever it may be for surface
14 disturbance that would impact any of those areas, you would
15 definitely want to identify them so they could have some
16 comment on them, and let them make that determination.

17 Q. Is the identification of cultural properties an
18 ongoing process?

19 A. It definitely seems to be by the way they've
20 written their regulations.

21 Q. So it would be appropriate for an operator who
22 isn't going to know if a site is registered or not to identify
23 anything that it considers potentially a site?

24 A. Absolutely.

25 Q. And SHPO may act on sites that are discovered?

1 A. That's what their regulations state.

2 Q. There were questions about Section F(9), which
3 deals with the legal notices and specifically about the legal
4 notice, including instructions for requesting a public hearing
5 on an application that has not been set for public hearing.
6 And there were some suggestions for alternative language on
7 that.

8 Let me ask you about -- we've talked about initial
9 applications have to be set for public hearing, so there's no
10 question about that, right?

11 A. Yes.

12 Q. The issue comes up with the other events that may
13 happen with an Exploration and Development Plan, the
14 amendments, the renewal, the replacement, right?

15 A. Yes.

16 Q. If the OCD received an application from one of
17 those three activities, could it decide on its own that a
18 public hearing should occur?

19 A. They could. Once again, let's say, it's an
20 amendment or -- well, amendment, and they're looking at placing
21 wells in different locations or relocating wells in different
22 locations.

23 There may be some new ground water data. There may
24 be conflicting ground water data. There may be insufficient
25 data that would warrant a lot of questions that you can't

1 address with a condition or an administrative approval, that
2 you may have some questions about because you're unclear due to
3 the information provided in the format it's provided. You may
4 want to have on record that discussion with the applicant for
5 clarification. So you may want to have a hearing.

6 Q. So the OCD may have its own reasons for wanting
7 to have a hearing set --

8 A. Yes.

9 Q. -- where it feels that going through an
10 evidentiary hearing would provide additional information for it
11 to make its determination?

12 A. Absolutely.

13 Q. And would that hearing be useful if the OCD was
14 going to add conditions to an Exploration and Development Plan
15 or deny an Exploration and Development Plan?

16 A. It might be wise to have such items on record,
17 yes.

18 Q. Because that decision may be challenged?

19 A. Absolutely.

20 Q. Could the OCD also decide that it wanted to set a
21 matter for hearing because it assumed the existence of great
22 public interest, such as, for example, a proposal to drill
23 wells in Eldorado?

24 A. I could see that definitely occurring.

25 Q. We might not wait the time period to see if

1 anybody was interested in that?

2 A. Yes. We might go ahead and schedule a hearing
3 for that.

4 Q. And is that process any different from what the
5 OCD goes through now in determining whether to set matters for
6 public hearing that are not absolutely required to be set for
7 public hearing?

8 A. To my understanding, there's no difference.

9 Q. Getting back to the language in the proposed
10 rule, the suggestion was made to change this so that it -- that
11 every legal notice would contain instructions for requesting a
12 public hearing if the application were for an amendment,
13 renewal, or replacement, but people may not have to ask for it
14 because the OCD may have already set it?

15 A. Yeah. That's definitely another scenario. So,
16 yes, it may not be required.

17 Q. There was a question about the language in G(1)
18 about the last sentence. If G(1) states that an application is
19 administratively complete if it contains all the information
20 required by 19.15.39.9, which is the entire rule, and the
21 suggestion was made to limit that to just 9B, which sets out
22 those 13 things that have to be in an application, if it's an
23 initial application, that might work, right?

24 A. Yeah, I think my testimony -- I was trying to
25 explain the reason I was referencing 9B is because even with a

1 renewal or an amendment, you have to address the things in 9B.

2 Q. But with a renewal or an amendment, there are
3 other things that would have to be in that application for it
4 to be complete, right?

5 A. Yes.

6 Q. And those are set out in other sections
7 besides B; is that right?

8 A. Yes.

9 Q. For example, the requirements for an amendment
10 are set out in C, and that includes updating the information?

11 A. That's what I was trying to get at. That's why
12 my focus was on B, because if you updated that information
13 amending that information, amending some of the ideas that have
14 been originally proposed -- so that's why my focus was on (B).
15 I didn't mean to infer that B is the only thing that would
16 apply.

17 Q. And we want to make sure that operators
18 submitting an amendment, renewal, or replacement couldn't argue
19 that they could just submit their original information and
20 that's good enough?

21 A. Yes, that's not the intent that we had.

22 MS. MACQUESTEN: I think those are all the questions
23 I have.

24 CHAIRMAN FESMIRE: Mr. Hall, anything on this
25 subject?

1 MR. HALL: Yes, Mr. Chairman.

2 RECROSS-EXAMINATION

3 BY MR. HALL:

4 Q. Mr. Jones, I thought I had understood this
5 procedural issue, but I'm confused again. I hope you can
6 straighten me out here.

7 As I understand what you intend to do, you want to
8 utilize the Division's proposal for adjudicatory hearings,
9 correct?

10 A. We do have those to apply to this, yes.

11 Q. And those are the rules you want to utilize here
12 for approvals for E&D Plans?

13 A. Yes.

14 Q. And do you realize that -- well, let me back up
15 again. Ultimately, we're converting to a special pool rules
16 format in five years or so, correct?

17 A. Yeah, potentially.

18 Q. Right. And you are aware that the Division's
19 rules 12.8.4 have particular rules for -- procedural rules for
20 special pool rules?

21 A. Yes, I've seen that title. Yes.

22 Q. How do we reconcile the operation of those
23 particular rules with what you're contemplating for
24 applications on E&D Plans?

25 A. I think we would have to identify which specific

1 provisions under Part 4 would be applicable for this process.

2 Q. Well, let's say there's a discovery. The need
3 for the Division's nomenclature and rules/regulations process
4 is immediate; is it not?

5 A. For nomenclature?

6 Q. Yes.

7 A. It seems to be to a certain extent. It evolves
8 as well, but yes.

9 Q. Okay. So do you anticipate that these rules
10 would operate in tandem?

11 A. With the nomenclature?

12 Q. Yes.

13 A. Yes.

14 Q. And the special pool rules, procedural rules
15 12A(4)?

16 A. Could you provide me with a reference?

17 Q. 12A(4).

18 A. Well, I know 12A(4). I'm sorry.

19 CHAIRMAN FESMIRE: Mr. Hall, could you be a little
20 more complete in the reference there?

21 MR. HALL: The rule formerly known as 12.10A(4),
22 special pool orders regulating a special pool, 12A(4) under the
23 new set.

24 THE WITNESS: Well, my understanding based upon the
25 title, those are specific adjudications that would be separate

1 of this rule.

2 CHAIRMAN FESMIRE: Mr. Jones, what section of the new
3 rules are you reading?

4 THE WITNESS: Well, this is -- 19.15.4.12 is the
5 section, and he's referring to A(4) of that section.

6 So these are certain specific ones. I guess,
7 eventually, you would reach that point to apply those once a
8 special pool order had been established under the Section 9
9 provision, a replacement of an E&D Plan, because that's what
10 we're addressing under that.

11 So the other adjudicatory requirements would apply.
12 These are specific ones, but the standards would apply until
13 that special pool order is established. And then those would
14 apply once it's been established, would be my understanding.

15 Q. (By Mr. Hall): All right. So once a special --
16 rules for a special pool are established, we've converted from
17 an E&D Plan. If there is a vertical or horizontal expansion of
18 the pool identified in the E&D Plan, an operator would apply
19 under 12A(4)?

20 A. If that operator had their E&D Plan replaced by a
21 special pool order, yes.

22 Q. And, again, once we've established special pool
23 rules for a pool after five years or whatever, again, those
24 pool rules would apply to the undesignated portions of that
25 pool as well, correct?

1 A. I'm not sure if I'm understanding.

2 Q. Okay. You may not know what I'm talking about.

3 A. I don't know enough about that to answer.

4 Q. If you don't know, you don't know.

5 MR. HALL: That's all I have, Mr. Chairman.

6 CHAIRMAN FESMIRE: Ms. Foster?

7 MS. FOSTER: Thank you.

8 RECROSS-EXAMINATION

9 BY MS. FOSTER:

10 Q. Looking at Rule 14, conduct of an adjudicatory
11 hearing, under the adjudicatory hearing process the OCD has, is
12 public comment allowed?

13 A. Yes.

14 Q. Okay. And public comments, is that to be taken
15 under oath?

16 A. I'm not seeing it specifically states that.

17 Q. Well, I would direct you to Section 14,
18 Section A.

19 A. Well, I was looking at, actually, C.

20 Q. C is the appearance of a pro se attorney. A is
21 actually the testimony.

22 A. Okay. Well, I go back to C because C states the
23 Commission -- or the Division examiner shall have the
24 discretion to allow other persons to present at the hearing and
25 to make relevant statements, but not to present evidence or

1 cross-examine witnesses.

2 That's why I point out C.

3 Q. Okay. And looking at C then, it also states that
4 participation in an adjudicatory hearing shall be limited to
5 parties as defined in Rule 10 NMAC.

6 A. Well, it seems like it addresses both issues.

7 Q. Okay. But the parties that are involved in
8 adjudicatory hearing in this instance with an Exploration and
9 Development Plan would definitely be the operator --

10 A. Yes.

11 Q. -- and might possibly be the OCD --

12 A. Yes.

13 Q. -- if you have an interest.

14 A. Yes.

15 Q. It might possibly be a member of the --

16 A. Possibly. But that's if they choose to submit
17 testimony, and this is for testimony. You asked about public
18 comment.

19 Q. Right. Well, I'm just a little bit -- I'm trying
20 to get clarification on how the public is going to be involved.
21 Again, this goes back to how is it that an operator knows.
22 That's my next question. What information should they be ready
23 for at the hearing?

24 A. I don't see the difference. I mean, in this
25 current hearing, we're going through the same process. We have

1 people that provide public comment that's not presented to all
2 parties or any parties present until it's stated.

3 Q. Okay. And what about, say, if SHPO has a problem
4 with the development plan? Would they come in and testify as a
5 party --

6 A. I can't speak for SHPO. I don't know what they
7 would do. I would assume they would, but I don't know.

8 Q. Okay. Looking at Section J, I just wanted to get
9 some clarification on, again, which -- would you mind? Thank
10 you.

11 I understand Section J, Sub (2), (a), (b), and (c).
12 What I don't understand is the OCD's rules and whether the
13 applications prevent waste, protect correlative rights,
14 protects fresh water and human health and the environment, and
15 when it is that that decision is going to be made by the OCD.

16 A. When is it?

17 Q. Yeah. Section J is basically in order to get
18 administrative completeness to move to the next step or
19 hearing, correct?

20 A. This right here is a plan approval.

21 Q. Right.

22 A. This would be at the hearing. This would be
23 during the hearing. This is what they base their determination
24 if they're going to approve the plan or not. So the hearing
25 examiner would be using J(2), the parameters within that to

1 make a determination if they're going to approve the plan.

2 Q. So the hearing examiner is not the Division, it's
3 not staffers of the Division like yourself?

4 A. I'm not a hearing examiner. If I were appointed
5 to be one, then I guess so. But I don't think that's the
6 protocol that we have.

7 Q. All right. Because, again, reading this portion
8 of the rule, it says, "The Division." The Division, the
9 Division.

10 A. Yes.

11 Q. And it also states in Section 3 there, it says,
12 "Division may impose conditions on its approval of the
13 application," right?

14 Again, should that be the hearing officer that
15 imposes the condition or the Division, meaning you?

16 A. This would be the hearing examiner. But the
17 hearing examiner is an employee of the Division. I mean,
18 that's our current hearings that we have here. We use the
19 Division also in conducting the adjudicatory hearings, as well.
20 We don't identify it. It's just the hearing examiner when we
21 talk about the Division.

22 Q. All right. Then that leads me to the next
23 question: What happens if an operator who has an Exploration
24 and Development Plan that has conditions on it put on it by the
25 hearing officer doesn't follow those conditions, for whatever

1 reason?

2 A. Then it could be revoked.

3 Q. What can be revoked?

4 A. The plan.

5 Q. The Exploration and Development Plan?

6 A. Absolutely. If you actually look at J(5), it
7 says the Division may revoke approval of the plan.

8 Q. And who is that? The Division or the hearing
9 officer?

10 A. Well, my understanding is if we revoke the plan,
11 we have to provide notice. There's a process in which the
12 applicant, or you can say in this case the operator, can
13 request a hearing.

14 Q. Okay. So this is sounding more and more like a
15 permit. The Exploration and Development Plan has to be
16 approved. It's got conditions on it. It can be revoked, and
17 you could have to shut in your wells. But your prior testimony
18 was that the Exploration and Development Plan is just a plan.
19 It's not meant to be a permit?

20 A. It doesn't -- what I was saying earlier, it is a
21 plan, and it's a plan of action that you're telling us what you
22 plan to do. If you do something contrary to that, then you're
23 not following your plan.

24 Now, permitting -- to obtain the permits that you
25 propose, based upon the activities that you proposed in your

1 plan, there's a permitting process, and permits are to be
2 obtained for those activities.

3 Q. Now, let's talk about enforcement if somebody
4 violates a part of the plan. Currently, if someone violates a
5 portion of a permit, they can get fined under the Oil and Gas
6 Act. If they violate a portion of the plan, it basically just
7 states that what they're facing is potential shut-in, nothing
8 else. There's no fines under the Oil and Gas Act.

9 A. Under the Oil and Gas Act? I'm not sure -- I
10 don't know all the details of the enforcement regulations to
11 know if they would apply as well. Because let's say you
12 propose to haul all your waste away, but you dispose of it
13 somewhere else illegally. That would be more than a violation
14 of the plan.

15 Q. Right. That would be a violation of waste
16 disposal.

17 A. Yes.

18 Q. But your plan, the way I understand it, you plan
19 to lease acreage. You plan to -- the plan is, again, an
20 overarching, general plan. Like we talked about earlier, it's
21 not meant to talk about specific well locations, correct?

22 A. Well, you're going to propose general
23 locations --

24 Q. General locations?

25 A. -- in your plan.

1 Q. Right. And if something changes and you don't go
2 for an amendment, or something changes in your plan --

3 A. Let's say you go outside your plan, the boundary
4 you identify, you would be in violation of your plan.

5 Q. Okay. And then, what's the repercussion to the
6 operator?

7 A. It states here we would shut in the existing
8 wells.

9 Q. If there's a well that --

10 A. And I'm sure there would be a violation of this
11 provision without having a plan for area outside your original
12 plan.

13 I mean, you could overlap things if you choose to,
14 but it depends on how you want to present it and deal with it.
15 Now, with this, we could discuss that and say, "Well, do you
16 want to come back and amend your plan to resolve this issue?"

17 Q. Right. Now, if you want to come back and amend
18 your plan, then you have to go through the public comment
19 process again, and you may -- not necessarily -- but you may
20 have to go to hearing if it's determined that you might have?

21 A. Yes.

22 Q. And I believe you stated in your redirect
23 examination that an amendment could occur if you have to do
24 relocation of wells?

25 A. It could.

1 Q. Okay. Let's talk about the five-year delay on
2 the pool designation. I got very confused during that
3 discussion. I believe Ms. MacQuesten asked you under the
4 current system, there is no five-year delay under the pool
5 designation, correct?

6 A. No. I mean, you're correct. There is no delay.

7 Q. Right. And I believe you stated that an operator
8 could make the argument that no special rule is needed and,
9 therefore, no Exploration and Development Plan if they're in an
10 area that already has a special pool rule?

11 Okay. Let me -- Ms. MacQuesten is looking all
12 confused at my question.

13 MS. MACQUESTEN: Oh, no. I'm not confused. I'd love
14 to answer it myself. That's the frustration.

15 Q. (By Ms. Foster): You talked about the Entrada
16 well and the wildcat well, the Tecton well, right?

17 A. Yes.

18 Q. So that already has a pool designation for that
19 one well.

20 A. Yes.

21 Q. You have another operator who wants to go and
22 drill close by, and you end up in the same pool. Okay? Does
23 that person need to have an Exploration and Development Plan?

24 A. Yes.

25 Q. Because they're in Santa Fe County? Or because

1 they -- because you don't know enough about the location even
2 though they're drilling into a pool that's already been
3 designated?

4 A. Because we don't have any infrastructure for them
5 in the Galisteo Basin, and that's where these wells are
6 located, the one that you're referring to. So we want to know
7 what other impacts -- that's what -- the E&D Plan will address
8 that and also will resolve things and let SHPO make their
9 assessment, as well, on those activities.

10 Q. Okay. So if they're in a geographic location,
11 they always need to get an Exploration and Development Plan?

12 A. Yes.

13 Q. There is no exception at this time?

14 A. Not at this time.

15 Q. Okay. Now, going down the line, if you did have
16 special pools that are designated in Santa Fe County, and you
17 have a new operator who's coming into an area that is not
18 virgin, for lack of a better word, but there's already been
19 some operation in there, because they're in that geographic
20 area, will they still have to ask for an EDP?

21 A. Right now, yes. And the reason why is when you
22 look at the APDs, most people will say, "Well, our target zone
23 may be the Entrada, but we're going to explore the ones above
24 it." So in this case, it could be the Morrison, the Dockum,
25 those others.

1 Now, if they find that those are something they want
2 to produce into, then they would need an E&D because there is
3 no special pool for those. There wouldn't be a special pool
4 order. That would be only to the Entrada, so they fall out of
5 that. That's why the E&D Plan is there.

6 Q. All right. Now, let's talk about renewals. Your
7 renewal needs to be done every five years because -- and I
8 think you used the words "external influences" might occur
9 during that five-year period?

10 A. Yes.

11 Q. Okay. Now, what happens if you have an operator
12 who has an approved Exploration and Development Plan, and he's
13 chugging along, and everything is going fine, but some
14 developer decides to build a hospital out there, and, you know,
15 you have -- your Exploration and Development Plan is for a
16 substantial acreage, and you happen to be operating not near
17 where that hospital is, but you already have your Exploration
18 and Development Plan.

19 Is that operator at threat of not getting a
20 Exploration and Development Plan renewed because somebody came
21 in between year one and five?

22 A. Did I hear you say they weren't in proximity, or
23 they were?

24 Q. Well, I'm looking at the instance where you've
25 drilled your three wells, say, like in the southern quarter,

1 and the top, you know, three-quarters have not been drilled
2 yet, but it is part of your Exploration and Development Plan.

3 A. Okay.

4 Q. And somebody comes in and builds a Mc-mansion or
5 a hospital or something.

6 A. Up in that undeveloped area that you've proposed
7 wells? Yeah.

8 Q. But you had proposed wells five years ago and had
9 been approved on a plan. Are you at risk as an operator of not
10 getting a renewal for that section of your plan?

11 A. I think you would need to look at an amendment at
12 that point. I don't think we're going to even issue an APD --
13 look at an APD that's going to put some well in someone's
14 house. So there's the practicality of the matter. We can't
15 tell the person they can't put their house there.

16 Q. Right. I'm not looking at the APD process. I'm
17 looking at just basic renewal of the EDP.

18 A. Well, the EDP would have to be amended to address
19 that issue at renewal time.

20 Q. So there is a possibility. And who is it, again,
21 that reassesses for a renewal? Is that, again, going to be--

22 A. Well, the applicant is applying for the renewal.

23 Q. Right.

24 A. So it would be the applicant/operator.

25 Q. Right. And since that renewal or modification or

1 amendment is not necessarily going to go to hearing, is it
2 automatically a hearing officer that's going to renew that? Or
3 do you actually have to ask for a hearing as an operator to
4 have a hearing officer review it as opposed to a staff member
5 at the OCD?

6 A. Well, there's a whole public notice component to
7 it, so we would have to see if there is any interest in that.
8 So it doesn't automatically do anything. There's a process.
9 We'll base it upon the outcome of the process.

10 Q. But there's a possibility that you as a staffer
11 could be the one rendering the final decision.

12 A. I didn't say that. I didn't answer that.

13 Q. Can you answer that, then?

14 A. It would -- I would assume it would be a hearing
15 examiner that would do that.

16 Q. But that would only occur if there was -- a
17 hearing was to occur. Hearing officers only get assigned --

18 A. Then, if I'm not mistaken, there's --

19 CHAIRMAN FESMIRE: Would you like to explain the
20 process, Ms. MacQuesten?

21 MS. MACQUESTEN: Well, hearing examiners do more than
22 conduct hearings. They also review administrative applications
23 and act on them administratively. So I don't want the
24 suggestion to be that hearing examiners only look at things if
25 they go to hearing.

1 CHAIRMAN FESMIRE: And hearing examiners -- are
2 hearing examiners the ones that make the decision?

3 MS. MACQUESTEN: The hearing examiner makes a
4 recommendation to the Division director. Orders are issued
5 under the name of the Division director, i.e., "The Division."

6 MS. FOSTER: I understand that. But what I'm trying
7 to get clarification on is are we going to have someone with
8 the title of Hearing Officer making these decisions, or are we
9 going to have --

10 CHAIRMAN FESMIRE: But Ms. Foster, she just explained
11 to you. They're not making the decisions. They make a
12 recommendation to the director who makes the decision.

13 MS. FOSTER: Okay. Then it's the director who makes
14 the decision, Mr. Mark Fesmire, as opposed to Mr. Brad Jones?

15 CHAIRMAN FESMIRE: It is the Division director who
16 makes the decision. The Division director signs the order.
17 The examiners make a recommendation.

18 MS. FOSTER: Okay. And that is the process that I
19 would prefer to have, and I'm getting clarity on that, rather
20 than an operator submit it to the Environmental Bureau, and
21 they're the ones that make the decision on something about
22 protection of correlative rights, prevention -- the
23 requirements that are here. Okay?

24 And if the staffer, Mr. Brad Jones, is the one who
25 makes the decision as to whether there's enough information for

1 renewal -- based on his testimony, I understand that his
2 department, the Environmental Bureau, does the administrative
3 review for completeness, but they are just making
4 recommendations when it ultimately goes to hearing.

5 What I'm looking at is when you have a renewal or
6 amendment what the process is. Because there's not necessarily
7 a hearing, so who is it that's going to be making that
8 decision? That's all. That's all I'm looking for,
9 Mr. Commissioner. I don't believe it's there in the rules.
10 Okay?

11 Q. (By Ms. Foster): I guess we're moving on.
12 Cultural resources: -- based on your testimony and redirect
13 testimony, your involvement with SHPO, they have their own set
14 of rules, correct?

15 A. Yes.

16 Q. But could SHPO feasibly have -- their involvement
17 could result in an operator not being able to get an
18 Exploration and Development Plan?

19 A. I really don't foresee that because the
20 expansiveness of the E&D Plan, they would have to declare the
21 whole area of concern for that to happen, and I really don't
22 see that occurring.

23 Q. Okay. So if an operator -- I would assume that
24 since most of us aren't archeologists, that an operator would
25 have to hire an archaeologist to go out there and walk the

1 area, and if there are any cultural resources out there --
2 which you would suggest, obviously, it's not required --
3 identify the resources and tell SHPO to comment on whether
4 these resources would be potentially registered in the National
5 register?

6 A. My recommendation would be they go to SHPO to see
7 what would be appropriate.

8 Q. Okay. And there's no time limit on SHPO getting
9 back, it's just reasonable and timely?

10 A. We're supposed to give them, if I'm not mistaken,
11 under their regulations a timely opportunity to look at it.

12 Q. A timely opportunity. Okay.

13 A. A reasonable and timely opportunity.

14 Q. Okay. Are you familiar with any other OCD rule
15 that actually has the mandatory public hearing provision in it?

16 A. Mandatory?

17 Q. Like in this instance for the initial application
18 you are going to hearing?

19 A. Am I aware of any? Rule making.

20 Q. Rule making. Okay. And any other adjudicatory
21 process?

22 A. There's none that I'm aware of, but I don't know
23 them all. I don't know of those regulations, what they
24 require.

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

1 CHAIRMAN FESMIRE: Thank you. Anything from the
2 Commission?

3 COMMISSIONER BAILEY: No.

4 CHAIRMAN FESMIRE: Commissioner Olson?

5 COMMISSIONER OLSON: I think so.

6 FURTHER EXAMINATION

7 BY COMMISSIONER OLSON:

8 Q. I'm still a little confused. I think this is
9 coming down to the special pool orders where it's replacing an
10 Exploration and Development Plan. If this comes under -- if
11 replacement comes under special pool order, what rule are they
12 subject to that governs the approval of that pool order?
13 Because I'm looking at 39.9J, and it talks about plan
14 approvals, conditions, denials, amendment revocations,
15 renewals, and transfers, but it doesn't mention special pool
16 orders. Are they governed by this rule or by another Division
17 rule?

18 A. That's a very good question.

19 COMMISSIONER OLSON: Mr. Chairman, if he wants to
20 take a look at that, we can take a break.

21 CHAIRMAN FESMIRE: Why don't we take a break, and
22 we'll reconvene at 3:10.

23 [Recess taken from 2:56 p.m. to 3:11 p.m., and
24 testimony continued as follows:]

25 CHAIRMAN FESMIRE: The record should reflect that

1 we're reconvening Case No. 14255. The record should also
2 reflect that all three Commissioners, Bailey, Olson, and
3 Fesmire are present. We, therefore, still have a quorum.

4 I believe Ms. MacQuesten, your witness was answering
5 questions from Commissioner Olson; is that correct?

6 MS. MACQUESTEN: That's right.

7 CHAIRMAN FESMIRE: Commissioner, are you ready to
8 proceed?

9 COMMISSIONER OLSON: Yes, I am.

10 CHAIRMAN FESMIRE: Go ahead, please.

11 Q. (By Commissioner Olson): Well, I think I already
12 asked the question. Do I need to ask it again?

13 A. If you don't mind. That way we'll --

14 Q. Because I'm just trying to -- there's some
15 confusion. I just want to try to understand how this will
16 work. So right now under 39, the proposed 39.9E, there's a
17 section on replacement of the E&D Plan with a special pool
18 order. It talks about what the application shall include.

19 And then we come to plan approvals in 39.9J. It
20 doesn't reference special pool orders. It just references
21 approvals, conditions and denials, amendments, revocations,
22 renewals, and transfers.

23 So I'm just trying to figure out what the criteria
24 are for approval of a special pool order. Does that fall under
25 this rule, or does it fall under another?

1 A. It was left out in the heading of the section.
2 We apologize for that. If you look at J(2), it does talk about
3 approvals. It also talks about amendments, renewals, and
4 replacement. And that replacement would only be a special pool
5 order under J(2). So those conditions under J(2) would apply.

6 And also J(4) would also address that. The Division
7 may include provisions in that special pool order that replaces
8 an E&D Plan, and it may determine that the provisions are
9 necessary.

10 So it does address it. It was just left out of the
11 heading of the section. So replacement -- it would probably be
12 wise to have replacement listed up there maybe after renewals
13 or somewhere in that heading to direct people where to look for
14 that.

15 Q. So I guess this is what would govern special pool
16 orders, because special pool orders aren't addressed otherwise
17 in the rules. Is that --

18 A. Well, what would happen is that you would replace
19 your E&D with a special pool order in which we may include
20 certain specific conditions -- based upon our determination --
21 based upon the requirements of J(2). Once that's been
22 established, it would fall under our normal pool rules.

23 Q. And are you referring, then, to existing pool
24 rules under 19.15.12?

25 A. Yes.

1 Q. Because if I look at 19.15.12.6, the objective of
2 the pool rules is to regulate oil and gas operations that
3 involve commingling oil and gas from different pools or leases
4 in order to prevent waste and protect correlative rights.

5 And I don't see anything there that talks about as an
6 objective of the pool rules dealing with protection of public
7 health and the environment, as well as protection of fresh
8 waters.

9 A. Well, I think indirectly how this comes about,
10 where those aspects would be addressed is in the initial
11 conditions under the E&D Plan. For applications for APDs,
12 there are those conditions, and we address those.

13 In order to go to a special pool order, we would
14 assess to see if we need to continue those conditions under
15 Section 10B of 39, if they're applicable or not. Those would
16 be conditions of that pool, that special pool order. So they
17 would stand as a condition linked to that special pool.

18 Q. I'm not sure I follow that. Could you say that
19 again?

20 A. Under the E&D Plan, you have your general plan.
21 You get your plan approved. You go out, and you apply for APDs
22 under 39.10. 39.10 has conditions under 10B, specific
23 conditions for the APDs. Some of those may continue on as
24 conditions that would be applied to the special pool order, if
25 we deem necessary, if the hearing officer deems necessary.

1 Q. I guess I may still be confused. But because,
2 then, this refers only to -- appears to only apply to APDs for
3 Exploration and Development Plans, not for special pool rules.

4 A. Well, they could develop into conditions for
5 special pool rules if we have concerns. Let's say an area that
6 has various water, freshwater zones, we may continue to require
7 the condition of the mud-logging to address that, even though
8 for the special pool itself that's established, we may continue
9 to exercise that condition in their special pool in case
10 there's any issues regarding that.

11 We may decide that there's sufficient information
12 from their activities under the E&D Plan that that's not needed
13 anymore, that due to the information provided, these conditions
14 may not be accurate, or we may need additional conditions
15 depending on the area.

16 Q. Well, I understand that. I think you'd expect
17 that if things were covered for specific types of requirements,
18 like this under the E&D Plan, the same thing would apply under
19 a special pool rule. But, then, I guess I come back to where
20 you seem to be saying that the 19.15.12 applies. But I don't
21 believe that section references special pool rules, does it?
22 Or am I missing something?

23 A. Maybe I'm not the appropriate person to answer
24 this question.

25 Q. I thought that.

1 A. Let's leave it at that.

2 MS. MACQUESTEN: Mr. Commissioner, it appears to be a
3 legal question. Would you like me to address it?

4 COMMISSIONER OLSON: Yes. That seems like a legal
5 issue in the rules.

6 MS. MACQUESTEN: I've looked at our existing rules on
7 special pool orders. There isn't a lot in our existing rules
8 on special pool orders; however, we've fumbled along since 1935
9 issuing special pool orders, and there seems to be a practice
10 and procedure in place that is working.

11 Traditionally, special pool orders have looked at
12 primary issues such as spacing. And you're right; the rule
13 that you're looking at deals with those sorts of issues, but
14 there's no reason that a special pool order couldn't address
15 other issues that are unique to that pool. And that's why we
16 put in this proposed rule a provision that would allow special
17 pool orders to contain conditions to address the issues that
18 this special rule wants to address, which includes the
19 environmental issue.

20 If you're looking for authority for that, I would
21 look outside of the rules -- which are not very detailed -- and
22 look at the statutes. If you look at 70-2-12, our Enumeration
23 of Powers -- and that's the section that Mr. Jones described,
24 the various provisions that address environmental concerns --
25 you'll see in the heading of the paragraph in Section B, apart

1 from any authority expressed or implied elsewhere, the Division
2 is authorized to make orders for the purposes and with respect
3 to the subject matter stated in the subsection.

4 So we clearly have the authority to issue orders that
5 deal with environmental concerns. What we're suggesting here
6 is that we have an existing process for special pool orders,
7 and that may be -- in this rule, we're using that as the
8 process to get out of the Exploration and Development Plan.

9 It's a relatively new concept, although the idea of
10 putting in provisions and special pool orders that are not
11 strictly limited to things like spacing has been done in the
12 past.

13 COMMISSIONER OLSON: But then I guess the legal
14 authority for the requirements of the special pool rule are
15 governed by this rule for protection of fresh waters, public
16 health, and the environment?

17 MS. MACQUESTEN: Yes. I think even without this
18 proposed rule, I think given our statutory authority to make
19 orders addressing environmental concerns, you could take a
20 special pool order and write in environmental issues if it was
21 warranted in order to protect the environment. That's my
22 suggestion.

23 This puts in a formal process that would allow us to
24 move from the E&D Plan to a special pool order in the right
25 circumstances.

1 COMMISSIONER OLSON: So then for these special pool
2 rules, they would be governed really by this rule and the
3 requirements here for approval?

4 MS. MACQUESTEN: Well, what would happen is they
5 would be governed by this rule to get away from the Exploration
6 and Development Plan and into the special pool order. Once
7 you're in a special order, you can close the book on
8 Exploration and Development Plans and simply go under the
9 regular process for pooling orders.

10 You get your original plan -- let's say, it imposes
11 some of the conditions that were in the original Exploration
12 and Development Plan. You proceed along those lines, and you
13 decide that maybe some of those conditions aren't necessary
14 anymore. You could go in and ask for an amendment to your
15 special pool order to see if you could get those removed. And
16 then the examiner would have to consider, does that make sense
17 in this area? If they agree, they agree. If they don't, those
18 conditions would remain.

19 Are there a lot of detailed rules on getting
20 amendments in special pool orders? No. We don't have those.
21 Again, we seem to be functioning without them. Should we have
22 them? Probably. But we don't.

23 MR. HALL: Mr. Chairman, is this argument of counsel
24 or -- I'm just asking.

25 CHAIRMAN FESMIRE: Would you like to rebut? I

1 believe it's -- the Commissioner was asking leading questions,
2 and Counsel is qualified to answer them. But if you consider
3 them rebuttable, we would be glad to hear a rebuttal on it.

4 MR. HALL: Do we get to ask Ms. MacQuesten questions?

5 CHAIRMAN FESMIRE: I don't think that's the sort of
6 rebuttal I was considering.

7 COMMISSIONER OLSON: Since it's a legal question, why
8 couldn't they address it as well --

9 CHAIRMAN FESMIRE: Sure.

10 MR. HALL: -- of Ms. MacQuesten?

11 CHAIRMAN FESMIRE: Well --

12 MR. HALL: Well, yeah. You're asking for comment
13 from me, as I understand it.

14 My understanding from what Mr. Jones has told us is
15 that the process would fall under the normal procedures the
16 Division has in place now statewide for establishing pool rules
17 per the nomenclature process.

18 One of the points I was driving at was -- Mr. Jones
19 didn't know the answer to this -- but if we establish -- we
20 make the conversion to special pool rules after an approved E&D
21 Plan, do we then apply the Division's traditional
22 interpretation of pool rules? Do the pool rules apply to the
23 undesignated portions of that pool within a mile of the pool
24 boundaries?

25 That's what I'd like to know. He wasn't able to

1 answer that question. As I understand his subsequent testimony
2 from what Ms. MacQuesten said, the answer is: Yes, we're going
3 to go under the Division's traditional pool rules for the
4 application.

5 MS. MACQUESTEN: If I could explain?

6 CHAIRMAN FESMIRE: Where did I lose control?

7 With permission of Counsel. Would you all like to
8 hear the answer?

9 MS. FOSTER: Yes.

10 MR. HALL: Sure.

11 MS. MACQUESTEN: You can replace -- the area covered
12 by an Exploration and Development Plan can be replaced by a
13 special pool order. That's what the pool order will apply to,
14 whatever conditions it wants to to that area.

15 Any well -- and Mr. Jones did testify to this -- any
16 well drilled outside of that area would have to come under a
17 new Exploration and Development Plan, because that area has not
18 yet been looked at. We don't know if there are archeological
19 sites. We don't know the infrastructure. We don't know
20 existing structures in that area. It hasn't been looked at.

21 What we're saying is that for the area that we've
22 looked at where we feel comfortable, where we can move away
23 from the process established in the special rules, to just go
24 to regular pool orders where they just come in and ask for a
25 hearing as they do in normal cases without all the public

1 notice and everything that's attached to the special rules,
2 that they can do that once we know enough.

3 But once you get outside of that area into the
4 unknown, we'd go back to Exploration and Development Plans.

5 MR. HALL: Well, whichever, the proposed rule does
6 not say that, and it needs to. We cannot understand it on its
7 face.

8 CHAIRMAN FESMIRE: We are asking for proposed
9 conclusions and findings of fact. That will be the kind of
10 thing you might address in that, Mr. Hall.

11 Any further questions of this witness?

12 COMMISSIONER OLSON: Ms. Foster, did you have a
13 comment?

14 CHAIRMAN FESMIRE: Ms. Foster, did you want to
15 comment on this?

16 MS. FOSTER: No, thank you.

17 CHAIRMAN FESMIRE: Anything else we need to cover
18 with this witness?

19 COMMISSIONER OLSON: No.

20 CHAIRMAN FESMIRE: Mr. Jones, thank you very much.
21 Ms. MacQuesten, I believe we have some unfinished
22 business with Mr. von Gonten also, don't we?

23 MS. MACQUESTEN: That's right. May I ask if
24 Mr. Jones can be excused from the proceeding?

25 CHAIRMAN FESMIRE: Mr. Hall? Ms. Foster?

1 MS. FOSTER: That's fine.

2 MR. HALL: That's fine.

3 CHAIRMAN FESMIRE: Thank you very much, Mr. Jones.

4 Mr. von Gonten, at the request of Ms. Foster, since
5 it's been so long, we're going to ask that you be re-sworn.
6 Would you please stand and raise your right hand?

7 GLENN VON GONTEN

8 after having been first duly sworn under oath,
9 was questioned and testified as follows:

10 CHAIRMAN FESMIRE: If my memory serves me right,
11 Ms. Foster was cross-examining Mr. von Gonten; is that correct?

12 MS. FOSTER: Actually, we were in the middle of
13 Mr. Hall's cross-examination.

14 CHAIRMAN FESMIRE: Mr. Hall, I'm sorry.

15 MR. HALL: Thank you, Mr. Chairman.

16 (CONT.) CROSS-EXAMINATION

17 BY MR. HALL:

18 Q. Mr. von Gonten, I believe where we left off was
19 on December 18th, and you had explained to us the Division's
20 expectations for operator submittals of monitor well plans. I
21 think we made it through that portion of the rule. And your
22 affidavit, which is Exhibit 4 -- it might be helpful to have
23 that in front of you, Exhibit 4.

24 A. All I have is both the regs and the post language
25 and Exhibit 4.

1 Q. Okay. And I understand you were involved in some
2 of the prior proceedings before the Division and the Commission
3 on Otero Mesa; is that right?

4 A. No, sir. I was not involved with Otero Mesa.

5 Q. Were you involved in the proposed federal
6 exploratory units for, I think, the Bennett Ranch Unit?

7 A. That was in the Salt Basin. Yes, I was.

8 Q. Okay. You have some familiarity with the
9 Division's Rule 21 addressing Otero County?

10 A. Fairly limited.

11 Q. Well, if you can, if you would look at those
12 rules, and it's obvious that those rules don't call for the
13 plan submittals that this new rule provides for at Sections
14 9B(6) and (7), the hydrogeologic and site report and then the
15 monitoring well plans.

16 Do you know, was it the Commission's determination
17 that the Division's statewide rules were adequate to protect
18 fresh water supplies and the environment in Otero County?

19 A. I have not familiarized myself with the
20 particular order and any particular findings. I have looked at
21 the regulation that deals with Otero Mesa.

22 My general impression, Mr. Hall, is that in Otero
23 Mesa there was more information available about the water
24 resources than we have in Santa Fe County and the Galisteo
25 Basin.

1 Q. If an operator is making application under the
2 new proposed Rule 39 and proposes to use closed-loop drilling
3 and air tools, would there continue to be a need for
4 hydrogeologic site reports and monitor well plans under a
5 circumstance like that?

6 A. Yes.

7 Q. Why?

8 A. One of the issues that -- I'll just refer to the
9 Galisteo Basin, but I also mean Santa Fe County. One of the
10 primary issues that we're dealing with, struggling with, is the
11 general lack of information on hydrogeology. So one of our
12 intents is that we gain that information when operators pursue
13 an exploration and development program.

14 Q. So your primary objective is to obtain the data
15 rather than any sort of active protocol to protect fresh water
16 supplies?

17 A. I wouldn't say that it's exclusionary. I think
18 that the monitoring program can address both those issues. We
19 get information on the top of water and the column of water,
20 and we also want to know to what depths does fresh water occur
21 before you get into saline waters that would not be
22 protectable.

23 And we also, potentially, would be interested in
24 having a monitoring program that would actually be in place to
25 determine if there was any sort of ground water contamination

1 as a result of drilling of wells or drilling for oil and gas
2 exploratory or development wells.

3 Q. And I can't recall if I asked you this. As part
4 of your monitoring plan requirement, one of your objectives is
5 to detect releases. I can't recall if I asked you this, but
6 releases of what?

7 A. Any contaminant. And those contaminants could
8 be -- I would think that we would probably stick pretty closely
9 to the WQCC 3103 constituent list. That would probably be our
10 baseline monitoring program; however, it could come out during
11 the hearing that there are other constituents that people might
12 be concerned with that we might add to that list.

13 You hear a great deal of concern now about drilling
14 fluid additives and whether those constituents that are in
15 those proprietary additives propose a risk. Potentially, we
16 might add something along those lines if that came out at
17 hearing.

18 Q. Okay. So you're talking about releases to
19 the soil to water?

20 A. All releases. But, yes, to both the soil and to
21 ground water or to surface water.

22 Q. We're not talking about air?

23 A. We have not talked about air releases. And my
24 understanding is, generally, that the Environment Department
25 has the authority for the air programs at this time.

1 It would require, I think, a change in statute and a
2 change in regulation to have air emissions dealt with by
3 the OCD.

4 Q. But you're not seeking to regulate that at this
5 time?

6 A. It's not addressed, as far as I know, in this
7 proposed rule making.

8 Q. We looked through some of the additional comments
9 in your affidavit on the proposed rule. You're asking for a
10 number of plans in addition to the hydrogeologic and site
11 report and monitor well plan, you talk on page 4 of your
12 affidavit about line 161. You want an infrastructure plan. On
13 lines 175, 176, you want a production or development plan. The
14 next page, on page 5, at line 220, you want a contingency plan.
15 At line 228, you want a response plan. Look on the last page.
16 About line 239, you want a safety plan. Any other plans?
17 Anything I've missed?

18 A. I followed you along, and that's what I have
19 highlighted on my copy.

20 But the regulations specify what we're asking for.
21 The proposed regulations specify what we're looking for as far
22 as these plans.

23 Q. Well, okay. I'd like to see those
24 specifications.

25 Let me point you to one item in your affidavit at

1 page 4 when you discuss your expectations for an infrastructure
2 plan. When you get down to the final portion of that paragraph
3 beginning on line 168, you say from a regulatory perspective
4 it's easier for OCD to provide oversight of operations at
5 centralized facilities. Operators may propose procedures
6 specified in BLM's Gold Book that are already required on
7 federal leases.

8 Let me ask you and get some specificity on that.
9 Would the OCD accept submittals conforming to the requirements
10 for federal APDs and surface use plan of operations? Would
11 that satisfy the Division?

12 A. I wouldn't say it would satisfy it 100 percent
13 because we may have other comments that come in at hearing, but
14 I think that would be a very good starting point. The BLM has
15 a pretty good track record of surface restoration and
16 reclamation minimizing the footprints that Mr. Jones referred
17 to.

18 And we do not have any guidance that we have put in
19 place or any regulations that deal specifically with those
20 surface issues that the land management agencies, such as BLM
21 and the State Land Office, deal with more routinely than we do.

22 Q. It sounds like you have some working familiarity
23 with the provisions of Onshore Order 1 and the federal
24 requirements.

25 A. I understand the concepts. I wouldn't be able to

1 quote you anything from memory.

2 Q. Okay. Do you know enough to tell us whether they
3 have fairly specific criteria for what they expect to see in
4 their APDs and plan submittals?

5 A. Well, for the infrastructure specifically, I
6 think they are quite specific on pad construction, on roads,
7 minimizing how many roads actually are constructed, having -- I
8 forget what the term is -- but, actually, a turnaround rather
9 than a continuation of a road.

10 They have runon and runoff specs that are specified
11 in the Gold Book to my recollection. And the goal is to make
12 sure that people install a road that, you know, will bear
13 traffic, but when the road is no longer needed can be
14 reclaimed. And they talk about the road construction and, I
15 think, the dimensions of the road that are acceptable to
16 the BLM.

17 Q. And the BLM's Gold Book is a pretty good
18 corollary to the OCD's best management practices publication,
19 wouldn't you say?

20 A. I think they're driven by the same concepts of
21 pollution prevention and best management practices for every
22 aspect of oil and gas operations. The goal is to prevent
23 spills by having pollution prevention and having good concepts
24 in place on knowing what you're going to do with the
25 contingency plan; for example, when that spill does eventually

1 occur. I think they're driven by the same sort of concepts.

2 Q. All right. Any reason why the Division's new
3 proposed rule can't enumerate the same criteria that the BLM
4 has done in Onshore Order 1 and in its Gold Book and be that
5 specific?

6 A. Well, I think there's a couple of issues there,
7 one of which is BLM enforces its own regulations and policies
8 and guidance. And if something was being drilled in the
9 Galisteo Basin that was on BLM land, you know, we do have these
10 overlapping authorities. We could come in and perhaps be more
11 stringent than the BLM was or more stringent than the State
12 Land Office is.

13 However, I'm not really familiar with anything
14 that -- with a great deal of specificity in the Oil and Gas Act
15 that directs the Oil Conservation Division to put out
16 regulations that deal with that as directly as the State Land
17 Office and BLM. And also operators have to comply with the
18 Surface Owners Protection Act.

19 Q. So the short answer to my question is, you see no
20 reason to be specific.

21 A. I think it would be great idea to be specific. I
22 just don't think that we have a clear mandate to go out and
23 address those things to the degree that other agencies do have.

24 And I think there's always overlapping authorities,
25 and it might muddy the waters if we were to come up with some

1 proposals that people that have been doing it for years haven't
2 already thought about. That might cause some conflicts.

3 Q. Let's ask you about the contingency plan
4 requirements at 9B(8). One thing caught my eye in there.
5 You're asking for a contingency plan to address all releases
6 with no exclusion for de minimus amounts. And, again, when we
7 say "all releases," we're not talking about air, as I
8 understand it?

9 A. We are talking about liquids and solids, and we
10 did not contemplate in this proposed rule making air emissions.

11 Q. Okay. Do you want to define de minimum release
12 for us?

13 A. I think that's a term that's used where people
14 will sit there and say, "Well, it was just a surface spill, and
15 we don't have to do anything about it." There may be a more
16 specific definition for that.

17 But our intent is that people have a plan in place
18 that says that whenever there is a spill, they deal with it
19 appropriately. I believe that you asked Mr. Jones about what
20 happens with one quart of transmission fluid. What we want is
21 that the operator who spills a quart of transmission fluid
22 would scrape up that contaminated soil, perhaps.

23 I mean, this should be in their plan. They can
24 propose other things. But, for example, they scrape it up, and
25 they put it in a 55-gallon drum, and then when they dispose of

1 their other waste that they generate during the drilling
2 operations, that they would haul it off and appropriately
3 dispose of it.

4 What we don't want is for people to sit there and
5 say, "It's less than the five-barrel reporting limit for OCD."
6 Even with that case, you're supposed to actually deal with
7 spills appropriately.

8 So we want to make it very clear in this proposed
9 rule we're making that if you have a spill, you address it, and
10 that should be in your contingency plan. I don't think that we
11 want people to report to us specifically on, you know, Release
12 Notification Form, a 141, that they had one quart of
13 transmission fluid. But it might be appropriate for them to
14 put that on their morning report.

15 Q. All right. Do you know why the Commission
16 adopted a five-barrel reporting threshold under Rule 29?

17 A. I don't.

18 Q. Do you know if the -- strike that.

19 One follow-up. At the very end of your affidavit,
20 you talk about your expectations for safety plans. You wanted
21 to address contingencies, fire, loss of circulation, traffic
22 accidents, pipeline ruptures, et cetera. Why can't the rule be
23 as specific as what you say in your affidavit?

24 A. I use the phrase "such as." We're putting the
25 burden on the operator to come up with something. Many

1 operators have these things in house already. And the health
2 and safety and environment groups and many operators are quite
3 rigorous internally in what they do.

4 So for us to specify here in the rule, that might
5 actually be less than they would normally give us. So we want
6 to look at what they're going to provide, what the operators
7 will provide to us. They may have some excellent ideas already
8 canned, already in place.

9 Q. Mr. von Gonten, could you tell us your view?
10 Does this rule need more work?

11 A. It would benefit from more polishing -- if that
12 is where you're going at -- as would any rule, I would say.

13 Q. Okay.

14 MR. HALL: That's all I have, Mr. Chairman.

15 CHAIRMAN FESMIRE: Ms. Foster?

16 MS. FOSTER: Thank you.

17 CROSS-EXAMINATION

18 BY MS. FOSTER:

19 Q. Mr. von Gonten, directing you to Section 9B(5),
20 which is the requirement for maps, one of the things that
21 you're requiring on the map is a detail on farms, which is your
22 new number C there?

23 A. Yes, I see it.

24 Q. Just for clarification, what exact information do
25 you need on the farms? Would that be the surface location, how

1 large their agriculture area is, where their cows actually
2 graze? And how do you define a farm?

3 A. Well, that's a pretty good question, because I
4 don't think we defined this or distinguished it intentionally
5 from ranches, for example. But if you have irrigated land, if
6 you've actually got crop land in there, then I think that would
7 be appropriate for that to be provided to us on this map.

8 And the reason for this is that some farmer can
9 actually say, "Hey, this pipeline is going right through my
10 south pasture."

11 Q. Right. Now, what happens if that's like a BLM
12 grazing allotment? Do you want that information as well?

13 A. That would be, I believe, covered by the surface
14 ownership, which is (5)(a).

15 Q. Right. But you would just -- the operator would
16 just need to say section so-and-so is a grazing allotment and,
17 therefore, I don't need to give you the exact dimensions of
18 where my proposed EDP is on top of that ranching land?

19 A. I think that would suffice. I think the reason
20 is that, you know, you can look -- you can walk out there and
21 see a particular plot that is being irrigated and actively
22 farmed versus where it's just open range land or, you know,
23 grazing land where BLM has, you know, leased it out to
24 somebody. The whole area is probably going to be grazed by the
25 cows.

1 Q. Right. And you're also requiring information on
2 all building infrastructure. Does that include any future
3 power lines or anything? Are you looking for all the
4 information that a potential operator might have?

5 A. I think this is just to existing buildings and
6 infrastructure.

7 Q. Okay.

8 A. It wouldn't be inappropriate for someone who had
9 knowledge of it to show that there's a road that's in the plans
10 that the county is going to construct. You can always add that
11 additional information, but you're limited to what's actually
12 on the ground now.

13 We don't specifically address things that are
14 contemplated or plans that are not in existence now and that
15 may never be built.

16 Q. Okay. Thank you. Then your water courses --
17 that's the new addition to Subsection E -- and it's the same
18 definition for waters courses used in the Pit Rule?

19 A. Yes.

20 Q. Okay. My understanding of Section 9B(5) is that
21 the operator is to provide information on the boundaries,
22 geographic and geological features, and that you are to
23 evaluate the sensitivity of an area?

24 A. Interested persons would be able to evaluate
25 that. It may not be something that this particular agency

1 would deal with, but it may be something that the BLM would
2 evaluate. It could be another State agency.

3 Q. But you were here for Mr. Jones testimony,
4 correct?

5 A. Yes.

6 Q. And his review of Section J talked about that the
7 Division is going to review the Exploration and Development
8 Plan pursuant to protection of correlative rights and
9 prevention of waste and protection of human health and the
10 environment, right?

11 A. That's correct.

12 Q. And I don't think I ever got an answer to the
13 question, but how is the OCD's involvement of a plan? Is it
14 just review for completeness, or will you be involved in these
15 sensitivity discussions only during the hearing process or
16 prior to the hearing process?

17 A. My understanding is that what we're proposing now
18 is an application completeness determination; that at that
19 point, it goes forward to hearing.

20 And I think what we're trying to propose or answer is
21 that during the entire hearing process information will come
22 forth either by public comments or perhaps something, as
23 Mr. Jones addressed, with SHPO requirements. And only at that
24 point will we go forward as a party perhaps to the hearing
25 examiner with our own concerns that we noted that would be more

1 technical comments at that time.

2 So we would actually put ourselves in a position of
3 waiting to see what other public comments were received.

4 Q. So based on at the hearing, if there's a
5 discussion of sensitivity of an area, is that the point that
6 you would be discussing with the operator the distance of
7 setbacks, et cetera, from existing buildings and all that? Or
8 is there any guidance that operators are supposed to follow for
9 that in the existing rules?

10 A. Well, the setbacks that we would enforce would be
11 on Pit Rule setbacks, and I believe I've been reminded that if
12 somebody is drilling closed-loops, then there's no setback
13 requirements other than probably being a water course or
14 something like that. The more rigorous ones would be if you
15 actually had a drilling pit. So we have those.

16 Other people or other agencies may have setback
17 requirements. For example, not only do you not put something
18 through a burial ground that's known to SHPO, but maybe there's
19 a setback requirement around there.

20 I don't know what their regulations would specify,
21 but at that point, I would think that the hearing examiner
22 would address the concerns of SHPO, for example, and say, "It
23 looks like you need to move your road or your pipeline or power
24 lines or something that you were running out there to avoid
25 this sensitive area."

1 Q. I would imagine that a hearing process would be a
2 give-and-take thing where you probably wouldn't finish the
3 hearing in one afternoon or one morning.

4 A. I don't think I've ever seen a hearing that was
5 finished in one day.

6 Q. So it sounds like it's going to be a
7 give-and-take process depending on what the OCD's
8 recommendations are going to be and depending on the public
9 comments and the additional information the hearing officer
10 wants.

11 A. I think that's likely to be correct, especially
12 so given that even a good faith operator who is doing
13 absolutely the best that he can may not have access to the
14 information that was considered to be confidential because of
15 cultural significance.

16 Q. Okay. Now, under Rule 10 it says, that unless
17 otherwise specified in the approved Exploration and Development
18 Plan, there's a list of things that an operator must do, and
19 one of those is to -- shall drill the well using a closed-loop
20 system, right?

21 A. You're talking about 10B(1). I didn't actually
22 testify on that, but I'd be happy to try to answer your
23 question.

24 Q. The question I have is: Is there an instance
25 where an operator might be able to make the argument that they

1 shouldn't have to use a closed-loop system, especially if they
2 fit under the parameters of your Pit Rule?

3 A. I believe Mr. Jones would have been able to
4 answer that question more completely than I. I don't know if
5 they can get an exception to these additional requirements for
6 the APD in 39.10.

7 Q. Okay.

8 A. But I'm -- I seem to be recalling that, yes, you
9 may be able to apply for an exception for a closed-loop.

10 Q. Well, because under the Pit Rule -- and you
11 testified at the Pit Rule -- there are certain locations,
12 depending on your chloride levels, that you would not have to
13 automatically use the closed-loop system.

14 A. I think it was depth-related.

15 Q. Depth -- I'm sorry. Depth-related. And then the
16 chloride was the issue of whether we --

17 A. That's right. Closure standards were more
18 related to chlorides.

19 Q. Right. So the use of an exception, it would be
20 relating to this proposed rule, correct?

21 A. Yes. They would have to have the EDP first and
22 then get the APDs. In the APD process, they could apply for
23 exceptions.

24 Q. But if you --

25 A. But I don't know the answer whether this 39.10

1 prohibits getting an exception or not.

2 Q. Right. I'm looking at the instance if you are
3 less than -- or greater than 50 feet to ground water, which
4 means under normal circumstances, you would be out of the
5 closed-loop system requirement.

6 Because the Pit Rule does not have--

7 CHAIRMAN FESMIRE: Ms. Foster, I think you're
8 misstating part of the rule. There is no closed-loop
9 requirement. There is a requirement that they not use a pit.

10 MS. FOSTER: Yes.

11 CHAIRMAN FESMIRE: But there is not a closed-loop
12 requirement.

13 MS. FOSTER: That's right. You're right. Thank you
14 for the correction. It's late in the day. But less than --
15 under the Pit Rule -- correct me if I'm wrong -- if you're less
16 than 50 feet to ground water, you will use a closed-loop
17 system. You won't use earthen pits.

18 CHAIRMAN FESMIRE: You will not use a pit; that's
19 correct.

20 MS. FOSTER: Right.

21 Q. (By Ms. Foster): So you could have an operator
22 who's going to make an application under the EDP to use earthen
23 pits, but they're going to have to demonstrate depth to ground
24 water?

25 A. The way I read 39.10B(1) is it says they shall

1 use a close-loop system. And I believe that that provision
2 applies in the Galisteo Basin in Santa Fe County. Whether
3 there can be a exception to that, I don't know.

4 Q. Okay. So irregardless of depth to ground water,
5 that's your understanding? That they're going to be using
6 closed-loop systems?

7 A. I would have to do some research on that.

8 Q. Okay. As it pertains to the quality of the
9 water, the operator basically doesn't have to prove a negative,
10 right, that the water that might be there is not protectable?

11 A. The State Engineer's Office witness testified
12 that the presumption the State Engineer's Office is under is
13 that the water would be protectable until a demonstration is
14 made otherwise.

15 Q. And that would be the operator's burden?

16 A. That would be the operator's burden.

17 Q. Okay. Are you familiar with the Galisteo Basin
18 Report?

19 A. Yes.

20 Q. Okay. And OCD recommendations in the Galisteo
21 Basin Report?

22 A. Yes, I have a copy here.

23 Q. Looking at page 26.

24 A. Could you remind me of what exhibit number that
25 is, please?

1 Q. Oh, I'm sorry.

2 CHAIRMAN FESMIRE: It's 20.

3 MS. FOSTER: 20? Okay.

4 THE WITNESS: And what page?

5 Q. (By Ms. Foster): Page 26. Looking at the second
6 to the last paragraph, there is a request in this report by the
7 OCD and the OCC to expand the statutory mandates and authority
8 to protect surface water and ground water; is that correct?

9 A. That was a discussion in this report, yes.

10 Q. Yes. And it actually states that the authority
11 for protection of ground water under the Oil and Gas Act is
12 under three directives: To prevent oil and gas and water from
13 escaping the strata; to regulate produced water to protect
14 against contamination of fresh water supplies; and to regulate
15 the disposition of oil field waste to protect human health and
16 the environment. Are you familiar with that?

17 A. Yes, I'd say that I'm familiar with the statute.

18 Q. So there is a request for expansion to increase
19 the authority of protection of ground water; is that correct,
20 according to this report?

21 A. This report did state that. That was a
22 recommendation that the statutory mandates be expanded, which
23 would require an act of the Legislature.

24 Q. Okay. And then one last question: In terms of
25 the de minimum spill question, I understand that you want to

1 have an operator present you with a contingency plan if there
2 are any spills on location?

3 A. That's right.

4 Q. Again, what happens to an operator if there is a
5 spill? He has an approved EDP, and there is a spill on
6 location that would not fall under your spill rules normally.
7 In other words, he didn't follow his contingency plan, such as
8 if a minor spill occurred. Is he in violation of anything at
9 that point?

10 A. Yes. If he has an approved E&D Plan that
11 specifies what we will do in a contingency, such as a very
12 minor spill, less than five barrels, and he doesn't comply with
13 it, he is in violation of his E&D Plan.

14 Q. Okay.

15 A. And probably -- that's an interesting point,
16 whether that would be a condition on the APD.

17 Q. Okay. So then it's feasible that following all
18 the requirements of the EDP could end up being a condition of
19 the APD?

20 A. We're getting a lot of acronyms. I haven't seen
21 that in the rule, but it seems logical to me. But, again, the
22 EDP -- the E&D Plan -- is approved before they even apply for
23 the APD.

24 Q. Right. Okay.

25 A. They're bound by their Exploration and

1 Development Plan, and if they fail to comply with one of those
2 conditions, then I'm not sure that this plan expressly
3 addresses what kind of enforcement options the Division has.

4 Q. Well, that is my concern on behalf of small
5 operators.

6 Now, small operators coming in will obviously have
7 smaller E&D Plans than a larger operator that would probably
8 present you with something that's probably the equivalent of
9 what they're doing now for a master plan. Is that how you
10 envision an EDP?

11 A. I'm not familiar with the term "master plan."

12 Q. Okay. Well, when you have a large operator,
13 ConocoPhillips, who comes into an area, and they know that
14 they're going to have a drilling plan of 100 wells in a year,
15 they, generally, my understanding is, like to get a lot of
16 their permitting done around the same time if they're in the
17 same geologic area.

18 A. Such as for a coal bed methane?

19 Q. Right. Right.

20 A. Okay.

21 Q. Now, if you have an operator, a small operator,
22 who's coming in to do one well, the EDP might only apply to
23 that single well that they're going to be doing.

24 A. If they get an approved one, it would be for what
25 they proposed, and if they proposed in your situation a single

1 well, that would be all that they would be approved for.

2 Q. All right. Now, question on the relationships
3 that you have between operators. If you have small operators,
4 say, five small operators who have gotten together, and they
5 have a plan between those five operators to do multiple wells,
6 do they need to submit an EDP for all those locations if
7 they're just a loosely-knit group of just operators with maybe
8 different operating responsibilities on those five wells?

9 A. I don't think I know the answer to that question.
10 But it seems to me that if you have partnerships, I guess they
11 would be specified in there as far as the general information.
12 It says the operator's name, address, and so on.

13 So if you have five potential operators that are
14 going to be operating under an EDP -- E&D Plan, all those
15 operators would need to be there if they were going to be the
16 operator. I guess if they're just a partner but not the
17 operator, then their name does not have to be on the
18 application.

19 Q. So I'll ask the legal department. Okay.

20 And you mentioned in your cross-examination that the
21 de minimus releases are for any contaminant that are under the
22 3103 constituents.

23 A. I'm sorry. Where are we looking at?

24 Q. In the contingency plan, where there's going to
25 be a control of any releases, even de minimus releases?

1 A. Right.

2 Q. Releases would include any contaminant under the
3 WQCC 3103 Rule?

4 A. No. I think what we say is when we have a
5 monitoring program, we would have a constituent list. That's
6 where we start off with the 3103 list.

7 If you have a release, and it's transmission fluid,
8 we don't have that on the WQCC list. So what we're talking
9 about is -- I think the monitoring program is when I was
10 referring to 3103. Your contingency plan should be if you
11 spill it on the ground, you dig up the residual
12 contamination --

13 Q. Okay.

14 A. -- for example, with the one quart example.

15 Q. All right. And you agree with the statement that
16 Mr. Jones made in his testimony that an operator could come in
17 and get a surface waste management facility in Santa Fe County
18 or Galisteo Basin without having to go through the EDP plan?

19 A. That's right.

20 Q. And the surface waste management facility has
21 3103 constituents and hydrocarbons?

22 A. We're trying to be consistent on our monitoring
23 lists, yes.

24 Q. All right.

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

1 CHAIRMAN FESMIRE: Commissioner Bailey?

2 EXAMINATION

3 BY COMMISSIONER BAILEY:

4 Q. On page 4 of Exhibit 4, you have a paragraph
5 labeled "Waste Management." And in that paragraph, you
6 reference Rule 10B(2) that it prohibits operators from
7 disposing on site and always must be collected, properly
8 stored, managed, and safely transported off site for final
9 disposition.

10 Does that modify the Pit Rule for this area?

11 A. This special provision is in 39.10B(2), in
12 addition to the requirements of the Pit Rule. The Pit Rule
13 still applies in the Galisteo Basin and Santa Fe County;
14 however, these are additional requirements.

15 Q. Okay. But doesn't the Pit Rule allow disposal of
16 waste on site under certain conditions?

17 A. Yes, it does.

18 Q. And this prohibits disposal of waste on site
19 under all conditions?

20 A. Yes, it does.

21 Q. Has there been any testimony, any presentation,
22 any contamination case, anything at all to indicate why the
23 Commission was in error in the way it promulgated the Pit Rule
24 concerning waste disposal on site?

25 A. We are not proposing or of the opinion that the

1 Commission erred in its Pit Rule. What we're saying is that
2 this is in Part 39, our special provisions, special rules. And
3 these are special provisions for the Galisteo Basin and Santa
4 Fe County.

5 Q. What I'm asking is: What is the justification
6 for modifying the application of the Pit Rule? It sounds like
7 sour grapes to me.

8 A. Our goal was to come up with additional
9 protection given the special nature of the Galisteo Basin and
10 Santa Fe County. And part of that was driven by our lack of
11 knowledge about the hydrogeology, and part of it was to provide
12 for public notice so that people who have authority over
13 culturally significant areas or archeological sites or the
14 tribes would have an opportunity to make comment on that.

15 Q. Which they also had public comment period for the
16 Pit Rule. We both sat through that for months.

17 A. Yes. Again, these are above and beyond the Pit
18 Rule. These are special provisions. The Pit Rule is statewide
19 and still applies. But the special provisions are in addition
20 to the Pit Rule requirements.

21 Q. Why is the Pit Rule not adequate in this case?
22 That's what I'm trying to get to.

23 A. I would rephrase my answer. It's that because of
24 the Executive Order, because of the information that we found
25 out during outreach, and because of the Galisteo Basin Report,

1 we proposed these regulations to the Commission to provide
2 additional protection of the environment and the cultural
3 resources in the Galisteo Basin and Santa Fe County.

4 Q. But you present no testimony to indicate that
5 there has been failure of the Pit Rule.

6 A. We have not made any testimony that there's been
7 a failure of the Pit Rule in the Galisteo Basin or Santa Fe
8 County.

9 Q. On page 3, there's a section labeled Rule 9B(6),
10 and the last sentence of that says, "Given that the potential
11 of proposed productive area may be large, the operator must
12 provide a report that covers the entire productive area."

13 What if the operator doesn't have the operating
14 rights for as large of an area that you're looking at here?

15 A. What we're looking for here is their best
16 estimate of the potential productive area, and we've had some
17 discussion on whether another phrase may be better.

18 From my perspective, it is that at some point they
19 use a best estimate, whether it's 50 percent, to the spill
20 point of the structure that they're drilling and testing or
21 something else, some other number internally they do. They put
22 an outline on the map and say, "This is our best estimate of
23 the potentially productive area." That may be very large.

24 The numbers I heard when Tecton was issuing some
25 press releases was 100 million barrels. The intent of the

1 special provisions is to put other agencies -- among the intent
2 of this rule -- is to allow other agencies who have authority,
3 such as SHPO, that goes beyond what the Division authority
4 extends to as far as protection of archeological sites or
5 cultural sites.

6 They will be put on notice that here is an
7 Exploration and Development Plan that addresses, let's say,
8 10,000 acres. It could be quite large, and they need to cover
9 that entire area with a hydrogeologic and site report.

10 Q. But if an operator only has a small lease and
11 does not have operating rights for what may be determined as
12 the entire productive area, are you asking them to go beyond
13 their lease rights?

14 A. Let's see if I understand your question. Let's
15 say that they assume that there's a 10,000-acre productive
16 area, but they only have rights to 640, for example. Is that
17 the scenario you're asking me to consider?

18 Q. Yes. Yes.

19 A. I think that I would argue that it is their
20 production that they need to be responsible for. So they may
21 be reporting on a subset of the entire potentially productive
22 area that they don't have the other acreage tied up, and that
23 they would be responsible for their, say, 640 if that was all
24 that they had leased.

25 Q. So this should be modified to provide a report

1 that covers the entire productive area of their lease?

2 A. And that would be changed. I think I would agree
3 with that, and that would be 9B(6). I think that might be a
4 useful revision to the proposed rule.

5 Well, actually, I guess you could also say that their
6 E&D Plan can only cover the area that they have rights to;
7 therefore, it wouldn't hurt to add that. But I think that
8 there could be some confusion about the best estimate of the
9 productive area, which is in 9B(2), versus the area to be
10 covered by the proposed plan and one-half mile beyond the
11 boundary of that area, which might be limited to their acreage.

12 I see that there is a point to be made there, yes.

13 Q. The section concerning spills, de minimus spills,
14 I'll go at it from a different angle. Why is there no
15 reclamation plan connected with a spill report?

16 A. There may be in their written contingency plan.

17 Q. Is that going to be a requirement for reclamation
18 and re-vegetation of any site impacted by it?

19 A. I don't believe that this contingency plan
20 addresses, say, pad and road reclamation.

21 Q. And my big question is: Why not?

22 A. To answer your question directly, I haven't seen
23 in the Oil and Gas Act anything that specifically mandates that
24 the Division promulgate rules on that issue. I understand that
25 both BLM and the State Land Office have more direct mandates to

1 address reclamation of impacted areas by pipelines or road or
2 pads in addition to any sort of spills.

3 Q. I'm just seeing it from the perspective of a
4 member of the public who says, "There's a pad out there. How
5 come there's no specific rule that says they have to
6 re-vegetate that as part of the environment?"

7 I think the environment is not being served well
8 since that is one of the requirements, the mandates, the
9 mantra, of OCD that surface restoration seems to fall in
10 between the cracks.

11 A. I couldn't disagree with that statement.

12 CHAIRMAN FESMIRE: Commissioner Bailey, can I count
13 on your helping me in lobbying this issue?

14 COMMISSIONER BAILEY: You bet. But I don't believe
15 you need to have any further legislative action in order to do
16 that. That's why I keep bringing this up at every hearing we
17 have. Because I believe it's implicit in protection of the
18 environment.

19 Q. (By Commissioner Bailey): I notice that there
20 are no closure plans required.

21 A. Closure of what kind of a facility?

22 Q. Any facility.

23 A. They would still be required under their Pit
24 Rule. They would still have to meet the closure.

25 Q. So we can apply the Pit Rule here?

1 A. The Pit Rule does apply throughout the Galisteo
2 Basin and Santa Fe County. It has additional provisions here
3 that limit the operator to a closed-loop system under 10B(1).

4 Q. And the only justification for that is the fiat?

5 A. This was protective, and I would say that, for
6 example, after a period of time -- not necessarily just five
7 years, but after a period of time, if the Division and the
8 State Engineer's Office and the other agencies that would be
9 impacted by oil and gas exploration in this area are
10 comfortable, that you could have a pit in this area because you
11 know the depth to ground water now.

12 That could be, I think, addressed in a special pool
13 order that this requirement does not need to continue after
14 they transition to being covered by a special pool order.

15 COMMISSIONER OLSON: Could I jump in on this issue?

16 COMMISSIONER BAILEY: Go ahead.

17 COMMISSIONER OLSON: Because I think -- correct me if
18 I'm wrong -- but I think it's already covered in 39.10B.
19 Because if you look at the preface right there in B, it says
20 "Unless otherwise specified in an approved Exploration and
21 Development Plan."

22 So these provisions below apply unless somebody tries
23 to propose not to do that, and they go through the hearing, and
24 they would be allowed to do that, I believe; is that correct?

25 THE WITNESS: Again, this was not the area where I

1 actually offered direct testimony on this section, so I would
2 say that -- let's see. That part was covered by Brad.

3 COMMISSIONER OLSON: Well, maybe I'll just ask. It
4 does say, "Unless otherwise specified in an approved
5 Exploration and Development Plan," correct?

6 THE WITNESS: It does say that.

7 COMMISSIONER OLSON: Okay.

8 COMMISSIONER BAILEY: Which means it's a requirement
9 unless an exception is granted --

10 COMMISSIONER OLSON: -- as part of the hearing on the
11 Exploration and Development Plan. That's the way I read that.
12 It seems to me that -- maybe we're debating this -- but it
13 seems to me that that would allow an exception as part of an
14 E&D Plan.

15 COMMISSIONER BAILEY: But there are no exceptions
16 allowed.

17 CHAIRMAN FESMIRE: I think we're deliberating.

18 COMMISSIONER BAILEY: I have no further questions.

19 CHAIRMAN FESMIRE: Commissioner Olson? I mean, it's
20 your turn now.

21 COMMISSIONER OLSON: Right.

22 EXAMINATION

23 BY COMMISSIONER OLSON:

24 Q. Well, I guess this comes back to that same issue.
25 Drilling pits are prohibited in rule -- proposed Rule 39.10. I

1 guess, how does this apply? Production pits are still allowed
2 as pursuant to the existing Pit Rule? Is that -- do I
3 understand that correctly?

4 A. Specifically, the reading -- the literal reading
5 of it in 10B(1) says, "drilling the well." And it does address
6 drilling or workover fluids without using below-grade tanks or
7 pits.

8 Again, this was not the focus of my testimony, and I
9 probably can't give you a best possible answer to that
10 question.

11 CHAIRMAN FESMIRE: Can I ask a question?

12 COMMISSIONER OLSON: Uh-huh.

13 CHAIRMAN FESMIRE: But production pits wouldn't be
14 allowed under general rules, would it?

15 THE WITNESS: Well, we use the terms "temporary and
16 permanent pits."

17 CHAIRMAN FESMIRE: Okay. Permanent pits wouldn't be
18 allowed under general rules; isn't that correct?

19 THE WITNESS: I don't know the answer to that. I
20 think a permanent pit could be allowed. It depends on if you
21 had a surface waste management facility, for example. We've
22 talked about that. If that's part of your overall plan, you
23 have to get a permit for that.

24 Let's say that you were, I don't know, operating a
25 centralized land farm, and maybe you would have a permanent pit

1 for separation of cuttings or something. I don't know. I
2 think you could have a permit for that.

3 CHAIRMAN FESMIRE: I apologize. Go ahead.

4 COMMISSIONER OLSON: No, that's okay. That's kind of
5 right where I was getting at that it seems you could use one.

6 Q. (By Commissioner Olson): You work a lot on
7 remediation of contaminated ground water, don't you?

8 A. Yes, I do.

9 Q. Is the intent of this rule as prevention of
10 pollution that could result in impacts on fresh waters?

11 A. It is. One of the major purposes of this rule is
12 to -- by implementing special provisions to afford extra
13 protection of ground water.

14 Q. And is that due to the cost benefits, then, of
15 production prevention versus cleanup?

16 A. It would certainly play a part in it, but the
17 special provisions were proposed without any sort of cost
18 analysis.

19 But your point is that prevention is certainly more
20 cost-effective than remediation. I would agree with that
21 completely.

22 Q. We've had some public concerns expressed in our
23 public comments about well fracing and concerns about ground
24 water contamination from hydraulic fracturing of the wells.
25 Are you aware of any cases in New Mexico of ground water

1 contamination from hydraulic fracturing?

2 A. I couldn't exclude it, but I'm not personally
3 familiar with any ground water contamination cases that are due
4 to fracing.

5 Q. And you work on most of the ground water
6 contamination cases for the OCD?

7 A. Yes.

8 Q. And maybe this is something that you had said,
9 but it's been awhile; maybe you don't remember. But I had
10 written down that you had made a statement that you don't
11 believe a company could submit a plan for a one-well wildcat.
12 Did I understand something incorrectly, or --

13 A. If their Exploration and Development Plan was a
14 one-well prospect, I don't think that I would believe that
15 their economics would pass muster given the lack of -- the
16 general lack of infrastructure in this area.

17 It's not like they can just tie into an existing
18 pipeline. It's not like they have injection wells that they
19 can dispose of produced water. The project has to bear the
20 cost of all that other waste and infrastructure, and it would
21 be surprising to me, in my experience, that a single well could
22 bear that in this area. You could probably do that in the more
23 established regions of New Mexico.

24 Q. Would it be possible if they could submit an E&D
25 Plan for a one-well wildcat and that's all they can do, I

1 guess, at that point? And then if they need to do anything
2 else, they would have to come back and potentially go through
3 hearing again on it?

4 A. I would think that they would need to. Again, I
5 would be under the impression, personally, that they were tight
6 holding the Division at that point and not giving their best
7 estimate.

8 Q. Okay.

9 COMMISSIONER OLSON: That's all I have.

10 EXAMINATION

11 BY CHAIRMAN FESMIRE:

12 Q. Mr. von Gonten, you indicated in response to a
13 question from Commissioner Bailey that there had been no
14 failure of the Pit Rule that you were familiar with.

15 A. In the Galisteo Basin and Santa Fe County was --
16 my intent was with that specific area.

17 Q. But the Pit Rule is being appealed, isn't it?

18 A. Yes, it is.

19 Q. And, you know, even a blind squirrel finds an
20 acorn once in a while. What happens if industry prevails on
21 one of their appeals?

22 A. Let's say that they prevail on the Pit Rule.
23 Well, I don't know what would happen, if it would be remanded
24 to the Commission to remedy some flaw that the courts
25 determine.

1 But if you're saying that the entire Pit Rule was set
2 aside and we were back to the previous Pit Rule, well, then,
3 this proposal stands on its own legs. 10B(1) would still say
4 "closed-loop system."

5 Q. So in order to protect -- to adequately protect
6 the Galisteo Basin, we'd still need -- and under that
7 condition -- and that's not the only condition -- but under
8 that condition, we would still need this provision; is that
9 correct?

10 A. That's correct. Our logic is still that the
11 State Engineer has reported in their part of the Galisteo Basin
12 Report that the ground water resources in this area are very
13 poorly understood, and we would still advocate a go-slow,
14 go-protective approach beginning off with closed-loop.

15 I believe I also testified that at some point, when
16 sufficient information has been gathered and you would
17 transition to being covered by a special pool provision or a
18 special pool order, that the closed-loop system at that point
19 may no longer be required.

20 Q. Now, you elaborated a little bit on your comment
21 about the one-well prospect. I think we need to go into that a
22 little farther.

23 Was what you were saying, a single-well prospect will
24 not generally bear the risk of an exploratory -- in an
25 exploratory area? Is that what were you were telling me?

1 A. I wouldn't believe that they're giving us their
2 best estimate. In other words, if they thought that their one
3 single well would adequately produce all the oil that they
4 discovered with that single well -- in other words, it was a
5 single well drainage -- then I don't think that that well's
6 going to ever make any money for the operator, would be my
7 inclination.

8 Q. Okay. Provision 9B(7)(f) -- again, we're talking
9 about the operator's estimate of the number and location of
10 development wells. When a company evaluates a prospect like
11 this, they have -- well, they probably run several cases; is
12 that correct?

13 A. That's my experience.

14 Q. And of those cases, they have a high case and a
15 low case?

16 A. That's my experience.

17 Q. And they have an expected case, don't they?

18 A. Yes. That would be my preference for a best
19 estimate.

20 Q. And that's the point I'm getting to. So they've
21 already -- when they've done the economics for this, they have
22 done their best estimate of what the potential for this
23 prospect is; is that correct?

24 A. In any oil and gas company I've been involved
25 with, yes.

1 Q. So it's not a major problem to acquire the data
2 that they would need to comply with this, is there?

3 A. I think they have it in their pocket.

4 Q. One of the disadvantages of going last up here is
5 that all the good questions are taken.

6 CHAIRMAN FESMIRE: I have no further questions.

7 Ms. MacQuesten, do you have a redirect of this
8 witness?

9 MS. MACQUESTEN: Yes, please.

10 CHAIRMAN FESMIRE: How long do you think you're going
11 to take, ma'am?

12 MS. MACQUESTEN: 15 minutes.

13 CHAIRMAN FESMIRE: Okay.

14 REDIRECT EXAMINATION

15 BY MS. MACQUESTEN:

16 Q. Mr. von Gonten, let's get back to the questions
17 about the provision in 10B that apply to APDs of wells drilled
18 in the Galisteo Basin area. There were questions about whether
19 an exception could be obtained to any of these requirements,
20 and I believe it was Commissioner Olson who pointed out that
21 that first line in Section B says, "Unless otherwise specified
22 in an approved Exploration and Development Plan, these
23 conditions apply." Do you see that?

24 A. Yes, I do.

25 Q. I'd like to direct your attention to 39.9B(10).

1 And 39.9B is the part of the proposed rule that says what an
2 operator needs to put into their application for an Exploration
3 and Development Plan. And that Paragraph 10, could you read
4 what that says?

5 A. 9B(10) says, "Any proposed exceptions to the
6 requirements set out in Subsection B, 19.15.39.10 NMAC and
7 evidence that operating in accordance with the proposed
8 exceptions will prevent waste, protect correlative rights,
9 protect fresh water, and protect human health and the
10 environment."

11 Q. So that provision sets out the mechanism for
12 obtaining an exception as parts of an Exploration and
13 Development Plan?

14 A. In looking at it now, it seems like they are
15 allowed to propose exceptions in their application.

16 Q. But the burden would be on the operator to show
17 that it would be protective of the environment?

18 A. It would have to meet these performance
19 standards.

20 Q. Okay. Let me ask you about the questions that
21 were raised by Mr. Hall about the application for an
22 Exploration and Development Plan. He asked about the level of
23 specificity and suggested that we were not giving the operator
24 enough information about the various elements that needed to be
25 included in the plan.

1 A. Was this the question that was proposed to me in
2 December?

3 Q. Well, it was also brought up -- it's come up
4 several times, but it was brought up again today about -- he
5 talked to you about the Gold Book having more specific
6 requirements than this rule and suggested that it would be
7 beneficial for the operator to have more information.

8 Let me ask you this in the context of a specific
9 example. Let's look at -- well, let me, first of all, back up.

10 For a plan to be approved, Mr. Jones testified about
11 Section J, that the Division must find that approval will
12 prevent waste, protect correlative rights, and protect fresh
13 water and human health and the environment.

14 A. Correct.

15 Q. As a whole; is that right?

16 A. That's the general performance standard.

17 Q. And that the plan as a whole must meet that
18 standard?

19 A. Correct.

20 Q. Let's look at one specific requirement of the
21 plan, just as an example, and I'd like to use the monitor well
22 provision.

23 It talks about -- it says the operator must submit as
24 part of its proposal for an Exploration and Development Plan a
25 proposed plan for installing monitor wells to determine depth

1 to water and saturated thickness, obtain baseline water
2 samples, and detect releases.

3 A. Yes, (7)(a).

4 Q. Now, it doesn't tell you what that plan has to
5 be, right?

6 A. No. It is not specific as far as the details.

7 Q. It doesn't tell you how many monitor wells, where
8 they're located, anything like that?

9 A. That's correct.

10 Q. Would those different factors differ depending on
11 the plan that was being proposed?

12 A. Yes, I think so. You would also look at least
13 one monitor well as a minimum, but you might consider that if a
14 landowner had a water well, they might be able to use that
15 water well as a monitor well. Although I think this came up
16 before. And our tendency would be to reject that because water
17 wells are not completed the same way that a monitor well is.

18 If you have a very large proposed program that would
19 be covered by the E&D Plan, then I think you're going to need
20 several monitor wells. But, again, that depends on how much
21 information is already known and will vary from site to site in
22 the Galisteo Basin and Santa Fe County.

23 Q. Would it make a difference if the available
24 evidence shows that the operator was proposing wells next to or
25 in an arroyo or other area that might recharge the ground

1 water?

2 A. Yes, it would. That's one of the things that we
3 would have to consider. You assume -- well, I don't know that
4 we should assume anything in the area where there's so little
5 information. But my impression is that the Galisteo Creek was
6 once a flowing creek, given the archaeological sites, and for a
7 period of time, from a few thousand years to a few hundred
8 years ago. It's essentially dried up. I'm basing that on a
9 conversation with the archaeologist at an outreach.

10 So I think you have to assume that there's recharge
11 in the arroyos, and whereas there might, be ground water highs
12 below the arroyos and ground water lows on some interstream
13 area or mesa or something, that the water table has declined
14 further in those areas. But there it's still more shallow
15 beneath an arroyo.

16 Q. But it's possible that if the area selected by
17 the operator was particularly vulnerable, that that might
18 dictate a different monitoring plan, then, if you picked an
19 area where evidence showed that perhaps there was no ground
20 water or protectable fresh waters?

21 A. Yes, I think so.

22 Q. So context is everything?

23 A. The site-specific nature would dictate what is
24 appropriate.

25 Q. There were questions about whether an operator

1 could propose an Exploration and Development Plan for a single
2 well, and you answered that in the context of current situation
3 being that there isn't infrastructure, and you expressed doubts
4 that an operator would come in with a single exploratory well
5 if he didn't think there was more production out there than a
6 single well would justify; is that right?

7 A. That's correct.

8 Q. Now, given that the initial review of an
9 Exploration and Development Plan is simply "check the box,"
10 have they met all of the 13 items that need to be in the plan,
11 you wouldn't have the power to kick that plan out at that
12 point, would you?

13 A. No. I think at that point, we would say the
14 application is complete.

15 Q. So the operator would make his case to the
16 hearing examiner that it was -- really was his best estimate
17 that -- and it was true that he was only going to drill one
18 well, and his best estimate was very limited as to the
19 production?

20 A. He would have to make that case to the hearing
21 examiner.

22 Q. But your concerns could be raised by the Division
23 or by other parties at that hearing?

24 A. Yes.

25 Q. Let's change the scenario and say that

1 development has taken place in the Galisteo Basin over many
2 years, and there are existing producing wells; there is an oil
3 and gas infrastructure; there are waste facilities; there are
4 pipelines. And a new operator comes in and proposes a single
5 well.

6 Would that change your evaluation of whether that
7 single well Exploration and Development Plan was an appropriate
8 good-faith estimate?

9 A. Yes, it would.

10 Q. So, again, context is everything, right?

11 A. Yes, it is. What you're talking about is if it
12 comes in an established oil and gas province in New Mexico, and
13 I think at that point we may have well moved past this rule
14 being in effect.

15 Q. And it's important, as we look at each of the
16 requirements of a plan, to understand that they are not -- the
17 point of the process is not to look at them in isolation, but
18 to evaluate the plan as a whole; is that right?

19 A. That's correct. They have to meet the general
20 performance standards.

21 Q. One more issue, and that is on the enforcement of
22 these provisions.

23 MS. MACQUESTEN: I would like the Commission to take
24 administrative notice of one of our rules. It's 19.15.5.11.

25 ' And with your permission, I'd like Mr. von Gonten to read it

1 into the record.

2 CHAIRMAN FESMIRE: What's the title of the rule?

3 THE WITNESS: Enforceability of Permits and
4 Administrative Orders.

5 MS. FOSTER: I'm sorry. What's it again?

6 THE WITNESS: If you have a new copy of the rule
7 book, which is effective December 1, it's on page 41. The
8 citation is 19.15.5.11.

9 MS. FOSTER: Thank you.

10 THE WITNESS: Shall I read it?

11 MS. MACQUESTEN: Please.

12 THE WITNESS: "The person who conducts an activity
13 pursuant to a permit, administrative order, or other written
14 authorization for approval of the Division shall comply with
15 every term, condition, and provision of the permit,
16 administrative order, authorization, or approval."

17 Q. (By Ms. MacQuesten): So if an operator is
18 operating with the approval of an Exploration and Development
19 Plan and violates that plan, they would also be in violation of
20 this rule, right?

21 A. That's correct.

22 Q. And violation of this rule is subject to all
23 enforcement mechanisms that are available to the OCD; is that
24 right?

25 A. That's correct.

1 MS. MACQUESTEN: That's all I have.

2 CHAIRMAN FESMIRE: Mr. Hall?

3 MR. HALL: I have no more questions.

4 CHAIRMAN FESMIRE: Ms. Foster?

5 MS. FOSTER: Just one quick line of questioning.

6 RECROSS-EXAMINATION

7 BY MS. FOSTER:

8 Q. In Rule 10B, it states that unless you get the
9 exception in the Exploration and Development Plan, that the
10 onsite closure methods -- and I believe it's the Pit Rule
11 that's cited -- will not be allowed.

12 A. I would have to cross-check that, but I believe
13 that Part 17 is the Pit Rule, and I would imagine that 17.13
14 talks about the onsite closure.

15 Q. Okay. So, again, an operator -- and under the
16 other section that Ms. MacQuesten cited -- would actually have
17 to go for an exception and have to demonstrate that that
18 exception for onsite closure, which is 11 in the Pit Rule, is
19 protective of human health and the environment in this
20 instance?

21 A. That's correct. My understanding is that under
22 9B(10) that they can propose -- excuse me -- exceptions to
23 39.10.

24 Q. Okay. And, again, in the testimony in the Pit
25 Rule hearing, did we not have this discussion? Or is the Pit

1 Rule designed to be protective of human health and the
2 environment, protection of correlative rights, and prevention
3 of waste?

4 A. It's designed for waste management. And, yes, it
5 meets those other standards, as well.

6 Q. Okay. So if an operator is meeting the
7 requirements of the Pit Rule, is he not already meeting your
8 exception?

9 A. I don't think that that argument is something I
10 would agree with. These provisions here in 39.10 are special
11 provisions, additional requirements, and they are being
12 proposed to the Commission because of the special conditions
13 that we encounter in the Galisteo Basin and Santa Fe County,
14 specifically that we don't know the depth to water.

15 That we -- as far as the Pit Rule, in particular,
16 this doesn't apply necessarily to, say, the archeological
17 sites. But looking strictly at it from the Pit Rule, we don't
18 know the depth to water, so we are proposing additional
19 requirements that were for additional protection to the ground
20 water.

21 Q. Would you be able to estimate how many water
22 wells there are in Santa Fe County and the Galisteo Basin?

23 A. No.

24 Q. Thousands? Hundreds?

25 A. I'm not here to guess.

1 Q. Okay. Well, Santa Fe County is pretty well
2 populated; is it not?

3 A. Yes.

4 Q. Okay. And have we had any testimony at all about
5 depth to ground water in Santa Fe County?

6 A. The State Engineer's Office witness testified
7 that generally north of the Galisteo Basin in the northern part
8 or central part of Santa Fe County is that the geology is less
9 complex, and they are more knowledgeable about the depth to
10 groundwater in that area. And I believe also the area to the
11 south of the Galisteo Basin.

12 Q. Okay.

13 MS. FOSTER: I have no further questions.

14 CHAIRMAN FESMIRE: Anything further from the
15 Commissioners?

16 COMMISSIONER BAILEY: No questions.

17 CHAIRMAN FESMIRE: Commissioner Olson?

18 COMMISSIONER OLSON: No questions.

19 CHAIRMAN FESMIRE: Ms. MacQuesten, is that your final
20 witness?

21 MS. MACQUESTEN: Yes.

22 CHAIRMAN FESMIRE: Mr. Hall, do you have any
23 witnesses?

24 MR. HALL: No witnesses.

25 CHAIRMAN FESMIRE: Ms. Foster?

1 MS. FOSTER: No witnesses.

2 CHAIRMAN FESMIRE: Okay. I think what we'll do at
3 this time is open the floor for public comment. I know that
4 there has been at least one person who indicated that they have
5 a public comment. Is there anybody else besides Mr. Frederick
6 who would like to make a comment?

7 Okay. Ms. Noon, I know you have already made a
8 comment in this case. Your comment won't be repetitive, will
9 it?

10 MS. NOON: No, sir.

11 CHAIRMAN FESMIRE: Okay. Mr. Frederick, since you
12 were first, why don't you go ahead and come forward.

13 We have two options. You can either make a public
14 comment or you can be sworn and give testimony. Which would
15 you rather do?

16 MR. FREDERICK: Well, I'm wondering if there might be
17 a third option. Because I, as a lawyer, filed a notice of
18 recommended changes on behalf of Drilling Santa Fe, and we had
19 talked about, I think, at the first hearing that I'd make, more
20 or less, not a closing argument, but I want to make some legal
21 points on our recommended changes.

22 So to the extent that the notice of recommended
23 changes wasn't sufficient to enter an appearance now -- But I
24 won't be calling witnesses or anything like that. This just
25 has to do with a little further explanation of our recommended

1 changes.

2 Also, in addition, I did notice some things that need
3 to be clarified. And I just have some slight amendments that
4 I'd like to give before the Commission.

5 CHAIRMAN FESMIRE: Okay. Well, Mr. Frederick, I
6 think your remarks would be considered argument and not
7 testimony.

8 MR. FREDERICK: That would be great. I'm perfectly
9 acceptable with that.

10 CHAIRMAN FESMIRE: Is there an objection?

11 MR. HALL: No.

12 MS. FOSTER: Yes.

13 CHAIRMAN FESMIRE: What's your objection?

14 MS. FOSTER: That if Mr. Frederick wanted to be
15 present and part of this hearing, he should have been here all
16 three days that we suffered through this.

17 MR. FREDERICK: Actually, I have been here and --

18 MS. FOSTER: Well, then, Mr. Frederick, you could
19 have entered an appearance and cross-examined witnesses is my
20 argument. There's no need. At this point, you can submit
21 written comments.

22 If he had comments ahead of time, again, I would make
23 the same argument that I made with the earlier witnesses in
24 this hearing, which is that I would like the opportunity to
25 have seen those comments so that we could cross-examine this

1 witness. It's basically the same argument.

2 CHAIRMAN FESMIRE: Okay. Mr. Frederick, I think
3 your --

4 Ms. MacQuesten, did you have a response?

5 MS. MACQUESTEN: I don't believe that what
6 Mr. Frederick is proposing is any different from any member of
7 the public making a comment.

8 The only need to enter an appearance is if you wish
9 to cross-examine witnesses or present testimony, and I don't
10 think that's what he intends to do.

11 CHAIRMAN FESMIRE: Your comments are not in the genre
12 of technical testimony, are they, Mr. Frederick?

13 MR. FREDERICK: These are purely legal comments
14 having to do with -- our comments have to do with public
15 notice, preemption, and the hearing, and they have nothing do
16 with substantive technical testimony or factual matters.

17 CHAIRMAN FESMIRE: Okay. I think we're going to
18 allow Mr. Frederick's comments, and the Commission does
19 understand that they are in the nature of the comments, and
20 they are not testimony.

21 MR. FREDERICK: Thank you, Mr. Chairman.

22 MS. FOSTER: Just for the record, Mr. Fesmire, I'm
23 not quite clear on the rule that this body has when it comes to
24 how you weight testimony; in this instance, public comment
25 testimony.

1 If it's public comments, but not under oath, does
2 that have more or less weight than just a public comment that
3 is not under oath at all for your deliberative purposes, and
4 weighing and the findings document that will be produced
5 later on?

6 CHAIRMAN FESMIRE: It's not specifically set out in
7 the rules, but sworn testimony is testimony that the Commission
8 can consider in their deliberations. Comments, public
9 comments, are statements of policy that the Commission can
10 hear, but I don't think that they can use public comments to
11 support a position. But they can hear it, and they need to
12 hear it. Okay?

13 MS. FOSTER: Okay. Thank you.

14 MR. FREDERICK: Thank you, Mr. Chairman,
15 Commissioners. Again, I'm here as a lawyer on behalf of
16 Drilling Santa Fe County.

17 In general, Drilling Santa Fe County supports the
18 rule, and we said that in our notice of the recommended
19 changes. We think it will help protect Santa Fe's water
20 resources, minimize the footprint of oil and gas operations.
21 But I think most significantly, it's one of the only instances
22 where there's an opportunity for the public to get notice of
23 oil and gas operations and to participate in the proceeding, so
24 we view that as kind of the most significant differences in
25 these regulations -- somewhat different than the Pit Rule also.

1 And what I'd like to do at this time, as I mentioned,
2 I do have some amendments to the notice of recommended changes
3 that are already in the records. If I may approach and just
4 hand those out?

5 And I'll be asking leave of the Chairman and the
6 Commission to get those on the record.

7 CHAIRMAN FESMIRE: Why don't you wait just a minute.
8 Mr. Frederick, go ahead.

9 MR. FREDERICK: Okay. Thank you.

10 I'm going to do this real quickly because it's
11 getting towards 5:00.

12 MS. FOSTER: Mr. Frederick, I'm sorry. Are these the
13 amendments that you proposed earlier during the comment period,
14 or are these new amendments or recommended changes?

15 MR. FREDERICK: In red are the proposed amendments to
16 the notice of recommended changes. In black would be the
17 original notice of recommended changes. They're very much
18 non-substantive. It's just to clarify some things.

19 MS. FOSTER: Okay. Thank you.

20 MR. FREDERICK: The first recommended change that
21 I'll talk about -- I'm not going to talk about all of them --
22 has to do with an issue that Mr. Olson brought up, and that's
23 to have effective public notice. You need to have the notice
24 published. And I should say "public notice." You need to have
25 that notice published, not only in the legal section, but

1 somewhere else in the newspaper that's calculated to give
2 effective notice to the public that they'll actually see.

3 And some of the background for that is in our court
4 cases. Everybody knows about the -- or all the lawyers know
5 about the famous case of Mullane v. Central Hanover Bank &
6 Trust where they pointed out maybe for the first time the
7 obvious fact that it's chance alone that the public will happen
8 to read the back of the newspaper and find out that some oil
9 and gas or whatever it is -- that they'll get notice of it
10 through the legal advertisement or the classifieds.

11 And our court of appeals actually reviewed that
12 language and echoed it, and that was in the case
13 of Martinez v. Maggiore, and I can get the cites if you want
14 the cites. Your lawyer can look these up, of course. And in
15 that case, the court cited that language in Mullane for the
16 reason in the Solid Waste Act that there's a requirement.

17 I think Mr. Olson was alluding to this, that you have
18 this notice published, both in the back of the newspaper --
19 that's fine, but also in someplace else in the newspaper,
20 presumably towards the front where the notice is reasonably
21 calculated to actually provide notice and not just be kind of a
22 perfunctory operation.

23 So we would support -- and our proposed language just
24 tracks the language of the Solid Waste Act. We also would
25 require notice in English and Spanish.

1 The next proposed changes -- this would be number two
2 on our list here. It has to do with -- and this issue has also
3 come up where you have public notice and public hearing on the
4 original plan, but on the -- not necessarily, I should say --
5 on the amendments, replacements, or renewal of the plan.

6 And we would propose an amendment that would require
7 or at least have the same criteria for public notice and
8 hearing on a renewal and amendments, because we think that the
9 public will feel misled if the original plan is done pursuant
10 to a public procedure but it can be substantially modified
11 outside of a public procedure. So we're just looking at a
12 symmetry there.

13 We would agree that it should be up to the Division,
14 the discretion with respect to renewals, if there's no change
15 at all with regard to a renewed plan.

16 And I'd like to skip to the preemption issue. And I
17 think the Commission can take administrative notice of the fact
18 that Santa Fe County has enacted a very lengthy ordinance on
19 oil and gas. And that ordinance is directed towards addressing
20 issues that are traditional local interests -- things like
21 availability of services and infrastructure, traffic, land use
22 capability, property values, noise and nuisance, and other
23 matters within the local government's police powers that are
24 outside the purview of the Oil and Gas Division.

25 Our proposed language would first make it clear and

1 express that oil and gas operators are required to comply with
2 local ordinances that are dually enacted.

3 Second, the regulation would include an express
4 statement that the rules aren't intended to preempt local
5 ordinances.

6 And, third, in the event a local ordinance has a
7 requirement that's more strict than some condition in the
8 Exploration and Development Plan, that the local ordinance
9 would apply unless there's a reasonable finding that the local
10 rule would somehow cause waste or damage correlative rights.

11 And the idea that the rule should include an
12 expressed provision about preemption, that's not unique. It's
13 been done before. The Environment Department has actually done
14 it in several instances. For example, in the Air Quality
15 Control Act, I would refer the Commission to NMAC 20.2.10.6,
16 20.2.60.6, and 20.2.61.6, where there's express language saying
17 that the rules are not intended to preempt more stringent
18 requirements that may be imposed under local law.

19 And I would also point out that as Commissioner
20 Bailey no doubt knows, that in the Land Office leases which are
21 statutory, operators, lessees, have to comply with local
22 environmental regulations, as well.

23 So if there are no questions --

24 CHAIRMAN FESMIRE: There are no questions allowed.

25 MS. FOSTER: Mr. Commissioner, I know that we have

1 two weeks to give you findings and recommendations. I would
2 like to respond specifically to Mr. Frederick's new section
3 recommendations on preemption questions since I know that will
4 be an issue that you and I will be battling out during this
5 coming session during the general legislature on the preemption
6 question.

7 . Actually, we're on the same side as you on the county
8 issue. So we'd like to have OCD jurisdiction.

9 CHAIRMAN FESMIRE: Am I to assume that you'll be
10 supporting any bill that I proposed?

11 MS. FOSTER: Absolutely not. Will we have the
12 opportunity to respond to that?

13 CHAIRMAN FESMIRE: I think that would be appropriate.

14 Ms. Noon, would you like to go next?

15 MS. NOON: I would like to be sworn in.

16 CHAIRMAN FESMIRE: Raise your right hand, please.

17 MARITA NOON

18 after having been first duly sworn under oath,

19 was questioned and testified as follows:

20 MS. NOON: Chairman Fesmire, I apologize. There is
21 some slight overlap from last time, in that I'm here to oppose
22 this regulation. My comments are different from last time, but
23 I haven't changed my mind. Is that acceptable?

24 CHAIRMAN FESMIRE: You haven't changed your mind?

25 MS. NOON: No. I'm still opposing this regulation.

1 CHAIRMAN FESMIRE: The only limit we put on it is
2 that it not be repetitive. That having been said, go.

3 MS. NOON: Okay. I oppose this regulation, this
4 proposed regulations on three specific areas that I wish to
5 address.

6 And those three specific areas -- I believe that this
7 regulation violates basic American rights that we as Americans
8 function under. The first one is innocent until proven guilty.
9 That is, the foundation of America's legal system is that
10 Americans are innocent until proven guilty, which is the reason
11 why Governor Blagojevich was able to introduce his senate
12 nominee and have that nominee seated in the Senate because he's
13 innocent until he's proven guilty. So he has that right.

14 In the case of this regulation, we have no instances
15 of the action that we are trying to prevent from happening.
16 And so what is happening here is the potential operators that
17 wish to do businesses in this State are placed in a position of
18 being assumed guilty. And then they have to come before the
19 Commission and prove that they are innocent.

20 And so I oppose this regulation and many of the other
21 regulations that you all have enacted against the oil and gas
22 industry and others have done on other energy industries. I
23 oppose it on the grounds that it violates that basic premise
24 that people are innocent until they are proven guilty.

25 I also believe I oppose it on the grounds of

1 retrospectively and property rights; that people have rights to
2 assets that are in the ground that are their rights. And I
3 believe that much like the ominous Public Lands Act, that is --
4 that is in front of the Senate this very moment, that this
5 regulation, along with some other previous regulations, removes
6 from our citizens the opportunity to access their property.

7 And I believe that that is an inalienable right for
8 American citizens to access their private property.

9 And the third thing is in the area of wealth
10 creation, that the Constitution provides for life, liberty, and
11 the pursuit of happiness, and that part of that pursuit of
12 happiness is earning money, earning a living, and that's how
13 the American economy works. We need people who are willing to
14 take a chance, to take a risk, which is what these operators
15 are proposing to do.

16 They are willing to spend millions of dollars that
17 will boost the New Mexico economy. They are willing to take a
18 chance that perhaps there is an asset under the ground, and
19 they're willing to gamble on that. In the process of gambling,
20 they spend a lot of money in the State of New Mexico. But you
21 know what? If they win the gamble, if it happens to pay off,
22 who wins is the State of New Mexico. Because we have increased
23 jobs, which is an important thing in this State at this time
24 and in this country, and we have increased wealth that comes
25 into the State coffers, which are desperately in need of

1 increased revenue.

2 Additionally, as I travel throughout the country at
3 energy-related events, I talk repeatedly to people who say,
4 "We're pulling out of New Mexico. New Mexico has got
5 regulations that have made it too hard to do business in that
6 State."

7 And I believe that this regulation adds to that. I
8 believe that this regulation chases business out of the State
9 and adds to the already existing delays and delays and delays
10 that -- this regulation has the apparent goal of stalling
11 potential operators off until they run out of money or they
12 give up and decide to go drill in Texas where this is a
13 friendlier environment.

14 So I would encourage you to rethink this regulation
15 before you make a decision on it based on those three specific
16 points: That citizens of America are innocent until proven
17 guilty, and this regulation assumes guilt before there's any
18 action to assume this guilt, forcing them to prove themselves
19 innocent instead of you proving them guilty; it violates
20 property rights; and it violates our citizens' right to create
21 wealth for this country.

22 And so I ask you to reconsider this proposed
23 regulation on those three areas, specifically. Thank you.

24 CHAIRMAN FESMIRE: Thank you, Ms. Noon.

25 Are there any questions of this witness?

1 Thank you, Ms. Noon.

2 Sir? Would you state your name for the record,
3 please?

4 MR. ANDERSON: Yeah, this is Ralph Anderson.

5 CHAIRMAN FESMIRE: Mr. Anderson, would you like to
6 come forward? Would you like to make a statement, or would you
7 like to give testimony?

8 MR. ANDERSON: I just want to give a statement. This
9 is my first attempt at this gathering here.

10 CHAIRMAN FESMIRE: Okay.

11 MR. ANDERSON: And I would like you to know that I am
12 just a citizen. I live in the East Mountain area of
13 Albuquerque, and I would like to encourage more oil and more
14 gas exploration.

15 I know you have a lot of details you have to go
16 through, but I would like to -- as a citizen, I'd like to see
17 us get on with exploring. I think the country needs it, and I
18 think the State needs it. And I have a lot of people who, I
19 think, feel the same way I do. They just don't have the time
20 to come up here. I'm retired, so I can come up here and do it.

21 And that's my comment.

22 CHAIRMAN FESMIRE: Okay. Thank you very much,
23 Mr. Anderson.

24 Johnny, anything that's -- have you made a statement
25 in this case yet?

1 MR. MICOU: Yes, I have.

2 CHAIRMAN FESMIRE: Okay.

3 MR. MICOU: If you would like me not to, that's fine.

4 CHAIRMAN FESMIRE: You're welcome to as long as
5 you're not repetitive.

6 MR. MICOU: It'll be real, real, brief.

7 CHAIRMAN FESMIRE: Okay.

8 MR. MICOU: And I won't be sworn in. Thank you.

9 I'm Johnny Micou, as a citizen. And I just want to
10 highlight that the reason Santa Fe County adopted an ordinance
11 is because citizens felt that the industry had been dominant,
12 and, yes, they have rights, but they were also taking away from
13 private property owners.

14 And I've been in this situation before as was
15 mentioned, Texas, where an oil and gas company -- we had not
16 had a settlement agreement -- cut our fences, put in new roads,
17 put an exploratory well 8500 feet, and did the worse practices,
18 no pit liners, nothing. And that's not a very good feeling.

19 So when you come back in here, and you have to look
20 at private property owners that own the surface and where they
21 have to live, if you're going to talk about going in and
22 extracting and things, and that is the only reason, well, there
23 are other rights. And the Santa Fe County ordinance is a
24 balancing of those rights. It doesn't take away drilling. It
25 doesn't take away exploration. It's a balancing of all the

1 resources and all of the rights.

2 And I'd like in this rule an order to protect a very
3 sensitive area that has these other resources, and they must be
4 counterbalanced and thought through.

5 That's all I would like to say.

6 CHAIRMAN FESMIRE: Thank you, Mr. Micou.

7 Is there anybody else who would like to make a
8 statement? Okay.

9 With that, what we are going to do is two weeks from
10 today the attorneys will need to get us the proposed findings
11 and conclusions. The Commission will have two weeks -- a
12 little more than two weeks this month -- to evaluate those.
13 And we will continue this case until the February 24th
14 regularly scheduled meeting of the OCC.

15 I need to point out that that is a Tuesday meeting
16 rather than a Thursday meeting. It is also a very full docket,
17 so we're going to be moving -- we'll have to keep moving on
18 February 24th. But we'll continue this case until
19 February 24th. Okay.

20 MR. HALL: Are you taking closing statements from the
21 parties on the 24th? Is that when you want them?

22 CHAIRMAN FESMIRE: Would you rather do your findings
23 and conclusions before you make your closing statements?

24 MR. HALL: We do it either way you want.

25 CHAIRMAN FESMIRE: Ms. MacQuesten?

1 MS. MACQUESTEN: I'm ready to do it today on closing
2 statements, if you'd like to take them today.

3 MS. FOSTER: I'm okay with that.

4 MR. HALL: Or we can wait.

5 MS. MACQUESTEN: It might be nice to do them now
6 while we're in the mood and have heard the evidence.

7 COMMISSIONER BAILEY: Let's take a ten-minute break.

8 CHAIRMAN FESMIRE: Okay. We're going to take a
9 ten-minute break, and then we're going to have closing
10 statements. And we will also do our continuances. We've got a
11 bunch of cases to continue. We will do that after the closing
12 arguments. So please be back here at 5:15.

13 [Recess taken from 5:05 p.m. to 5:16 p.m., and
14 testimony continued as follows:]

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

16 Ms. MacQuesten, I believe you indicated that you were
17 prepared to deliver your closing statement.

18 MS. MACQUESTEN: Yes, sir.

19 CHAIRMAN FESMIRE: Are you going to reserve any time
20 for rebuttal, or are you just going to make a closing
21 statement?

22 MS. MACQUESTEN: How much time do I have?

23 CHAIRMAN FESMIRE: Ten minutes. How much time do you
24 need?

25 MS. MACQUESTEN: I think I'll probably use the ten

1 minutes.

2 I thank you for the opportunity to give closing
3 statements tonight. I will use this opportunity to provide an
4 overview of our position and try to address the big questions
5 that have been raised during this proposing. I will not be
6 doing a point-by-point analysis of the rules. That will be
7 done in our proposed findings and conclusions.

8 CHAIRMAN FESMIRE: Okay.

9 MS. MACQUESTEN: The OCD is asking the Commission to
10 adopt special rules for Santa Fe County and the Galisteo Basin.
11 The first question that comes up is, why special rules for this
12 area?

13 The first reason is water. We have heard testimony of
14 the limited water resources in the Galisteo Basin. We have
15 heard testimony that the existing population is dependent on
16 ground water as the sole source of its drinking water. We've
17 heard testimony that the information on the hydrology is
18 limited. There are no ground water flow models, no large
19 comprehensive studies.

20 But the evidence shows that what we do know is that
21 the geology is complex, that it is highly fractured. The
22 testimony was that you can drill a well in one area and move a
23 very short distance, a matter of feet, and the conditions will
24 be different.

25 We also heard the hydraulic connection is highly

1 variable. And according to the Office of the State Engineer,
2 you must presume the ground water encountered is fresh,
3 although the water quality in this area is very site-specific.

4 We also heard that the ground water is particularly
5 vulnerable to contamination from the surface. That recharge is
6 through a very porous, permeable, alluvial material to a
7 shallow aquifer, which makes this area vulnerable if there is
8 contamination on the surface. That's the first point; concerns
9 about the water.

10 Second point; oil and gas development in this area
11 will have to develop around existing uses of the land. We
12 currently have very little oil and gas development in this area
13 and no infrastructure in place to support this development.
14 But the area already supports varied uses, including
15 residential uses and business uses.

16 Third point that makes this area unique is the
17 existing archeological sites. We've shown and even the U.S.
18 Congress recognizes that there are large ruins of the pueblo
19 Indian settlements in this area. We've had comments from
20 Tesuque Pueblo, from the State Historic Preservation officer.
21 Tesuque Pueblo, in particular, noted that this area is still in
22 use year-round for cultural purposes. This makes this area
23 unique.

24 Why all of Santa Fe County and not just the Galisteo
25 Basin? We were asked to look at Santa Fe County, as well as

1 the Galisteo Basin. The public concern extends beyond the
2 basin. Adopting a rule that covers all of Santa Fe County
3 would be consistent with the Santa Fe County ordinance.

4 The Office of the State Engineer testified that they
5 assume good hydrological connection between ground water south
6 and north of the Galisteo River, and the conservative approach
7 would be to protect the entire county as well as the Galisteo
8 Basin. However, if the Commission determines that the rule
9 should only apply to the Galisteo Basin, we could adjust the
10 rule to define its applicability strictly to the Galisteo
11 Basin.

12 The next big question is, what is the authority for
13 us to adopt -- propose and adopt this rule? We have statutory
14 authority in the Oil and Gas Act, and you have heard testimony
15 on that. I'd like to highlight some of that and direct you to
16 some specific provisions.

17 The general statement in the rules of Exploration and
18 Development Plans is that adoption of a plan must satisfy
19 basically all of the OCD's statutory mandates under the Oil and
20 Gas Act. We must prevent waste, protect correlative rights,
21 and protect public health and the environment. Those are in
22 the Oil and Gas Act. Those are from Sections 70-2-11 and
23 70-2-12.

24 There are specific provisions in our Enumeration of
25 Powers that I'd like to point out to the Commission that

1 support the authority for us to adopt this rule and our
2 authority to look at plans and make sure they meet those
3 requirements of prevention of waste, protection of correlative
4 rights, and public health and the environment.

5 In 70-2-12, our Enumeration of Powers, Paragraph A,
6 we have the specific power to collect data. As Mr. Jones
7 testified, part of the goal of this plan is to collect data in
8 an area where we have little information. We clearly have
9 statutory authority to require that.

10 In B(2) we have the power to prevent oil, natural
11 gas, or water from escaping from the strata in which they are
12 found into other strata. It supports the requirements that we
13 are putting in for the drilling that Mr. Will Jones testified
14 about, especially in an area where the geology is unknown,
15 where each well is going to be site-specific. For each well as
16 it's drilling, we're going to have to gather the information
17 that we need to make the decisions that we have to make to
18 protect whatever water is encountered.

19 B(3) requires the filing of logs and drilling records
20 and reports. That supports our rule making requirements, that
21 the operator provide us with reports during the drilling, the
22 mud-logging, et cetera. We have the right to require that
23 information so we can carry out for statutory mandates.

24 The other parts of the Oil and Gas Act are parts that
25 Brad Jones testified regarding B(15), the regulation of

1 disposition of produced water in a manner to afford reasonable
2 protection against contamination of fresh water supplies, and
3 B(20), (21), and (22), regarding regulation of waste, to
4 protect public health and the environment. I would also
5 mention, as he did, that that includes our authority to
6 administrator the Water Quality Act.

7 What's interesting about what we're proposing today
8 is that not only are we asking you to look at our authority
9 under the Oil and Gas Act, but we're asking you to look at our
10 authority under the Cultural Properties Act.

11 The OCD has not looked at this in the past, but
12 Section 18-6-8.1, which is one of the exhibits in your exhibit
13 packet, says if we are permitting something that may affect a
14 registered cultural property, we must allow the State Historic
15 Preservation Office an opportunity to participate in planning
16 so as to preserve and protect and to avoid or minimize adverse
17 effects on the registered cultural property.

18 What we are trying to do with this proposed plan is
19 provide a mechanism to allow the participation by the State's
20 Historic Preservation Officer, allow that input and
21 participation in the planning, so that we can take action to
22 prevent harm or mitigate harm.

23 Now, we haven't done a very good job of doing this in
24 the past. This statute has been in place since 1986. It needs
25 to be addressed, and there's no better place to start than in

1 an area such as the Galisteo Basin, where we know there are a
2 great many cultural resources that need to be identified and
3 protected.

4 Now, we've looked at the authority in what we're
5 trying to do. The next question is, how does this rule
6 accomplish what we're trying to do? How do these rules protect
7 water, regulate oil and gas development in an area already
8 subject to multiple uses and protect archeological sites? How
9 can we do that while balancing all of those needs against our
10 other mandates to prevent waste and protect correlative rights?

11 Let's look at Section 9 first. That's the section
12 that proposes the Exploration and Development Plan. I'm going
13 to take a big-picture approach here and see what we are trying
14 to do in general by requiring operators to propose and obtain
15 approval for a plan before they start development.

16 The first thing we are asking them to do is to
17 describe their intentions. We're asking the operator to take a
18 big-picture approach, and this is one of the few areas in OCD's
19 purview where we are asking to step back and take a big-picture
20 approach. But I would submit that's the best way that we can
21 protect the environment, protect water, and protect
22 archeological sites.

23 The operator needs to tell us, what area is it
24 planning to develop? What facilities does it plan for the
25 area? What structures currently exist in the area? What

1 surface conditions exist in the area that need to be dealt
2 with? How will it detect ground water in an area where we
3 don't know where ground water occurs? How will it drill its
4 wells and operate its facilities to protect that ground water?
5 What will it do with waste? What are its contingency plans to
6 prevent, detect, and respond to releases?

7 These are normal common-sense questions that need to
8 be asked of any operator coming into an area to develop it.
9 What are you going to do? What's the scope of the problem
10 here? What do we need to address?

11 The second thing we're asking the operator to do is
12 to gather the existing information and build on that
13 information as it develops the area.

14 The third thing we're asking for them to do is
15 provide for public notice and participation, which is a very
16 different step for the OCD. Normally, we look at just single
17 APDs, and they go through the process with very little public
18 notice and participation. Here, that happens up front.

19 The rules provide for notice, comment, and the
20 opportunity for hearing at each significant stage of the
21 process. A hearing is required on the initial application and
22 may be requested for amendments, renewals, and replacements,
23 specific notice to the State Historic Preservation Officer and
24 tribal leaders so they can participate and help OCD comply with
25 the standards of the Cultural Properties Act.

1 There's also a standard for approval. The operator
2 must meet all of our statutory mandates, prevention of waste,
3 protection of correlative rights, protect fresh water, protect
4 human health, and the environment. It's a balance. It allows
5 for imposition of conditions. We customize to address the
6 site-specific conditions, and it allows for replacements of a
7 special pool order, if appropriate, once we have a track record
8 in the area and we know about the particular area and its
9 needs.

10 Section 10, the conditions on APDs. If Section 9 is
11 the big picture, this is the small picture. It looks at the
12 individual applications for permits to drill and imposes
13 additional conditions that provide a baseline level of
14 protection in an area in which the geology is complex and the
15 location and quality of ground water is unknown.

16 Remember the Office of the State Engineer testimony.
17 We must presume all zones capable of producing fresh water and
18 presume all ground water in this area is fresh until shown
19 otherwise. The conditions in Section 9 are designed to detect
20 where the water is and/or protect that water.

21 If the operator can show that these conditions are
22 not necessary, there is a process for him to seek an exception.
23 But unless he shows that, this will be the baseline.

24 In conclusion, we're asking you to adopt new rules.
25 But we're also asking you to adopt a new paradigm. The old

1 paradigm, according to industry, is that the OCD should not
2 engage in environmental regulation until damage is done and
3 that damage is linked back to a specific act of industry.

4 OCD must prove the harm and the link after the harm
5 has occurred. What we are proposing with this rule is a new
6 paradigm. What the OCD needs to do is identify a need for
7 protection, and the operator comes in and shows how that
8 protection will be accomplished.

9 The specific need in this case, number one, is the
10 need to protect ground water. In connection with that, protect
11 the surface from contamination that may migrate to the ground
12 water. We have the evidence of the complex geology. We have
13 the Office of the State Engineer telling us that we must
14 presume all zones capable of producing protectable fresh water
15 and to assume all water is fresh until shown otherwise. We
16 have evidence that ground water in this area is vulnerable to
17 contamination migrating from the surface.

18 We have a need. We have science showing a need. Now
19 it is up to the operator to show that its activities will not
20 harm that fresh water, and the operator is in the best position
21 to provide that information. Remember the testimony. Each
22 well in this area will need to be evaluated with site-specific
23 information. We will not know until that drilling is happening
24 where the water is. We need the operator to act with the OCD
25 to provide us the information we need to work together to

1 establish what needs to be done in that well to protect the
2 water.

3 There's a second need, basic need here; protection of
4 those archaeological sites. We know the sites are out there.
5 We have a congressional finding that this is an important area.
6 It's been supported by the comments that you've heard.

7 We have a statutory mandate in New Mexico to protect
8 registered cultural properties. Not only is protection of
9 cultural properties the right thing to do, we are required to
10 do it by statute. The proposed rules bring the State Historic
11 Preservation Office and the tribes in to the loop so that they
12 can alert us to the issues and have input in planning to
13 preserve and protect or minimize adverse affects.

14 Basically, what we're doing here is we're flipping
15 the sound science argument. We have the sound science showing
16 the need for protection. Our message to operators is: Show us
17 the sound science that what you're going to do will not harm
18 the ground and surface waters and will not harm archaeological
19 sites.

20 Thank you.

21 CHAIRMAN FESMIRE: Thank you, Ms. MacQuesten.

22 Mr. Hall, how long do you think you'll be?

23 MR. HALL: Nine minutes.

24 CHAIRMAN FESMIRE: That would leave one minute for
25 Ms. Foster.

1 MR. HALL: Mr. Chairman, Commissioners, I represent a
2 client who owns no lease interest or operating rights in
3 Santa Fe County, Sandoval, or San Miguel Counties. We have no
4 directly affected interest here; however, as an operator in
5 other parts of New Mexico, we do have an interest in this
6 process. And I believe you need the perspective of an
7 operator. Let's hope you'll find our comments useful in this
8 process.

9 Some of the Division's witnesses have testified that
10 there is an administrative preference for the reliability and
11 predictability that statewide rules provide. Flexibility in
12 their interpretation and application and has allowed the
13 Division to discharge its duties to prevent waste, protect
14 correlative rights, and to protect water, human health, and the
15 environment. Usually the Division's APD approval process has
16 gotten the State where it needs to go. Some of the witness
17 testimony offered by the Division has borne that out.

18 When we see a departure from an established and
19 successful regulatory practice, we take note. As the testimony
20 has borne out in this case, there is a legitimate concern that
21 what might be adopted on a localized basis, whatever the
22 motivation, might have implications in other parts of the
23 State.

24 Approach Resources should not be identified as a
25 party opponent here. Perhaps the label "challenger" is more

1 apt. But we have attended this hearing in good faith
2 attempting to learn what the Division intends to achieve and
3 how it plans to achieve it. I'm not convinced that we're
4 there.

5 Here are some of my comments, both good and bad.
6 First the bad.

7 I respect the Division's efforts here, but this rule
8 is flawed. It was rushed into production prematurely. There
9 were barely 30 days from the rule's initial publication in
10 November to the first hearing in December without adequate
11 stakeholder consultation, and the testimony to date shows the
12 rule is not ready.

13 What the Division has offered the Commission is not a
14 new paradigm, but a new paradox. That's just bad governance.
15 That's bad administrative process. Even the Division's
16 witnesses agree; this rule needs more work. And it's not as if
17 we're operating without evidentiary standards in this rule
18 making process. Under the Commission's own rules, the
19 Commission is obliged to make a determination about the
20 reliability of the evidence. You don't have much by way of
21 reliable evidence. You have argument at best.

22 First, the Division offered zero evidence to
23 establish that this rule would protect correlative rights or,
24 especially, prevent waste. Neither did the Division present
25 any reliable evidence showing that this rule accomplished the

1 objective of Executive Order 2008-38, that it is necessary to
2 protect this fragile and ecologically sensitive area.

3 No proof was offered establishing that Santa Fe
4 County is any more ecologically sensitive or unique than
5 San Juan County or Otero County or Chaves County. Remember
6 that the Division's counsel specifically disclaimed that the
7 Galisteo Basin Report constitutes any factual evidence that you
8 can rely on.

9 No witness explained why compliance with and
10 enforcement of the Division's statewide rules do not protect
11 water, protect human health, and the environment. No Division
12 witness explained why we couldn't accomplish these same goals
13 through the current APD approval process.

14 No one clearly explained why the casing, cementing,
15 and logging protocol that's effective under the special rules
16 for Otero Mesa is not effective for Santa Fe County. We heard
17 some testimony about the benefits of dual casing strings and
18 circulating cement around surface pipe, but the evidence
19 clearly supports a conclusion that it may be necessary to hold
20 freshwater well drillers to the same requirements in order to
21 adequately protect fresh water supplies in the county. How one
22 tests for water quality in identifying freshwater zones while
23 drilling and logging was not explained to us.

24 We had zero testimony on economics. The requirement
25 for an Exploration and Development Plan is a hopeless morass.

1 The rule is too vague and does not provide an operator with any
2 sufficient particularity. What the rule says and what the
3 Division's staff say are two ships passing in the night. It
4 can't be reconciled.

5 The Division's witnesses could not offer any clear
6 guidance on what an E&D Plan should look like. One Division
7 witness steadfastly refuses to provide us with an exemplar or a
8 template of what an acceptable E&D Plan should look like.

9 This is just not a problem for the operator. It also
10 fails to provide the Division with any meaningful guidance on
11 applying the E&D Plan requirements. What may constitute an E&D
12 Plan is unacceptably vague. Is this process to work like a
13 unit approval process? We don't know. What are the vertical
14 and horizontal areas of an E&D Plan? How does the Division
15 make the conversion from an approved plan to special pool
16 rules? That question simply was not answered.

17 Will the Division accept a one-well E&D Plan? We
18 don't know. What quality and amount of supporting data will
19 the Division accept? Can an operator submit an E&D Plan and an
20 APD simultaneously? We don't know.

21 Can the Division staff mandate well locations and
22 directional drilling? Maybe. There's no definition of
23 appropriate setbacks from water courses. The rule doesn't
24 clearly define a monitoring well plan. How does an operator
25 comply?

1 In addition, staff wants operators to submit an
2 infrastructure plan, a contingency plan, a response plan, and a
3 safety plan. Where are these specified in the rule? Why is
4 the Division staff reluctant to provide examples of acceptable
5 plans? Would an E&D Plan submittal that would otherwise be
6 sufficient to support a C-144 application suffice? We don't
7 know.

8 The rule offers us no guidance and the Division staff
9 won't commit. Why does the Division want to upend a
10 preexisting rule on the release reporting volumes? Why does it
11 want to supercede the Pit Rule? Why, in the context of this
12 30-day rule making hearing, does the Division get a virtually
13 unlimited time period to review an E&D Plan and APDs, or send
14 the operator back to the drawing board for deficiencies that
15 are undefined on the face of the rule?

16 There is unlawfully broad and undefined discretion to
17 approve or disapprove E&D Plans and APDs. That authority is
18 pushed, unlawfully in my view, down to the staff level. There
19 is an absence of staff accountability. Staff discretion is
20 boundless and open to abuse, and that violates all notions of
21 proper administrative and rule making procedure. It's an open
22 invitation to arbitrary application.

23 I won't address all the motivations behind this rule
24 making, but it seems to me that the Division has tried to
25 launch into the regulatory seas a new ship that flies the flag

1 of environmental protectionism. That's a worthy goal, but in
2 this case, the ship was launched with an inoperative rudder,
3 broken compass, and it's manned by a crew arguing over which
4 direction to take her.

5 There is a significant issue of administration here.
6 This rule cannot be implemented and administered as written,
7 and I think the staff acknowledges that. In its present form,
8 this rule won't work. This rule is not ready for the
9 Commission's consideration. It's an important step for the
10 agency to take. What the Commission needs to do is tell the
11 Division to go back to the drawing board.

12 Now for my comments on the good. This won't take
13 long. That didn't come out right.

14 Although ill-conceived, this rule is ultimately
15 well-intentioned. Its generalized goals for protection of the
16 environment, prevention of water pollution, and recent use of
17 surface resources, are consistent with the industry's
18 practices, and I think they acknowledge the path that the
19 industry and the regulators have been on over the last few
20 decades.

21 These goals are consistent with the industry's good
22 neighbor initiatives. They are consistent with the Division's
23 existing best management practices. They are also consistent
24 with the Division's existing statewide rules, and I think
25 they're consistent with the Surface Owners Protection Act;

1 however, the need for clarity and predictability and
2 reliability remains, both for operators and Division staff.

3 Although the Division has been unable to clearly
4 articulate all this in the form of this rule and through its
5 testimony, I would suggest to you that the Division could draw
6 much from the experience of the BLM and the Forest Service in
7 applying their Gold Book standards. I was frankly astonished
8 that Division staff wasn't better versed in those resources.

9 The quality of evidence presented to the Commission
10 here is just lacking and does not support the rule. Therefore,
11 the Division's application must be denied. If we are to embark
12 on this path, then, at a minimum, the Commission should direct
13 the Division to go back, do its homework, involve all the
14 stakeholders, make another effort, and come back to us next
15 year with a rule we can all understand.

16 Thank you, Mr. Chairman.

17 CHAIRMAN FESMIRE: Thank you, Mr. Hall.

18 Ms. Foster?

19 MS. FOSTER: Thank you, Mr. Chairman.

20 I would agree with Ms MacQuesten on two things: One
21 is that the OCD has a statutory responsibility for protection
22 of correlative rights and prevention of waste. I would agree
23 with Ms. MacQuesten that the secondary duty of the OCD is
24 protection of ground water, human health, and the environment
25 under the Enumeration of Powers as it relates to the

1 disposition of waste.

2 But I do not agree with Ms. MacQuesten's statement
3 that now the OCD has the responsibility of protection of
4 cultural resources. That just shows and demonstrates the
5 confusion that occurred at this hearing. There was confusion
6 every time that we turned around with every single witness.

7 These proposed rules demonstrated the conflict with
8 existing rules; conflict with the special pool rules that
9 exist. It ignores existing rules. Now, in Santa Fe, without
10 any special reason or any science demonstrated, a de minimus
11 spill is equal to a spill that's 25 barrels large anywhere else
12 in the State.

13 Now, in Santa Fe County, under this proposed rule,
14 the operator must use closed-loop systems, even though we went
15 through 18 painstaking days of testimony plus your
16 deliberations on the Pit Rule over the specifics of when we
17 should try and protect the environment, depending on depth to
18 ground water, and depending on chlorides.

19 In that hearing, you heard a lot of testimony, a lot
20 of science. In this hearing, I would submit there was
21 absolutely none. The only time that any hydrology was actually
22 discussed in this hearing was from a former Office of the State
23 Engineer employee. He's now a consultant. And the best
24 evidence that he had was a report from 1980. He did not even
25 mention the four-quad study that was done and is a more recent

1 study that specifically highlights Santa Fe County. Neither
2 did any of the other witnesses.

3 There's no reason for this overriding additional
4 bureaucratic layer for operations in Santa Fe County. I would
5 submit that the Pit Rule, even if it were to be overturned on
6 appeal like Mr. Fesmire seems to think is going to happen --
7 but even if it were to be overturned -- okay -- you did spend
8 some time on the Put Rule.

9 CHAIRMAN FESMIRE: You forgot the premises to that.

10 MS. FOSTER: Which is?

11 CHAIRMAN FESMIRE: Everybody gets lucky once in a
12 while.

13 MS. FOSTER: Even a blind squirrel can find an acorn
14 is what you said.

15 Even if it were to be overturned, we would still go
16 back to Pit Rule 50. There would still be a pit rule, and I
17 have no doubt that we will be before you again discussing the
18 Pit Rule. And we will be discussing a spill rule, which is a
19 statewide rule. We will be discussing the disposition of
20 produced water, which are statewide rules.

21 You have many statewide rules. We have spent many
22 days together going over statewide rules. I understand that
23 there might be the need to respond to public pressure in this
24 instance and the need to respond to Governor Richardson's
25 mandate for a special rule in Santa Fe County.

1 But I think we heard if there was any science at all
2 presented in this case, it had to do with the Galisteo Basin,
3 if at all. And I would submit that that evidence was not even
4 that strong.

5 But there was really no discussion of the rest of
6 Santa Fe County and the need for the rest of Santa Fe County to
7 have a special rule and this overriding layer of additional
8 bureaucracy, additional time, and resources that the OCD staff
9 will have to go through -- and hearing -- that the public will
10 have to come in and comment on, that industry lawyers will have
11 to work on to -- for what? So that we can go ahead and turn
12 around and apply for APDs under the normal process, under the
13 normal statewide rules, once we get approved for an Exploration
14 and Development Plan?

15 It sounded like from some of the witnesses that the
16 real goal of this exercise, this Exploration and Development
17 Plan, was really not Santa Fe at all. It's really to be
18 applied to wildcat areas or underdeveloped areas. There was
19 even testimony today by Mr. Brad Jones that he would consider a
20 basin that is beneath already explored basins to be a wildcat
21 area.

22 Are we going to have to do Exploration and
23 Development Plans for that? Are we going to have to do
24 Exploration and Development Plans any time that an OCD staffer
25 decides that he doesn't have adequate, fresh information,

1 hydrological information?

2 We are having problems with the Pit Rule, and one of
3 the problems that we're having is that your staff here at the
4 OCD is unhappy with the information that my operators are
5 providing to you, the hydrological information, the geological
6 information, that is out there. And my operators are having to
7 do things like drill additional monitoring wells. So we can't
8 agree to this proposed rule as it is written without the
9 limitations on your staff running rampid, which is happening.
10 Okay?

11 Your staff -- and I said this in the questioning --
12 your staff needs to have somebody to answer to. They need to
13 submit -- they can testify in a hearing in front of a hearing
14 officer. If the ultimate decision comes to the Division
15 Chairman who signs off on the order and a staffer cannot change
16 that decision arbitrarily -- like what is happening now under
17 the Pit Rule -- then we might be okay with this process, this
18 additional bureaucratic layer.

19 But the way it was testified to, the Division is
20 going to run rampid on this. They have way too much discretion
21 under the rule as it is proposed. There's too much
22 subjectivity. Small operators, especially, are going to get
23 hurt; the ones that don't have the money to do all these
24 ridiculous hoop-jumping that your staffers are going to require
25 under this rule.

1 There's a financial issue here. There is a
2 time-wasting issue in the proposed rule. It's unclear how long
3 an operator would have to wait for SHPO to come back with an
4 answer, if at all. It's unclear how long an operator will have
5 to wait to have another proposed agency involved in this thing.
6 We don't know.

7 Operators are going to go into this process not
8 knowing which agencies are going to be involved. They're going
9 to be subject to an environmentalist coming in and making
10 public comments that could be completely and absolutely
11 unsubstantiated and an operator is going to have to respond to
12 that. That doesn't make any sense. That is not good policy.

13 It will also hurt large operators; large operators
14 who want to develop large tracts of land. We heard over and
15 over again from your staffers, the OCD witnesses, that they're
16 going to want to have internal communications from these
17 companies as to what the risk-based analysis was for buying
18 this acreage or buying these leases.

19 They're going to want to have all that information,
20 because if they come in and say, "We're only going to drill one
21 wildcat well and see how that goes," your staffers,
22 specifically, Mr. von Gonten said, he won't believe the
23 operators. He's going to second question business decisions
24 that are made by operators for buying large acreage and
25 starting development plans. He will question business

1 decisions.

2 I would submit that there was no guidance given, and
3 there's not going to be any guidance given by the OCD in this
4 rule, if it passes. That was the testimony. And I would
5 submit also there were very few straight answers in this
6 hearing. And I have to apologize to the Commission for losing
7 my temper the first time that I started my cross-examination
8 with Mr. Brad Jones, but I felt like I was not getting any
9 straight answers, and I was extremely frustrated.

10 This proposed rule, I have no doubt if this passes we
11 will see the OCD coming in and trying to apply this to other
12 parts of the State. This is not going to end in Santa Fe
13 County. This is going to Rio Arriba County. This is going to
14 go to other counties, and that is our big concern. It will
15 have a huge economic impact. It's already having a huge
16 economic impact. And the reason is because operators know that
17 you're going through this process and it's part of the
18 regulatory instability that's going on in this State right now.

19 They're not going to invest any money here as long a
20 rule like this could potentially pass with this Commission.
21 The message you're sending to operators is you can't drill in
22 Santa Fe, not because of a need for protection of correlative
23 rights and the prevention of waste. It's not even because this
24 rule is going to protect the environment anymore than you are
25 protecting the environment already. It's because of politics

1 and public perception.

2 And I would ask you to review this rule very
3 carefully and ask the OCD to again, like Mr. Hall said, if they
4 really want to pass this -- and I think in their heart they
5 think that their motivations are good. But they need to come
6 back and be able to answer the questions and be able to think
7 this process through on how this is going to work on a
8 day-to-day basis with operators.

9 Thank you.

10 CHAIRMAN FESMIRE: Ms. Foster, I do need to set one
11 thing straight. I did not say that it was my opinion that the
12 Pit Rule would be overturned on appeal.

13 MS. FOSTER: I'm aware of that, Mr. Fesmire. You did
14 state, I think -- in two questions to witnesses, you asked,
15 hypothetically, if the Pit Rule were to be overturned, how
16 would this rule stand.

17 CHAIRMAN FESMIRE: Right.

18 MS. FOSTER: Yes.

19 CHAIRMAN FESMIRE: Thank you. Anything else in this
20 case?

21 With that, we will adjourn for the time being. We
22 will continue Case 14255. We will reconvene the case on
23 February 24th, the regularly scheduled OCC meeting. The
24 attorneys are reminded that they have two weeks from today to
25 get to the Commission secretary post findings and conclusions.

1 Anything further in this case?

2 Okay. With that, we will call the next case on the
3 docket, which is Case No. 14163, the Application of Merrion Oil
4 and Gas Corp. for Compulsory Pooling in San Juan County, New
5 Mexico. This case will be continued to February 24, 2009.

6 The next case on the docket is Case No. 14106, the
7 Application of the New Mexico Oil Conservation Division for a
8 Compliance Order Against Xeric Oil and Gas Corporation. This
9 case will be continued to the February 24, 2009, Commission
10 docket.

11 The next case on the docket is Case No. 13957, the
12 de novo, Amended Application of Energen Resource Corp. to Amend
13 the Cost Recovery Provisions of Compulsory Pooling Order
14 No. R-1960 to Determine Reasonable Costs and for Authorization
15 to Recover Costs From Production of Pool Mineral Interests in
16 Rio Arriba County. This case will be continued to the
17 February 24, 2009, Commission docket.

18 The next case on the docket is Case No. 14149, the
19 de novo Application of El Paso E&P Company, LP, to Abolish the
20 Van Bremmer Canyon-Vermejo Gas Pool, Expand the Castle Rock
21 Park-Vermejo Gas Pool and to Establish Special Rules and
22 Regulations for the Castle Rock-Vermejo Gas Pool, Colfax
23 County, New Mexico. This case will be continued to the
24 February 24, 2009, docket.

25 The next case on the docket is Case No. 14150, the

1 Application of El Paso E&P Company, LP, to Expand the
2 Stubblefield Canyon Raton-Vermejo Gas Pool and to Establish
3 Special Rules and Regulations for the Pool, Colfax County, New
4 Mexico. This case will be continued to the February 24, 2009,
5 docket.

6 The next case on the docket is Case No. 14124, the
7 Application of Cimarex Energy Company of Colorado for Special
8 Pool Rules, Lea County, New Mexico. This case will be
9 continued to the February 24, 2009, docket.

10 The last case on the docket today is Case No. 14145,
11 the de novo Application of Fasken Oil and Ranch, Ltd., for a
12 Compliance Order Requiring Cimarex Energy Company of Colorado
13 to Comply with the Division's Oil Proration Rules for the
14 Apache Ridge-Bone Spring Pool, Lea County, New Mexico. This
15 case will be continued to the February 24, 2009, docket.

16 As you can see, the February 24, 2009, docket is kind
17 of full.

18 Is there any other business before the Commission
19 this evening?

20 MS. FOSTER: On the 24th, we start at 9:00 a.m.?

21 CHAIRMAN FESMIRE: Yes, ma'am. Is there anything
22 else?

23 The Chair would entertain a motion to adjourn.

24 COMMISSIONER BAILEY: I so move.

25 COMMISSIONER OLSON: Second.

1 CHAIRMAN FESMIRE: All those in favor signify by
2 saying "aye."

3 COMMISSIONER BAILEY: Aye.

4 COMMISSIONER OLSON: Aye.

5 CHAIRMAN FESMIRE: Aye.

6 With that, we're adjourned. Thank you.

7 * * *

1 **REPORTER'S CERTIFICATE**

2
3 I, JOYCE D. CALVERT, Provisional Court Reporter for
4 the State of New Mexico, do hereby certify that I reported the
5 foregoing proceedings in stenographic shorthand and that the
6 foregoing pages are a true and correct transcript of those
7 proceedings and was reduced to printed form under my direct
8 supervision.

9 I FURTHER CERTIFY that I am neither employed by nor
10 related to any of the parties or attorneys in this case and
11 that I have no interest in the final disposition of this
12 proceeding.

13 DATED this 15th day of January, 2009.
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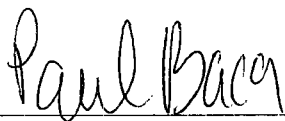
1 STATE OF NEW MEXICO)
2 COUNTY OF BERNALILLO)

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4 I, JOYCE D. CALVERT, a New Mexico Provisional
5 Reporter, working under the direction and direct supervision of
6 Paul Baca, New Mexico CCR License Number 112, hereby certify
7 that I reported the attached proceedings; that pages numbered
8 1-262 inclusive, are a true and correct transcript of my
9 stenographic notes. On the date I reported these proceedings,
10 I was the holder of Provisional License Number P-03.

11 Dated at Albuquerque, New Mexico, 15th day of
12 January, 2009.

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