

STATE OF NEW MEXICO
ENERGY, MINERAL AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION COMMISSION

ORIGINAL

APPLICATION OF THE NEW MEXICO OIL AND GAS
ASSOCIATION FOR AMENDMENT OF CERTAIN PROVISIONS OF
TITLE 19, CHAPTER 15 OF THE NEW MEXICO
ADMINISTRATIVE CODE CONCERNING PITS, CLOSED-LOOP
SYSTEMS, BELOW GRADE TANKS AND SUMPS AND OTHER
ALTERNATIVE METHODS RELATED TO THE FORE GOING
MATTERS, STATE-WIDE.

CASE NO. 14784 AND 14785

VOLUME 14

September 26, 2012
9:00 a.m.
Wendell Chino Building
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Porter Hall, Room 102
Santa Fe, New Mexico

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RECEIVED OGD

THE COMMISSION:

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GREG BLOOM, Commissioner

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1 (Note: In session at 9:00.)

2 CHAIRWOMAN BAILEY: Good morning. It's
3 9:00 o'clock on Wednesday, September 26th. The Oil
4 Conservation Commission is deliberating the
5 consolidated applications in Cases 14784 and 14785.
6 All three commissioners are here, and so there is a
7 quorum. I believe we left off yesterday at
8 19.15.17.12A(8) for consideration on whether or not
9 an oil absorbent boom or other device to contain and
10 remove oil from the pit surface should be a
11 requirement for an operator. We do have some
12 discussion on this.

13 COMMISSIONER BALCH: I think we went
14 around it probably longer than we needed yesterday.
15 I think the keeping the "remove oil from the pit
16 surface," and since the pit is going to be small and
17 already contained, I don't know that that's
18 necessary. If the concern is from an overflow and
19 you are trying to contain the oil that's moving
20 along the ground, I think that's different and we
21 would have to reword Section 8 to make it reflect
22 that.

23 COMMISSIONER BLOOM: It could read "from a
24 pit surface or an overflow situation" or something
25 along those lines.

1 CHAIRWOMAN BAILEY: Or emergency spill?

2 COMMISSIONER BLOOM: Or emergency spill.

3 COMMISSIONER BALCH: I would say more from
4 a release or something like that. But I am
5 concerned this is already -- I think a typical low
6 pit is something on the order of maybe twice the
7 size of this room. It's already contained if
8 there's a spill within that area. So a boom is not
9 going to do anything except keep it on one-half of
10 the room.

11 But if the concern is oil getting involved
12 in some sort of a sheet flow and then moving across
13 the surface, then the language should really
14 indicate instead of removal from the pit surface, it
15 would be to contain oil in case of a release.
16 Something like that.

17 CHAIRWOMAN BAILEY: Unanticipated release?

18 COMMISSIONER BALCH: Yes.

19 COMMISSIONER BLOOM: That would be fine.

20 CHAIRWOMAN BAILEY: So it will read,
21 Theresa, "The operator shall install or maintain
22 on-site an oil absorbent boom or other device to
23 contain and remove oil due to" --

24 COMMISSIONER BALCH: To contain.

25 CHAIRWOMAN BAILEY: Not due to but

1 resulting from.

2 COMMISSIONER BALCH: An unanticipated
3 release?

4 COMMISSIONER BLOOM: Yes.

5 COMMISSIONER BALCH: I think you want to
6 delete "and remove oil" and one of the
7 two "contains" because really you just want to stop
8 it from spreading and then we can figure out the
9 best way to pick it up.

10 MR. SMITH: May I ask a question? If you
11 are going to require the maintenance of an oil
12 absorbent boom, is it necessary to say -- could you
13 just say "or similar device"? Do you have to say
14 why you want it on there? Is the boom used for more
15 than one thing? Why would you want to describe what
16 they have to use it for?

17 COMMISSIONER BALCH: I think you don't
18 want to -- well --

19 CHAIRWOMAN BAILEY: Just put a period
20 after "device"?

21 MR. SMITH: Or similar device.

22 CHAIRWOMAN BAILEY: Well, we have to say
23 what the similar device needs to be functioning as.
24 We could have a wrench on location and call it a
25 similar device.

1 MR. SMITH: Would that be similar to an
2 absorbent boom?

3 CHAIRWOMAN BAILEY: Not necessarily, but
4 there's no qualification.

5 COMMISSIONER BALCH: It could be something
6 like a bag of sawdust. Just something to control
7 overlap flow of oil.

8 MR. SMITH: Oh, okay.

9 COMMISSIONER BALCH: So I think you want
10 to say --

11 COMMISSIONER BLOOM: I think the language
12 got a little garbled there. You can say "or other
13 similar device".

14 COMMISSIONER BALCH: "To contain an
15 unanticipated release."

16 COMMISSIONER BLOOM: Perhaps we don't want
17 "similar" in there because is a vacuum truck similar
18 to an oil absorbent boom?

19 COMMISSIONER BALCH: Not really. Not if
20 my recollection of Sesame Street is right. Which of
21 these things is not like the other.

22 COMMISSIONER BLOOM: Okay.

23 CHAIRWOMAN BAILEY: Do we really need to
24 have that there, at every well site where we don't
25 have 99.99 percent of the time any kind of release

1 from a temporary pit?

2 COMMISSIONER BALCH: Well, I did not think
3 so, and I particularly didn't think so when it was
4 for oil on the surface of the pit because it's
5 already contained. I think Mr. Bloom's concern was
6 if you had fluid release that had oil on it, you
7 would want to be able to contain that oil from
8 blowing across the surface. Timing-wise, I don't
9 know --

10 COMMISSIONER BLOOM: Correct. There was
11 testimony from Mr. Arthur that he had to use the
12 boom at one point and found reason for it, so he
13 needed it.

14 CHAIRWOMAN BAILEY: Let's go on to Section
15 12B, Temporary Pits.

16 COMMISSIONER BLOOM: Do we still need to
17 talk about closed-loop systems in 17.12A?

18 CHAIRWOMAN BAILEY: Yes. We had put that
19 on hold to see what else we had come up with. We
20 have removed closed-loop systems from Paragraph 5.

21 COMMISSIONER BALCH: The only other note
22 of it is at 1.

23 CHAIRWOMAN BAILEY: So we had nothing that
24 references closed-loop systems in 12A.

25 COMMISSIONER BALCH: Most of the

1 discussion yesterday was about the difference
2 between the closed-loop system being temporary and
3 then also just notification to us, so enforcement
4 would be hard. And it seems, at least to me, that
5 any release or operational issue with it would be
6 resolved by the Spill Rule.

7 CHAIRWOMAN BAILEY: Yes. If we delete the
8 language, the words "closed-loop system" in A1, we
9 should also remove it in A because there are no
10 following requirements connected to closed-loop
11 system. Mr. Bloom, do you have anything?

12 COMMISSIONER BLOOM: Generally, I don't
13 know if it's bad to have a statement that says, "A
14 closed-loop system shall be operated in such a
15 fashion that it prevents contamination of freshwater
16 and protects health and the environment."

17 CHAIRWOMAN BAILEY: That would have to be
18 a separate paragraph.

19 COMMISSIONER BLOOM: Because A1
20 essentially says that.

21 COMMISSIONER BALCH: A1 says you have to
22 operate your equipment safely, so in that sense if
23 you leave closed-loop system in there, I don't think
24 it detracts from anything.

25 CHAIRWOMAN BAILEY: Okay: Then we will

1 not delete closed-loop system in A1. All agreed?

2 COMMISSIONER BLOOM: Agree.

3 COMMISSIONER BALCH: I agree.

4 CHAIRWOMAN BAILEY: Then we go to

5 temporary pits. B1. The suggestion was made by

6 Dr. Neeper to include the word "mineral" so it would

7 read "only fluids or mineral solids."

8 COMMISSIONER BLOOM: Did we put that in

9 elsewhere?

10 COMMISSIONER BALCH: Yes.

11 COMMISSIONER BLOOM: Then I think we

12 should do it here.

13 CHAIRWOMAN BAILEY: Then switching

14 "generated" and "used," which is more logical, so we

15 need to have those changes with those words, I

16 think. Do you all agree with that?

17 COMMISSIONER BALCH: That looks fine, yes.

18 Delete that "or used."

19 CHAIRWOMAN BAILEY: Do we need to add the

20 word "completion" as suggested?

21 COMMISSIONER BALCH: I would agree to

22 that.

23 CHAIRWOMAN BAILEY: Are you good with

24 keeping the word "completion"?

25 COMMISSIONER BLOOM: Did we include that

1 previously?

2 COMMISSIONER BALCH: These are all of the
3 things that you use the circulation pit for. So
4 putting it in there is actually more for the purpose
5 of completeness.

6 COMMISSIONER BLOOM: That's fine.

7 CHAIRWOMAN BAILEY: Then we come to the
8 sentence that has been suggested for deletion. "The
9 operator shall use a tank made of steel or other
10 material which the appropriate division district
11 office approves to contain hydrocarbon-based
12 drilling fluids."

13 Our public comments suggested that we do
14 not delete that sentence because it is specific to
15 hydrocarbon-based drilling fluids and their belief
16 was it should be contained within steel or other
17 material.

18 COMMISSIONER BLOOM: I don't recall much
19 more than limited testimony other than, perhaps I
20 think it was Mr. Arthur, saying that he didn't
21 believe that hydrocarbon-based drilling fluids would
22 attack a pit liner. I guess that was it.

23 One thing I would point out is that we are
24 considering allowing multiple wells to use a
25 temporary pit for a up to a year, so you would see

1 more contact between the hydrocarbon-based drilling
2 fluids and the pit liner.

3 COMMISSIONER BALCH: I think that we
4 specified that the liner has to be resistant to
5 hydrocarbons and other chemicals that might attack
6 it in that definition. I also have a note that
7 says, "See Thomas testimony." So I think Dr. Thomas
8 addressed this as well at some point.

9 What is the current practice? I guess the
10 current practice right now is to use the closed-loop
11 system in Southeast New Mexico where they use the
12 hydrocarbon-based drilling fluid. But before that,
13 were they circulated in the drill pit?

14 CHAIRWOMAN BAILEY: Yes.

15 COMMISSIONER BALCH: If you use a tank --
16 I guess you would de facto be disallowing the use of
17 the drilling pit. You would almost force a
18 closed-loop system because once you have the
19 hydrocarbon-based mud circulating, you would not
20 ever be able to put it back in the pit. If you
21 leave that in there, you're forced to use the
22 closed-loop system, I think.

23 CHAIRWOMAN BAILEY: And we need to
24 consider if in whatever circumstances we agree to
25 burial of pit waste, that the hydrocarbon-based

1 fluids would be part of that burial and that would
2 maybe influence our decisions concerning burial of
3 pit waste.

4 COMMISSIONER BALCH: I think regardless of
5 how we conclude on on-site burial, the inclusion
6 of -- if you leave this sentence in then I think you
7 remove the option of using the temporary pit. You
8 would have to use the closed-loop system of some
9 sort, so that's the other issue. It seems to me if
10 we want to force the use of a closed-loop system we
11 should do it explicitly instead of by default.

12 CHAIRWOMAN BAILEY: There's also the
13 potential for spills and leaks through tears in
14 liners, which would put hydrocarbons directly in
15 contact with the materials in the liners. Part of
16 the problem has been hydrocarbon contamination and
17 that could influence abatement and cleanup.

18 COMMISSIONER BALCH: Which I believe is
19 why Dr. Thomas addressed that. I have to review my
20 notes on his testimony.

21 COMMISSIONER BLOOM: I read over that, and
22 I think it was pretty minimal, along the lines of
23 are you okay with --

24 COMMISSIONER BALCH: Are you okay with it.
25 So probably it would relate back to his testimony

1 about the tables that had limits of hydrocarbons for
2 on-site disposal.

3 COMMISSIONER BLOOM: The TPH would factor
4 in.

5 COMMISSIONER BALCH: Yes. I think in
6 practice the current Pit Rule in most places does
7 force the use of a closed-loop system, and
8 particularly in the Southeast, because of chlorides,
9 and even the low chloride drilling fluid is not
10 going to fix that issue for the Southeast. They
11 will probably still be primarily using closed-loop
12 systems. There might be places where they would
13 not, depending on what formation they are drilling
14 into. But you may be dealing with a technical
15 non-issue.

16 CHAIRWOMAN BAILEY: To leave that sentence
17 in?

18 COMMISSIONER BALCH: If the result of any
19 modifications continue to result in effectively only
20 use of closed-loop systems in the Southeast, it
21 doesn't matter whether we say it explicitly or
22 non-explicitly or whether the sentence is there or
23 not. Because if they are not using a circulating
24 mud pit, they would by default be using a
25 closed-loop system and all of their fluids would be

1 contained. We don't have to say it has to be a tank
2 of steel or other material. It would be whatever
3 was in the design of the closed-loop system. So we
4 may have to come to a discussion of intent.

5 CHAIRWOMAN BAILEY: And the effects of
6 both burial and reclamation.

7 COMMISSIONER BALCH: I think closure and
8 site reclamation is next.

9 CHAIRWOMAN BAILEY: We can put this
10 sentence off until we reach other decisions
11 concerning burials and reclamations because this is
12 peripheral to that discussion.

13 COMMISSIONER BALCH: That's fine.

14 COMMISSIONER BLOOM: I would be fine with
15 that.

16 CHAIRWOMAN BAILEY: If you would like to
17 highlight that sentence in yellow for us. Okay.

18 COMMISSIONER BALCH: I think it will come
19 up one way or the other.

20 CHAIRWOMAN BAILEY: Probably. Paragraph
21 2, the suggestion is to insert the words "Under
22 normal operating circumstances the operator shall
23 maintain at least two feet of freeboard for
24 temporary pit." Do you have an opinion on that?

25 COMMISSIONER BLOOM: I'm sorry I do. I

1 would be supportive of making this change.
2 Freeboard is there for an emergency, I believe, but
3 perhaps we need some reporting requirement there,
4 because if that space was needed, an inspector came
5 out, how would the inspector know if the lack of
6 freeboard was due to an emergency? I guess it
7 creates an enforcement quandary.

8 COMMISSIONER BALCH: When there's an
9 inspection -- I'm going to ask a question you may
10 not know the answer to. I'm pretty sure you don't
11 and I know I don't. But in the operation of a pit
12 with people on-site, is there a log or monitoring of
13 the level of liquid in the pit? Is that something
14 that's tracked normally by an operator?

15 CHAIRWOMAN BAILEY: Unless there is a line
16 drawn, some kind of a marker put on the liner to be
17 able to judge whether it's a foot and a half or two
18 feet, you know, it's a matter of judgment call.

19 COMMISSIONER BALCH: So they just visually
20 inspect?

21 CHAIRWOMAN BAILEY: Yeah. They say,
22 "Okay, does that look like two feet? Yeah, that
23 looks like two feet."

24 COMMISSIONER BALCH: And the same thing
25 for the inspector, they look at it and say, "That's

1 around two feet"?

2 CHAIRWOMAN BAILEY: Yes.

3 COMMISSIONER BALCH: If it was above two
4 feet they would probably make an inquiry as to why
5 it was above two feet?

6 CHAIRWOMAN BAILEY: Or they would
7 understand that they just had a 25-year flood event
8 that drops however many inches on the surface
9 everywhere or created a flood, or there would be
10 other extenuating circumstances probably that they
11 would be aware of.

12 COMMISSIONER BALCH: So the way it's
13 written now, "The operator shall maintain at least
14 two feet of freeboard for a temporary pit" is black
15 and white. There's no gray area there. The
16 testimony that I recall in regards to this was an
17 inspector coming to the site would have to write a
18 citation if they were above two feet regardless of
19 any reason, and that's why the modification was
20 requested.

21 CHAIRWOMAN BAILEY: Because there are
22 extenuating temporary circumstances, and I think
23 there should be some kind of leeway for temporary
24 extenuating circumstances.

25 COMMISSIONER BALCH: And I think that

1 under cross-examination -- I may be recalling
2 incorrectly -- but I think there was concern that if
3 you change the language to what it is now, that that
4 normal operating circumstance is left up to the
5 operator and you could have that envelope pushed
6 more often than it ought to be. So I think I'm with
7 Mr. Bloom that you don't really want it to be black
8 and white. We maybe want to be careful about how we
9 phrase the modification.

10 CHAIRWOMAN BAILEY: Do you believe we
11 could insert the words "under normal operating
12 circumstances" to somehow bring in the temporary
13 circumstances of less than two feet? Or extenuating
14 circumstances that only last for a short period of
15 time?

16 COMMISSIONER BLOOM: We could have it
17 along the lines of "The operator shall maintain at
18 least two feet of freeboard for a temporary pit
19 unless there's an emergency situation" or something
20 along those lines, "and it shall be documented or
21 reported" or something like that.

22 COMMISSIONER BALCH: It seems to be one of
23 the intents to try to remove the paperwork that's
24 coming to Santa Fe.

25 CHAIRWOMAN BAILEY: It is. That's one of

1 them.

2 COMMISSIONER BALCH: But if the operator
3 were to just log any time that it sees a freeboard
4 with a reason, that should be sufficient.

5 CHAIRWOMAN BAILEY: To maintain their
6 records for questions.

7 COMMISSIONER BALCH: So if they see it's
8 above freeboard and it's because it rained five
9 inches last night and that happens to be the day the
10 inspector is coming, they have an explanation and
11 they have a notation.

12 CHAIRWOMAN BAILEY: Let's craft that
13 sentence then. For temporary extenuating
14 circumstances?

15 COMMISSIONER BLOOM: Very good.

16 CHAIRWOMAN BAILEY: "Operator shall
17 maintain a log describing why freeboard may be less
18 than two feet"? Does that work?

19 COMMISSIONER BALCH: I think if we
20 reorganize the sentence a little bit that it will
21 work. If you take out "under normal operating
22 circumstances" and then move the last sentence to be
23 the first sentence. You have the goal, which is to
24 keep freeboard of at least two feet, and then we
25 have a way to escape that absolute for temporary

1 extenuating circumstances.

2 CHAIRWOMAN BAILEY: That works for me.
3 Does that work for you?

4 COMMISSIONER BALCH: Is that language
5 clear enough?

6 MR. SMITH: I'm looking here.

7 COMMISSIONER BALCH: It seems a little
8 fuzzy around the edges.

9 MR. SMITH: Well, it seems to me that you
10 probably should make it clear in that -- although I
11 think it's implied in the second sentence you might
12 say "For temporary extenuating circumstances,
13 operator may maintain a freeboard of less than two
14 feet," period, and then go on with the additional
15 requirement that the log has to be kept.

16 COMMISSIONER BALCH: Of less than two
17 feet?

18 MR. SMITH: Of less than two feet. There
19 you go. You could put "in such circumstances
20 operator shall maintain a log." Shall. Describing
21 such circumstances.

22 COMMISSIONER BLOOM: Does that seem to you
23 all that it would prevent an unscrupulous operator
24 from constantly running at less than two feet of
25 freeboard?

1 COMMISSIONER BALCH: I don't think you
2 will ever stop an unscrupulous operator from running
3 unscrupulously. However, if you catch them in the
4 long-run you would hope --

5 COMMISSIONER BLOOM: The log can't be
6 filled out for every day having an emergency.

7 CHAIRWOMAN BAILEY: Yeah.

8 COMMISSIONER BALCH: I imagine most of the
9 inspectors know which of the operators are more
10 trustworthy than others.

11 CHAIRWOMAN BAILEY: And they will know
12 whether there was a five-inch rain the night before,
13 too.

14 COMMISSIONER BLOOM: Yeah.

15 CHAIRWOMAN BAILEY: Okay. We'll go to
16 Paragraph 3, changing the timing of inspections from
17 weekly on the temporary pit to monthly as long as
18 liquids remain in the temporary pit. Do you have
19 opinions on that?

20 COMMISSIONER BALCH: So it's daily while
21 drilling and currently after that it's weekly.

22 COMMISSIONER BLOOM: Madam Chair, I
23 believe that you should leave the language as it
24 currently is, particularly given that we are looking
25 at extending the service life of the temporary pit

1 and having one pit serve multiple wells. Monthly
2 inspection while there are liquids in the pit could
3 allow for quite a bit of leakage, probably even
4 before we are talking about changing the service of
5 the operations of the temporary pit. So I would
6 support leaving this as weekly.

7 COMMISSIONER BALCH: Now, under normal
8 circumstances, once you are done drilling you may
9 leave fluids in the pit for a week or two until you
10 are doing your completion. It could be longer than
11 a week or two.

12 CHAIRWOMAN BAILEY: Right.

13 COMMISSIONER BALCH: If you have multi
14 wells like we discussed potentially including, then
15 it could be up to a year. I don't recall the direct
16 testimony or if there was a lot of discussion
17 between weekly and monthly. There was a fair amount
18 of discussion about the next deletion.

19 CHAIRWOMAN BAILEY: Right.

20 COMMISSIONER BALCH: So I guess this comes
21 down to reasonableness. What do we think is
22 reasonable?

23 CHAIRWOMAN BAILEY: Well, the temporary
24 pit is going to have completion fluids, workover
25 fluids.

1 COMMISSIONER BALCH: Potentially
2 hydrocarbon-based drilling mud.

3 CHAIRWOMAN BAILEY: Potentially.
4 Materials that we are protecting the surface of the
5 land from spills and things. If there's a tear in
6 the liner during the month, particularly if it's
7 below the liquid line, that would be cause for
8 concern.

9 COMMISSIONER BALCH: I think to me it
10 seems like if you have a pit, even if it's waiting
11 for completion, if you are done with all of your
12 operations then you are probably going to drain the
13 fluids pretty quickly.

14 CHAIRWOMAN BAILEY: Well, they have 30
15 days.

16 COMMISSIONER BALCH: Thirty days. So if
17 you make it monthly there would be no inspection in
18 between. If they are going to continue to use it,
19 there will probably be people regularly on-site, and
20 a weekly inspection would not be a burden to an
21 operator or to keeping a simple checklist of
22 conditions of the pit. So I guess I don't see the
23 change from weekly to monthly is necessary.

24 CHAIRWOMAN BAILEY: Then we all agree to
25 continue with the word "weekly" and not accept the

1 word "monthly"? Then the next proposal is to remove
2 the last line of that paragraph requiring the
3 operator to file a copy of the log with the division
4 district office when the operator closes the
5 temporary pit.

6 COMMISSIONER BALCH: I believe an example
7 that was recited during testimony was that
8 particularly if you were changing operators or if
9 somebody reacquired the land from the previous
10 operator the logs could be lost. I believe that was
11 by an OCD witness saying that perhaps it ought to
12 still be filed with the division district office. I
13 wonder --

14 CHAIRWOMAN BAILEY: It's a log of
15 inspections. It's not a log of activity.

16 COMMISSIONER BALCH: That's kind of what
17 I'm thinking. I wonder how important it is after
18 the pit is closed to have that log. It's really
19 only valuable during the operation of the pit.

20 CHAIRWOMAN BAILEY: I see deletion of this
21 sentence as a reduction in unnecessary paperwork on
22 both the part of the operator and the Division,
23 because a log of the inspections after a pit is
24 closed doesn't seem to hold any higher purpose.

25 COMMISSIONER BLOOM: One concern that I

1 had some strong feelings about is that if we at some
2 point determine that there's been a release from the
3 pit, we wouldn't have the log on hand to go back and
4 see what had happened. And also there would be
5 no -- there's also no public access to the logs that
6 are held by a company but there is the access to
7 documents through the temporary request.

8 COMMISSIONER BALCH: The log is supposed
9 to be maintained by the operator and made available
10 to the division district office. The note was that
11 on occasion during transfer of a well you might lose
12 a log or something like that. At that point it
13 would not really be relevant. In the time that
14 there was a release of the pit that was identified,
15 it would certainly be during the early part of the
16 operational phase.

17 CHAIRWOMAN BAILEY: And releases are
18 documented through the spill report, so any problem
19 that may arise, if it's enough to trigger the need
20 for a spill report, it's going to be available
21 anyway.

22 COMMISSIONER BLOOM: Let me ask one more
23 question. We made some changes yesterday to the
24 language regarding repairs to the liners above and
25 below the water line. I believe those repairs do

1 not require notification within 48 hours, correct?

2 I think it's actually one page back.

3 CHAIRWOMAN BAILEY: A4? Could we just
4 scroll back up to A4? There.

5 COMMISSIONER BLOOM: I guess there is
6 notification.

7 CHAIRWOMAN BAILEY: Five does require
8 notification.

9 COMMISSIONER BALCH: For a tear above, all
10 that's required is they repair it or seek a
11 variance.

12 CHAIRWOMAN BAILEY: And then this
13 paragraph below talks about below the liquid surface
14 we have to notify the office. Does that take care
15 of your concern?

16 COMMISSIONER BLOOM: Essentially if
17 there's anything resulting in a leak, the division
18 is going to be notified.

19 COMMISSIONER BALCH: The goal, I think, in
20 the case of a tear above the water level is to
21 immediately mitigate the risk, and that's what 4
22 addresses. Five addresses a release, and that is
23 going to trigger a notification, and then there will
24 be an evaluation if the Spill Rule has been
25 triggered or not.

1 I think the testimony, I want to say by
2 Mr. Scott, around Point 4 was you really are just
3 going to be reducing overhead for staff on both
4 sides. If they can put a patch on it above the
5 water line, it's fixed. There's really nothing that
6 notification provides you except there was a tear
7 and it's fixed. If they don't fix it, then they
8 risk triggering 5. So I think it's protective.

9 COMMISSIONER BLOOM: Then the log would
10 still be available to OCD staff for inspection at
11 the company offices, correct?

12 COMMISSIONER BALCH: That would be part of
13 their recordkeeping.

14 COMMISSIONER BLOOM: I'm okay then with
15 permitting that language and turning it over to the
16 division district office.

17 CHAIRWOMAN BAILEY: So Commissioner Balch,
18 do you agree to delete that last sentence of 3?

19 COMMISSIONER BALCH: Yes, I agree.

20 CHAIRWOMAN BAILEY: And then we will go to
21 Paragraph 4, which changes the length of time for
22 removal of the fluids from the temporary pit from 30
23 days to 60 days?

24 COMMISSIONER BALCH: The testimony, the
25 notes that I have of the testimony were whether an

1 equipment unavailability might delay being able to
2 remove it within 30 days.

3 CHAIRWOMAN BAILEY: And if another well is
4 being drilled using the same temporary pit, that
5 would make this allowed. Otherwise, if they have to
6 remove it within 30 days but they don't have their
7 rig at the new location yet, that could cause a
8 problem.

9 COMMISSIONER BLOOM: To get that second
10 reading to use the temporary pit again?

11 CHAIRWOMAN BAILEY: Yes.

12 COMMISSIONER BLOOM: This would give them
13 60 days. I'm starting to get a little concerned
14 about how long we have liquids in the pit, because I
15 think we have already gone from the six-month
16 maximum to a year, correct? This allows 60 days and
17 then three months extension. If we extended this
18 out to 60 days could we limit the extension to two
19 months?

20 COMMISSIONER BALCH: Same amount of time
21 but more flexibility.

22 CHAIRWOMAN BAILEY: True. And I'm
23 wondering if we need to be any more specific.

24 COMMISSIONER BALCH: I think we are
25 thinking the same thing, something along the lines

1 of "Within 60 days from the date the operator
2 releases the last drilling or workover rig
3 associated with an APD for that well."

4 CHAIRWOMAN BAILEY: That's exactly what I
5 was thinking.

6 COMMISSIONER BALCH: That's what I was
7 thinking, too. I'm not sure we are completely
8 resolved yet on the issue of multi-wells using one
9 pit. It may be -- is that something we need to
10 rediscuss right now or is this a temporary issue?

11 COMMISSIONER BLOOM: I think that allowing
12 reuse of the temporary pit for other wells could
13 save a lot of impacts in terms of both surface
14 disturbance and truck traffic going in and out of
15 the site, et cetera. I'm a little worried, though,
16 about putting more liquids in the pit for a longer
17 period of time and then being faced with a situation
18 where we may be having this multi-well temporary pit
19 closer to groundwater, which would come about if we
20 adopted the low chloride fluid recommendations which
21 would take that distance from 50 feet to 25 feet.
22 But we can discuss that when we get there.

23 COMMISSIONER BALCH: All right. So are
24 you okay with the addition of the language saying
25 that it would be from when they pull the last rig

1 that's permitted for that pond? I think in practice
2 you are going to see maybe two wells, except in the
3 situation where you have like a drilling island
4 where you might see more.

5 COMMISSIONER BLOOM: You are saying from
6 the last APD, the associated APD, right?

7 CHAIRWOMAN BAILEY: No, this isn't a
8 multi-well fluid management pit. This is a drilling
9 pit, a temporary pit.

10 COMMISSIONER BLOOM: ,Correct. I'm
11 following you.

12 CHAIRWOMAN BAILEY: So we are not
13 requiring the list of APDs or have not yet done
14 that.

15 COMMISSIONER BLOOM: Yeah.

16 CHAIRWOMAN BAILEY: We could simply say,
17 "Releases the drilling or workover rig from the last
18 well associated with the pit."

19 COMMISSIONER BALCH: With the pit permit.
20 Because they would have to list the permit.

21 CHAIRWOMAN BAILEY: Yeah, because the pit
22 is permitted.

23 COMMISSIONER BALCH: And I think that in
24 practice, if it looked like things were starting to
25 go too long, then the permits wouldn't be approved.

1 COMMISSIONER BLOOM: Why are we adding
2 associated with the APD then?

3 COMMISSIONER BALCH: That was language
4 that I suggested before we started discussing.

5 COMMISSIONER BLOOM: Where is that trying
6 to get us? It's fine to have it up there. It's
7 helpful.

8 CHAIRWOMAN BAILEY: Because we may have
9 one well drilling using that pit, then 45 days later
10 we may have another well using that same pit, and
11 then the time starts 60 days after the last well, so
12 we are trying to ensure that there's a starting
13 point and end point.

14 COMMISSIONER BLOOM: That makes sense.

15 MR. SMITH: Do you want to consider
16 changing the word "and" to "the relevant"?

17 COMMISSIONER BLOOM: "Associated with the
18 relevant application or permit to drill"?

19 MR. SMITH: Yes.

20 COMMISSIONER BALCH: I see a gray area
21 that probably needs to be addressed when we go back
22 to the language associated with using more than one
23 well for a pit. Because an APD is two years. You
24 could drill the first well with the pit in month
25 one, wait 23 months and drill the second one.

1 COMMISSIONER BLOOM: So the temporary pit
2 has a limit of one year.

3 COMMISSIONER BALCH: There you go. So it
4 has a built-in limit. It's a one-year. Plus up to
5 four months.

6 COMMISSIONER BLOOM: So I think this
7 language makes sense. I would just ask that we
8 consider perhaps limiting the extension to two
9 months.

10 MR. SMITH: Are you creating an ambiguity
11 here if you have a two-year, yet a one-year limit on
12 the temporary pit?

13 COMMISSIONER BALCH: The APD means they
14 have to spud so there's no ambiguity.

15 MR. SMITH: Okay.

16 COMMISSIONER BALCH: Basically there won't
17 be fluid until it's spud. That's when the one-year
18 limit on the temporary pit starts. They can start
19 that any time within the two-year period.

20 CHAIRWOMAN BAILEY: If we change it to two
21 months it does ensure some flexibility.

22 COMMISSIONER BALCH: Maximum added to the
23 one year.

24 COMMISSIONER BLOOM: Previously we have
25 been looking at six months plus 30 days plus

1 potentially three more months, which gets us out to
2 ten months. In this scenario we are talking about
3 12 months plus 60 days plus two more so it's 14
4 months, I guess.

5 CHAIRWOMAN BAILEY: So change three months
6 to two months.

7 COMMISSIONER BLOOM: Second to last word.

8 CHAIRWOMAN BAILEY: We are all in
9 agreement?

10 COMMISSIONER BALCH: I think we are
11 comfortable with taking 60 days instead of 30 days
12 in the second line.

13 CHAIRWOMAN BAILEY: And the language
14 changes have been accepted in the first two lines of
15 Paragraph 4.

16 MR. SMITH: May I comment on this?
17 Everywhere else, and I think it's a good practice,
18 if you are going to impose an obligation on someone
19 you want to say this person has that obligation.
20 You have "the operator shall" in all of these other
21 areas. In this you are changing it into a passive
22 voice, "All free liquids shall be." Is there a
23 reason that you don't want to make specific the
24 operator's obligation?

25 COMMISSIONER BLOOM: You're recommending

1 saying something along the lines of, "The operator
2 shall remove all free liquids from the surface of
3 the temporary pit within 60 days"?

4 COMMISSIONER BALCH: Which is essentially
5 the language that was originally there.

6 MR. SMITH: Yeah. I mean, that's what you
7 have everywhere else, and it would make me wonder if
8 I was reading this three years from now why the
9 obligation is placed on the operator in all of the
10 other subparagraphs but this is written in a passive
11 voice.

12 COMMISSIONER BALCH: It's the obligation
13 of the operator.

14 CHAIRWOMAN BAILEY: We might as well name
15 them.

16 COMMISSIONER BLOOM: Thank you. That's
17 helpful.

18 COMMISSIONER BAILEY: In the second line,
19 the "shall be removed" should be removed.

20 This is a correction of a typo. We all
21 have an agreement to change that?

22 COMMISSIONER BLOOM: Yes.

23 COMMISSIONER BALCH: Yes.

24 CHAIRWOMAN BAILEY: That concludes Section
25 5 except for the question concerning the use of

1 steel tanks for hydrocarbon-based drilling fluids,
2 which we'll come back to. Below-grade tanks. The
3 first proposal is to remove "visible" in Paragraph 2
4 meaning that only if it's measurable is the operator
5 required to remove the oil from the surface of the
6 below-grade tank. Do we have any comments on that?

7 COMMISSIONER BALCH: So now the operator
8 will go to the tank, they will see a sheen and they
9 will put in their test strip.

10 CHAIRWOMAN BAILEY: Color cut.

11 COMMISSIONER BALCH: Look at it. If it's
12 measurable, they will clean it up. If it's not
13 measurable, it's all right.

14 CHAIRWOMAN BAILEY: Yes.

15 COMMISSIONER BLOOM: I was looking to see
16 if there's any comments from the OCD on this. I
17 don't see any in there.

18 COMMISSIONER BALCH: You could have a real
19 difficulty including "visible layer of oil from the
20 fluid surface" because you end up with a layer
21 that's a molecule thing. You scrape it off and then
22 it spreads out again, but without really posing a
23 significant risk.

24 COMMISSIONER BLOOM: I guess we dealt with
25 visible and measurable with temporary pits?

1 CHAIRWOMAN BAILEY: In the definitions.

2 COMMISSIONER BLOOM: We said if there's
3 any visible oil it shall be removed?

4 CHAIRWOMAN BAILEY: Measurable.

5 COMMISSIONER BALCH: I was just trying to
6 remember if we actually included that.

7 COMMISSIONER BLOOM: I think we were
8 looking at language that said if there's oil visible
9 on 30 percent of the temporary pit it should be
10 removed and we decided --

11 CHAIRWOMAN BAILEY: We rejected that.

12 COMMISSIONER BLOOM: We rejected that, so
13 essentially the language says if there's any visible
14 oil on the temporary pit it should be removed.

15 COMMISSIONER BALCH: I think we may have
16 actually concluded our discussion regarding the
17 use -- I think the reason this is highlighted is we
18 were going to continue talking about multiple wells
19 in one pit, and we may have resolved that issue.

20 Visible, I think we were going to wait
21 until there were some examples in the regulation of
22 using them, and now we have reached that point.

23 This is in the definitions.

24 Commissioners, maybe we can resolve the three final
25 definitions right now. We have visible, measurable

1 and temporary pit left in the definitions.

2 COMMISSIONER BLOOM: We may be able to do
3 that.

4 CHAIRWOMAN BAILEY: So we go first to the
5 definition for temporary pit.

6 COMMISSIONER BLOOM: I guess the one
7 reservation I have about the definition of temporary
8 pit is that temporary pit would be used for
9 multiple --

10 COMMISSIONER BALCH: On-site or off-site.

11 COMMISSIONER BLOOM: And then if it's
12 being used in an area where there's depth to
13 groundwater at 25 to 50 feet.

14 COMMISSIONER BALCH: I think we will
15 resolve that when we talk about siting criteria,
16 because the definition doesn't necessarily have to
17 change because of that. Yesterday we talked about
18 on-site and off-site. Did we resolve that?

19 COMMISSIONER BLOOM: That was for the
20 multi-well fluid management pit. On that one I felt
21 that off-site would actually seem to fit the nature
22 of it because it's a pit shared among many wells in
23 the planned development. Here, and I have been
24 thinking on this for a while, I don't know if we
25 want to create, if a temporary pit serves two wells,

1 if we want to create a third site. I'm trying to
2 get my head around that. And I was thinking about
3 spacing and what if you had two sections so you had
4 four 320s, right? Maybe you could put a temporary
5 pit in each corner and have the temporary pit serve
6 four wells.

7 COMMISSIONER BALCH: You have a temporary
8 pit at the intersection and you could theoretically
9 serve all four wells that went away from that
10 location.

11 COMMISSIONER BLOOM: Correct.

12 COMMISSIONER BALCH: That would be an
13 efficient use of land surface.

14 COMMISSIONER BLOOM: In that case it would
15 be off-site.

16 COMMISSIONER BALCH: Well, it could
17 potentially -- it depends what you mean by on-site
18 or off-site. So one proposed definition of on-site
19 is anywhere on the lease. I think that was the
20 proposed language to that extent.

21 CHAIRWOMAN BAILEY: Or unit.

22 COMMISSIONER BALCH: So basically in the
23 area that's already under the responsibility of the
24 operator. If it's within that area, then that's
25 fine. Practically, because you are pumping dense

1 fluids, you are not going to be able to move it a
2 mile away like you might be able to in a multi-well
3 fluid management pit, which is primarily using
4 liquids that it don't have significant amounts of
5 agents that create viscosity necessarily. Actually,
6 that's not true. But pumping mud, there's going to
7 be limitations on how far you can push it. The
8 limitations are practical. The idea, I think, was
9 if you wanted to -- I think we have to resolve this
10 on-site or off-site issue.

11 CHAIRWOMAN BAILEY: Yes. And how far is
12 off-site?

13 COMMISSIONER BALCH: What is off-site?

14 COMMISSIONER BLOOM: I guess I lean
15 towards keeping it on one of the drilling sites.

16 CHAIRWOMAN BAILEY: On the well pad.

17 COMMISSIONER BLOOM: On the well pad,
18 yeah, because I can see a situation where if you
19 have two 320s and it sits on the line and then you
20 could bridge over and run a little bit of pipe and
21 you could have multiple wells off of that even. Or
22 I could see it in the corner of four 320s or
23 something like that.

24 COMMISSIONER BALCH: So the way it reads
25 now --

1 COMMISSIONER BLOOM: If you get any bigger
2 than that, I think a unit planned development or
3 something like that, I don't know if --

4 COMMISSIONER BALCH: I think you are
5 looking for an exception or a variance so there's a
6 way to do it. There's a few places where the
7 language on-site or off-site was added. It was
8 added for multi-well fluid management pits and it
9 was added for temporary pits. What would your
10 suggested language for Definition Q be, Commissioner
11 Bloom?

12 COMMISSIONER BLOOM: Something along the
13 lines of starting with the second sentence.
14 "Temporary pits may be used for more than one well
15 and will be located on-site of a well pad."

16 COMMISSIONER BALCH: Right now in the
17 existing definition of temporary pit it doesn't say
18 anything about on-site or off-site. I guess it
19 assumes it will be on the pad.

20 CHAIRWOMAN BAILEY: Because that's the
21 most convenient place.

22 COMMISSIONER BALCH: But if a permit came
23 in now and the temporary pit was not on a pad, what
24 would happen?

25 CHAIRWOMAN BAILEY: They would throw it up

1 in the air and say, "Santa Fe, what should we do?"

2 COMMISSIONER BALCH: They would then have
3 to ask for an exception or would that be
4 administratively dealt with?

5 CHAIRWOMAN BAILEY: Administratively.

6 COMMISSIONER BALCH: So maybe if we
7 eliminate the whole on-site or off-site in the
8 definition of temporary pit permit, it would result
9 in what happens now. If there was something that
10 was unusual, which would be a pit off of a pad,
11 somebody would ask somebody in Santa Fe. We are
12 trusting the main office to make that decision.
13 Skirt the issue on the on-site or off-site for
14 temporary pits.

15 CHAIRWOMAN BAILEY: So there would be a
16 period after "one or more wells."

17 COMMISSIONER BALCH: Yes.

18 COMMISSIONER BLOOM: I guess my
19 reservation is still do we want the extra site to be
20 created. I know the overall square footage between
21 on-site and off-site might be about the same, but I
22 think there's a visual impact on the environment
23 when you might have two locations.

24 COMMISSIONER BALCH: Well, if we take out
25 the language for on-site and off-site, the way it

1 works now is a pit is nearly always on the pad. If
2 it wasn't on the pad, Commissioner Bailey felt that
3 the division district office would turn to Santa Fe
4 for guidance so that would be a -- basically, if
5 they want to do it and have it not be on the pad
6 they would have to seek some sort of exception or
7 variance, so it would be left to the discretion.

8 COMMISSIONER BLOOM: I would prefer to
9 articulate that and say "on-site exception or
10 variance."

11 COMMISSIONER BALCH: But nowhere in the
12 regulation does it say you have to have a pit on a
13 pad, does it?

14 CHAIRWOMAN BAILEY: I don't believe.

15 COMMISSIONER BALCH: I don't think that's
16 specifically required anywhere. It could be
17 adjacent to a pad, and, in fact, I imagine sometimes
18 they are adjacent to pads.

19 CHAIRWOMAN BAILEY: Well, yeah,
20 particularly when the topography of the site is
21 limited, then it may be just off to the side.
22 Because site-specific conditions would rule where
23 the pit is located, but because of process
24 considerations it would be as close to the actual as
25 it could be.

1 COMMISSIONER BLOOM: You don't want to lay
2 extra pipe.

3 COMMISSIONER BALCH: And there's the
4 feasibility of pumping the mud through the pipe
5 horizontally.

6 COMMISSIONER BLOOM: Here's what I'm
7 worried about, is somebody wants to put wells on
8 320s and they lease full sections from State Land
9 Office and they want to separate those two wells by
10 half a mile, and there's a pad in the middle of the
11 quarter mile with pipe running from each one or
12 something like that.

13 COMMISSIONER BALCH: You are worried about
14 almost certainly someone will try to do that at some
15 point. I guess if you want to look at it from --
16 maybe we could go back to the risk discussion. Your
17 tradeoff is instead of having two separate -- I
18 think your tradeoff is you are going to have two
19 separate pits in the case where you don't allow them
20 to do the one central pit, right? I think the
21 balance -- not the balance but the check on that is
22 going to be economics, if it's cheaper for them to
23 build the second pit than to have an elaborate
24 system of pits.

25 CHAIRWOMAN BAILEY: Or hauling by truck.

1 COMMISSIONER BALCH: Or hauling by truck
2 or pumps or something like that, then they probably
3 wouldn't try to do that. So I think there would be
4 limits on how far, and I think Mr. Lane's direct
5 testimony is they would probably only do it when
6 they were very close and most likely not for more
7 than two wells. I think he said he couldn't
8 envision a case of more than two wells.

9 MR. SMITH: If you all want something done
10 in a particular way or you envision some particular
11 process that you want used -- someone said something
12 about going to the Santa Fe office -- I would
13 suggest to you that you might want to make it clear
14 and put that in. If you don't want it to work that
15 way, that's another matter entirely. But for
16 clarity, if you want something done or not done, you
17 should address it.

18 COMMISSIONER BALCH: Okay. So if you have
19 "temporary pits may be used for one or more wells,"
20 if you add language after that to say, "If a
21 multi-well temporary pit" -- I'm probably trying to
22 make too many -- that's a confusion of terms. "If a
23 multi-well temporary pit is not on a pad or adjacent
24 to a pad," then you trigger something? Would that
25 work, Mr. Bloom?

1 CHAIRWOMAN BAILEY: An exception must
2 be --

3 COMMISSIONER BALCH: Or variance.

4 CHAIRWOMAN BAILEY: Goes to the district.
5 A variance must be requested from the division
6 district office.

7 COMMISSIONER BALCH: Then they could look
8 at it case by case to determine if it was
9 reasonable.

10 COMMISSIONER BLOOM: Would OCD consider
11 those impacts that the surface owner might have?

12 COMMISSIONER BALCH: This goes beyond.
13 This is division level, but the surface owner also
14 has recourse.

15 COMMISSIONER BLOOM: I'm sorry?

16 COMMISSIONER BALCH: The surface owner
17 also has recourse.

18 CHAIRWOMAN BAILEY: Not the State Land
19 Office.

20 COMMISSIONER BALCH: Right.

21 COMMISSIONER BLOOM: So if we kick it to
22 the division district then they simply say, "Oh,
23 that's fine," and then you have two well sites and a
24 temporary pit in the middle, you just created --

25 CHAIRWOMAN BAILEY: The OCD would not look

1 at that, which sounds like part of your concern.
2 That would have to come under a land office rule
3 that would have to be enacted.

4 COMMISSIONER BLOOM: I'm just trying to
5 think if that would be through our lease, which is
6 legislatively determined.

7 CHAIRWOMAN BAILEY: No, it would have to
8 be a rule, 1.058 or 1.059.

9 COMMISSIONER BLOOM: I guess I would say
10 temporary pits -- multi-well temporary pits must be
11 co-located at a pit or the well site, the well pad.

12 CHAIRWOMAN BAILEY: So you like the second
13 Paragraph Q there?

14 COMMISSIONER BLOOM: No. I mean, I think
15 I would leave it --

16 COMMISSIONER BALCH: If you took the first
17 definition and you went to the highlighted -- not
18 the changed portion. "Temporary pits may be used
19 for one or more wells and must be co-located with a
20 well drilling location." Co-located with a well
21 drilling location. And then leave the language
22 either on-site or off-site.

23 CHAIRWOMAN BAILEY: And scratch the
24 second "of a well drilling location."

25 COMMISSIONER BALCH: Is co-located fuzzy

1 enough for a lawyer?

2 MR. SMITH: I was wondering about that.
3 I'm not sure what that means. You could put "and
4 must be located on one of the relevant well drilling
5 locations" or something like that. If that's what
6 you are trying to say.

7 COMMISSIONER BALCH: I think that's what
8 we are trying to say.

9 COMMISSIONER BLOOM: Yes.

10 COMMISSIONER BALCH: So you can --

11 MR. SMITH: Now, do you want to put in the
12 next sentence about an ability to seek a variance?
13 Or do you want to make it --

14 COMMISSIONER BALCH: We haven't discussed
15 it yet but later on there's a blanket statement
16 saying, "Variances for any of the line items in the
17 regulation can be sought at the division district
18 level." Sometimes it's explicitly stated and
19 sometimes it's not.

20 CHAIRWOMAN BAILEY: We have two "must be"
21 in the upper line of Q.

22 COMMISSIONER BLOOM: This is coming back
23 to the concern about having a temporary pit at a
24 third location or something.

25 CHAIRWOMAN BAILEY: But there may be a

1 circumstance where the Land Office thinks that is a
2 better thing to have two producing wells and one pit
3 location that's reclaimed for both of them. Because
4 the well location themselves may be totally to claim
5 to whatever standards, and then just having the one
6 pit location.

7 COMMISSIONER BLOOM: I could see that. I
8 could see that.

9 COMMISSIONER BALCH: You do see that in
10 particular in the Raton Basin with coal methane.
11 You can be walking through the forest and not
12 realize you are walking through the gas field
13 because all of the well heads are painted green and
14 brown and there's not a lot of stuff happening
15 around them.

16 COMMISSIONER BLOOM: That would be
17 acceptable.

18 CHAIRWOMAN BAILEY: So we will go with the
19 first paragraph.

20 MR. SMITH: Just to make this clear, I
21 just asked Theresa to put the word "relevant" in
22 front of "well drilling locations."

23 COMMISSIONER BALCH: Probably a good
24 addition.

25 CHAIRWOMAN BAILEY: Thank you.

1 COMMISSIONER BALCH: Otherwise it could be
2 on a drilling location somewhere else.

3 CHAIRWOMAN BAILEY: Okay. That took care
4 of that issue concerning off-site/on-site. There
5 were other areas that we skipped over in the
6 definitions.

7 COMMISSIONER BALCH: Visible and
8 measurable. Measurable we seem to have come to
9 agreement on. It was visible that was left.

10 CHAIRWOMAN BAILEY: We'll deal with
11 visible because that's what's up on the screen. It
12 means that it's not measurable and it is just a
13 sheen that may be a molecule thick and color cut
14 tape is just going to show no volume at all. So
15 when it is seen on the surface --

16 COMMISSIONER BALCH: Basically, the reason
17 you would have the definition of visible is because
18 if you see something you want to trigger a
19 measurement attempt. If you then measure it and
20 it's immeasurable, you don't have to worry about it.
21 Otherwise, you would have to do something about it.
22 So in that respect, I think the definition is fine.

23 COMMISSIONER BLOOM: I believe I agree
24 with that. The definition is fine.

25 CHAIRWOMAN BAILEY: Okay. We will accept

1 visible as it stands and let's go back up to
2 measurable.

3 COMMISSIONER BALCH: Measurable, it seems
4 like we already accepted.

5 CHAIRWOMAN BAILEY: Yes. There it is.
6 It's fine. Okay. We will get to low chloride at a
7 later time.

8 COMMISSIONER BALCH: There's one deletion
9 that we want to talk about.

10 CHAIRWOMAN BAILEY: That's relevant when
11 we come to reclamation. So we are back on Page 24
12 looking at B, below-grade tanks, No. 2, where the
13 proposal is to remove the words "visible or" from
14 the requirement for the removal of oil from the
15 surface of a below-grade tank. Commissioner Balch,
16 you made the comment that visible may be impossible
17 to actually clean up?

18 COMMISSIONER BLOOM: What's the concern
19 about having oil on the surface of the below-grade
20 tank? Lack of the ability to evaporate?

21 CHAIRWOMAN BAILEY: And waste.

22 COMMISSIONER BALCH: I think it's probably
23 more of a waste issue. These are covered so you are
24 not going to have birds landing on it.

25 CHAIRWOMAN BAILEY: It's a matter of if

1 there's an overflow.

2 COMMISSIONER BALCH: During an overflow,
3 then that overflow would be distributed across the
4 land surface or actually would be contained probably
5 by the berm of the tank. So that would probably be
6 the concern. If there was a measurable amount of
7 oil, then you have a measurable amount of
8 hydrocarbons that could be released. If you have a
9 visible sheen, I think the question is can you
10 actually remove visible sheen? If there's any oil
11 at all on the site of the tank it will just keep
12 spreading that one-molecule layer. You can sit
13 there all day trying to scrape the sheen off and
14 it's not a measurable amount of hydrocarbon so even
15 if it was distributed, the risk is very low. It's
16 still protective.

17 CHAIRWOMAN BAILEY: So we all agree to
18 remove the words "visible or" from 2?

19 COMMISSIONER BLOOM: Correct. I agree.

20 CHAIRWOMAN BAILEY: And that takes us to
21 Paragraph 3, which has to do with inspection of
22 below-grade tanks for leakage and documenting the
23 inspections and maintaining written records. The
24 OCD recommended that the words "and damage" be
25 included; that the operator shall inspect

1 below-grade tank for leakage and damage at least
2 monthly so that if there are any unseen results of
3 damage that they would be noted.

4 COMMISSIONER BALCH: I think you are
5 already looking for a leak so you can probably do a
6 damage inspection at the same time.

7 CHAIRWOMAN BAILEY: Exactly. We are not
8 adding any additional effort. Do we agree to
9 add "and damage" as one of the criteria?

10 COMMISSIONER BLOOM: Agreed.

11 COMMISSIONER BALCH: Yes.

12 CHAIRWOMAN BAILEY: And now it's a matter
13 of how often shall the operator document the
14 integrity of each tank.

15 COMMISSIONER BLOOM: I think if somebody
16 is out there inspecting it they can probably
17 document that its integrity was good or not, as the
18 case may be.

19 COMMISSIONER BALCH: I think the leakage
20 and damage, you are doing a visual inspection. The
21 integrity test may be a little more involved.

22 CHAIRWOMAN BAILEY: Which could include a
23 pressure test or somehow demonstrating --

24 COMMISSIONER BALCH: That could be a less
25 frequent interval but it would be more for

1 long-term.

2 COMMISSIONER BLOOM: Let me say something
3 then because that wasn't clear to me. So are we
4 then saying that the integrity test should be done
5 yearly and that's different from the inspection for
6 leakage? Because it's not spelled out.

7 CHAIRWOMAN BAILEY: Just what all is
8 involved in documenting the integrity? You are
9 right.

10 COMMISSIONER BLOOM: What we had
11 before "the operator shall inspect the below-grade
12 tank at least monthly and maintain a written record
13 for five years."

14 COMMISSIONER BALCH: So maybe -- I don't
15 know if this would make it a little more specific
16 but you said, "The operator shall visually inspect
17 the below-grade tank for leakage and damage at least
18 monthly. The operator shall document the integrity
19 of each tank at least annually and make any written
20 record of the integrity test for five years." And
21 then certainly the implication is that you do more
22 than just a visual inspection on that annual
23 integrity test.

24 COMMISSIONER BLOOM: Perhaps we could say,
25 "The operator shall inspect the below-grade tank

1 testing for damage at least monthly and perform an
2 integrity test annually"?

3 COMMISSIONER BALCH: That's more or less
4 what it says.

5 CHAIRWOMAN BAILEY: Let's take into
6 account that some of the below-grade tanks may be
7 some of these large tank farm tanks. How far are we
8 expecting them to test the integrity of those very
9 large below-grade tanks? Do they require emptying
10 every year? Do they require -- what? I mean, we
11 can get very involved here!

12 COMMISSIONER BALCH: We have asked them
13 to, for all of the other below-grade tanks, we have
14 asked them to determine if they have integrity
15 already under that portion of the rule. Now we are
16 specifying how they are supposed to do that. I'm
17 not sure it's appropriate for us to put into a
18 regulation a specific procedure for testing
19 integrity. I think that should be up to the
20 operator and the division district office what
21 constitutes a proper integrity test.

22 COMMISSIONER BLOOM: Really what we are
23 documenting is the inspection.

24 CHAIRWOMAN BAILEY: Exactly.

25 COMMISSIONER BALCH: That it has occurred.

1 CHAIRWOMAN BAILEY: So "The operator shall
2 inspect the below-grade tank for leakage and damage
3 at least monthly. The operator shall document the
4 integrity of each tank."

5 COMMISSIONER BALCH: At least annually.

6 CHAIRWOMAN BAILEY: At least annually and
7 maintain a written record of the integrity for five
8 years. As it's presented, it seems to make some
9 good sense and allows tank-specific methods for
10 documenting integrity.

11 COMMISSIONER BLOOM: I think that would be
12 fine. As we go down then, we see that if the
13 below-grade tank is not demonstrating integrity or
14 develops a leak that it's repaired.

15 CHAIRWOMAN BAILEY: There are certain
16 things to do.

17 COMMISSIONER BLOOM: I would accept your
18 language.

19 CHAIRWOMAN BAILEY: Okay. We agree that
20 that's the way we need to have it?

21 COMMISSIONER BALCH: Yes.

22 CHAIRWOMAN BAILEY: Yes.

23 COMMISSIONER BLOOM: Correct.

24 CHAIRWOMAN BAILEY: Okay. Paragraph 5 has
25 to do with what to do if there is damage that's

1 found during one of the inspections.

2 COMMISSIONER BALCH: I think both of the
3 deletions in this paragraph make sense, and the
4 addition of "repair the damage or" also makes sense.
5 I think in the context of --

6 COMMISSIONER BLOOM: If the new tank were
7 to be brought in because the operator decided not to
8 repair, does the new tank have to meet the
9 requirements of --

10 COMMISSIONER BALCH: It has to meet the
11 site construction characteristics.

12 CHAIRWOMAN BAILEY: The current
13 requirements.

14 COMMISSIONER BLOOM: That's what I
15 thought.

16 COMMISSIONER BALCH: Basically, the way
17 this is written now, the last sentence means that
18 you have to put a new tank, even if you would make a
19 decision not to put in a new tank at all.

20 CHAIRWOMAN BAILEY: So shall we accept the
21 proposed language changes in 5?

22 COMMISSIONER BLOOM: Yes.

23 COMMISSIONER BALCH: Yes.

24 CHAIRWOMAN BAILEY: We will go to
25 Paragraph 6, which has to do with equipping and

1 retrofitting existing tanks and what to do if there
2 is evidence of a possible release. The argument was
3 made that any releases shall be handled under the
4 spill regulations and not create a separate and
5 different requirement other than what the spill
6 regulations already talk about. So the first two
7 lines can be removed as they were in the paragraph
8 above; is that agreeable?

9 COMMISSIONER BALCH: Yes.

10 COMMISSIONER BLOOM: Yes. I don't believe
11 I have any issue with the proposed language.

12 COMMISSIONER BALCH: I think it's much
13 clearer.

14 CHAIRWOMAN BAILEY: Throughout the entire
15 paragraph?

16 COMMISSIONER BLOOM: Yes.

17 CHAIRWOMAN BAILEY: We will accept all of
18 the proposed language changes in the entire
19 paragraph.

20 COMMISSIONER BLOOM: This is much more in
21 line of the rule in general.

22 COMMISSIONER BALCH: There is no need to
23 be specific when there's a specific regulation that
24 deals with the exact same issue.

25 CHAIRWOMAN BAILEY: We will go to the next

1 section that has proposed changes and that's all the
2 way down to F for multi-well fluid management pits.

3 COMMISSIONER BLOOM: Madam Chair, I
4 believe there's a correction in E, Paragraph 2, a
5 typo.

6 CHAIRWOMAN BAILEY: Yes. E2 has the
7 addition of the letter S, just a typo. F, right off
8 the bat we need to add the word "multi" in the
9 title.

10 COMMISSIONER BALCH: At the very
11 beginning.

12 CHAIRWOMAN BAILEY: And it sets forth
13 operation and maintenance requirements for the
14 multi-well fluid management pit that limits the
15 substances that can go into this pit to only
16 stimulation fluids, produced water used for
17 stimulation and drilling, and flowback from multiple
18 wells. Do we have any comments on F1 to limit it to
19 those fluids only?

20 COMMISSIONER BALCH: I don't have a
21 problem with that.

22 COMMISSIONER BLOOM: I believe that's what
23 we heard testimony to and that would be fine.

24 CHAIRWOMAN BAILEY: So we are accepting
25 Paragraph 1. Paragraph 2 says --

1 COMMISSIONER BLOOM: Excuse me, is there
2 another proposed language there?

3 CHAIRWOMAN BAILEY: Okay. The OCD had
4 some suggested language there.

5 COMMISSIONER BALCH: We have a word in
6 there, "and drilling." I don't think these are
7 designed for drilling.

8 CHAIRWOMAN BAILEY: No, but it's the
9 storage of the produced water used for drilling.

10 COMMISSIONER BALCH: So if they are
11 recycling that water --

12 COMMISSIONER BLOOM: Let's see what the
13 comments are here.

14 CHAIRWOMAN BAILEY: The OCD rule on
15 produced water requires tracking of that produced
16 water in essence from cradle to grave. So it could
17 be that the OCD had objections to use of produced
18 water for drilling, but yet it's all right for use
19 of stimulation. Let's see if they see anything in
20 their closing statements.

21 COMMISSIONER BLOOM: I don't think I saw
22 anything.

23 CHAIRWOMAN BAILEY: I don't see anything
24 either. I would like to leave it in there.

25 COMMISSIONER BALCH: I think anything that

1 encourages recycling is going to be good.

2 COMMISSIONER BLOOM: I agree.

3 COMMISSIONER BALCH: That's the whole
4 point of the multi-well fluid management.

5 CHAIRWOMAN BAILEY: So we agree to delete
6 that additional language. All right. In Paragraph
7 2, removal of "visible layers" rather than
8 "measurable layers."

9 COMMISSIONER BLOOM: This might go back to
10 how we dealt with that language in the temporary
11 pits, which I think we agreed that any visible layer
12 would be removed.

13 CHAIRWOMAN BAILEY: Then are we agreed to
14 leave Paragraph 2?

15 COMMISSIONER BALCH: That's consistent
16 with the way we did it for temporary pits.

17 CHAIRWOMAN BAILEY: Yes. Then we will
18 keep Paragraph 2. Paragraph 3 has to do with the
19 freeboard, whether it's two feet or three feet.

20 COMMISSIONER BLOOM: In this case that
21 might be advisable, given the greater quantities of
22 water we might be looking at.

23 COMMISSIONER BALCH: Since two feet was
24 the recommended language by NMOGA, the three feet
25 was recommended by the OCD?

1 CHAIRWOMAN BAILEY: Three feet is what the
2 permanent pit has.

3 COMMISSIONER BALCH: Well, in every other
4 way we treated these as temporary permanent pits, so
5 I think to be consistent we could go with three feet
6 of freeboard.

7 COMMISSIONER BLOOM: I agree. I was
8 thinking about the language we adopted for temporary
9 pits where we allowed that freeboard to disappear in
10 the case of an emergency, but there shouldn't
11 actually be an emergency because this is a drilling
12 pit.

13 COMMISSIONER BALCH: I mean, the only
14 thing you would have would be water from rain would
15 be an inch or two or three.

16 CHAIRWOMAN BAILEY: One of the concerns
17 for permanent pit was the overtopping due to wave
18 action and there could be significant wave action.

19 COMMISSIONER BALCH: As you have a larger
20 surface area.

21 CHAIRWOMAN BAILEY: Right. So we will
22 change the two feet to three feet. Did we want to
23 add any language concerning normal operating
24 circumstances as we did for other pits?

25 COMMISSIONER BLOOM: I think because of

1 the way this pit will be used for storage of water,
2 it's not tied in the same way to the drilling
3 process, that we probably do not need to add that.

4 COMMISSIONER BALCH: We don't have the
5 language in the existing permanent pit. I don't see
6 a reason to add it.

7 CHAIRWOMAN BAILEY: Then we will accept 3
8 with the change to three feet. Paragraph 4 has to
9 do with inspections of the pit while it has fluids
10 and documentation of those inspections and
11 documentation of inspecting the leak detection
12 systems and making that log available to the
13 district office. I believe testimony had to do with
14 if a leak is detected. I'm not sure where that
15 should go.

16 COMMISSIONER BALCH: I believe the
17 testimony that was brought up is what happened if
18 the leak is detected? Do you trigger reporting and
19 at what level do you trigger reporting?

20 COMMISSIONER BLOOM: We don't have
21 anything related to that with the permanent pit, do
22 we?

23 CHAIRWOMAN BAILEY: That's what I am
24 looking for right now. No, there's nothing like
25 that in the current rule for permanent pits.

1 COMMISSIONER BALCH: So for a permanent
2 pit -- what page is that?

3 CHAIRWOMAN BAILEY: Page 25.

4 COMMISSIONER BALCH: I'm looking for the
5 other language.

6 MR. SMITH: May I ask you this? Theresa
7 points out to me that we are not consistent in our
8 use of division district office. Do you want it to
9 be district division office, division district
10 office, division's district office, district's
11 division office? How do you want it to read?

12 CHAIRWOMAN BAILEY: Division district
13 office. No apostrophe S.

14 MR. SMITH: Now, here you would, of
15 course, keep it. Okay. So it should be this way
16 all the way through. Thank you.

17 COMMISSIONER BLOOM: Madam Chair, also in
18 terms of continuity, one thing we want to look at is
19 the language of permanent pit where it says the
20 surface shall be kept free of hydrocarbons. There's
21 no language on measurable or visible. I don't know
22 if we want to consider syncing up our language
23 there.

24 CHAIRWOMAN BAILEY: There should not be
25 any hydrocarbons because we are removing the visible

1 layer.

2 COMMISSIONER BLOOM: I just saw the
3 language for permanent pit. It says that no oil or
4 floating hydrocarbon should be present in the
5 permanent pit.

6 CHAIRWOMAN BAILEY: That could be an
7 additional sentence in Paragraph 2 where we require
8 the removal of visible layer. Is that what you are
9 suggesting?

10 COMMISSIONER BLOOM: No, I just wondered
11 if 2 under permanent pit was actually indicating
12 what we had done for some of the other -- some of
13 the other language where we say no visible oil, but
14 perhaps it's the case that there's never any oil in
15 a permanent pit.

16 COMMISSIONER BALCH: I think a permanent
17 pit is a little bit different operationally, so
18 maybe we could take a suggested break and talk more
19 about the differences between the two.

20 CHAIRWOMAN BAILEY: We will meet back up
21 at ten till.

22 (Note: The hearing stood in recess at
23 10:40 to 10:55.)

24 CHAIRWOMAN BAILEY: Commissioner Bloom,
25 you asked about having the same language for

1 permanent pit as we had for multi-well fluid
2 management pits as far as whether or not to remove
3 oil that may be found on the surface?

4 COMMISSIONER BLOOM: Yeah, I was thinking
5 maybe we would want to at least consider having
6 similar language between permanent pits in terms of
7 removing a visible sheen or something like that.
8 But Paragraph C2 doesn't really -- I mean, it might
9 be, with some other things, essentially saying that
10 no oil shall be present in a permanent pit, which is
11 a little different than that any sheen shall be
12 removed.

13 COMMISSIONER BALCH: Well, I think it's
14 different because the design of the permanent pit is
15 primarily for allowing evaporation of produced water
16 and things like that.

17 CHAIRWOMAN BAILEY: Yes.

18 COMMISSIONER BALCH: Where you probably
19 have a limited amount of hydrocarbons. With the
20 flowback you could have some hydrocarbons from
21 stimulation operation, so I think you want to
22 actively say you are going to remove what's visible
23 rather than disallowing hydrocarbons at all, because
24 then you sort of disallow the stimulation.

25 COMMISSIONER BLOOM: Yeah, I think this is

1 fine as it is then.

2 CHAIRWOMAN BAILEY: So we will now go to F
3 5, Stimulation Fluids.

4 COMMISSIONER BALCH: I think that we have
5 already covered the lifespan of a pit, and since
6 it's for stimulation purposes you would necessarily
7 need to allow them to leave the fluids in there
8 until they are done with the pit.

9 CHAIRWOMAN BAILEY: Well, the way 5 is
10 suggested, there is no deadline. It's not tied to
11 an APD with the two-year expiration. It doesn't
12 have a beginning and ending time the way it's
13 written.

14 COMMISSIONER BALCH: But in the multi-well
15 fluid management section where we effectively
16 limited the lifespan to that of the last APD -- I'm
17 sorry, to the APD associated with the multi-well
18 management pits, and since the APD has three years
19 then I think we effectively already limit it. I
20 think it's effectively limited elsewhere in the
21 regulation.

22 CHAIRWOMAN BAILEY: Yes, I agree with you
23 that the lifespan would be controlled by the wells
24 with the approved APDs that were listed on the
25 permit for the multi-well fluid management pits, but

1 this doesn't give a deadline for how long after the
2 last well stimulation operations are concluded, how
3 long do we have until they have to remove the
4 drilling fluids?

5 COMMISSIONER BALCH: This says until the
6 operator ceases all stimulation operations, which
7 seems concrete. Once you are done stimulating, the
8 fluids have to go.

9 CHAIRWOMAN BAILEY: But you have to give a
10 deadline by which they have to be removed. It's too
11 vague, too open-ended. If we make it where the
12 stimulation fluids shall be removed within 60 days
13 after the operator ceases all stimulation operations
14 in compliance with the pit permit, then we are
15 giving an actual deadline.

16 COMMISSIONER BALCH: Was that language
17 suggested anywhere?

18 CHAIRWOMAN BAILEY: I think it reflects
19 language that we have already talked about for
20 temporary pits.

21 COMMISSIONER BLOOM: I would be fine with
22 60 days. I think it makes sense to put an end on
23 it.

24 CHAIRWOMAN BAILEY: So that there is a
25 timeline --

1 COMMISSIONER BLOOM: Agreed.

2 CHAIRWOMAN BAILEY: -- after the last well
3 stimulation.

4 COMMISSIONER BALCH: For the temporary
5 pits we also had an optional extension of 60 days.
6 Is it appropriate to have an extension optional here
7 as well? It could require significant effort to
8 remove them. You might start with the fluids on day
9 one of the 60-day period and still be removing
10 fluids on day 60. It seems unlikely, but --
11 particularly if you had bad roads.

12 COMMISSIONER BLOOM: Do we want to allow a
13 couple more months then to seek a variance or
14 request -- I forget how we put it -- a variance,
15 yeah.

16 CHAIRWOMAN BAILEY: We could have the same
17 language as we agreed to for temporary pits.

18 COMMISSIONER BALCH: Sixty days.

19 CHAIRWOMAN BAILEY: Exactly. So the
20 language could read, "Stimulation fluids shall be
21 removed within 60 days from the date that the
22 operator ceases all stimulation operations as
23 identified" -- or "in compliance with the pit
24 permit."

25 COMMISSIONER BALCH: So remove "as

1 identified in" and replace with "in compliance
2 with."

3 COMMISSIONER BLOOM: You might change the
4 beginning to say, "Operators shall remove."

5 CHAIRWOMAN BAILEY: Yes.

6 COMMISSIONER BALCH: The way we changed
7 the language in the other portion.

8 CHAIRWOMAN BAILEY: The operator shall --
9 at the very beginning of the paragraph. Let's begin
10 at the very beginning. "The operator shall remove
11 all fluids." Then scratch "shall be removed within
12 60 days from the date the operator ceases all
13 stimulation operations."

14 COMMISSIONER BLOOM: You want to say all
15 operations?

16 CHAIRWOMAN BAILEY: Okay. "Ceases all
17 operations."

18 COMMISSIONER BALCH: What is an operation?
19 I mean, if they are operating a well for the next 30
20 years --

21 CHAIRWOMAN BAILEY: Stimulation.

22 COMMISSIONER BLOOM: Stimulation, yeah.

23 CHAIRWOMAN BAILEY: In compliance with the
24 pit permit. "The appropriate division district
25 office may grant an extension of up to two months."

1 And we're making that change because we want to have
2 it reflect the same language and requirements as the
3 temporary pit requirements that we discussed earlier
4 today.

5 COMMISSIONER BLOOM: Madam Chair, I have
6 noticed that in the section on temporary pits --
7 under A, General Specifications, could we include
8 temporary pit in that language?

9 CHAIRWOMAN BAILEY: It says a pit, so it
10 includes all kinds of pits.

11 COMMISSIONER BLOOM: Okay. I wanted to
12 make sure we had that.

13 CHAIRWOMAN BAILEY: Okay. That concludes
14 Section 12. Do I hear a motion to accept the
15 language as we agreed to individually for each of
16 those sections?

17 COMMISSIONER BALCH: Was there anything we
18 didn't come to an agreement on yet?

19 COMMISSIONER BLOOM: I thought there was
20 something.

21 CHAIRWOMAN BAILEY: There was the question
22 about closed-loop systems under A, but I thought
23 that we solved that.

24 COMMISSIONER BALCH: We solved that.

25 CHAIRWOMAN BAILEY: Then there was the

1 deletion of the sentence in B1 concerning the
2 hydrocarbons.

3 COMMISSIONER BALCH: That's the only thing
4 we haven't resolved and we are holding up on that.

5 COMMISSIONER BLOOM: So hydrocarbon
6 discussion aside, I think we can agree on the
7 changes.

8 CHAIRWOMAN BAILEY: Do I hear a motion?

9 COMMISSIONER BLOOM: So move.

10 COMMISSIONER BALCH: I will second.

11 CHAIRWOMAN BAILEY: All in favor? Aye.

12 COMMISSIONER BLOOM: Aye.

13 COMMISSIONER BALCH: Aye.

14 CHAIRWOMAN BAILEY: Now we come to closure
15 and site reclamation requirements. The proposal is
16 to delete almost the entire portion of of 13B of the
17 current rule. B, C, D, E, F.

18 COMMISSIONER BLOOM: Madam Chair, if I
19 may, I might like to use some time over lunch to
20 review this yet again. Perhaps we could turn to a
21 later section on site contouring? I guess that's
22 all part of closure.

23 CHAIRWOMAN BAILEY: Page 36 goes to
24 closure notice and closure reports.

25 COMMISSIONER BLOOM: We could probably

1 work on some of that.

2 COMMISSIONER BALCH: As long as it doesn't
3 tie back to --

4 CHAIRWOMAN BAILEY: Well, it does.

5 COMMISSIONER BALCH: I think it may well.

6 CHAIRWOMAN BAILEY: Then we come to the
7 tables for the proposed constituents.

8 COMMISSIONER BALCH: We may be able to do
9 something with Sections 14 and 15.

10 CHAIRWOMAN BAILEY: Exceptions and
11 variances.

12 COMMISSIONER BALCH: And emergency --

13 CHAIRWOMAN BAILEY: What page?

14 COMMISSIONER BLOOM: Page 42 in NMOGA's
15 exhibit.

16 CHAIRWOMAN BAILEY: Let's look at
17 emergency actions. The suggested change is in B.
18 It has to do with the definitions of emergency pit
19 and pit used in an emergency. We fixed the
20 definition of emergency pit back in Section 7 on
21 Page 2 where we removed the anticipated problem in
22 construction of the pit and had "an emergency pit
23 means a pit that is constructed during an emergency
24 to contain a spill in the event of release." With
25 that definition in mind, we could have --

1 COMMISSIONER BALCH: I think the only
2 reason that's there is for clarification. Because
3 if you strictly read it the way it was before, you
4 could determine that you have to build the pit even
5 if you don't need one.

6 CHAIRWOMAN BAILEY: Right.

7 COMMISSIONER BALCH: Whereas, the
8 modification specifies that it wouldn't be strictly
9 necessary but to the extent possible in the
10 emergency you could build the pit consistent with
11 others.

12 COMMISSIONER BLOOM: I'm fine with the
13 suggested language.

14 COMMISSIONER BALCH: I think you want
15 operators to be as flexible as possible during an
16 emergency.

17 CHAIRWOMAN BAILEY: So we accept the
18 proposed language change because we have fixed the
19 definition of emergency pit; is that correct?

20 COMMISSIONER BALCH: I believe so.

21 COMMISSIONER BLOOM: Yes.

22 CHAIRWOMAN BAILEY: So we will accept the
23 language change, Theresa. And then at the end of
24 that -- yes, we need to add the "S" as a typo there.

25 COMMISSIONER BLOOM: Actually, there was

1 something in OCD's closing about emergency actions.
2 It says, "The operator shall construct a pit during
3 emergency."

4 CHAIRWOMAN BAILEY: Which coincides with
5 the language that we have.

6 COMMISSIONER BLOOM: I think we're good.

7 CHAIRWOMAN BAILEY: Okay. So do I hear a
8 motion to accept the changes in 14?

9 COMMISSIONER BLOOM: There's something in
10 E. A little fix perhaps.

11 CHAIRWOMAN BAILEY: It's a citation
12 change, isn't it? It refers back to subsection --

13 COMMISSIONER BLOOM: That might actually
14 be G now.

15 CHAIRWOMAN BAILEY: It should be G,
16 shouldn't it? No, we deleted confined water so we
17 come to A, B, C, D, E, F. So it's F.

18 COMMISSIONER BALCH: This is the sort of
19 thing you will catch, right, Theresa?

20 MR. SMITH: It's good to do it if you
21 catch it as you go.

22 CHAIRWOMAN BAILEY: We are accepting the
23 suggested change to Subsection F in Paragraph E. Do
24 I hear a motion to adopt the changes that we have
25 agreed to in Section 19.15.17.14?

1 COMMISSIONER BALCH: I will make that
2 motion.

3 CHAIRWOMAN BAILEY: Do I hear a second?

4 COMMISSIONER BLOOM: I second.

5 CHAIRWOMAN BAILEY: All in favor?

6 COMMISSIONER BLOOM: Aye.

7 COMMISSIONER BALCH: Aye.

8 CHAIRWOMAN BAILEY: Aye. None opposed.

9 Now we come to Section 15, Exceptions and Variances.

10 COMMISSIONER BALCH: We are replacing
11 general exceptions with two separate categories,
12 exceptions or variances.

13 CHAIRWOMAN BAILEY: That is correct.

14 COMMISSIONER BALCH: Without assuming
15 anything, we have been going through this document
16 so far leaving in the term "variance."

17 CHAIRWOMAN BAILEY: For district office
18 approval.

19 COMMISSIONER BALCH: Right. So if we are
20 at least in agreement that variances should be
21 allowed, then maybe we can look at the meat of the
22 new proposal and not necessarily have to look at the
23 two-and-a-half pages of what's being removed in
24 great detail if we are in that general agreement.

25 COMMISSIONER BLOOM: Commissioners, I have

1 some reservations that maybe I could describe
2 generally and then some specific concerns as well.
3 Generally, I was intrigued with Dr. Neeper when he
4 spoke about how if we are going to have an exception
5 or variance it should rise to a high standard. We
6 spent months here trying to put together a rule and
7 an exception or variance in some cases would be a
8 very quick run-around of what we have done.

9 This process has been open to the public.
10 It's had participants from many sides, and the
11 exceptions and variances can be approved often
12 inside the OCD.

13 So I think any changes or many changes
14 should meet a high bar to make sure that we haven't
15 created a backdoor that people can go through to
16 avoid much of what we put together here.

17 COMMISSIONER BALCH: I think to me the
18 original Rule 17 had general exceptions. So these
19 exceptions already exist. I think they largely come
20 to the division level and they need a hearing.

21 CHAIRWOMAN BAILEY: If there is an appeal
22 of a denial --

23 COMMISSIONER BALCH: Of a denial to an
24 exception --

25 CHAIRWOMAN BAILEY: Then it can be brought

1 to hearing by the operator.

2 COMMISSIONER BALCH: But the initial
3 decision is made by the division level in Santa Fe?

4 CHAIRWOMAN BAILEY: In large part.

5 COMMISSIONER BALCH: For the current
6 implementation of exceptions?

7 CHAIRWOMAN BAILEY: Right.

8 COMMISSIONER BALCH: So I think what the
9 intent of the -- I don't want to describe intent,
10 but what I see happening here is instead of having
11 one category of exceptions, you retain essentially
12 that exception level deviation from the rule as
13 finalized but you add in variances which are for
14 more minor issues. And I think they have actually
15 specified in a number of places that a variance can
16 be sought, and that included in the rule that we
17 understand is a relatively minor deviation whereas
18 an exception is a great deviation.

19 COMMISSIONER BLOOM: I agree that a
20 variance is often more technical in nature. So if
21 we are talking about, I guess, aspects of pit
22 construction, that would be a variance that would go
23 to the district office, correct?

24 COMMISSIONER BALCH: So I think what I was
25 proposing that we do is we talk about both

1 exceptions and variances and if we think the
2 language as proposed needs to be added to then we
3 can do so.

4 CHAIRWOMAN BAILEY: As it's written, an
5 exception is handled only for permanent pits at the
6 Santa Fe level.

7 COMMISSIONER BALCH: So everything else
8 would be an exception at the district office level.

9 CHAIRWOMAN BAILEY: I like making that
10 distinction between exception and variance because
11 that is a clear indicator of what level of
12 bureaucracy takes care of both the permitting and
13 the decisions for variance or change from what is
14 specified.

15 COMMISSIONER BALCH: So if I am hearing
16 you correctly, essentially variances already exist.
17 They are exceptions taken care of at the district
18 office level.

19 CHAIRWOMAN BAILEY: Yes. The permanent
20 pits that are processed and approved at the Santa Fe
21 level are held to be an exception to be processed at
22 the Santa Fe level. Essentially, I believe, what is
23 proposed is that if it's approved at the district
24 level, variances are approved at the district level.
25 If it's approved at the Santa Fe level like a

1 permanent pit, then a variance from the requirements
2 are handled by the same people who processed it as
3 an approval.

4 COMMISSIONER BLOOM: When I look at the
5 existing language, I see that exceptions are all
6 done in the Division's Santa Fe Office of the
7 Environmental Bureau.

8 CHAIRWOMAN BAILEY: Right.

9 COMMISSIONER BLOOM: There are no
10 variances or currently are no variances and there
11 are no exceptions to the existing rule that have
12 decisions made at the district office, correct?

13 CHAIRWOMAN BAILEY: No, I can't say that's
14 correct. I think some of the lesser rules are
15 processed at the division district office.

16 COMMISSIONER BLOOM: Even though they come
17 through the Environmental Bureau?

18 CHAIRWOMAN BAILEY: If they come through
19 the Environmental Bureau, the Environmental Bureau
20 looks at any change from the norm.

21 COMMISSIONER BLOOM: And then would refer
22 it to the district office?

23 CHAIRWOMAN BAILEY: No, if the rule says
24 the Environmental Bureau, that's where it's
25 processed.

1 COMMISSIONER BLOOM: I'm just looking at
2 the existing language, and I don't see any mention
3 of the District.

4 COMMISSIONER BALCH: If I can make one
5 initial comment, it might help with the discussion.
6 I think in every instance where we have said a
7 variance may be granted, it's nearly always in the
8 context of allowing something that would be
9 better -- equivalent or better but do the same task
10 that's laid out in the regulations. So basically
11 you are allowing flexibility and improved technology
12 without having to have an explicit change to the
13 regulation to deal with.

14 So I think in that respect, variances --
15 it's not like a variance is going to be granted for
16 virtually any portion of a regulation. It's really
17 kind of specifically designed to allow flexibility
18 and best operating practices, best management
19 practices. Exceptions, I think, are still going to
20 be processed at a pretty high level. An exception
21 would be you're going to not want to use the second
22 physical liner in a multi-well management pit. You
23 are not going to get a variance for that. You will
24 have to get an exception and that would come to
25 Santa Fe still. Or should.

1 CHAIRWOMAN BAILEY: Well, we need to write
2 that into the multi-well fluid management pit
3 section then because that is processed and approved
4 at the division district level.

5 COMMISSIONER BALCH: That was perhaps a
6 bad example.

7 CHAIRWOMAN BAILEY: But no, that does
8 point out if we consider a multi-well management pit
9 a change of the requirements to be of such a level
10 that it should come to Santa Fe, then we need to say
11 that an exception may be granted rather than a
12 variance may be granted, and we can go back and
13 revisit that.

14 COMMISSIONER BLOOM: The permanent pit is
15 approved out of Santa Fe?

16 CHAIRWOMAN BAILEY: Yes.

17 COMMISSIONER BLOOM: What did we say for
18 the multi-well fluid management pits?

19 CHAIRWOMAN BAILEY: We said it was
20 approved at the district level, so the district
21 level would be handling any changes from the norm.
22 We can raise that to call it an exception because of
23 the importance.

24 COMMISSIONER BLOOM: Perhaps the volume of
25 water they contain?

1 CHAIRWOMAN BAILEY: Right.

2 COMMISSIONER BALCH: 17.15, I think, was
3 presented in testimony as a way to streamline not
4 only the process but also the rule. Because if you
5 look at the existing rule there's a great amount of
6 detail about the exception process.

7 COMMISSIONER BLOOM: Some of that detail
8 I'm concerned about losing.

9 COMMISSIONER BALCH: There's nothing to
10 say you can't add some of that detail back into any
11 definition.

12 COMMISSIONER BLOOM: I'm trying to
13 remember the testimony we heard about exceptions
14 during the hearing, and I think I remember Mr. Lane
15 saying that -- I think one of the witnesses was
16 asked if they had ever done an exception and I think
17 the answer was, "Somebody did one and it took eight
18 months," and I think that's all we have ever heard.
19 Actually, it was Page 431. It is the only exception
20 that's ever been done. I think the first one would
21 take longer. You never want to be first.

22 COMMISSIONER BALCH: There's longer and
23 then there's the other testimony that pointed out
24 that in the four years of existing Rule 17 there
25 haven't been any exceptions, so there's longer and

1 then there's a bar that means never.

2 CHAIRWOMAN BAILEY: And with the
3 difficulty of getting an approval process through
4 the limited staff and the backlog of work that's
5 part of their daily work schedule, it does take an
6 inordinate amount of time for them to process. I
7 recognize that. But I don't see that we are going
8 to be able to clear that up in any significant way
9 until we can ease the administrative requirements
10 and shift some of the decision-making back to the
11 districts where there is adequate staffing and
12 ability to make judgment calls based on the
13 knowledge of the area and the specific knowledge of
14 the district needs and requirements.

15 COMMISSIONER BALCH: I guess it comes down
16 to what we think as individuals is the intent. If
17 an exception is supposed to be something that's
18 incredibly rare, then there's perhaps a very
19 strong --

20 COMMISSIONER BLOOM: Perhaps not rare but
21 significant.

22 COMMISSIONER BALCH: It should be a
23 notable -- there should be a notable -- it should be
24 a notable difference from the regulation. If you
25 make it too hard to have any deviation from the

1 rule, you have to have a perfectly crafted rule to
2 begin with, and the perfectly crafted rule has to
3 foresee technology into the future until it's
4 revised, and that revision process, as we have
5 already observed, is not short. So you want, in my
6 opinion, to build in reasonable flexibility and also
7 a process which can be processed in a timely manner.
8 Because if you do have a -- if you come up with a
9 better way to monitor a multi-well fluid management
10 pit with a double liner system, that shouldn't be
11 something that should have to take a couple years to
12 process through the first time and maybe six months
13 every time thereafter, especially if people want to
14 use the technology more often.

15 COMMISSIONER BLOOM: Just to stick with
16 that example, so there's a request for an exception
17 for a permanent pit or variance for in this case a
18 multi-well fluid management pit and you essentially
19 created an opportunity where somebody could say the
20 primary layer will be a geomembrane liner, the
21 secondary layer would be clay, and we didn't feel
22 comfortable living with that ambiguity, but somebody
23 in the Division or Environmental Bureau could look
24 at that and say, "Yeah, I think that actually
25 provides equal or better."

1 COMMISSIONER BALCH: That's the
2 stipulation.

3 COMMISSIONER BLOOM: But then that
4 exception has done something outside of what we
5 intended and heard evidence on and is adopted by
6 somebody through that process. And that's my
7 concern about having a run-around of what we put
8 together here.

9 CHAIRWOMAN BAILEY: But the application --
10 if we just look at what was presented here, the
11 application has to state in detail explaining why
12 their innovation is providing equal or better. They
13 would have to justify it and demonstrate why their
14 variance or exception should be approved as
15 something different from what the rule states.

16 COMMISSIONER BALCH: In the proposed
17 definitions for variances and exceptions, both of
18 them have statements which include the language we
19 already adopted in other places for equal or better
20 protection, so I think that's -- even for a
21 variance, which would be somewhat a minor perhaps
22 technical aspect, there's still that bar written
23 into the proposed language of equal or better. So
24 if the intent of whatever Rule 17 modification we
25 come out with at the end of the day is to protect,

1 then the intent is the protection. What we want to
2 see is that same protection or some greater
3 protection.

4 If we don't have that flexibility, I think
5 we run the risk of only having that level of
6 protection that we concurrently foresee or is
7 available to us from current best practices.

8 So if you allow -- I think if you allow
9 some flexibility with well-defined parameters, which
10 we can discuss as we go through these, you make the
11 rule much more durable.

12 COMMISSIONER BLOOM: One thing that might
13 be helpful to me, I'm not quite sure where we put
14 variance in so far. If we could do a search and
15 find that so we can understand or remember or
16 recall.

17 COMMISSIONER BALCH: Maybe we are looking
18 at that backwards. If you don't mind me proposing
19 something.

20 COMMISSIONER BLOOM: Sure.

21 COMMISSIONER BALCH: That would be to
22 define what we think a variance should be and what
23 an exception should be and then go back and change
24 the language as necessary to say, "This should be an
25 exception and that should be a variance." Because

1 if we go back and look at them without knowing what
2 we think they are, that might run us in a couple
3 ways.

4 CHAIRWOMAN BAILEY: This gives us the side
5 bars.

6 COMMISSIONER BLOOM: I don't think I'm
7 necessarily opposed to having two categories and
8 exception having perhaps a higher bar and a variance
9 being a little bit lower bar. A variance might be
10 acceptable in some cases.

11 CHAIRWOMAN BAILEY: What we talked about
12 today was the boom. A boom or some other device.

13 COMMISSIONER BLOOM: Subject to the
14 variance.

15 CHAIRWOMAN BAILEY: Subject to the
16 variance. That's something that doesn't have to
17 rise to the level of Santa Fe.

18 COMMISSIONER BLOOM: I would agree with
19 that.

20 COMMISSIONER BALCH: When the district
21 division office makes the decision, does it come to
22 Santa Fe for approval or is it completely done
23 there?

24 CHAIRWOMAN BAILEY: It would be done at
25 the district level, but things go into the

1 electronic well file information, so you can find
2 out everything about a well through that electronic
3 method.

4 COMMISSIONER BALCH: At the risk of adding
5 paperwork to the pile, would it be appropriate for
6 the division district office to keep a log of
7 variances?

8 CHAIRWOMAN BAILEY: It's easier just to
9 file it electronically so it's available to
10 everybody.

11 COMMISSIONER BALCH: I'm not necessarily
12 saying a detailed description, but just a listing of
13 the variance for this or the variance for that.

14 CHAIRWOMAN BAILEY: To what purpose would
15 you use it? It's electronically bound with each and
16 every well. That's part of the process. It's a
17 whole lot easier than some file cabinet with 500
18 pieces of paper.

19 COMMISSIONER BALCH: Mr. Bloom, we can
20 start with the proposed changes and start going
21 through them. Maybe the most straightforward way to
22 tackle it would be to make modifications as needed
23 or insert some of the language --

24 COMMISSIONER BLOOM: We can go about it
25 that way.

1 COMMISSIONER BALCH: The other option is
2 to go through the existing language and try to
3 modify it, and somebody has already made an effort
4 at that.

5 COMMISSIONER BLOOM: Yeah. I think just
6 working through it, which is where I'm at. It might
7 be beneficial to start with what we would be
8 removing to see how that's reflected in the proposed
9 changes.

10 CHAIRWOMAN BAILEY: To go ahead and go
11 through Section 15 and then evaluate what we have
12 done before to see if it should be categorized?

13 COMMISSIONER BLOOM: Yeah. Look where we
14 are at now with the existing rule and see how
15 that -- where it is and where it isn't represented.

16 COMMISSIONER BALCH: Maybe if we just take
17 a few minutes and read what's deleted we can go
18 through the proposed new version.

19 CHAIRWOMAN BAILEY: Okay. It's 11:30. We
20 can read through it for what, about 15 minutes and
21 then take lunch? From a quarter to 12:00 to 1:00
22 clock? And we will reconvene at 1:00 o'clock while
23 we are reading through and bringing ourselves up to
24 speed on what is proposed for deletion and what is
25 proposed?

1 COMMISSIONER BLOOM: Would it be
2 inappropriate to request just a quick search on the
3 computer to find mention of variance?

4 CHAIRWOMAN BAILEY: So you can have that?
5 Sure.

6 COMMISSIONER BLOOM: Just as you are
7 reading through this, let me say that I did have a
8 concern about the deletion of sections which include
9 notification to local governments, state government.
10 No need to publicize anything through a newspaper of
11 general circulation in the county. Those were some
12 of my concerns.

13 COMMISSIONER BALCH: I think those are
14 appropriate concerns for things that in my mind rise
15 to the bar of an exception.

16 COMMISSIONER BLOOM: Yeah, I might agree
17 with that. And there's another one which is
18 apparently getting rid of a list of people who want
19 to know about when an exception has been filed. I
20 understand why people want to know when exceptions
21 come up. Just like people at the State Land Office
22 want to be on our resell notification, for example.
23 Just some of those things as you read through it
24 that stood out to me, so you know what I'm looking
25 at.

1 CHAIRWOMAN BAILEY: We will pay attention
2 to those details. So we are in recess until 1:00
3 o'clock.

4 (Note: The hearing stood in recess at
5 11:35 to 1:00.)

6 CHAIRWOMAN BAILEY: It's 1:00 o'clock. We
7 will go back on the record. Over the lunch period
8 we read through the proposed deletions and compared
9 them with the proposed language so we are freshly
10 prepared to talk about exceptions and variances and
11 the different viewpoints as expressed. Mr. Bloom,
12 you had some concerns you wanted to discuss?

13 COMMISSIONER BLOOM: Yes. So generally I
14 think I can be supportive of distinguishing between
15 a variance and an exception, a variance being for
16 something that should be decided at the district
17 level that would be for issues perhaps of less
18 importance. Theresa did a search for us and
19 currently the only variance we have is for how we
20 would deal with a puncture below the -- above the
21 level of liquids in a liner of a below-grade tank.

22 COMMISSIONER BALCH: That was optional
23 because they could just fix it.

24 COMMISSIONER BLOOM: Yes, or they could
25 request a variance. That's the only place we saw

1 variance outside these sections. So we could
2 reserve exceptions for matters of greater
3 importance, perhaps things along the lines of
4 permanent pit construction. I'll throw out
5 multi-well, including man-made construction as well.

6 CHAIRWOMAN BAILEY: Along those lines, if
7 we are talking about exceptions, I would like to
8 strike the requirement that it go to the
9 Environmental Bureau of the Division Santa Fe Office
10 and simply say that it goes to the Division Santa Fe
11 Office. That way the director has the latitude as
12 to which personnel would be looking at it.

13 COMMISSIONER BALCH: Not every issue may
14 be appropriate for departmental evaluation. Some
15 may require technical evaluation by engineers.

16 COMMISSIONER BLOOM: Very good.

17 CHAIRWOMAN BAILEY: So for 15A1, we will
18 strike "the Environmental Bureau" and simply have it
19 read "from the Division Santa Fe Office." Okay. I
20 wanted to get that in before we left that section.

21 COMMISSIONER BLOOM: I think if you read
22 down into exceptions further you see the same
23 language in C1 and C3.

24 CHAIRWOMAN BAILEY: Yes.

25 COMMISSIONER BLOOM: C5.

1 COMMISSIONER BALCH: So C1 would read, "An
2 operator may apply to the Division Santa Fe Office."
3 Where is the third location?

4 CHAIRWOMAN BAILEY: C3, first line.

5 COMMISSIONER BALCH: To the Division Santa
6 Fe Office. I think all three of those would be a
7 reasonable deletion.

8 CHAIRWOMAN BAILEY: And C5 also.

9 COMMISSIONER BALCH: It doesn't seem to
10 make sense to send it to a subdivision, rather than
11 to just send it to a division.

12 CHAIRWOMAN BAILEY: Correct.

13 COMMISSIONER BLOOM: Report back to you as
14 the director of the OCD. Sure. So I mentioned
15 previously that I wished to discuss retaining
16 notification to other parties of interest,
17 particularly if we are dealing with permanent pits,
18 something the potential size of a multi-well fluid
19 management pit. Surface owner should be advised,
20 perhaps surrounding surface owners within a half
21 mile location as it fits with the existing language
22 in Paragraph 2.

23 COMMISSIONER BALCH: Paragraph 2 of the
24 deleted material?

25 CHAIRWOMAN BAILEY: Yes.

1 COMMISSIONER BALCH: Although I hope we
2 could make that maybe that a little bit smaller.
3 Where would you think the language should be
4 inserted or modified originally?

5 COMMISSIONER BLOOM: We could move it --
6 just cut and paste it into the new language under
7 Section C, put that in somewhere about notification.

8 COMMISSIONER BALCH: I think it probably
9 becomes C2.

10 CHAIRWOMAN BAILEY: Well, it replaces part
11 of C2.

12 COMMISSIONER BALCH: Replaces part of it.
13 So I guess we can compare and contrast those two.

14 CHAIRWOMAN BAILEY: Well, a lot of the
15 language that's being deleted in 2 should be deleted
16 because it references closed-loop systems and
17 below-grade tanks.

18 COMMISSIONER BLOOM: We could probably
19 rewrite this and make it a little easier, too,
20 because it repeats below-grade tank, closed-loop
21 system each time and it could just be something
22 along the lines of County Commission of the county,
23 the city officials -- within one-half mile city
24 officials, landowners, governmental agencies.

25 CHAIRWOMAN BAILEY: It may be easier to

1 just go through and first cut delete wherever it
2 says closed-loop system and below-grade tank.

3 COMMISSIONER BLOOM: Sure.

4 CHAIRWOMAN BAILEY: That way we have
5 condensed it down to what we are really going to be
6 dealing with.

7 COMMISSIONER BLOOM: While Theresa is
8 doing that, Madam Chair, I had a question that you
9 might be able to answer or know the history of.
10 Paragraph 1 essentially devoted to "Environmental
11 Bureau may revoke an exception notice of the
12 operator of a closed-loop system," et cetera, et
13 cetera, that has received an exception in a case
14 involving the emergency danger to freshwater health
15 or the environment.

16 CHAIRWOMAN BAILEY: Okay. That's in the
17 deleted portion?

18 COMMISSIONER BLOOM: Yeah.

19 COMMISSIONER BALCH: Is that something
20 that is an inherent ability of the division to do
21 anyway?

22 CHAIRWOMAN BAILEY: Yes, it is.

23 COMMISSIONER BALCH: So it's already an
24 enumerated power of the division. If something is
25 not working they can just shut it down. That's just

1 an order.

2 CHAIRWOMAN BAILEY: Right.

3 COMMISSIONER BALCH: I don't think there's
4 any introduced language that says once an exception
5 is granted it's permanent, so you're not
6 contradicting anything and it's already inherent in
7 existing operational powers. No point in repeating
8 it in the regulation.

9 COMMISSIONER BLOOM: I would agree with
10 that. Let me look at that and maybe we can strike
11 that whole paragraph.

12 CHAIRWOMAN BAILEY: So now you finished
13 deleting the unnecessary references? Okay. Are we
14 contemplating that this would apply for permanent
15 pits and multi-well fluid management pits?

16 COMMISSIONER BLOOM: That's what I would
17 propose.

18 COMMISSIONER BALCH: So you are
19 comfortable for the purpose of exception/exceptions
20 the multi-well management pits would be more of an
21 exception level process than a variance process?

22 COMMISSIONER BLOOM: Considering that they
23 could become --

24 COMMISSIONER BALCH: And also since
25 they're a new thing, that there is some question

1 about, a little closer monitoring might not be a bad
2 idea.

3 CHAIRWOMAN BAILEY: And I believe there
4 was some testimony about the odor that may arise
5 from these kinds of pits. I'm trying to recall who
6 it was that mentioned it.

7 COMMISSIONER BLOOM: Ms. Denomy maybe?

8 COMMISSIONER BALCH: She came in with a
9 jar from a pit in Colorado that she couldn't get
10 opened, and I think everybody was happy about that.
11 I can't cite the page but I recall it.

12 CHAIRWOMAN BAILEY: It's within the
13 transcript.

14 COMMISSIONER BALCH: It's in the
15 transcript. On that note, if you look at the second
16 definition -- and I don't want to cloud things up
17 unnecessarily, but going through some of these
18 changes, it might be simpler if we completed
19 agreement on the definitions of exceptions and
20 variance. We talked about exception are we removed
21 Environmental Bureau. Variance means an
22 authorization from the appropriate division district
23 office to depart from the requirements of 19.15.17
24 NMAC, so it's a blanket statement that you can have
25 a variance from anything within the newly proposed

1 Rule 17.

2 I would suggest that if something is going
3 to require an exception instead that we, in the rule
4 specifically say this action will require an
5 exception, and then that allows the variance to
6 cover everything else.

7 CHAIRWOMAN BAILEY: So specifically say
8 within the multi-well pit areas --

9 COMMISSIONER BALCH: That exceptions are
10 required, not a variance.

11 CHAIRWOMAN BAILEY: That would be easy.

12 COMMISSIONER BALCH: That way we don't
13 have to say variance all over the place. We can
14 just point to the places where an exception would be
15 required and allow the variance to occur for more
16 technical aspects without -- it might simplify
17 things.

18 COMMISSIONER BLOOM: Does this language
19 for variance, for example, mean that a variance can
20 be sought for anything?

21 COMMISSIONER BALCH: The way it reads now,
22 it would be everything, so I would probably add to
23 that "except for areas where exceptions are
24 specifically noted."

25 CHAIRWOMAN BAILEY: Required.

1 COMMISSIONER BALCH: And then we would
2 have to go through and make sure we have the areas
3 where we would want the exception only, we would
4 have to note that in the document.

5 CHAIRWOMAN BAILEY: Seems like an easier
6 way to manage it.

7 COMMISSIONER BALCH: I think it clearly
8 defines the difference between the exception and the
9 variance. Because the way it reads now, a variance
10 could essentially provide an exception to just about
11 anything. I believe that was also brought out in
12 testimony.

13 COMMISSIONER BLOOM: That would concern
14 me. I think we ought to indicate in the rule where
15 an exception will be permitted and where a variance
16 will be permitted.

17 COMMISSIONER BALCH: Well, I think it's
18 easier to go with the idea that the variance can
19 work for anything and point to the place where you
20 can't have the variance and it has to be an
21 exception. So we can specifically say, "For
22 construction of permanent pits, for construction of
23 multi-well pits an exception will be sought, not a
24 variance."

25 COMMISSIONER BLOOM: I think in that case

1 it would probably entail a read-through of the
2 entire document.

3 COMMISSIONER BALCH: I'm sure we will go
4 through it at some point anyway, at least once,
5 maybe twice.

6 CHAIRWOMAN BAILEY: Because that would
7 apply to operations and maintenance, construction
8 requirements.

9 COMMISSIONER BALCH: Closure.

10 CHAIRWOMAN BAILEY: Closure when we get to
11 it.

12 COMMISSIONER BALCH: Citing requirements.

13 CHAIRWOMAN BAILEY: Citing requirements
14 when we get to it.

15 COMMISSIONER BALCH: So it saves us from
16 having to write variance in a lot of places. We can
17 just point to the places where exception is
18 necessary.

19 CHAIRWOMAN BAILEY: Then with that
20 notation on the variance definition, that it applies
21 to everything other than those specific areas noted
22 as needing exceptions.

23 COMMISSIONER BALCH: Mr. Smith, the
24 language there, "Except where exceptions are
25 desired," would we need to wordsmith that a little

1 bit?

2 MR. SMITH: Well, you know, I was just
3 thinking, you have the exact same definition for
4 exception. It's just a matter of where you have to
5 get the authorization from. So I think you may need
6 to be more specific in your definitions if you are
7 going to limit exceptions to permanent or permanent
8 and multi-well pits.

9 COMMISSIONER BALCH: At this point those
10 are the things that have occurred that have been
11 discussed that would probably be in the exception
12 category. There may be other things that occur as
13 we go through some of the sections we skipped over.

14 MR. SMITH: Okay. Let's see.

15 COMMISSIONER BALCH: I think the intent
16 really is an exception would require a division
17 level look and a variance would require a district
18 level look.

19 MR. SMITH: As I appreciate it, though,
20 you are going to note in the rule the various areas
21 where an exception is required. You are not going
22 to note variance, assuming that variances may be
23 applied for on virtually anything else; is that
24 right?

25 COMMISSIONER BALCH: That, I think, is the

1 gist of what we discussed so far.

2 MR. SMITH: I think I would put a period
3 after NMAC and put, "Variances may not be obtained
4 where exceptions are required by this rule."

5 COMMISSIONER BALCH: That's exactly what
6 we are trying to get to, I think.

7 MR. SMITH: Take out the word "except."

8 COMMISSIONER BALCH: Where exceptions are
9 specifically required?

10 MR. SMITH: That's fine. No, you know
11 what? You don't need "specific." Just say
12 required, I think, by a provision of 19.15.17 NMAC.

13 COMMISSIONER BALCH: I think in the spirit
14 of allowing innovation and flexibility, that this
15 would provide protection and we can specifically
16 point to the places where we need more protection or
17 oversight is needed.

18 COMMISSIONER BLOOM: I could think of
19 aspects of citing distance to groundwater, for
20 example, that would be an exception.

21 COMMISSIONER BALCH: I think it would be
22 easier to point out where the exceptions would be
23 than the variances. Sorry for that side bar --

24 CHAIRWOMAN BAILEY: No, it's necessary.
25 We start out from a good basis. Commissioner Bloom,

1 you were discussing notice, which may substitute for
2 3A which only requires notification to the surface
3 owner?

4 COMMISSIONER BALCH: That's for a
5 variance.

6 CHAIRWOMAN BAILEY: Oh, okay. I'm sorry.
7 Yeah. So it would be --

8 COMMISSIONER BALCH: Mr. Bloom, do your
9 concerns apply to variances and exceptions or
10 primarily to exceptions?

11 COMMISSIONER BLOOM: No, I wouldn't want
12 to put somebody through the notification
13 requirements.

14 COMMISSIONER BALCH: Maybe we can work
15 through the variance section and then tackle the
16 other.

17 CHAIRWOMAN BAILEY: Works for me. For
18 variances, our first paragraph, "Except as provided
19 below in C, an operator may apply to the division
20 district office." I think that's exactly what we
21 were getting at in the definition above, isn't it?
22 So are we good with B1?

23 COMMISSIONER BLOOM: I'm wondering if it's
24 redundant.

25 COMMISSIONER BALCH: It looks redundant

1 unless you want to reiterate language and put in
2 something similar to what we have in the definition.

3 CHAIRWOMAN BAILEY: I don't think we need
4 to. We can save part of a page there. So we can
5 delete 1 and renumber beginning with No. 2.

6 COMMISSIONER BLOOM: Mr. Smith, does that
7 seem okay to you?

8 MR. SMITH: I'm sorry, Theresa asked me a
9 question and I missed what you were saying.

10 CHAIRWOMAN BAILEY: Delete 1 because we
11 covered it in definitions.

12 COMMISSIONER BLOOM: Anywhere we can get
13 rid of a referral to a spot elsewhere in the
14 document we are better off, too.

15 CHAIRWOMAN BAILEY: Okay. I would like to
16 insert the words "complete application" so there's
17 no confusion over an incomplete application
18 triggering any kind of action.

19 COMMISSIONER BLOOM: An operator
20 demonstrates with a complete application to the
21 appropriate division district office.

22 CHAIRWOMAN BAILEY: "An operator shall
23 demonstrate with the complete application to the
24 appropriate division district office that the
25 requested variance provides," and then have we made

1 a decision on the use of equal or better as opposed
2 to reasonable?

3 COMMISSIONER BALCH: I like equal or
4 better.

5 COMMISSIONER BLOOM: Equal or better.

6 CHAIRWOMAN BAILEY: Then we will use,
7 "Equal or better protection to freshwater and
8 protection to public health," and then we have the
9 question about safety and livestock.

10 COMMISSIONER BALCH: I think in other
11 places we have changed this to read "protection to
12 freshwater, public safety and the environment."

13 COMMISSIONER BLOOM: Say that again.

14 COMMISSIONER BALCH: In other places in
15 the document we have changed that similar statement
16 to say instead, "Protection of freshwater, public
17 safety and the environment."

18 COMMISSIONER BLOOM: Public health.

19 CHAIRWOMAN BAILEY: Public health.

20 COMMISSIONER BALCH: Might have been
21 public health, yes. And the environment, and
22 assuming that safety was built in, public health and
23 livestock was built into the environment. I'm
24 assuming that was our interpretation.

25 CHAIRWOMAN BAILEY: That was our

1 interpretation that we discussed.

2 COMMISSIONER BLOOM: I would be fine with
3 that language.

4 COMMISSIONER BALCH: So you can delete the
5 highlighted section.

6 COMMISSIONER BLOOM: This gets a little
7 sticky. "The appropriate division district office
8 shall approve the variance within 60 days." I think
9 that should be a "may" and I don't know about the
10 timeline of 60 days.

11 CHAIRWOMAN BAILEY: It does not always
12 work. I think the OCD had a suggestion in that
13 area. The exception applies to the higher level
14 things. Yes, the OCD does have some language.

15 COMMISSIONER BALCH: We are going to run
16 into other sticky language in other areas, but it
17 might be more appropriate to say, "The appropriate
18 division district office may then approve the
19 variance." Because the word "shall" tells them they
20 have to do it.

21 CHAIRWOMAN BAILEY: Absolutely we will
22 change the shall to may, and if we delete the 60-day
23 requirement and simply have a period --

24 COMMISSIONER BALCH: And there was an
25 awful lot of testimony and cross-examination and

1 redirect on basically the concept of making sure the
2 division was able to diligently respond to these
3 requests.

4 COMMISSIONER BLOOM: I think we could add
5 some of that in 3 below.

6 COMMISSIONER BALCH: That was my thinking
7 was that it would be addressed when we talk about
8 that specifically.

9 CHAIRWOMAN BAILEY: So we have a period
10 after "environment." And and we are deleting the
11 rest of it because we already indicated where it
12 goes.

13 COMMISSIONER BLOOM: We need the "may
14 approve the variance" or does that come below?

15 COMMISSIONER BALCH: I think it's here.
16 Do you want "may then" instead of "may"?

17 COMMISSIONER BLOOM: Makes sense.

18 COMMISSIONER BALCH: First you have the
19 demonstration and then you have the approval.

20 CHAIRWOMAN BAILEY: So demonstrate --

21 COMMISSIONER BALCH: Part of the approval
22 for something at the variance level could be
23 relatively quickly.

24 CHAIRWOMAN BAILEY: Could be.

25 COMMISSIONER BALCH: Could be done by --

1 might be initiated by a phone call. You bring in
2 your expert and your evidence and show it to the
3 division district office and they say, "This
4 should work" and they approve it.

5 CHAIRWOMAN BAILEY: No, because some
6 requests are very clear and open, complete
7 application. It would not take a long period of
8 review to evaluate. We should be able to allow that
9 process, that flexibility. So we can delete the
10 green paragraph.

11 COMMISSIONER BLOOM: I would agree.

12 CHAIRWOMAN BAILEY: This becomes two.
13 This gives a 60-day timeline for approval or denial
14 and if there's no action or denial, the operator
15 always has the option of applying for a hearing.

16 MR. SMITH: One of the things that you
17 might want to consider here is a requirement that if
18 the division denies the request they inform the
19 operator why they denied the request in writing in
20 order to avoid any confusion or problems with an
21 operator saying, "It was denied. I don't know why.
22 I don't know what I could do."

23 I'm not sure you have a due process
24 problem because this is discretionary, but it's akin
25 to a due process problem of informing someone.

1 COMMISSIONER BALCH: So right now they are
2 saying if it's denied in writing within 60 days they
3 are entitled to a hearing.

4 MR. SMITH: Denial in writing could just
5 be "it's denied." The issue is --

6 COMMISSIONER BALCH: Why was it denied?

7 MR. SMITH: -- why was it denied?

8 COMMISSIONER BLOOM: That came up during
9 the hearing, too.

10 COMMISSIONER BALCH: There was a lot of
11 discussion about this issue.

12 CHAIRWOMAN BAILEY: If we look at the
13 struck-out language on Page 46, the bottom half of
14 Paragraph 5, there's a sentence that says, "If the
15 Environmental Bureau determines to deny the
16 exception then it shall notify the operator of the
17 determination by certified mail." That would take
18 care of Mr. Smith's question and comment that it's a
19 notification to the operator by certified mail,
20 return receipt requested, and if the operator
21 requests the hearing within ten days after the
22 receipt of such notice they set the matter for
23 hearing. It doesn't say why.

24 MR. SMITH: Again, the issue is what does
25 the determination mean there? If the determination

1 is simply a denial, it may not take care of it.

2 CHAIRWOMAN BAILEY: That doesn't work. We
3 would have to insert the words "giving reason for
4 denial."

5 MR. SMITH: I'm not sure reason is the
6 word you want.

7 COMMISSIONER BALCH: One of the things
8 that was brought up in the testimony was that they
9 wanted to make sure the process moves along in a
10 timely manner. They didn't have to wait two years
11 for an exception or eight months for the answer.
12 There was testimony about looking at attempts to
13 contact an there was no reply and things like that.
14 So in that sentence the inclusion of language like
15 from the stricken Paragraph 5 does give a distinct
16 timeline. If we modify that to include a reason why
17 it was denied, I think that would cover everybody.
18 If not as speedy a timeline as you might desire, at
19 least a timeline.

20 MR. SMITH: No, I think that's right. My
21 only -- the only thing -- all the timelines and all
22 that stuff is entirely up to you. I'm just saying
23 as a matter of avoiding legal problems, you want to
24 say that the determination needs to inform the
25 operator as to why the variance wasn't granted.

1 COMMISSIONER BALCH: I think that's fair.
2 I think that's actually very fair.

3 CHAIRWOMAN BAILEY: So Theresa, have you
4 found on Page 46 it's in the struck-out area for A.

5 COMMISSIONER BLOOM: Starting with, "If
6 however the environmental" --

7 CHAIRWOMAN BAILEY: Yes. Which is
8 essentially what Paragraph 3 says if we insert the
9 reason why.

10 COMMISSIONER BALCH: The only thing that
11 the stricken part did was have a trackable certified
12 mail.

13 CHAIRWOMAN BAILEY: Right, and a timeline
14 for response.

15 COMMISSIONER BALCH: For response.

16 CHAIRWOMAN BAILEY: And I think those are
17 necessary.

18 COMMISSIONER BALCH: That would provide
19 value to both parties.

20 CHAIRWOMAN BAILEY: Both.

21 COMMISSIONER BALCH: That's not what we
22 were talking about.

23 CHAIRWOMAN BAILEY: No. It's the last
24 half of 5, not the first half.

25 COMMISSIONER BALCH: It starts can with,

1 "If, however, the Environmental Bureau." We have to
2 strike "the Environmental Bureau."

3 CHAIRWOMAN BAILEY: It shall notify the
4 operator of the determination by certified mail.

5 COMMISSIONER BALCH: So I think you would
6 strike "the Environmental Bureau" in the first part.

7 CHAIRWOMAN BAILEY: And replace it with
8 "the appropriate division district office."

9 COMMISSIONER BALCH: Because this is for
10 variance.

11 CHAIRWOMAN BAILEY: Yes.

12 COMMISSIONER BLOOM: The term deny is
13 strange.

14 COMMISSIONER BALCH: I would just say
15 denies, and in this case it would be "denies the
16 variance."

17 CHAIRWOMAN BAILEY: Then it shall notify
18 the operator for the reasons of denial. Delete "its
19 determination."

20 COMMISSIONER BALCH: What is Subsection A
21 1954 NMAC?

22 CHAIRWOMAN BAILEY: That is specifically
23 the rule concerning hearings.

24 COMMISSIONER BALCH: That's saying you
25 abide by the rules, but do we need that statement?

1 CHAIRWOMAN BAILEY: Well, it points people
2 to how to go about asking for a hearing.

3 COMMISSIONER BALCH: So it's for
4 clarification?

5 CHAIRWOMAN BAILEY: Yes. So we really
6 don't need the first underlined sentence, do we?
7 No, wait a minute.

8 COMMISSIONER BALCH: I think it's worth
9 leaving in.

10 CHAIRWOMAN BAILEY: Okay.

11 COMMISSIONER BALCH: I just wanted to know
12 what it was.

13 CHAIRWOMAN BAILEY: But we have redundant
14 phrases in there.

15 COMMISSIONER BLOOM: Yeah, that's not
16 going to work.

17 COMMISSIONER BALCH: The whole first part
18 of that.

19 CHAIRWOMAN BAILEY: Okay. If we
20 insert "then it shall notify the operator within 60
21 days of the filing of the request for variance."
22 I'm taking some of the language in the first
23 sentence and putting it down in the second sentence.
24 So it would read, looking at the second sentence
25 that's not underlined now, "If, however, the

1 appropriate division district office denies the
2 variance" --

3 COMMISSIONER BALCH: It shall notify the
4 operator within 60 days of the reasons for denial.

5 CHAIRWOMAN BAILEY: No, not yet. After
6 shall notify the operator. Then it shall notify the
7 operator within 60 days.

8 COMMISSIONER BALCH: I think you can
9 delete everything above that.

10 COMMISSIONER BLOOM: Now, is that holding
11 the division district office to making a decision in
12 60 days or should we state that -- do we need to
13 state that more clearly?

14 COMMISSIONER BALCH: Well, within 60
15 days -- that's true. This is telling them they have
16 to notify them of a denial within 60 days. It
17 doesn't have anything to do with an approval. You
18 would hope most variances would be relatively simple
19 matters and approval would be obvious and more or
20 less immediate.

21 CHAIRWOMAN BAILEY: You would hope so, but
22 you never know what's lurking out there.

23 COMMISSIONER BALCH: In Section 1 we said
24 the appropriate division district office would make
25 the variance. We didn't give them a timeline. That

1 was also discussed in testimony.

2 COMMISSIONER BLOOM: How about if we
3 change 2 to something along the lines of, "The
4 appropriate division district office shall notify
5 the operator" or "shall decide this within of 60
6 days of a decision if there's a denial." Something
7 along those lines?

8 COMMISSIONER BALCH: Seemed like a better
9 place -- if you are going to put a timeline on the
10 approval, the best place would be on the end of
11 Section 1. You want to say something like, "The
12 appropriate division district office shall then
13 approve or deny the variance within 60 days" or
14 whatever time period.

15 COMMISSIONER BLOOM: And 2 would work
16 after that, right?

17 CHAIRWOMAN BAILEY: No, we are putting
18 shall approve or deny. Yes.

19 COMMISSIONER BALCH: Approve or deny the
20 variance. Now the timeline.

21 COMMISSIONER BLOOM: Sixty days?

22 COMMISSIONER BALCH: Sixty days was
23 suggested by the proponents, NMOGA and I think it
24 was also accepted by IPANM.

25 CHAIRWOMAN BAILEY: Well, yes, it's in the

1 proposed language.

2 COMMISSIONER BALCH: Nobody is asking for
3 less time or more time.

4 COMMISSIONER BLOOM: If the variance is
5 going to be something less complex, could it be
6 turned around in 30 days?

7 COMMISSIONER BALCH: That's my question.

8 CHAIRWOMAN BAILEY: Depends on how complex
9 it is and what the staffing level is.

10 COMMISSIONER BLOOM: I could see where an
11 exception, if right now we are talking about
12 permanent pits, multi-well pits, 60 days or longer.
13 I don't know, but if we are talking about keeping
14 the variance to simpler things --

15 CHAIRWOMAN BAILEY: I would hate to commit
16 to 30 days.

17 COMMISSIONER BALCH: We could say "in a
18 timely manner," but that's too vague. Hopefully in
19 practice the variance would be something that would
20 be pretty quickly dealt with or determined that hey,
21 this has to go to hearing or has to go to exception.

22 CHAIRWOMAN BAILEY: Now we are to 2A which
23 has to do with notification for variances.

24 MR. SMITH: You may have other issues in
25 2. First of all, I don't think you need

1 the "however." Such notice shall be set --

2 CHAIRWOMAN BAILEY: There needs to be a
3 comma.

4 MR. SMITH: Who shall set the hearing?

5 CHAIRWOMAN BAILEY: Put a comma
6 after "notice" and say, "The division shall set the
7 matter for hearing."

8 MR. SMITH: Now, is there another
9 provision here someplace allowing comment on the
10 variance to be submitted at any particular time?

11 COMMISSIONER BALCH: A variance is
12 supposed to come below that threshold so I suppose
13 comma.

14 CHAIRWOMAN BAILEY: It's the
15 administrative process.

16 MR. SMITH: Then you might not want to
17 require that notice be given to anyone who has filed
18 a comment.

19 COMMISSIONER BALCH: Stop with "notice to
20 the operator" and strike "any party who has filed a
21 comment or requested a hearing"?

22 CHAIRWOMAN BAILEY: Yes. Because all
23 hearing dockets are distributed anyway to people who
24 have asked to be on the distribution list.

25 MR. SMITH: And I suppose you are just

1 assuming that notice will be given to the district
2 office.

3 CHAIRWOMAN BAILEY: That should be the way
4 things work, but we could get and include it.

5 COMMISSIONER BALCH: Notice to the
6 operator and the appropriate division district
7 office. That makes it very clear.

8 COMMISSIONER BLOOM: That would be better
9 as two sentences without the "and" in the middle.
10 Make it a separate paragraph.

11 CHAIRWOMAN BAILEY: Okay.

12 MR. SMITH: As you take off on to the
13 things that should be included in the application,
14 you might want to make that another paragraph.

15 CHAIRWOMAN BAILEY: Yes, that becomes No.
16 3. The reference is to the hearing. We are not
17 referencing the hearing. I think we need to be very
18 clear on that. That reference to 19.15.4.8
19 references the rule titled Adjudication.

20 COMMISSIONER BLOOM: What we are getting
21 into is what the application shall include initially
22 to the division district office?

23 CHAIRWOMAN BAILEY: That was my
24 interpretation.

25 COMMISSIONER BLOOM: Yeah, I think so. So

1 maybe that should go under 1 or ahead of 1.

2 MR. SMITH: Is that what this is or is
3 that some sort of application for the hearing?

4 COMMISSIONER BALCH: I thought it was an
5 application for a hearing.

6 COMMISSIONER BLOOM: We need to look at
7 that.

8 CHAIRWOMAN BAILEY: We don't indicate
9 what's necessary for a variance, what kind of
10 application is needed.

11 COMMISSIONER BALCH: I think that's what
12 we are supposed to be discussing in A, B and C.

13 MR. SMITH: Well, I don't know. Then you
14 go down to 4 and you have, "The division clerk will
15 set the application for hearing as soon as
16 practicable." That makes me think that the
17 application requirements above that are the
18 application for hearing. But you don't require an
19 application for a hearing in 3, all you require in
20 the paragraph above that, all you require is a
21 request, so you may want to clarify all of this.

22 CHAIRWOMAN BAILEY: I think so. How can
23 anyone determine whether or not it's a complete
24 application unless they know what the application
25 needs to be? So some of these requirements should

1 be at the very beginning of this section on the
2 variances rather than stuck in the middle.

3 COMMISSIONER BLOOM: Regarding proof of
4 notification to the surface owner, I don't know that
5 the surface owner would be interested in knowing
6 that there was a leak above the --

7 CHAIRWOMAN BAILEY: Yeah, for a minor
8 variance.

9 COMMISSIONER BLOOM: On a below-grade tank
10 or something like that.

11 COMMISSIONER BALCH: Well, they might be,
12 but they could also find that information elsewhere.

13 MR. SMITH: Although if there has been a
14 denial, and it's important enough to go to hearing,
15 the surface owner might be interested there. I
16 think you might be better off -- easier if you just
17 go up and create a new section to talk about what
18 the application for variance should include and then
19 go on and take up further with notice.

20 CHAIRWOMAN BAILEY: And that information
21 should become B1 entitled "An application for a
22 variance shall include the following information."
23 So what we have as 1 becomes 2 again and we develop
24 our own 1 for what the application for variance
25 should include.

1 MR. SMITH: Well, I don't know. I think
2 you might make your application for variance No. 3.
3 I mean, you have set out the process, you know, what
4 they have to show in 1, what happens in 2. In 3 you
5 could say, "An application for a variance shall
6 include," and then if you have anything you want to
7 say about the hearing you could have that in another
8 paragraph.

9 CHAIRWOMAN BAILEY: Okay. Let's try that.

10 COMMISSIONER BALCH: I'm not sure why you
11 have to have anything more than what's already in 2
12 about the hearing. There's already processes and
13 procedures in place.

14 MR. SMITH: If you have the complete
15 application for the variance in the first instance,
16 presumably that would be going into the hearing
17 officer. But if you don't say what has to be in the
18 application for variance, you don't know what the
19 hearing officer is going to get.

20 COMMISSIONER BALCH: So what does an
21 application for variance include?

22 CHAIRWOMAN BAILEY: Let's have a colon and
23 then Subsection A, and then we can copy B from down
24 below, the statement in detail. Then we could have
25 a Subsection B which copies C, their statement in

1 detail explaining why the applicant believes. That
2 could be moved up to there. Yes.

3 COMMISSIONER BALCH: Again, to use
4 consistent language, we probably want to go "protect
5 freshwater, health and environment," so remove "and
6 safety, livestock."

7 MR. SMITH: Now, if I may, an application
8 for a variance, it is easy to put in a statement of
9 why, and it's easy to put a statement why the
10 applicant has that belief. If that's all that's
11 required for an approval, there isn't really a
12 demonstration required.

13 COMMISSIONER BALCH: Where is the proof?

14 COMMISSIONER BLOOM: There's no how
15 either.

16 MR. SMITH: So you might not want a
17 statement, you might want a demonstration. Now, I
18 don't know if that's too onerous for a variance or
19 not.

20 COMMISSIONER BALCH: I think you want a
21 statement in detail why the applicant believes the
22 variance would protect freshwater.

23 MR. SMITH: I think I would put "that."

24 COMMISSIONER BALCH: That the applicant.

25 CHAIRWOMAN BAILEY: That the variance will

1 protect.

2 COMMISSIONER BLOOM: Don't we want to use
3 perhaps language used above, "Equal or better
4 protection"?

5 COMMISSIONER BALCH: Equal or better
6 protection. So take out the protect and put in a
7 "to."

8 CHAIRWOMAN BAILEY: Or for?

9 COMMISSIONER BALCH: We have "to" above.
10 Equal or better protection to freshwater. If we can
11 find another instance where we used that phrase and
12 then we would have to change it there as well.

13 MR. SMITH: Let's do a global on
14 protection. You don't have to do it now.
15 Protection to freshwater and change it to protection
16 of freshwater.

17 COMMISSIONER BALCH: I think "of" might be
18 a better word than "to."

19 CHAIRWOMAN BAILEY: Protection of
20 freshwater.

21 COMMISSIONER BALCH: And you can
22 immediately change it up in 1 where we also have the
23 same phrase, and then you can do a word search for
24 that phrase.

25 CHAIRWOMAN BAILEY: Is that all we will

1 need for an application to determine whether or not
2 it is complete and demonstrates that the variance
3 provides equal or better?

4 MR. SMITH: Do you need a statement
5 demonstrating or just a detailed demonstration?

6 CHAIRWOMAN BAILEY: A detailed
7 demonstration, yes. 3B should be changed to a
8 detailed demonstration and then delete the next four
9 words.

10 COMMISSIONER BALCH: So a demonstration
11 would encompass oral argument, it would encompass --

12 CHAIRWOMAN BAILEY: Everything in writing.
13 Everything in writing. That way it gets put into
14 our electronic file system.

15 COMMISSIONER BALCH: So you want a
16 detailed written demonstration?

17 CHAIRWOMAN BAILEY: Yes. Then we can go
18 to No. 4, I think, so what's labeled there as 3
19 becomes 4, "The application shall include."

20 COMMISSIONER BALCH: So this is in the
21 case of a hearing?

22 CHAIRWOMAN BAILEY: So we need to have a
23 copy of the complete application.

24 COMMISSIONER BALCH: You need a statement
25 saying, "If the variance goes to a hearing."

1 CHAIRWOMAN BAILEY: Sure.

2 MR. SMITH: You might want to cite the
3 provision. Goes to hearing pursuant to. That way
4 they know exactly what kind of hearing you're
5 talking about.

6 COMMISSIONER BALCH: 15A2?

7 MR. SMITH: 15B2.

8 CHAIRWOMAN BAILEY: 19.15.17.15B2.

9 COMMISSIONER BALCH: You need a comma.

10 MR. SMITH: Is 4.8 -- does that have the
11 process you want for this or is that a more
12 extensive process than you are considering for a
13 variance?

14 CHAIRWOMAN BAILEY: 4.8 is how to initiate
15 an judicatory hearing, so we might want to just have
16 4 and leave off the 8 part, because that entire rule
17 has to do with hearing process.

18 COMMISSIONER BALCH: This is Subsection A
19 of 19.15.4.

20 CHAIRWOMAN BAILEY: A becomes the complete
21 application.

22 MR. SMITH: Now, if you ask for an
23 application for variance up at the top or you ask
24 for the request for variance.

25 COMMISSIONER BALCH: You ask for the

1 detailed written demonstration.

2 MR. SMITH: Okay.

3 CHAIRWOMAN BAILEY: The complete
4 application for variance.

5 MR. SMITH: Then you want just a copy,
6 right?

7 CHAIRWOMAN BAILEY: Right.

8 MR. SMITH: So you might want to put a
9 copy of the application for variance submitted
10 under, and then cite up again.

11 COMMISSIONER BALCH: Under 19.15.17.15B3?

12 MR. SMITH: Or 2?

13 COMMISSIONER BALCH: Scroll up. 3.

14 MR. SMITH: 3.

15 COMMISSIONER BALCH: I think the next step
16 becomes B, Proof or Notification.

17 CHAIRWOMAN BAILEY: You can delete the
18 green things there.

19 COMMISSIONER BALCH: That's already
20 included in the application.

21 CHAIRWOMAN BAILEY: So that can be
22 deleted.

23 COMMISSIONER BALCH: So 5 becomes C?

24 COMMISSIONER BLOOM: I think 4 is the
25 application shall include, so I think 5 should stay.

1 MR. SMITH: Madam Chair, for the sake of
2 the hearing officer, whenever this goes to hearing,
3 and it may be they don't do this now, but I would
4 think that they would want some idea of how long the
5 hearing is going to go, if witnesses are going to be
6 called, if it's just going to be like an informal
7 conference or how you imagine this.

8 COMMISSIONER BALCH: I think if it's a
9 hearing, it's a hearing.

10 CHAIRWOMAN BAILEY: Right. Not just a
11 conference. And it would be following all of the
12 requirements for notice and parties and everything
13 else having to do with judicatory proceedings under
14 the rules that we referenced in 19.15.4.

15 MR. SMITH: Okay. Do you want to just put
16 in there that the hearing is governed by 19.15.4?

17 CHAIRWOMAN BAILEY: It's in there.

18 MR. SMITH: The only reason I'm asking is
19 because this requires, in addition to the
20 information required -- does that include witness
21 list, exhibit list and all of that business?

22 COMMISSIONER BALCH: You are saying in 5
23 we should say, "The clerk shall set the application
24 for hearing under 19.15.4 NMAC as soon as
25 practicable"? Will that take care of it?

1 MR. SMITH: No. What I was saying is if
2 you want to allow witnesses and exhibits and notice
3 to witnesses and so forth, you should probably put
4 in that it's governed by --

5 COMMISSIONER BALCH: Oh, I see.

6 MR. SMITH: Yeah, although now my question
7 to you is this: Is the process under 4 -- I'm
8 sorry, I don't know this -- is the process under 4,
9 does it make it impossible to have that hearing in
10 ten days?

11 COMMISSIONER BALCH: You are supposed to
12 set the hearing in ten days.

13 CHAIRWOMAN BAILEY: I thought it said the
14 hearing had to be held in ten days.

15 COMMISSIONER BALCH: No, set within ten
16 days.

17 MR. SMITH: Oh, I see. I apologize.

18 CHAIRWOMAN BAILEY: Nevermind.

19 MR. SMITH: My bad.

20 CHAIRWOMAN BAILEY: So there's still the
21 question of conduct of a hearing, but that's all we
22 need to do is reference Rule 4 appropriately. I
23 mean, the way we have it worded here may not be the
24 best way to word that.

25 MR. SMITH: Right. I think I would put in

1 a C and say it's going to be governed by 19.15.4,
2 although is this getting enough process involved now
3 that it's going to defeat the purpose of the notion
4 of a variance being quick.

5 COMMISSIONER BALCH: I think most
6 variances would be a quick administrative process.
7 In the case there was a disagreement at the district
8 level, you want to allow an operator to feel that.
9 The purpose would be yes, it would not be short but
10 it would set the precedent for other actions by that
11 or another operator, if they were to win the appeal
12 or lose the appeal, and it also gives guidance to
13 the district office.

14 MR. SMITH: Well, I guess what I was
15 thinking is do you want to have some sort of
16 expedited appeal process? Expedited hearing
17 process?

18 CHAIRWOMAN BAILEY: I think it should go
19 through the hearing process as Rule 4 allows. I
20 don't want to have sections all over the place where
21 different circumstances. The hearing process is
22 ruled by Rule 4.

23 MR. SMITH: Okay.

24 COMMISSIONER BLOOM: It would create a
25 mess for the calendar.

1 CHAIRWOMAN BAILEY: It really would.

2 COMMISSIONER BALCH: Ideally it would be
3 to make a precedent one way or the other.

4 MR. SMITH: I think that's right.

5 CHAIRWOMAN BAILEY: Why not just include
6 that up to the top and change the language to say,
7 "In addition to the hearing process required by
8 19.15.4, the application shall include."

9 MR. SMITH: There you go.

10 CHAIRWOMAN BAILEY: Just eliminate the
11 next word. And we are ensuring that we have
12 notification to the surface owner for a minor
13 variance?

14 COMMISSIONER BALCH: Well, if it goes to
15 the hearing level, I think if there's a hearing,
16 then the surface owner might be interested.

17 COMMISSIONER BLOOM: It seems funny that
18 we wouldn't notify the surface owner if the variance
19 was requested.

20 CHAIRWOMAN BAILEY: Some things are so
21 minor.

22 COMMISSIONER BALCH: I guess the question
23 is do we need B or not.

24 COMMISSIONER BLOOM: If it's denied than
25 the essentially the OCD is saying we haven't --

1 COMMISSIONER BALCH: We don't think the
2 variance meets the bar.

3 COMMISSIONER BLOOM: We don't think it's
4 equal or better. I think the surface owner should
5 be able to show up and address those concerns.

6 COMMISSIONER BALCH: I think that makes
7 sense.

8 MR. SMITH: I missed this. Archives wants
9 everything in lower case.

10 CHAIRWOMAN BAILEY: You know these things
11 better than we do. Now we come to exceptions. We
12 might want to eliminate the words "permanent pit" to
13 any of the requirements -- somehow we need to
14 broaden that.

15 COMMISSIONER BALCH: It should read maybe,
16 "The operator may apply to the Division's Santa Fe
17 office for an exception to any of the" -- and we
18 need language for the specific --

19 CHAIRWOMAN BAILEY: If we go back up to
20 the definitions for exceptions.

21 COMMISSIONER BALCH: It's at the bottom of
22 the definition of variance actually. The bottom of
23 the definition of variance under A. So basically we
24 are going to point out in 19.15.17 where exceptions
25 are required.

1 CHAIRWOMAN BAILEY: Yes.

2 COMMISSIONER BALCH: If you capture
3 exceptions are required by provision, and copy it
4 down and we can work from there perhaps.

5 COMMISSIONER BLOOM: So we are not going
6 to list here where exceptions are required?

7 COMMISSIONER BALCH: I think if we end up
8 with two or three things we could come back and list
9 them, but it's probably going to already be in the
10 regulation.

11 CHAIRWOMAN BAILEY: It's problematic at
12 this point until we go through.

13 COMMISSIONER BLOOM: Correct. I would
14 agree with that. I think a list might be helpful
15 just so we don't have to go through -- go back and
16 find it. So at some point. Okay.

17 COMMISSIONER BALCH: Okay.

18 CHAIRWOMAN BAILEY: Or an exception to.
19 In the middle line, delete the words "of the
20 permanent pit requirements."

21 COMMISSIONER BALCH: I think you could
22 delete the 19.15.17 in that as well.

23 COMMISSIONER BLOOM: That are.

24 CHAIRWOMAN BAILEY: Okay.

25 COMMISSIONER BALCH: And if you want to

1 put a holder, you could put a colon and then an A or
2 a 1 or something.

3 CHAIRWOMAN BAILEY: Why not highlight this
4 in yellow so we know we have to come back to this if
5 we have a small kind of list of what the exceptions
6 will be. Just so that we don't lose that.

7 MR. SMITH: Do you want the word "allowed"
8 or "required"?

9 CHAIRWOMAN BAILEY: Exceptions that are
10 allowed. Okay. No. 2., "Operator shall give notice
11 of any request for an exception to the surface owner
12 of the requested exception. Division shall send
13 E-mail notice for the filing of the application for
14 exception to persons that have filed a written
15 request to be notified."

16 COMMISSIONER BALCH: I'm sorry. I'm stuck
17 on an exception to any exceptions.

18 MR. SMITH: Why wouldn't they apply to the
19 Santa Fe office for any exception that is allowed?

20 COMMISSIONER BALCH: Any exceptions that
21 are allowed. We can delete the "for" and "exception
22 to" after the Santa Fe office. All right. There we
23 go.

24 CHAIRWOMAN BAILEY: Okay. Now to No. 2.
25 Concerning notice. And this is where --

1 COMMISSIONER BLOOM: That's the existing
2 language and the proposed is below.

3 CHAIRWOMAN BAILEY: That would include the
4 surface owner, surface owners within a half mile,
5 county commission, officials, federal or tribal or
6 pueblo agencies and anyone who the division may
7 direct and people who requested notification and
8 posted on the division's website.

9 COMMISSIONER BALCH: The modification
10 reduces that to the surface owner and anybody who
11 filed a request for notice of filing.

12 COMMISSIONER BLOOM: Gets an E-mail.

13 COMMISSIONER BALCH: An E-mail. There was
14 some debate about this?

15 CHAIRWOMAN BAILEY: Yes.

16 COMMISSIONER BLOOM: The standards by
17 which much of our state government operates is
18 certified mail, return receipt requested.

19 COMMISSIONER BALCH: Well, that gives you
20 proof where an E-mail does not. That was brought up
21 in testimony. E-mail doesn't have a return receipt
22 on it. What happens if it's not ever read? I'm
23 sure you have received an E-mail without a return
24 receipt requested and you get to say yes or no or
25 you can read it and delete it without the return

1 request, so U.S. mail is probably more --

2 CHAIRWOMAN BAILEY: You are asking for a
3 very expensive proposition for the Division.
4 Certified mail to all of these entities is not a
5 cheap thing to do.

6 COMMISSIONER BALCH: What size is that
7 list of people right now that require or request
8 notice?

9 COMMISSIONER BLOOM: We could be talking
10 \$4 an entity.

11 CHAIRWOMAN BAILEY: Easily.

12 COMMISSIONER BLOOM: Six. I can't
13 remember what it is now. It's expensive. What if
14 the exception was accompanied by a fee of whatever
15 amount? We can't do that.

16 CHAIRWOMAN BAILEY: No. But we have that
17 notification that goes out to everybody wants to
18 know what the hearing dockets are or specialized
19 list of things, so we already have this publication
20 notice for distribution to many of these entities.

21 COMMISSIONER BALCH: I think in any
22 hearing process -- maybe I am incorrect --

23 CHAIRWOMAN BAILEY: We are not talking
24 hearing at this point.

25 COMMISSIONER BALCH: Oh, this is just to

1 apply for an exception.

2 CHAIRWOMAN BAILEY: Yes.

3 COMMISSIONER BALCH: Okay. Well, in an
4 application for exception there's going to be people
5 that are directly and immediately impacted by the
6 exception, and that might require certified mail.
7 Then there are other people that may just be
8 interested in a generic set of any exceptions that
9 might occur, and that might allow a more informal
10 notification.

11 COMMISSIONER BLOOM: In this case the
12 operator is sending the notice to the various
13 entities of the government, correct? Not the
14 division.

15 MR. SMITH: I'm sorry, I'm just confused.
16 This requires the operator to distribute notice to
17 other persons as the bureau may direct, right? So
18 why couldn't that include the persons who have
19 requested notification from the Division? I mean,
20 now we are talking about transferring that expense
21 from the Division to the operator but the operator
22 already has a pretty healthy list of people there.

23 COMMISSIONER BALCH: Commissioners, when
24 we are going through the document later, were
25 placing the bar of where the exception would be

1 required versus the variance. In my mind, if you
2 are going to have a process that is this involved
3 and expensive simply for notification, that bar
4 should be where you would accept one or two
5 exception applications a year, not 100 applications
6 a year.

7 COMMISSIONER BLOOM: We have been going
8 through this. I believe the rule, in places where I
9 can imagine where an exception would be advised,
10 would be changes to the design of a permanent pit,
11 multi-well pit, perhaps distances to water,
12 horizontal and vertical, because we have some issues
13 there with how a county would feel about that, how a
14 rancher would feel about that, State Land Office,
15 etc. That's about it.

16 CHAIRWOMAN BAILEY: Closure requirements.

17 COMMISSIONER BALCH: Closure requirements,
18 but definitely that might be a place where an
19 exception would be asked for or justified.

20 COMMISSIONER BLOOM: I think so. You want
21 notification.

22 COMMISSIONER BALCH: So in that context,
23 and I know I am asking you to make a judgment call
24 based on your experience, how many exceptions would
25 you expect to see a year? And you could say none,

1 few, many. I don't know.

2 CHAIRWOMAN BAILEY: I think until everyone
3 understands what the process is and what these new
4 requirements might be for siting requirements and
5 closure requirements and multi-well pits, that it's
6 very difficult to say. But I believe that it will
7 increase significantly depending on where we put
8 that bar, for what actions?

9 COMMISSIONER BALCH: Okay. So if you used
10 stringent closing requirements you would see more
11 exceptions requested. If you had perhaps less
12 stringent siting requirements, then you would see
13 fewer?

14 CHAIRWOMAN BAILEY: Right.

15 COMMISSIONER BLOOM: I don't know that we
16 are going to be making closure requirements more
17 stringent, so I don't know that by including closure
18 requirements under exceptions that we would be
19 seeing more exceptions.

20 COMMISSIONER BALCH: Well, I mean, I think
21 the place where closure requirements come in the
22 siting criteria is where you can close on-site
23 versus -- you are not really tying that back to the
24 requirements themselves. We still have to have the
25 siting requirements discussion, because the case was

1 brought to us with reduction to some of them,
2 keeping others the same, and that's something we
3 still have to debate.

4 The reason I brought it up is I think it's
5 important that exceptions would be a very rare
6 thing. We wouldn't want it to be common. We would
7 hope the rule itself would inherently allow
8 efficient, protective operations and that in most
9 cases a variance could be applied for if you had a
10 better way to do it, and in very frequent cases you
11 would need an exception to the rule.

12 COMMISSIONER BLOOM: I would agree with
13 that.

14 COMMISSIONER BALCH: So that's kind of a
15 philosophical thing. If exceptions are rare, I'm
16 comfortable with the wall of text there because it
17 wouldn't be something that would occur very often.

18 CHAIRWOMAN BAILEY: I'm looking at the
19 index to rules for what we are currently, and there
20 may be 15 different references to notice having to
21 do with abatement plans, allowables, commingling.
22 It's a pretty extensive list. As we try to
23 consolidate and make hearing references, a standard,
24 rather than having this application for hearing goes
25 to this and this application for hearing does that,

1 I would hate to bring up an additional way for
2 providing notice when we already have certain
3 processes for notice.

4 COMMISSIONER BALCH: Can we identify the
5 specific statute that replaces this whole paragraph
6 and then just refer it? Or approximates the intent
7 of --

8 CHAIRWOMAN BAILEY: There's no statute
9 that applies that is specific for who gets notified.
10 Some of the regulations are specific as to who gets
11 notified but it's not in the statute.

12 COMMISSIONER BALCH: Okay. So perhaps --
13 I don't know why this was included necessarily.

14 COMMISSIONER BLOOM: Commissioners, this
15 has been the law of the land for the past four
16 years. Are we seeing many exceptions for permanent
17 pits?

18 CHAIRWOMAN BAILEY: Well, remember, there
19 have been no exceptions required for 17 because it
20 was such an impossible process?

21 COMMISSIONER BALCH: I think every witness
22 that we examined could identify no applications.
23 Now, I personally am familiar with no exceptions
24 granted or maybe I think somebody said possibly one.
25 I'm not personally aware of more than one attempt to

1 get an exception. I am aware of one attempt to get
2 an exception, and that was for a modified system of
3 on-site burial. And during the process of applying
4 for that exception they eventually decided just to
5 withdraw and not try. That's a very limited amount
6 of anecdotal evidence, but the direct, indirect and
7 then our examination of the witnesses indicated that
8 exceptions are simply not happening. So the law of
9 the land allows exceptions and then makes it
10 impossible to do so.

11 COMMISSIONER BLOOM: Do we think that the
12 notification language is the reason that no one
13 would seek an exception? This is maybe a
14 standardized letter, merge it with -- put some
15 addresses on it, print it out, take it to the post
16 office? Couple hours.

17 CHAIRWOMAN BAILEY: Finding out exactly
18 who you write to to effect the federal or pueblo or
19 tribal government --

20 COMMISSIONER BLOOM: But then within a
21 half mile? I think that's pretty easy.

22 CHAIRWOMAN BAILEY: Okay. If we confine
23 it to within a half mile. But that phrasing doesn't
24 confine federal or tribal or pueblo governments
25 within a half mile.

1 COMMISSIONER BALCH: It just says
2 affected.

3 COMMISSIONER BLOOM: I think that would be
4 fine.

5 COMMISSIONER BALCH: That could be broadly
6 interpreted to mean anything that happens in any of
7 your tribal holdings.

8 CHAIRWOMAN BAILEY: But if it were
9 modified so that notification to these entities
10 within a half mile of the facility, so if there was
11 a city within a half mile or federal land within a
12 half mile or tribal lands?

13 COMMISSIONER BALCH: Federal land --
14 surface ownership, that's pretty easily tracked.
15 That data exists to the accuracy of the map. Now,
16 what you get from it that data -- and this is served
17 at the University of New Mexico on the RGIS server.
18 What you get when you get that is you get a code and
19 the code says I for Indian, B for BLM, S for state
20 and then, I think, something else for private.
21 That's kind of what you get. You don't get a
22 detailed listing of that. So you are still looking
23 at doing some research. But if you limit it to a
24 half mile, it might be a little more reasonable.

25 MR. SMITH: I suggest a couple of things.

1 On the tribal and pueblo governmental agencies, you
2 might want to say federal agencies and then tribes
3 or pueblos, because tribes and pueblos may have
4 governmental agencies that are not standard and no
5 one will be able to, with ease, identify. So I
6 would consider that, but I would caution you about
7 tribal and pueblo governmental agencies within a
8 half mile, because as we all know, tribes and
9 pueblos particularly can have interests in areas
10 that extend well beyond reservation borders and you
11 may be getting into trouble by restricting the
12 tribal and pueblo governments to a half mile.

13 CHAIRWOMAN BAILEY: How do we restrict it
14 so the Chippewas in Arkansas aren't notified?

15 MR. SMITH: Virtually every project that I
16 have known about for the past 15 years has grappled
17 with that, but I would not expect it to be more than
18 a handful, even if it's a half dozen tribes and
19 pueblos somewhere within the area, that's another
20 six letters. It's easier to ask someone to send out
21 the six letters to give notice than it is to
22 restrict it to a half mile here and have to deal
23 with complaints about that later on from tribes and
24 pueblos. I mean, I understand -- I have seen it
25 happen numerous times that you have to go through an

1 exercise to figure out what tribes and pueblos
2 should get notice. But I think in this instance
3 it's better to leave it more inclusive than to try
4 to cut it down to a half mile, particularly if we
5 are talking about some sort of exception that could
6 arguably effect notice.

7 CHAIRWOMAN BAILEY: Let's take a break.
8 Ten minutes.

9 (Note: The hearing stood in recess at
10 2:30 to 3:00.)

11 CHAIRWOMAN BAILEY: We are back on the
12 record. We took a break and we were discussing the
13 notice requirements. The proposed language reduced
14 the notice requirements to only the surface owner of
15 the location of the requested variance. The
16 previous or the current rule language that was
17 suggested to be struck is much more detailed as to
18 who needs to be notified. I think, Commissioner
19 Bloom, you said that you would not care if the
20 newspaper publication --

21 COMMISSIONER BLOOM: No, I did not say
22 that.

23 CHAIRWOMAN BAILEY: Oh, okay. I
24 misunderstood.

25 COMMISSIONER BLOOM: Commissioners, if I

1 could take a stab at some suggested language?

2 CHAIRWOMAN BAILEY: Sure.

3 COMMISSIONER BLOOM: How about something
4 along the lines of, "The operator shall give written
5 notice via certified return receipt requested to
6 surface owner, any surface owner within one-half
7 mile, including federal, state or tribal government,
8 county government or any county within one-half
9 mile, city manager or mayor," whatever we decide on
10 there, "Or city or county zoning and planning
11 jurisdiction within one-half mile and persons who
12 have requested notice from OCD of any exceptions. A
13 list of people or entities who have requested such
14 notice shall be obtained from OCD." And then you
15 could maybe do it on a separate line, "The newspaper
16 of record for the county or any county within a half
17 mile. The division in Santa Fe shall approve
18 written and public notice and put the notice on the
19 division's website."

20 That hits some of the major things that
21 are in that paragraph and spells it out a little
22 more succinctly, takes the onus of advising people
23 who have requested notify off of the division and
24 puts it on the entity that's requesting the
25 exception.

1 MR. SMITH: I want to reiterate what I
2 said earlier about tribal and pueblo governments. I
3 also want to suggest to you -- let's make sure I
4 understand where we are. As I appreciated, you have
5 testimony, evidence and argument before you that the
6 exception process has not been used much because it
7 is too cumbersome. As part of that, there have been
8 proposals made as to how to edit the notice
9 provision in order to cure some of the cumbersome,
10 right? I think you can consider that. I think you
11 can make decisions in that regard.

12 I am concerned about the half mile,
13 however you use it. I know you wanted to say before
14 a half mile of tribes and government and now
15 Commissioner Bloom, that's sort of expanding.

16 My concern with the half mile is this:
17 Unless you have something before you that gives you
18 an idea that a half mile for some reason or other
19 will do the notice job that you need to have done
20 here, and I don't think that anyone testified to
21 that, if or unless you have maybe an example from
22 another governmental entity that has restricted
23 notice to a half mile for perhaps the same reasons
24 that you might want to, I am concerned that
25 inserting the half mile business could be argued as

1 arbitrary.

2 COMMISSIONER BALCH: Now, in the existing
3 Rule 17 language that has been struck in this
4 modification, they had the half mile.

5 CHAIRWOMAN BAILEY: The half-mile limit
6 for surface owners of the location. It does not
7 restrict the half mile for county commission, city
8 officials, federal or tribal or pueblo governmental
9 agencies.

10 COMMISSIONER BALCH: So that's actually
11 could include pretty much anybody.

12 COMMISSIONER BLOOM: Actually within half
13 mile of the city limits or city zoning and planning
14 jurisdiction, and I thought to include federal,
15 state or tribal governments within one-half mile so
16 we don't have to notify them all in the state.
17 That's pretty ambiguous.

18 COMMISSIONER BALCH: Whether that was
19 decided arbitrarily or not because I --

20 MR. SMITH: But your precedent for the
21 existing rule, it looks to me like are those divided
22 by semicolons.

23 CHAIRWOMAN BAILEY: Yes.

24 MR. SMITH: Looks to me you are talking
25 about city officials that are within a half a mile.

1 That's it, isn't it?

2 COMMISSIONER BALCH: So let me make a
3 brief comment. At this point we are getting bogged
4 down in the details of comparing and contrasting the
5 language. The existing language and the proposed
6 language. What may be important really is to lay
7 out the intent as we see it in a clear, listed
8 fashion and then say yes or no to each individual
9 one.

10 COMMISSIONER BLOOM: That's what I
11 attempted to do. So surface owner within a half
12 mile, city or county government within a half mile
13 and people that have requested notice and then any
14 other level of government within a half mile.

15 COMMISSIONER BALCH: Well, anybody that
16 requested notice of the exception could be
17 world-wide.

18 COMMISSIONER BLOOM: But I can understand
19 why they want to know what the exception is, too,
20 the people that you have on the list. And I don't
21 know that it's a tremendously long list. You
22 probably get some environmental organizations.
23 That's who comes to my mind.

24 MR. SMITH: From the due process
25 perspective, you can get in trouble faster with

1 notice than practically anything.

2 CHAIRWOMAN BAILEY: Let's look at --

3 MR. SMITH: So please be careful.

4 CHAIRWOMAN BAILEY: -- the current
5 language and delete the references to closed-loop
6 systems, below-grade tanks, which Theresa has
7 already done, and let's look at the paragraph as
8 it's written now to see if it is the final copy.

9 COMMISSIONER BALCH: I think if the
10 commissioners would be willing to humor me, we are
11 getting to the point where we are starting to list
12 the people notified and put a colon and if we could
13 put a bullet list of some kind and put it in the
14 paragraph later, but just for me to see how they
15 work together. I am having a hard time digesting
16 that large block of text.

17 CHAIRWOMAN BAILEY: Okay. So the operator
18 shall give written notice by certified mail, return
19 receipt requested, to, colon. Now, hit the return
20 and turn that into a bullet.

21 COMMISSIONER BALCH: Or A, B, C or
22 whatever is appropriate.

23 CHAIRWOMAN BAILEY: Okay. A. The surface
24 owner of record where the pit of proposed
25 alternatives is or will be located. B, surface

1 owner goes of record within a half mile of such
2 location. C, hit the return where there's a
3 semicolon and turn it into D. Right there.

4 COMMISSIONER BALCH: Thank you very much.

5 CHAIRWOMAN BAILEY: That's easier.

6 COMMISSIONER BALCH: Now we can determine
7 whether we think it's appropriate or not or if the
8 record has anything that would allow us to make a
9 determination.

10 CHAIRWOMAN BAILEY: This is certified
11 mail, return receipt, which is 4 to \$6. Is that
12 what you said? Surface owner, I think we can all
13 agree on that, can't we?

14 COMMISSIONER BLOOM: Yes.

15 COMMISSIONER BALCH: Yes.

16 CHAIRWOMAN BAILEY: Surface owner within a
17 half mile? We can all agree on that?

18 COMMISSIONER BALCH: I would think so.

19 CHAIRWOMAN BAILEY: County Commission of
20 the county where the pit is located?

21 COMMISSIONER BLOOM: Sure.

22 COMMISSIONER BALCH: Yes.

23 CHAIRWOMAN BAILEY: City officials located
24 if it's within city limits or within a half mile of
25 city limits or within zoning or planning

1 jurisdiction.

2 COMMISSIONER BALCH: It's it redundant to
3 say a half mile there.

4 CHAIRWOMAN BAILEY: No, because it's
5 either in the city or within a half mile of the
6 city, which may not be the same as the city zoning
7 or planning jurisdiction?

8 COMMISSIONER BALCH: I think the logic for
9 that would be similar to that of surface owners
10 within a half mile compared to the surface owner.
11 If you have a city limit within a half mile.

12 Now, in practice I would like to just
13 bring up again if you want to look at city limits,
14 there's a couple sources you can go to. One of them
15 is going to be a topo sheet, which is very likely to
16 be out of date and not accurately represent where
17 the city limit is. You could also go to RGIS at UNM
18 and it's got a time stamp. They don't update it
19 every day, they update it periodically.

20 So some of the things you can say within a
21 half mile and you may or may not be able to comply
22 unless you give them a direct source that they are
23 going to go to.

24 CHAIRWOMAN BAILEY: They can communicate
25 with the city manager or some city official to

1 determine if the city limits.

2 COMMISSIONER BLOOM: I think remember,
3 these may not apply to everybody. Being in
4 proximity to a city may be rare.

5 COMMISSIONER BALCH: If you are close to a
6 city you may want to talk to somebody in the city.

7 COMMISSIONER BLOOM: I think we could
8 specify the city manager.

9 COMMISSIONER BALCH: If you say
10 appropriate city officials, I don't know what that
11 means.

12 COMMISSIONER BLOOM: It's too ambiguous.
13 I think there's a lot of ambiguity in E. Affected
14 is just an unbelievably wide door.

15 COMMISSIONER BALCH: When you mean city,
16 does that also include villages, pueblos?

17 COMMISSIONER BLOOM: Municipality.

18 COMMISSIONER BALCH: Municipality?

19 COMMISSIONER BLOOM: Then you get into --

20 COMMISSIONER BALCH: I'm not sure if the
21 city and the village are defined by the same
22 municipalities. I don't know anything about that.

23 I know we have the City of Socorro and next to us is
24 the Village of Magdalena.

25 CHAIRWOMAN BAILEY: So you would only

1 notify Socorro, but the county would also be
2 notified on behalf of the village.

3 COMMISSIONER BALCH: Okay. So that would
4 cover the lower tier of municipalities.

5 COMMISSIONER BLOOM: And there's
6 publication in the paper of record, which for most
7 of the state is the Albuquerque Journal and perhaps
8 a smaller one.

9 COMMISSIONER BALCH: In my example
10 Magdalena has a weekly paper and Socorro has a
11 biweekly paper.

12 CHAIRWOMAN BAILEY: That's the big time.

13 COMMISSIONER BALCH: So you are suggesting
14 we modify D to be the city manager in.

15 CHAIRWOMAN BAILEY: We don't know if
16 that's the appropriate city official. I don't know
17 the city regulations or who would be the appropriate
18 person.

19 COMMISSIONER BLOOM: I think the city
20 manager could decide very easily.

21 COMMISSIONER BALCH: Does every city have
22 a city manager?

23 MR. SMITH: You may not have a city
24 manager.

25 COMMISSIONER BALCH: So what will be -- I

1 guess the language would be the appropriate city
2 official would be as close as you could get and you
3 would have to do research to find out who the person
4 would be.

5 CHAIRWOMAN BAILEY: Shall we go to E?

6 COMMISSIONER BLOOM: Should we make it
7 appropriate city official?

8 CHAIRWOMAN BAILEY: Make it single?

9 COMMISSIONER BALCH: Yeah. That's very
10 broad. Affected is very inclusive.

11 CHAIRWOMAN BAILEY: Affected may not be
12 the land manager, the way that's written.

13 MR. SMITH: I would suggest that you
14 separate federal from tribal and pueblo.

15 COMMISSIONER BLOOM: Make another F for
16 tribal or pueblo?

17 COMMISSIONER BALCH: Okay.

18 MR. SMITH: You may have different
19 considerations.

20 COMMISSIONER BALCH: If you have a federal
21 agency, BLM, U.S. Forest Service, et cetera, aren't
22 they already the surface owner?

23 MR. SMITH: Well, you would think that if
24 the BLM is involved or if the Forest Service is
25 involved, they would be involved as surface owners,

1 yes.

2 COMMISSIONER BALCH: So I'm not sure what
3 you gain by having notice to affected federal
4 agency. An affected federal agency might be
5 physician and game or you could send notice to BLM.

6 MR. SMITH: I have no idea who is
7 envisioned here on affected federal agencies.
8 You're right, it's very broad.

9 COMMISSIONER BALCH: So affected, seems
10 like affected agencies might be within a half mile
11 becomes even -- even if you are trying to limit it
12 to a half mile, if you just use the word affected
13 you are including anybody that might think that they
14 are impacted no matter where they are.

15 MR. SMITH: Well, in order to avoid
16 struggle with whoever that may be, yes. The fact
17 that someone thinks they are affected, at least the
18 fact that the federal government thinks it's
19 affected does not mean that it is. I truly don't
20 know where affected federal agency gets you did,
21 because the only ones I can think of that will be
22 involved would be the surface owners.

23 COMMISSIONER BALCH: Surface owners.

24 MR. SMITH: But I can't promise you that
25 because I don't know enough about the long arms of

1 federal agencies.

2 CHAIRWOMAN BAILEY: But if we say 2,
3 federal land managers of -- land managers of federal
4 lands within one-half mile.

5 COMMISSIONER BALCH: Isn't that already
6 covered by A and B?

7 CHAIRWOMAN BAILEY: Which becomes surface
8 owners. That's right.

9 COMMISSIONER BLOOM: What about
10 subsurface? I just mention that because we are
11 dealing with permanent and multi-well.

12 COMMISSIONER BALCH: If you want to gum
13 things up, you can talk about pore space, too.

14 COMMISSIONER BLOOM: Who owns the pore
15 space?

16 MR. SMITH: I mean, you could look at it
17 this way. Well, no. I was going to say if the only
18 affected federal agencies are agencies for the
19 surface owners, then having to affected federal
20 agencies doesn't really add anything that the
21 operator has to do, but what it does do is allow a
22 federal agency that is not a surface owner to claim
23 a failure of notice.

24 COMMISSIONER BALCH: They would be able to
25 include themselves on the list of other persons that

1 the Environmental Bureau in Santa Fe maintains.

2 CHAIRWOMAN BAILEY: They could include
3 themselves as surface owners.

4 MR. SMITH: As long as they have asked to
5 be on some list.

6 COMMISSIONER BALCH: You know that, you
7 worked at the land office. For mineral rights is
8 there any other agency that owns minerals besides
9 BLM?

10 CHAIRWOMAN BAILEY: BIA may manage some.

11 COMMISSIONER BLOOM: Forest Service.
12 Forest Service is doing the NEPA process for the
13 proposed uranium mine.

14 CHAIRWOMAN BAILEY: But is that for
15 surface considerations?

16 COMMISSIONER BALCH: NEPA is usually
17 surface related.

18 CHAIRWOMAN BAILEY: State Parks owns some.

19 COMMISSIONER BALCH: But they also are the
20 surface owner/operator. So to me if you include --
21 if you are very, very broad about affected agencies,
22 you are going to come up with a situation where you
23 can never going to be able to notify everybody who
24 could potentially be identified.

25 MR. SMITH: Talking about affected federal

1 agencies now?

2 COMMISSIONER BALCH: Yes. You could do
3 your due diligence and you could nail a list of 12
4 different agencies and Agency 13 could come in and
5 say, "Wait a second. We were affected."

6 COMMISSIONER BLOOM: Are we required to
7 notice anybody?

8 CHAIRWOMAN BAILEY: No.

9 COMMISSIONER BALCH: Says shall give
10 written notice by certified mail.

11 COMMISSIONER BLOOM: No, I mean, is OCD
12 required to --

13 CHAIRWOMAN BAILEY: There's a list. I
14 looked this up a while ago. There's a list of
15 certain instances in which we do have specified
16 people that require notice, but if a situation
17 arises where it's not one of those specified lists,
18 it says "as the division requires." So it leaves
19 this wide open. And I'm hearing a solution to your
20 question by simply eliminating E.

21 COMMISSIONER BALCH: I think for almost
22 every case I can imagine, A and B cover E.

23 MR. SMITH: You're going to eliminate
24 tribal and pueblo governments along with federal
25 agencies?

1 CHAIRWOMAN BAILEY: Because they are part
2 of B and A.

3 MR. SMITH: If they are within a half
4 mile.

5 CHAIRWOMAN BAILEY: Right.

6 MR. SMITH: I told you what I think about
7 that.

8 CHAIRWOMAN BAILEY: We need to include the
9 tribes?

10 MR. SMITH: I think you should include
11 affected tribes and pueblos.

12 COMMISSIONER BALCH: Then I think you
13 should use the language similar to what is in the
14 line for surface owners. You should say, "Federal
15 agencies of record with land ownership or within a
16 half mile." Or if you want to say --

17 MR. SMITH: Well, I have suggested to you,
18 and I won't, because now, again, there are more than
19 this because I don't want to harp on it -- that you
20 separate federal agencies from tribal and pueblo
21 governments; that you consider whatever restrictions
22 you wish to put on the federal agencies and tribal
23 and pueblo governments separately and that you leave
24 it at affected tribal or pueblo governments.

25 CHAIRWOMAN BAILEY: Okay. So in E, you

1 are suggesting that we delete -- no, E, above that.

2 We subtract the word "federal or"?

3 MR. SMITH: No, I am suggesting the first
4 thing you do is hit the enter key after "or" and
5 create another line.

6 CHAIRWOMAN BAILEY: Okay.

7 MR. SMITH: Now, if you want to
8 put "affected federal agencies who have an interest
9 within one-half mile" or something, and you want to
10 limit that in some way --

11 CHAIRWOMAN BAILEY: So we could say, "To
12 federal agencies managing lands within one-half
13 mile."

14 COMMISSIONER BLOOM: Surface and
15 subsurface. I think I was wrong about the forest
16 service. The only division I have heard of is the
17 Department of the Interior.

18 COMMISSIONER BALCH: This may be difficult
19 to determine. I don't know what else to do. I'm
20 trying to think of a resource that would show this.
21 It's nice to include everybody, but if you can't
22 find the information --

23 MR. SMITH: I am having real trouble
24 figuring out what federal agencies we are talking
25 about here, the same way you are. I mean, all I can

1 think of --

2 COMMISSIONER BALCH: It's not that.
3 There's no place, I don't think, where you can do a
4 search and say, "Here is my location, show me all
5 federal agencies withhold goes within a half mile."
6 There's nothing like that, that I know of. Maybe
7 there is, but if you are going to require people to
8 do that, that might be is significant task for
9 someone that's trying to provide notification.

10 COMMISSIONER BLOOM: If it we look to see
11 how other state agencies have dealt with this sort
12 of a list of identification.

13 COMMISSIONER BALCH: We don't have a duty.

14 CHAIRWOMAN BAILEY: As the Division
15 determines.

16 MR. SMITH: I think what you want to be
17 careful of here is you are talking about an
18 exception, and the argument that is going to be
19 raised is if exceptions are going to be significant,
20 at least as you all are considering them, hoping
21 that they will be few and far between. And if they
22 are significant departures from requirements of the
23 rule, there's an argument that you don't want to
24 short script your notice.

25 COMMISSIONER BALCH: If you modify A and B

1 to say surface and mineral owners of record, would
2 that cover E and F?

3 MR. SMITH: You want to do mineral owners?
4 That's a mess.

5 CHAIRWOMAN BAILEY: That's miserable.

6 COMMISSIONER BALCH: All right. I think
7 that's the can of worms you are opening if you say
8 federal agencies managing lands within a half mile.

9 CHAIRWOMAN BAILEY: But you are including
10 fee owners, and that determination of fee ownership
11 is a whole --

12 COMMISSIONER BALCH: Could be 100 people
13 with 1 percent.

14 CHAIRWOMAN BAILEY: Exactly. Let's not
15 have mineral owners. Okay. So we are down to how
16 do we determine what federal agencies are managing
17 lands within a half mile?

18 MR. SMITH: Well, let me ask now, again,
19 the concern here is streamlining a process that has
20 been testified to as cumbersome but you don't have
21 testimony specifically -- or do you? That notifying
22 federal agencies has been a chore.

23 CHAIRWOMAN BAILEY: We don't have any
24 specific --

25 COMMISSIONER BALCH: There's no testimony

1 on that specific portion of the modification.

2 MR. SMITH: I mean, I think you are able
3 to streamline the process. I think you are able to
4 streamline the process including notice if you have
5 notice that it's cumbersome and since you already
6 have a proposed amendment that addresses notice.
7 But I don't know that you need to fret over what to
8 do with federal agencies if no one has told you
9 federal agencies are a real problem.

10 COMMISSIONER BALCH: So are you saying we
11 can delete B or leave it there and not worry about
12 it?

13 MR. SMITH: I don't know that you need to
14 worry about it. No one has told you it's a real
15 issue. You can streamline the process in other
16 ways. I mean, if you had already fixed to your
17 concern over federal agencies, that would be one
18 thing. But you are trying very hard to make a cut
19 that you don't know how to make and you may not have
20 to make it anyway.

21 CHAIRWOMAN BAILEY: Let's go ahead and
22 delete E.

23 MR. SMITH: I would be inclined to tell
24 you to leave it in.

25 COMMISSIONER BALCH: I would as well. I

1 think his point is nobody said it's bad.

2 CHAIRWOMAN BAILEY: Okay. So we leave it.

3 COMMISSIONER BALCH: And F, if you could
4 change the language to match that of E, would that
5 be acceptable?

6 MR. SMITH: I'm sorry, for what?

7 COMMISSIONER BALCH: I don't really like
8 the word "affected." I would rather say, "To tribal
9 or pueblo governmental agencies managing lands
10 within a half mile.

11 COMMISSIONER BLOOM: How about governments
12 so we don't have to notify multiple governmental
13 agency goes?

14 COMMISSIONER BALCH: That's true.

15 CHAIRWOMAN BAILEY: Are you going to stick
16 with managing land within a half mile or are you
17 going to go back to affected agencies?

18 COMMISSIONER BALCH: I think affected is
19 too vague.

20 MR. SMITH: Once again --

21 COMMISSIONER BALCH: Put it this way. I
22 don't think you can ever prove to everyone's
23 satisfaction that you notified all the affected
24 agencies.

25 MR. SMITH: But you also don't have a

1 problem with that.

2 COMMISSIONER BALCH: But part of the
3 process of streamlining something is to anticipate
4 the problems that could occur with that process.

5 CHAIRWOMAN BAILEY: Affected means that we
6 would have to look at the EPA, at quality.

7 COMMISSIONER BALCH: Who thinks they are
8 affected? We would have to query every federal
9 agency and ask them if they think we are affected.

10 COMMISSIONER BLOOM: Among themselves they
11 will typically share that information.

12 COMMISSIONER BALCH: I would suspect that
13 if an agency were not managing lands within a half
14 mile yet felt they were affected, say the EPA, that
15 that would be brought to their attention by BLM.

16 COMMISSIONER BLOOM: And we are publishing
17 this in a newspaper of record, too.

18 MR. SMITH: Okay.

19 CHAIRWOMAN BAILEY: You advise us to not
20 put the limitation on the tribal governments?

21 MR. SMITH: I would advise you to put
22 tribal or pueblo governments, period.

23 COMMISSIONER BLOOM: Within one-half mile?

24 MR. SMITH: Period. I wouldn't limit it
25 to a half mile. Affected tribal or pueblo

1 governments.

2 COMMISSIONER BALCH: How about tribes are
3 there in the U.S.?

4 MR. SMITH: Well, look. That sort of
5 notice provision is not uncommon in virtually any
6 development that the government has anything to do
7 with, and yes, it creates an issue of who is
8 affected and how many tribes you need to notice.

9 COMMISSIONER BALCH: Can I say something
10 real quick?

11 MR. SMITH: Sure.

12 COMMISSIONER BALCH: If someone applied
13 for exception, they made their notice and they
14 demonstrated due diligence in notifying affected
15 agencies and tribes, are they in trouble if somebody
16 else says, "Wait a second, we are affected too"?

17 MR. SMITH: There will be a claim of
18 failure of notice. Yes.

19 CHAIRWOMAN BAILEY: Aren't there statutes
20 concerning notification of Indian and pueblo tribes,
21 governments for certain activities? I seem to
22 recall that there has been some sort of state way to
23 address this.

24 MR. SMITH: We have a tribal consultation
25 requirement. I don't know and I haven't looked at

1 it. I don't know that that would reach this and I'm
2 relatively certain operators would just as soon that
3 it didn't.

4 CHAIRWOMAN BAILEY: Right.

5 MR. SMITH: Consultation could be quite a
6 process.

7 CHAIRWOMAN BAILEY: Let's go ahead and put
8 F, to affected tribal and pueblo governments and
9 scratch that language. There are ways that we can
10 get in trouble with the --

11 COMMISSIONER BALCH: By the same token you
12 have to switch E back to affected federal agencies.

13 MR. SMITH: No, let me tell you why you
14 don't. Because your experience with tribes and
15 pueblos tells you is that they say routinely that
16 they have interests extending beyond their
17 reservation boundaries. You don't have federal
18 agencies -- although federal agencies may want to
19 extend their jurisdiction a good deal -- you don't
20 have the same sort of cultural sensitivity issues
21 with federal agencies and that's why. So if you
22 want to keep a half mile on federal agencies.

23 COMMISSIONER BALCH: I think it's easier
24 to apply even though I don't know how you would
25 apply it. I guess you could walk around that square

1 mile area and look for signs.

2 MR. SMITH: Well, remember, your goal here
3 is to streamline the entire process, not just the
4 notice provision. So you don't streamline that,
5 maybe you streamline something else and accomplish
6 the goal.

7 CHAIRWOMAN BAILEY: In G, let's
8 remove "the Environmental Bureau."

9 COMMISSIONER BALCH: That's the "division
10 of Santa Fe office may direct." Delete the and
11 also. Does this list meet your concerns?

12 COMMISSIONER BLOOM: Yes.

13 CHAIRWOMAN BAILEY: Can we agree on that
14 paragraph?

15 COMMISSIONER BALCH: For what it is. I
16 guess you can't make everything efficient. But, you
17 know, I think we go back to the intent of the
18 exceptions. They should be a rare thing and the
19 variances will capture most of the more routine
20 processes. If it's a once or twice a year or once
21 every couple years attempt, I suppose it deserves a
22 lot of attention. We have crafted it so the
23 exception is something people are asking for three
24 times a month, this will become burdensome.

25 COMMISSIONER BLOOM: Yeah, I generally

1 agree with that. I think it's for changes to
2 something that have a lot of impact.

3 CHAIRWOMAN BAILEY: Higher level.

4 COMMISSIONER BLOOM: Higher level. It
5 might be requested frequently but they still have a
6 big impact so you want to be careful how you
7 proceed.

8 CHAIRWOMAN BAILEY: Let's go down to the
9 next paragraph --

10 MR. SMITH: Madam Chair, I'm sorry. On
11 federal agencies, you might want to put "within
12 one-half mile" of what? Assuming that "of such
13 location." Or you could put Seattle, Washington and
14 you don't have any problems.

15 CHAIRWOMAN BAILEY: Okay. In A we might
16 want to change the word "pit" to "where the
17 exception is requested."

18 COMMISSIONER BALCH: That's what the
19 exception is. The next three words there.

20 CHAIRWOMAN BAILEY: Delete the next three
21 words and delete the next word.

22 COMMISSIONER BALCH: Requested, comma.

23 CHAIRWOMAN BAILEY: No comma after B.

24 Then we go to the next paragraph that
25 begins "additionally."

1 COMMISSIONER BLOOM: Could we make that 3?

2 CHAIRWOMAN BAILEY: Yes, it would be.

3 MR. SMITH: Put it the way they want it
4 and if they kick it back we can fix it. You can
5 indent them.

6 COMMISSIONER BALCH: I think this gives
7 the person doing the requesting a nice checklist on
8 the regulation instead of a paragraph.

9 CHAIRWOMAN BAILEY: Okay. We need to look
10 at that paragraph that begins "additionally." And
11 you were correct to remove "the Environmental
12 Bureau." Are we happy with Paragraph 3?

13 COMMISSIONER BLOOM: We might want to
14 delete in the last sentence, "The division shall
15 distribute notice of the application to persons who
16 have requested notification," because the division
17 up above would be instructing the operator to do so.
18 It should read, "The division shall post notice of
19 the notice on the division website."

20 COMMISSIONER BALCH: You're asking them to
21 send certified letter to all those people.

22 CHAIRWOMAN BAILEY: Okay. Then that is
23 No. 3 and the following paragraph becomes No. 4.

24 COMMISSIONER BALCH: I think 2 and 3 now
25 replace this one, right?

1 CHAIRWOMAN BAILEY: Yes.

2 COMMISSIONER BLOOM: We can delete 2.

3 CHAIRWOMAN BAILEY: And that deletes the
4 green portion. And we have the correct number
5 there.

6 MR. SMITH: The green portion that you
7 just deleted was a standard for demonstration,
8 wasn't it?

9 COMMISSIONER BLOOM: We have that up
10 above.

11 COMMISSIONER BALCH: No, that was in
12 variances, so I think you are right. We need to --

13 CHAIRWOMAN BAILEY: Can we put it back?

14 COMMISSIONER BALCH: There were two
15 suggested language changes for -- well, there was a
16 modification and a is suggested change to the
17 modification?

18 COMMISSIONER BLOOM: I think perhaps we
19 were leaning towards the sort of language we saw in
20 3. Change the N to "The Santa Fe office may
21 approve."

22 COMMISSIONER BALCH: If we go back to the
23 variances section briefly, I wonder if it would be
24 wise to just adopt some of the same language and
25 modify it to the Santa Fe office.

1 COMMISSIONER BLOOM: I think that would
2 work.

3 CHAIRWOMAN BAILEY: Copy Paragraphs 1 and
4 2.

5 COMMISSIONER BALCH: You might even
6 want --

7 COMMISSIONER BLOOM: So 3 and everything
8 under it?

9 COMMISSIONER BALCH: I don't know.

10 CHAIRWOMAN BAILEY: Is there has to be
11 some basis for denial?

12 COMMISSIONER BLOOM: We are coming up on
13 that language there. It's the same language, A, B
14 and C, so probably start by --

15 COMMISSIONER BALCH: I think we should
16 probably be consistent in our language and the
17 process. The only thing that's really changing is
18 this part of the process. This becomes 4.

19 COMMISSIONER BLOOM: We changed
20 "appropriate division district office" to the "Santa
21 Fe office"?

22 CHAIRWOMAN BAILEY: Yes.

23 COMMISSIONER BLOOM: The requested
24 exception.

25 CHAIRWOMAN BAILEY: The Santa Fe office.

1 COMMISSIONER BLOOM: Shall approve or
2 deny.

3 COMMISSIONER BALCH: Is 60 days enough for
4 an exception?

5 CHAIRWOMAN BAILEY: This is more
6 technical. It has a lot more to do with --

7 COMMISSIONER BALCH: Ninety?

8 CHAIRWOMAN BAILEY: At least 90.

9 MR. SMITH: Do you want to change variance
10 to exception?

11 CHAIRWOMAN BAILEY: Yes. The beginning of
12 the line just above.

13 COMMISSIONER BALCH: Right above your
14 cursor. Exception. Next paragraph will become 5.
15 "If the appropriate division district office denies
16 the exception." Put 90 days. With just notice to
17 the operator, and then do we want to point back to
18 all of those stakeholders that we just identified?

19 COMMISSIONER BLOOM: What happens if the
20 operator doesn't request the hearing within ten
21 days? They can't request it?

22 CHAIRWOMAN BAILEY: That's their time. Is
23 that reasonable?

24 COMMISSIONER BALCH: More time perhaps?

25 CHAIRWOMAN BAILEY: Maybe 30.

1 COMMISSIONER BALCH: Twenty one?
2 Fourteen.

3 COMMISSIONER BLOOM: Maybe 21 in case
4 somebody is out of town.

5 MR. SMITH: I'm going to point out now
6 before I forget, we have both in the variance
7 section and in this section requirements that
8 something be done within 90 days, and I think we
9 need to make sure it says within 90 days of the
10 application or receipt of the application.
11 Otherwise if I wanted more time under 5, I would say
12 within 90 days of when I made the determination.

13 COMMISSIONER BALCH: Of the complete
14 application?

15 CHAIRWOMAN BAILEY: Definitely the
16 complete application.

17 COMMISSIONER BALCH: You are suggesting we
18 go back and change the language in variance as well?

19 MR. SMITH: Yes, and above where you have
20 the approval or denial of the exception would be
21 within 90 days of receipt of the complete
22 application.

23 COMMISSIONER BALCH: So the first place
24 you can put it is at the end of 4. And then 1 and 2
25 of the variance section. Right after 60 days. So

1 we can go back down to where we were.

2 CHAIRWOMAN BAILEY: Now we are down to 3,
3 to change the word "variance" to "exception."

4 COMMISSIONER BALCH: I think you want to
5 say, "Wants an exception to the requirement."

6 CHAIRWOMAN BAILEY: Demonstration that the
7 exception. You can scroll on down. This becomes 7.

8 COMMISSIONER BALCH: "If an exception."

9 CHAIRWOMAN BAILEY: It needs to be "an
10 exception." C actually becomes As.

11 COMMISSIONER BLOOM: Looks like we are
12 cutting and pasting and something got cut off after
13 NMAC.

14 CHAIRWOMAN BAILEY: Yes, we need to go
15 back up to variance and see what we copied from.

16 COMMISSIONER BLOOM: What we lost.

17 MR. SMITH: You may just need to change N
18 to a lower case.

19 COMMISSIONER BLOOM: Yes, that's it.

20 MR. SMITH: After NMAC, change the N to a
21 lower case I.

22 COMMISSIONER BALCH: Now go back to 7 of
23 the exceptions portion, C7 and do the same thing?

24 CHAIRWOMAN BAILEY: C becomes A down
25 below.

1 COMMISSIONER BALCH: For an exception
2 instead of a variance. I don't know where that "un"
3 came from.

4 CHAIRWOMAN BAILEY: It has to be "an
5 exception."

6 COMMISSIONER BALCH: Here we may want to
7 point back to the big master list of everyone that's
8 supposed to be notified.

9 COMMISSIONER BLOOM: We could say proof of
10 notification to --

11 COMMISSIONER BALCH: Pursuant to whatever.

12 CHAIRWOMAN BAILEY: Whatever the citation
13 was there.

14 COMMISSIONER BALCH: Proof of notification
15 pursuant to.

16 MR. SMITH: You may not want to use
17 pursuant to -- and maybe this is what you want
18 although I doubt it -- all that would have to be
19 proven would be that notice was given originally
20 under. So you might want to say "proof of
21 notice" --

22 COMMISSIONER BALCH: Parties identified.

23 MR. SMITH: Yes, proof of notice of the
24 hearing.

25 COMMISSIONER BALCH: Proof of notification

1 of the hearing.

2 MR. SMITH: To persons or entities?

3 COMMISSIONER BALCH: I would say parties
4 identified in 19.15.17.15C and then I don't know
5 what the number is.

6 CHAIRWOMAN BAILEY: Check citation.
7 That's all right.

8 COMMISSIONER BLOOM: Two. Do we need to
9 notify those people again that a hearing could be
10 held?

11 COMMISSIONER BALCH: First thing you are
12 doing is you are notifying them that an exception is
13 being requested, and I think all those parties would
14 still be interested in the case of a hearing
15 regarding the exception.

16 COMMISSIONER BLOOM: So do they need to be
17 contacted that a hearing might take place?

18 COMMISSIONER BALCH: Or that a hearing was
19 scheduled?

20 MR. SMITH: You could consider giving
21 notice to those parties if they responded or
22 expressed an interest because of the notice that
23 they got on the exception.

24 COMMISSIONER BALCH: Well, they might not
25 be interested in the application for the exception

1 but they may be interested in the result.

2 MR. SMITH: Okay.

3 COMMISSIONER BALCH: Of that application.

4 MR. SMITH: I think that's a good point.

5 COMMISSIONER BALCH: You know, we are
6 trying to make the exceptions a rare beast so the
7 bar should be high. Variances are supposed to take
8 care of all the minor stuff that people would be
9 requesting an exception for.

10 MR. SMITH: Okay.

11 CHAIRWOMAN BAILEY: Okay. I think we can
12 scroll down.

13 COMMISSIONER BALCH: We may have just
14 finished the exceptions section. I think we have
15 established a timeline so 4 is not necessary.

16 CHAIRWOMAN BAILEY: It discusses who is
17 capable, who is contesting. I think 4 should stand
18 as it is.

19 COMMISSIONER BLOOM: Would that be above
20 8? No, that's different.

21 COMMISSIONER BALCH: This is before there
22 would be a hearing.

23 CHAIRWOMAN BAILEY: To determine whether
24 or not a hearing is --

25 COMMISSIONER BALCH: So this would come --

1 COMMISSIONER BLOOM: Not necessarily,
2 because the first hearing takes place if the
3 exception is rejected, right? That's one way to get
4 to hearing. The other is --

5 CHAIRWOMAN BAILEY: There could be the
6 appeal of the operator if there is denial.

7 COMMISSIONER BALCH: That's the only way
8 it goes to hearing.

9 COMMISSIONER BLOOM: That's the first one.
10 The second one is if --

11 COMMISSIONER BALCH: Seems like this has
12 to go between the point where we have had a decision
13 made.

14 COMMISSIONER BLOOM: Yeah.

15 COMMISSIONER BALCH: And before you start
16 talking about hearings.

17 COMMISSIONER BLOOM: Yeah. Does that need
18 to be moved up?

19 COMMISSIONER BALCH: I think so.
20 Commissioner Bailey?

21 CHAIRWOMAN BAILEY: Sure. Let's try it up
22 above the first hearing.

23 MR. SMITH: So just so I'm clear on what
24 you all are doing here, what you are envisioning is
25 the hearing process that you have just now worked

1 through and got happy with was an appeal hearing?

2 COMMISSIONER BALCH: Yes.

3 MR. SMITH: And the hearing that you are
4 currently contemplating is a hearing that someone
5 else requests on the exception before the division
6 makes a decision?

7 CHAIRWOMAN BAILEY: Right.

8 COMMISSIONER BALCH: So that would go
9 right before 5. So they first have to submit the
10 first application before anybody can make a
11 determination or conclusion that they have a problem
12 with it or an interest in it.

13 CHAIRWOMAN BAILEY: We already had notice
14 given by the operator to all those people
15 withstanding.

16 MR. SMITH: I want to make another
17 suggestion. You are going to get a lot from me on
18 this because this is process. You might want to put
19 something after the notice provision, but the fact
20 that someone is listed for notice does not mean that
21 they have standing or it's not the intent to grant
22 standing by giving notice.

23 COMMISSIONER BALCH: Let's do this and
24 then we can do that. This is a new 5. Now we can
25 go up. All right. So do you want to continue

1 Paragraph 2 below that list?

2 MR. SMITH: Sure you could do that.

3 COMMISSIONER BALCH: Right at the end of
4 G. Start into the unnumbered text, which would
5 continue Paragraph 2?

6 MR. SMITH: Go down one more.

7 CHAIRWOMAN BAILEY: Just hit return.

8 COMMISSIONER BALCH: You can recite your
9 legal terminology here.

10 MR. SMITH: Receipt of notice pursuant to
11 this -- are we calling them subsections or
12 subparagraphs?

13 CHAIRWOMAN BAILEY: That's determined by
14 the --

15 MR. SMITH: Do you know what they are
16 being called? Pursuant to this subpart shall not be
17 construed, in and of itself -- no, take out "in and
18 of itself." As an indication of standing. Put a
19 comma after without more.

20 COMMISSIONER BLOOM: Without more what?

21 MR. SMITH: Comma.

22 COMMISSIONER BALCH: You can tell this
23 part was not written by us.

24 COMMISSIONER BLOOM: I'm lost. I can't
25 make sense of that now. I don't know what we are

1 trying to do.

2 MR. SMITH: What we are trying to say is
3 just because you get notice doesn't mean that you
4 effectively to demand a hearing. You have to have
5 standing, and the fact that you get notice doesn't
6 necessarily mean that you have standing.

7 COMMISSIONER BLOOM: How about receipt
8 shall not be construed as an indication of standing?
9 Do we need without more?

10 CHAIRWOMAN BAILEY: No.

11 MR. SMITH: Take out "without more."

12 COMMISSIONER BALCH: Then it's up to them
13 if they want to get a determination of standing
14 somehow.

15 MR. SMITH: Right.

16 COMMISSIONER BALCH: I think that's a fair
17 enough disclaimer.

18 CHAIRWOMAN BAILEY: So we can --

19 COMMISSIONER BLOOM: I'm sorry, just to
20 clarify, is there anything up above that would
21 indicate what type of standing that is? Standing
22 in --

23 CHAIRWOMAN BAILEY: Well, that's a legal
24 term.

25 COMMISSIONER BLOOM: I know, but it's kind

1 of hanging out there.

2 COMMISSIONER BALCH: Do we have to be more
3 specific prior to that?

4 COMMISSIONER BLOOM: We haven't mentioned
5 any sort of -- why it would be standing.

6 COMMISSIONER BALCH: The concern Mr. Smith
7 had, I think, was if you are going through the
8 process and go, "I was notified, therefore I have
9 standing," whereas that's not necessarily the case.
10 To have standing in the case you have to have some
11 sort of a demonstrable --

12 MR. SMITH: God, I have forgotten.

13 CHAIRWOMAN BAILEY: There are different
14 criteria?

15 MR. SMITH: You could put standing for or
16 standing to after that. You know, request a hearing
17 under -- and then cite. An indication of standing
18 to request a hearing under, and give a cite of the
19 section where you allow someone withstanding to get
20 a hearing?

21 COMMISSIONER BLOOM: That's sort of what I
22 was driving at.

23 COMMISSIONER BALCH: So then we are going
24 to cite down to 19.15.17.15C6? No. We had C4 where
25 there was standing.

1 MR. SMITH: There you go, 5.

2 COMMISSIONER BALCH: So it would be
3 request a hearing under.

4 COMMISSIONER BLOOM: Add the word "under."

5 MR. SMITH: Pursuant to.

6 COMMISSIONER BALCH: All right. So I
7 guess go back down to where we stopped numbering at
8 7 or 8.

9 COMMISSIONER BLOOM: Do we have two 5s in
10 there?

11 COMMISSIONER BALCH: So that's old
12 language that's replaced by the process we have
13 outlined.

14 CHAIRWOMAN BAILEY: Do we have the list up
15 above?

16 COMMISSIONER BALCH: I think we do in 7 or
17 8.

18 CHAIRWOMAN BAILEY: Okay. We have
19 exception request. And then scroll down.

20 COMMISSIONER BALCH: Basically we replaced
21 this language in the variance section.

22 COMMISSIONER BLOOM: You're right.

23 COMMISSIONER BALCH: So 5 can be deleted.

24 CHAIRWOMAN BAILEY: In its entirety.

25 COMMISSIONER BLOOM: We can delete that,

1 right?

2 CHAIRWOMAN BAILEY: Yes.

3 COMMISSIONER BALCH: I think 6, as well,
4 has been replaced by the process we outlined. I
5 think commissioners, that we have outlined a pretty
6 clear process. Maybe not necessarily non-cumbersome
7 in the case of a exception, but a clear process, and
8 both of them follow the same kind of process, so I
9 would move that we strike the remainder of the
10 previous general exceptions section. What we have
11 come up with I think matches the intent?

12 COMMISSIONER BLOOM: I think you are
13 right.

14 CHAIRWOMAN BAILEY: I certainly agree as
15 far as A is concerned, so let's go ahead and delete
16 A, all of that paragraph.

17 COMMISSIONER BLOOM: A1, yes.

18 CHAIRWOMAN BAILEY: Let's look at A2. We
19 covered that with the list that we did. Okay. A3
20 has to do with requesting a hearing?

21 COMMISSIONER BALCH: I think this is
22 covered by a process.

23 CHAIRWOMAN BAILEY: Three can be deleted.

24 COMMISSIONER BLOOM: Did we include that?

25 COMMISSIONER BALCH: This has to do with

1 the standing and the process of who is notified when
2 and when they need to declare a hearing. So if you
3 have -- currently, the way it's laid out, if you
4 request an exception, you do notification and then
5 anybody withstanding could request a hearing.

6 CHAIRWOMAN BAILEY: Let's delete 3 but I
7 want to look at 4 because 4 gives the right to
8 determine whether a hearing can be scheduled if it
9 has technical merit or significant public interest.
10 If it doesn't meet those criteria, if it's just a
11 nuisance or application for hearing, that gives the
12 authority to the director not to do that.

13 COMMISSIONER BALCH: What would you
14 propose about the language in 4? Is that
15 substantially the way --

16 CHAIRWOMAN BAILEY: Well, strike the
17 Environmental Bureau in the divisions.

18 COMMISSIONER BALCH: Now we have a
19 different reference.

20 CHAIRWOMAN BAILEY: Paragraph A,
21 Subsection 3, that will all need to be changed. Why
22 don't you highlight Paragraph 3 of Subsection A,
23 19.15.17.15 in the third line of the paragraph we're
24 looking at. Yes. And turn that yellow or green or
25 some color to indicate that we need to verify what

1 the citation is.

2 COMMISSIONER BALCH: Do we have an
3 established timeline?

4 CHAIRWOMAN BAILEY: We have so many days.

5 COMMISSIONER BLOOM: That would be within
6 the 90 days.

7 COMMISSIONER BALCH: So we have to find
8 the citation. Ninety days is the time to make the
9 determination, not necessarily -- what happens now?

10 CHAIRWOMAN BAILEY: Under the existing
11 there's notification, and then Paragraph 3 that was
12 struck said, "Any person wishing to comment on the
13 application for an exception may file comments or
14 request a hearing within 30 days after the later of
15 the date when the applicant mails the notice
16 required by that section or when the division
17 districts or posts the notice provided in the
18 section. In a request for hearing the person shall
19 set forth the reasons why the division should hold a
20 hearing." So that Paragraph 3 should be reinserted
21 in order for Paragraph 4 to make any sense. That
22 opens to door to anyone on the notice list to
23 request a hearing. Yes, there it is. So let's
24 color those citations so we can also go back and
25 make sure. Right. Two lines above that.

1 MR. SMITH: You already have a section in
2 here, right? That says someone withstanding can
3 request a hearing?

4 COMMISSIONER BALCH: Yes. Now this has to
5 do with comments, so I don't know.

6 MR. SMITH: Well, you can go back to the
7 section where you said people could request a
8 hearing and allow anyone to comment and anyone with
9 standing to ask a hearing.

10 COMMISSIONER BALCH: So that was in 4?

11 COMMISSIONER BLOOM: It would be helpful
12 to have a printout of this.

13 CHAIRWOMAN BAILEY: Oh, we will read it
14 over tonight.

15 COMMISSIONER BLOOM: Read it over tonight,
16 yeah.

17 COMMISSIONER BALCH: Okay. So this says
18 if you have standing you can comment.

19 CHAIRWOMAN BAILEY: And if you have
20 standing you can request a hearing.

21 COMMISSIONER BALCH: Doesn't say anything
22 about if you just want to comment?

23 MR. SMITH: You should let anyone comment.

24 CHAIRWOMAN BAILEY: If a person --

25 COMMISSIONER BLOOM: Any person should be

1 able to comment?

2 MR. SMITH: You can put, "Within 30 days
3 following notice the director may receive comments
4 and anyone withstanding may request a hearing."
5 Something like that. Within 30 days after -- now
6 take the operator or the division sends notice to
7 such person. Do you see that? Put that after the
8 word "after" that you just typed in. Persons may
9 suggest comments to the director. I think you can
10 strike everything down to the director.

11 COMMISSIONER BALCH: That's too much.

12 MR. SMITH: You need "request a hearing"
13 after the word "may" that you just typed in.

14 CHAIRWOMAN BAILEY: Which means delete
15 with the file a comment."

16 MR. SMITH: Take out "or" and change 4 to
17 A. Now take out after the word "hearing" everything
18 over to "the director." Put a period after hearing
19 and then put, "If the director determines that a
20 request for hearing." Take out comma "or request
21 for hearing."

22 CHAIRWOMAN BAILEY: Leave 4. Put the
23 word "request" before it.

24 MR. SMITH: Does that get you where you
25 want to be?

1 COMMISSIONER BLOOM: The beginning reads a
2 little rough. "Within 30 days after the operator of
3 the division sends notice to the person of the
4 requested exception, persons may submit comments to
5 the director."

6 MR. SMITH: Take out "such person."
7 Just "division sends notice." You can put instead
8 of "persons, anyone may submit."

9 COMMISSIONER BALCH: Anyone with standing.

10 MR. SMITH: I don't know why but when we
11 are talking about something like requesting a
12 hearing, just say anyone.

13 COMMISSIONER BLOOM: Yeah, I hear you.

14 CHAIRWOMAN BAILEY: We are good with that
15 paragraph.

16 COMMISSIONER BALCH: Now, this is C5,
17 right? This paragraph may now no longer be
18 necessary.

19 CHAIRWOMAN BAILEY: That's correct.

20 COMMISSIONER BALCH: This paragraph may
21 have to go up underneath what we just did. What
22 about Paragraph 5? This is all things that would
23 happen before the hearing or without a hearing.
24 This would go right below what we just modified.

25 MR. SMITH: We have 4 that we are looking

1 at right now.

2 COMMISSIONER BALCH: Yes.

3 CHAIRWOMAN BAILEY: Not really, because
4 the sentence above sets the application for hearing.
5 It's 4:25. Why don't we just leave it at this
6 point. If when you send this out the results of the
7 day, if you would just go ahead and include through
8 the end of that section so we can see what we have
9 repeated and what needs to be deleted. I think it's
10 time to call it a day. Commissioner Bloom
11 specifically asked for 4:30 and tomorrow afternoon
12 we also need to break at 4:30. We will have that
13 break from 2:00 to 2:30 and Friday we are not in
14 session so we need to get as much done tomorrow as
15 we possibly can. If we could clear the room.

16 (Note: The proceedings were adjourned for
17 the day at 4:25.)

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REPORTER'S CERTIFICATE

I, JAN GIBSON, Certified Court Reporter for the State of New Mexico, do hereby certify that I reported the foregoing proceedings in stenographic shorthand and that the foregoing pages are a true and correct transcript of those proceedings and was reduced to printed form under my direct supervision.

I FURTHER CERTIFY that I am neither employed by nor related to any of the parties or attorneys in this case and that I have no interest in the final disposition of this case.



JAN GIBSON, CCR-RPR-CRR
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