STATE OF NEW MEXICO
ENERGY, MINERALS, AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION DIVISION

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 FOREGOING MATTERS, STATE-WIDE.

CASE NOS. 14784 AND 14785

TRANSCRIPT OF PROCEEDINGS

VOLUME 17

COMMISSION MEETING
October 4, 2012
Santa Fe, New Mexico

THE COMMISSION:
JAMI BAILEY, Chairperson

GREG BLOOM, Commissioner
DR. ROBERT BALCH, Commissioner
MARK A. SMITH, Esq.

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CHAIRPERSON BAILEY: Good morning.

This is Thursday, October 4. It is the meeting of the Oil Conservation Commission for the purpose of continuing deliberations in Consolidated Cases 14784 and 14785.

All three commissioners are here, so we do have a quorum.

Commissioners, I looked over the proposed draft rule that was a result of day 5 of deliberations, and I came across some areas where we needed to reduce the ambiguity where we could, and then make some corrections and just point out some areas where we could possibly run into conflict.

The first comment I have is on page 2, having to do with the definition of "permanent pit."

The concept for the permanent pit, in my mind, has always been to limit it to collection, retention, or storage of produced water or brine.

The way this is written could mean anything unless we take off the words "including pit." So it would read: "'Permanent pit' means a pit used for collection, retention, or storage of produced water or brine," et cetera.

COMMISSIONER BLOOM: I would agree with that. It makes it seem like it's including any

other sort of pit.

CHAIRPERSON BAILEY: Anything.

I think we need that specificity, so please delete those words.

The next comment I have is on the definition of "temporary pit," just as a heads-up that we need to be very careful that we are skirting the definitions of centralized facility. So we just need to keep aware that in Rule 2, temporary pits are specifically excluded from surface waste management facilities. So we need to be very clear in our rule that we're not inadvertently making any change to that.

COMMISSIONER BALCH: Can I ask a question about that?

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BALCH: One of the kinds of conceptual models that we discussed was centralization of the waste for several pits, perhaps.

CHAIRPERSON BAILEY: Centralized facilities are specifically included in surface waste management facility Rule 36.

COMMISSIONER BALCH: Right. So are we -- that's what you are talking about we have to be

careful of?

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BALCH: Because you could imagine some extreme scenario or something that would have 100 wells and they're trying to put all the waste in one location.

CHAIRPERSON BAILEY: And then it becomes very questionable.

In that definition for temporary pit it says, on the third line, next-to-the-last sentence, next-to-the-last word, "must be located at one of the relevant well drilling locations."

Do we want to replace the word "relevant" with the words "associated permitted well locations"?

COMMISSIONER BLOOM: I would support that change, yes.

COMMISSIONER BALCH: Yes. That would probably resolve your other issue as well. Because if somebody sent in a permit with 96 wells on it then it probably won't get passed.

CHAIRPERSON BAILEY: Yes. So please replace the word "relevant" with "associated permitted."

My next comment goes all the way to

page 7. We have talked several times about the placement of the word "spring" in the siting requirements of 10 A, so that we are ensuring that a spring doesn't have to be used by five households or domestic or stock watering purposes.

On page 9, under (6) (b), there is the word -- the way it's written "within 200 feet of a spring or a fresh water well." And I think that makes it very clear that the public -- that the use applies only to the fresh water well and not to the spring, by the insertion of the word "a."

So if we go back to page 7 A (1) (d) -- no, it's farther on down under "siting." Yes, scroll on down under (d). Yes.

If we insert the word "a" on that second line in (d) before "private," so it reads "200 feet of a spring or a private domestic water well."

Do you-all agree that that makes that very clear now, or better than it was?

COMMISSIONER BLOOM: So essentially, we are saying the spring doesn't have to be used by five households?

CHAIRPERSON BAILEY: Right.

COMMISSIONER BALCH: Right.

COMMISSIONER BLOOM: What if we have

within 200 feet of a private domestic fresh water well used by less than five households or a spring -- well, the spring doesn't have to be used, so maybe it would come after watering purposes.

COMMISSIONER BALCH: I think I'd like to have the spring in the front because it's by itself, and then everything else applies to private domestic fresh water well. I think it's fairly clear with the "a" added.

CHAIRPERSON BAILEY: Okay?

COMMISSIONER BLOOM: Okay. I will be fine with that.

CHAIRPERSON BAILEY: Okay. That insertion also needs to be made in the red portion of (d), then, scrolling on down. There, yes.

And also scrolling on down to (3) (d) for "a" fresh water.

On page 12, we are talking design and construction specifications. Under "Fencing," (4), so that is D (4). The appropriate division district.

No, I think you have gone too far. D (4). Yeah, in red.

We talked about alternatives, the division district office may approve alternatives. Do we

want to be consistent in the use of "variance" instead of "alternatives," to make it very clear that it's a variance that would have to be resolved?

COMMISSIONER BLOOM: I would agree with that.

COMMISSIONER BALCH: There's that. And then there's also kind of a blanket applicability in variance under the rule. We are basically saying it's a variance, but later on we are saying there is no variance.

CHAIRPERSON BAILEY: But we wanted to be sure to indicate where an exception was necessary and where a variance would be required.

COMMISSIONER BALCH: Right. I think we need to be specific where an exception was required, more than anything else --

CHAIRPERSON BAILEY: Anything else was a variance.

COMMISSIONER BALCH: -- by default it would be the subject of a potential variance.

CHAIRPERSON BAILEY: Right.

COMMISSIONER BALCH: I think we are identifying it for a better protection.

CHAIRPERSON BAILEY: So you don't think that word replacement is necessary?

COMMISSIONER BALCH: Well, I don't know. I guess I don't know if the paragraph is necessary.

Well, you are approving the alternative. I think, basically, you are saying they can have a variance.

CHAIRPERSON BAILEY: Uh-huh. But everything can have a variance unless it's an exception.

COMMISSIONER BALCH: But I guess I don't know if this paragraph is really needed.

CHAIRPERSON BAILEY: Well, let's double-check what it says under variances.

Under variances, in Section 15 (a). "Definitions for variance means authorization from the appropriate division district office to depart from the requirements of 19.15.17 NMAC." Very broad, very general. So I might agree with you that that entire paragraph is unnecessary.

COMMISSIONER BALCH: I think we scrubbed out a couple of other places with that similar language.

COMMISSIONER BLOOM: I would agree. It's for fencing, so it's not something we are trying to underscore.

CHAIRPERSON BAILEY: So why don't we go

back to page 12, (11) (d) (4) -- that's it -- and just delete that entire paragraph.

Page 17, under -- we are still under "Operation Design and Construction." This has to do with design and construction of multi-well fluid management pits, so it's 11 J (4): "The primary" -- yes, you're in the right area. Yes, between (4) and (5).

In (4), the third line says that the membrane liner shall consist of certain specifications or an equivalent liner that the division's Santa Fe office approves.

Multi-well fluid management pits are permitted by the district office, so I believe it is the division's district office that needs to do the approval of any change.

COMMISSIONER BLOOM: Very good. Yes.

CHAIRPERSON BAILEY: Do you agree?

COMMISSIONER BALCH: Yes.

CHAIRPERSON BAILEY: Okay.

COMMISSIONER BALCH: We spoke to that at great length in other sections with similar language and wanted the site specific analogy to the district office to apply to this.

CHAIRPERSON BAILEY: Exactly.

And I believe that brings us to the design and construction specifications for burial trenches on page 18, which is logically just scrolling on down.

COMMISSIONER BLOOM: We left this until after we finished with the closure, correct?

CHAIRPERSON BAILEY: Yes, we did.

COMMISSIONER BLOOM: Yes.

CHAIRPERSON BAILEY: So in that case, we can go to something I just wanted to point out to the commissioners. That for the definition of temporary pit -- you don't need to go scrolling back to it yet. We say "temporary pits must be closed in less than one year from the spud date of the first well using the pit."

That's what we agreed to under Q, definition of temporary pit.

On page 21, under "Operational Requirements" -- and here we do need to go to page 21, 12 B (4). It says: "The operator shall remove all free liquids from the surface of the temporary pit within 60 days from the date the operator releases the last drilling or workover rig associated with the relevant pit permit."

Okay. We have that on there.

And then on page 35, which we have not yet gotten to, there is another potential conflict with the length of time that a pit can be...

I just want us to keep to the front of our minds how long is a temporary pit and what actions need to be taken at what time.

COMMISSIONER BALCH: You know, I think we discussed -- we actually discussed this. I remember Mr. Bloom and I having a long conversation about really wanting to limit the age of these temporary pits to a year plus the closure. So I think we ought to repair the other language in that, rather than having to revisit that conversation.

So for example, I'm not sure if we would want to be specifying the last drilling or workover associated with the relevant pit permit, because that could circumvent the -- or if you want to have it this way that's fine. But I think the one year plus the extension is the absolute, right?

COMMISSIONER BLOOM: Yes. I thought we talked about the temporary pits extending out to a maximum of 14 months, at least 12, plus 2 months.

COMMISSIONER BALCH: Plus a 2-month extension.

COMMISSIONER BLOOM: Yeah.

COMMISSIONER BALCH: So I'm not sure if this directly conflicts with that, but we maybe want to get it a little more clear.

We probably don't need the language of "the date the operator releases the last drilling or workover rig," since the closure deadline is already fixed earlier in the rule.

Basically, this would limit how many pits an operator would put on, too -- how many wells an operator would --

COMMISSIONER BLOOM: The reason we might want to keep that language in there is that -- suppose there are two pads associated with a temporary pit and everything is finished within 8 months. If we didn't have this language in there, then it could sit open for 12 plus 2.

COMMISSIONER BALCH: I see, yeah.

COMMISSIONER BLOOM: So I think this is probably important. But what we might want to do is remove the last line, should get an extension of another 2 months to remove the free liquids from the surface of the temporary pit. And...

COMMISSIONER BALCH: Or point it back to the other finding that we set in the previous part of the rule.

CHAIRPERSON BAILEY: Well, the timing that was set in the definition of the pit "must be closed in less than one year from the spud date of the first well."

COMMISSIONER BALCH: Right. But I see Mr. Bloom's point. You really want them to also be drilling fluids off the --

CHAIRPERSON BAILEY: Within 60 days.

COMMISSIONER BALCH: -- of the last well.

So you might keep the language here, but then maybe point -- I don't know if you want to point back to the definition of -- the time line definition, or maybe it doesn't matter.

CHAIRPERSON BAILEY: I think keeping the notation on the C-105 or the C-103, what the date is for the drilling or workover rig's release, is important to give the calendar for when those 60 days begin and end. Otherwise, it's pretty unclear. When do you start your 60 days?

COMMISSIONER BALCH: Right. The timing is important.

Mr. Smith, do you think it is clear? I'm not so much focusing on this language. But earlier, we defined a temporary pit as being closed within one year with a small extension. Is that going to

cause confusion?

MR. SMITH: Just a second.

I don't think so.

CHAIRPERSON BAILEY: Okay.

COMMISSIONER BLOOM: Madam Chair, one question for you. Does "closed" mean that operations have ceased or does it mean that operations have ceased and liquids have been removed?

Then I think we would have, perhaps, a contradiction here if we are saying that. Or maybe it would just indicate that the liquids need to be removed within that year.

COMMISSIONER BALCH: Well, I think they have to be. By the definition of "temporary," they have to be removed within a year plus a 60-day extension. So you wouldn't probably make a design that would keep your liquids in there longer. That's self-limiting.

CHAIRPERSON BAILEY: And when we get to closure requirements, I think that that shows that this is a term of "in effect," and that we are very specific later on in this rule of what "closure" means, because we have closure reports, we have closure processes. It's a word of art, a term of

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art, I think.

COMMISSIONER BLOOM: So if I'm an operator looking at these new rules, I look at temporary pit and I see a temporary pit must be closed in less than one year from the spud date of the first well using the pit.

So I say, okay, it's closed. But then do I have 60 days to get the liquids off?

COMMISSIONER BALCH: Well, that's what this is saying. This is saying you have -- once you're not using the pit anymore you need to remove the liquids within 60 days. It doesn't mean you have to close the pit within 60 days, it means you have to remove liquids, which is really the risk.

CHAIRPERSON BAILEY: And the closure plans will indicate what the process is for -- because a closure plan has to be approved before that permit is allowed.

COMMISSIONER BLOOM: Right.

MR. SMITH: Let me make sure that I'm not confused.

When I told you I thought it was clear, it seems to me that these provisions overlap, that they have a year to get it closed from the first spud date. And during that year, at some point, they are

going to have 60 days to remove the liquid, and that's going to be from the last -- the release of the last rig.

In my view, this doesn't give the operator an additional 60 days, and I think that is pretty clear. If you intend otherwise, then my previous answer to you is wrong.

COMMISSIONER BALCH: That's exactly what we intend.

COMMISSIONER BLOOM: I guess this might be another issue, too, is that 60 days -- the initial 60 days to remove the liquids, is that inside the first year? And if so, is the extension 2 extra months after the 12 months or does that all have to take place within 12 months?

CHAIRPERSON BAILEY: It all has to happen within 12 months.

COMMISSIONER BLOOM: So --

CHAIRPERSON BAILEY: If you spud a well, however many wells you want to close or remove the liquids after that last well is taken care of. But from the -- you go back to the calendaring of that first well that was spudded.

COMMISSIONER BLOOM: Would it be more clear if we added something here that said this

shall -- this 60 days plus an extension shall be concluded within 12 months from the spud date, just to remove any ambiguity?

CHAIRPERSON BAILEY: As in repeating what the sentence says?

COMMISSIONER BALCH: I'm not sure that there's any ambiguity. I mean, Mr. Smith was able to directly interpret the intent.

CHAIRPERSON BAILEY: It would just be a repetition of the sentence in the definition itself.

COMMISSIONER BALCH: I think, basically, your operational plan for the pit and your closure plan are going to be set within that one-year time line.

COMMISSIONER BLOOM: Okay.

COMMISSIONER BALCH: If you ran into a problem, that's when you would be asking for the 60-day extension. You wouldn't be building in the 60-day extension onto your plan, or you shouldn't be. And it shouldn't be approved if you did.

COMMISSIONER BLOOM: But then you see it as 12 months plus 2 months?

COMMISSIONER BALCH: It's 12 months -- for the closure, we did give them a possibility of a 60-day extension, I believe.

CHAIRPERSON BAILEY: There's no extension for the 12 months. The 2 months has to do with the 60-day removal of fluids.

COMMISSIONER BALCH: Okay.

COMMISSIONER BLOOM: So I would -- I mean I think what I'm seeing here is we might have three different interpretations of what we're reading here, so we may need to clarify.

So you're saying everything will happen within a year.

CHAIRPERSON BAILEY: Uh-huh.

COMMISSIONER BLOOM: Mr. Balch said 12-months, and they could get 2 extra months, and I'm thinking the way it reads is 12-months plus 4 months.

COMMISSIONER BALCH: I think we have to be clear that the 2 months here applies only to the removal of the liquids. It does not extend the time line of the temporary pit, although I presume they could ask for an extension if needed.

CHAIRPERSON BAILEY: Yes, there's always that potential.

COMMISSIONER BALCH: Maybe Mr. Bloom is correct. The thing we could do at the very end of this paragraph would be to just say not to exceed

the 12-month lifespan of the temporary pit.

CHAIRPERSON BAILEY: So it would be a comma after "months" at the end?

MR. SMITH: Why don't you just put in a separate sentence that says something like nothing in this paragraph (4) shall be interpreted to relieve the operator of the obligation under whatever paragraph it is to close the pit in one year.

CHAIRPERSON BAILEY: Isn't it just easier to say "not to exceed"? I mean, just because the current rule has so many citations back and forth, back and forth, you never really are sure which citation is going where. I mean...

MR. SMITH: Well, my concern is if you don't -- if you don't cite the paragraph you are trying to clarify its relationship with, you're probably not really clarifying.

COMMISSIONER BALCH: Can we just say not to exceed temporary pit lifespan defined in, and then point at the definition, the 19.15.17?

MR. SMITH: You could do that.

COMMISSIONER BALCH: -- 19.1, and then whatever the definition was?

COMMISSIONER BLOOM: Not to exceed the

temporary lifespan of 12 months as per 19.15.17.1 NMAC.

MR. SMITH: Well, I think I would use the word "under" as opposed to "as per" --

CHAIRPERSON BAILEY: 19.15.17.7.Q NMAC.

In Q we reference one year. We don't spell it 12 months.

COMMISSIONER BALCH: So if someone in the 11th month came to ask for an extension they would not get more than 30 days in their extension. I think that makes sense.

COMMISSIONER BLOOM: Correct.

CHAIRPERSON BAILEY: Okay. If you go up to paragraph (2), the same section, "circumstance", in the first line needs to have an S on it at the end, "for temporary extenuating circumstances."

"May maintain a freeboard."

COMMISSIONER BALCH: Would that be "an operator" or "operators"?

CHAIRPERSON BAILEY: "An operator."

COMMISSIONER BALCH: "In such circumstances the operator shall maintain a log," in the next line down. I think it would be "the operator."

COMMISSIONER BLOOM: I would agree.

CHAIRPERSON BAILEY: Let's go on down to Section 13, "Closure and Site Reclamation Requirements."

The very beginning under the title should be an A for closure plans, not a C.

We could combine paragraphs (1) and (2) to say "closure plans for a multi-well fluid management pit shall be filed with the appropriate division district office and shall describe," and that eliminates number (2).

To put it up there after the first "shall" in the first line, yes. "Shall be filed with the appropriate division district office and shall describe."

Does that work for you-all?

COMMISSIONER BLOOM: Yes.

COMMISSIONER BALCH: Yes.

CHAIRPERSON BAILEY: And then (2) can be deleted.

Is it time for us to discuss that yellow highlighted paragraph (1)?

COMMISSIONER BALCH: I think we were in the process of finishing...

CHAIRPERSON BAILEY: We had gotten quite a bit farther down. We had talked through this

section for the closure and the reclamation requirements. We had gone up until the massive deletions several pages back.

This was late in the day, I think we were all...

This requires an operator closing on-site closure to give proposal A and proposal B, rather than just a proposal A for closure. It seems to me like this is an unusual thing, to require an operator to come up with two different ways of closure.

COMMISSIONER BALCH: I don't even think it's two. This would include the universe of possible alternatives if they can, by rule, be required to supply their initial closure plan.

COMMISSIONER BLOOM: So, okay. I might be a step behind here. So actually, this is saying that an operator has to submit a closure plan and alternative closure plans?

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BLOOM: Right. And I believe the testimony was that this becomes time consuming, and if the closure plan is not sufficient then the division would let the operator know.

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BALCH: And then they would come up with an alternative with equally -- equivalent or better protection.

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BLOOM: I would be okay with removing this as proposed.

CHAIRPERSON BAILEY: To delete that entire paragraph (1)?

COMMISSIONER BLOOM: Agreed.

CHAIRPERSON BAILEY: Okay. Then A becomes B.

And then we can scroll down to the next yellow highlighted area which has to do with "closure where wastes are destined for burial in place or into nearby division-approved pits or trenches."

I'm not sure that we resolved whether or not we would limit the number of pit wastes that would be moved into a nearby temporary pit or burial trench.

COMMISSIONER BALCH: I think that we actually have, because we have a hard time line of a year for the closure of a temporary pit.

There's going to be some physical limit on how many wells you could permit under one pit and

complete within a year. So there is a limit. That limit is not specifically defined as 2 or 3 or 9 or 29 or whatever, but there's going to be some operational constraints on how many you do. And whether we want to be more specific is probably the question that needs to be discussed.

CHAIRPERSON BAILEY: And that's why I bring it up, because it's not a specific limitation where we could easily put in a limitation in that third line from the bottom where the word is "from another" and put one other or whatever we chose. Yes.

COMMISSIONER BALCH: "Adjacent," something like that.

You know, I believe that the testimony going back a few days earlier, where we were talking about this -- it may have been Mr. Lane. Mr. Lane's testimony about doing multiple pits out of one -- multiple drilling pads off of one pit. And he seemed to think that exceeding two would be an extraordinary circumstance for that sort of operation. You wouldn't co-locate more than two drilling pads.

CHAIRPERSON BAILEY: So this is an operational constraint that we really don't need to

cause a limitation, particularly if they have nine laterals coming off of a horizontal well using one temporary pit. I agree with you. We don't.

COMMISSIONER BALCH: We want that to occur.

CHAIRPERSON BAILEY: Yes, we do. We don't want to change this paragraph, then. It's just something that struck me as a possible area. But the more I think through it the more I agree that we would want to have that one temporary pit for...

COMMISSIONER BALCH: And you know, if somebody came up with a development plan where you were going to bend the intent of the rule, that development plan or closure plan would have to be approved by the division or Santa Fe, depending on what type of pit it is. And that would have to be approved by the division district office, and you would hope that they would say 193 drills going into this one pit are too many.

COMMISSIONER BLOOM: I guess my concern is that the language "development plan" could mean a lot of waste just going into one pit for final burial. If it just read "a lease," I think we would understand -- we would know we were dealing with a smaller universe of potential pits.

CHAIRPERSON BAILEY: Well, in that yellow highlighted area of closure, B -- well, it's not yellow anymore -- we have that last sentence that says it all has to be under the control and management of the operator/producer, which would imply either it's communitized, unitized, or one lease.

COMMISSIONER BLOOM: Okay. So the units are quite extensive.

CHAIRPERSON BAILEY: Oh, yes.

COMMISSIONER BLOOM: So...

COMMISSIONER BALCH: And again, it could be very hard because you could have hundreds of wells.

COMMISSIONER BLOOM: So then you could actually have a lot of -- you could have 30 --

COMMISSIONER BALCH: Well, by the time you're unitizing most of those wells have already been replaced.

CHAIRPERSON BAILEY: Not for an exploratory unit.

COMMISSIONER BALCH: I recall discussing this on Thursday -- on Monday, and I thought that we had gotten to the place where we were thinking that centralizing waste would actually be a good thing,

because then you don't have -- or you're not going to need this ultimate scenario, especially if you have more spacing with a waste pit every 600 feet in parts of New Mexico.

CHAIRPERSON BAILEY: Well, with all of the multilateral horizontal wells that are being drilled having one temporary pit that holds the waste, or recycles the mud used for each one of those, I think is a real positive way that we can reduce the problem and encourage the reuse of drilling wells.

COMMISSIONER BALCH: And then the limits that are in Table II -- and I know we haven't discussed them explicitly yet. If you start to concentrate your waste because of those multiply-added operations you may not be able to meet the requirements for on-site closure anyway.

CHAIRPERSON BAILEY: That is right. I hadn't really thought about that, but that's right.

COMMISSIONER BLOOM: That is true.

CHAIRPERSON BAILEY: Okay. So shall we just leave that the way it was written, then?

And we can scroll down to C (5).

Yes. The very last section, the very last few words there, "the stabilized waste does not exceed the criteria in Table I of 19.15.17.13 NMAC

or a division-approved alternative concentration limit."

I would suggest that we have the language, instead of "division-approved alternative concentration limit," to say "concentration limit approved by a division district office variance."

COMMISSIONER BALCH: Well, I would say that you could stop that paragraph at "NMAC," because we already have variance language elsewhere the document that covers everything that's not an exception.

CHAIRPERSON BAILEY: You're right. Just like we did for the other paragraph today.

COMMISSIONER BLOOM: I wonder if variance or alternatives to table -- the new Table I shouldn't be -- rise to the occasion of an exception.

COMMISSIONER BALCH: You know, that's a tough call, I think, because you want, I think, the division district offices to be evaluating those scenarios. And if you are -- if you are asking to exceed a limit by 1 percent, that's different than asking to exceed it by a thousand percent. A thousand percent, I think you are looking at a variance, where 1 percent, that should be more of

the discretion of the district office.

So I'm not sure how to -- how to address that. Or do you trust the division district office to say no, in the case where it's too high?

CHAIRPERSON BAILEY: Currently, the division district offices look to Santa Fe for guidance for cleanup to whatever standards are set.

It's always a consultation. They will go with the standards, but if there are questions they always are in consultation with the Santa Fe group.

A lot probably depends on how we handle Table I. I would almost think that we could delay debate on that until after we see what we come up with for Table I, because I have some suggestions on that one, too.

COMMISSIONER BALCH: I still think this language should be stricken, in either case. And then maybe highlight the paragraph, and we will come back to it, because we will either decide that it needs an exception or it will be covered by the variance rule.

COMMISSIONER BLOOM: By the variance. I would agree.

CHAIRPERSON BAILEY: The way the following paragraph (6) is written could be changed for the

very first part to read: "Upon contents meeting the constituent concentrations in Table I" of blah, blah, "the operator may either proceed to dispose of wastes," and then continue with the rest of the paragraph.

Are we happy with the way those first three lines are written? Because this is a negative, when we could turn it into a positive sentence.

COMMISSIONER BLOOM: Along the lines if -- I think after "appropriate stabilization," if contents are less than any of the constituent concentrations, along those lines.

CHAIRPERSON BAILEY: Upon contents, or if after appropriate stabilization the contents meet the constituent concentrations in Table I, the operator may -- it just seemed to be a very awkward sentence construction here to me.

But if you-all are happy with it that's fine. It just seemed like it could be improved.

COMMISSIONER BALCH: Well, maybe if you went -- after "do not exceed," to where it says "any of the constituent concentrations," we could just say "limits defined in Table I." That would shorten it. I don't know if it would make it less awkward.

COMMISSIONER BLOOM: If we say "meet," it might mean it has to come in at the same level or...

CHAIRPERSON BAILEY: Yes. So -- okay. That's fine. It was just an idea.

COMMISSIONER BLOOM: Okay.

CHAIRPERSON BAILEY: If we scroll on down to (9) (a), Commissioner Balch was concerned about where the sampling would take place.

If we added the sentence at the end of (a) "in compliance with 19.15.17.13 C, the operator will provide notice prior to sampling," as the notice is required later on, that would provide the district office an opportunity to witness the sampling, if they are provided notice.

Would that alleviate your question concerning how an operator would be sampling any areas underneath the liner?

COMMISSIONER BALCH: Well, I talked with -- at great length with, I believe Dr. Thomas, about appropriate sampling because that's an issue that you -- you can end up with two completely different sampling results, depending upon how the sampling --

CHAIRPERSON BAILEY: Yes, you could, completely skewed results.

COMMISSIONER BALCH: So I think that this is a place where you would at least want the opportunity for some oversight.

CHAIRPERSON BAILEY: Right. Okay. So at the end of that sentence, "in compliance with 19.15.17.13 C, the operator will provide notice prior to sampling."

We haven't yet gotten there, but it has to do with closure notice.

COMMISSIONER BALCH: Right. And the time line.

CHAIRPERSON BAILEY: Not yet.

But as it stands, it's "shall provide notice at least 72 hours but not more than one week."

And that brings us to the large deleted areas after this particular portion.

There are -- with the use of the table, much of this deleted portion can be removed. I think it's a matter of looking at each section and saying, have we dealt with this in another way or another area.

So I would suggest that we look at what's crossed out, deleted -- proposal for deletion for all of B, which has to do with closure methods for

temporary pits, and see if we have handled -- or will handle with that table -- all of the aspects that are brought out in the various subsections there.

COMMISSIONER BLOOM: Actually, I believe we have found alternative methods for disposal here of temporary pit waste.

I still have questions about off-site or off-pad burial as allowed in B above, but I think we have worked through this, and some of the subsections of B related to levels of benzene, BTEX, TPH, and chlorides are currently addressed in what has now become Table I.

COMMISSIONER BALCH: Paragraph B is covered now by paragraphs A and B, so that is replaceable. We have talked about waste excavation and removal, and now the table that would define those standards.

CHAIRPERSON BAILEY: The only section that I question is in B (1) (c), which has to do with "if the operator of the division determines that a release has occurred, then the operator shall comply with 15 -- 19.15.29 NMAC and 19.15.30 NMAC, as appropriate."

Looking at that referenced Rule 29, it has

to do with the notification, the reporting, and findings. But there is one portion of 29 that requires a responsible person to "complete division-approved correction action for releases that endanger public health or the environment. The responsible person shall address releases in accordance with the remediation plan submitted to and approved by the division or with an abatement plan submitted in accordance with 19.15.30," which is the other rule that is referenced here.

I would suggest that we retain that language so that we can use 29 and 30 to require abatement or remediation.

COMMISSIONER BALCH: Now Mr. Smith, at the beginning of the day, was cautioning us about wholesale deletions. Do we have to line by line go through and say approved of a deletion with a justification or can we justify blocks of it that have been replaced largely by the table or other text?

MR. SMITH: I think if you delete something it needs to be either because you have superseded it with another change that was based on evidence placed before you or because evidence placed before you supports the deletion, regardless

of whether there has been a superseding section. And I think you can do that in blocks if the blocks meet that test.

But if there is a portion that is being proposed to be deleted and there hasn't been any evidence placed in the record to support that deletion, either because it's been superseded or otherwise, then I think you don't have what you need in order to remove it.

COMMISSIONER BALCH: So if we were to say, for example, Section B that's stricken out is replaced by section -- new Sections A and B that we deliberated based on testimony --

CHAIRPERSON BAILEY: And Table I.

COMMISSIONER BALCH: -- and the definition of the table for clarification, with the exception of B (1) (3) (c), we accept striking the language? I mean there's a little piece of it that we think might need to be retained, but really is more a broad definition that would then become probably a C or a B (10) or something like that.

MR. SMITH: You said D, right? You're looking at --

COMMISSIONER BALCH: No, it's C. It's the highlighted portion there.

MR. SMITH: Oh, okay.

COMMISSIONER BALCH: It's a little piece of -- it's in the middle of the page, and a quarter of text.

COMMISSIONER BLOOM: With respect to that specifically, I would assume that was covered, for example, in the new Section A when we have A (3) (b): "If the results exceed any of the parameters exceeded in Table I the division may require additional delineation upon review of the results, and the operator must receive approval before proceeding with complete closure."

We do have that in there.

COMMISSIONER BALCH: So we --

COMMISSIONER BLOOM: We might want to specify --

COMMISSIONER BALCH: We might want to put the pointers in there.

COMMISSIONER BLOOM: Yeah. Rule 29 and so on, and 30. But perhaps that would solve this issue.

CHAIRPERSON BAILEY: Where were you referencing?

COMMISSIONER BLOOM: On A above.

CHAIRPERSON BAILEY: Okay. 13 A, "Closure

plans"?

COMMISSIONER BLOOM: Yes. (3) (b) -- I'm sorry. Yes, (3) (b).

COMMISSIONER BALCH: Then you could just say "subject to 19.13" -- or "19.15.29 and 19.15.30 NMAC."

COMMISSIONER BLOOM: These are a little different, though. I mean, one is if the operator determines that -- the existing language is if the operator determines a spill -- a release has occurred, then the operator has to comply with that. And the current language is more along the lines of if the five-point composite sample shows that parameters are exceeded, the division may require additional delineation.

COMMISSIONER BALCH: Well, I would say that we do have language that addresses that concern.

CHAIRPERSON BAILEY: Yes, we do.

COMMISSIONER BALCH: We just don't specifically state the statutes -- or regulation, not statutes, right?

CHAIRPERSON BAILEY: So shall we insert 29 and 30 in there? Or this -- I think it's covered there. I had not realized that we had taken care of

it. All right.

So in my mind, then, all of the proposed Section B has been taken care of elsewhere in A and B. So we could delete, at this point, all of Section B as proposed.

COMMISSIONER BALCH: I would agree with that.

CHAIRPERSON BAILEY: Do you agree with that, Commissioner Bloom?

COMMISSIONER BLOOM: My only question is, would it be helpful for OCD to have some mention, as Mr. Balch pointed out, of Rule 29 and Rule 30? Or would it just be assumed that the office would be keeping those things in mind as they proceed forward with a mitigation plan?

COMMISSIONER BALCH: Delineation.

CHAIRPERSON BAILEY: I think that we don't need to have that reference, because 29 is so vague anyway, that we could just go along -- you're frowning, Mr. Smith.

MR. SMITH: Well, I'm having trouble remembering what you put in previously. But if you have, based on the evidence, closure requirements that you believe, for instance, replace the requirement here, for instance, on constructing with

the prescribed soil cover, recontouring, and revegetating, then I think that you could take that out.

COMMISSIONER BALCH: The reclamation we haven't quite gotten to yet, but it will be resolved. This issue will be resolved in that section. Do we have to wait to strike this section until we have that discussion?

MR. SMITH: I think it wouldn't hurt to make sure that you have requirements that are based on the evidence that supersede these.

CHAIRPERSON BAILEY: Okay. We'll just wait and strike B after we deal with the remainder of the rule that still needs to be addressed.

COMMISSIONER BALCH: I imagine the same thing is going to occur with C.

MR. SMITH: To ensure that the changes that you are making are based on evidence that was placed before you and that they supersede this or restate it in a different way or something like that.

CHAIRPERSON BAILEY: Then it may be more efficient for us to skip all of these deleted pages and go directly to the next area for discussion, and then we can go back.

COMMISSIONER BLOOM: That would be "Closure Notice"?

CHAIRPERSON BAILEY: Yes, it would be. Page 34, "Closure Notice."

COMMISSIONER BLOOM: Madam Chair, a quick restroom break perhaps?

CHAIRPERSON BAILEY: Oh, all right. Why don't we do that. Come back at 10 after.

(A recess was taken from 9:58 a.m. to 10:10 a.m.)

CHAIRPERSON BAILEY: Okay. I believe we were at closure notice. And the first topic has to do with notification of the surface owner, as part of the deleted language.

Commissioners, do you have an opinion on that?

Did we have any testimony that anyone recalls having to do with closure notice to surface owners?

COMMISSIONER BLOOM: That's fuzzy.

COMMISSIONER BALCH: I'm trying to remember. In the -- the closure notice is basically a notice to -- a notice that you are getting ready to close the pit. You have already filed your closure plan. Is that correct?

CHAIRPERSON BAILEY: And the closure plan has to be approved as part of the permit application process.

COMMISSIONER BALCH: Right.

CHAIRPERSON BAILEY: This paragraph says that the operator shall notify the surface owner on the closure of the pit or the tank, where the operator has approval for the closure.

COMMISSIONER BALCH: Which seems completely redundant, because they would have already had some notification that it was going to happen.

CHAIRPERSON BAILEY: Not necessarily. Under SOPA there would be agreements, but we don't enforce SOPA. That's the Surface Owner Protection Act.

COMMISSIONER BALCH: Well, let me --

COMMISSIONER BLOOM: SOPA doesn't affect the state land office either.

COMMISSIONER BALCH: Okay. Well, let me put the plan on its head. You're in closure -- you're getting ready to close the pit, and then you have to notify the surface owner. If there has to be a notification of the surface owner it should be at the time that you are planning on closing that

site, not at the end of your operation and you're getting ready to close out the site.

CHAIRPERSON BAILEY: That's correct.

COMMISSIONER BLOOM: Say that again. I'm sorry, I didn't hear you.

COMMISSIONER BALCH: It seems like an illogical place to have notice. If you were going to require notice it should have been when you were filing your closure plan or your site plan, not when you're all done with your operations getting ready to close then you say, "Oh, by the way, we are going to leave this stuff here."

I'm not sure if we addressed that elsewhere earlier in the process or not. But regardless, this seems out of place.

CHAIRPERSON BAILEY: Under filing of a permit application, the filing only goes to the appropriate division district office, and the permit application does include a closure plan. The surface owner is not notified that a permit application is on hand other than the OCD posts an electronic notice of the number and the locations of wells that have APDs.

COMMISSIONER BLOOM: Commissioners, I didn't find anything in the OCD or NMOGA's findings

of fact or closing statements about closure notice.

I think I would be opposed to the removal of Section (1), in that I believe surface owners should have an understanding of where any contents are buried on their property.

CHAIRPERSON BAILEY: Well, that can be handled under placement of a -- under a different method, rather than sending the certified mail with evidence of mailing. That can be done by requiring a pipe with the -- a location on it.

COMMISSIONER BLOOM: Well, I'm thinking about the state land office. Or I guess it's a little different for private owners, fee owners. But...

COMMISSIONER BALCH: Would this language require notifying the state land office? You said they weren't protective under SOPA.

COMMISSIONER BLOOM: Correct. So yes, maybe with a surface owner, where we have -- we typically have surface and subsurface rights in the same locations. There are scenarios where we split a state, where we have the subsurface and not the surface acreage.

COMMISSIONER BALCH: And I've read through it a couple of times, yes.

COMMISSIONER BLOOM: And so one of the things that I'm thinking of is we often have overlapping uses of land. So an area might be used for oil and gas, and then you get a company that comes in -- one thing that comes to mind right now is Pegasus wanting to have open tracts in southeastern New Mexico. And they come to the state land office, look for a -- a commercial lease, and we would want to have, in our tract books or something in the lease records, as to where waste was buried so we could see it immediately.

COMMISSIONER BALCH: The way it -- it took me a couple of readings to get through it. But the way this reads would not say you are giving notice, one, that you're going to close it, and it's going to be when you -- if you have approval for on-site closure then you notify them?

CHAIRPERSON BAILEY: Well, it's written so badly. First, I would like to address Commissioner Bloom's concerns, is that the same plugging requirement that we have for plugging in the abandonment of wells, the placement of -- where is it? In 19.15.25.10 B, there's the requirement that: "An operator shall mark the exact location of a plugged and abandoned well with a steel marker not

less than 4 inches in diameter set in cement and extending 4 feet above mean ground level."

That's a very effective marker to indicate where a P and A'd well is located. It could also be a very effective marker for where a buried pit or trench would be located.

COMMISSIONER BLOOM: Is there such language currently in the rule for pit closures, a requirement for a marker?

CHAIRPERSON BAILEY: There is -- yes. On page 30 of the crossed-out proposed deleted areas under F. So that would be -- F (d) requires placement of steel marker at the center of an on-site burial. That would be one area I've highlighted that either needs to be taken care of in another section or we can't delete, because there wasn't any testimony heard.

COMMISSIONER BALCH: Well, there was broad testimony about this section and previous other parts of this section where they were trying to increase clarity and remove redundancy.

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BALCH: So some of the deletions may have been justified on that basis, of making a more clear rule. In particular, looking at

Mr. Gantner's testimony, on page 69. He was asked about the closure section.

He said: "The section itself, the actual title of 19.15.17.13 says "Closure and Reclamation." We left that off because I'm not going to talk about that. But this section of the current pit rule was really cumbersome. Andrew Hoff, with BP, and I, we worked on this for a whole day trying to improve the clarity and reduce redundancy of the section. We did so from taking it from six pages to three.

"Part of what we accomplished was the tables establishing scientifically supportable thresholds," which they then had Dr. Thomas and others address, and removing redundant texts.

So there was very broad testimony about all of these deletions. A lot of them were for purposes of clarity and removing redundancy.

I don't think there's any specific testimony on this paragraph; at least I haven't found it yet.

I'm still searching for "closure" on that first page -- or that first day.

I think the way this reads now -- and if I read it again I may come up with a different conclusion -- is that if you get permission -- even

if you get permission -- if you get permission to close on site, then you notify the surface owner.

Is that the -- that's the way I read the intent of this paragraph the way it's written.

COMMISSIONER BLOOM: Yes.

COMMISSIONER BALCH: It's not at all clear that that's what it means. It took me a few tries to get that from it.

COMMISSIONER BLOOM: Well, I think the intent is -- the bottom-line intent is that the surface owner would then know where the on-site closure is so they can note it in their records.

And great -- you know, potentially making some changes here, where we have off-pad closure -- off-site closures, we might need to delete "on-site" to keep the intent of this the same and add in multi-well fluid management pit also, to update it. But certainly, we don't have to remove this from the rule as it stands.

CHAIRPERSON BAILEY: So if we don't delete it we can -- have we dealt with on-site closure of multi-well fluid management pits? We have --

COMMISSIONER BLOOM: So in 13 -- Section 13 (1) it says: "Closure for a multi-well fluid management pit shall describe the proposed

procedures and protocols for the removal of all unused stimulation fluids and the disposition of liner materials and other pit contents."

CHAIRPERSON BAILEY: So we are not allowing on-site burial of the contents or the liners of the multi-well fluid management pits. So closure of a multi-well fluid management pit maybe doesn't belong in the consideration that we are looking at for on-site burial, because there's not going to be any.

COMMISSIONER BALCH: Well, except for the extent they have to test under the liner.

CHAIRPERSON BAILEY: Right. But that's for remediation purposes, not for burial purposes.

COMMISSIONER BLOOM: So I would agree that we do not need number (3).

COMMISSIONER BALCH: I'm sorry. I was searching through the transcript. Did we come to a conclusion on paragraph (1)?

CHAIRPERSON BAILEY: No, we didn't. I think that I'm understanding the consensus is that we do not delete paragraph (1), but maybe reword it to clarify when that notification by certified mail/return receipt happens, and if it happens only for on-site burial.

COMMISSIONER BLOOM: That is interesting. Because the permanent pit, currently, cannot be left on-site -- can't have on-site burial or closure. So I wonder if the intent was to allow the surface owner to go out and look at the -- watch the closing operations or something like that.

CHAIRPERSON BAILEY: Or is it simply notice that they are shutting down operations?

COMMISSIONER BLOOM: Yes.

CHAIRPERSON BAILEY: I mean, to me, that's -- that's an unnecessary action, if they are just shutting down operations. Because all of this is closure. It's not burial, it's not anything other than notification that operations are being shut down under a closure plan. And operators notify the district for shutting down operations at a temporary pit or below-grade tank.

COMMISSIONER BALCH: It really just says you are going to be -- okay. So this is saying you have to notify the surface owner when you're going to shut down your surface operations and go into production operations, does it not?

So this doesn't have anything to do with closure of a pit or anything. It's just one of the things that triggers notification of a surface

owner.

You know, I'm looking at OCD's comments, and they have nothing here against striking this sentence. And I think there was testimony about trying to remove redundancy and unnecessary unclear language. And this may -- may be in that category.

And the concerns that Mr. Bloom has, particularly with respect to working at the state land office, may be better addressed in a different area or later in the section.

CHAIRPERSON BAILEY: So that we do ensure that there is a permanent marker would take care of your concerns for an operator leaving a buried pit without any kind of notice on the ground, because it will be under discussion for putting it in the C-105 and C-102.

COMMISSIONER BALCH: Correct.

COMMISSIONER BLOOM: Believing this language is important, too, in that it gives the land office the opportunity to make note of where the -- where a pit is being buried, potentially.

CHAIRPERSON BAILEY: Well, notice of where it's going to be buried will be accomplished on the filing of the C-105 and C-103 and the permanent marker, if we agree to that.

COMMISSIONER BLOOM: Okay.

COMMISSIONER BALCH: Yeah. I think this language falls under the category of redundant language.

CHAIRPERSON BAILEY: It's certainly unclear.

COMMISSIONER BALCH: And it's unclear.

CHAIRPERSON BAILEY: I mean if we can't even figure out what it is, how can anybody else?

MR. SMITH: I would caution you that notice is typically a very sensitive issue. And I think that in something like this you want to be careful to have something in front of you that addresses why this notice provision should be deleted. And I would be careful about making assumptions in that regard.

COMMISSIONER BALCH: Well, the way this reads now you virtually have to make assumptions about what it means and what its intent is. There's no clear language in this paragraph as to what its intent is.

I just read it again and got a completely different conclusion.

MR. SMITH: I'm sympathetic with that. There is a difference between the regulators and

operators, unfortunately, having to make assumptions in terms of what it means and you-all making assumptions in order to change the rule.

COMMISSIONER BALCH: What's not in this paragraph is when -- when this is supposed to occur. If you have a -- a pit, a very permanent below-grade tank or otherwise, or plan for on-site closure, you are required to notice the surface owner by certified mail.

Do you do that when you file your -- your plan, your C-144? Do you do it when you are going to close the pit? When?

MR. SMITH: If you have testimony regarding the clarity of portions of this rule, including this portion, and if you read it as unclear, I think that you may have enough to clarify it. I don't know that that gives you enough to delete it.

COMMISSIONER BALCH: So you would say removing some sort of a notice requirement -- we would have to replace some sort of a notice requirement elsewhere or in some different language to strike this -- this paragraph?

MR. SMITH: You can strike this paragraph if you have evidence in the record supporting the

striking of it.

COMMISSIONER BALCH: Well, there --

MR. SMITH: If you have evidence in the record supporting the clarification of it, then I think that you could clarify it.

COMMISSIONER BLOOM: I thought I remembered Ms. Foster asking somebody some questions -- some were related to this, about who's the surface owner, or who are we actually notifying, along the lines of is it the lessee? Is it the state land office? There's some ambiguity that might relate more to a subsequent section.

But as I read this again, then it would seem to say that it's almost -- there were two times when the surface owner could be notified, and it almost says that the operator can pick.

COMMISSIONER BALCH: Yeah.

COMMISSIONER BLOOM: I mean, one would be the operator shall notify when there's a plan to close, or when the operator has approval for on-site closure. That's really different.

So the plan to close might come at the beginning.

CHAIRPERSON BAILEY: For the permit application.

COMMISSIONER BALCH: Not to mention the fact that at least the way we are currently discussing the system, you may not know for sure if you're going to have on-site closure until you have done your -- your testing of contents and mixing stabilization and all of that.

CHAIRPERSON BAILEY: That's right.

COMMISSIONER BALCH: So you will have a plan to close on site, but the alternative would be to haul off.

So let me ask again. In the process as it stands now, is there ever any explicit involvement of the landowner besides their operating agreement?

CHAIRPERSON BAILEY: We do not -- are not privy to SOPA agreements. We do not have SOPA agreements on file. We have no knowledge of what occurs between the operators and the surface owners as a part of the SOPA agreements.

COMMISSIONER BALCH: So is the surface owner ever notified that you plan to build a temporary pit?

CHAIRPERSON BAILEY: I can't tell you what SOPA even requires.

COMMISSIONER BALCH: Because that's the thing that really confuses me about this language.

MR. SMITH: If timing is your concern, you may want to look at this in the context of the rest of the provisions under closure notice.

I'm not sure what is in (3) --

CHAIRPERSON BAILEY: And closure operation encompasses more than just the backfilling. It encompasses the testing of the soils, it encompasses the backfilling and replacement of earthen material and topsoil and revegetation. So closure is a process; it's not a one-event situation.

MR. SMITH: I -- I would suggest to you that, in reading this section in its entirety, that with respect to timing you may reasonably interpret this section, particularly the first one where you are seeing ambiguity with regard to timing --

COMMISSIONER BALCH: Well, it just seems odd that --

MR. SMITH: -- that you can reasonably interpret that section to be requiring notice in temporal proximity to the closure process that is based on number (2), number (3), and the fact that in number (1) -- would you go up a little bit for me please -- you -- sufficient notice is to the address and the surface owner that's reflected in the County tax records.

It would make sense to me, given that and the provisions of (2) and (3), that if you're concerned about clarity in number (1) for timing, and since you have something in the record with respect to this being unclear, or this section being unclear, you could clarify it by putting something in there that would indicate that the notice in number (1) is required at some point around the time the closure process begins.

COMMISSIONER BALCH: Here's the confusion that I think that I'm still having with this.

All of the discussions involving notice were also circling around SOPA, which is a statute, not a rule. So this can't supersede that, I think in any way, right?

The -- I think the proponents of the changes felt that SOPA would give them the notice that something was going to happen, and then that would meet the notice requirement here, which really just says you have to give them a notice of -- at some undescribed time -- that you're going to, at some point, close the pit or tank on that site. It could be any time. It could be day one, it could be in their SOPA, it could be --

CHAIRPERSON BAILEY: Just prior to the

beginning --

COMMISSIONER BALCH: -- the week before bulldozers come out.

CHAIRPERSON BAILEY: Yeah.

COMMISSIONER BALCH: I mean, it could be...

COMMISSIONER BLOOM: The rest of the section focuses more on the closure end. I think as Mr. Smith pointed out, take that as some guidance and then fix (1) above, perhaps, the operator shall notify the surface owner when there has been approval for on-site closure.

CHAIRPERSON BAILEY: Or it could be fixed to say the operator shall notify the surface owner by certified mail/return receipt requested prior to any closure operation for a temporary pit, permanent pit, below-grade tank. That's borrowing language from paragraph (2), down -- or the next paragraph down.

COMMISSIONER BLOOM: Yes.

COMMISSIONER BALCH: Can I ask a question from the state land office perspective? And both of you have that perspective.

So for my clarity here, you say you are not involved with SOPA. However --

COMMISSIONER BLOOM: SOPA excludes the state land office.

COMMISSIONER BALCH: Excludes the state land office. So presumably, notice that something is going to happen at that site will be part of your agreement, your SOPA agreement, if you are not the state land office. So you would know something was going to happen and what their intent was.

COMMISSIONER BLOOM: Right.

COMMISSIONER BALCH: You would have already had some kind of notice.

If the state land office doesn't have that -- and you mentioned a Rule 99 or 100 or something like that?

CHAIRPERSON BAILEY: Rule 100 does not require that.

COMMISSIONER BALCH: Now, is there a way that the state land office can say, as part of their lease agreement?

CHAIRPERSON BAILEY: No. You can't change the lease agreement.

COMMISSIONER BLOOM: It's set by the legislature.

COMMISSIONER BALCH: Okay. So your concern, I think, is that --

COMMISSIONER BLOOM: We can't make any rules in-house that would somehow limit the lease.

COMMISSIONER BALCH: I think NMOGA's witnesses argued that the redundancy really is that SOPA is going to take care of a lot of notification issues. However, in the case of the state land office, that is not the true case.

COMMISSIONER BLOOM: The state land office holds 40 percent of the land in the Permian Basin.

COMMISSIONER BALCH: So if there is some language somewhere, maybe here, maybe somewhere else, that said -- well, I don't know if you could say something like that. But if you could say if not already addressed in SOPA, notice of intent to place and then subsequently remove, whatever, would be given to the surface owner.

But this is really odd to me, that you could have a scenario where -- and I think where your concern comes from is you don't know what they are doing, and then all of a sudden there's a notice that they're closing on site, with no prior notice that they planned to. I know nothing in your agreement about how that would be resolved.

CHAIRPERSON BAILEY: Unless we use the language from the paragraph below that gives an

indication of when this notice should be given to the surface owner, and because that notice is given to the OCD prior to any closure operation, we could have that same language reflect the notice for surface owners.

MR. SMITH: I'm looking at SOPA now. And there are a variety of things of which the surface owner is required to get notice, but I don't see anything that requires anything like a notice at the time of closure.

CHAIRPERSON BAILEY: Then we don't need to assert that responsibility.

COMMISSIONER BALCH: I don't think so.

CHAIRPERSON BAILEY: Because the Oil and Gas Act does not give us that responsibility.

COMMISSIONER BALCH: You know, at some point you are going to be filing your closure plan. If there was any sort of notice to be given, I think that would be the appropriate time to give it, not prior -- 72 hours before they close or anything like that. But again, like you just said...

CHAIRPERSON BAILEY: The Oil and Gas Act does not give us that responsibility. SOPA does not give us that responsibility. We would be usurping that from the SOPA statutes.

COMMISSIONER BALCH: So SOPA would cover everybody but the state land office and maybe BLM, but presumably they have their own lease requirements. And maybe the state land office just has to figure out a way to get notice, because we're not required to.

CHAIRPERSON BAILEY: Well, the main concern for the land office is being able to distinguish where on the lands the pit closure occurs. And that -- if that's accomplished with a permanent steel marker the same as the plugging and abandonment of a well.

COMMISSIONER BALCH: And it would also be on the plat.

CHAIRPERSON BAILEY: It would be on that -- yes. It would have to come on the C-105 and the C-102. So there would be --

COMMISSIONER BLOOM: That would be sufficient, yeah.

COMMISSIONER BALCH: I guess we don't need a paragraph (1).

MR. SMITH: It has been requested to be deleted. Do you have evidence -- or do you have argument that was made before you -- that supports the deletion? Or are you simply deleting it?

Because the former is allowed --

COMMISSIONER BALCH: Well, this --

MR. SMITH: -- the latter, I think, is not.

COMMISSIONER BALCH: I think the conclusion that I personally have made from the discussion is that it's redundant.

MR. SMITH: It what?

COMMISSIONER BALCH: It's redundant. This issue is already resolved elsewhere.

MR. SMITH: That notice is required?

COMMISSIONER BALCH: Either in SOPA or through the C-103.

MR. SMITH: I do not believe that it is addressed in SOPA.

COMMISSIONER BLOOM: But the -- doesn't SOPA give the surface owner the opportunity to create the terms under which --

MR. SMITH: Yes, I believe that does.

COMMISSIONER BLOOM: -- the operator goes out on their land?

I guess there's also times where there's -- agreement isn't reached and then they bond in, right?

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BLOOM: And then there is no notification. So...

CHAIRPERSON BAILEY: In the interest of trying to get forward, let's just put this on hold along with a lot of other stuff and just highlight it in yellow and see if we can't mull it around in the back of our minds while we deal with the other portions that are before us. Because, obviously, we are not coming to any kind of resolution. Any two of us haven't come to any resolution on this. So...

COMMISSIONER BALCH: Well, not that -- not that what Mr. Smith said was inappropriate.

CHAIRPERSON BAILEY: Well, we have spent adequate time debating the pros and cons. And maybe we could move on to the next paragraph. Let's just highlight that in yellow and see if we have any issues with the following paragraph.

I do, for the next paragraph. The first line of what's labeled there as (3) says notification of the environmental bureau, and I think we can strike that and have it simply say the Santa Fe office, because this deals with a permanent pit closure, which is processed in the Santa Fe office. And that also happens in three different places in that paragraph.

Did you catch all three?

Commissioners, are you in agreement with those four paragraphs under "Closure Notice"?

COMMISSIONER BLOOM: On the new suggested (3), there is verbal notification of the potential to close a multi-well fluid management pit sufficient for OCD's purposes.

CHAIRPERSON BAILEY: The multi-well fluid management pit would be in the district. Do they need to have written notification? It would never hurt. I don't like verbal anythings.

COMMISSIONER BLOOM: I would agree.

CHAIRPERSON BAILEY: So "written" is probably a very good addition that could be put in where?

COMMISSIONER BALCH: I would just replace "verbally or by other means" with "in writing."

COMMISSIONER BLOOM: There you go.

Does that mean that -- I could see the letter going out 72 hours before and it doesn't arrive for a week.

COMMISSIONER BALCH: Well, does e-mail count as writing?

CHAIRPERSON BAILEY: Yes, it does.

COMMISSIONER BLOOM: What if a letter is

put in the mail and...

CHAIRPERSON BAILEY: So we could specify.

COMMISSIONER BLOOM: Say "via e-mail" instead of "in writing"?

CHAIRPERSON BAILEY: The problem with that, if it goes to one person's e-mail, then they may be on vacation for a week.

COMMISSIONER BLOOM: But we could say should notify in writing at least one week...

COMMISSIONER BALCH: I guess that's probably -- one could get a phone call.

COMMISSIONER BLOOM: We could say two weeks. These things could be out there anywhere from two to four years. I don't think there's going to be a crash. I couldn't imagine a rush to close.

COMMISSIONER BALCH: So really, the time window is between 72 hours and a week?

CHAIRPERSON BAILEY: But we could change it between one week and two weeks.

For temporary pit/below-grade tank we have 72 hours to one week. And that's verbally or other means also, so that both of these need to be considered at the same time.

The OCD did not object to 72 hours.

COMMISSIONER BALCH: No, or the use of the

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word "verbally."

Could you give it verbally and then in writing? Because what if you couldn't get ahold of anybody? Verbally and then in writing?

CHAIRPERSON BAILEY: Sure. Let's go with "shall notify the office verbally and in writing at least 72 hours."

COMMISSIONER BLOOM: Okay.

CHAIRPERSON BAILEY: And that goes both in the paragraph below the deleted area and in the paragraph in red.

COMMISSIONER BLOOM: So in (2) we would read "verbally or by other means at least 72 hours," and then add the suggested language from NMOGA?

CHAIRPERSON BAILEY: Which is "and in writing."

Okay. Are we in agreement, then, for the rest of closure notice except for the first one, Commissioners?

COMMISSIONER BALCH: Yes.

COMMISSIONER BLOOM: Yes.

CHAIRPERSON BAILEY: And now we'll go to a "Closure Report." So -- "Closure Completion."

Have we really defined what closure -- how do we know when completion is? Is that after

they've reseeded? Is that after they've pushed dirt back? Is that -- what is closure completion?

COMMISSIONER BALCH: Well, there's Section F on reclamation, which describes everything associated with that.

You know, I believe Dr. Buchanan testified that pinning a hard number upon when a site was reclaimed is a difficult thing to do. You see little variations. You want to seed your different vegetation at times that are appropriate for seeding it rather than within some rules, guidelines.

So there's a couple of different things that this could refer to as closing completion. The first would be the site is -- you know, operations have been completed. You've substantially initiated reclamation operations. That would be one time. The other time would be after it's completely reclaimed, and that could be a year later.

When does the division need to know, I guess is probably the better question.

CHAIRPERSON BAILEY: In order to release a lease -- because this is very important for the land office in determining when a lease should be expired. It's a matter of before or after reseeding or revegetation. So if revegetation can take years,

we don't want a lease still active just waiting on the proper revegetation standards to be met.

But you do want to have all of the ground disturbance activities completed, which would include the backfilling and preparation of the surface for revegetation.

COMMISSIONER BALCH: Contour and other --

CHAIRPERSON BAILEY: Yes. So in my mind, closure completion could occur when -- contouring and other ground-disturbing activities. That leaves it so wide open that you'd never get a lease expired.

When plugging and abandonment and recontouring operations have been completed and approved by the division, to me, that's closure completion.

COMMISSIONER BALCH: So closure, to the division, is when the site is completely done being used.

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BALCH: But in the context of this section, you could be moving from the drilling phase to your operational phase and have closure of a temporary pit and still have other operations continuing at the site.

CHAIRPERSON BAILEY: The permit application requirements don't give us any help as to what should be included in a closure plan or when a closure plan is finished. It's simply a wide open question as to what a closure plan -- what the process that needs to be included or when you know there's been completion of that closure plan.

COMMISSIONER BALCH: I might suggest that we hold off on this section until we discuss reclamation. We may be able to order the process such that we can say the closure report comes within 60 days of Step 3 or Step G or something in the reclamation part of the rule.

CHAIRPERSON BAILEY: Okay. So why don't we put that in yellow. Well, just that portion of it, just "Closure Completion."

COMMISSIONER BALCH: There may be some obvious place that strikes us.

CHAIRPERSON BAILEY: The operator shall submit -- because whatever happens we'll want to have a report on a C-144 that includes the sampling results, information required, plot plan -- what is a plot plan?

COMMISSIONER BALCH: Maybe it's supposed to be plat.

CHAIRPERSON BAILEY: A plat plan?

COMMISSIONER BALCH: Are we allowed to resolve typos and grammatical problems that leads to confusion?

MR. SMITH: Yes.

CHAIRPERSON BAILEY: Actually, closure completion is very well defined in the remainder of that paragraph. Because closure completion, as reported on C-144 has to document sampling results; other information required; backfilling; capping and covering details; certification that they have complied with their approved closure plan, whatever that covers in the application; and the plat on 105.

So actually, the closure completion is fairly well lined out in that paragraph. So maybe we don't need to put it in yellow in that -- if we approve of this paragraph we can just leave it as is.

COMMISSIONER BLOOM: I would be okay with that.

CHAIRPERSON BAILEY: Are you okay with that, Commissioner Balch, except figuring out what a plot plan is?

COMMISSIONER BALCH: It might be a simplification to remove everything after the word

"activities," down to and including the end of that sentence.

CHAIRPERSON BAILEY: Well, we need to understand what all is part of closure completion, and those explain what all is a part of that completion process.

I wouldn't mind deleting a plot plan, because that doesn't make any sense.

COMMISSIONER BALCH: I could only imagine that they are referring to updating the plat to reflect any changes that may have occurred and things like that; location of the waste, if there is any waste left on site.

CHAIRPERSON BAILEY: Well, that's part of the last part of that last sentence, a plat of the pit location on Form 105.

COMMISSIONER BALCH: I don't know what they mean by "plot plan."

CHAIRPERSON BAILEY: I move that we delete the words "a plot plan," because they don't make any sense. They are not clear and possibly even a typo, for all we know.

COMMISSIONER BLOOM: I would agree.

COMMISSIONER BALCH: Now my thought on this might be that -- and Dr. Buchanan was pretty

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adamant -- that a good reclamation would not necessarily recreate existing contours; it would, instead, create contours that limited opportunities for infiltration and erosion. So if you change the contours of the area does that mean you reflect it on the plat?

COMMISSIONER BLOOM: I guess I'm unfamiliar. I don't know if they show content here.

CHAIRPERSON BAILEY: No, they don't.

COMMISSIONER BALCH: No, they just show area.

I wonder if that's what they are trying to get at with the plot plan.

I think eliminating the language is probably a good solution, or we may be talking about it all the way up to lunch.

CHAIRPERSON BAILEY: Right. So let's delete "a plot plan" in that third line, yes, and detail -- yes.

Are we okay? Then we can go to the next -- we can remove the yellow from "Closure Completion," because we agreed that that was explained adequately in that paragraph.

If we go to the red paragraph (2) there, if the operator elects to conduct burial, the

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operator shall report on C-105.

COMMISSIONER BALCH: That would address the state land office concern.

COMMISSIONER BLOOM: Yes.

CHAIRPERSON BAILEY: Okay. So we agree to keep that.

We can delete that green line now.

Okay. Going to the next paragraph which is labeled F, or is that E?

E, "Timing requirements for closure" requires an operator to "close a pit, drying pad associated with a closed-loop system or below-grade tanks within the following time periods."

All of these time periods are past and we are no longer allowing unlined temporary pits.

Permanent pits that are not -- permanent pits that are not permitted or unlined permanent pits.

Can this be cut, because they are no longer applicable? The deadlines are past, and we are no longer allowing these conditions to occur.

COMMISSIONER BLOOM: I have seen requests for removal of outdated language, irrelevant outdated language in other parts of the NMOGA proposals.

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BALCH: You know, in other portions of the document we have stricken language about specific deadlines which are no longer relevant.

COMMISSIONER BLOOM: I believe we can remove.

CHAIRPERSON BAILEY: Okay. We can remove paragraphs labeled (1), (2), and (3).

And go down to what's labeled as paragraph (4): "An operator shall close any other permitted pit." At the very last line of that it references the environmental bureau.

COMMISSIONER BALCH: We still have E that now is still kind of hanging.

CHAIRPERSON BAILEY: Well, E now belongs to this paragraph under consideration. So "timing requirements for closure" goes down to the next paragraph in black there that's labeled (4): "An operator shall close any other permitted permanent pit within 60 days."

So that still goes under this title under this subsection. So we agreed to delete what is crossed out up there, already.

COMMISSIONER BLOOM: In (4)?

CHAIRPERSON BAILEY: In (4) and (5).

COMMISSIONER BLOOM: I think (4) we addressed when we talked about below-grade tanks, correct?

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BALCH: We completely -- we did rework the grandfather tanks.

CHAIRPERSON BAILEY: So we can delete (4) and (5).

COMMISSIONER BLOOM: Yes.

MR. SMITH: What about your time frame in (4)? Is this no longer an issue because of other provisions you have in there?

COMMISSIONER BALCH: We have the same language. We actually have June of 2013, as stated in the below-grade tank section.

MR. SMITH: Okay.

CHAIRPERSON BAILEY: So now what's labeled as 4 comes up, becomes number (1).

COMMISSIONER BLOOM: We can delete A in front of "Timing Requirements," correct, so that would be E?

CHAIRPERSON BAILEY: Yes.

And "Timing Requirements for Closure." Here, we are dealing with a permanent pit in the

next paragraph.

Oh, first, before we leave (1), let's delete environmental bureau.

And then the following paragraph becomes labeled under (2).

COMMISSIONER BALCH: We can delete -- we can accept the deletion of that last sentence in E, correct?

CHAIRPERSON BAILEY: Yes, I believe we can.

COMMISSIONER BLOOM: I thought that was dealt with elsewhere.

CHAIRPERSON BAILEY: Yes.

Okay. Before we leave, what has become of paragraph (1), that talks about closure of permanent pit within 60 days? I have a note that it might conflict with the definition in paragraph -- on page 3 for definitions.

COMMISSIONER BLOOM: So you think that might conflict with the definition of permanent pit? I thought we had addressed that somewhere else.

COMMISSIONER BALCH: A lot of places we made the 60 days, and then one 60-day extension possible.

CHAIRPERSON BAILEY: Okay. I'm not

finding it. I'm not seeing that there is a conflict anymore, so we have obviously taken care of that.

So we can go down to the next paragraph that begins: "An operator shall close any other permitted temporary pit," and we've talked about that this morning. And we agreed to accept the language of this paragraph, which is now labeled number (2).

COMMISSIONER BLOOM: Doesn't the beginning of (2) create a conflict because -- "An operator shall close any other permitted temporary pit within six months."

COMMISSIONER BALCH: You know, I think that --

COMMISSIONER BLOOM: They might not have six months, but they would have to do it within that time, right? If somebody has a temporary pit and uses it for three months they could have six months to close it --

COMMISSIONER BALCH: Instead of within --

COMMISSIONER BLOOM: -- but if they had a temporary pit that's serving a number of wells and they go out to ten months they don't have an extra six, if this is okay.

CHAIRPERSON BAILEY: This could run up

against whether or not to extend that one year. If they close that last -- or if they release that last drilling rig a month before that year is up. Because they have 60 days to remove the fluid, so there is that potential that they would run up against that one-year time line.

COMMISSIONER BLOOM: Before they get to the six months. I think that's okay. I don't think that's a --

COMMISSIONER BALCH: This is -- this is all closure, right? I don't think it's a problem.

CHAIRPERSON BAILEY: Okay. So we can leave that paragraph.

COMMISSIONER BLOOM: Is that okay for the purpose of multi-well fluid management pits?

COMMISSIONER BALCH: Well, that was my next question, was: Do we need to have a third definition, or do we just add multi-well management up there with the permanent pit?

CHAIRPERSON BAILEY: In our definition for multi-well fluid management we require it to be closed -- may remain in use until all wells with approved application for permit to drill are identified or completed. Extensions for APDs go to hearing.

COMMISSIONER BALCH: And again, this is just closure.

CHAIRPERSON BAILEY: Why does it say "any other"? Why do we have "other"? Because it was referring back to those deleted paragraphs. We can delete the word "other" for sure.

It would be "a permitted -- shall close a permitted temporary pit or fluid management pit."

COMMISSIONER BALCH: That's one possibility. The other possibility is to have its own sentence. But virtually every other way that we've treated this is permanent pit or --

COMMISSIONER BLOOM: I believe for consistency he should add "temporary multi-well fluid management pit" to the one above.

COMMISSIONER BALCH: You can delete what's highlighted.

CHAIRPERSON BAILEY: Okay. And then the paragraph above would be dealing with permanent pits. We could add the words "or multi-well fluid management pit" up at the top.

COMMISSIONER BLOOM: We can get rid of "other," also, right?

CHAIRPERSON BAILEY: Yes.

"Within 60 days of cessation of

operation," scratch the "of the permanent pit."

Well, the problem there is we have the Santa Fe office approving permanent pits and multi-fluid management.

COMMISSIONER BALCH: Okay. So it needs a new paragraph.

CHAIRPERSON BAILEY: "In accordance with a closure plan approved by the appropriate office."

COMMISSIONER BLOOM: Okay. Does "permitted" serve any purpose in either (1) or (2)? Are there unpermitted that are dealt with elsewhere?

COMMISSIONER BALCH: There are other issues for unpermitted.

CHAIRPERSON BAILEY: Just in case there's one out there that is a leftover from many years past, probably.

So we scratch "of the permanent" in the middle line there. "Cessation of operation of the pit," so scratch "permanent."

Yes? Are we okay?

COMMISSIONER BLOOM: Yes.

CHAIRPERSON BAILEY: Okay. We can go on down to what was (6) and now becomes (3).

COMMISSIONER BLOOM: Can we get rid of that 2008 language?

CHAIRPERSON BAILEY: It seems to me like we can.

COMMISSIONER BLOOM: So it would just be: "An operator shall close a drying pad used for a closed-loop system..."

CHAIRPERSON BAILEY: Well, we are not permitting those anymore, anyway.

COMMISSIONER BLOOM: That's right. So we can get rid of that. That was due within six months. So get rid of anything from "permitted" to the end of "NMAC." Is that right?

COMMISSIONER BALCH: That would be appropriate, I think.

CHAIRPERSON BAILEY: Yes.

We are okay with the rest of that paragraph?

COMMISSIONER BLOOM: What about the last sentence? I'm just wondering how that shakes out in terms of variance or exceptions.

CHAIRPERSON BAILEY: Yes. That would be the variance. So that means that we can just delete that last sentence.

COMMISSIONER BALCH: Well, we differentiated extension granting in other places differently than a variance. It seems to me that a

variance would be if you wanted a different extension or an additional extension.

A lot of places we say enclosed within 60 days, the appropriate division district office may grant an extension of 60 days.

If you don't specifically state the amount of time of the extension, it's up to the variance, and that could be a longer period of time.

COMMISSIONER BLOOM: It could be longer, you're saying?

COMMISSIONER BALCH: Well, it could be indefinite.

COMMISSIONER BLOOM: Yeah.

COMMISSIONER BALCH: So I think leaving in the time periods of extensions would not really be like a variance; that that would be an expectation that if you close it, in X amount of time you may have X amount more time granted administratively without going through a variation or exception process.

CHAIRPERSON BAILEY: And then a variance would come in after that extension.

COMMISSIONER BALCH: If they say we need three months or we need seven months, then they are looking for a variance.

COMMISSIONER BLOOM: Yeah.

CHAIRPERSON BAILEY: I agree with that. So we will keep that last sentence.

Okay. Going on to what becomes paragraph (4), "Closure of a below-grade tank." We can delete the "permitted" because below-grade tanks are no longer permitted; they're registered.

Okay. We don't have transitional provisions anymore, so we can't --

COMMISSIONER BALCH: Well, we still do have a June 13 deadline.

CHAIRPERSON BAILEY: That's right. Okay.

COMMISSIONER BALCH: But we may want these -- there's certainly a lot of this language that's not required.

You may want to keep what's in green and then point it to the appropriate paragraph.

CHAIRPERSON BAILEY: Yes, because the red is duplicative of what's in green.

COMMISSIONER BLOOM: Now, do we want to change 60 days to six months?

COMMISSIONER BALCH: You know, I think a lot of the testimony that had to do with time lines was really for operational constraints. You had examples of you can't get a truck out there because

all the CDLs are driving brine trucks.

The risk component of the tank, and to some degree of even the pit, is really during the operational phase where you have fluids in them. We have addressed those time lines with 60 days.

The request has been made for a change to six months. Really, the empty tank is not providing a real risk.

COMMISSIONER BLOOM: Does it drain within 60 days?

COMMISSIONER BALCH: Well, that's a good question.

CHAIRPERSON BAILEY: I'm looking at the operational requirements for below-grade tanks in Section 12 D concerning below-grade tanks.

I don't see -- we have monthly inspections. We have prevention of overtopping. We have demonstration of integrity and repair of damage and closure, according to what we are working with now.

COMMISSIONER BALCH: Okay. So maybe the thing to do would -- you have a 60-day requirement for draining it and then six months for removal.

COMMISSIONER BLOOM: "An operator shall drain a below-grade tank within 60 days."

CHAIRPERSON BAILEY: "Shall remove all contents," rather than say "drain." "Shall remove all contents of the below-grade tank."

COMMISSIONER BALCH: We had that before.

CHAIRPERSON BAILEY: And in fact, I think this language, rather than having to reinvent the wheel, it's somewhere in the deleted pages having to do with closure of below-grade tanks.

COMMISSIONER BALCH: Okay.

CHAIRPERSON BAILEY: On page 28 we have "Closure methods for below-grade tanks." And the first three paragraphs, I think, are very appropriate for closure of a below-grade tank, because it deals with removal of liquids and sludge, disposing of the tank itself, reclaiming in the manner approved, and removal of on-site equipment associated with it, because there's so much that's just left on the location so many times.

COMMISSIONER BALCH: Okay.

CHAIRPERSON BAILEY: What do the commissioners think about wholesale copying of those first 3 paragraphs of the original pit -- rule concerning closure methods for below-grade tanks?

COMMISSIONER BALCH: I would support that.

COMMISSIONER BLOOM: That looks good.

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CHAIRPERSON BAILEY: Okay. Can you find that, Theresa, on page 28, E?

Those first three paragraphs. And put those in Section 13, where we were discussing below-grade tanks in paragraph (4).

COMMISSIONER BALCH: Do we want to borrow the header from that?

CHAIRPERSON BAILEY: Sure.

COMMISSIONER BALCH: It basically says: "Closure method for below-grade tanks."

CHAIRPERSON BAILEY: So we could delete everything that's --

COMMISSIONER BALCH: "Closure methods for below-grade tanks."

CHAIRPERSON BAILEY: So the red words in the title there, (4) should be deleted.

"Shall close a below-grade tank within" -- do we want 60 days or six months?

COMMISSIONER BALCH: I don't see why six months would be a problem. Once you remove the material you have removed the risk of transport of any materials.

CHAIRPERSON BAILEY: Okay. If we point it to the following paragraph (1). So within six months following completion of removal of the

liquids and sludge.

COMMISSIONER BALCH: Really, at the time you remove the liquids it's still in operation.

CHAIRPERSON BAILEY: Not necessarily. It may not be receiving any new, but it's --

COMMISSIONER BALCH: But it's fulfilling its duty as a tank to store liquids.

CHAIRPERSON BAILEY: Well, it's just storing again. So how should that language go?

"An operator shall close below-grade tank within six months of completion of paragraph (1) below."

Now, I know you are going to have to replace that with a real citation. I understand that.

COMMISSIONER BALCH: I would say "a closure, as defined," and then point.

CHAIRPERSON BAILEY: Okay.

COMMISSIONER BALCH: "Closure methods for below-grade tanks" then becomes subheading (5)?

CHAIRPERSON BAILEY: Not all of it. Only the paragraph (1) down below.

COMMISSIONER BALCH: How do we really want this structured? It should be clear.

COMMISSIONER BLOOM: It looks like it

might be 19.15.17.13 NMAC.

CHAIRPERSON BAILEY: "Within six months of completion of closure method defined," and then scratch the rest of the sentence.

COMMISSIONER BLOOM: Scratch everything after that NMAC.

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BALCH: Why don't we just point it to the paragraph right below?

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BALCH: So it seems like merging that paragraph below up there might be a little more clear.

So we can just say: "An operator shall close a below-grade tank within six months of," and then use the "removal of liquids and sludge from -- removal of liquid and sludge."

COMMISSIONER BLOOM: "An operator shall close a below-grade tank within six months of cessation of the tank's operation"?

COMMISSIONER BALCH: There's kind of two things I'm not sure that we are clear on about here.

The first is, when does a tank go out of service, which to me is really an operational decision.

CHAIRPERSON BAILEY: Uh-huh.

COMMISSIONER BALCH: Because you may have it sit there for a few months doing nothing, but then use it again in the spring.

COMMISSIONER BLOOM: Could it say --

COMMISSIONER BALCH: I would just say something like: "An operator shall close a below-grade tank within six months of" --

COMMISSIONER BLOOM: Cessation of operations?

COMMISSIONER BALCH: -- "cessation of operations."

COMMISSIONER BLOOM: Do you want the liquids and sludge removal within 60 days of cessation of operation?

COMMISSIONER BALCH: Yes, I think so.

COMMISSIONER BLOOM: Well, if we -- could (4) just be closure methods for below-grade tanks, and then we'd say within -- (1) would be: "Within 60 days of cessation of operations the operator shall remove liquids and sludge," and then (2) would be: "Within six months the operator will remove the below-grade tank"?

COMMISSIONER BALCH: In the manner specified in (3). That would be much clearer.

COMMISSIONER BLOOM: Theresa, let's go up to (4) and say -- just put -- take "Closure methods for below-grade tanks" and bring that up right after (4). Make it after the (4).

COMMISSIONER BALCH: And then --

COMMISSIONER BLOOM: Actually, make that (1). Actually, use the (1) that's already there.

COMMISSIONER BALCH: I think the thing to do is delete the rest of what's in (4) and then just modify (1), (2), and (3).

COMMISSIONER BLOOM: Okay.

CHAIRPERSON BAILEY: And then that sentence goes away.

And then we insert the words. And then paragraph (1) would read: "The operator shall remove liquids and sludge within 60 days of cessation of operations."

It would be "within 60 days of."

COMMISSIONER BLOOM: Do you want to put that in the front?

CHAIRPERSON BAILEY: Yes, it's really awkward.

COMMISSIONER BALCH: "Within 60 days of the cessation of operations."

COMMISSIONER BLOOM: Yes, just put that at

the front of the sentence.

COMMISSIONER BALCH: And then a comma.

COMMISSIONER BLOOM: Yes, that's good. And then (2) below would be --

CHAIRPERSON BAILEY: "Within six months of cessation of operations." Okay.

COMMISSIONER BLOOM: Could we bring (3) up as part of (2), so it's covered within six months?

CHAIRPERSON BAILEY: I like that.

Okay. That takes care of closure of below-grade tank.

We can now move on to what becomes paragraph (c). Well, becomes number (5), actually, for closure of multi-well fluid management pit, within six months from the date.

We have two options here. The second option removes drilling and relies on cessation of stimulation operations.

COMMISSIONER BALCH: These are for drilling.

CHAIRPERSON BAILEY: Right.

COMMISSIONER BLOOM: We should probably work off of the --

CHAIRPERSON BAILEY: The top paragraph, and delete the bottom paragraph there in green.

Are we okay with that?

COMMISSIONER BLOOM: Do we want a -- I'm sorry. Do we need "drilling" on (5)?

COMMISSIONER BALCH: No, drilling needs to go.

COMMISSIONER BLOOM: I'm just wondering, with respect to the multi-well fluid management pits, I think that's correct. It would be all wells identified in the permit, right? Because that will talk about any the plan of development or...

COMMISSIONER BALCH: Yeah. And the APD is really what provides the time line.

CHAIRPERSON BAILEY: And the list of wells with approved APDs.

COMMISSIONER BLOOM: Yes. So that should work, then.

CHAIRPERSON BAILEY: Yes, I think so.

COMMISSIONER BALCH: And we have allowed six-month extensions for every other closure, so there's no reason not to leave it here.

COMMISSIONER BLOOM: Yes. It's in the specification of permanent pits. So...

CHAIRPERSON BAILEY: Okay. And then we come to site contouring and reclamation.

Do we want to handle that now or after

lunch?

COMMISSIONER BALCH: Why don't we -- if you don't mind, if we could handle that after lunch. I'm going to take a wild guess and assume we are going to be here tomorrow morning.

CHAIRPERSON BAILEY: I would assume so, if for no other reason than to review in total what we've done, as I have done, to ensure that we have consistency and it's proper.

Okay. So shall we take a break and come back at 1:00? Would that give you adequate time?

(A recess was taken from 11:42 a.m. to 1:01 p.m.)

CHAIRPERSON BAILEY: We'll go back on the record.

When we broke for lunch we had come to Section F of 13, dealing with "Reclamation of pit locations, on-site burial locations, and drying pad locations."

And the first topic under that is "Site Contouring."

If you will recall very early in the discussions, we put the definition for "restore" in highlighted yellow. Because as far as I have found, the use of the word "restore" is used only in this

paragraph, in about the seventh line down, which says -- where it says: "The operator shall substantially restore the impacted surface area to the condition."

The definition for "restore" means "to return the site to its former condition in the manner and to the extent required by applicable provisions to this rule."

So I think at this point we could either remove the yellow from the definition of restore or use a different term in this paragraph.

COMMISSIONER BLOOM: Madam Chair, are you moving to accept the definition of restore?

CHAIRPERSON BAILEY: Yes, I am.

COMMISSIONER BLOOM: I think that would be acceptable.

COMMISSIONER BALCH: I think as long as we are careful not to -- as Dr. Buchanan would say -- well, as he said in his testimony -- forced reclamation, to be completely restored to exactly the way it was before, it may not be the best thing in all cases.

CHAIRPERSON BAILEY: It may not. But we need to be very careful about what requirements we do put on.

COMMISSIONER BALCH: Well, I think in returning to its former condition, and then with the qualifiers in the manner and to the extent required, reclamations does take care of it.

Where I'm saying we need to be careful is to make sure that we -- we don't write a regulation that says you do a list of things, where that list of best practices may alter in some future.

COMMISSIONER BLOOM: Mr. Balch, also on page 38 the language reads that: "The operator shall substantially restore." I think that leaves some room.

COMMISSIONER BALCH: Right.

CHAIRPERSON BAILEY: Okay. So may we go back to the definitions on page 2 for restore and remove the yellow highlighted area?

COMMISSIONER BALCH: And also the deletion.

CHAIRPERSON BAILEY: Well, keep the definition. Okay.

So then we are back to page 36. And if the rest of that paragraph of site contouring meets our approval...

COMMISSIONER BLOOM: D (2) up above, I guess I am not sure what that is referring back to.

COMMISSIONER BALCH: Well, D (2) in the proposed modifications is -- has to do with reporting the exact location for an on-site burial. I'm not sure what that would have to do with this, as well.

CHAIRPERSON BAILEY: Placement of soil cover comes on the next page, so it's actually F (2).

COMMISSIONER BALCH: I think it's referring to the paragraph two paragraphs down.

CHAIRPERSON BAILEY: Yes. That is where soil cover designs are discussed. On the next page below the green line it says "the above," "Soil cover designs."

COMMISSIONER BALCH: It would be F (2).

CHAIRPERSON BAILEY: Page 37.

COMMISSIONER BLOOM: Shall we read through soil cover designs? I guess we could just wait until we get there.

CHAIRPERSON BAILEY: I think we'll have some changes in it.

COMMISSIONER BLOOM: Yeah.

COMMISSIONER BALCH: I don't think we pointed to it, and referencing it is fine.

CHAIRPERSON BAILEY: Okay. And the

recontour that approximates the original. Because it approximates it, it doesn't have to be exact, and blends with the surrounding topography and revegetated according to F (3), and F (3) is just a couple of paragraphs down.

COMMISSIONER BLOOM: That's very good.

CHAIRPERSON BAILEY: So are we okay with that paragraph, the first one under site contour?

COMMISSIONER BLOOM: Yes.

COMMISSIONER BALCH: Yes.

CHAIRPERSON BAILEY: Then we go to subparagraph (b), which inserts the word "recontouring" as open for alternatives, as long as the alternative prevents erosion, protects fresh water, public health, and the environment.

COMMISSIONER BLOOM: I agree with that. And I think it addresses against some of the other concerns that you had, Mr. Balch.

COMMISSIONER BALCH: Yes. I think it's important to have that ability. The goal is to prevent erosion.

COMMISSIONER BLOOM: Absolutely. Okay.

CHAIRPERSON BAILEY: So that paragraph is acceptable.

And then we will go to the new paragraph

(c), which would allow areas that are needed for production operations or subsequent drilling to be compacted, covered, paved, or otherwise stabilized and maintained, which I think is a sensible way to handle reclamation on a well site, if it's going to be in use in the future.

COMMISSIONER BLOOM: I would agree with that. We heard some testimony to that effect.

COMMISSIONER BALCH: Again, you are really just wanting to make sure you are not running water off the pad into an area where...

CHAIRPERSON BAILEY: Okay. So all of this Section (1) for site contouring is approved.

And then we can go to soil cover designs.

Now, I have some concerns over number (2) (a) for the soil cover, where the pit contents or contaminated soil have been removed to replace only with 1 foot of topsoil or suitable vegetation.

COMMISSIONER BLOOM: I understand your concerns there. Have you thought of some potential language that would better meet our goals?

CHAIRPERSON BAILEY: Well, actually, I have. I would believe that we were shown in many different ways by several different people to testify that in order to ensure that salt does not

rise to the surface we need to have 4 feet of material from the surface to the source of the salt.

COMMISSIONER BALCH: Are we looking at 2 (a) or (2) (b)?

CHAIRPERSON BAILEY: We are looking at both of them, actually.

COMMISSIONER BALCH: Okay.

CHAIRPERSON BAILEY: (2) (b) requires the 4 feet of non-waste.

COMMISSIONER BALCH: You know, in -- for (2) (a), originally, there was a model that had some limits that all of us wanted put there.

But I think the way we addressed that was really to -- for substantial reclamation, if there were more contaminants that were there, just to be covered by 1 foot.

So I think (a) still covers that case, and we wouldn't have a situation where we would be burying the salt at less than a foot or around a foot.

CHAIRPERSON BAILEY: But we also talked about the rooting zone for revegetation, for some of the deeper-rooted shrubs such as the four-wing saltbrush.

COMMISSIONER BALCH: But I think we're

going to remove all the contaminations. So I think it says a foot --

CHAIRPERSON BAILEY: Uh-huh.

COMMISSIONER BALCH: -- or the background thickness. So the background thickness would be appropriate for vegetation that is already in the area.

CHAIRPERSON BAILEY: We have a pit, we have removed the pit. This doesn't call for backfilling of 3-foot of clean material. This says you can have a pit, recontour it so it blends with the topography, and put a foot.

COMMISSIONER BALCH: But this is also a drying pad location.

CHAIRPERSON BAILEY: It's not only a drying pad.

COMMISSIONER BALCH: Well, I mean it could also be a drying pad location where it would not be appropriate to build a mound with 4 feet of material above it.

COMMISSIONER BLOOM: That's a good point. Maybe we need to segregate those.

COMMISSIONER BALCH: I agree with you. If there's is a pit, then you would want to make sure you have material for plants to --

CHAIRPERSON BAILEY: Adequate rooting.

COMMISSIONER BALCH: -- adequate rooting down to 4 feet.

CHAIRPERSON BAILEY: Right.

COMMISSIONER BALCH: And there was an awful lot of testimony throughout the redirect examination of Dr. Buchanan on that subject particularly.

CHAIRPERSON BAILEY: But for the drying pad area --

COMMISSIONER BALCH: You're probably going to --

CHAIRPERSON BAILEY: -- and I can understand how that should be, yes.

COMMISSIONER BALCH: You're just going to scrape up a few inches of soil if your test is negative.

CHAIRPERSON BAILEY: Then why don't we separate out drying pad areas from other conditions in which we would be removing pit contents?

COMMISSIONER BALCH: I'm looking at reclamation of pit, A; on-site burial locations, A; drying pad locations. So, yes, they are not in the same category.

CHAIRPERSON BAILEY: Good.

Okay. The soil cover for closures of drying pit areas, the areas.

COMMISSIONER BLOOM: Drying pad areas?

CHAIRPERSON BAILEY: Or closures of drying pads associated with closed-loop systems.

COMMISSIONER BALCH: Could I make a suggestion for clarity?

CHAIRPERSON BAILEY: Uh-huh.

COMMISSIONER BALCH: That we have a (2) and a (3) here, and that (2) would regard the drying pad areas and then have (a) as a subparagraph; and then have a (3), which would have paragraph (b).

CHAIRPERSON BAILEY: Soil cover designs for pits?

COMMISSIONER BALCH: Yes.

COMMISSIONER BLOOM: Say that again. So one will be for pits and the other --

COMMISSIONER BALCH: One will be for pits and on-site burial. The other one will be for drying pad locations.

CHAIRPERSON BAILEY: So it will be -- "Soil cover designs for drying pits associated with closed-loop systems," would be the title of (2).

COMMISSIONER BALCH: Yes.

MR. SMITH: Could you repeat that, please?

CHAIRPERSON BAILEY: "Associated with closed-loop systems."

I can accept it as it is written now.

Then we would insert, after (a), (3): "Soil cover designs..."

COMMISSIONER BLOOM: I think for (a) we would have to change the language to: "The soil closures where the operator has removed the drying pad."

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BALCH: Or remediated down into the soil.

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BALCH: I think it would be "where the operator has remediated the contaminated soil to the division's satisfaction."

COMMISSIONER BLOOM: Theresa, in (2) (a) we would change "pit contents" to "drying pad."

COMMISSIONER BALCH: I think you would actually just say "where the operator," and then remove "has removed the pit contents or" --

CHAIRPERSON BAILEY: Don't forget "pit." "Pit" has to be removed.

COMMISSIONER BALCH: That's what I mean. So the part she has highlighted, I think if we

remove that, it will make sense. "Where the operator has remediated the contaminated soil to the division's satisfaction."

COMMISSIONER BLOOM: It might not necessarily be contaminated soil.

COMMISSIONER BALCH: Okay. You're right. So you would have to have "remove the drying pad."

COMMISSIONER BLOOM: So should "pit contents" be changed to "drying pad"?

COMMISSIONER BALCH: This would be an "and," wouldn't it, instead of "or"?

CHAIRPERSON BAILEY: We could go back and look at the deleted language on page 28 that talked about closure methods for closed-loop systems, which actually doesn't give us a whole lot of help.

COMMISSIONER BALCH: Okay. Maybe if you replace the "or" after "drying pad" with "and if necessary, remediate contaminated soil"? That would take care of that.

I think that's all the components. There may still need to be some wordsmithing that needs to be done.

CHAIRPERSON BAILEY: "Has removed the drying pad contents and liner."

COMMISSIONER BALCH: "And liner."

COMMISSIONER BLOOM: Yes, that would be consistent.

COMMISSIONER BALCH: A comma after "drying pad."

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BALCH: And then "contents" would be plural.

CHAIRPERSON BAILEY: The comma doesn't make sense. It's "the drying pad contents and liner, and if necessary, remediated."

And it's "remediation to concentrations listed in Table I." Because in Table I I'm going to suggest that we have a separate category for the surface to 4 feet for concentrations of chlorides.

COMMISSIONER BALCH: Okay.

CHAIRPERSON BAILEY: So if we replace that language of -- yes. "And if necessary, remediated to the concentrations for surface listed in Table I."

COMMISSIONER BALCH: Would that be "remediated to the concentration specified for surface closure listed in Table I"?

CHAIRPERSON BAILEY: However we want to put that, sure.

"Specified for closure in Table I." Okay.

"For closure of surface," and then blah, blah, blah.

COMMISSIONER BALCH: I think if we just say "for closure in Table I," we will make Table I clear as to what is surface.

CHAIRPERSON BAILEY: I agree with that. Okay.

A period after "Table I." And then delete the following words "contaminated soil to the division's satisfaction."

COMMISSIONER BALCH: And then in the second line, "concentration" should be plural because we're talking about more than one --

COMMISSIONER BLOOM: Probably a comma after "Table I."

CHAIRPERSON BAILEY: All right.

Yes. I think we have taken care of that.

Then the title for (3) would be "Soil cover designs for" --

COMMISSIONER BALCH: That would go back to the original title --

CHAIRPERSON BAILEY: -- pits?

COMMISSIONER BALCH: -- for the most part.

COMMISSIONER BLOOM: Go up to F, the title there for "Reclamation of pit locations, on-site burial locations, and drying pad locations."

COMMISSIONER BALCH: Well, we don't need the drying pad locations.

CHAIRPERSON BAILEY: Okay. So don't put the word "pits" there.

But we go back to the title of F and copy that portion that says "Reclamation of pit locations, on-site burial locations, and below-grade tanks," or just "below-grade tanks" go with the...

COMMISSIONER BALCH: You know, I think that these below-grade tanks, they are a lined enclosure, and it's below grade.

CHAIRPERSON BAILEY: Uh-huh.

COMMISSIONER BLOOM: So essentially, it would be filling in the hole where the tank is.

COMMISSIONER BALCH: So it seems that this would probably be appropriate. I suppose the worst-case scenario would be you would have to dig out a little bit more material if you had a shallower tank.

CHAIRPERSON BAILEY: If you have a leak you're going to dig out a substantial amount of material.

COMMISSIONER BALCH: Well, if there is no leak?

CHAIRPERSON BAILEY: If there's no leak --

COMMISSIONER BALCH: Then you would have to dig a little bit out, if you had a 3-foot --

CHAIRPERSON BAILEY: To bring it to whatever the concentration is, and then put a foot onto it after it's been contoured.

So maybe we could include below-grade tanks with the drying pad paragraph.

COMMISSIONER BLOOM: Okay. How do we get back there? I'm sorry.

CHAIRPERSON BAILEY: The soil cover designs for --

COMMISSIONER BLOOM: Yes. I just wondered how -- why we would put it with closed-loop systems.

CHAIRPERSON BAILEY: Because they would be shallow. They would not necessarily need to be dug down 4 feet, as long as the soil beneath the closed-loop system liner meets the criteria that we will establish in Table I for surface to 4 feet.

COMMISSIONER BLOOM: I was thinking of some of the pictures we saw, I think it was in NMOGA's presentation, what a below-grade tank looks like. It's probably that the hole might be going down multiple feet and...

CHAIRPERSON BAILEY: Well, we are requiring contouring of everything.

COMMISSIONER BLOOM: Yes.

COMMISSIONER BALCH: I think that the below-grade tanks probably are going to have to fit in either their own category or in with pits.

Because I recall those same images. We are looking at things which could -- probably are not going to be 1-foot thick.

CHAIRPERSON BAILEY: Okay.

COMMISSIONER BALCH: You are probably looking at a more thorough reclamation, regardless of the contamination. It's probably going to have to be substantially backfilled. The drying pad locations with the closed-loop systems, we are looking at something that is very near surface. Everything else is -- has penetrated the ground.

CHAIRPERSON BAILEY: Then I agree. Let's put below-grade tanks in the title for --

COMMISSIONER BLOOM: (3).

CHAIRPERSON BAILEY: -- (3), yes.

So yes, it's there. So now that covers the universe.

COMMISSIONER BLOOM: I guess that would become (3)(a), right?

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BLOOM: I think we need to

get that to reflect temporary --

CHAIRPERSON BAILEY: Well, we have multi-well --

COMMISSIONER BALCH: This would --

CHAIRPERSON BAILEY: -- pits.

COMMISSIONER BLOOM: I guess it would. Okay.

CHAIRPERSON BAILEY: Dr. Buchanan was very clear that we couldn't and should not have compacted.

COMMISSIONER BLOOM: I think that's fine to remove that, because the closure plan would address whether it should be compacted or whatnot.

CHAIRPERSON BAILEY: So let's delete "compacted" from that paragraph.

COMMISSIONER BALCH: Yes.

CHAIRPERSON BAILEY: And I have asked to have inserted -- everywhere else we had non-waste-containing waste material to have non-waste-uncontain- -- non-waste-containing -- we have thrown in the word "uncontaminated." Now, where does it belong?

COMMISSIONER BALCH: Between "containing" and "earthen material."

CHAIRPERSON BAILEY: Non-waste-containing

uncontaminated earthen material.

COMMISSIONER BALCH: Do we need a comma after "containing" also?

COMMISSIONER BLOOM: So I guess it's implied that the soil cover goes on top of the 4 feet of non-waste-containing uncontaminated earthen material? It's maybe not so clear, or is that included -- is that going to be the top foot of the 4 feet?

COMMISSIONER BALCH: I think that the 4 feet is the depth of burial. So you could have at least -- you would have at least 1 foot of topsoil or whatever the background was. If the background is 3 feet you would have -- 3 feet out of your 4 would be topsoil. If you have 3 inches, then it would be 1 foot.

CHAIRPERSON BAILEY: If you wanted to be very, very specific, which we do, you could say "the soil cover on the earthen material shall include either the background," to be very clear where the soil cover goes.

COMMISSIONER BALCH: Well, I think it's pretty clear right now what it's saying. If you have 4 feet of material above your waste, or the bottom of whatever you have done -- you may have

more. For example, if you have an 8-foot-deep pit you would have more than 4 feet, because you're bringing up to ground level.

But this is saying that top 4 feet has to be non-waste-containing uncontaminated earthen material, of which some percentage of it is going to be topsoil. Well, at least 25 percent of it is going to be topsoil.

CHAIRPERSON BAILEY: To result in a minimum of 4 feet.

COMMISSIONER BALCH: Yes. So in practice, you will probably have more on some sites.

COMMISSIONER BLOOM: I would say: "The soil cover shall include the background thickness," so if it's more, you would have more topsoil, and the minimum is 1 foot.

COMMISSIONER BALCH: Well, I think it says that already.

CHAIRPERSON BAILEY: Whichever is greater.

COMMISSIONER BALCH: It says: "The soil cover shall include either the background thickness of topsoil or 1 foot of suitable material to establish vegetation of the site, whichever is greater."

So if you had 3 feet of background

topsoil -- which is pretty unlikely. But if you did you would have to put 3 feet as part of your 4-foot of earthen material. If you had 3 inches, you would have to put a foot.

COMMISSIONER BLOOM: Okay. I agree. I think we are okay. Sorry.

CHAIRPERSON BAILEY: Okay.

COMMISSIONER BLOOM: It looks like that other (a) is an IPA.

CHAIRPERSON BAILEY: The green, I think --

COMMISSIONER BALCH: It's alternate language.

CHAIRPERSON BAILEY: -- is alternate, and we can delete that.

And then (c): "Operator shall construct the soil cover to the site's existing grade and prevent ponding of water and erosion of the cover material."

Dr. Neeper was very clear about ponding on the material.

COMMISSIONER BALCH: Now, this should actually become (4), right?

CHAIRPERSON BAILEY: It can be -- no. It needs to apply to both soil cover designs for drying pads and soil cover designs for everything else.

COMMISSIONER BLOOM: We repeat it above?

COMMISSIONER BALCH: Well, it's either repeat it above or make it into paragraph (4).

CHAIRPERSON BAILEY: Let's make it into paragraph (4). And that way, it...

COMMISSIONER BALCH: It's global to reclamation.

CHAIRPERSON BAILEY: Yes.

Okay. Then we can go down to the language in green.

We have already addressed that in "Site Contouring" up above. That was our paragraph (c) under site contouring. So I don't see that we need to have it repeated here. Do you?

COMMISSIONER BLOOM: I don't know that we need to have it under site contouring and under soil cover designs.

CHAIRPERSON BAILEY: So shall we delete it here?

COMMISSIONER BALCH: Essentially, if you're -- if you're applying (c) in site contouring, then it would be unneeded until you got to the point where you are going to do reclamation, which would be at some later time.

CHAIRPERSON BAILEY: Yes. So let's go

ahead and delete that paragraph in this location.

And that brings us to "Reclamation and Revegetation."

COMMISSIONER BALCH: Which is now (5).

CHAIRPERSON BAILEY: And specifically, looking at: "Reclamation of areas no longer in use. All areas disturbed by the closure of pits and below-grade tanks, except what's needed for subsequent operations, shall be reclaimed as early and nearly as practicable to their original condition for their final land use, and shall be maintained to control dust and minimize erosion to the extent practicable."

Can we accept that introductory paragraph under (5) (a)?

I think it allows for partial reclamation of a well site, leaving open only those areas that are needed for continued use of operations.

Are we in agreement to leave (5) (a)?

COMMISSIONER BLOOM: Yes.

COMMISSIONER BALCH: Yes.

CHAIRPERSON BAILEY: (5) (b): "Topsoils and subsoils replaced to the original relative positions and contour as near as practicable to achieve erosion control and long-term stability.

The area will then be reseeded in the first favorable growing season following closure of a pit or pad or tank."

Can we accept that paragraph?

COMMISSIONER BALCH: I'm not sure if, in the first sentence, we really need the "as near as practicable."

CHAIRPERSON BAILEY: Because we earlier referenced approximating the original contouring.

COMMISSIONER BALCH: And I think that the goal -- and I believe we could probably give you about 50 citations from Dr. Buchanan's testimony -- was to achieve erosion control and long-term stability, not to mesh the contour as close as you could.

CHAIRPERSON BAILEY: But we don't want to allow moonscapes, either, where we have 15-foot holes in the ground where a pit used to be.

So what -- we could replace "as near as practicable" to the same language that we used in site contouring. So it says: "Shall be replaced to their original relative positions and contoured to the approximate original contour, to prevent erosion control."

COMMISSIONER BALCH: I think that would be

better than "as near as practicable."

CHAIRPERSON BAILEY: Well, it reflects and is consistent with the language that we have in F (1) (a). "And contour to the approximate original contouring."

Are we happy with that now?

MR. SMITH: I think you could just put, after "positions," "and to the approximate original contour."

CHAIRPERSON BAILEY: Yes. That makes a lot of sense.

COMMISSIONER BALCH: Can I -- I would like to read a citation, if I could find it, from Dr. Buchanan.

He didn't like the term "approximate original configuration," that was in the Rule 17. And we are sort of around that same kind of language here. He liked "final surface configuration." But I would like to look at his citation real quick, if you don't mind.

I've highlighted it for a reason. I can't remember why.

CHAIRPERSON BAILEY: We need to get it right, so we can certainly take time for you to look it up.

COMMISSIONER BALCH: And if you want to look, I have it on page 833, lines 1 through 12.

Actually, the discussion starts on page 832, line 19. And Dr. Buchanan is asking -- he's being asked the question under direct:

"Now, before you move on to the questions about erosion, a lot of times in older reclamation practice we talked about restoring things to its natural or original contour.

"If the original natural contour is not geomorphically stable, is that a good idea?"

And Dr. Buchanan responds:

"That is right, it's not. It is not a good idea, and we did that in the early years. We AOC'd everything. Approximate original contour, AOC. By law we were to AOC.

"And you know what we did? We FSC'd it. That's not in here, so just write it down, the letters, FSC, final surface configuration. We went from AOC to a final surface configuration that was stable.

"Generally, with the final FSC" --

This is another question of him:

"Generally, with the final FSC, as you just said, we were trying to approximate the

original contour to the extent we can, but we take out those features of it that may have made it geomorphically unstable?"

Answer: "We are trying to get away from the instability."

CHAIRPERSON BAILEY: I think we need to understand that Dr. Buchanan was talking from the point -- the viewpoint of coal surface mining reclamation. Because when he says that by law they had to do it a certain way, that is under the SMCRA, which is what -- surface mining control and reclamation. And in the discussions for coal surface mining reclamation, the problems with the benches, that were developed as a part of the approximate original contours, were not stable.

And so there has been a bit -- large change in the -- that philosophy, as far as I understand it.

So when he is talking about the geomorphic stability, I don't think he's talking about 15-foot holes in the ground.

COMMISSIONER BALCH: No, I don't think he is. I don't think that -- and we want to make sure that that doesn't happen. Although I would suspect that that wouldn't be stable and would certainly

allow pooling anyway, so it would not be allowed.

CHAIRPERSON BAILEY: I agree with you there.

COMMISSIONER BALCH: I think that he was asked a number of questions around this issue, also, on cross-examination.

COMMISSIONER BLOOM: I don't think there's any disagreement here that we want to find contours that help with erosion control, particularly if they are not --

COMMISSIONER BALCH: Well, I'm just saying we want to -- how can we say it correctly, I think is probably the larger issue.

CHAIRPERSON BAILEY: I think so. I think that we don't have an issue with recontouring where it's not exactly matching foot by foot of the contour, but so that we are not allowing ponding or moonscapes or blowouts.

COMMISSIONER BLOOM: Could we say "replaced to the original relative position and contour, and so that erosion control and long-term stability are achieved," along those lines?

COMMISSIONER BALCH: Well, I guess I was just saying the language that we had in there might imply some other regulatory or statutory meaning,

this "approximate original contour."

COMMISSIONER BLOOM: I mean, maybe we're talking about trying to do two things. One is getting back to original relative positions and contours, but also so as to prevent erosion and ponding and allow for long-term stability, or something along those lines, and spell it out that way so that all of those things are considered.

COMMISSIONER BALCH: And I think he called it final surface configuration. And you're trying to -- basically, it's a modification. We're trying to approximate the original contour to the extent we can, but we take out those features of it that may have made it geomorphically unstable. So we are making it better than it was before for erosion control, pooling, whatever you want.

COMMISSIONER BLOOM: All right. Is there some language that comes to mind that can get us there? I'm willing to support it.

CHAIRPERSON BAILEY: I am, too, but let's just find the words.

COMMISSIONER BALCH: Well, I think I -- my only concern, and maybe this is -- maybe I have just been listening to the lawyers too much, so you can help me if I'm -- I'm just walking down some

unnecessary path.

MR. SMITH: I would like to say, first of all, that's not really possible, to listen to the lawyers too much.

COMMISSIONER BALCH: AOC is a term that is known out there in reclamation, that they have an abbreviation for it. So if we use the words here, "approximates the original contour," somebody reading that from a reclamation standpoint could say oh, AOC. That's what we'll do, or that's what we have to do.

Whereas Dr. Buchanan's emphasis was on an FSC, which is a final surface configuration that was stable.

CHAIRPERSON BAILEY: So we could say "topsoils and subsoils shall be replaced to their original relative positions and contoured to achieve erosion control and long-term stability."

See, that's deleting almost all of that sentence.

COMMISSIONER BLOOM: That would be good. To contour so as to --

CHAIRPERSON BAILEY: Just delete all the way down to "achieve erosion control."

COMMISSIONER BLOOM: And add a "so as to."

MR. SMITH: The one thing that you leave off there maybe is -- it allows for the change, does it not, the way you have it, in surface water patterns?

You could have erosion control and long-term stability and still pretty drastically change surface water flow.

You may think that's okay, but I'm just -- that's one thing that seems to me that you lose by taking out the language of "original contouring."

CHAIRPERSON BAILEY: Which is the justification for requiring AOC in many different areas, mining and et cetera.

COMMISSIONER BALCH: But I think if you are replacing it to original relative positions you are more or less following the rule that you are trying to make it fit in with the surrounding terrain. But you are also looking at it with a mind of limiting erosion and being stable in the long-term. Because if you're going to sequester material there you want it to be stable as long as possible; forever, ideally.

MR. SMITH: You could put in, in order to avoid the problem that you were thinking of, "to achieve erosion control, long-term stability, and

preservation of surface flow patterns," or something like that, if that's something that you want to do.

COMMISSIONER BLOOM: Do you guys want to restore surface flow patterns?

CHAIRPERSON BAILEY: If they are established by nature.

COMMISSIONER BALCH: Yes.

Well, what I was looking for in the definition, to be honest, was -- because there was a lot of dialogue with Dr. Buchanan about how best practices and reclamation have changed over time.

If we want a regulation that is going to last a while, we don't want to be too narrow and constrain the ability of people to generate new best practices.

What we are interested in, I think -- what I'm interested in from a regulatory point of view -- is the end result which is stability. I don't want pooling, I don't want erosion.

CHAIRPERSON BAILEY: And by the addition of the suggested language "for preservation of surface flow patterns," that would prevent unusual or different erosions of the surrounding areas that would be impacted by changes made for --

COMMISSIONER BALCH: You don't want to

have your little one area to be stable and everything else around it erode away.

CHAIRPERSON BAILEY: Uh-huh. So I think it would be a good idea to include that language concerning the preservation of surface flow patterns.

Do you two agree?

COMMISSIONER BLOOM: Does that add anything to the concept of long-term stability?

COMMISSIONER BALCH: Well, I think it does.

COMMISSIONER BLOOM: Doesn't long-term stability include preservation of surface flow patterns?

CHAIRPERSON BAILEY: Not necessarily. Long-term stability can be inferred to only apply to that specific location where the surface flow patterns would encompass a larger area and create the concept of impact outside of that specific location.

COMMISSIONER BALCH: An example might be you could have a small tributary to a -- you know, some fourth order of tributary to an arroyo that cuts across one corner of your area that you are reclaiming.

If you take that and you then direct it completely around your area you have done something to achieve erosion control for your specific area. But that diversion from the natural channeling or the flow of the surface water could then cause more erosion somewhere else, and you don't want to have that happen either.

So I think that's a good addition.

COMMISSIONER BLOOM: People understand what that means?

MR. SMITH: It should probably be "surface water flood patterns."

CHAIRPERSON BAILEY: Uh-huh.

COMMISSIONER BALCH: I think people like Dr. Buchanan, who are doing these reclamations, would --

CHAIRPERSON BAILEY: They would understand this.

COMMISSIONER BALCH: -- understand this mandate.

COMMISSIONER BLOOM: Okay.

COMMISSIONER BALCH: It's not to do an AOC, I guess is what I was concerned about.

CHAIRPERSON BAILEY: Then we can go to the next paragraph (c): "Reclamation of all disturbed

areas no longer in use shall be considered complete," so this is final evaluation, "when all ground surface activities have been completed and all disturbed areas have either been built on, compacted, covered, paved, or otherwise stabilized to minimize erosion, or a uniform vegetative cover has been established."

There was some discussion about having "compacted" in there and the ability of some operators to not ever revegetate if they just compact the whole thing.

COMMISSIONER BALCH: Well, the way it reads gives you compaction as an option to --

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BALCH: -- instead of.

CHAIRPERSON BAILEY: Instead of.

COMMISSIONER BALCH: And not just for specific cases, but for any case.

CHAIRPERSON BAILEY: For anything. Yes.

COMMISSIONER BALCH: Maybe there are specific cases where compacting would be the most appropriate thing to do, at least in the interim.

CHAIRPERSON BAILEY: If the after-reclamation land use is a parking lot, well, yeah, you want to compact it. But if it's

rangeland, as so much of the land is down in the southeast, compaction is not appropriate, and paving isn't appropriate.

COMMISSIONER BALCH: Well, there was a good amount of discussion about reclamation. Some of the concerns that were brought up by Mr. Jantz on cross-examination, and also by Dr. Neeper, of his cross-examination of himself, was about what happens if you build your basketball court on top of that site, and then 30 years from now it no longer has that purpose --

CHAIRPERSON BAILEY: Right.

COMMISSIONER BALCH: -- then who is responsible for the reclamation, or do you even know if there's a site that needs reclamation?

And I think those were the two concerns that were brought up.

COMMISSIONER BLOOM: I think another one of -- maybe Dr. Neeper brought it up in his findings of fact -- is that it would seem like because of that -- or in the middle, you can either compact, cover, or pave, or you could do a vegetative restoration.

So I can imagine something where the only conceivable use -- well, not to mention too much --

a lot of land that has a pad on it is -- or pit on it -- is only going to be simply used for grazing. And it makes it sound like you can get away from doing vegetative cover if you decide to compact cover or pave.

COMMISSIONER BALCH: Well, we have -- we have already had language a little bit earlier on in this section that allowed for partial -- partial recovery, at least in the interim.

And sometimes, when you're -- when you're contemplating one of these long paragraphs it helps me to go back and look at what -- what is being intended.

What is being intended, I think, is that you will vegetatively reclaim, unless you have some specific good reason to do so -- and here's the important language -- that would be equally equivalent or better protection which, to me, sounds like if you're not doing a vegetative reclamation you should be seeking a variance.

CHAIRPERSON BAILEY: Uh-huh.

COMMISSIONER BALCH: So you might be able to simplify this dramatically if you distill it down to that, and that would still allow someone to do something different, but they would need to have it

vetted at least at the district office level.

CHAIRPERSON BAILEY: So --

COMMISSIONER BALCH: I would say when all disturbed areas have been reclaimed or otherwise stabilized in such a way as to minimize erosion to the extent practicable, maybe we'd want to give it a time limit as well.

COMMISSIONER BLOOM: I think it's laid out pretty well in (a) above, where we have "shall be reclaimed as early and as nearly as practicable to the original condition or their final land use."

COMMISSIONER BALCH: Okay. So if we just point to (a), we might be able to then go down to the specifics of 7 percent cover and whatnot.

CHAIRPERSON BAILEY: I think that's a great idea. So we would go into (a) and copy the phrase "or their final land use, and shall be maintained to control dust and minimize erosion" -- no, I'm sorry. Nevermind.

"Shall be considered complete with all areas -- all disturbed areas."

We could just delete "and all disturbed areas that have either been built on, compacted, covered, paved, or otherwise stabilized in such a way so as to minimize erosion to the extent

practicable." Delete all the way down to "or a uniform vegetative cover has been established."

COMMISSIONER BALCH: Because we already covered the specific cases that we would not need a variance for, and everything else they would need to apply for a variance.

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BLOOM: So delete "that" and put in "and"?

COMMISSIONER BALCH: "And a uniform vegetative cover has been established."

COMMISSIONER BLOOM: Yeah. I think this would be better.

CHAIRPERSON BAILEY: Okay.

COMMISSIONER BALCH: And then change the "or" to an "and."

CHAIRPERSON BAILEY: Then we have some alternative language here to indicate that -- the predisturbance standards with forbs, shrubs, and grasses.

COMMISSIONER BLOOM: Somewhere in here it would consider putting in native, or something along that line. I know that's a slightly charged word because it gets into what's native.

COMMISSIONER BALCH: Well, we talked for a

while about what was native on the first or second day of deliberation.

COMMISSIONER BLOOM: Yes. Is it native to the lease or is it to the county or the region?

CHAIRPERSON BAILEY: Or the region or the entire western part of the USA.

COMMISSIONER BALCH: What language did we use? Was it in a definition?

CHAIRPERSON BAILEY: It was so early in the deliberation it seems like it may have been.

COMMISSIONER BALCH: Are we talking about life-form ratio in the definition? "'Life-form ratio' means the relative percentage of regionally native plant species in each of the following qualifications: shrubs, forbs, and grasses."

So if we wanted to use our definition that might shorten the text.

COMMISSIONER BLOOM: Predisturbance life-form ratios?

COMMISSIONER BALCH: Yes. Well, it's already there in the red text, "that reflects the life-form ratio." So I think that already builds in the -- what we have in the definition, which is regionally native.

CHAIRPERSON BAILEY: I believe the

difference between the last part of the red sentences and the green is that in the red area it reflects a life-form ratio of plus or minus 50 percent of predisturbance levels, where that 50 percent requirement is not in the green wording.

COMMISSIONER BALCH: Okay.

CHAIRPERSON BAILEY: So with the red, the vegetative cover has to have that ratio, 50 percent of the predisturbance, and the green only requires -- doesn't specify what those ratios would be or should be.

COMMISSIONER BALCH: Let me see. I have a couple of notes on life-form ratio. Let me see if anything is relevant to the discussion.

CHAIRPERSON BAILEY: Okay. It appears as though that language in the red would more closely approximate what the original condition was.

COMMISSIONER BALCH: Dr. Buchanan, when he was talking about life-form ratio, was really talking about within categories: forbs, shrubs, grass.

CHAIRPERSON BAILEY: Then I suggest that we delete the green language and use what was submitted in the red language, as far as the standards for defining the reclamation.

COMMISSIONER BALCH: Broadly taking Dr. Buchanan's testimony was that he wanted flexibility.

CHAIRPERSON BAILEY: Yes. But he was also very clear that those ratios between the forbs, shrubs, and grasses was part of the whole community of plants.

So do you agree that we should delete the area of the sentence in green?

COMMISSIONER BLOOM: I would agree with that.

COMMISSIONER BALCH: I think it restricts best practices. So, yes.

CHAIRPERSON BAILEY: Okay.

COMMISSIONER BLOOM: How do we interpret the life-form ratio of plus or minus 50 percent? I mean, it's essentially saying uniform vegetative cover that has been established that reflects "the relative percentage of regionally native plant species in each of the following classifications: shrubs, forbs, and grasses."

Does that mean that there's a 50 percent difference in the number of shrubs, versus forbs versus grasses?

COMMISSIONER BALCH: The way I read is if

you have -- if 50 percent of your area was grass before, that this would allow you to have 25 to 75 percent grass after the reclamation; and similarly for forbs and shrubs.

CHAIRPERSON BAILEY: That was my interpretation.

COMMISSIONER BALCH: So it gives you some flexibility in receiving -- and that may actually help with a faster reclamation, because Dr. Buchanan talked quite a bit about the appropriate time to seed, appropriate seasons.

COMMISSIONER BLOOM: Okay. I'm good with it.

CHAIRPERSON BAILEY: And then the following paragraph (4) says that federal or tribal agencies have the right to have their alternative revegetation and reclamation obligations.

COMMISSIONER BLOOM: That's interesting language. It certainly makes me think if we include it here -- or should it appear elsewhere in the document where there are actually other federal and tribal agencies that might have -- but I don't know where that would be.

COMMISSIONER BALCH: Well, here's my question.

COMMISSIONER BLOOM: Do we footnote that everywhere?

COMMISSIONER BALCH: If you have an alternative regulatory or contractual requirement, I think it's pretty obvious that if it's stricter, that it wouldn't conflict with what we're trying to do here.

CHAIRPERSON BAILEY: If it's equal or better.

COMMISSIONER BALCH: If it's equal or better.

What if their requirement is lesser? Now a lot of places in regulations you'll see language to the extent of, you know, this applies -- if you have two competing regulations the stricter one usually applies, I believe.

I've seen it in context of greenhouse gas at state levels versus federal levels, for example. So -- and this is really -- it seems like a really interesting legal thing to put in there at the end of the section.

CHAIRPERSON BAILEY: We could add at the end of the sentence "if requirements are equal or better to -- for the protection of water and the environment."

COMMISSIONER BALCH: Could we even do that?

COMMISSIONER BLOOM: What's better in the --

CHAIRPERSON BAILEY: Yeah. I mean, that's a very relative judgment.

COMMISSIONER BALCH: What happens if we write these reclamation standards for pits and then a surface owner or the BLM or a tribe says, no, we want this done instead, and it's not as protective as what we have come up with?

This says that their requirements would supersede our requirements.

COMMISSIONER BLOOM: A surface owner could say, I want some grass that's indigenous to Siberia.

COMMISSIONER BALCH: I want Kentucky bluegrass so I can play golf on it, or something like that.

CHAIRPERSON BAILEY: A real-life example is that we had an operator who wanted to not have to revegetate because the surface owner happened to be a working interest in the company and didn't want to spend the money for revegetation. He owned the property, he owned the surface, and he said he did not want revegetation, which is included in this

paragraph.

MR. SMITH: You're requiring exceptions, aren't you, for changes in closure requirements?

COMMISSIONER BALCH: Well, it depends.

MR. SMITH: That is, it couldn't be addressed with a variance.

COMMISSIONER BALCH: Some things mostly associated with multi-well and permanent pits are at the exception level; most everything else is a variation.

On the one hand, we could have a surface owner that would like something that would exceed this protective level done.

On the other hand, you may have an example like Commissioner Bailey just gave of somebody saying just don't reclaim it at all. The problem there is you might impact your next-door neighbor.

MR. SMITH: I think, in that instance, the operator would have to either seek an exception or a variance, one of the two.

COMMISSIONER BALCH: At which point you wouldn't need this language at all.

COMMISSIONER BLOOM: I think an exception would work -- I'm sorry, a variance.

COMMISSIONER BALCH: Well, if it's a

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variance you don't need the language at all.

CHAIRPERSON BAILEY: And this happens time and again on federal lands, where their reclamation requirements have, in the past, been very different from what the OCD reclamation requirements were.

If we make it into an exception or a variance we have a lot of OCD personnel spending a lot of time saying, yeah, it's federal. Go ahead and do what they say. Yeah, it's federal. You know, permit after permit after permit.

COMMISSIONER BALCH: Do you think it's better to leave this language and then add an "equivalent or better protection"?

CHAIRPERSON BAILEY: I think so, if that is enforceable.

COMMISSIONER BLOOM: And it might be good to leave in federal and tribal. But do you want to leave in specific agreements with surface owners?

CHAIRPERSON BAILEY: And anything having to do with the surface owner becomes a variance or an exception. Is that what we choose to do?

COMMISSIONER BALCH: I think it would be a -- a variance would be the way to go, because most of this stuff you would be -- it should be pretty obvious if someone comes up and says we want to...

CHAIRPERSON BAILEY: Not revegetate at all, which it got kicked up to Santa Fe.

COMMISSIONER BALCH: Well, if they said not revegetate at all because we are going to do this and it's going to be -- going to provide equivalent or better protection. Then if it's clear that it would, then the division district office would say okay. If not, they would kick it upstairs, right?

CHAIRPERSON BAILEY: If they justify it that way, yes.

COMMISSIONER BALCH: Well, if they kept pushing the issue and they were denied, then it would go to hearing.

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BALCH: And then there would be the appropriate notifications and all of that.

So my understanding of the state land office and the surface owner is that you are somewhat restricted in your -- can you make a -- it sounds like the lease agreement had a large impact on your operational agreements with the companies.

COMMISSIONER BLOOM: Yes.

CHAIRPERSON BAILEY: The land office relies heavily on the OCD requirements for

reclamation and vegetation.

COMMISSIONER BLOOM: Yes.

CHAIRPERSON BAILEY: So it's not likely that you guys would seek to have some different reclamation standard.

COMMISSIONER BLOOM: No.

COMMISSIONER BALCH: Plus the other stakeholder, and we're not interested in that stakeholder.

COMMISSIONER BLOOM: So this was suggestive language, then?

COMMISSIONER BALCH: I think if you just add --

MR. SMITH: You're talking about putting something in that would say, I don't know, provided that the alternatives will provide equal or greater protection to, and then your litany the operator may request a variance to the revegetation and reclamation obligation under this rule --

COMMISSIONER BALCH: Well, I think we would just stop at after "if the alternative provides equivalent or better protection to fresh water, public health, and the environment," because the variation part of the rule specifically says that if it's not an exception you can apply for a

variance.

COMMISSIONER BLOOM: What if we took out "or imposed by specific agreements with the surface owners"?

CHAIRPERSON BAILEY: That way, if a surface owner has a -- different reclamations, they could seek a variance.

COMMISSIONER BALCH: They could still go to a variance, yeah.

CHAIRPERSON BAILEY: So delete "imposed by specific agreements with surface owners." That it would be "imposed by other applicable federal or tribal agencies shall supersede these provisions and govern the obligations."

MR. SMITH: You are sort of pre-assenting there to your regulation being preempted by other laws, and they may not be.

There may be other laws that speak to these sorts of obligations, but it doesn't mean that they necessarily have a preemptive effect.

CHAIRPERSON BAILEY: BLM? BLM requirements for operators have preempted OCD reclamation.

MR. SMITH: On BLM property, I'm sure that's true.

COMMISSIONER BALCH: And I would guess the same for tribal lands.

MR. SMITH: Well, you have something awfully broad here.

CHAIRPERSON BAILEY: That's true.

MR. SMITH: And I would be careful about tailoring it to what you know about BLM or supposedly about tribes.

I mean if you're preempted, you're preempted. If you're not, you're not.

COMMISSIONER BLOOM: Yes. Mr. Smith makes a point, that it's -- what we are proposing here doesn't say revegetation or reclamation obligations imposed by the applicable federal or tribal agencies on their land when superseding these provisions. It's almost saying that if they supersede they should go by federal or Indian guidelines.

CHAIRPERSON BAILEY: Ah, good catch.

COMMISSIONER BALCH: And I think it may not hurt to add "provide such alternatives that provide equivalent or better protection" at the end, regardless.

COMMISSIONER BLOOM: Let me ask this question. There was no language of this sort previously?

CHAIRPERSON BAILEY: No, there wasn't.

COMMISSIONER BLOOM: Was there any testimony as to why we would want to add this? If there isn't, maybe we just reject it.

COMMISSIONER BALCH: Well, it's -- one of our mandates is we have prevention of waste, we have preservation of correlative rights, and then we have -- I think we have 19 or 20 other enumerated things that we are supposed to do.

And one -- and we have sort of distilled those down to three broad categories: fresh water, public health, and the environment.

So I think the rule is supposed to be protective of those three things in particular, which broadly encompasses most of our enumerated responsibilities. So I think you do want to have language here that would preclude someone doing less without seeking a variance to the rule.

COMMISSIONER BLOOM: I think this maybe opens up more territory than...

COMMISSIONER BALCH: Well, we certainly can't leave it the way it is because it -- and this is proposed language. This is not --

COMMISSIONER BLOOM: I'm saying we could reject this.

COMMISSIONER BALCH: We could reject the entire thing.

COMMISSIONER BLOOM: Then if anybody wants to bring up --

CHAIRPERSON BAILEY: Any kind of variance.

COMMISSIONER BLOOM: -- a variance or come forward and say, well, this is -- this is guided by federal guideline.

COMMISSIONER BALCH: BLM says we have to do this, the tribe says we have to do that. And then we have already determined some variances could be as simple as a phone call to the district office.

CHAIRPERSON BAILEY: But we don't want district personnel to have to process and deal with variances filed because of BLM requirements.

COMMISSIONER BLOOM: So it could be "revegetation reclamation obligations imposed by other applicable federal or tribal agencies" --

CHAIRPERSON BAILEY: On their --

COMMISSIONER BLOOM: -- "on their land" --

COMMISSIONER BALCH: "On their land" --

CHAIRPERSON BAILEY: -- "on their managed land."

COMMISSIONER BLOOM: -- "that would supercede" --

MR. SMITH: Was there any testimony about either real or theoretical conflicts that this rule poses with other regulators?

CHAIRPERSON BAILEY: Not that I recall.

COMMISSIONER BALCH: There was maybe some very short discussion around -- around BLM issues, but nothing substantively pointing at this section.

But this is a recommended language by the proponents.

MR. SMITH: No, I understand -- I understand that. But you know, you want to make recommended changes that are supported by the record before you or that are logical extensions of other changes that are supported by the record before you.

COMMISSIONER BALCH: Well, I think that may go back to the discussion we were having about protections. We want to make this rule, in all instances, protective. And if this language is not clear on that it would allow less protection. We can't leave it in the way it's written.

MR. SMITH: Do not your variance and exception provisions require across the board that variances and exceptions will be made only to the extent that they provide equal or better protection?

COMMISSIONER BALCH: Absolutely.

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MR. SMITH: So if you pull this out and someone wants to alter their obligations under this rule, they will have -- for whatever reason -- they will have to seek a variance or an exception, right?

COMMISSIONER BALCH: That would be right.

MR. SMITH: That's your protection, then.

COMMISSIONER BALCH: And then Commissioner Bailey brought the point up you have thousands of sites that are administered by the BLM, and then you have a thousand variations, potentially, to the rule that would have to be sought.

And another direct issue that was brought up by the proponents of this was to make it clear and easily administrated.

CHAIRPERSON BAILEY: And prevent conflict.

COMMISSIONER BALCH: And prevent conflict.

CHAIRPERSON BAILEY: This is a source of conflict or a question.

MR. SMITH: That may be enough to justify something like this.

But do -- do I understand correctly, then, Madam Chair, that you wish for this, for lack of a better word, "preemption," to be automatic?

CHAIRPERSON BAILEY: For revegetation and reclamation on federal or Indian lands managed by

those agencies, yes, so that our personnel don't have to spend the time to process a variance for thousands and thousands of permits.

COMMISSIONER BLOOM: Because the alternative -- there is really no alternative there. The OCD can insist that the guidelines be followed on federal land, correct?

COMMISSIONER BALCH: I don't think so. I mean, it does work -- you know, it works the other direction --

COMMISSIONER BLOOM: I mean, if you can't have a --

COMMISSIONER BALCH: If the federal statute or regulation is stiffer than ours we have to go by federal. I don't think it works the other way around.

CHAIRPERSON BAILEY: No, it doesn't.

COMMISSIONER BALCH: So I think that that would probably be the way to go. Specify "on their managed lands," and then just take out the language we have discussed earlier, and then not add anything to it, because we can't enforce that.

MR. SMITH: I cannot speak specifically to this. But I do think that in the area of mining, for instance, if the state has stiffer regulations

than BLM does, for instance, the BLM regs say that you must comply with the stiffer regs.

COMMISSIONER BALCH: So they have a -- you must use the stiffer regulation.

COMMISSIONER BLOOM: That would probably be a -- BLM, yeah, in a situation where there's state and BLM lands involved in one mining project, correct, if it was all on state?

MR. SMITH: Yeah. Yeah. Right. Well, or if it's just BLM land, because the state still regulates mining on BLM land.

COMMISSIONER BLOOM: Okay.

COMMISSIONER BALCH: All right. So it seems the most appropriate thing to do might be to add in the language about "managed on their."

CHAIRPERSON BAILEY: So after "tribal agencies" insert the language "on lands managed by those agencies."

Delete "or imposed by specific agreements with surface owners."

COMMISSIONER BALCH: And now do we want to add the language of "provided the alternative provides equivalent or better protection to fresh water, public health, and the environment"?

COMMISSIONER BLOOM: I don't think we -- I

don't know that we can.

COMMISSIONER BALCH: Well, I think Mr. Smith just said that at least for mining reclamation and BLM, that if you had a more stringent state regulation that we would follow that.

CHAIRPERSON BAILEY: So it doesn't hurt to include that language, does it? Does it --

MR. SMITH: Well, to the extent -- to the extent the law governing the oil patch is different from the law governing mining, you might be stepping on some toes.

COMMISSIONER BLOOM: Then the OCD employee that's reading through this could say, well, I'm not going to allow you to revegetate and reclaim to BLM standards because I don't think it's --

COMMISSIONER BALCH: It's not as good as ours.

COMMISSIONER BLOOM: -- protective, yes. I mean --

MR. SMITH: We could try it.

COMMISSIONER BLOOM: -- I don't know if we could do it.

MR. SMITH: And at that point --

CHAIRPERSON BAILEY: Well, we don't have

an MOU with BLM at this point either.

MR. SMITH: At that point it would be worked out, I would assume --

CHAIRPERSON BAILEY: Yeah. We try not to --

MR. SMITH: -- between OCD and BLM.

CHAIRPERSON BAILEY: We do our best not to provide conflicting requirements.

COMMISSIONER BALCH: So the real goal is just to make sure that we don't have a thousand variances being sought.

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BALCH: So I think the language the way it is now, to remove one of the two at the end of the second line would be reflective of that.

COMMISSIONER BLOOM: Do we want to call this other requirements or something?

COMMISSIONER BALCH: Other regulatory requirements. I don't think "contractual" belongs in there either.

COMMISSIONER BLOOM: No, not anymore. That was related to surface owner.

CHAIRPERSON BAILEY: Okay. So the title of (4) --

MR. SMITH: You know, I think that you can add your provided -- the proviso that you were talking about, Commissioner Balch. As I appreciate your obligation to protect the environment, it is not simply to protect the environment for a particular landowner, it is to protect the environment.

CHAIRPERSON BAILEY: Okay.

COMMISSIONER BALCH: All right. We still need to change the language up here.

CHAIRPERSON BAILEY: Yes. In title (4), replace the word "alternative" with "other." Remove the words "or contractual." At the end of that paragraph, at the end of "provisions," put a comma, "provided the alternative requirements" --

COMMISSIONER BALCH: Other requirements.

CHAIRPERSON BAILEY: Oh. "Provided the other requirements," I'm sorry, "provide equal or better" --

COMMISSIONER BALCH: I think we've used "equivalent," right?

CHAIRPERSON BAILEY: Did we use "equivalent"?

COMMISSIONER BALCH: Didn't we use "equivalent or better"? As long as we're

consistent, in the end, it doesn't matter.

CHAIRPERSON BAILEY: "Provide equal or better protection of fresh water, human -- public health, and the environment."

Okay. Are we happy with that paragraph, then?

COMMISSIONER BALCH: "Happy" might be a stretch, but... It's the most innocuous paragraph --

COMMISSIONER BLOOM: Do we need "applicable" in there?

COMMISSIONER BALCH: Yes, I think we do, because it may not be just BLM. It could be something else.

CHAIRPERSON BAILEY: It could be EPA trying to do something.

COMMISSIONER BALCH: It could be an EPA regulatory agency or it could be any number of -- it could be a tribal agency.

COMMISSIONER BLOOM: But they would still be applicable by definition.

CHAIRPERSON BAILEY: But we have narrowed it to those agencies that are managing the land.

COMMISSIONER BLOOM: Yeah. I don't think we need "applicable."

CHAIRPERSON BAILEY: But it could be NRC on BLM land.

Okay. Why don't we look at the proposed crossed-out language just below, to ensure that we can cross that out while we are in this area.

COMMISSIONER BLOOM: Yes. There's actually something down there that might make sense to include up above. And that was --

COMMISSIONER BALCH: Let's just go through it line by line.

COMMISSIONER BLOOM: Yeah.

COMMISSIONER BALCH: We have replaced -- substantially replaced revegetation with reclamation and revegetation in (3).

COMMISSIONER BLOOM: We can get rid of that.

CHAIRPERSON BAILEY: Okay.

COMMISSIONER BALCH: And instead of having specific requirements we have, instead, imposed a life-form ratio and surface cover. So I think...

CHAIRPERSON BAILEY: We can get rid of paragraphs (1) and (2), then.

COMMISSIONER BALCH: Yes.

COMMISSIONER BLOOM: Is (3) implicit in what we created above?

COMMISSIONER BALCH: Well, you don't have 70 percent cover until you successfully --

COMMISSIONER BLOOM: You're not successful until you have 70 percent coverage?

COMMISSIONER BALCH: Right.

CHAIRPERSON BAILEY: True.

COMMISSIONER BALCH: So (3) can go.

And we have also said in the first appropriate growing season, so (4) is also now --

CHAIRPERSON BAILEY: The first favorable growing season, so that covers any problem with drought. So we can eliminate (4).

And (5) is notification of division when it has successfully achieved vegetation.

COMMISSIONER BALCH: Right. And I think that that may be...

COMMISSIONER BLOOM: Maybe up above in what is (c) we would need to add something about notification and the ratios.

COMMISSIONER BALCH: I think you don't want notification every time you are seeding.

Dr. Buchanan presented a scenario where you might go out and do your contour and your geomorphology, and then a month or so later when it's getting ready to start raining, you would plant

your seeds, and then you plant your forbs in March, and so on and so forth. But do you really want a notification every time they plant a seed?

CHAIRPERSON BAILEY: Why don't we change that to "the operator shall notify the division when reclamation is complete," and that reflects the language of (c).

And what are we going to do with it if they notify us?

COMMISSIONER BLOOM: Exactly. That's what I was --

CHAIRPERSON BAILEY: What difference -- I mean...

COMMISSIONER BLOOM: Yeah. They'll notify the division when --

COMMISSIONER BALCH: When reclamation and revegetation is complete.

CHAIRPERSON BAILEY: Right.

COMMISSIONER BLOOM: Notify for inspection or...

CHAIRPERSON BAILEY: Yeah. What are we going to do?

COMMISSIONER BALCH: Well, that's the next question.

COMMISSIONER BLOOM: Maybe when these

conditions are met the operator shall notify the division for final signoff or certification or...

COMMISSIONER BALCH: What happens when they are done with reclamation? Is there some certification letter that's put on file somewhere?

CHAIRPERSON BAILEY: Not that we have written in here, no.

COMMISSIONER BALCH: You know, I think there was discussion or testimony about -- I think it was in cross-examination of Dr. Buchanan. So you go and you reclaim the site, and then two months later it's failed.

CHAIRPERSON BAILEY: I know where this is useful. It's for bond release.

COMMISSIONER BALCH: For bond release?

CHAIRPERSON BAILEY: Yeah. Because in some areas that would be the condition for bond release. So the operator shall notify the division when reclamation and revegetation are complete.

COMMISSIONER BALCH: And we're calling it reclamation and revegetation.

CHAIRPERSON BAILEY: And revegetation are complete.

COMMISSIONER BLOOM: The bond may be released when --

CHAIRPERSON BAILEY: Well, we don't even have to say that. That's just what would happen. That's why we would want to be notified.

COMMISSIONER BALCH: And presuming where there would be some inspections of that for the release of the bond.

CHAIRPERSON BAILEY: Yes.

And that sentence could become the last sentence of (c) up above.

COMMISSIONER BALCH: Or (d), in Section (3), if you wanted to have it -- if we put it into (3) or (c) of (3), then it cuts specifically to that.

It excludes the other regulatory requirements? Maybe you want to have it as a (5), so it would cover all reclamation revegetation.

CHAIRPERSON BAILEY: So it would be at the end of (5) (c).

COMMISSIONER BALCH: Well, it will become (5).

CHAIRPERSON BAILEY: Okay. Before you move it, though, you will want to delete the language in there that should be deleted, as in after the word "complete," you would have that deletion.

Yes. Now it can be moved up to the end of (c).

COMMISSIONER BLOOM: I think Commissioner Balch and I were thinking it might actually remain as (5) down below, and that perhaps --

COMMISSIONER BALCH: Even if there was another regulatory requirement and a different reclamation, the division would still want to know when it was complete, right?

CHAIRPERSON BAILEY: Oh, now I see. Okay.

COMMISSIONER BALCH: So I think you'd still want to have --

CHAIRPERSON BAILEY: Okay. Nevermind.

COMMISSIONER BALCH: If you control Z a couple of times it will probably fix itself.

There you go.

CHAIRPERSON BAILEY: Let's take a break.

Why don't we come back at 10 till.

(A recess was taken from 2:37 p.m. to 2:52 p.m.)

CHAIRPERSON BAILEY: Commissioner Bloom, we talked about marking a pit location with a steel marker, but we didn't actually include it in any part of what we covered this afternoon.

I was looking at D, "Closure Report, for a

logical place to put any requirement that we may choose, if we choose.

COMMISSIONER BLOOM: I think that happened when we failed to -- or we stopped going through the proposed deletions, correct?

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BALCH: I think D (3) could specify that segment.

CHAIRPERSON BAILEY: That's exactly what I was going to propose.

On page 30 of the pages and pages of deleted language, so that would be old F (1) (d), that begins with: "The operator shall place a steel marker at the center of the on-site burial."

Have you found where I'm talking?

COMMISSIONER BLOOM: Yes.

CHAIRPERSON BAILEY: "The steel marker shall be not less than 4 inches," et cetera, et cetera, et cetera.

We could, if the commission chooses, copy that paragraph and insert it as D (3) under "Closure Report," so that on-site burials would be marked not only in C-105, but also with a steel marker.

COMMISSIONER BLOOM: We don't need anything below that, do we?

CHAIRPERSON BAILEY: Well, because we already have that in D (1).

COMMISSIONER BLOOM: Right.

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BLOOM: Yeah. So we could take that down and cut it out there.

CHAIRPERSON BAILEY: Yes. Copy it and put it under D, as D (3) in Section 13 that we have been working with.

Do we all agree?

COMMISSIONER BALCH: The only thing that tickles the back of my mind on this, as I recall, somebody at some point -- not in the hearing, it was outside of this -- noting that there was some constraint on how high aboveground we could have things because of the --

COMMISSIONER BLOOM: For the lesser prairie chicken habitat and things like that.

COMMISSIONER BALCH: Yeah, something like that. I don't know if they --

CHAIRPERSON BAILEY: Well, (c) is the same as the -- that 4 feet is the same as the plugging requirement for a well.

COMMISSIONER BALCH: Okay. I'm presuming that's going to be --

COMMISSIONER BLOOM: Fencing -- cattle fencing as well.

CHAIRPERSON BAILEY: Uh-huh.

COMMISSIONER BALCH: Okay. No conflict with something else structural.

CHAIRPERSON BAILEY: Not that we're aware of.

COMMISSIONER BLOOM: I guess a variance could be sought if --

COMMISSIONER BALCH: We just don't -- again, you just don't want to --

COMMISSIONER BLOOM: -- if somebody was trying to comply with the CCA, for example.

COMMISSIONER BALCH: You don't want to have someone --

COMMISSIONER BLOOM: That's an important consideration.

CHAIRPERSON BAILEY: Or if there's an irrigation problem with the pipe 4 feet above the ground interfering with an irrigation system. That's another area where a variance may be necessary.

Okay. Now we have come to Table I, unless we want to go back and talk about other areas that we put off.

COMMISSIONER BALCH: I think what we could do --

COMMISSIONER BLOOM: I think that probably --

CHAIRPERSON BAILEY: But I think a lot of what we put off is predicated on Table I.

I would propose that we add another category to Table I that would apply to all depths of groundwater, and from the surface to 4 feet below the surface of the ground, which is the rooting zone and topsoil for revegetation.

I propose this because all of the testimony and -- has been predicated on the revegetation requirement in order to prevent downward migration of salts.

So to me, and also with Dr. Neeper's testimony on page 1,295, where I asked him what the limit he recommended to be for chlorides at the surface for revegetation.

And on line 12 on page 1,295 I asked if he was recommending no more than 600 milligram per kilogram of chloride within the top 4 feet of the surface.

And he responded:

"That's what I would recommend. If you

made it 700, it would be fine for the surface waste facilities. I think they put up to a thousand at one point. I think that's pushing it, but that's the region in which I would put it. That 600 might really be 700 for the equivalent of EC4," which is the limit he set for revegetation.

So we have several different values that we could put for chlorides.

COMMISSIONER BLOOM: What was the initial one he said?

CHAIRPERSON BAILEY: The initial one he said was 600, and that's what he recommends.

COMMISSIONER BLOOM: Milligrams per kilogram?

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BALCH: At the surface.

CHAIRPERSON BAILEY: At the surface.

He also said 700 would be fine for surface waste facilities.

COMMISSIONER BLOOM: That's interesting, because I thought he testified to a near sterilizing effect at 450.

CHAIRPERSON BAILEY: This is on page 1,295, lines 12 through 23.

He had testified that the EC4 was about

equivalent to 600 milligrams per kilogram, and that was the limit he recommends.

So when we are looking at Table I, we could move that block that says "Depth to Groundwater" down a row. We would be adding a row only for that block and establishing, at the top of that table, "Constituent, Chloride; Method, EPA 300.1; Limit," 600 or 700, whatever we choose here, for that area which is from the surface to 4 feet below the surface of ground.

COMMISSIONER BALCH: I'm starting to wonder if we might need to have two tables, because most of the criteria in the rest of this table have to do with on-site burial.

CHAIRPERSON BAILEY: Uh-huh.

COMMISSIONER BALCH: Whereas, chlorides at the surface would apply to pretty much all situations.

CHAIRPERSON BAILEY: All situations, yes.

COMMISSIONER BALCH: So maybe we don't need a table if we could just include it in the text appropriately for that scenario.

CHAIRPERSON BAILEY: We have so many different locations where we talk about closure of pits in this area and closure of drying pads in that

area, we need to have one global comment, or statement.

COMMISSIONER BALCH: One place where it's clear.

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BALCH: But I don't know if adding it to this table does that.

CHAIRPERSON BAILEY: Well --

COMMISSIONER BALCH: You could have a separate -- you could have a truncated Table I in the original proposal that addressed the scenario that you are talking about, and that would cover -- that would cover any surface condition after remediation or reclamation.

CHAIRPERSON BAILEY: For reclamation.

COMMISSIONER BALCH: For reclamation.

CHAIRPERSON BAILEY: In order to have reclamation, the surface down to 4 feet can be no more than 700 milligrams.

COMMISSIONER BALCH: So when we were talking about reclamation in the text, when we are describing that earthen uncontaminated material, could we not just put in the criteria of less than 600 milligrams of chloride?

CHAIRPERSON BAILEY: So you are talking

about F: "Reclamation of pit locations, on-site burial locations, and drying pad locations"?

COMMISSIONER BALCH: Yes.

CHAIRPERSON BAILEY: That doesn't talk about below-grade tanks.

COMMISSIONER BALCH: Well, we could also add the same language to the section on below-grade tanks, or we could add a separate small table that would -- both of those sections would point to.

But if the only thing it's saying is 600 milligrams of chloride or less, then I'm not sure it's important as a table.

CHAIRPERSON BAILEY: Okay. What we could do is at F, instead of going from the title of F into site contouring --

COMMISSIONER BLOOM: What page are we on now?

CHAIRPERSON BAILEY: Page 36.

We could put it before --

COMMISSIONER BALCH: We could just put as a new (1) --

CHAIRPERSON BAILEY: Uh-huh.

COMMISSIONER BALCH: -- and then renumber everything from there.

Let's see. Where do we talk about the

4-foot of material?

CHAIRPERSON BAILEY: In "Soil cover designs."

COMMISSIONER BALCH: That is in F also?

CHAIRPERSON BAILEY: Yes. That's F (2).

COMMISSIONER BALCH: Okay. (F) (2).

CHAIRPERSON BAILEY: For drying pads. And then for pits, that could be --

COMMISSIONER BALCH: If we only really need to refer to it in one or two places, it might not warrant a table.

CHAIRPERSON BAILEY: Uh-huh.

COMMISSIONER BALCH: And we could put it here, instead of saying "to the concentration specified by in closure of Table I," you replace that language with the limit, whatever we establish that to be.

And then I think that there was -- also, we would want to do it in (3).

CHAIRPERSON BAILEY: Which deals with pits, tanks, and on-site --

COMMISSIONER BALCH: And here you could just say "a minimum of 4 feet of non-waste-containing uncontaminated earthen material with chlorides."

CHAIRPERSON BAILEY: "With chloride concentration."

COMMISSIONER BALCH: -- "concentrations less than" --

CHAIRPERSON BAILEY: "Less than 600 milligrams per kilogram."

COMMISSIONER BALCH: I would be comfortable with that.

CHAIRPERSON BAILEY: Okay. Let's go ahead and put it in both of those areas.

COMMISSIONER BALCH: Would you be all right with that, Mr. Bloom?

COMMISSIONER BLOOM: Yes.

In going back and reviewing the section of testimony -- and it was actually Dr. Neeper saying that a recovered site -- and he was doing some sampling and found areas where there were chlorides that were 2- to 4,000 and nothing was growing there. But he said that some things could survive. He found grass growing in areas where there was chlorides up to 400. So...

COMMISSIONER BALCH: And apparently 700 is an appropriate standard for other types of waste facilities, so this is a little more conservative than that.

CHAIRPERSON BAILEY: That's 600 milligrams per kilogram.

COMMISSIONER BLOOM: MG over KG.

CHAIRPERSON BAILEY: Okay. And that also goes up above. Yes.

COMMISSIONER BALCH: And then you can delete the -- after the "milligrams per kilogram," down to the "shall." You can say "and shall consist of."

Would that work?

CHAIRPERSON BAILEY: That works for me. And that will ensure that we can have revegetation of the surface, which is one of the bases for allowing the on-site closure to begin with.

COMMISSIONER BALCH: All right.

So now back to Table I.

CHAIRPERSON BAILEY: Yes. We --

MR. SMITH: But do you -- I'm sorry.

Do you want the word "and" after your citation to 600 milligrams per kilogram or do you want a comma there?

COMMISSIONER BALCH: Well, you are describing what the thickness has to be, and then you are describing what the chloride content of the material that you are covering can be at its

greatest amount. So they are really two separate components of the criteria.

CHAIRPERSON BAILEY: Yes, but is also an insertion after --

COMMISSIONER BLOOM: I'm having trouble reading that and making sense of it.

MR. SMITH: Well, you -- well, you -- I mean if you omit some of the interjected clauses, the basic function of this sentence is to say that the soil cover for closures shall consist of, is that right, and everything in between is describing...

COMMISSIONER BALCH: So you're thinking make a subparagraph (a) that would have the chloride limit, pull that out of the middle there?

MR. SMITH: No. If I understand what you're getting at here, I would think -- I would think that you would remove the "and" after "milligrams per kilogram," and put in a comma, so that the "shall" goes back to soil cover for closures.

COMMISSIONER BALCH: Why don't we try that.

MR. SMITH: And everything after "closures," the "where the operator has removed,"

down to "600 milligrams per kilogram" is really modifying the word -- the phrase "soil cover for closures," right?

COMMISSIONER BALCH: I think that's pretty clear.

MR. SMITH: Okay. Okay.

COMMISSIONER BLOOM: Yes. That makes sense to me now.

CHAIRPERSON BAILEY: Well, the phrase in there "to establish vegetation at the site" seems to be in the wrong place.

COMMISSIONER BALCH: This is soil design. I don't know if we actually need to explicitly state "to establish vegetation at the site." That's covered in later sections.

CHAIRPERSON BAILEY: We could delete those words and maybe remove some confusion. "Shall consist of the background thickness of topsoil or 1 foot of suitable material, whichever is greater."

I think that makes sense now.

COMMISSIONER BLOOM: Yes.

CHAIRPERSON BAILEY: Are we in agreement?

COMMISSIONER BALCH: Yes.

CHAIRPERSON BAILEY: Okay. Now, to Table I.

No matter what value we put on chloride at the very first category, that needs to change from milligram per liter to milligram per kilogram, the same there and in the category below.

COMMISSIONER BALCH: Now, was that a typo?

CHAIRPERSON BAILEY: Yes, it certainly has to be, because everything else is milligram to kilogram.

COMMISSIONER BALCH: Because we're talking about dry material.

CHAIRPERSON BAILEY: And we're talking about soils, yes.

COMMISSIONER BALCH: Okay.

CHAIRPERSON BAILEY: So --

COMMISSIONER BALCH: Unless that EPA 300.1 test saturates the material. I don't know.

CHAIRPERSON BAILEY: Well, we are talking waste.

COMMISSIONER BALCH: Okay.

CHAIRPERSON BAILEY: Okay. Now, we can talk about what the values are.

COMMISSIONER BLOOM: I'm sorry. In the upper left-hand corner, I think that should still be liters there, because that's the groundwater where --

CHAIRPERSON BAILEY: Uh-huh.

COMMISSIONER BLOOM: Right?

CHAIRPERSON BAILEY: Yes. We're talking water there.

COMMISSIONER BLOOM: That's still liters.

CHAIRPERSON BAILEY: Should we work with the title?

COMMISSIONER BALCH: Well, let's fix the title first.

COMMISSIONER BLOOM: These wastes may not be necessarily left in place.

COMMISSIONER BALCH: Well, it may not necessarily --

CHAIRPERSON BAILEY: It's temporary pits.

COMMISSIONER BALCH: Yeah. The purpose of the table, the way we work around to it, is to define limits at which point you could then apply cover and reclamation.

So you could, in one instance, look at this table after testing the -- below your removed below-grade tanks, you cross-reference your depth to groundwater, and then look to see if -- your five-point test -- to see if you're at the limit or not.

The other case would be you might actually

have material left on site that you have stabilized and mixed, whatever, and then you do the same thing.

So we don't want to necessarily say "for waste left in place," in the title. It could just be closure criteria.

CHAIRPERSON BAILEY: It works for me. It makes it pretty broad. And that way, it also --

COMMISSIONER BALCH: It applies to every situation you have referenced this table to, yes.

COMMISSIONER BLOOM: Yes.

CHAIRPERSON BAILEY: Okay. So let's delete that language.

COMMISSIONER BALCH: Okay. Do you want to work down the depth table?

CHAIRPERSON BAILEY: Yes. I think we should just start on the top and work on down.

COMMISSIONER BALCH: All of the witnesses for NMOGA that referenced this table were asked under their direct examination whether these limits were protective, and they all said yes.

IPANM did not directly address this table. However Mr. Mullins, under examination about his model criteria, said that in his model criteria, where they were different from previous models, reflected the values in this table. So that's --

the relevancy of his models are designed around this table.

CHAIRPERSON BAILEY: And he modeled at 25 feet below the bottom of the trench.

COMMISSIONER BALCH: So this was the most conservative case.

In his examination he referred to IPANM Exhibit 13, which is a soil and groundwater research bulletin, non-aqueous phase liquid mobility and limits of the soil.

He testified that all of the limits on this table were well below limits established in this document as well.

So I just wanted to throw that out as kind of a broad background of where and how appropriate these levels might be. So if you are looking in -- it's on page 3 of Exhibit 13 of IPANM. It has a table, and it has benzene in gasoline and diesel range organics.

And chlorides, of course, we have discussed extensively elsewhere.

CHAIRPERSON BAILEY: Page 3 of Exhibit 13, IPANM?

COMMISSIONER BALCH: Yes.

A good example of that is the benzene

limit is 53,000, and in every category here it's 10. But that was the specific discussion that occurred in the testimony, so I wanted to present that.

CHAIRPERSON BAILEY: Recurrent benzene limits.

COMMISSIONER BLOOM: 0.2 milligrams per kilogram?

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BALCH: Yes.

CHAIRPERSON BAILEY: Which is a far cry from 10, much less 53,000.

COMMISSIONER BALCH: Well, it's 20 times greater.

CHAIRPERSON BAILEY: 50 times.

COMMISSIONER BALCH: It's many, many more times.

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BALCH: Several orders of magnitude.

CHAIRPERSON BAILEY: Exactly.

COMMISSIONER BALCH: Well, okay. Let's maybe talk a little bit more about the structure of the table.

For BTEX and benzene, those limits don't change regardless of the depth. So all we have to

really do is decide if the limits are appropriate. TPH does increase with depth, and chloride increases with depth to groundwater.

Dr. Thomas, under cross-examination, said that a hundred or a thousand milligrams per kilogram of benzene would be protective for on-site disposal in unsaturated materials.

A hundred or a thousand are greater than 10 and greater than .2. They're also -- it's also well less than 53,000.

CHAIRPERSON BAILEY: Uh-huh.

COMMISSIONER BALCH: So we have quite a range of values that were presented to us. These are the values that were put into the table, and I think that there was some testimony to the effect that these were safe values that would allow operational flexibility.

CHAIRPERSON BAILEY: I don't recall that there was any conflicting testimony put on by either citizens for clean air and water or through OGAP, as far as the level for benzene.

There was conflicting presentations on chlorides, but I don't recall that there was any argument against the levels that were recommended in this table for benzene.

COMMISSIONER BALCH: I don't recall any either. And that is also why I did some research on my own. And I think I have discussed that already during our deliberations. That when you pump gas you can be exposed to 20 milligrams of benzene. That was actually from Dr. Thomas' testimony.

Benzene is a risk in the liquid phase. It can transport great distances through water in a liquid phase.

In soil, benzene degrades pretty quickly. So you are looking, really, at those degraded components going up through the soil or venting into the atmosphere before you bury it, as the vector.

And a lot of these vectors for benzene, BTEX, and TPH were not really discussed, except for in the context of witnesses being asked if they were protective limits, which they always said yes.

And then Mr. Mullins pointed to the document Exhibit 13.

CHAIRPERSON BAILEY: And I can resolve this, that BTEX and benzene are aromatic hydrocarbons that oxidize, given appropriate remediation. Stripping is one of the techniques for remediation.

If they are found at 25 feet below the

bottom of the trench, then the exposure is limited to its concentration in groundwater movements.

COMMISSIONER BALCH: Well, first of all, it has to be -- it has to be there, and it's not necessarily stable in soil.

So you would have to have -- again, I think this really comes back to benzene in a pit is dangerous during the operational phase.

CHAIRPERSON BAILEY: Because the contact is --

COMMISSIONER BALCH: Because it's in fluid. And if you had a release you would have greater infiltration than you would have if it was stabilized and then buried.

CHAIRPERSON BAILEY: And the impact to public health is higher at -- during the operational phase than it is during the burial phase of the reclamation.

COMMISSIONER BALCH: We established that weekly inspection and a two-day response by operators that would -- that allowed us to adopt siting criteria, not just for low chloride, but for any chlorides. Some of it can be kept from the previous Rule 17. The response time was attributed as to the greatest offense, and I think we have

established a protective response time.

Once you mix the benzene and BTEX aromatics in the soil and stabilize them, you are going to accelerate degradation and they are going to be isolated from the water table.

Chloride transport in a downward direction were estimated to be processes -- estimated by Dr. Buchanan to be processes that occurred over a thousand years, and then modeled in two different ways, which we have discussed, one which I characterized as more of a -- of a worst-case scenario, and one which is more a representative scenario.

Chloride was also discussed quite a bit in testimony as being a marker. If you saw the chlorides you could see the other stuff, in theory. There wasn't a lot of discussion about transport of benzene or BTEX or any of your gasoline or diesel range organics.

How is benzene going to get into a pit fluid, might be the question to ask.

CHAIRPERSON BAILEY: A multi-well fluid management pit is going to have benzene.

COMMISSIONER BALCH: But that's going to be completely removed.

CHAIRPERSON BAILEY: That is right. Any kind of stimulation fluid, even in a temporary pit, would be the source of a waste in place.

COMMISSIONER BALCH: And that would be similar for BTEX. That could be chloride.

CHAIRPERSON BAILEY: Right.

COMMISSIONER BALCH: And the gasoline range and diesel range organics?

CHAIRPERSON BAILEY: I do believe so.

COMMISSIONER BALCH: Similar.

COMMISSIONER BLOOM: Benzene is a corral, yeah.

COMMISSIONER BALCH: Yeah.

So to me, the greatest level of protection you want to have during the operational phase, and I think we have done as good as you can without having somebody sit there and watch the pit 24 hours a day and limiting transport risk.

And then there's also the spillover, which takes up if there's a more catastrophic failure of some system.

CHAIRPERSON BAILEY: I hear justification for the levels of BTEX and benzene in both 25 feet below the surface of the bottom of the trench or pit and 51 to 100 feet below the bottom of the trench or

pit.

COMMISSIONER BALCH: They do increase the -- the only thing that increases going downward is chloride and TPH. Basically, the further transport distance you have the lower the risk of contamination of chlorides. That's pretty obvious.

The TPH, I think, is going to become very stable in the waste material.

CHAIRPERSON BAILEY: It oxidizes and degrades.

COMMISSIONER BALCH: Yes. So the long-term concern of having these components in buried waste is really in two directions. You have a direction down, where it's --

CHAIRPERSON BAILEY: It can impact fresh water.

COMMISSIONER BALCH: -- it can impact groundwater.

I think -- I think it's going to be reasonably protective, and the chloride modeling showed that those are long-term processes.

And I don't think that TPH, BTEX, and benzene are as long-lived -- and certainly not as long-lived as chloride. But they are not long-lived enough to impact groundwater on the scales of time

that chloride transport through the soil appears to be occurring, both from the physical evidence presented in the pit examples of Dr. Buchanan and Dr. Neeper, but also in the modeling.

CHAIRPERSON BAILEY: Physical and chemical reactions within burial would, over time, eliminate TPH, BTEX, and benzene.

COMMISSIONER BALCH: So the next question is impact upwards. And that was discussed much less in regards to BTEX, benzene, and TPH. It was discussed with chlorides.

Dr. Buchanan, in his testimony, said that he'd looked at over 6,000 soil profiles and examined over 8,000 soil samples. And he was pretty adamant that it was hard to move those salts up by more than, say, 6 to 12 inches, and usually much less than 6 would be where the concentrations would occur. So chloride upper movement is probably relatively safe.

CHAIRPERSON BAILEY: Particularly when we have it protected by 4 feet of uncontaminated soil with -- what was it -- 600 milligrams or less.

COMMISSIONER BALCH: And benzene is not toxic to plants. BTEX and TPH, I think, could be.

But again, it's how long are they exposed

and how long before this material degrades.

And we did not get a lot of direct testimony, except for the various experts were asked if this was detected.

And then Mr. Mullins referenced to the Exhibit 13 soil and groundwater research bulletin, non-aqueous phase liquid mobility and limits of the soil. And their limits were all much higher than what was presented here for BTEX, TPH, and benzene.

CHAIRPERSON BAILEY: I believe we have enough testimony in the record to be able to accept at least those concentrations for TPH, BTEX, and benzene.

Do you agree?

COMMISSIONER BLOOM: On benzene, I will point out that we didn't see modeling of benzene transport.

COMMISSIONER BALCH: No.

COMMISSIONER BLOOM: And Dr. Thomas, he spoke about benzene and how to slide the NMOGA to 1115, pointing out that benzene is a bone marrow poison and a carcinogen, and although present in the pits at low concentration, many regulatory agencies consider any exposure to a carcinogen to be unacceptable, so that -- that causes me some

concern.

Again, I am looking for cost/benefit. I'm looking for a bit of a cost/benefit analysis here, and I didn't see either. I don't know how an industry operator would be gaining by increasing the benzene levels 50-fold.

We didn't hear testimony about what a typical benzene level is in pits around New Mexico.

I also don't support the change because I haven't seen a compound risk analysis. And one of the things we are doing -- we would be doing is increasing benzene 50-fold, decreasing the distance to groundwater by up to 50 percent, reducing the distance to surface water horizontally by a third, and having liners potentially in the field almost twice as long as they were in temporary pits previously.

So I think that the risk is actually changing in kind of a multiplier effect there. It's just one on top of the other.

COMMISSIONER BALCH: We discussed this on Monday. We were talking about benzene, and I can't remember the context. But I think I pointed to that Dr. Thomas liked to talk about benzene. It's -- I had a number of different citations, and I can

provide them to you, or you can look them up in the transcript from Monday.

He really did not feel that these levels were unprotective, particularly the example I said of even 20 milligrams just putting gasoline in your car.

The risk, as he presented it, was in the transport. And once it's stabilized, it's not as transportable.

The --

COMMISSIONER BLOOM: Here's another -- I guess what we are being asked to take on faith is that these newly suggested levels are somehow going to result in savings to industry.

COMMISSIONER BALCH: Well, I think that --

COMMISSIONER BLOOM: But if they result to savings in industry, then that means that there's not waste. And I would have already disputed the, perhaps, debatable link between economic costs and waste.

I think there's a -- a balance that has to be struck there.

COMMISSIONER BALCH: Sure.

COMMISSIONER BLOOM: And again, I haven't heard anything about what the benefits are and a

little bit more about what the possible cost of increasing these could be.

COMMISSIONER BALCH: I mean, a nationally known toxicologist did talk down the risk of benzene in particular. So I think you do have to take into account evidence from -- from a witness like that.

And much like I did put a lot of weight on Dr. Buchanan's testimony, because he is nationally known and awarded for his reclamation efforts. And he is very familiar with desert soils of New Mexico in general, and would be -- I think it would be limiting to -- to try and disregard their experience, even if they are not directly giving you a model. But their experience with contaminate flow -- I think Mr. Arthur, also.

And that's a much more applied -- he was a much more applied person and has worked with the EPA and other types of waste sites, and also oil and gas waste sites across the country.

His experience led him to be able to say that these levels were protective.

And while we do have an increase of 50-fold on benzene, for example, it is 5,000 times lower than what is -- what is cited in the mobility report in the soils and groundwater research

bulletin.

I think the mobility is not a terribly -- it comes down to -- to what you're looking at in the risk. And in the fluid phase, I think benzene is very dangerous. I don't think there's any doubt about that.

In the stabilized state, these are aromatic hydrocarbons that will drain very quickly, and then you're going to bury them down 4 feet.

Now, I'm not a chemical engineer or a chemist, so I can't give you personal experience on these numbers. All I can say is that the witnesses that were asked about this did say they are protective.

And we didn't have a lot of counter-discussion to that, as Commissioner Bailey pointed out.

COMMISSIONER BLOOM: I think it was more in some of the lines of questioning that we heard.

And I certainly respect Dr. Thomas' work in toxicology. I think he's probably a little less qualified to speak to transporting. He said that those were -- those are experiences he's gained over the years by working in industry and talking with folks and working on some of these issues for --

COMMISSIONER BALCH: Well, he wasn't the only one that talked about transport and liquid phase/operation phase being the primary risk. Just about all of the witnesses addressed that.

And a lot of them did address it from an experiential point of view. I will give you that.

COMMISSIONER BLOOM: And Dr. Thomas talked and described the difference between -- I think it was, what, risk and hazard, for example. It's risky to step out in front of a bus, but it's not hazardous if it's five blocks away.

The reason he said that benzene isn't going to move into water is because he believed the bentonite clay and the drilling fluids -- or the drilling mud would -- would stop that.

And I think we head into some slipperier territory there. His belief in that seemed to be boundless or endless, as he was asked if it could handle a hundred or a thousand milligrams per kilogram benzene. He said that that would be fine, he thought it would be protective.

COMMISSIONER BALCH: Yes. His risk discussion is on page 448, lines 12 through 23 of the transcript. But we have essentially discussed that.

But after he gives his best example he goes on, on line 14 page 448:

"Similarly, with chemicals. You -- you have got to have an exposure in order to have a risk. You can have the world's most toxic chemical, but if there is no exposure there is no risk.

"It becomes important in a regulatory setting because it is the risk that determines whether or not regulation is warranted. It's not a hazard, it's a risk. Because the terms get thrown about so loosely, I think it's important to make sure we all understand the vocabulary."

So that's really where his risk versus hazardous discussion is.

Is there any -- maybe we should see what -- where we have some commonality on this table.

COMMISSIONER BLOOM: I think one thing that I really don't believe has changed much is BTEX. It's coming a little closer to groundwater from where it was before. And previously, you couldn't bury it on site or bury it -- bury the waste if groundwater was between 25 and 50 feet.

I guess it's only the case where it's a low chloride fluid, correct?

But I believe the limit for BTEX previously was between 50 and 100 feet, and beyond 100 feet was 50 milligrams per kilogram. So I don't really see much change there, so that's, I don't think, much of an issue.

CHAIRPERSON BAILEY: We can agree on concentrations for BTEX in both categories 25 to 50 feet and 51 to 100 feet?

COMMISSIONER BALCH: I would say so.

COMMISSIONER BLOOM: Again, as far as -- I support it. I will support the current standards, but I didn't support the low chloride fluid, so that's a little different issue. But certainly beyond 50 feet.

CHAIRPERSON BAILEY: Okay. Can we reach commonality for TPH?

COMMISSIONER BALCH: TPH, for the shallow burial, what's the existing rule?

COMMISSIONER BLOOM: I want to think -- unless I wrote it down wrong, 2,500, but I may be wrong.

It's 2,500.

COMMISSIONER BALCH: I'll take your word.

COMMISSIONER BLOOM: If we are looking at the deleted material, for example, on -- I guess I'm

looking at NMOGA's Exhibit A, Attachment A, on page 32. "In-place burial is where groundwater would be between 50 and 100 feet below the bottom of the buried waste. Operator shall collect a minimum of five-point composite sample."

COMMISSIONER BALCH: 2,500.

CHAIRPERSON BAILEY: Thank you.

COMMISSIONER BALCH: That's for 50 to 100.

COMMISSIONER BLOOM: And I think beyond 100 it's still 2,500.

COMMISSIONER BALCH: But they didn't have anything from 25 to 50, right?

COMMISSIONER BLOOM: Correct.

COMMISSIONER BALCH: So they actually reduced the TPH for...

CHAIRPERSON BAILEY: 51 to 100 feet.

COMMISSIONER BALCH: Well, we created this category. I think we -- well, we renumbered. We did the distances from the original table.

CHAIRPERSON BAILEY: Well, the original table was 50.

COMMISSIONER BALCH: It was greater than 50.

CHAIRPERSON BAILEY: 50 to 100 feet, because it was below the -- there was greater.

COMMISSIONER BALCH: So I guess you're -- with, again, the same caveat that you --

COMMISSIONER BLOOM: To support the change in distances, yes, I guess we could adopt the proposed TPH levels.

CHAIRPERSON BAILEY: Okay.

COMMISSIONER BALCH: I think, while we're on TPH for greater than 100 feet, I would go with the previous standard of 2,500. Nobody asked us to specifically define 25 -- greater than 100 feet.

Also, in -- in their closure criteria, in the original Table I, "Closure Criteria for Soils Beneath Pits and Below-Grade Tanks," they had for depths of -- for greater than 100 feet of depth to groundwater they had 5,000 milligrams per kilogram.

And while we incorporated these two tables together, we didn't yet discuss this particular case, greater than 100 feet below the bottom of the trench or pit.

So we could either adopt the existing Rule 17 2,500 milligrams per kilogram or we could adopt the 5,000 from greater than 100 in the original Table I on page 41 on NMOGA.

MR. SMITH: Commissioner Balch, just to make this perfectly clear, these proposals that you

are now discussing are based on the testimony regarding soil physics as well as Dr. Thomas' toxicology testimony?

COMMISSIONER BALCH: Most of the limits presented for the tables, except for chloride, which was discussed extensively by both sides, were cited by all of the witnesses that were asked about them as being protective.

And in some cases, these limits are lower than -- are more constraining than was in the previous rule.

Presumably, nobody is going to have a problem if we make it more constraining. We are trying to be -- well, not nobody.

We are trying to be as consistent as we can be where we have guidance. If we don't have guidance, we can look to existing Rule 17.

MR. SMITH: Okay. Good.

COMMISSIONER BALCH: So existing Rule 17 is 2,500. We did have some guidance for greater than 100 feet in the original Table I of 5,000 for TPH.

COMMISSIONER BLOOM: Mr. Balch, you're talking about chloride currently?

COMMISSIONER BALCH: I'm talking about

TPH.

COMMISSIONER BLOOM: TPH at --

COMMISSIONER BALCH: Chloride was --

COMMISSIONER BLOOM: -- at greater than 100 feet.

COMMISSIONER BALCH: Yes.

COMMISSIONER BLOOM: Yes. I think 2,500 was in the existing rule. We could carry over.

COMMISSIONER BALCH: In TPH, how does TPH factor into oil-based wells?

CHAIRPERSON BAILEY: It's going to have a huge impact. Because if it is a diesel-based drilling fluid it's going to permeate the --

COMMISSIONER BALCH: Mud.

CHAIRPERSON BAILEY: -- mud completely and will raise the limits, I would assume, above the limits that we have here in the Table I.

COMMISSIONER BALCH: And from the testimony we have, those diesel-based fluids are primarily used in Southeast New Mexico.

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BALCH: Water-based in northwest.

CHAIRPERSON BAILEY: Well, primarily, but because of the formations that are drilled through.

COMMISSIONER BALCH: It's more operational.

CHAIRPERSON BAILEY: It is an operational --

COMMISSIONER BALCH: Shallow you can use fresh water.

CHAIRPERSON BAILEY: Well, clay. It's a matter of the clay. Because water-based will induce clay swelling which creates problems for drilling.

COMMISSIONER BALCH: Well, the testimony that was given for the original Table I, when you're below 100 feet they suggest the TPH level of 5,000.

If you have something of 2,500 --

COMMISSIONER BLOOM: That was the table to indicate when testing should be done.

CHAIRPERSON BAILEY: Right.

COMMISSIONER BLOOM: Now --

COMMISSIONER BALCH: Right. But it does give -- it does give some --

COMMISSIONER BLOOM: Which means that when there's remediation, so it's apples and oranges.

COMMISSIONER BALCH: Okay.

If you look at table -- this is under a different Table I. We're talking about Exhibit 13 that Mr. Mullins pointed out.

And you look at gasoline range gasoline, you are looking at 3,400 to 80,000. On diesel, 7,700 to 34,000.

CHAIRPERSON BAILEY: So if we use --

COMMISSIONER BALCH: These limits are still well below --

CHAIRPERSON BAILEY: And protective of the fresh water.

COMMISSIONER BALCH: Witnesses said they were protective at 5,000.

CHAIRPERSON BAILEY: With groundwater greater than 100 feet below the bottom of the trench and the pit, the migration of TPH may not play a huge role in the value of the -- or the protection of the fresh water.

So the TPH that we have up there for 2,500, relying back to the current rule, I think, is very justifiable.

COMMISSIONER BALCH: That's also what they had for TPH in 51 to 100 feet.

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BALCH: But again, I think you want to err on the side of being more protective of the groundwater.

Okay. So 2,500 for greater than 100 feet?

CHAIRPERSON BAILEY: I could agree to that.

COMMISSIONER BLOOM: I could agree to that.

COMMISSIONER BALCH: I think also, since BTEX and benzene are the aromatic components, you are primarily worried about whatever degredational components will migrate upward through the soil. It doesn't matter what the depth is. Those limits stayed the same for both of the presented cases, and I think they should be the same for the greater than 100 case as well.

COMMISSIONER BLOOM: I think we could agree that BTEX could be 50 milligrams per kilogram because that's what it was previously.

COMMISSIONER BALCH: Okay.

CHAIRPERSON BAILEY: And benzene at 10 below 100 feet?

COMMISSIONER BALCH: I think that, based on the testimony, that I am comfortable with the benzene level of 10.

COMMISSIONER BLOOM: I don't agree with changes to the benzene levels, as I have stated here recently. But...

COMMISSIONER BALCH: Well, we can go -- we

can go through and --

COMMISSIONER BLOOM: Yes.

COMMISSIONER BALCH: -- line by line.

COMMISSIONER BLOOM: Sure.

CHAIRPERSON BAILEY: But if we're going to maintain 10, then it makes sense to maintain 10 at that level also.

COMMISSIONER BLOOM: Sure. I would agree.

CHAIRPERSON BAILEY: Okay. Which leaves us with chlorides.

COMMISSIONER BALCH: We had some discussion on Monday about chlorides. And I think that I was able to conclude from that discussion that greater than 100 feet there was very little risk from chlorides and that there shouldn't necessarily be a limit at all.

COMMISSIONER BLOOM: Can you refresh my memory as to what Mr. Mullins modeled the distance of the chlorides that traveled 25 feet down and 100 feet up? What was the initial chloride concentration? Was it 15,000?

CHAIRPERSON BAILEY: It was below chloride, yes.

COMMISSIONER BALCH: Which corresponded to the -- what's now the 51 to 100 case with one --

3-to-1 mixing ratio. So your pit contents would be 15,000, you mix it down to 5,000, and then you would run your models.

CHAIRPERSON BAILEY: The graphs that indicated the salt bulge all indicated -- every single one of them indicated that the chloride concentration returned to normal, or to that --

COMMISSIONER BALCH: No, not to normal.

CHAIRPERSON BAILEY: Well, to its natural concentration.

COMMISSIONER BALCH: Well, that's not exactly what Dr. Buchanan said, and I asked him twice on -- on examination, once during his direct and once during his redirect.

And he very explicitly stated that if you had chlorides above it you would increase the concentrations at the level of the salt bulge, but you would not increase the depth of the salt bulge. It's a little bit different.

CHAIRPERSON BAILEY: But I'm talking about below the salt bulge.

COMMISSIONER BALCH: Below the salt bulge.

CHAIRPERSON BAILEY: Below the salt bulge, the return to the natural chloride concentrations occurred well before 100 feet.

COMMISSIONER BALCH: Yes. In fact, I think all the examples I had were between 10 and 25 feet.

CHAIRPERSON BAILEY: Every single one. So I have no problem with whatever concentration of chlorides we have.

COMMISSIONER BALCH: Well, I would propose putting N/A for greater than 100 feet on the chlorides.

CHAIRPERSON BAILEY: Because we've had testimony for hours and hours on the salt bulge and below the salt bulge, where it returns to background, put it that way.

So I would agree that for chlorides we could put N/A.

COMMISSIONER BALCH: On --

CHAIRPERSON BAILEY: No. Greater than 100 feet, yes. And then we could eliminate the EPA method in the middle column, because it doesn't matter what you -- the process you use to analyze it.

COMMISSIONER BLOOM: Is that a not applicable or...

COMMISSIONER BALCH: Not applicable, yes.

COMMISSIONER BLOOM: Okay.

CHAIRPERSON BAILEY: And now we come to chloride concentration, both 25 to 50 and 51 to 100.

COMMISSIONER BALCH: So the 20 -- those are -- those were the cases that were modeled. It was demonstrated by Mr. Mullins. So those are the cases where we have predicted data for southeast and northwest New Mexico.

CHAIRPERSON BAILEY: And showed that the concentration of chlorides was essentially negligible.

COMMISSIONER BALCH: Within time spans that were consistent with Dr. Buchanan's understanding of the formation of -- natural formation of the salt bulge, on the order of thousands of years, would not see, at those concentrations, transport at groundwater in those depths.

CHAIRPERSON BAILEY: But this is also with the understanding that we have 4 feet of un- -- or less than 600 milligrams per kilogram for the surface, and that these concentrations would only begin at 4 feet below the surface.

COMMISSIONER BALCH: At a minimum of 4 feet.

CHAIRPERSON BAILEY: Right.

COMMISSIONER BALCH: And in practice, probably more than 4 feet.

CHAIRPERSON BAILEY: Potentially.

COMMISSIONER BALCH: Well, if you have an 8-foot-deep pit that you backfill. You will backfill it with some material, which we don't know what it's going to be.

CHAIRPERSON BAILEY: Uh-huh.

COMMISSIONER BALCH: It will be whatever they piled up when they dug out the pit. And then there will be 600 milligrams per -- of chloride for 4 feet.

CHAIRPERSON BAILEY: Right.

COMMISSIONER BALCH: So I think you have adequate protection.

CHAIRPERSON BAILEY: So the 2,500 milligrams per liter begins at 4 feet and runs to 25 to 50 feet below the bottom of the trench.

I think that having that concentration of chlorides is not going to be detrimental to fresh water, it's not going to be detrimental to the establishment of vegetation, which is part of the process of ensuring that chlorides do not -- are not transported vertically.

I can agree with the 2,500 feet at that

point -- I mean the 2,500 milligrams per kilogram.

COMMISSIONER BALCH: The only other thing that we have not really addressed, that was discussed at length by both sides in the testimony, was the top liner.

COMMISSIONER BLOOM: The top liner.

CHAIRPERSON BAILEY: Exactly.

COMMISSIONER BLOOM: That's one of my reservations about the 5,000 milligrams per kilogram. And I have some reservations about moving up from 500 milligrams of chloride, as the rule currently reads, the depth, because it's 50 feet previously.

I did -- I would agree that there is a salt bulge. It looks like it can be at sometimes around 25 feet or 30 feet, or -- given some of the different cases we have looked at.

COMMISSIONER BALCH: Well, we are also depending on Dr. Buchanan's experience in New Mexico, where he says that those ranges are consistent with his observations.

So we get to extend that a little bit, because we were lucky enough to have a nationally recognized soils and remediation expert talk to us who is also a resident of New Mexico and does a lot

of his work here. So I think we can extend that.

The real question comes down to do you need to have a top cover or not.

CHAIRPERSON BAILEY: Dr. Buchanan was very clear that he does not recommend having that top liner.

But Dr. Neeper, as I understood -- I can't say what Dr. Neeper said. I just remember that Dr. Neeper -- that Dr. Buchanan was very clear not to have the upper --

COMMISSIONER BLOOM: Dr. Neeper made two relevant points I can think of. One was that when excavating some pits for -- I believe it was Marbob -- that he found a salt layer that had risen up to the top of the liner, for example.

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BLOOM: And then he also stated that he felt that salt could migrate up, I believe it was 12 to 24 inches, and get into the root zone for some plants, and chlorides can have an impact on plants.

CHAIRPERSON BAILEY: With no top liner, we could have the bathtub effect, where infiltration remains within the bathtub, or the taco, as it was called in previous hearings.

COMMISSIONER BALCH: Well, we also had testimony that these liners are not -- are not forever.

CHAIRPERSON BAILEY: Right.

COMMISSIONER BALCH: They are 200 to 300 years or so, and it's effectively not going to be a liner anymore. You may still have pieces of it there, but...

My -- my thought is that if you have a top liner -- you know, there wasn't -- I don't think there was a terribly strong opinion about the top liner from anybody, even from Dr. Buchanan. He suggested that it wasn't necessary.

But from what I remember of his -- his testimony, I think on rebuttal, on questioning that was asked -- you know, the roots are going to find a way. They will just poke a hole right through the liner. Anybody that's ever put down gravel on their yard with a plastic layer underneath it will see weeds the next year.

So having it may not be of great benefit, but I don't think anybody really said that not having it would be a great benefit either.

CHAIRPERSON BAILEY: True.

COMMISSIONER BALCH: Now, both of the

current closure standards under Rule 17 -- and I don't remember exactly how the burritos and the tacos and all of that works. But one is a foldover of the liner, which essentially gives you a top liner.

CHAIRPERSON BAILEY: Well, not completely, because it would only be the edges going into --

COMMISSIONER BALCH: Okay.

CHAIRPERSON BAILEY: -- and so the middle would not be covered.

COMMISSIONER BALCH: So that's the taco.

CHAIRPERSON BAILEY: Right. That's the taco --

COMMISSIONER BALCH: Not the tostada.

CHAIRPERSON BAILEY: The bathtub, yes.

COMMISSIONER BALCH: More like a tostada.

And then you have the burrito, where you've folded it over completely.

CHAIRPERSON BAILEY: Folded it over, and then you add a top liner to cover it.

COMMISSIONER BALCH: And then you add a top liner.

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BALCH: Mr. Bloom, are you going to feel more comfortable with these limits if

there's a top liner? Because I didn't see strong evidence one way or the other.

COMMISSIONER BLOOM: Yeah. Dr. Thomas mentioned that he thought -- he said he would prefer a cover, he thought it would be good, something along those lines.

COMMISSIONER BALCH: He may have been thinking of it from more of a benzene or BTEX context, where you're going to give those volatile components more chance to interact with the material, although he did say benzene is not toxic to plants. So...

Without a lot of guidance on it, the original rule had a top liner, right.

CHAIRPERSON BAILEY: The original rule, which is found on page 33 of -- under "On-site Trench Burial," subparagraph (i) talks about installing "a geomembrane cover over the excavated material in the line trench. The operator shall design and construct the geomembrane cover in accordance with the requirements specified" elsewhere.

"The operator shall cover the geomembrane liner -- lined and covered, filled, trench with compacted materials."

So the original rule does require a geomembrane cover.

COMMISSIONER BALCH: For 50 to 100 feet, but not for greater than 100.

COMMISSIONER BLOOM: It looks like it's for both of them.

CHAIRPERSON BAILEY: It is for both of them.

COMMISSIONER BALCH: It is for both of them? Okay.

CHAIRPERSON BAILEY: If we incorporated that paragraph, which is a geomembrane liner, it's not an HDPE, it's not an impervious liner. So...

COMMISSIONER BLOOM: If it's not impervious, I don't know --

CHAIRPERSON BAILEY: What's the point?

COMMISSIONER BLOOM: -- what's the point?

COMMISSIONER BALCH: Well, did you have, like you said Dr. Thomas -- and I have a citation for the same thing. He said it can't hurt, essentially.

COMMISSIONER BLOOM: Does Dr. Buchanan feel that the -- he mentioned that he felt that the liner could retard the root growth of some plants.

CHAIRPERSON BAILEY: Yes. Because some of

those, like the four-wing saltbush, can have roots that go beyond the 4 feet.

COMMISSIONER BLOOM: If that happens, does that leave, then, the chlorides to migrate upwards through the grade effector, if the chlorides move upwards, if there's something that has roots down to that zone?

CHAIRPERSON BAILEY: The roots aren't going to transport the chlorides upwards, they are simply going to withdraw from the chloride concentration.

COMMISSIONER BALCH: With my limited understanding of roots -- and we did have quite a dissertation given to us -- was that the roots essentially act as a filter. And what would happen is the roots would -- the area surrounding the roots would clog up with the salt and then they would essentially drown -- or not drown, but they would die from lack of water.

CHAIRPERSON BAILEY: Yes. The root dies back from the chloride concentration.

COMMISSIONER BALCH: I'm not concerned that that would necessarily kill the plants, as long as it had access to other sources of fluid. But I'm not -- that's way beyond my area of expertise.

And I don't think we have -- I'm not sure we had any discussion about that.

I guess the question on the liner is: Do you want to have something which will be temporary, in the grand scale of things, a couple hundred years, that will be able to shed water while everything above it is establishing itself, or if that's not necessary.

CHAIRPERSON BAILEY: Dr. Buchanan was clear that he did not recommend a top liner.

In the original rule, I'm finding where the top liner was described as a geomembrane liner. The geomembrane liner is not impervious to fluid transport.

COMMISSIONER BALCH: So the purpose of the geomembrane was to prevent root growth through?

CHAIRPERSON BAILEY: I believe so, and also to prevent settling of the upper fill into the lower area where the pit is located. So that would prevent the -- the lowering of the surface, which allows --

COMMISSIONER BALCH: So it's --

CHAIRPERSON BAILEY: -- so it's the site.

COMMISSIONER BALCH: -- more of a geomorphology than...

CHAIRPERSON BAILEY: That is my understanding. Because when I look back, it only talks about a geomembrane cover. And what other reasons could there be if it's not impervious?

COMMISSIONER BALCH: So we're not trying to control infiltration, which is why Dr. Buchanan wouldn't say that.

I went through last night, and I was searching for -- for liners in the transcript. I think we pretty much covered all of the examples that were brought up.

CHAIRPERSON BAILEY: I think so. So can we resolve our discussion for chlorides?

We have resolved our questions on TPH and BTEX and benzene, I believe, for the three categories. Is that correct?

But we are hung up on chlorides. And if the previous rule doesn't really require --

COMMISSIONER BALCH: So would the geomembrane stop the upward salt migration? The upward salt migration is what --

CHAIRPERSON BAILEY: No. The geomembrane is pervious to fluids.

COMMISSIONER BALCH: Well, if it's salts -- it was testified to here that the salts are

really only going to move in a saturated form.

CHAIRPERSON BAILEY: True.

COMMISSIONER BALCH: So the membrane -- not the membrane, but the liner that he may have been looking at -- and then you have saturated chlorides.

CHAIRPERSON BAILEY: Yes, you could have.

COMMISSIONER BALCH: I don't think anything is going to stop the roots from going through a liner of any sort --

CHAIRPERSON BAILEY: Over time.

COMMISSIONER BALCH: -- over time.

A geomembrane liner, which is specified in the original Rule 17, which may have been why many of the witnesses have talked about it and said it wasn't necessary, does not prevent infiltration. In fact, infiltration may be a good thing if you think about salt bulge. It's basically transporting the chlorides to a level where they are stable over long periods of time.

CHAIRPERSON BAILEY: So we can't use a liner as a factor in the chloride concentrations.

COMMISSIONER BALCH: I think it's not relevant to that discussion.

COMMISSIONER BLOOM: It's not going to

be -- it's permeable to...

COMMISSIONER BALCH: If there's saturated flow, which is the situation which would give you upward migration of chlorides, it's not going to stop it.

And for infiltration, it's not going to stop water, so it's not going to stop it.

I didn't see anything that directly said a liner was necessary. A number of people said they weren't necessary.

I think Dr. Thomas' testimony was really probably not thinking about chlorides, he was probably thinking more of your volatiles --

COMMISSIONER BLOOM: Yes.

COMMISSIONER BALCH: -- which is going to be a short-lived problem.

If you wanted to have something to stop upward migration of volatiles, then you would want a plastic liner.

CHAIRPERSON BAILEY: HDPE or equivalent.

COMMISSIONER BALCH: Yeah, which would also shed water. Which is why I think Dr. Buchanan is right.

CHAIRPERSON BAILEY: Right.

COMMISSIONER BALCH: He wanted to have as

little disruption from the natural process, or the way I interpret his testimony, would make me believe that.

COMMISSIONER BLOOM: Well, what I'm looking at -- I can support burial in the 25 to 50-foot to groundwater range.

And the 51 to 100-foot, we're seeing this increase from a thousand milligrams to 5,000 milligrams per kilogram. And I have some reservation about the type of modeling, and is this just waste, or is it just economic impact? What's the cost, the benefit?

I don't support this change to 5,000 milligrams to kilograms issue.

COMMISSIONER BALCH: What about the liner issue? Because if we need to have a liner, it needs to go into the text somewhere.

COMMISSIONER BLOOM: Yeah.

CHAIRPERSON BAILEY: Other than that, we can just start -- line item through some of these things.

COMMISSIONER BLOOM: No, I guess I can't see how a top liner would seem to make any difference, if it's not -- if it's not impermeable. And just a geomembrane liner, I can't see any sense

to it. I don't think that it's strong enough to prevent subsidence. It's not going to limit the movement of fluids. And we have heard that it could be to the detriment of revegetation, as Dr. Buchanan testified. So...

CHAIRPERSON BAILEY: Okay. So we may be at the point where we have either reached an agreement or not on Table I.

COMMISSIONER BALCH: I suspect we are not going to change with any more discussion.

CHAIRPERSON BAILEY: I don't believe we are.

So it's a matter of, Commissioners, do you support Table I as shown on the screen with those concentrations?

COMMISSIONER BALCH: Do you want to do it by depth range or is that going to make a difference, Mr. Bloom?

COMMISSIONER BLOOM: I --

COMMISSIONER BALCH: Or by constituent?

COMMISSIONER BLOOM: We could do it -- we could run down the list or...

CHAIRPERSON BAILEY: Okay. Then let's vote on chloride concentration at 25 to 50 feet below the bottom of the trench/pit.

Commissioner Bloom, do you support 2,500 milligrams per kilogram?

COMMISSIONER BLOOM: No, I do not.

CHAIRPERSON BAILEY: Commissioner Balch, do you?

COMMISSIONER BALCH: I do.

CHAIRPERSON BAILEY: I do, also. So at this point, it's the majority of the commission agrees to that concentration.

For TPH, which is GRO plus DRO at 25 to 50 feet, Commissioner Bloom, do you support 100 milligrams per kilogram?

COMMISSIONER BLOOM: No, I do not.

CHAIRPERSON BAILEY: Commissioner Balch, do you?

COMMISSIONER BALCH: I do.

CHAIRPERSON BAILEY: I also do.

So this is an example of the majority of the commission supports 100 milligrams per kilogram.

For BTEX in the 25 to 50 feet below the bottom of the trench or pit we have a 50 milligram per kilogram.

Commissioner Bloom, do you accept or support 50 milligrams per kilogram?

COMMISSIONER BLOOM: I don't support that,

only because I don't support the burial in that 25-foot to 50-foot to groundwater range.

CHAIRPERSON BAILEY: Commissioner Balch, do you support 50?

COMMISSIONER BALCH: I support that range.

CHAIRPERSON BAILEY: I do, too.

So the majority of the commission agrees to the 50.

And for benzene, Commissioner Bloom, you do not support 10 milligrams per kilogram?

COMMISSIONER BLOOM: No, I do not.

CHAIRPERSON BAILEY: Commissioner Balch, do you?

COMMISSIONER BALCH: I do support it.

CHAIRPERSON BAILEY: So the majority of the commission agrees to 10 milligrams per kilogram.

For the category of 51 to 100 feet below the bottom of the trench or pit we have a proposal for chlorides at 5,000 milligrams per kilogram.

Commissioner Bloom, do you support 5,000?

COMMISSIONER BLOOM: No.

CHAIRPERSON BAILEY: Commissioner Balch, do you?

COMMISSIONER BALCH: I do.

CHAIRPERSON BAILEY: I also do.

So this is -- the majority of the commission supports 5,000.

For TPH at a thousand, Commissioner Bloom, do you support 1,000 TPH?

COMMISSIONER BLOOM: I do. I believe that is --

COMMISSIONER BALCH: It's lower than the existing level.

COMMISSIONER BLOOM: -- it's lower than the existing level, yes.

CHAIRPERSON BAILEY: Commissioner Balch, do you?

COMMISSIONER BALCH: I also support it.

CHAIRPERSON BAILEY: So we have -- all three commissioners support 1,000 milligrams per kilogram.

For BTEX at 50 milligrams per kilogram, Commissioner Bloom, do you support that?

COMMISSIONER BLOOM: Yes, I do. That's the same as the existing one.

COMMISSIONER BALCH: And I support it.

CHAIRPERSON BAILEY: So all three commissioners support 50 milligrams per kilogram.

For benzene, 10 milligrams per kilogram in the category of 51 to 100 feet below the bottom of

the trench or pit.

Commissioner Bloom?

COMMISSIONER BLOOM: No, I do not.

COMMISSIONER BALCH: And I do.

CHAIRPERSON BAILEY: So we have the majority of the commission supporting that value.

For greater than 100 feet below the bottom of the trench or pit we have "not applicable" for chloride concentration.

Commissioner Bloom, do you support that?

COMMISSIONER BLOOM: No, I do not.

CHAIRPERSON BAILEY: No, you do not?

COMMISSIONER BLOOM: I do not, no.

COMMISSIONER BALCH: I do support it.

CHAIRPERSON BAILEY: Commissioner Balch -- so this is the majority of the commission supports the N/A, the not applicable category.

For TPH at 2,500 milligrams per kilogram.

Commissioner Bloom?

COMMISSIONER BLOOM: Yes, I am supportive of that. That's the same as the existing rule.

CHAIRPERSON BAILEY: Commissioner Balch?

COMMISSIONER BALCH: I support it as well.

CHAIRPERSON BAILEY: So all three commissioners support that category, that

concentration.

BTEX at 50 milligrams per kilogram.

Commissioner Bloom?

COMMISSIONER BLOOM: Yes, that remains unchanged.

COMMISSIONER BALCH: And I support it.

CHAIRPERSON BAILEY: So all three commissioners support that value.

Benzene for 10 milligrams per kilogram.

Commissioner Bloom?

COMMISSIONER BLOOM: No, I do not.

COMMISSIONER BALCH: And I do.

CHAIRPERSON BAILEY: So the majority of the commission supports that value.

We have now reached a con- -- a majority of the commission supporting Table I as presented.

We can now use that decision for -- in those areas where Table I has been cited as a reference in previous sections.

That is the next-to-the-last area.

In Section 15, having to do with "Exceptions and Variances," Section C we have highlighted in yellow. It's towards the end of the document, almost.

Can we reach any agreement for whether or

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not an operator has to apply to the Santa Fe office for an exception?

COMMISSIONER BALCH: This is -- the reason I think we highlighted this is because we hadn't completely fleshed out our thoughts on exceptions versus variances.

CHAIRPERSON BAILEY: And this was a stopping point, wasn't it?

COMMISSIONER BALCH: Yes.

CHAIRPERSON BAILEY: Okay. So we can remove the yellow designation there.

COMMISSIONER BLOOM: That would be an operator may apply or shall apply. I guess "may apply" in this instance.

COMMISSIONER BALCH: They don't have to apply for an exception if they don't want to.

CHAIRPERSON BAILEY: They may.

Okay. Then it's a matter of going back through the entire draft rule.

COMMISSIONER BALCH: Madam Chair, since we have just finished the section on closure and reclamation, I would suggest that we look at the deletions there while it's still fresh in our mind.

CHAIRPERSON BAILEY: While they are still fresh in our mind.

COMMISSIONER BLOOM: Yes.

CHAIRPERSON BAILEY: Okay. We can go to page 26. We have already talked about deleting all of Section B.

COMMISSIONER BALCH: So we have addressed now everything in subsection (i) of B, and (1) of B, which I think was why we decided not to -- and (2) of B, which is why we decided not to go ahead with deleting this earlier. So I think we can now delete this.

CHAIRPERSON BAILEY: Yes, we can, because we have just worked on the concentrations of the referenced constituents according to depth to groundwater.

So B (1) (ii).

COMMISSIONER BLOOM: So I would move that we strike all of Section B here, because we have come up with language related to closure of temporary pits. We have established a table to set maximum contaminant levels for disposal.

COMMISSIONER BALCH: We've discussed on-site burial and alternative closure methods.

COMMISSIONER BLOOM: Yes.

CHAIRPERSON BAILEY: So all of Section B can be deleted.

Closure methods for permanent pits. We included permanent pits as -- in the area concerning --

COMMISSIONER BALCH: Limits here also go back to Table I.

Closure sampling we have addressed also in the revised Sections A and B.

CHAIRPERSON BAILEY: Yes. Because in -- the closure reports are at Section E "Timing Requirements for Closure."

We have included permanent pits and all pits. We say an operator shall close a pit within the following time lines.

COMMISSIONER BALCH: So I think we can delete all of Section C.

CHAIRPERSON BAILEY: I agree.

COMMISSIONER BLOOM: Yes.

CHAIRPERSON BAILEY: Section D, having to do with closure for closed-loop systems. We took care of that.

As far as the waste removal --

COMMISSIONER BALCH: On-site burial.

CHAIRPERSON BAILEY: -- on-site burial.

COMMISSIONER BALCH: And then variances cover Section (3).

So I think we can delete all of Section D.

CHAIRPERSON BAILEY: So we can delete all of Section D.

Now, Section E, concerning below-grade tanks. We've copied some of that language into the other areas.

COMMISSIONER BALCH: I think the rest of it all has to do with concentration, which are now dealt with in Table I; and sampling, which is dealt with in (a) and (b).

CHAIRPERSON BAILEY: So we can delete all of Section E.

Are we agreed?

COMMISSIONER BLOOM: Yes, agreed.

CHAIRPERSON BAILEY: On to Section F. There is included in here the provision for notice to the surface owner. We have not resolved that, and that could be the next point that we talk about.

The remainder of Section F (2) has been dealt with as far as concentrations and placing steel markers.

Deed notice. We have not talked about that, have we? So that should go on that discussion concerning...

COMMISSIONER BLOOM: Where is that, Madam

Chair?

CHAIRPERSON BAILEY: On page 30, F.

COMMISSIONER BLOOM: Yes, I see it.

COMMISSIONER BALCH: F (1) (b) is the surface owner --

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BALCH: -- notification.

CHAIRPERSON BAILEY: And F (f) has to do with deed notices.

COMMISSIONER BALCH: Well, I think aside from those two sections, everything else has been dealt with in Table I and in Sections A and B.

CHAIRPERSON BAILEY: And we can delete everything else except for those two.

COMMISSIONER BALCH: So down to there.

CHAIRPERSON BAILEY: Yes.

COMMISSIONER BALCH: And from there down to (f).

CHAIRPERSON BAILEY: No, not the -- okay.

COMMISSIONER BALCH: And now, down to the end of this section.

I'm sorry, down to "Closure Notice."

Okay. And those two will probably go into "Closure Notice."

CHAIRPERSON BAILEY: Yes. We will have to

discuss those.

COMMISSIONER BALCH: Scroll to the top of the very next page, is where we were talking about closure notice.

CHAIRPERSON BAILEY: All right. We had begun the discussion on notice to the surface owner that was proposed, as we deleted the paragraph under closure notice, and we never did really resolve that question whether or not to delete that paragraph.

We really did not have very much discussion, and there's ambiguity as to when this closure notice should be provided to the surface owner.

Commission's counsel has recommended that we be very cautious in deleting any paragraph concerning notice.

COMMISSIONER BALCH: I have no problems with notice at all. I would just like it to be clear about when.

CHAIRPERSON BAILEY: When.

COMMISSIONER BALCH: And what.

CHAIRPERSON BAILEY: Yes. So we should remove the proposed -- yes, you already have it there.

So now we need to wordsmith this to

indicate when this notice should be provided, whether it is provided at the application -- but the application is a process that's negotiated between the division and the operator.

MR. SMITH: And just to be clear, this is based on testimony regarding a lack of clarity in the rules that make them difficult to deal with for operators. Is that correct?

COMMISSIONER BALCH: And the redundancy, if we identify that this notice is already provided elsewhere.

But primarily, clarity. None of us can make any sense of this paragraph, and it's suggested for deletion.

COMMISSIONER BLOOM: We could have something along the lines of "The operator shall notify the surface owner by certified mail/return receipt requested, that the operator has approval for on-site closure for pits or below-grade tanks."

COMMISSIONER BALCH: Well, I mean, some -- I think this is for more than just on-site closure, though. This is for any closure of a pit or a tank.

So a multi-well or permanent pit you would be removing everything and there wouldn't be anything on site.

For a temporary pit there may or may not be material left on site.

And for a below-grade tank there will be removal, possibly remediation, but nothing left on-site.

MR. SMITH: If you are concerned about the timing, and everything else is all right here, you could put in a second sentence that simply establishes a time, presumably before the closure process is begun, for the notice to be given.

CHAIRPERSON BAILEY: It could reflect the same language that we have in the paragraph below, where the appropriate division district office is notified at least 72 hours, but not more than one week, prior to any closure operation.

We could borrow that language if we want to have that short of a time span.

COMMISSIONER BLOOM: It would probably be good to include the operator's name and the location, too. Otherwise, it's just saying that you could send a postcard that says...

COMMISSIONER BALCH: As long as it's certified mail --

COMMISSIONER BLOOM: Yeah.

COMMISSIONER BALCH: -- they could send a

postcard.

COMMISSIONER BLOOM: I'm going to close a well on your land. It doesn't have to specify the name or location. It doesn't have to include API.

CHAIRPERSON BAILEY: That is pretty vague, isn't it.

COMMISSIONER BLOOM: Yeah.

COMMISSIONER BALCH: Well, going back to what this is supposed to mean -- I think I'm on -- I went over this two or three times to figure out what this is supposed to do.

But I think what it's supposed to do is just to say you are closing the site. And the reason somebody might be curious about that is they would want to make sure it was remediated correctly. They might want to know if something was left there.

CHAIRPERSON BAILEY: So that they could be witness to the closure operation.

COMMISSIONER BALCH: So I think on the one hand in Section (2) and (3) we have -- or in Section (2) we have division notice of between 72 hours and a week prior. The surface owners might want more time than that.

CHAIRPERSON BAILEY: I would think so. They may be on vacation for a week.

COMMISSIONER BALCH: So it seems to me the appropriate time to notify them that you are going to -- it's weird -- but when you're going to close the site is when you open the site.

CHAIRPERSON BAILEY: But you will not know the closure methods until after you've tested the soils beneath any kind of liner or on the surface.

COMMISSIONER BALCH: So administratively, how much of a time window do you want from site cessation of operation and closure of the site to occur? Because that's really the window during which you would be notifying people.

CHAIRPERSON BAILEY: And that varies according to the closure requirements for temporary pits or for permanent pits.

COMMISSIONER BALCH: Now the other thing is, here, this is -- this refers simply to notice. It doesn't talk about what you do with the notice or if you can do anything with a notice besides just be notified.

CHAIRPERSON BAILEY: It does not provide appeal or required input.

COMMISSIONER BALCH: Well, you would hope you would actually be well past that point, anyway, before it occurs. So it's really simply a

notification that they are closing.

CHAIRPERSON BAILEY: That they are going to have equipment out there doing something.

COMMISSIONER BALCH: So I think if you want to simplify this as much as you can, you want to have as clear a notice as possible, or feasible, and that's really all you have to do to fix this.

COMMISSIONER BLOOM: We could almost add something -- delete number (1) above and add something to number (2) that says: "The operator shall also notify the surface owner" -- you could use that language up above -- "one month before closure."

COMMISSIONER BALCH: However, they may not know when the closure is going to be that far in advance.

COMMISSIONER BLOOM: Yeah.

COMMISSIONER BALCH: The other thing -- and maybe you have the best way to do it. I mean, it is a notice, so the time window, I guess, is not as important. Even if they are on vacation they come home, they go to the mailbox, they will see the notice, and then they will know.

CHAIRPERSON BAILEY: Which takes us back to the 72 hours, but not more than one week.

COMMISSIONER BALCH: So if you take Section (2) and just add a sentence after "notify the appropriate division office verbally and in writing," at the end of that sentence.

CHAIRPERSON BAILEY: Or put it before.

COMMISSIONER BALCH: Or put it before.

CHAIRPERSON BAILEY: "Shall notify the surface owner and the appropriate division district office."

COMMISSIONER BALCH: I believe you want to say the surface owner in writing, using the certified mail language above, and then the division office could be verbally and in writing.

COMMISSIONER BLOOM: That's tricky.

CHAIRPERSON BAILEY: Why don't we keep the yellow paragraph, because we do want to insert some of what needs to be in that notice, as Commissioner Bloom brought out. So let's keep that paragraph and have it say: "The operator shall notify the surface owner by certified mail/return receipt requested that the operator plans -- plans closure operations at least 72 hours, but not more than one week, prior to any closure operation," which is simply copying the sentence out of paragraph 2.

COMMISSIONER BALCH: So at the same time

as they notify the division district office they notify the surface owner. I think we can't do any better than that. And it's just a notification, so that should be sufficient.

CHAIRPERSON BAILEY: And then we can eliminate the rest of that sentence. Eliminate the rest of that sentence after "operation."

Add a sentence that: "Notice shall include well name, API number, and location."

COMMISSIONER BALCH: And then they could file the information with the division.

I think the rest of it is fine.

MR. SMITH: Now, is this all pit closure?

COMMISSIONER BALCH: This is any closure. So this is the three different flavors of pits and below-grade tanks and closed-loop system surface drying pads. Anything you're closing.

CHAIRPERSON BAILEY: Are we in agreement with this?

COMMISSIONER BLOOM: That will work.

CHAIRPERSON BAILEY: Okay. Then we can take the yellow --

COMMISSIONER BLOOM: Particularly because the fee owner can, through SOPA, request earlier notifications.

COMMISSIONER BALCH: Sure.

Now, I think we can go back to the beginning and start over again.

CHAIRPERSON BAILEY: Well, no. No, we --

COMMISSIONER BALCH: There was one more thing?

CHAIRPERSON BAILEY: There was one more thing.

COMMISSIONER BLOOM: The permitting --

CHAIRPERSON BAILEY: It was the deed notice question.

COMMISSIONER BALCH: Oh, right.

CHAIRPERSON BAILEY: Whether or not the operator shall file a deed notice identifying the exact location of the on-site burial with the county clerk.

COMMISSIONER BALCH: The (d) can be deleted.

Do you want to add (f) as another part of closure notice?

COMMISSIONER BLOOM: That's what we need to discuss. And I believe there was testimony that a deed notice can't be filed on federal lands.

COMMISSIONER BALCH: There was also testimony -- I think it was by Mr. Hasely -- that

this information is already on the C-103 or C-105.

CHAIRPERSON BAILEY: And we are requiring the pipe 4 feet -- on the ground. We will have it on C-105. So...

COMMISSIONER BLOOM: I imagine the deed notice would be important when -- if we want to -- the owner of private lands would want to sell his or her property.

COMMISSIONER BALCH: If you want to keep language like this you might want to have to qualify it by "if appropriate, file a deed notice." But what was --

CHAIRPERSON BAILEY: Yes. And who determines if it's appropriate or not.

COMMISSIONER BALCH: Maybe this would go back to the SOPA.

COMMISSIONER BLOOM: Folks think that -- to have that in there, I don't know.

COMMISSIONER BALCH: Well, on the one hand, it was -- the point was raised that you can't do this on federal land.

COMMISSIONER BLOOM: I don't know about state land, how that would affect it.

COMMISSIONER BALCH: So it would seem to be something that would be specific to the surface

owner. The surface owner would have to specify the requirements for something like this. And we do have -- and is the same information available elsewhere?

CHAIRPERSON BAILEY: Both on the ground, physically.

COMMISSIONER BLOOM: You could say: "The operator shall file a deed notice identifying the exact location of the on-site burial with the county clerk in the county where the on-site burial occurs on private -- somewhere on private lands," or something like that, or fee -- fee lands or...

COMMISSIONER BALCH: Well, I think the reason the language is here is, you know, if you go to sell a piece of your ranch, and say they want to put their house on it. And the bank, during the mortgage process, is going to do a deed search. And this is the kind of information that you want to have on that.

How that applies to -- I guess that doesn't apply to federal land anyway. Would it really just apply to private landowners?

CHAIRPERSON BAILEY: Yes. Because it can't apply to state land either.

COMMISSIONER BALCH: So I think if you

specified this when the on-site burial occurs on private land --

CHAIRPERSON BAILEY: The operator shall file a deed notice identifying the exact location.

COMMISSIONER BLOOM: There we go.

CHAIRPERSON BAILEY: And it would become (5).

COMMISSIONER BALCH: And I think if you -- if you go to the very beginning of that sentence: "When the on-site burial occurs" -- I would just say: "When on-site burial occurs," because it's not always going to happen.

CHAIRPERSON BAILEY: Right. Okay. That took care of the deletion of those portions of F (f) and F (1) (b). So the entire Section B has now been either dealt with in other ways or deleted.

Okay. It's a quarter to 5:00. We could review this overnight. If Theresa can e-mail to us the draft as it now stands at the end of this day, and we can review it overnight. And then at 9:00 tomorrow morning we'll talk about what may be left, what we may have skipped, or what areas we feel need better consideration.

COMMISSIONER BALCH: Well, I thought about this just a little bit as well. I think it's

important to consider that the rule that we end up with is going to be usable, it's going to be easily administered, and then also appropriately protective of fresh water, public health, and the environment.

We don't want to end up with unanticipated consequences if we can foresee them. I guess that is the whole idea.

CHAIRPERSON BAILEY: Which gives us this evening to review.

COMMISSIONER BALCH: Have we gone through everything except --

CHAIRPERSON BAILEY: I think that we can agree that we will reconvene, or continue this case, to 9:00 tomorrow morning.

COMMISSIONER BALCH: I think Mr. Bloom had a question that should still be on the record.

COMMISSIONER BLOOM: I think we still need to review permit approvals, commission's denials, certifications, because there was some language in there saying that if a reply was not received in 30 days it would be deemed approved.

COMMISSIONER BALCH: I thought we had --

CHAIRPERSON BAILEY: I thought we had changed that, that it was denied, and that they could appeal.

COMMISSIONER BLOOM: Maybe we could go through that.

CHAIRPERSON BAILEY: Okay. Let's flag that in our reading.

COMMISSIONER BLOOM: Other than that, I think we have gone through the entire ruling.

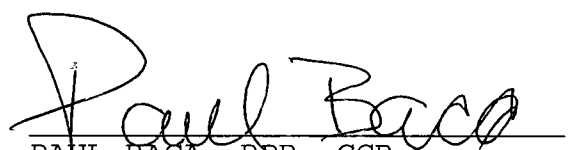
CHAIRPERSON BAILEY: I think so, but we can ensure that.

We're off the record.

(Proceedings concluded.)

CERTIFICATE

I, Paul Baca, RPR, CCR in and for the State of New Mexico, do hereby certify that the above and foregoing contains a true and correct record, produced to the best of my ability via machine shorthand and computer-aided transcription, of the proceedings had in this matter.



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