

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

ORIGINAL

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

CASE NO. 14784 AND 14785

VOLUME 18

October 5, 2012  
9:00 a.m.  
Wendell Chino Building  
1220 South St. Francis Drive  
Porter Hall, Room 102  
Santa Fe, New Mexico

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- JAMI BAILEY, Chairperson
- GREG BLOOM, Commissioner
- DR. ROBERT BALCH, Commissioner
- MARK SMITH, Esq.
- FLORENE DAVIDSON, COMMISSION CLERK

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1 (Note: In session at 9:55.)

2 CHAIRWOMAN BAILEY: Good morning. Today  
3 is Friday, October the 5th. It is a continuation of  
4 Cases 14784 and 14785. We have all three  
5 commissioners here so we do have a quorum of the  
6 Commission for the deliberations on the amendment of  
7 OCD Rule 17, that's 19.15.17 NMAC.

8 Overnight some interesting developments or  
9 interesting observations were made, and that has to  
10 do with the Rule 17 that was presented to the  
11 Commission by NMOGA and IPANM for consideration for  
12 amendment. The application referenced the 2007  
13 version of Rule 17 instead of the 2009 version of  
14 Rule 17.

15 MR. SMITH: Do you want me to take it from  
16 here?

17 CHAIRWOMAN BAILEY: Yes, please do.

18 MR. SMITH: Just to clarify that a little  
19 bit, the application, Commissioners, that was  
20 submitted contained a black line showing the changes  
21 that NMOGA and IPANM wanted to make to the Pit Rule.  
22 That's fine. But the version of the Pit Rule that  
23 they used did not include the amendments to the Pit  
24 Rule that were made in 2009. So that means that  
25 what you have been considering, and more

1 importantly, what notice was given did not include  
2 the 2009 amendments so we have the order that was  
3 entered in 2009 that will black-line and show you  
4 the difference between the 2007 Pit Rule and the  
5 amendments made in '09. Which means, I think, that  
6 probably the most efficient thing to do is to go  
7 through the '09 amendments and add them to the  
8 document that you are currently using.

9 I would advise you that because notice was  
10 not given to those -- that changes might be made in  
11 the '09 amendments that you should not make any  
12 changes in the '09 amendments and they should be  
13 retained unless because of some drafting matter or  
14 something else, they had been omitted or changed.  
15 But if they are substantive portions of the '09  
16 amendment you probably should keep them.

17 So that's where we are, and I would  
18 suggest that you make those changes before you do  
19 any further consideration of anything else.

20 CHAIRWOMAN BAILEY: This morning I printed  
21 off the order which contained the '09 amendments. I  
22 gave each of the commissioners and the court  
23 reporter a copy of what was labeled as Attachment A  
24 in Case No. 14292 and this is part of Order No.  
25 R12939 A. It is a red-lined strikeout of the Pit

1 Rule and the changes are indicated.

2 The first change is indicated on Page 19  
3 that we need to be aware of.

4 MR. SMITH: Madam Chair, I'm sorry.  
5 Before you get into this substantively I want to  
6 make it perfectly clear on the record that this is  
7 arising because of the original submission of  
8 petitioners. This was not some switch that was made  
9 in any kind of confusion as we went through. This  
10 error dates all the way back to the original  
11 application. I looked this morning. It dates all  
12 the way to the original application that was  
13 submitted by NMOGA in 2011.

14 CHAIRWOMAN BAILEY: And IPANM.

15 COMMISSIONER BLOOM: I'm sorry, you said  
16 the changes came about because of what?

17 MR. SMITH: The changes are 2009  
18 amendments. Which means the submissions we received  
19 from petitioners used the 2007 version. They are  
20 not included in what you have thus far been  
21 considering. So what you are basically having to do  
22 here is update your document to include these  
23 provisions so it will be the current Pit Rule.  
24 There aren't very many, which is one reason, I  
25 suppose, no one really noticed it.

1                   COMMISSIONER BLOOM: How did the '09  
2 edition changes come to take place?

3                   MR. SMITH: There was a hearing like this.

4                   COMMISSIONER BLOOM: The petitioners were  
5 NMOGA and IPANM or was it OCD?

6                   MR. SMITH: I don't know.

7                   CHAIRWOMAN BAILEY: OCD.

8                   COMMISSIONER BLOOM: That's helpful.

9                   CHAIRWOMAN BAILEY: So you also have  
10 cautioned us that we cannot make any changes or  
11 deliberate on anything that was not presented in  
12 this hearing on this case. For instance, looking at  
13 some of the language that was added in the 2009  
14 version, we could go to the very last page of this  
15 document. We look at Page D. All of that language  
16 that is underlined there was added to the 2009. If  
17 there was any -- we cannot consider changing those  
18 unless we have testimony in the record for this  
19 hearing.

20                   MR. SMITH: Even if you had testimony in  
21 the record, the fact that the public did not get  
22 notice -- for instance, let's say that the latter  
23 part of B down at the bottom that begins, "An  
24 operator of an existing operation that is required."

25                   CHAIRWOMAN BAILEY: Where are you?

1 MR. SMITH: Page 30? Is that where you  
2 are looking?

3 CHAIRWOMAN BAILEY: I just turned to the  
4 last page.

5 MR. SMITH: The very last page has a D in  
6 it. It says, "By no later than October 2009."  
7 There is additional language there. If any of that  
8 were stricken for some reason in what we are looking  
9 at now, I don't think that you could strike that  
10 because the public didn't get notice of it. Now,  
11 that's not a good example because it's unlikely that  
12 language that wasn't included is going to be  
13 stricken, but you get my point. If the public  
14 didn't know that a change was being proposed, I  
15 don't think that you can make that change even if  
16 you have testimony on it.

17 That's sort of a global rule. There may  
18 be exceptions. I would suggest as you go through  
19 the 2009 amendments if we hit a problem then let's  
20 look at that specific problem and try and make a  
21 determination on how to treat it. Do you understand  
22 what I'm saying?

23 CHAIRWOMAN BAILEY: Yes.

24 MR. SMITH: Like if you hit a conflict.

25 CHAIRWOMAN BAILEY: The first underlined

1 area that we saw was on Page 19, Portion 5 and 6.  
2 Paragraph 5, the language has "the side walls open  
3 for visual inspection is placed on a geomembrane  
4 liner," Was deleted from the 2000 version, so the  
5 2009 version did not have that restriction. The  
6 2009 version added the language "and is not included  
7 in Paragraph 6 of Subsection I of 19.15.17 NMAC," so  
8 that's another reference that needs to be put in  
9 there.

10 The end of Paragraph 5 on Page 19 was,  
11 "The operator shall comply with the operational  
12 requirements of 19.15.17.12 NMAC." These changes to  
13 paragraph 5 of Page 19 may or may not have an impact  
14 on what we have before us today.

15 Paragraph 6, "The operator of a  
16 below-grade tank constructed and installed prior to  
17 June 16, 2008," and the language is struck, "Does  
18 not comply with Paragraph 1 through 4 of Section I  
19 of 19.15.17.11 NMAC or that does not comply with  
20 Paragraph 5 of Subsection I of 19.15.17.11 NMAC."  
21 That language was struck and underlined. Added to  
22 the rule was that "is single-walled and where any  
23 portion of the tank side wall is below the ground  
24 surface and not visible." So that does affect the  
25 design and construction of a below-grade tank.

1           The very last line of Paragraph 6 was  
2   added language, "The operator shall comply with the  
3   operational requirements of 19.15.17.12." So at  
4   this point I wonder if it would be efficient to look  
5   at the operational requirements for below-grade tank  
6   to see if this added language and deleted language  
7   of Paragraph 6 has any impact for what we have been  
8   considering. This is in Section 11.

9           COMMISSIONER BLOOM: I'm wondering if it  
10  might not be fruitful to pause here today for a  
11  period or a weekend and take a look at this and  
12  compare it to where we are at currently.

13          CHAIRWOMAN BAILEY: It will take some time  
14  and consideration for us to look at this. There are  
15  also a couple other areas that we would need to  
16  spend time on today also, was the proposed change  
17  that we had for the table for the concentration of  
18  chlorides.

19          COMMISSIONER BLOOM: I saw that the  
20  chlorides language were raised in this document we  
21  are looking at.

22          CHAIRWOMAN BAILEY: Yes, they have. But  
23  also I made the change yesterday, Table 1 went from  
24  the milligrams were liter, which was what was  
25  submitted by the NMOGA document, to milligrams per

1 kilogram, which is the normal values for measuring  
2 chlorides in soils. We need to go back and look at  
3 what was being testified to by NMOGA and IPANM as  
4 far as what method of measurement were they using in  
5 their testimony.

6 COMMISSIONER BALCH: I did do a brief  
7 search on that through the first several NMOGA  
8 witnesses. It appears that the terms were used  
9 interchangeably, milligrams per liter when they were  
10 referring to liquids, and milligrams per kilogram  
11 when they were referring to solids.

12 CHAIRWOMAN BAILEY: Which is correct. But  
13 we need to make sure that the witnesses were  
14 testifying to milligrams per kilogram and not  
15 milligrams per liter. Because Dr. Neeper, in the  
16 section that I quoted, had milligrams per kilogram,  
17 and that value, that concentration, may be -- needs  
18 to be considered when we are changing the  
19 measurements for that.

20 Also I was in error yesterday. I made a  
21 huge mistake. I confused the definition of  
22 geotextile with geomembrane. So the discussion that  
23 we had concerning covering of the pit, we need to  
24 rethink it with the understanding that the  
25 geomembrane is not permeable to water.

1 COMMISSIONER BLOOM: I saw that, too.

2 CHAIRWOMAN BAILEY: That's also something  
3 that we need to revisit.

4 COMMISSIONER BLOOM: I'm not opposed to  
5 trying to talk through this, but it might be easier  
6 to work on other things until lunch and take time  
7 over lunch and get an initial thought in our heads  
8 about where this might go.

9 COMMISSIONER BALCH: I guess my approach  
10 is a little different. It would be let's dive into  
11 this and it will quickly become apparent if we have  
12 major issues that are going to slow things down to  
13 the point where we have to consider it for a long  
14 period of time. I believe if we just start it, at  
15 least we will have some idea of how these changes  
16 are going to have an impact and how serious that  
17 impact is.

18 CHAIRWOMAN BAILEY: We could go until noon  
19 and decide at that time whether or not we need to  
20 reconvene in the afternoon or if we would continue  
21 this until Thursday of next week.

22 COMMISSIONER BALCH: I won't be here.

23 CHAIRWOMAN BAILEY: That's right. So the  
24 continuance would have to last for quite some time.  
25 We would have to check our calendars. Let's go at

1 least until noon.

2 COMMISSIONER BLOOM: That's fine.

3 CHAIRWOMAN BAILEY: And then we can decide  
4 whether or not to come back after lunch. We had  
5 stopped to see if in Section 11 the language that is  
6 now the current Rule 17 has an impact on the  
7 decisions that we made for the design and  
8 construction specifications for a below-grade tank.  
9 We find that on Page 14.

10 COMMISSIONER BLOOM: I had a question on  
11 Page 15 related to below-grade tanks. Maybe it  
12 would be helpful to clarify that first or later. It  
13 was on paragraph 6 there, Page 15.

14 CHAIRWOMAN BAILEY: Okay.

15 COMMISSIONER BLOOM: It reads, "The  
16 operator of a single wall below-grade tank  
17 constructed and installed prior to the effective  
18 date of this amendment or any portion of the tank  
19 side walls below the ground surface and not visible  
20 shall equip or retrofit the below-grade tank to  
21 comply with Paragraphs 1 through 4 or close it by  
22 January 16, 2013 if the tank does not demonstrate  
23 integrity."

24 I thought this paragraph came to keeping  
25 that phase-out date of January 16, 2013 in place and

1 that those tanks might have to be changed out by  
2 then if they are single-walled and still have part  
3 of the --

4 COMMISSIONER BALCH: I saw the same thing  
5 and I struck the language after the date.

6 COMMISSIONER BLOOM: That's what I was  
7 thinking, too.

8 COMMISSIONER BALCH: That made it  
9 consistent. We are already talking about the case  
10 where you don't have all of the side walls visible.

11 CHAIRWOMAN BAILEY: I agree. If you could  
12 delete that clause.

13 COMMISSIONER BLOOM: I wasn't sure if I  
14 remembered our intent for that correctly.

15 COMMISSIONER BALCH: Leftover words.

16 COMMISSIONER BLOOM: That was it. Now  
17 turn to the other dilemma.

18 CHAIRWOMAN BAILEY: I had quite a few  
19 other suggestions for change. Do we want to go  
20 through those first before we deal with the problem  
21 of the wrong working base?

22 COMMISSIONER BALCH: Here is my concern.  
23 If we go through the working base and find out that  
24 we are not allowed to change some of these  
25 paragraphs that we changed, then there's no point in

1 fixing the stuff that we did.

2 CHAIRWOMAN BAILEY: So let's dive right  
3 in, as you said.

4 Okay. I don't see that -- in fact, where  
5 we were is also the same area that we need to check  
6 for the amendments that were made in 2009 on Page  
7 19, Paragraph 6 there. That deals with single walls  
8 and below-ground and not visible. So the  
9 correlative language is on Page 15 of our Day 6  
10 draft.

11 COMMISSIONER BALCH: To the 2009 version  
12 of Paragraph 5, looks like they go straight across,  
13 Paragraph 5 and Paragraph 6. In the 2009 version,  
14 Paragraph 5, starting about the middle of it, "shall  
15 close the existing below-grade tank pursuant to the  
16 closure requirements and install one that meets the  
17 requirements." The version of 5 that we have here,  
18 however, removes that language and replaces it with,  
19 "Can stay in place if it demonstrates integrity."

20 CHAIRWOMAN BAILEY: So for the 2009  
21 version, it requires removal, whether or not  
22 integrity is demonstrated? Is that the way you read  
23 that?

24 COMMISSIONER BLOOM: Madam Chair, I'm  
25 comparing this back to NMOGA's Attachment A. I'm

1 seeing language there that doesn't relate to what we  
2 have in the working draft, which is different  
3 from '09. In our working drafts we have, "The  
4 operator of a single-walled below-grade tank," and  
5 that doesn't appear in NMOGA's Attachment A or the  
6 2009.

7 COMMISSIONER BALCH: That was from our  
8 discussion and testimony. I want to be clear there  
9 were two cases, a single-walled below-grade tank  
10 that you could see all the sides and one that you  
11 could not see all of the sides. I believe that  
12 Paragraph 6 in NMOGA Exhibit A or attachment --  
13 yeah, Exhibit A is now 7 in our working draft and 5  
14 was split into 5 and 6.

15 So we have significantly modified those  
16 sections compared to what is in 2009. In 2009 in  
17 Paragraph 5, the language I think that's relevant  
18 is "shall close an existing below-grade tank" and we  
19 qualified that in the new 5 and 6 to say that in  
20 some circumstances they wouldn't have to and others  
21 they would.

22 COMMISSIONER BLOOM: I'm just throwing  
23 this out there. Would it be easier to go back to  
24 NMOGA's original proposed language, compare that to  
25 the 2009 rule?

1           CHAIRWOMAN BAILEY: I believe that that  
2 would be easier than trying to figure out what  
3 happened in order to result in our working draft;  
4 that if we go back to their submittal or even the  
5 combined submittal that IPANM gave us that indicates  
6 both and compare it to the 2009 order, that we may  
7 or may not arrive at a different working draft. I  
8 think that's a good suggestion. Don't you, Mr.  
9 Balch?

10           COMMISSIONER BALCH: The only -- you know,  
11 I'm trying to compare it word for word, side by  
12 side, but 5 from the NMOGA draft and 5 from the 2009  
13 version appear to be substantially identical except  
14 for the 2007 version or whatever version NMOGA had  
15 has additional language after the NMAC that was  
16 stricken in 2009. The language that says on Page  
17 24, NMOGA Exhibit A, "And install a below-grade tank  
18 that complies." It appears to be the only change  
19 between the 2007 and the 2009 was striking that  
20 sentence, which NMOGA recommended we strike anyway.

21           MR. SMITH: Could I ask you where you are  
22 on the order?

23           COMMISSIONER BALCH: Okay. I'm looking at  
24 Page 21, Section 5 on the 2009 order.

25           CHAIRWOMAN BAILEY: We were on Page 19.

1 MR. SMITH: I think you should be on Page  
2 19.

3 COMMISSIONER BALCH: Okay.

4 MR. SMITH: Boy, am I glad, because I was  
5 really confused.

6 COMMISSIONER BALCH: Would it be too  
7 difficult to open up a new document and what we have  
8 is comparisons, put them both up on the screen with  
9 each other, the NMOGA Attachment A and the 2009  
10 version? Because again, as I am reading through  
11 this I am not seeing a large variation.

12 CHAIRWOMAN BAILEY: Okay. We don't have  
13 the word document.

14 UNIDENTIFIED SPEAKER: The order is on the  
15 website, the order itself.

16 CHAIRWOMAN BAILEY: It's a PDF?

17 COMMISSIONER BALCH: Nevermind then. So I  
18 think this corresponds with Page 18 of NMOGA's  
19 Attachment A.

20 CHAIRWOMAN BAILEY: Yes. It appears as  
21 though the exhibit has the same strikeout in the  
22 same line, the first sentence, that the 2009 order  
23 has, "Has the side walls open for visual  
24 inspection," except -- yes. So that comparison is  
25 all right.

1                   COMMISSIONER BLOOM: Madam Chair, I think  
2 we will need to go up further because we struck the  
3 word -- if we go back a page, start at the beginning  
4 with below-grade tanks, we struck No. 2 under I.  
5 There was a recommendation to strike "system" in  
6 the '09. Just cleaning up language there. But then  
7 in A that gets into shutoffs and alarms.

8                   COMMISSIONER BALCH: Mr. Smith, I think  
9 that this could be particularly hard to unravel.  
10 The concern is at what level can we convince  
11 ourselves and anybody that examines the document  
12 that we have posted due notice, deliberated  
13 appropriately, had testimony presented when you have  
14 an issue where you have a paragraph here that's  
15 pointing to two or three other places. Some of  
16 those places we may have made changes.

17                   For example, Mr. Bloom pointed out in  
18 Paragraphs 1 through 4 that are referenced by this  
19 paragraph. It appears to me that the paragraphs are  
20 substantially the same between NMOGA Exhibit A and  
21 what was in rule 2009 for this particular case.  
22 Page 21, I notice another section where the language  
23 was substantially the same or exactly the same  
24 except for the strikeout of the sentence at the end,  
25 which was also stricken out in 2009. In that case

1 it might be a little more clear because NMOGA  
2 basically presented a change that had already been  
3 made in 2009.

4 MR. SMITH: So I think you can make that  
5 without any problem.

6 COMMISSIONER BALCH: That's a little more  
7 straightforward. But once you start to go away from  
8 Paragraph 5 here and Paragraph 5 here to the places  
9 where the paragraph is pointing, operational  
10 requirements, et cetera --

11 MR. SMITH: I don't think that with  
12 respect to the cross-referencing, if you have  
13 changed a paragraph that you are cross-referencing  
14 to, I don't think that's particularly a problem.

15 COMMISSIONER BALCH: Or even if the number  
16 has changed from 12A to 12B because we struck or  
17 changed something?

18 MR. SMITH: No, that's not -- I don't  
19 think that's an issue. I didn't mean -- which is  
20 why I said I thought you should consider them as you  
21 go through. Changes like that I don't think are an  
22 issue. I'm talking about -- let me see if I can  
23 find an example, because this is one that I noticed  
24 that I think -- if you would, look at Page 26 of the  
25 order. This is in closure requirements, on-site

1 trench burial. Under C, if you look down you will  
2 see a Romanette 3 that references concentrations of  
3 organic water contaminants and a standard there. Do  
4 you see that?

5 COMMISSIONER BALCH: Yes.

6 MR. SMITH: Now, that was not in the  
7 version of the Pit Rule that the petitioners  
8 submitted, which means it has, thus far, been  
9 omitted from your draft and no notice was given to  
10 the public about whether that would be omitted or  
11 not. So what I'm saying is I think that sort of  
12 thing you have to put it back in. Those are the  
13 kinds of changes that I'm talking about. And above  
14 that there is "an operator certification required."  
15 Now, I would say that should go back in unless not  
16 having it in there is a logical consequence of a  
17 change that you already have made of which the  
18 public is aware.

19 Let's say, for instance -- and I'm just  
20 making this up because I don't want to have to be  
21 real in this. Let's say that said, "The operator  
22 has to give notice to someone whenever the operator  
23 does A." Okay? And in the version of which the  
24 public had notice the suggestion was made by the  
25 petitioners that they shouldn't have to do A anymore

1 and you heard the evidence and you determined no,  
2 you don't have to do A anymore.

3 Now, if you have the provision here that  
4 was in 2009 and not in 2007 that says the operator  
5 has to give notice whenever they do A, I think you  
6 can take that out because it flows logically from  
7 changes that you have already made. But if it's  
8 something like this 3103 reference in 3C, I don't  
9 think you can do that so that's why I say as you go  
10 through --

11 COMMISSIONER BALCH: There was no  
12 testimony on organic constituents in water so we  
13 have nothing to base that on.

14 CHAIRWOMAN BAILEY: That's right. We were  
15 given the old version of the Pit Rule to deliberate  
16 changes, but changes have already been made to that  
17 2007 version. The current rule is 2009 but we were  
18 not given that and testimony was not presented on  
19 that the 2009 version.

20 MR. SMITH: Well, now, wait. Testimony  
21 was presented on the great majority of the 2009  
22 version because the 2009 version and the 2007  
23 version are very similar. There are just these few  
24 changes that you note here in the order. So it's  
25 not like the majority or maybe even all of what was

1 done here can't be applied to the 2009 version. Of  
2 course it can. It's the same thing practically.  
3 But where they differ, that's where you have your  
4 problems.

5 CHAIRWOMAN BAILEY: What I meant is that  
6 we can't have a wholesale deletion as given to us in  
7 the draft because those wholesale deletions will not  
8 reflect what the actual deletions would be from the  
9 current rule.

10 MR. SMITH: That's exactly right.

11 CHAIRWOMAN BAILEY: That's what I was  
12 trying to get to.

13 COMMISSIONER BALCH: I don't want to say  
14 this, but I'm not sure if that allows us to make an  
15 effective modification because you are conflicting  
16 portions of the rule. We would have replacement  
17 language and then the old language right next to it.

18 COMMISSIONER BLOOM: I think we have to  
19 see.

20 MR. SMITH: You have to see if there's a  
21 conflict. I mean, you are going to have to look at  
22 each one of these.

23 COMMISSIONER BALCH: We can still make  
24 deletions. We can't broadly take them away.

25 CHAIRWOMAN BAILEY: Right. And we have to

1 compare them to the current rule, not what the old  
2 rule used to be.

3 COMMISSIONER BALCH: So Page 19 of the  
4 2009 order, Paragraph 5, and Page 18 of NMOGA  
5 Exhibit A Paragraph 5, I don't think that there's  
6 any substantial difference between the paragraphs.  
7 In fact, I think the only real difference is the  
8 striking at the end of Paragraph 5 on Page 18 of the  
9 NMOGA exhibit which was apparently struck in the  
10 2009 version. In fact, I'm not even sure where the  
11 language "and install below-grade tank" comes from  
12 because it's not in the 2009 version at all.

13 CHAIRWOMAN BAILEY: But it doesn't show it  
14 was struck out in the 2009 version.

15 COMMISSIONER BALCH: Unless I'm looking at  
16 the wrong page.

17 MR. SMITH: If we were to find this on our  
18 current working draft, what is the citation?

19 CHAIRWOMAN BAILEY: Page 18?

20 MR. SMITH: It's 11.

21 COMMISSIONER BLOOM: I think we are  
22 talking Page 15, 5 and 6. We are probably not  
23 looking at the working draft. We would have to go  
24 back to the proposed changes to '09. So I think if  
25 we go up from 5 to A above, we heard testimony about

1 alarms and automatic shutoffs. The differences  
2 between '07 and '09 in those paragraphs, so that  
3 would.

4 CHAIRWOMAN BAILEY: I agree that alarm, we  
5 are okay with that paragraph.

6 COMMISSIONER BALCH: I think the  
7 difficulty might be that NMOGA struck all of 6 so we  
8 have to look carefully at the differences between 6  
9 between the 2009 and the NMOGA recommended changes.

10 CHAIRWOMAN BAILEY: Yes.

11 COMMISSIONER BALCH: I think, to add more  
12 confusion to it, that we took 5 and 6 and changed  
13 them into three paragraphs.

14 CHAIRWOMAN BAILEY: Which would relate to  
15 5, 6 and 7.

16 COMMISSIONER BALCH: So in a sense, we  
17 didn't take NMOGA's change in 6. We substantially  
18 changed the entire section to reflect three cases, a  
19 double-walled case, a single-walled case where you  
20 have all sides visible and a single-walled where you  
21 did not have all sides visible.

22 CHAIRWOMAN BAILEY: We had testimony and  
23 we had deliberation, so we may be able to just  
24 accept and go forward with our Paragraphs 5, 6 and 7  
25 because there was no problem with the 2009 version.

1 Is that correct?

2 MR. SMITH: I think what you want to do is  
3 look at 5 and 6 in your order and look at what is no  
4 longer in the Pit Rule before it's amended this  
5 time. Look at what was added and see if there is  
6 anything there that is substantive that has been  
7 overlooked or glossed over in the deliberations.

8 COMMISSIONER BLOOM: If I look at 6 in the  
9 2009 order, it's essentially saying that the  
10 operator of a below-grade tank that was constructed  
11 and installed prior to 2008 that is single-walled or  
12 any of the portion of the tank side walls below the  
13 ground surface not visible, that either has to be  
14 retrofitted to comply with 1 through 4, which we  
15 left unchanged, or it has to be removed five years  
16 after June 16, 2008.

17 COMMISSIONER BALCH: Which we also didn't  
18 change.

19 COMMISSIONER BLOOM: We kept that in  
20 place.

21 COMMISSIONER BALCH: I think that in  
22 regards to the below-grade tanks in operational 5  
23 and 6, we didn't change anything. In fact, we  
24 actually, I think, brought back in 6 that was struck  
25 by NMOGA and modified it. And the language is

1 substantially the same. What we based our  
2 deliberations on was essentially the same with a few  
3 word changes that do not change the intent of the  
4 paragraph.

5 MR. SMITH: And I think that's what's  
6 significant here. Remember now, as you go through  
7 the sections, before you had one issue, and that was  
8 what does the evidence advise me to do? Is there  
9 substantial evidence to make this change? Now you  
10 have that issue and the second issue is despite the  
11 evidence, is this something that people should have  
12 known that we might have done when they read the  
13 proposed -- the application that NMOGA gave you.

14 COMMISSIONER BALCH: Now, we had a lot of  
15 discussion about this section, and we decided there  
16 needed to really be three cases instead of the one  
17 case presented by NMOGA and the two that were  
18 presented in the original, for clarity. That's why  
19 we made the changes that we made.

20 MR. SMITH: And I think that you can do  
21 that because that's a logical extension of the  
22 changes that were proposed.

23 CHAIRWOMAN BAILEY: Okay. So for these  
24 changes that became a part of the 2009 order, we are  
25 in agreement that the draft order that we are

1 presenting is in compliance or whatever with these  
2 guidelines we need to be aware of in order to make  
3 the decision to change.

4 COMMISSIONER BALCH: Well, they are not in  
5 conflict. I think if we would have been reading  
6 these same two paragraphs in 2009 we would have had  
7 the same discussion, same result.

8 COMMISSIONER BLOOM: I agree.

9 CHAIRWOMAN BAILEY: Exactly.

10 COMMISSIONER BALCH: Based on the  
11 discussions or the testimony.

12 CHAIRWOMAN BAILEY: So we have taken care  
13 of these amendments.

14 COMMISSIONER BLOOM: There's one thing we  
15 might want to consider, and that is that it looks  
16 like in the 2009, the current regulation, there's a  
17 sentence added at the end of '09 at the Sections 5  
18 and 6 which say, "The operator shall comply with the  
19 operational requirements of 19.15.17.12." Would we  
20 want to incorporate that? We should discuss that,  
21 if we want to incorporate that.

22 COMMISSIONER BALCH: We can discuss that.

23 CHAIRWOMAN BAILEY: My belief it if we  
24 have direction given in Section 12, that that is the  
25 rule and it should be complied with. I don't see

1 that we have to reiterate in any other section that  
2 yes, you have to obey another section of the rule.  
3 An operator has to obey all parts of the rule.

4 COMMISSIONER BLOOM: I agree.

5 COMMISSIONER BALCH: That came up in many  
6 other areas when we trimmed off unnecessary  
7 verbiage.

8 CHAIRWOMAN BAILEY: You don't have to  
9 reiterate the obvious.

10 COMMISSIONER BLOOM: We took out the  
11 reference to variance where people knew that they  
12 could get a variance.

13 COMMISSIONER BALCH: There's a section  
14 that describes that.

15 CHAIRWOMAN BAILEY: Yes. So let's go to  
16 Page 21 of the 2009 order. We have Paragraph D5 and  
17 6 that was new language that's in Section 12  
18 concerning below-grade tanks operations.

19 COMMISSIONER BALCH: This is the paragraph  
20 that I noted was identical to that in the NMOGA  
21 order, so maybe they had already copied that  
22 language over.

23 CHAIRWOMAN BAILEY: Okay. Paragraph 5 is  
24 equivalent to Paragraph 5 on Page 24 of the NMOGA  
25 submittal?

1           COMMISSIONER BALCH: So in NMOGA Exhibit A  
2 Paragraph 5 on Page 24, their modifications are all  
3 based upon this paragraph in the 2009 order.

4           CHAIRWOMAN BAILEY: So any discussion we  
5 had is not in conflict with the 2009 concerning  
6 paragraph 5. Let's look at Paragraph 6 to see if we  
7 see any conflict for our discussions.

8           COMMISSIONER BALCH: This is where I would  
9 like to see the two paragraphs in text and do a word  
10 comparison with software. I'm doing it with my eyes  
11 and I am seeing the same exact thing.

12           COMMISSIONER BLOOM: I would agree.

13           COMMISSIONER BALCH: Paragraph 6 appears  
14 to be modifying the language from the 2009 rule.

15           COMMISSIONER BLOOM: So we actually --  
16 strangely we were given the updated language here in  
17 NMOGA's attachment.

18           MR. SMITH: Wait. I would like to get  
19 this straight. Do I understand that the sections  
20 that you were talking about now -- can you tell us  
21 where to look up there?

22           COMMISSIONER BALCH: Sure. On the NMOGA  
23 order it's Page 24, the NMOGA version of the  
24 modifications.

25           MR. SMITH: What about our draft that

1 we're using?

2 COMMISSIONER BALCH: On our draft it's  
3 going to be on Page 20.

4 CHAIRWOMAN BAILEY: Page 20 of our draft.

5 COMMISSIONER BALCH: What we are noticing  
6 here is that the NMOGA language is the 2009 language  
7 for these two paragraphs and then they applied  
8 modifications to that, so they had apparently  
9 grabbed that language.

10 MR. SMITH: Out of 2009 and put it in the  
11 application? Which we have already indicated was  
12 2007.

13 COMMISSIONER BALCH: Well, appears to be a  
14 hybrid of 2007 and 2009.

15 COMMISSIONER BLOOM: Yes.

16 COMMISSIONER BALCH: In some cases.

17 MR. SMITH: I just wanted to make sure I  
18 understood.

19 COMMISSIONER BALCH: And since Paragraph 5  
20 and Paragraph 6 are both working from the 2009  
21 version and all of our deliberations were based on  
22 the evidence and testimony given to us in this  
23 hearing and we modified the language based upon our  
24 interpretation of that and in our deliberations, I  
25 think we are fine here as well.

1 CHAIRWOMAN BAILEY: So we don't appear to  
2 have any conflict between our deliberations and the  
3 2009 version.

4 COMMISSIONER BALCH: My understanding is  
5 in the 2009 version everything underlined was added.

6 MR. SMITH: You are looking at the order I  
7 gave you earlier?

8 COMMISSIONER BALCH: Yes.

9 MR. SMITH: Yes.

10 COMMISSIONER BALCH: That was not there  
11 before?

12 MR. SMITH: No, that's added.

13 COMMISSIONER BALCH: I did an eyeball back  
14 and forth sentence to sentence and they are  
15 identical to the best of my ability to do that.

16 MR. SMITH: Okay.

17 CHAIRWOMAN BAILEY: So we can go forward  
18 with the decisions we made concerning below-grade  
19 tanks, operational systems. Then we go forward for  
20 the next page, 22. There were changes concerning  
21 the closure and retrofitting to comply prior to any  
22 sale or change of operator.

23 COMMISSIONER BLOOM: Madam Chair, if we  
24 look at the bottom of Page 21 where we were talking  
25 about below-grade tanks and the 2009 order, I'm

1 looking at closure requirements there, and I am  
2 seeing significant differences between what we went  
3 over with NMOGA's proposal. Looks like NMOGA  
4 deleted an A or changed A. Maybe we didn't see  
5 that. I'm not quite sure what I'm looking at here.  
6 The 2009 rule starts with time requirements for  
7 closure, and I don't see that in NMOGA's draft  
8 Attachment A.

9 CHAIRWOMAN BAILEY: NMOGA's draft  
10 attachment begins with suggestion of B. It doesn't  
11 address A at all, does it?

12 COMMISSIONER BALCH: Where are we at?  
13 Page 21?

14 CHAIRWOMAN BAILEY: Page 21 of the order,  
15 Page 26 of NMOGA and Page 21 of our draft.

16 COMMISSIONER BLOOM: Now, that relates to  
17 some of the legacy stuff, it appears. A, the  
18 closure requirements, which we actually talked  
19 about.

20 CHAIRWOMAN BAILEY: And all timelines had  
21 expired anyway.

22 COMMISSIONER BLOOM: Yes.

23 MR. SMITH: Well, I'm sorry. Once again,  
24 I'm confused. You're looking at Section 13, closure  
25 requirements?

1 CHAIRWOMAN BAILEY: Yes.

2 COMMISSIONER BALCH: Yes.

3 MR. SMITH: Okay. And the current rule  
4 begins, "Time requirements for closure. An operator  
5 shall close the pit," and then there are various  
6 dates set forth under that, 1, 2, 3, 4, 5 and so  
7 forth.

8 CHAIRWOMAN BAILEY: And the first four  
9 have either expired or have been taken care of.

10 MR. SMITH: No. What I'm asking you is  
11 this: Those dates were in except for one paragraph,  
12 those dates were in the 2007 order.

13 COMMISSIONER BLOOM: Yes, and NMOGA didn't  
14 indicate that they were going to strike that  
15 language in their --

16 COMMISSIONER BALCH: That whole Section A  
17 is actually not -- it was replaced by a new Section  
18 A in theirs.

19 COMMISSIONER BLOOM: They added this A  
20 here and showed that they were striking -- they put  
21 the whole new plan here and showed they were  
22 striking B but never showed they were striking A.

23 MR. SMITH: So here is what I want to get  
24 clear on. The submission that we got in the  
25 petition not only does not include the 2009 changes,

1     except for a few; it also has portions of the 2007  
2     version that are removed and you don't know that  
3     they were removed.

4             CHAIRWOMAN BAILEY: Right.

5             COMMISSIONER BALCH: No, they replace  
6     Section A with a new Section A but didn't show a  
7     strikeout of the old Section A.

8             MR. SMITH: So here is my concern: That  
9     from which you are currently working reflects, as  
10    far as you know -- well, may have changes made to  
11    the 2007 order that are not reflected.

12            CHAIRWOMAN BAILEY: By the editing out of  
13    that Paragraph A of the 2009 order we don't know if  
14    the submittal by NMOGA and IPANM is an accurate  
15    reflection of the 2007 rules or not.

16            COMMISSIONER BALCH: I'm not so sure  
17    that's completely true because they did complete a  
18    new Section A which was a modification of 2007.

19            CHAIRWOMAN BAILEY: But there was no  
20    indication that they were deleting A.

21            COMMISSIONER BALCH: But they did give  
22    testimony about Section A and the closure  
23    requirements. It wasn't ignored.

24            MR. SMITH: That isn't the issue. The  
25    issue is what is the document that you have in front

1 of you from which you are working? We have been all  
2 along, up to today, I think, assuming that it was  
3 the current Pit Rule. Today we discovered no, it's  
4 not the current Pit Rule. We thought it's the 2007  
5 Pit Rule and in order to fix it what you have to do  
6 is go back and consider each of the 2009 amendments,  
7 right.

8 Now, with this unannounced omission of  
9 Section A, the question is, is this an accurate  
10 reflection of the 2007 Pit Rule?

11 COMMISSIONER BALCH: Let me ask a  
12 question. Because this document was presented to  
13 all parties who had interest in the hearing, they  
14 would have had the opportunity to notice that the  
15 stricken Section A did not exist here, and they  
16 could have brought it up in testimony. So they had  
17 notice. I'm not sure -- and we can go back and look  
18 at the transcript. I'm trying to remember if NMOGA  
19 ever said this was the 2007.

20 CHAIRWOMAN BAILEY: No.

21 COMMISSIONER BALCH: So I'm not sure not  
22 having stricken Section A is a problem because it's  
23 in the record, in the documents, and everybody had  
24 an opportunity to make the observation. Maybe  
25 nobody did or maybe nobody thought it was important

1 enough to bring up in hearing but the opportunity  
2 was there for them to make the observation.

3 MR. SMITH: The problem is, if you have a  
4 document that shows strike-throughs for deletions  
5 and underlines for additions, you may fairly assume  
6 that something that has been deleted is going to be  
7 stricken through.

8 CHAIRWOMAN BAILEY: But it was not edited  
9 before it came to the Commission.

10 COMMISSIONER BALCH: But this is a  
11 wholesale replacement of that Section A?

12 COMMISSIONER BLOOM: May I ask, I don't  
13 have it in front of me, IPANM's lined through, but  
14 we might see if that Section A was there.

15 COMMISSIONER BALCH: I'll look in the OCD  
16 version as well.

17 CHAIRWOMAN BAILEY: I have the combined  
18 version that was given to us, and that combined  
19 version, which is what I have been looking at, does  
20 not show suggested deletion of Section A.

21 COMMISSIONER BLOOM: The closure  
22 requirements. Okay. Looking at OCD's version, it  
23 looks like they were working off of NMOGA's version  
24 or the combined version. Now, in this case I think  
25 everything that's in A is stuff -- material that

1 NMOGA proponents gave testimony to in terms of  
2 getting rid of language that is expired. I don't  
3 know about below-grade tank. I have to take a  
4 closer look at that.

5 This is the order as it currently appears  
6 on the OCD website?

7 CHAIRWOMAN BAILEY: Yes.

8 COMMISSIONER BLOOM: So I'm wondering if  
9 this language, somehow we have a hybrid with the  
10 closure requirements of 2007 were stricken in the  
11 2009 version?

12 COMMISSIONER BALCH: This is in that same  
13 section, 17.13A, Closure Requirements, in the  
14 application for rule making from Holland & Hart.  
15 They have the stricken Section A crossed out.

16 MR. SMITH: Good. What's the date?

17 COMMISSIONER BALCH: September 30, 2011.

18 MR. SMITH: Then why don't we show it  
19 stricken here? This is not what we have on the  
20 website. Okay. Well in a September 30, 2011  
21 submission from Holland & Hart this language is  
22 reflected as stricken.

23 CHAIRWOMAN BAILEY: What page?

24 MR. SMITH: Fourteen.

25 COMMISSIONER BALCH: This is in the binder

1 Florene gave me that had the case information.

2 COMMISSIONER BLOOM: Is it this binder?

3 COMMISSIONER BALCH: That one. What tab  
4 is that under?

5 MR. SMITH: Case 14784. It's Page 14.

6 CHAIRWOMAN BAILEY: I have it.

7 MR. SMITH: The whole -- all of it is  
8 stricken including A and the time requirements that  
9 we don't show here. Now, was there another  
10 submission in October?

11 CHAIRWOMAN BAILEY: Because there were  
12 modifications sent in?

13 MR. SMITH: Let me see.

14 COMMISSIONER BALCH: So this is their  
15 original application for modifications, and in that  
16 they had struck that entire section indicating that  
17 they were going to make changes.

18 CHAIRWOMAN BAILEY: Then the modification  
19 of their modifications that came in does not have  
20 that stricken section.

21 COMMISSIONER BLOOM: What we have on the  
22 website I don't think has that.

23 CHAIRWOMAN BAILEY: Yeah, we show  
24 modifications of the modifications. We have the  
25 application and then we have the modifications.

1 MR. SMITH: I have OCD up. Can you guide  
2 me to OCC?

3 CHAIRWOMAN BAILEY: Go to the rules.  
4 Scroll down. We have a whole series.

5 MR. SMITH: Here we go. Notice of  
6 hearing. Was that the first notice of hearing,  
7 December of 2011?

8 CHAIRWOMAN BAILEY: Possibly.

9 MR. SMITH: The question is what version  
10 of the rules do we have published on the website.  
11 Here we have two applications. Well, one is -- I'm  
12 assuming is IPANM and the other is NMOGA. What's  
13 the date that you have there?

14 COMMISSIONER BALCH: September 30, 2011.

15 MR. SMITH: Okay. That's good. The one  
16 that is published has A stricken, so there's notice  
17 that that's been taken out.

18 COMMISSIONER BALCH: Okay.

19 MR. SMITH: Well, the question is why is  
20 it not stricken on the version that we are using  
21 here?

22 COMMISSIONER BLOOM: Looks like somebody  
23 hit "accept changes" along the way and submitted  
24 this without deleting it.

25 COMMISSIONER BALCH: Or they thought that

1 the replacement in Section A negated needing to have  
2 it in this version.

3 CHAIRWOMAN BAILEY: Accept changes along  
4 the way, that's not good.

5 COMMISSIONER BALCH: However, it does  
6 appear that there was opportunity for people to look  
7 at the stricken changes in the case files.

8 MR. SMITH: Yes.

9 CHAIRWOMAN BAILEY: So the modifications  
10 of those served on April 16, 2012.

11 MR. SMITH: Is it in there?

12 CHAIRWOMAN BAILEY: Not in there. So this  
13 date, September 30th, and then there were  
14 modifications made to the applications and that  
15 version is dated April 16th, 2012. That's when it  
16 was served to the different attorneys.

17 MR. SMITH: Well, my suspicion is this is  
18 some sort of word processing glitch, and I would  
19 suggest that you do whatever it is you're going to  
20 do today the way you had planned and then we should  
21 have the original of your working draft before you  
22 even started deliberations, have that red-lined  
23 against the current rule to make sure that you know  
24 exactly what all those changes are.

25 COMMISSIONER BALCH: Do you think that

1 will resolve the issue of the differences between  
2 the 2007 and the 2009 and the hybrid given to us by  
3 NMOGA?

4 MR. SMITH: I think it will resolve the  
5 hybrid issue. You will still have to consider the  
6 2009 changes separately.

7 COMMISSIONER BALCH: So we need to go back  
8 and reconsider the stricken part of A explicitly?

9 COMMISSIONER BLOOM: We should.

10 MR. SMITH: Well, yeah, yes. Although --  
11 I guess you can do that today if you want to since  
12 you know about it, but --

13 COMMISSIONER BALCH: And we have a version  
14 of the stricken Version A that we can look at to see  
15 the differences between that and the newly inserted  
16 Section A that was presented by the proponents?

17 MR. SMITH: Yes.

18 COMMISSIONER BLOOM: So the deletion of A  
19 was noticed in one of the versions at least, and we  
20 can go back and consider it because we have never  
21 actually accepted the proposed deletion of the old  
22 Section A, go back and look at that. We heard  
23 testimony to at least some of it was looked at.

24 COMMISSIONER BALCH: We spent a lot of  
25 time on closure and looking at that proposed

1 modification to A, and then we also subsequently  
2 modified the following sections as part of that  
3 discussion. So it's not as though we didn't  
4 deliberate on it.

5 CHAIRWOMAN BAILEY: We did. Just not in  
6 the right area or order.

7 COMMISSIONER BALCH: So we need to  
8 deliberate on the omission of Section A, and we  
9 could do that probably now.

10 MR. SMITH: Yes. Hopefully it will be an  
11 empty set, but there may be another set of changes  
12 that you will have to look at once the original  
13 working draft that you started with here on the  
14 screen is red-lined against the existing Pit Rule.  
15 Hopefully there will be nothing in there that is  
16 additional to what you have seen thus far and the  
17 2009 order and the deletion of this Subparagraph A  
18 that you just saw. But there could be, and then you  
19 will have to talk about those, too.

20 COMMISSIONER BALCH: So we can continue  
21 today, do as much as we can, and then you are  
22 encouraging us to come back and go through it all  
23 again once we have the appropriate version to  
24 compare it to?

25 MR. SMITH: Yes.

1 COMMISSIONER BALCH: Okay.

2 CHAIRWOMAN BAILEY: Let's take a  
3 ten-minute break.

4 (Note: The hearing stood in recess at  
5 11:13 to 11:27.)

6 CHAIRWOMAN BAILEY: We were looking at --  
7 we had resolved the problem of the missing Section  
8 A, hadn't we?

9 COMMISSIONER BLOOM: Yes. I think maybe  
10 what we should do -- I will suggest that perhaps we  
11 go through, look at Section A as it currently  
12 exists, consider it in light of the testimony we did  
13 hear and then decide if we want to accept the  
14 removal of that section.

15 COMMISSIONER BALCH: Well, we did  
16 deliberate already on Section A, but we do need to  
17 look at the deleted Section A, which we can find in  
18 the September 30th exhibit, and then we can  
19 determine if there's anything we have to deliberate  
20 further on.

21 CHAIRWOMAN BAILEY: Simply be able to say  
22 okay, A, No. 6, gives us 60-day order with the  
23 closure plan and we have addressed that in section  
24 blah blah. I think that would be the easy way to do  
25 that.

1 COMMISSIONER BLOOM: Yes.

2 COMMISSIONER BALCH: Okay.

3 CHAIRWOMAN BAILEY: Or to deliberate that  
4 yes, the first --

5 COMMISSIONER BLOOM: We did the same thing  
6 when we were looking at closure yesterday.

7 CHAIRWOMAN BAILEY: Exactly.

8 COMMISSIONER BLOOM: We looked at what  
9 deletion was after we looked at the proposed  
10 wording.

11 COMMISSIONER BALCH: So the old version of  
12 A said essentially you have to close using these  
13 requirements in this section or earlier if ordered  
14 by the division.

15 CHAIRWOMAN BAILEY: And we have adequately  
16 addressed that in our version.

17 COMMISSIONER BALCH: I think so as well.  
18 I think the earlier day by the division, we have a  
19 specific paragraph in there that says --

20 COMMISSIONER BLOOM: Talking about 1? I'm  
21 sorry.

22 COMMISSIONER BALCH: I'm talking about A.

23 COMMISSIONER BLOOM: Okay.

24 COMMISSIONER BALCH: Really I think it  
25 falls under emergency.

1           CHAIRWOMAN BAILEY: Let's go section by  
2 section. A1 has to do with discharging into an  
3 unlined permanent pit within two years of 2008.  
4 This paragraph has expired, so we do not need to be  
5 concerned about Paragraph 1. A2 has to do with  
6 discharging into an existing lined or unlined pit.

7           COMMISSIONER BLOOM: Madam Chair, I would  
8 point out that Paragraph 1 also says, "An operator  
9 shall close an existing unlined permanent pit within  
10 three years after June 16, 2008." That has expired  
11 as well.

12           CHAIRWOMAN BAILEY: That has expired.  
13 Paragraph 2 has to do with June 16, 2008 as a  
14 deadline for discharging into existing lined or  
15 unlined permanent pits. That has expired. "An  
16 operator shall also close an existing lined or  
17 unlined permanent pit within six months after June  
18 16, 2008," so that has also expired.

19           COMMISSIONER BLOOM: I believe the focus  
20 was on ones that weren't registered with the  
21 division and at this point everything should be  
22 registered.

23           CHAIRWOMAN BAILEY: Correct.

24           COMMISSIONER BLOOM: So we can delete No.  
25 2.

1 CHAIRWOMAN BAILEY: We can delete  
2 Paragraphs 1 and 2. Paragraph 3, "An operator shall  
3 close an existing unlined temporary pit within three  
4 months after June 2008," and that has expired so we  
5 can delete that. Paragraph 4 has to do with closing  
6 an existing below-grade tank that does not meet the  
7 requirements or is not included in another section  
8 within five years after June 16, 2008, if not  
9 retrofitted.

10 COMMISSIONER BALCH: We discussed these  
11 paragraphs earlier were substantially the same and  
12 we carefully deliberated and came up with language  
13 that is appropriate to the testimony we heard.

14 CHAIRWOMAN BAILEY: And maintained the  
15 deadline.

16 COMMISSIONER BALCH: We did not touch the  
17 deadline.

18 COMMISSIONER BLOOM: We discussed it both  
19 in terms of the 2000 and and the 2009 rule.

20 CHAIRWOMAN BAILEY: Paragraph 5, new  
21 language, "An operator shall close an existing  
22 below-grade tank that does not meet the requirements  
23 if not retrofitted to comply with Paragraphs 1  
24 through 4 prior to any sale or change of operator."  
25 We did not receive any testimony on that.

1                   COMMISSIONER BLOOM: Actually, Mr. Lane, I  
2 believe, or someone spoke to that. I remember  
3 asking the question -- this is saying that upon  
4 sale, the change of operator of a below-grade tank  
5 would have to be disposed of if it didn't meet  
6 requirements no matter what its integrity was, and I  
7 think we talked about that if the tank --

8                   COMMISSIONER BALCH: Demonstrated  
9 integrity -- if you could inspect it on all sides?  
10 There was discussion of this?

11                   CHAIRWOMAN BAILEY: There was discussion.  
12 Okay. Let's check to see if in our version we did  
13 deal with that so we can delete the requirement.

14                   COMMISSIONER BLOOM: It might have been in  
15 the section on permitting below-grade tanks? Could  
16 you search for the word "sale" please?

17                   UNIDENTIFIED SPEAKER: There's no matches  
18 to the word "sale."

19                   CHAIRWOMAN BAILEY: On Page 32 there is  
20 discussion on transfer of a permit, but we are no  
21 longer permitting below-grade tanks, we are  
22 registering below-grade tanks. So because it has  
23 become a registration instead of a permit, it would  
24 not fall under the transfer of permit requirements.  
25 If Mr. Lane did have testimony concerning the

1 importance of transferring below-grade tanks then I  
2 support the deletion of Paragraph 5.

3 COMMISSIONER BALCH: I would as well.

4 COMMISSIONER BLOOM: Based on the  
5 conversation we had about that, I don't believe that  
6 sale or change of operator should be the reason to  
7 say that a below-grade tank is no longer fit to be  
8 in the field.

9 COMMISSIONER BALCH: Inspectability and  
10 integrity of the tank. That's really where all of  
11 the testimony and our deliberations was.

12 CHAIRWOMAN BAILEY: So this paragraph  
13 should be deleted. Paragraph 6, "An operator shall  
14 close any other permitted permanent pit within 60  
15 days of cessation of order of the permanent pit in  
16 accordance with the closure plan." Closure for  
17 permanent pits --

18 COMMISSIONER BLOOM: I think we maintained  
19 this in the current rule.

20 COMMISSIONER BALCH: This is any permanent  
21 or temporary pit?

22 CHAIRWOMAN BAILEY: Any other permanent  
23 pit.

24 COMMISSIONER BALCH: Six is temporary.

25 CHAIRWOMAN BAILEY: No, 6 is temporary.

1           COMMISSIONER BALCH: I'm looking at the  
2 stricken-out version in NMOGA's application, which  
3 is 2007 version apparently. All right. We had a  
4 lot of testimony about --

5           COMMISSIONER BLOOM: Page 25 of our  
6 current working document under E, Timing  
7 Requirements for Closure. Paragraph 1 says, "An  
8 operator shall close a permitted permanent pit or a  
9 multi-well fluid management pit within 60 days of  
10 cessation of operation of the pit according to the  
11 closure plan approved by the appropriate office."

12           And the current language we are looking at  
13 in 6 says, "An operator shall close any other  
14 permitted permanent pit within 60 days of cessation  
15 of operation in accordance with the plan if the  
16 Environmental Bureau and the Division Santa Fe  
17 office approves."

18           COMMISSIONER BALCH: Every other place we  
19 had that we changed the language to the division  
20 district office so that's really the only change for  
21 clarity.

22           CHAIRWOMAN BAILEY: I agree with you.

23           COMMISSIONER BLOOM: Seven is, "An  
24 operator shall close any other permitted temporary  
25 pit within six months from the date the operator

1 releases the drilling or workover rig. The  
2 appropriate division district office may grant  
3 extension not to exceed three months," and on Page  
4 25 of our current working draft under E, Timing  
5 Requirements for Closure, Paragraph 2 says, "An  
6 operator shall close a permitted temporary pit  
7 within six months from the date the workover rig."

8 We added the language, "The operator shall  
9 note the date the drilling or workover rig is  
10 released on Form C105 or C103 filed with the  
11 division upon the well's or workover's completion.  
12 The appropriate division district office may grant  
13 extension not to exceed three months." The language  
14 is virtually identical with the extra requirement in  
15 there that the --

16 COMMISSIONER BALCH: We have not  
17 subtracted that.

18 CHAIRWOMAN BAILEY: So we can't delete  
19 Paragraph 7 on the 2009 order. The next one has to  
20 do with the closing of a drying pad with a  
21 closed-loop system and we also deal with that in E3  
22 on Page 25 of our working draft.

23 COMMISSIONER BLOOM: Yes.

24 CHAIRWOMAN BAILEY: And deliberated on  
25 that paragraph so we can delete Paragraph 8.

1 COMMISSIONER BLOOM: Same language.

2 CHAIRWOMAN BAILEY: Yes, it is. So that  
3 we can delete Paragraph 8 and look at Paragraph 9,  
4 closure of a below-grade tank within 60 days.

5 COMMISSIONER BALCH: Now, there are no  
6 more under the current -- the proponents propose  
7 registration instead of permitting.

8 CHAIRWOMAN BAILEY: Right.

9 COMMISSIONER BALCH: We discussed that and  
10 there was testimony on both sides with regard to  
11 this issue. I don't think the language is necessary  
12 for the changes that were made based on the hearing.

13 CHAIRWOMAN BAILEY: And we did deal with  
14 closure within 60 days of cessation of order in E4  
15 on Page 25 of our working draft.

16 COMMISSIONER BLOOM: We. A and B, yes.

17 COMMISSIONER BALCH: So if we had seen  
18 this language it wouldn't have affected the  
19 deliberations.

20 CHAIRWOMAN BAILEY: It would not, so we  
21 can delete all of Section A of the 2009 if Rule  
22 19.15.17.13. The next changes that were made  
23 between the 2007 and 2009 rule are found on Page 26  
24 concerning on-site burial, which is still part of  
25 19.15.17.13 Closure Requirements, so the on-site

1 burial is Section 3 of Section F. So we have 13F3A,  
2 which requires notification to the surface owner  
3 concerning closure of the drying pad or closure of a  
4 temporary pit.

5 We discussed this yesterday concerning  
6 notification, and we did determine that we would  
7 require notification of the surface owner with the  
8 same timeline that we had developed for notification  
9 of the OCD, which was not less than 72 hours, not  
10 more than a week prior to the beginning of closure  
11 of operations.

12 That's found on Page 24 of the closure  
13 notice. C1 requires notification to the surface  
14 owner. The only other portion of that 2009 order  
15 requires certification to the division that it has  
16 given written notice and we are requiring certified  
17 mail between receipt and evidence of mailing to  
18 demonstrate compliance.

19 So we have dealt with the requirements  
20 that were part of the 2009.

21 COMMISSIONER BLOOM: For on-site trench  
22 burial.

23 COMMISSIONER BALCH: We specified how they  
24 would certify.

25 COMMISSIONER BLOOM: We incorporated

1 stronger language.

2 CHAIRWOMAN BAILEY: So we can effectively  
3 delete that or show that we are in compliance.

4 COMMISSIONER BALCH: We replaced the  
5 language.

6 CHAIRWOMAN BAILEY: We replaced it. Then  
7 Section B under 3 for on-site trench burial has to  
8 do with a language modification in C to include B  
9 for temporary pit, which is just a grammar  
10 correction. The next substantive change goes beyond  
11 to the Romanette 1, 2 and 3 having to deal with the  
12 concentration limitations and the reference to the  
13 Water Quality Control Commission regulations  
14 20.6.2.31A.

15 COMMISSIONER BLOOM: In Romanette 1 we see  
16 that in 2009 of the current existing rule the  
17 chloride limitation was raised from 250 to 3,000.

18 CHAIRWOMAN BAILEY: That is correct. Or  
19 the background concentration, whichever is greater.  
20 That needs to be included.

21 The draft Table 2 for closure criteria for  
22 waste left in place in temporary pits and burial  
23 trenches indicates that that the chloride  
24 concentration in the current -- the 2009 Pit Rule  
25 has a limitation of 3,000 milligrams per liter or

1 background concentration. The proposed table had  
2 2500 milligrams per liter or 5,000 milligrams per  
3 liter, depending on depth to groundwater. The  
4 tables that were presented did not address the  
5 inorganic water contaminants or all of the inorganic  
6 water contaminants specified in 3103.

7 COMMISSIONER BLOOM: Then we would need to  
8 maintain the language on concentrations of organic  
9 water contaminants?

10 COMMISSIONER BALCH: Well --

11 COMMISSIONER BLOOM: We heard no  
12 testimony.

13 COMMISSIONER BALCH: We did have  
14 testimony. Not specifically for that issue but we  
15 had testimony of reducing the constituents that you  
16 test against to the three or four that were then put  
17 in Table 1 and Table 2. There were many other  
18 constituents on the 3103 list?

19 CHAIRWOMAN BAILEY: That's the water  
20 quality control.

21 COMMISSIONER BALCH: Okay. The 3103 list  
22 that were previously listed as some that would have  
23 to be tested, right.

24 CHAIRWOMAN BAILEY: Correct.

25 COMMISSIONER BALCH: Now we did have

1 extensive testimony and extensive deliberation about  
2 is it appropriate to move down to chloride, the  
3 marker, and then BTEX and TPH as the three most  
4 appropriate hazards to groundwater. So in that  
5 sense they neglected to specifically discuss every  
6 other component on the 3103 list.

7 CHAIRWOMAN BAILEY: Because there was  
8 justification for why they selected only those  
9 components of the waste that would be of concern to  
10 the protection of fresh water, public health and the  
11 environment.

12 COMMISSIONER BLOOM: I would like to drill  
13 down a little better to what this means, but I do  
14 have one concern, and that is that the public did  
15 not have notice that perhaps a broader criteria or  
16 inorganics was going to be removed.

17 COMMISSIONER BALCH: Was the 3103 list  
18 including organic?

19 CHAIRWOMAN BAILEY: I can pull that up  
20 right here and tell you what 3103 covers.

21 COMMISSIONER BALCH: I think that's  
22 important, because we did have testimony about 3103  
23 and that that was --

24 CHAIRWOMAN BAILEY: It says Subsection A  
25 of 3103 is referenced in this particular paragraph.

1 Is that correct? So I can look at Subsection A of  
2 3103 and that lists quite a few components  
3 constituents: Arsenic, Barium, Cadmium, Chromium,  
4 Cyanide, Fluoride, Lead, Total Mercury, Nitrate,  
5 Selenium, Silver, Uranium, Radioactivity: Combined  
6 Radium-226 and Radium-228, Benzene, Polychlorinated  
7 biphenyls, Toluene, Carbon Tetrachloride,  
8 1,2-dichloroethane, 1,1 dichloroethylene,  
9 1,1,2,1-tetrachloroethylene,  
10 1,1,2-trichloroethylene, ethylbenzene, total  
11 xylenes, methylene chloride, chloroform,  
12 1,1-dichloroethane, ethylene dibromide,  
13 1,1,1-trichlormethane, 1,1,2-trichlormethane, vinyl  
14 chloride, PAHs: total naphthalene plus  
15 monomethylnaphthalenes, benzopyrene, chloride,  
16 Copper, Iron, Manganese, Phenols, Sulfate, Total  
17 Dissolved Solids, Zinc, pH.

18 COMMISSIONER BALCH: Some of those more  
19 specifically discussed the arsenic. We had a  
20 discussion.

21 COMMISSIONER BLOOM: Does it mention  
22 concentration levels for those?

23 CHAIRWOMAN BAILEY: These are standards  
24 for human health standards for groundwater of 10,000  
25 milligrams per liter TDS concentration or less. So

1 for protected groundwater, these are human health  
2 standards for all of those constituents.

3 COMMISSIONER BLOOM: Does it list the  
4 levels there?

5 CHAIRWOMAN BAILEY: Yes, it does.

6 COMMISSIONER BLOOM: May I ask what  
7 Benzene is at?

8 CHAIRWOMAN BAILEY: Benzene is at 0.01  
9 milligrams per heater.

10 COMMISSIONER BLOOM: 0.01 milligrams per  
11 liter? And the previous rule was .2 milligrams per  
12 kilogram.

13 CHAIRWOMAN BAILEY: See, these are listed  
14 as water evaluations, not as soil analyses.

15 COMMISSIONER BLOOM: This is interesting,  
16 because what the 2009 rule is saying is that the  
17 operator shall, using EPA SW-846 method 1212 or  
18 other EPA procedures that the division approves, the  
19 operator shall demonstrate that the chloride  
20 concentration determined by EPA method 00.1 or other  
21 EPA method does not exceed 3,000 milligrams per  
22 liter or the background concentration, whichever is  
23 greater, to the concentration of the inorganic  
24 contaminants specified in Section A of 20.6.2.3103  
25 NMAC as determined by appropriate EPA methods do not

1 exceed the standards specified in that section that  
2 you just read. So we might have a problem here.

3 COMMISSIONER BALCH: The discussion we are  
4 having -- I don't know if you came in in the middle  
5 or not -- was the proponents argue that there were  
6 four constituents of concern for leaching from  
7 disposal on-site or burial of contaminated surfaces.  
8 They do not specifically talk about the organic  
9 chemicals listed in 3103 that are specifically  
10 stated in the 2009 version of the rule and are not  
11 in their modified strikeout.

12 However, there was testimony about 3103  
13 and that that broad list was not appropriate and  
14 that the four constituents were appropriate and then  
15 the levels of those constituents were also discussed  
16 and then witnesses said that they were protected.

17 MR. SMITH: I'm not sure that I think what  
18 you have here is an evidentiary issue. I think it  
19 is, as Commissioner Bloom mentioned, a notice issue  
20 to the public.

21 COMMISSIONER BALCH: But the notice, the  
22 way I interpret it, included the entire list of 3103  
23 excluding A, B, C and D.

24 COMMISSIONER BLOOM: I think what the  
25 public thought we were talking about was chloride,

1 TPH, BTEX and Benzene, which was all that was in the  
2 2007 rule.

3 COMMISSIONER BALCH: But they did talk  
4 about 3103, the list.

5 COMMISSIONER BLOOM: But I guess I would  
6 feel that -- I can imagine that some of the groups  
7 that were here would feel that they didn't know we  
8 were looking at deleting standards for everything  
9 which is under 3103.

10 MR. SMITH: It isn't just the groups that  
11 were here, it's --

12 COMMISSIONER BALCH: Some group that  
13 may --

14 MR. SMITH: It's the notice that was  
15 given. So if when you say they talked about you're  
16 referring to something that took place in the  
17 hearing --

18 COMMISSIONER BALCH: I think the standard  
19 both 2007 and 2009 was 3103, and then the proponents  
20 in this hearing said no, that's not necessary. You  
21 can do it with chloride, Benzene, BTEX and TPH.

22 MR. SMITH: To the extent those were  
23 included in the notice that was given and the  
24 original proposal on the change for the rules, I  
25 think if the evidence supports it you can change

1 those. But to the extent 3103 contains references  
2 to other elements or metals or whatever, those I  
3 don't think the public had notice of being taken  
4 out.

5 COMMISSIONER BALCH: So a specific  
6 example, Commissioner Bailey read the list earlier.  
7 I don't think we have to do that again but there  
8 were 15 or 20 components much one of them was  
9 Arsenic, Benzene, TPH, chlorides, et cetera. There  
10 were ten other things on 3103 list that were not  
11 talked about directly in testimony. Are you saying  
12 we can't delete any of them either?

13 MR. SMITH: That's what I'm saying.

14 COMMISSIONER BALCH: Even though they  
15 presented a case of the four?

16 MR. SMITH: Yes. Remember, the problem is  
17 not the evidence. The problem is whether someone  
18 had notice that arsenic would no longer be treated  
19 by the rules.

20 COMMISSIONER BALCH: Well, in the stricken  
21 part of the 2007 version of this language, it cites  
22 the same rule or statute. I don't know if it was a  
23 rule or a statute, as 3103. So there was notice  
24 that that was going to be stricken and replaced with  
25 the four component model.

1 MR. SMITH: In the context of the  
2 Romanette 1, not in the context of Romanette 3.

3 COMMISSIONER BALCH: So because they  
4 specifically singled out the organics for listing in  
5 the 2009, even though it is included in the 3103  
6 list, we still have to -- we can exclude the other  
7 ones but not the one that was specifically singled  
8 out in 2009?

9 MR. SMITH: I don't see how you can unless  
10 it's a logical extension of what you did, of other  
11 changes that you made.

12 COMMISSIONER BALCH: I think that's my  
13 argument. I think Mr. Bloom's argument might be  
14 that we need to add a fifth thing to Table 1 that  
15 meets these requirements for the --

16 MR. SMITH: All right. So then the issue  
17 before you, that the three of you should discuss, is  
18 whether changing or taking out the Romanette 3 that  
19 is in the current rule, which was not noticed by the  
20 petitioners, whether you may or should remove that  
21 because it is a logical extension of changes that  
22 you have made of which the public had fair notice.

23 COMMISSIONER BLOOM: Two concerns much one  
24 is Mr. Smith mentioned notification. Groups knew  
25 that the regulation we have in place now, the 2009,

1 gave protection, for example, on mercury. Mercury  
2 is often a substance of concern to environmental  
3 advocates and health advocates. They weren't  
4 notified that that potentially has been removed.

5 COMMISSIONER BALCH: They were notified  
6 that the 3103 standard would be changed to a four  
7 component standard.

8 COMMISSIONER BLOOM: Where was the 3103?  
9 Can you point it out in the --

10 COMMISSIONER BALCH: Well, it was in 2007  
11 on Page 33 and 34 of NMOGA Exhibit A, Section C. It  
12 says water contaminants specified in Subsection A of  
13 NMAC. So they weren't noticed that would be  
14 changed. They weren't specifically noticed but they  
15 were basically noticed of the list.

16 COMMISSIONER BLOOM: Maybe you have a  
17 point here.

18 MR. SMITH: Could you all tell us where  
19 the -- not the table but where the actual language  
20 on the 3103 would be located or would have been  
21 located here?

22 COMMISSIONER BALCH: It's in stricken text  
23 from NMOGA Page 34 Paragraph C, about the middle of  
24 the paragraph. That's where it starts.

25 UNIDENTIFIED SPEAKER: Could you direct me

1 to your working draft?

2 COMMISSIONER BALCH: Not in the working  
3 draft. It was stricken from the working draft.

4 MR. SMITH: Do you have Attachment A that  
5 I could look at?

6 COMMISSIONER BALCH: Yes, I do. It starts  
7 here. The list in 3103.

8 MR. SMITH: Okay. So all of C was  
9 stricken.

10 COMMISSIONER BALCH: Yes. And replaced  
11 with the four contaminants specification table, and  
12 then the testimony and the cross-examination and  
13 some of the components, or at least one, was brought  
14 up directly, and that was arsenic that was  
15 discussed.

16 MR. SMITH: Well, I don't think you should  
17 be concerned about what was discussed at this point.  
18 I think the question is, is the removal of Romanette  
19 3 a logical extension of the request to have removed  
20 the rest of Paragraph C. Could someone have looked  
21 at this change that was published and have said to  
22 themselves, "Okay. Well, it looks like they are not  
23 taking out Romanette 3. Looks like Romanette 3 is  
24 going to remain." Is the change you made a logical  
25 extension of it? Would the public have said, "Well,

1 if they are going to change that they probably are  
2 going to change that."

3 COMMISSIONER BALCH: But the contaminants  
4 they are talking about are on the list in 3103 which  
5 in both language --

6 COMMISSIONER BLOOM: Looks like in the  
7 2009 version for some reason it looks like inorganic  
8 and organics were split, but this version here,  
9 which we heard testimony on, was noticed, it  
10 mentioned just 3103. Would that include organics  
11 and inorganics?

12 COMMISSIONER BALCH: From my limited  
13 knowledge of chemistry, she was --

14 COMMISSIONER BLOOM: We have mercury and  
15 xylene.

16 COMMISSIONER BALCH: Inorganic would be  
17 metals and organic would be hydrocarbons from the  
18 list that was read?

19 CHAIRWOMAN BAILEY: Argue in this case  
20 falls under the inorganic. Benzene, TPH falls under  
21 the organic.

22 COMMISSIONER BLOOM: Perhaps this was  
23 noticed and perhaps both of those were included in  
24 the 3103 list. We certainly -- I believe it was  
25 Dr. Thomas that went through and said, "I looked at

1 everything in the 3103 list."

2 COMMISSIONER BALCH: Under  
3 cross-examination he was asked about arsenic, but  
4 the opportunity was there for any of the  
5 constituents in 3103 to be discussed.

6 COMMISSIONER BLOOM: Arsenic was never in  
7 the original -- a substance of concern in the 2007  
8 or the 2009.

9 COMMISSIONER BALCH: Except it was in the  
10 list, the 3103 list. It was the first if it went  
11 alphabetically. So I guess to me it's a logical  
12 extension.

13 COMMISSIONER BLOOM: I think I would  
14 concede that.

15 CHAIRWOMAN BAILEY: Then we can look at  
16 Paragraph C on the 2009 order. That's Subpart 3C  
17 on-site trench burial, and indicate that we have  
18 noticed correctly and we have deliberated  
19 extensively on the concentrations of the four  
20 constituents that we are focusing on for burial  
21 waste or for determination of soil contamination.

22 MR. SMITH: You know, I would like to  
23 think about whether I think you should do that or  
24 not. Can we take a lunch break?

25 (Note: The hearing stood in recess at

1 12:05 to 1:15.)

2 CHAIRWOMAN BAILEY: We'll go back on the  
3 record. This morning events and issues arose that  
4 indicated that we need to take some time to go back  
5 and look at the record, to look at the draft  
6 documents that we have been working from, to look at  
7 our working draft, which needs to reflect the  
8 current Rule 17, the problems that we encountered  
9 today led to difficulties in resolving some of the  
10 questions before us and some of the evidence before  
11 us. We need to take some time to identify these  
12 problems correctly and thoroughly and so provide  
13 solutions for moving forward on this case.

14 I asked the other commissioners to look at  
15 their calendars so we can recess today and continue  
16 this case to a date in the next couple months. The  
17 rest of October is not available for me or for  
18 Commissioner Balch, from what I understand?

19 COMMISSIONER BALCH: Well, I have mostly  
20 most of my stuff is in the beginning of the month.  
21 The week of the 15th.

22 CHAIRWOMAN BAILEY: Of November?

23 COMMISSIONER BALCH: Of October --

24 CHAIRWOMAN BAILEY: I think we need more  
25 time than in the next two weeks in order to

1 correctly identify and analyze and evaluate the  
2 issues that became so apparent this morning.

3 COMMISSIONER BALCH: I'm just telling you  
4 what I got. The 22nd through the 24th, the next  
5 hearing dates?

6 CHAIRWOMAN BAILEY: Let's begin with  
7 November.

8 COMMISSIONER BLOOM: One question. Will  
9 there be any opportunity to review -- I don't know,  
10 Mr. Smith, if you will be looking at some of the  
11 legal questions. Is there any opportunity to hear  
12 about some of your considerations? I'm just  
13 wondering so we don't come in cold in November and  
14 sit down and start from zero.

15 MR. SMITH: Well, I think the primary  
16 point here is to have a recess long enough to make  
17 sure that we are where we think we are and put  
18 everything together. I will want to look at a  
19 couple of legal issues to make sure that as we  
20 proceed we proceed in the best way. Yeah, I will be  
21 happy to share that when we reconvene. I don't  
22 think there's any other way or time to do that  
23 because any time the commissioners get together  
24 it's, of course, a public meeting.

25 But I think that we can go through that.

1 I would think that the first part of the next time  
2 you all convene for this should consist of a review  
3 of issues that arose, ways in which those issues  
4 have been or need to be resolved, and that will  
5 include, I would think, a review of pertinent law as  
6 it applies to where we are. I mean, I think this is  
7 a recess to figure out exactly where we are and how  
8 you want to move forward. I don't see anything here  
9 that would prevent a moving forward if that's what  
10 you are thinking.

11 COMMISSIONER BALCH: Let me ask a question  
12 then. Perhaps we ought to schedule sometime in the  
13 next two or three weeks a short meeting to discuss  
14 the going forward part, because that will impact how  
15 we review material and prepare ourselves for the  
16 hearing.

17 CHAIRWOMAN BAILEY: It can't happen in the  
18 next couple weeks.

19 COMMISSIONER BALCH: Then in November.

20 CHAIRWOMAN BAILEY: In November possibly  
21 so, but we have to take the time to analyze it, and  
22 that's not going to happen in the next couple weeks.  
23 Plus the transcript isn't available for the next  
24 couple weeks.

25 MR. SMITH: I suppose what you could do is

1 I would schedule the next meeting you have without  
2 being ludicrous in terms of the delay, and maybe the  
3 way you could approach that meeting would be to  
4 discuss only where you are, what staff has found or  
5 what any of you have found in looking through this,  
6 any issues that I need to weigh in on, and get that  
7 taken care of. Then schedule your next meeting for  
8 your deliberations.

9 COMMISSIONER BALCH: My idea was that if  
10 there was a one-day window somewhere in November  
11 that we would not want to use because we think the  
12 hearing would go longer we might use it for a  
13 discussion like that.

14 CHAIRWOMAN BAILEY: That's a possibility.

15 COMMISSIONER BALCH: Also there's the  
16 November 8th regular hearing that we could  
17 potentially tack that discussion on to.

18 COMMISSIONER BLOOM: That's kind of where  
19 I was going. If we can get some information about  
20 how we are going to proceed it might influence our  
21 research and thinking about going forward from  
22 there.

23 CHAIRWOMAN BAILEY: That is still going to  
24 require preparation. I would go out further than  
25 that for your first meeting, if you can.

1           COMMISSIONER BALCH: Then you have the  
2     December 6th?

3           MR. SMITH: Is the rest of November gone?

4           COMMISSIONER BALCH: If you go much  
5     further out you are into December.

6           MR. SMITH: Well, as long as you are able  
7     to give notice, you can have the meeting that you're  
8     talking about on a day other than --

9           COMMISSIONER BLOOM: I am available  
10    November 13th, 14th and 15th and maybe the 16th as  
11    well.

12          MR. SMITH: Let me correct that. For that  
13    matter you don't have to give notice. You can  
14    continue the hearing right now to whatever date you  
15    want to schedule for your short meeting and then  
16    continue it again to whenever you want to pick up  
17    deliberation.

18          CHAIRWOMAN BAILEY: We could be prepared  
19    within the division sometime during the week of  
20    November 13th through 16th. How does that fit in  
21    with your schedules?

22          COMMISSIONER BLOOM: I can be available  
23    all four of those days.

24          COMMISSIONER BALCH: My calendar doesn't  
25    have anything right now so I would prefer not to

1 meet on a Wednesday.

2 CHAIRWOMAN BAILEY: So you prefer 15th or  
3 16th?

4 COMMISSIONER BALCH: That or Monday or  
5 Tuesday.

6 CHAIRWOMAN BAILEY: Monday is a holiday.  
7 We could continue this case to Tuesday, November  
8 13th, for the purposes of regrouping and developing  
9 a path forward given the issues that arose today.

10 COMMISSIONER BALCH: That's only one  
11 working day past November 8th since Monday is the  
12 holiday.

13 CHAIRWOMAN BAILEY: It's not just me, it's  
14 the other members.

15 COMMISSIONER BALCH: No, I understand  
16 that.

17 MR. SMITH: Your point is that's not  
18 really giving a lot of additional time to the 8th.

19 COMMISSIONER BALCH: If the 8th was too  
20 sign, the 13th is only one day closer.

21 CHAIRWOMAN BAILEY: Very good observation.  
22 We can go with the 15th through 16th. The 16th  
23 would work better with your schedule?

24 COMMISSIONER BALCH: Either is fine?

25 COMMISSIONER BLOOM: Perhaps, yeah, the

1 15th or 16th.

2 CHAIRWOMAN BAILEY: Okay. We will go with  
3 the 16th then.

4 COMMISSIONER BLOOM: Friday, November  
5 16th?

6 CHAIRWOMAN BAILEY: Yes.

7 COMMISSIONER BALCH: At that point we can  
8 continue on to wherever we think we need to, based  
9 on that discussion.

10 MR. SMITH: Realizing that it could take  
11 as long as it needs to on that day, would you  
12 imagine this would be a half day meeting?

13 CHAIRWOMAN BAILEY: I believe so because  
14 we won't begin deliberations on that day, we will  
15 simply deliberate and decide on a path forward,  
16 given what the circumstances are?

17 MR. SMITH: To clarify the record, that  
18 meeting will still be part of deliberations. It  
19 will just be --

20 COMMISSIONER BALCH: We can put it on a  
21 Friday and we would not anticipate that the material  
22 we will cover on that day would be more than one  
23 day.

24 COMMISSIONER BLOOM: Would it matter if we  
25 did it the morning of Thursday the 15th?

1                   COMMISSIONER BALCH: That doesn't matter.  
2                   My conference call I was referencing is 2:00 p.m. on  
3                   Wednesday. I usually come up the night before.

4                   COMMISSIONER BLOOM: I prefer that.

5                   CHAIRWOMAN BAILEY: So the morning of  
6                   Thursday the 15th. So we are agreed, 9:00 o'clock  
7                   November 15th here in porter hall.

8                   MR. SMITH: Continuance of the meeting.

9                   CHAIRWOMAN BAILEY: Continuance of this  
10                  hearing, yes. Thank you very much.

11                  (Note: The hearing was concluded at 1:25)

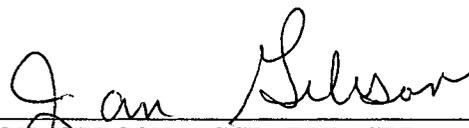
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REPORTER'S CERTIFICATE

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I, JAN GIBSON, Certified Court Reporter for the State of New Mexico, do hereby certify that I reported the foregoing proceedings in stenographic shorthand and that the foregoing pages are a true and correct transcript of those proceedings and was reduced to printed form under my direct supervision.

I FURTHER CERTIFY that I am neither employed by nor related to any of the parties or attorneys in this case and that I have no interest in the final disposition of this case.



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JAN GIBSON, CCR-RPR-CRR  
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