

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

IN THE MATTER OF THE HEARING CALLED BY)
THE OIL CONSERVATION COMMISSION FOR THE)
PURPOSE OF CONSIDERING:)
APPLICATION OF THE NEW MEXICO OIL)
CONSERVATION DIVISION FOR THE REPEAL)
OF EXISTING RULES 709, 710 AND 711)
CONCERNING SURFACE WASTE MANAGEMENT)
AND THE ADOPTION OF NEW RULES GOVERNING)
SURFACE WASTE MANAGEMENT)

CASE NO. 13,586

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

COMMISSION HEARING

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

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Volume VIII - September 21st, 2006

Santa Fe, New Mexico

This matter came on for hearing before the Oil Conservation Commission, MARK E. FESMIRE, Chairman, on April 20th-21st, May 4th-6th, May 18th, June 5th and September 21st, 2006, at the New Mexico Energy, Minerals and Natural Resources Department, 1220 South Saint Francis Drive, Room 102, Santa Fe, New Mexico, Steven T. Brenner, Certified Court Reporter No. 7 for the State of New Mexico.

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SEPTEMBER 21st, 2006 (VOLUME VIII):
Commission Hearing
CASE NO. 13,586

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* * *

ALSO PRESENT:

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JOHN BARTLIT, PhD
New Mexico Citizens for Clean Air and Water

MARVIN BURROWS
John H. Hendrix Corp.

CARL CHAVEZ
Environmental Engineer, OCD

JERRY FANNING, JR.
Yates Petroleum Corporation

KARIN FOSTER
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RAND FRENCH (Marbob Energy Corporation)
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Controlled Recovery, Inc.

RAYE P. MILLER
Marbob Energy Corporation

(Continued...)

ALSO PRESENT (Continued):

OCEAN MUNDS-DRY
Holland and Hart

LISA NORTON
Yates Petroleum Corporation

WAYNE PRICE
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GLENN VON GONTEN
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* * *

1 WHEREUPON, the following proceedings were had at
2 9:03 a.m.:

3 CHAIRMAN FESMIRE: The next cause before the
4 Commission is Case Number 13,586. It's continued from the
5 July 13th, 2006, Commission meeting. It's the Application
6 of the New Mexico Oil Conservation Division for repeal of
7 existing Rules 709, 710 and 711 concerning surface waste
8 management and the adoption of new Rules governing surface
9 waste management.

10 The Commission at this time will take the entry
11 of appearance by attorneys in that case.

12 MR. BROOKS: Mr. Chairman, honorable
13 Commissioners, I'm David Brooks appearing for the Division.

14 CHAIRMAN FESMIRE: Thank you, Mr. Brooks.

15 MR. CARR: May it please the Commission, William
16 F. Carr with the Santa Fe office of Holland and Hart,
17 L.L.P. We're appearing today for the industry committee
18 and also appearing for the New Mexico Oil and Gas
19 Association.

20 CHAIRMAN FESMIRE: Doctor?

21 DR. BARTLIT: I don't know exactly my position.
22 I'm not an attorney. We don't have an attorney here. We
23 do have a statement we wish to read in summary, which I
24 think has been presented to the Commission. So I don't
25 know my standing, but that's who I am. My name is John

1 Bartlit, I'm on behalf of New Mexico Citizens for Clean Air
2 and Water.

3 CHAIRMAN FESMIRE: Okay. Dr. Bartlit, we're
4 going to call for comments from the public very quickly.

5 DR. BARTLIT: Thank you.

6 MR. HUFFAKER: Good morning, Mr. Chairman, I'm
7 Gregory Huffaker appearing today for Controlled Recovery,
8 Inc.

9 CHAIRMAN FESMIRE: Are there any other attorneys
10 present in the case?

11 In the past Mr. Hiser and Mr. Sugarman, I
12 believe, have made appearances. Are they not present
13 today?

14 MR. CARR: No, Mr. Hiser is my co-counsel for the
15 industry committee, and he is not here today.

16 CHAIRMAN FESMIRE: Okay. And Dr. Bartlit, I
17 assume that Mr. Sugarman couldn't make it today either?

18 DR. BARTLIT: I believe that's true, let me just
19 check.

20 CHAIRMAN FESMIRE: Okay, the status of this case
21 was that basically the case had been continued to allow a
22 stakeholders' committee to review the proposal and to make
23 one final set of comments.

24 At this time I'm going to ask the mediator from
25 that task force to give us a report and to outline the

1 recommendations of that committee.

2 MR. SANCHEZ: Mr. Commissioner, Commissioners --
3 Mr. Chairman, I mean -- my name is Daniel Sanchez from the
4 OCD, and of course I'm the compliance officer. I overheard
5 the -- or held the meetings, I guess, that we're talking
6 about, and those are for the Rules 51, 52, and 53.

7 In accordance with the June 23rd, 2006,
8 memorandum from Cabinet Secretary Prukop, the first meeting
9 of the surface waste management stakeholder task force was
10 held on June 28, 2006. The objective of the stakeholder
11 task force was to review the June 8th, 2006, NMOCD proposed
12 Rule 51, 52 and 53 and attempt to reach consensus on how
13 parts of the Rules could possibly be treated or revised.
14 Members of the stakeholder task force consisted of the
15 following individuals:

16 Alan Alexander, Burlington Resources/
17 ConocoPhillips,

18 John Byrom, D.J. Simmons, Incorporated,

19 Carl Chavez, OCD Staff,

20 Bill Marley from Gandy Marley,

21 Raye Miller, Marbob Energy Corporation,

22 Don Neeper and John Bartlit, New Mexico Citizens
23 for Clean Air and Water,

24 Dennis Newman, Occidental Permian, Ltd.,

25 Terry Riley, Theodore Roosevelt Conservation

1 Partnership,

2 and Glen von Gonten, OCD staff.

3 Subsequent meetings were held on July 11th,
4 August 1st through the 2nd, August 15th through the 16th,
5 and on August 29th of 2006.

6 A subcommittee consisting of Bill Marley, Dennis
7 Newman, Don Neeper and Terry Riley was formed to identify a
8 list of issues to be discussed by the task force. The
9 subcommittee decided initially on the first 10 issues,
10 however issue 11 also was identified and amended during the
11 August 29th meeting.

12 Of the 11 items that were reviewed by the
13 committee, eight of them were agreed on. The three that
14 were not agreed on were chloride limits for landfarm waste
15 loading, the tiered approach; closure standards for
16 landfarm wastes and vadose zones, selection of appropriate
17 constituents of concern; and the risk based decision making
18 regulatory approach.

19 The items that were agreed on were vadose zone
20 monitoring; closure standards for re-vegetation;
21 bioremediation endpoint, no 80-percent reduction and 1-
22 percent TPH residual; size of landfarm cell; financial
23 assurance of landfarms; small landfarms; review of section
24 K, exceptions; and a grandfather clause from section L.

25 The group also -- although we did not agree, or

1 the group did not agree on a certain issue, the group came
2 up with a general comment on one of the issues, and I'd
3 like to read that.

4 In addition, the stakeholder task force agreed on
5 the following statement pertaining to section G.(6) of the
6 proposed Rules:

7 In some areas of the State of New Mexico, the
8 natural soil concentrations of some of the proposed
9 regulated constituents, such as arsenic and other
10 inorganics, may exceed the proposed closure standards. If
11 such naturally occurring high-background soils were
12 contaminated with petroleum hydrocarbons and the waste-
13 bearing soils were brought to a landfarm having a lower
14 background concentration, it is likely that the final
15 concentrations of these constituents in the landfarm
16 treatment zone could exceed the proposed closure limits
17 established by the original background soil concentrations
18 of the landfarm.

19 This could be a significant problem for current
20 and future landfarm operators, who may not meet the
21 proposed closure limits and who would need to apply for an
22 exception or waiver or dispose of the waste-bearing soil
23 that failed to meet closure limits at a landfill. This
24 raises the serious question of whether petroleum
25 contaminated soils exceeding the closure limits of a

1 landfarm should be transported to that landfarm.

2 All participants of the stakeholder task force
3 recognize this potential problem. Determination of the
4 extent of this problem will require more data and study
5 regarding the appearance of arsenic and other inorganics in
6 petroleum contaminated soils.

7 We had -- Would you like for me to go through the
8 changes and what those would be?

9 CHAIRMAN FESMIRE: Yeah, I'd like you to review
10 them.

11 MR. SANCHEZ: Okay.

12 CHAIRMAN FESMIRE: I don't think we have to go
13 into them in depth. They're outlined in your report.

14 MR. SANCHEZ: Okay.

15 CHAIRMAN FESMIRE: When was your report -- Your
16 report is posted on the Web?

17 MR. SANCHEZ: Yes, sir, on September 1st.

18 CHAIRMAN FESMIRE: It was posted?

19 MR. SANCHEZ: It was posted.

20 CHAIRMAN FESMIRE: Okay.

21 MR. SANCHEZ: Change Number 1. The stake holder
22 task force believes that a small farm should be restricted
23 to a maximum area and that the volume of treated waste
24 should be consistent with that area. Therefore, the
25 following changes in A.(1).(e) are recommended.

1 Just for your information, we went through these
2 changes in the report as they came up in the proposed Rule.
3 So they didn't exactly meet the organization that I just
4 presented.

5 So on A.(1).(e), a small landfarm, a centralized
6 landfarm of two acres or less -- that's the main change in
7 there -- that has a total capacity of 2000 cubic yards or
8 less, remains active for a maximum of three years from the
9 date of its registration, and that receives only petroleum
10 hydrocarbon contaminated soils, excluding drill cuttings,
11 that are exempt or non-hazardous waste.

12 All these changes are also followed in the rule
13 that was attached, task force redline copy, that was
14 attached to the report, so they can be followed that way as
15 well.

16 Change Number 2. The taskholder task force
17 believes -- the stakeholder task force believes that the
18 rule should define the maximum size of a cell. Otherwise
19 in principle a single cell could be the entire permitted
20 area, which would lead to difficulty in regulating sampling
21 and closure.

22 So A.(2).(f) -- the change in A.(2).(f) would
23 read, A landfarm cell is a bermed area of 10 acres or less
24 within a landfarm.

25 Change Number 3. The stakeholder task force

1 believes that the rule should assure notification of the
2 public when exceptions, waivers or alternatives are
3 considered in an application. The stakeholder task force
4 recommends that a new subparagraph be inserted at
5 C.(4).(f).(i) little -- a little below (i) 6 [sic], and
6 that subparagraphs (vi) and (vii) be renumbered to (vii)
7 and (viii) respectively.

8 C.(4).(f).(vi), description of any alternatives,
9 exceptions or waivers that may be under consideration in
10 accordance with paragraph (5) of subsection J or with
11 subsection K of 19.15.2.53 NMAC.

12 Change 4. Stakeholder task force believes that
13 the OCD should be able to review the financial assurance of
14 an operator whose landfarm contains one or more cells that
15 do not meet a five-year closure condition -- the five-year
16 closure conditions. Stakeholder task force recommends that
17 the following language be inserted after the first sentence
18 of C.(6).(e):

19 Additionally, the Division may review the
20 adequacy of an operator's financial assurance, without
21 regard to the date of its last review, whenever the
22 Division determines that the operator has not achieved the
23 closure standards specified in subparagraph (b) of
24 paragraph (7) of subsection G of 19.15.2.53.

25 Change 5. The stakeholder task force believes

1 that the existing language in G.(2) was insufficiently
2 precise. Although there was extensive discussion on
3 setting the number of background samples per cell to be
4 equal to the number of samples for comparison at closure,
5 the stakeholder task force believes that this might require
6 sampling far in excess of what might be needed to establish
7 a reasonable background value. An operator who felt that
8 the background concentration might vary across this
9 facility would be to establish more refined background
10 concentrations if he wished. Stakeholder task force
11 recommends the following language as replacement for the
12 first sentence in G.(2):

13 Background testing. Prior to beginning operation
14 of a new landfarm or operating a new cell at an existing
15 landfarm at which the operator has not already established
16 background, the operator shall take, at a minimum, 12
17 composite background soil samples, with each consisting of
18 16 discrete samples from areas that have not been impacted
19 by previous operations at least six inches below the
20 original ground surface to establish background soil
21 concentrations for the entire facility. The operator shall
22 analyze the background soil samples for total petroleum
23 hydrocarbons (TPH), as determined by EPA Method 418.1 or
24 other EPA method approved by the Division, benzene,
25 toluene, ethylene benzene [sic] and xylenes (BTEX), as

1 determined by EPA SW-846 method, 8021B or 8260B, chlorides
2 and other constituents listed in subsection A and B of
3 20.6.2.3103 NMAC, using approved United States
4 Environmental Protection Agency methods.

5 Change 6. Stakeholder task force believes that
6 periodic TPH and chloride monitoring should be on a cell-
7 by-cell basis, which is not currently required by the draft
8 language of Rule 53. Because the periodic monitoring
9 serves mainly as an indicator of progress to the operator,
10 the stakeholder task force believes that one single
11 composite sample per cell would be adequate. Accordingly,
12 it is recommended that the third sentence in G.(4) be
13 revised as follows:

14 The operator shall collect and analyze at least
15 one composite soil sample per cell, consisting of four
16 discrete samples, from the treatment zone at least semi-
17 annually using the methods specified below for TPH and
18 chlorides.

19 Change Number 7. Stakeholder task force believes
20 that the semi-annual monitoring program should require
21 operators to test for TPH, BTEX and chlorides with a
22 comparison against the analytical method PQL to determine
23 when a release has occurred. In addition, the annual
24 monitoring program should be changed to five years and
25 would include testing for the 3103 list of constituents and

1 the language changed from "corrective action for releases"
2 to "release response". Language was deleted from G.(5).(a)
3 because the Rule specifies what must be done but not
4 necessarily why it must be done. The stakeholder task
5 force recommends that the following changes occur in
6 section G.(5).(a), (b), (c) and (e) respectively:

7 G.(5).(a), sampling. The operator shall monitor
8 the vadose zone beneath the treatment zone in each landfarm
9 cell. The vadose zone samples should be taken from soils
10 between three and four feet below the cell's original
11 surface.

12 G.(5).(b), the operator shall collect analyze a
13 minimum of four randomly selected independent samples from
14 the vadose zone at least semi-annually using the methods
15 specified below for TPH, BTEX and chlorides and shall
16 compare each result to the higher of the practical
17 quantitative [sic] limit, PQL, or the background soil
18 concentrations to determine whether release has occurred.

19 G.(5).(c), five-year monitoring program. The
20 operator shall collect and analyze a minimum of four
21 randomly selected independent samples from the vadose zone
22 using the method specified below for TPH, BTEX, chlorides
23 and the constituents listed in subsection A and B of
24 20.6.2.3103 NMAC at least every five years and shall
25 compare each result to the higher of the PQL or the

1 background soil concentrations to determine whether release
2 has occurred.

3 G.(5).(e), release response. If any vadose zone
4 sampling results show that the concentrations of TPH, BTEX
5 or chlorides exceed the higher of the PQL or the background
6 soil concentrations, then the operator shall notify the
7 Division's Environmental Bureau of the exceedence and shall
8 immediately collect and analyze a minimum of four randomly
9 selected independent samples for TPH, BTEX, chlorides and
10 the constituents listed in subsection A and B of
11 20.6.2.3103 NMAC. The operator shall submit the results of
12 the resampling event and a response action plan for the
13 Division's approval within 45 days of the initial
14 notification. The response action plan shall address
15 changes in the operation of the landfarm to prevent further
16 contamination, if necessary [sic], a plan for remediating
17 any existing contamination.

18 Change number 8. The stakeholder task force
19 believes that one composite, including four samples from
20 various locations, will accomplish the same objective as
21 four discrete samples and at a lower analytical cost. In
22 addition, the total extractable hydrocarbons for TPH [sic]
23 as measured by EPA 418.1 could be 2500 milligrams per
24 kilogram for treatment zone closure, because the TPH-GRO
25 and TPH-DRO concentrations were limited by separate

1 specifications. Accordingly, the stakeholder task force
2 recommends changes to language in G.(6) and that the 1000
3 milligram per kilogram TPH limit in G.(6).(c) be revised to
4 2500 milligrams as follows:

5 G.(6), treatment zone closure performance
6 standards. After a landfarm cell has been filled to the
7 maximum thickness of two feet or approximately 3000 cubic
8 yards per acre, the operator shall continue treatment until
9 the contaminated soil has been remediated to the higher of
10 the background concentrations or the following closure
11 performance standards. The operator shall demonstrate
12 compliance with the closure performance standards by
13 collecting and analyzing a minimum of one composite soil
14 sample consisting of four discrete samples.

15 G.(6).(c), the total extractable petroleum
16 hydrocarbons fractions as determined by EPA Method 418.1 or
17 other EPA method approved by the Division shall not exceed
18 2500 milligrams per kilogram.

19 Change 9. The stakeholder task force believes
20 that all references to achievement of closure standards and
21 financial assurances should be clearly consistent.
22 Accordingly, the stakeholder task force recommends
23 insertion of a new paragraph G.(7).(c):

24 If the operator cannot achieve the closure
25 performance standards specified in paragraph (6) of

1 subsection G of 19.15.2.53 NMAC within five years or as
2 extended by the Division, then the Division may review the
3 adequacy of the operator's financial assurance as provided
4 in subsection (e) of paragraph (6) of subsection C of
5 19.15.2.53 NMAC. In that event, the Division may require
6 that the operator modify its financial assurance to
7 adequately provide for the appropriate disposition of all
8 contaminated soil in a manner acceptable to the Division.

9 Change 10. The stakeholder task force believes
10 that the meaning of "TPH" in the bioremediation endpoint be
11 more clearly specified by inserting a phrase in the second
12 sentence of G.(8).(a).

13 The bioremediation endpoint in soil occurs when
14 TPH as determined by EPA Method 418.1 or other EPA method
15 approved by the Division has been reduced to a minimal
16 concentration as a result of bioremediation and is
17 dependent upon the bioavailability of residual
18 hydrocarbons.

19 Change 11. The stakeholder task force believes
20 that the same numerical limit for TPH should apply to small
21 landfarms as would apply to registered landfarms in
22 G.(6).(c) above.

23 The change would come in H.(5).(iii) [sic]. TPH
24 as determined by EPA SW-846 Method 418.1 or other EPA
25 method approved by the Division shall not exceed 2500

1 milligrams per kilogram.

2 Change 12. The stakeholder task force believes
3 that specification of re-vegetation could be strengthened
4 by requiring comparison with native perennial cover.
5 Because an example of the native condition might not be
6 available in the vicinity of the landfarm, the stakeholder
7 task force also believes that an established scientific
8 description of the appropriate native condition would
9 suffice. Language would also be added regarding chloride
10 concentrations and EC and SAR testing. Accordingly, the
11 stakeholder task force recommends the following changes be
12 made to J.(1) and J.(4).(d).(viii):

13 J.(1). Re-vegetation, except for landfill cells,
14 shall consist of establishment of a vegetative cover equal
15 to 70 percent of native perennial vegetative cover
16 unimpacted by overgrazing, fire or other intrusion damaging
17 or [sic] native vegetation, or scientifically documented
18 ecological site description consisting of at least three
19 native plant species, including at least one grass, but not
20 including noxious weeds, and maintenance that can cover
21 through -- maintenance of that cover through two successive
22 growing seasons.

23 J.(4).(d).(viii). For operators who choose to
24 utilize the landfarm methods specified paragraph (8) of
25 subsection G of 19.15.3.53 NMAC, the operator shall ensure

1 that the soil has an electrical conductivity, EC, of less
2 than or equal to 4.0 and a sodium absorption ratio, SAR, of
3 less than or equal to 13.

4 Change 13. Stakeholder task force believes that
5 the inclusion of a grandfather clause is necessary to
6 ensure that operators, complying with their current
7 permits, and are given [sic] sufficient time to come into
8 compliance with the closure standards of 19.15.3.53 NMAC.
9 Therefore the stakeholder task force recommends the
10 following change be made to L.(1), (2), (3) and (4):

11 L.(1). Except as provided in paragraph (2) of
12 subsection L of 19.15.2.53 or as otherwise specifically
13 provided in the applicable permit or order or in any
14 specific waiver, exception or agreement that Division has
15 granted in writing to the particular facility, all existing
16 facilities shall comply with the operational, waste
17 acceptance and closure requirements provided in 19.15.2.53
18 NMAC.

19 (2). Landfarm cells existing as of May 18, 2006,
20 shall either be closed within 10 years after the effective
21 date of 19.15.2.53 in accordance with the closure standards
22 of its existing permit or comply with the requirements
23 provided in 19.15.2.53. When an existing landfarm cell has
24 been filled to capacity, no additional waste shall be
25 placed in that landfarm cell. Any landfarm cell that the

1 operator intends to re-use is subject to the requirements
2 provided in 19.15.2.53.

3 (3) and (4) were just moved down from original
4 positions.

5 CHAIRMAN FESMIRE: Okay. Mr. Sanchez, do you
6 have any other comments besides the ones that have been
7 outlined here?

8 MR. SANCHEZ: No, sir.

9 CHAIRMAN FESMIRE: Okay. Before I open it to
10 general public comment, I'm going to ask the members of the
11 task force who are present if they have any further
12 comments on the recommendations or the process to reach the
13 recommendation.

14 Mr. Alexander, you're --

15 MR. ALEXANDER: Yes.

16 CHAIRMAN FESMIRE: -- would you have any comments
17 on the recommendations or the process to reach these
18 recommendations?

19 MR. ALEXANDER: Yes, I do have one or two
20 comments.

21 We did believe -- we do believe that the
22 stakeholder process that we entered into was a very
23 valuable process, and it offered some good suggestions and
24 changes that we think should be incorporated into the
25 Rules.

1 A couple of items that we're interested in there,
2 that the organic and inorganic and the metal constituents
3 that are listed in Rule 53.G.(6).(e) often appear -- in
4 many instances they appear naturally in the environment.
5 It appears at this time that we don't fully understand the
6 toxicity or the hazard limits regarding landfarm operations
7 as to these constituents.

8 We also believe that any Rule that's finally
9 adopted should recognize the appropriate limits of these
10 constituents that do not impose significant environmental
11 risk, and they should be -- these limits should be set so
12 that we should be able to meet the closure criteria in most
13 of the instances that they occur. In other words, we don't
14 believe that we should adopt a rule where we should be
15 having closure limits met by exception and hearing. They
16 should be followed under -- they should be able to be met
17 under a Rule once we've determined what the appropriate
18 limits of these constituents really should be. We don't
19 feel that we exactly know what those are at this point in
20 time, and that needs further study.

21 We also believe that these constituents that are
22 listed will necessarily be placed in the environment as a
23 consequence of normal operations of landfarms, and we
24 believe that that is not -- that is not out of the ordinary
25 when considering the other industries that operate in the

1 State of New Mexico, that would place some of these similar
2 type of constituents in the environment. So we think that
3 that should be recognized, that that necessarily is going
4 to happen as a part of the landfarming operations.

5 The other item that I think is worth mentioning
6 is that I think we need to better understand any procedure
7 or real problems with the Rules, the current Rules, before
8 we start attempting to make changes to the Rules. As we
9 found out in the stakeholder process, I don't think we
10 really understood some significant components of the Rule,
11 and that came out through the stakeholder process, and I
12 think that was very valuable and it would help us to form a
13 better Rule.

14 And in this regard we think that a stakeholder
15 process should be employed in the future anytime we think
16 that we have problems, either perceived or real, with our
17 rules and any rules that we believe should be opened up for
18 further rulemaking process.

19 CHAIRMAN FESMIRE: Mr. Alexander, may I ask a
20 question on that? I understand your point, but five times
21 before we started the rulemaking process, the formal part
22 of the rulemaking process, industry and other stakeholders
23 were invited to meetings to participate in that and, you
24 know, oft times there was not much participation.

25 MR. ALEXANDER: Yeah, I think that was -- I agree

1 with you, and I think that was a problem maybe that was
2 created by the format of those stakeholder meetings that
3 were put together. I don't think they were formal enough
4 or the groups were consistent enough, like was done in this
5 stakeholder process, that we could really get to the heart
6 of the matters. It seems like every time we met on those
7 things it was more of a rebuttal process, instead of really
8 sitting down, trying to understand what the real problem
9 was, and if we perceived a problem, then work out that
10 problem.

11 Now I agree that takes some time, and I know that
12 you think these processes ought to be more speedily
13 conducted than that.

14 But I think that's the difference. I think once
15 we were able to get together, identify a problem, then work
16 through that problem, we actually came up, I think, with
17 some good results --

18 CHAIRMAN FESMIRE: So you think --

19 MR. ALEXANDER: I think that was the difference
20 in the prior stakeholder process than the one that was
21 finally employed.

22 CHAIRMAN FESMIRE: Okay, so you think the rule as
23 proposed by the committee, with the changes they've
24 recommended, is at least a good rule to use?

25 MR. ALEXANDER: Yes, sir, with the addition of

1 the comments, particularly concerning -- I think we
2 either -- there's still some unknown areas --

3 CHAIRMAN FESMIRE: The G.(6) comments.

4 MR. ALEXANDER: -- the 3103 constituent levels,
5 whether they are toxic or hazardous at the levels provided
6 in the Rule or whether -- I think we do need to study those
7 thoroughly because like I said, I think we need to have a
8 rule that if we reach closure in these landfarms, hopefully
9 that will be done under a normal process under the rule and
10 we won't have to go through exception processes. I just
11 don't think we know the real levels, either individually or
12 on a cumulative basis, of these constituents yet, and I
13 think that needs further study.

14 Like I said, necessarily some of these
15 constituents are going to be placed in the environment, and
16 I don't think that's any different than other industries
17 that operate in the State of New Mexico. I think they also
18 release constituents like these in the environment, and I
19 don't necessarily think that they're either toxic or
20 hazardous to human health, but we need to know more about
21 that.

22 And that's the limit of my comments.

23 CHAIRMAN FESMIRE: Thank you, Mr. Alexander.

24 John Byrom, were you here?

25 Mr. Chavez with the OCD staff, do you have any

1 additional --

2 MR. CHAVEZ: Mr. Chairman, no comments.

3 CHAIRMAN FESMIRE: Mr. Marley, did you have
4 anything that you wanted to add to the report?

5 MR. MARLEY: I'd just reiterate about 3103
6 constituents. Raise the limits or use change siting
7 criteria or size, or use a different DAF factor, where you
8 can get those limits on those constituents raised. As it
9 stands right now, I feel no landfarm will be able to
10 operate under these -- successfully under this rule.

11 CHAIRMAN FESMIRE: Thank you, Mr. Marley.

12 Mr. Miller?

13 MR. MILLER: Bear with me, I have just a few
14 written comments. Sometimes I ramble, so maybe it's better
15 that I wrote some of them down.

16 The good thing is, I'm actually going to be
17 reasonably brief, which is always appreciated by those who
18 know me.

19 I would like to -- Mr. Chairman, Commissioners, I
20 would like to thank you for actually allowing the work
21 group process. I think the work group focused on many
22 specific issues. I think there were some relationships
23 built among the work group members, and we were able to
24 work through many of the issues with some excellent
25 solutions.

1 I'd like to spend a little bit of time just
2 talking about some of the specific issues that I see as
3 still left with some questions in the proposed Rule.

4 I'm a little worried about the grandfathering of
5 our existing facilities, and even though the work group
6 tackled that late and did come up with an alternative, I'm
7 still worried about that. And I think part of the problem
8 that I see is the fact that previously to this rule we have
9 allowed facilities to accept material, and they were
10 permitted to accept that material, and now we'll impose
11 rules that if they don't close their cells within 10 years,
12 it would make it virtually impossible to actually comply
13 with the closure under the new rules. So basically they're
14 forced to close those cells under the old rules within 10
15 years. Otherwise, they'll never be able to comply without
16 an exception granted by the Division or by a dig and haul.

17 I believe that the solution to that would
18 actually be to allow those facilities to operate under the
19 old rules, except that new material they receive in the
20 facilities should actually comply with the new rules, but
21 that their closure should actually be related to the rules
22 that were in place at the time that they actually accepted
23 the material, because part of our -- or part of my issue
24 is, if an operator properly manages his facility and does
25 the right things and actually accepted waste that was

1 permitted waste, then I think you should be allowed to
2 actually close it in a proper manner.

3 The other issue -- and the two folks before me
4 have actually probably addressed it much more eloquently
5 than I can, but I am bothered also by the closure standards
6 for facilities, because I don't believe they'll work. Our
7 closure standards allow for a default of background as an
8 alternative, so there's a standard proposed under 3103, or
9 you have the ability to use what is naturally occurring
10 background, such that it's the higher of the standard or
11 the natural background at the site.

12 Our company -- and let me say that the task force
13 basically had ground rules that we couldn't look at, quote,
14 new data, new information. We were basically working with
15 the 1700 pages of testimony and the stuff that had already
16 been presented.

17 But our company actually went in and paid for
18 some laboratory analysis of three soil samples and four oil
19 samples, and the soil samples were background at two
20 existing landfarms in Lea County and one producing site in
21 Chaves County.

22 CHAIRMAN FESMIRE: Okay, Mr. Miller, can I -- I
23 just need to interject something. This -- We're not able
24 to accept new testimony on this. This is just a comment,
25 you understand --

1 MR. MILLER: This is just a comment. I make the
2 comment because I think you need the information.

3 The results identified some of the problems with
4 the Rule. One Lea County landfarm had a background iron
5 content of 2030 milligrams per kilogram. The other Lea
6 County landfarm had a background of 5490. And the Chaves
7 County location -- I should say this, Chaves County
8 location was just a producing location out in the middle of
9 Timbuktu, east of Roswell, so it's not unusual that it had
10 an iron content of 6550.

11 When the oil was mixed with the soil in the
12 Chaves County location, as in the case of a spill, it
13 lowered the iron content to 4720. But if that material was
14 actually hauled to the first Lea County landfarm which had
15 a background of 2030, it would raise the iron above an
16 acceptable closure standard. Iron will not remediate over
17 time, and as a result this cell could never mediate the
18 proposed closure standard. The proposed closure standard
19 for iron is 277 or background.

20 Obviously by the test we ran in the southeast,
21 background will always be the closure standards for many of
22 these constituents.

23 To confirm this flaw, samples were taken inside
24 the landfarm on cells that were ready for closure. The
25 sample inside the first Lea County landfarm had an iron

1 content of 4030, compared to a background of 2030, or
2 nearly double.

3 This failure to meet closure standards is not a
4 result of the waste, it has nothing to do with the oil or
5 the hydrocarbon material. It's simply that the iron is
6 found in the native, uncontaminated soils.

7 So the question becomes, why do we have the
8 problem? Well, the criteria that was used by OCD in
9 developing the standards are the most conservative
10 possible. They used a DAF factor of 1. This means that
11 basically the material in the landfarm is perceived to be
12 as in direct contact with groundwater. While there may be
13 areas where groundwater is very shallow, I do not believe
14 that OCD has previously permitted or will permit in the
15 future facilities where water is very shallow. By using a
16 more reasonable DAF, the closure standards would be more
17 realistic and yet still protect human health and the
18 environment.

19 One of the questions becomes -- that you may ask
20 is, what are the solutions for the Commission to this
21 problem?

22 One, the Commission could omit adopting this
23 section of the Rule and ask OCD to gather additional
24 information and proposed closure standards that would be
25 workable and protect human health and the environment.

1 Another alternative would be to ask OCD to
2 propose a change in the Rule which would allow for
3 naturally occurring elements in the soils to be exempt from
4 the closure standards. In other words, if we know that
5 iron in different areas is going to be a problem, then
6 figure out what type of level of iron occurs naturally so
7 that, you know, basically we allow for that type of
8 exemption. This would allow soil differences to be taken
9 into account when looking at closure limits.

10 The third alternative would be to ask OCD to
11 draft rule language providing for a risk-based, site-
12 specific approach that would propose closure standards and
13 a permit application process based on individual site
14 conditions that would protect human health and the
15 environment.

16 Now what is the risk if the Commission does not
17 change these limits? I honestly believe, as Mr. Marley has
18 stated, that no new landfarms would be established under
19 the new rules, since a prudent operator couldn't be assured
20 of a successful closure. With the alternative to closure
21 being dig-and-haul, and that cost being huge, if it's not
22 allowed to be closed in place, it's too great to undertake
23 the venture.

24 The Commission and the OCD must look closely at
25 what is -- targeted objective that they have. Do we want

1 material remediated and put back into useful purpose, or do
2 we want to build large waste sites? If the answer is that
3 we want well-managed landfarms, then we must design the
4 rules to work towards that end.

5 The question becomes that if a prudent operator
6 who accepts oil, oil spills and variant soils does all the
7 remediation by the book, at the end is there a guarantee
8 that he'll meet the closure standards? And that's a
9 question that I think still exists under our current Rule.

10 The final thing is just looking at the cost of
11 operating a landfarm. The work group proposal reduces the
12 cost burden placed on landfarms, but we need to look at the
13 remaining costs placed on these facilities. If landfarms
14 serve a good purpose, rather than just adding this material
15 to perpetual disposal sites, then we need to make sure that
16 we've not regulated their costs to where they don't exist,
17 that we put them out of business. The Commission should
18 ask OCD to identify the increased cost placed on operators
19 by these new rules and whether this makes disposal more
20 economic than remediation.

21 Where do we go from here? I would hope that the
22 Commission would ask OCD to consider utilizing the work
23 group process in any upcoming rule. If OCD is considering
24 review of the pit rules, I would suggest that a work group
25 be formed immediately and the issues be framed, discussed

1 and solutions identified prior to rewriting the rule. If
2 all parties participate, then the proposed rule will be
3 significantly less controversial, and the hearing can deal
4 with a few unresolved issues.

5 I know that timeliness is important, but the work
6 group on waste management dealt with short time frames and
7 met its deadlines. Likewise, time frames should be
8 established up front for any pit work group.

9 Again I'd like to thank you all for allowing the
10 work group process. I would ask that the 3103 standards
11 not be adopted as currently proposed, because I think at
12 this point I'd consider that bad rule making. And I think
13 you for listening to my comments, and I'd be happy to
14 answer any questions.

15 CHAIRMAN FESMIRE: Thank you, Mr. Miller. At
16 this time I don't think we ought to allow questioning of
17 the commentators. I need the record to reflect that the --
18 some of the facts that were introduced are not introduced
19 as sworn testimony but simply as comments from the public.

20 MR. MILLER: I'm a strange public person, sir.

21 CHAIRMAN FESMIRE: Thank you, Mr. Miller.

22 MR. MILLER: Thank you.

23 CHAIRMAN FESMIRE: Dr. Bartlit, would you or Dr.
24 Neeper have any comments --

25 DR. BARTLIT: Yes.

1 CHAIRMAN FESMIRE: -- any further comments?

2 DR. BARTLIT: My name is John Bartlit, I'm
3 representing New Mexico Citizens for Clean Air and Water.
4 I was Dr. Neeper's alternate during the stakeholder task
5 force process. As you know, Dr. Neeper had family issues,
6 concerns, during that time, and between the two of us we
7 covered all of the meetings -- I think Dr. Neeper was
8 probably there about two-thirds of them and I was there
9 about one-third of the -- and we had interchange of
10 information, including this notebook, between us, in
11 between those times.

12 Generally we want to leave our case with what we
13 made at the testimony, our closing arguments that were made
14 in May. The task force report speaks for itself. I do
15 have a few written comments here which Dr. Neeper put
16 together, which I'd like to read. I believe they've been
17 submitted to -- is that true? -- to the --

18 CHAIRMAN FESMIRE: We did get comments --

19 DR. BARTLIT: They're dated September 6th.

20 CHAIRMAN FESMIRE: Yes, let me make sure we --

21 DR. BARTLIT: -- and I'd like to read those.

22 Let me say also, about the process, people did
23 deal with issues in the process. I would say 98 or 99
24 percent of the time an effort went into dealing with
25 issues. If that were true all the time in the public -- in

1 the earlier stakeholder meetings, in everything, think
2 where we would be now, as compared to where we are. It's a
3 very powerful process that's used rarely. I am not
4 advocating more post-hearing stakeholder meetings, but it's
5 such a difference between the normal dynamic and that
6 dynamic.

7 Comments of New Mexico Citizens for Clean Air and
8 Water. They're dated September 6th.

9 One, comments regarding the Secretary's task
10 force. We appreciate the opportunity to have worked with
11 the task force that will separately submit its comments.
12 Nonetheless, we want the Commission to understand that
13 participation in such a group, occurring after presentation
14 of testimony in the hearing, is in effect a participation
15 forced by the dubious nature of the procedure and by the
16 implications that might be made if an invited party elected
17 not to participate. Accordingly, we note that there were
18 several stakeholder meetings prior to the hearing and that
19 all participants in the task force had opportunity to
20 participate in those meetings and to present their
21 arguments during the hearing. We therefore urge that the
22 Commission not again extend closure of a hearing except for
23 the need of additional information that the Commission
24 itself seeks, information that will be presented in
25 testimony.

1 Some of the rule modifications encouraged by the
2 task force generally point in the directions of specific
3 changes that we had proposed in our testimony and in our
4 formal findings submitted on May 18, although the numerical
5 values proposed by the task force may differ from our
6 recommendations. We are pleased with the general thrust of
7 the task force recommendations regarding:

8 a limit on the area of small landfarms,
9 a definition of the maximum cell size of any
10 landfarm,

11 public notification of exceptions and waivers
12 being considered for new facilities and major
13 modifications,

14 increased review of the financial assurance for
15 landfarms,

16 and more precise specifications of soil sampling
17 protocols.

18 Comments regarding numerical standards. We
19 expect that other participants will offer comments
20 regarding numerical standards, such as limiting values of
21 contaminant concentrations. We urge the Commission to
22 establish its standards based on what is needed for
23 environmental protection, rather than establishing
24 numerical closure limits based on anticipated content of
25 the wastes. The purpose of a standard is to prevent

1 contamination, not to accommodate it.

2 Three, depth to groundwater. As proposed, Rule
3 53 generally requires at least a 50-foot depth to
4 groundwater beneath a surface waste facility. This
5 proposed limit is supported by testimony based on models
6 that employ a presumed rate of transport, presumed flow
7 rate in the aquifer, and the presumption that the rule
8 should allow a single facility to contaminate the
9 groundwater to the WQCC standard. In the absence of better
10 transport models applied to a variety of contaminants and
11 soils, we continue to urge that the required depth to
12 groundwater be 100 feet, simply to reduce the opportunity
13 for rapid transport via pathways, as might occur subsequent
14 to a heavy rainfall.

15 Four, the chloride closure standard. The
16 proposed landfarm closure standard for chloride is 1000
17 milligrams per kilogram. Our testimony established that
18 this value is not protective of vegetation. Furthermore,
19 we remind the Commission that the cited vegetation studies
20 are conducted with well-watered samples, rather than the
21 more realistic conditions of arid climates in which the
22 soil moisture potential is low, even without excess
23 chloride.

24 Five, and final comment, is in the area of
25 availability of water for bioremediation landfarms. Expert

1 testimony, including from industry, established that
2 irrigation will be necessary for bioremediation landfarms.
3 While we regard attempts to operate bioremediation
4 landfarms in New Mexico as a valid experiment, we also note
5 that the only practical way to enforce the required
6 application of water is to require that the applicant
7 demonstrate physical and legal access to water when
8 applying for the permit. We have heard arguments to the
9 effect that the OCD has no authority to enforce a
10 requirement for water. We do not find such arguments
11 valid. The OCD has authority to enforce all of the
12 requirements that it applies to a permit, including
13 notices, plans to control run-on and run-off water,
14 acquisition of hydrologic data and, quote, any other
15 information that the Division may require to demonstrate
16 that the facility's operation will comply with Division
17 rules and orders, end quote. One of those proposed
18 Division rules for bioremediation landfarms is procedures
19 to monitor, apply and maintain moisture, unquote. It will
20 be impossible to apply moisture unless the applicant has
21 access to the necessary amount of water. OCD is not
22 required to enforce regulations that prohibit the misuse of
23 water. However, there is no reason why OCD cannot examine
24 the capability of an operator to meet the conditions
25 necessary for proper operation, just as OCD implicitly

1 requires landowner approval of the operation through OCD's
2 notification requirements.

3 And that concludes our special comments on --

4 CHAIRMAN FESMIRE: Thank you, Doctor.

5 Mr. Newman, are you here today?

6 MR. CARR: He's not here.

7 CHAIRMAN FESMIRE: Dr. Riley?

8 And Mr. von Gonten with the OCD, did you have
9 anything to add to --

10 MR. VON GONTEN: No, sir.

11 CHAIRMAN FESMIRE: Okay. Why don't we take a 10-
12 minute break? When we come back, we'll open the comments
13 up to the general public. We'll reconvene at 10 o'clock on
14 the dot. Thanks.

15 (Thereupon, a recess was taken at 9:50 a.m.)

16 (The following proceedings had at 10:03 a.m.)

17 CHAIRMAN FESMIRE: Let the record reflect that
18 the September 21st meeting of the NMOCD is reconvened at
19 10:04.

20 I believe that we were going to ask for public
21 comment. Is there anyone in the audience who wants to make
22 a comment on the Rules or the process or anything having to
23 do with the matter before the Commission today?

24 Mr. Marsh, do you want to be first or --

25 MR. MARSH: I'll be happy to.

1 CHAIRMAN FESMIRE: -- maybe only?

2 MR. MARSH: Chairman Fesmire, Commissioner
3 Bailey, Commissioner Olson, thank you for the opportunity
4 to be here and offer you some comments today. I would say
5 to you that we have submitted our written comments and
6 trust that you have looked at those, and we appreciate the
7 opportunity to be here today.

8 And I would also say that we have furnished
9 comments on October the 27th of '05 and December the 1st of
10 '05, on December the 28th of '05, January the 25th of '06,
11 March the 9th of '06, April the 13th of '06, and June the
12 2nd of '06, and finally September the 6th of '06. I point
13 these dates out to remind everyone how long and contentious
14 this process has been, with the numerous stakeholders
15 meetings and so forth and so on to get to the end of this
16 process.

17 I wish to thank the OCD and its staff for all the
18 work that they've done, all the members of the public that
19 have been involved, and I'm sure that the accounting
20 departments of the law firms involved thank everybody for
21 the total billable hours involved in this.

22 (Laughter)

23 MR. MARSH: So it's been a long and arduous
24 process, but I think that we have got to the end of this.
25 But let me say how we got where we are today, I believe.

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1 And I'll broad-brush this.

2 Many years ago, some OCD staff took a concept
3 from New Mexico Environment Department called landfarming,
4 and that was the landfarming of gasoline and diesel
5 materials to volatize so that you could treat that soil and
6 re-use it.

7 An ex-OCD employee convinced some staff at OCD
8 that this was a viable concept for the oil and gas
9 industry, and so it got permitted under those conditions.
10 But it didn't follow the OCD guidelines or their
11 procedures, it was a new ball of wax, and it was completely
12 skewed from the process that NMED used that transferred
13 over here.

14 Well, this process continued on for many years
15 until some changes in the staff were made, and it came to
16 the attention of the OCD that this probably needed some
17 regulation for landfarming issues. And that transformed
18 into a rulemaking procedure for landfarms and landfills and
19 other treating plants and other surface waste management
20 facilities. And that's how we got here where we are today.

21 Well, Mr. Price testified that one of the reasons
22 that we were here was to conform with some of our sister
23 agencies' rules and regulations and methods of dealing with
24 some of the materials that we are concerned with. And we
25 did that in the area of landfills. So the landfill

1 specifications and conditions in these rules are very
2 comprehensive and follow almost exactly NMED's rules, which
3 over the past have shown the test of time that are
4 effective and useful.

5 Our company very probably will be one of the
6 first to build a new landfill under these new rules, and we
7 realize how expensive that it's going to be. And it's
8 going to take millions of dollars to build this facility,
9 and it will take almost that much to close it at the end of
10 -- the closure and the post-closure.

11 And these costs for this landfill are going to be
12 borne by industry. It's going to be borne by the
13 producers, it's going to be borne by the service companies,
14 by the pipelines, by the refineries and everybody in
15 industry, but no comment has been made here about that cost
16 from the industry experts or anybody involved in this. And
17 we didn't raise any significant questions about that
18 because we read these rules when they were put out, and we
19 understand them and we can live with them.

20 But we don't follow the same process in this
21 thought process with landfarms as we did with landfills.
22 And landfills have -- under our past practices, have
23 actually become a permanent disposal site. Now we can
24 argue that somewhat but not much. But we can go out there
25 and look and see that what we have allowed to go in there

1 is not going to remediate, and those things are never going
2 to re-vegetate. You can see that by the photos that were
3 shown here, the fly-overs that were -- of existing
4 landfarms.

5 So the landfarm procedures that you put in place
6 today, or when you pass this Rule, need to be as strict as
7 possible to rectify those past practices.

8 And we don't want any more permanent disposal
9 sites. Mr. Miller commented that that's not what industry
10 wants, and that's not what any of us here want. We don't
11 want to create those things. But we have to have some very
12 strict standards to govern these things or that will
13 happen, and they'll never re-vegetate.

14 And one of the things is, is that -- like the 50-
15 foot-to-groundwater standard that we're talking about, that
16 -- I'm in agreement with Dr. Neeper and Mr. Bartlit that
17 that ought to be 100 feet. NMED says that you can't site
18 anything, any kind of waste facility, if it's double-lined
19 and leachate collection and all these things, if the bottom
20 of that -- the bottom of the waste zone is less than 100
21 feet to groundwater.

22 Now if we're going to put a landfill with all
23 those protections, is 100 feet to groundwater, then why
24 would we let -- put waste on top of the ground with no
25 liner at 50 feet where we've shown that -- their testimony

1 has shown that we've got preferential pathways in southeast
2 New Mexico with the fractured caliche to go to groundwater?
3 So that doesn't exactly -- I don't exactly follow the
4 difference in the 50 feet or the 100 feet.

5 Nor the chloride standard. The chloride standard
6 that we're using -- We know that chlorides are not going to
7 remediate, they're going to be there. So if you put
8 chloride -- if you let waste go in that's had high chloride
9 standards, then at the end you're not going to re-vegetate
10 it, because the testimony has shown here that it's going to
11 take about 500 parts per million, is going to be about the
12 most that you can tolerate for germination, successful
13 germination. So we support the 500 parts per million
14 chloride.

15 Now we have covered some other things in our
16 comments here, but I want to touch on one more. I want to
17 touch on the one about the transition facility -- the
18 transition language that the task force made. And there's
19 been some comment that the task force reached consensus on
20 some issues. Well, we weren't on the task force but we are
21 a participant to this party, so I can say to you that
22 there's not consensus among all the parties to this
23 proceeding on these things.

24 But the transitional thing for landfarms, that's
25 the reason that we got here today, because we know that

1 some changes need to be done in the past practices. So why
2 would we extend those for 10 more years when the purpose is
3 to change them? So that doesn't make sense.

4 Now we read that -- we read the language in the
5 original version of this Rule that hasn't been changed, we
6 read it and we understood what it meant, and we still do.
7 And in all the testimony and all the industry experts that
8 testified, none of them brought up this thing. It was
9 never mentioned at all in any of the testimony or any of
10 the stakeholders meetings or this until the eleventh hour.
11 And so I think this flies in the face of public notice and
12 proper rulemaking procedure, to even consider that be
13 allowed in this Rule.

14 That would conclude my comments, and thank you
15 for the opportunity to visit with you today.

16 CHAIRMAN FESMIRE: Thank you, Mr. Marsh.

17 Is there any other public comment?

18 Yes, ma'am?

19 MS. SUMI: Good morning.

20 CHAIRMAN FESMIRE: Good morning.

21 MS. SUMI: My name is Lisa Sumi, I'm the research
22 director with the Oil and Gas Accountability Project, and
23 we've been participating in this process from the
24 beginning, various members of our staff have been here.
25 And I've mainly come to just reiterate some of the points

1 that we expressed in a letter that we sent to you on
2 September 6th. And I'm not going to read the letter out,
3 I'll just try to summarize the comments.

4 I guess the main reason we weighed in recently
5 was just to encourage the Commission to adopt the Rule here
6 today. We feel like we've all been through a lot in the
7 past year, we've heard a lot of really great testimony,
8 there's a lot of information that was considered, and we
9 believe that the time has come to put some kind of rule in
10 place.

11 We support most of the recommendations that were
12 expressed by the task force.

13 We have difficulty with two in particular of the
14 recommendations, the first one being the issue around the
15 natural concentrations of metals being problematic for the
16 industry. Part of our problem with that issue is in
17 relation to the fact that we don't believe that over the
18 course of the hearing that testimony was presented that
19 really supported their contentions.

20 The task force was not supposed to address new
21 issues or issues not based on evidence that were brought
22 forward in the hearings, and so, as the previous commentor
23 said, we believe that's another issue that's one of the
24 eleventh-hour issues that -- again, it should not -- if it
25 is a problem -- and it sounds like it's a problem of lack

1 of data at this point -- we believe that we should go
2 forward with the data that we have, and as data become
3 available, if it seems like the Commission needs to come
4 back and revisit that part of the Rule, then industry has
5 the ability to petition for that.

6 The second issue that we wanted to talk about is
7 the transition clause, transitional provision, and we'll
8 echo again the comments of the previous speaker who said
9 that there was no testimony given on this issue during the
10 hearing, at least that we're aware of. And if the industry
11 felt as if they needed 10 years to close or bring existing
12 cells into compliance, that should have been raised earlier
13 during the hearing.

14 We -- OGAP does not believe that allowing a
15 decade or more of continued contamination is in the best
16 interests of the citizens or the environment in New Mexico,
17 and they're also -- those things can be in the draft rule,
18 the ability to provide allowances on a site specific basis,
19 rather than a *carte blanche* 10-year grandfathering clause.
20 So we don't see the need to work that new clause into this
21 Rule.

22 And I guess those are our main comments. I'll
23 just once again encourage the Commission to pass the Rule
24 that's before you. We think it's a good Rule and we think
25 it's going to go a long ways to improving the situation in

1 surface waste facilities.

2 Thank you.

3 CHAIRMAN FESMIRE: Thank you very much, ma'am.

4 Is there any other public comment?

5 Okay, with that, the Commission will begin
6 deliberations on this cause. The deliberations are open to
7 the public, they will be held in this room. I imagine we
8 will go until about noon, break for lunch and then resume
9 again this afternoon. You're welcome to come and go as you
10 please or stay and watch us work this out. I believe the
11 recommendation is 32 pages, and we'll be going through it
12 rather slowly, I imagine.

13 So with that, we'll begin our deliberations.

14 Well, has everybody had the a chance to review
15 the comments?

16 COMMISSIONER BAILEY: Pretty well, as much as
17 humanly...

18 CHAIRMAN FESMIRE: My suggestion is that we start
19 with the task force redline version and use that as sort of
20 the controlling document. Refer to the other redline
21 versions that we've gotten and the comments that we've
22 gotten, but use the task force version to sort of keep our
23 place, and just march through it.

24 COMMISSIONER BAILEY: Works for me. That's where
25 I put most of my comments.

1 COMMISSIONER OLSON: That's the way I did it too
2 when I was looking at, so...

3 CHAIRMAN FESMIRE: Okay. Starting with the
4 definitions, 19.15.1.7, after reviewing them I didn't have
5 any recommendations on, I think, the proposal, and there
6 are no -- that I know of, there are no differences between
7 that and the committee recommendation.

8 COMMISSIONER BAILEY: There's a typo on the last
9 line.

10 CHAIRMAN FESMIRE: On the last line of the first
11 page?

12 COMMISSIONER BAILEY: Yes, where a bracket is
13 inserted with the word zero.

14 CHAIRMAN FESMIRE: Yes.

15 COMMISSIONER OLSON: Uh-huh.

16 CHAIRMAN FESMIRE: Cheryl, are you going to keep
17 track of all this?

18 MS. BADA: I'm trying to find my redline version,
19 so...

20 COMMISSIONER OLSON: I think it came in -- it
21 came in the --

22 MS. BADA: -- OCD's?

23 COMMISSIONER OLSON: -- e-mail that Florene sent
24 us. I don't know if you've got that one. Because it
25 originally said it was attached to this, and then I didn't

1 get it, so it's my fault.

2 CHAIRMAN FESMIRE: Florene, do you have a spare
3 copy of the -- Yours? I'm not sure I want to do that.

4 (Laughter)

5 CHAIRMAN FESMIRE: Okay, so Cheryl, you'll be
6 taking the --

7 MS. BADA: Yeah.

8 CHAIRMAN FESMIRE: -- the corrections on it?
9 The first change, and it's -- we'll vote on it in
10 a minute, but I think the consensus is that the bracket on
11 the last line of page 1 under S.(2), the bracket between
12 the words from and zero, should be taken out.

13 Anything on page 2 that...

14 COMMISSIONER BAILEY: No.

15 COMMISSIONER OLSON: Nothing, really, but I still
16 get a little confusion to me when I look at the exceptions,
17 you know, which comes back to Rule 116, and I asked some
18 questions about that at the hearing.

19 Most everything that occurs out there is -- most
20 of the problems are leaks and spills outside of things that
21 might be a planned activity that they're cleaning up, like
22 in a prior pit. But those are all exempt anyways from all
23 this, so it made me just still kind of wonder what exactly
24 goes to a small landfarm if leaks and spills are all
25 exempt. Just more of a comment, I guess.

1 CHAIRMAN FESMIRE: You know, the idea behind the
2 small landfarms, at least according to my interpretation of
3 the testimony, is to facilitate near instantaneous response
4 in the case of leaks and spills.

5 COMMISSIONER OLSON: Uh-huh.

6 CHAIRMAN FESMIRE: I guess I didn't understand
7 your statement that they wouldn't go to --

8 COMMISSIONER OLSON: Well, I just was, you know,
9 looking at the exemption that's here in the definition, you
10 know, the remediations that are under Rule 19, it's under
11 -- on page 2 it's under S.(10).(f).

12 COMMISSIONER BAILEY: So you're pointing out that
13 if material is removed from its spill location, it is
14 removed from Rule 116 and becomes subject to Rule 53?

15 COMMISSIONER OLSON: I don't know if that's
16 necessarily the way that I was reading it, I guess. I was
17 reading that if you're doing anything under a spill, some
18 type of corrective action under 116 or part of abatement
19 under Rule 19, that anything you do, and even if you
20 removed it from the site, it seems to me it's still exempt.
21 Because it doesn't say that it's things that are done on
22 site, it just says that if it's done under an abatement
23 plan or --

24 CHAIRMAN FESMIRE: Yes.

25 COMMISSIONER OLSON: -- pursuant to 116, it's --

1 CHAIRMAN FESMIRE: The idea is that 116 and 19
2 work -- will not be subject to -- will not be -- the small
3 landfarm will not be available for that. If they're going
4 to do that, they need to take it to a commercial facility,
5 or a centralized facility. And that was --

6 COMMISSIONER OLSON: Right.

7 CHAIRMAN FESMIRE: -- that was the intention.

8 COMMISSIONER OLSON: Because I've seen some 116
9 or -- not Rule 19 actions that were even bigger than what
10 would be considered a small landfarm under this --

11 CHAIRMAN FESMIRE: Yes.

12 COMMISSIONER OLSON: -- this definition.

13 CHAIRMAN FESMIRE: Yeah, the idea is that, you
14 know, abatement plan work and things like that not go to
15 these small landfarms. The idea behind the small landfarm
16 is to facilitate immediate reaction to an event that --
17 hopefully before we get to the place where they need an
18 abatement plan, and that work under an abatement plan
19 should go to a centralized facility or a commercial
20 facility. That's what that was intended to --

21 COMMISSIONER OLSON: I guess the abatement plan
22 is as much a problem for me, because there is a public
23 participation process, there's a lot of stuff that goes on
24 with that under its own rule. I know under 116, you know,
25 there's not such a process, and -- and the way we have it

1 here under the small landfarm is that you're having to look
2 at landowner approval of the action, where under 116 you
3 don't necessarily do that.

4 And I know that's been a problem in the past on
5 sites I'd worked on where landfarm action started going on,
6 and then the landowner was kind of up in arms that he
7 hadn't, you know, approved this, it was off the well pad
8 and things like that.

9 CHAIRMAN FESMIRE: Yeah, but the provisions in
10 here, I mean you have to have -- that's addressed later, I
11 think.

12 MS. BADA: No, but what he's saying is they're
13 exempted under the --

14 COMMISSIONER OLSON: It's exempted under the
15 definition.

16 MS. BADA: -- the definition, yeah.

17 CHAIRMAN FESMIRE: Uh-huh.

18 COMMISSIONER OLSON: So therefore it doesn't
19 apply to the -- you know, any of the small landfarm
20 provisions.

21 CHAIRMAN FESMIRE: Yeah. No, anything that's
22 under a 116 or a 19 abatement plan will not be part of a
23 small landfarm.

24 MS. BADA: No, but this is a definition for a
25 surface waste management facility, not the definition for a

1 small landfarm.

2 COMMISSIONER OLSON: Yeah, a small landfarm,
3 then, is a type of surface waste management facility, is
4 one type out of the three types of landfill, small landfarm
5 and then regular landfarm.

6 And I'll admit it's just -- at the same time, you
7 don't -- you want to encourage folks to get out there and
8 do something right away in a corrective action, and I agree
9 with that. I just wondered to what extent you get a long-
10 term landfarm that goes on as part of a Rule 116 action.

11 I mean, I guess the only distinction I really see
12 is that the actions that go on there are individual
13 actions, versus what goes on at a small landfarm. Most
14 likely it's going to be coming from a number of different
15 sites, not just one site.

16 But I've seen Rule 116 actions that are in the
17 scale of what would be considered a small landfarm.

18 CHAIRMAN FESMIRE: Uh-huh. So how do we fix it
19 then?

20 COMMISSIONER OLSON: I don't know. I don't think
21 there's a lot of testimony that went about how to -- what
22 to do on fixing that. I think you do need an exemption
23 for, you know, emergency actions that you do under spills,
24 where you're trying to do something quick. I agree with
25 that. And I'm not quite sure how to fix that. I didn't

1 get a real clear answer when I was discussing at the
2 hearing as to how to address it either, so...

3 COMMISSIONER BAILEY: I don't think many people
4 understood exactly what your point was --

5 COMMISSIONER OLSON: Right.

6 COMMISSIONER BAILEY: -- at the hearing.

7 COMMISSIONER OLSON: Right.

8 CHAIRMAN FESMIRE: Is perhaps the idea that a
9 remediation -- treatment plan -- not a surface waste
10 management facility -- those are exempted from the
11 definition, and consequently the Rules, of a surface waste
12 management facility.

13 COMMISSIONER OLSON: Right. So therefore they
14 wouldn't have to apply to any of even the small landfarming
15 requirements or any of the landfarming requirements.

16 CHAIRMAN FESMIRE: Uh-huh, and it looks to me
17 like that's a problem we'll have to address in 19 and 116.

18 COMMISSIONER OLSON: Because I was just thinking
19 that you could get some inconsistency, then, if you're not
20 at least following similar rules to the small landfarms
21 for, you know, what's your closure limits, what do you -- I
22 assume the Division would probably be using this as a
23 guidance in the landfarming that they're doing under --

24 CHAIRMAN FESMIRE: Right.

25 COMMISSIONER OLSON: -- under 116.

1 CHAIRMAN FESMIRE: But under 19 and 116 your
2 concern is that you could do those remediations or the
3 corrective action plan without giving notice to the surface
4 owner, but that's -- I don't think that's something that we
5 can address in this Rule, I think that is a --

6 COMMISSIONER OLSON: Right.

7 CHAIRMAN FESMIRE: -- a problem that we have to
8 address in 19 and 116.

9 COMMISSIONER OLSON: And I was thinking also in
10 terms of the actions that you do there might not
11 necessarily be consistent with how other folks are having
12 to do landfarms. If you're landfarming, your landfarming
13 materials should be done fairly similarly. I would think
14 these would be done similar to a small landfarm, for
15 example, but they're exempt from those requirements.

16 So you might be right, I guess maybe the best way
17 to really handle that -- I agree, it seems like they should
18 be exempt because they're kind of emergency actions. Rule
19 19 is less problematic because there's a public
20 participation process. I think 116 is more of -- the one
21 where there's more potential for a problem.

22 CHAIRMAN FESMIRE: Okay, is that a change that
23 the proposed and the new -- I mean, I don't have the
24 redline for the -- the other redline.

25 COMMISSIONER OLSON: I mean, I don't think

1 there's any changes that were proposed on this, that I
2 heard through the hearing, on this part of the definition.
3 I mean, I brought it up as a potential problem that I was
4 seeing just when we were talking about it at the hearing,
5 but --

6 MS. BADA: Actually, it's a new definition that
7 was proposed.

8 CHAIRMAN FESMIRE: New definition that's
9 proposed. What's the old definition?

10 COMMISSIONER OLSON: I don't believe there was
11 one.

12 CHAIRMAN FESMIRE: Okay. So you're concerned
13 about a remediation conducted in accordance with Division-
14 approved abatement plan or a corrective action. So maybe
15 the solution -- if we take that out, are we going to
16 subject 19 and 116 actions to the --

17 COMMISSIONER OLSON: And I don't necessarily know
18 that it needs to come out. I guess -- Is there some way
19 that we could make the landfarming more consistent so that
20 people know what they're having to accomplish when they're
21 doing the landfarming? I don't know.

22 COMMISSIONER BAILEY: So when 19 and 116 are
23 enforced, you're recommending that they use the guidance of
24 Rule 53?

25 COMMISSIONER OLSON: I would almost think you'd

1 use the guidance of the small landfarm. The only problem
2 -- I can still see a problem there, because not everything
3 you deal with in Rule 116 and Rule 19 is necessarily
4 hydrocarbons as well; it's used at other types of --

5 COMMISSIONER BAILEY: Uh-huh.

6 COMMISSIONER OLSON: -- facilities where you may
7 have other types of waste. Some of the 3103 constituents
8 could easily come in at some of those, such as a service
9 company.

10 COMMISSIONER BAILEY: Tankbottoms would be --

11 COMMISSIONER OLSON: Right, tankbottoms would be
12 another example, uh-huh. And I don't know that we have
13 enough evidence just that was presented to us here to
14 really give us a good direction as to what to do with it,
15 because I get worried now that if you start trying to play
16 with the language on something that we're doing, it has
17 some other --

18 CHAIRMAN FESMIRE: Right, right.

19 COMMISSIONER OLSON: -- unintended consequence
20 that we're not aware of.

21 CHAIRMAN FESMIRE: And like you said, the place
22 to deal with this is 19 and 116.

23 COMMISSIONER OLSON: Right, that may be it.

24 CHAIRMAN FESMIRE: As of right now they
25 specifically excluded from some of the requirements of the

1 surface waste management facility by virtue of the
2 definition.

3 COMMISSIONER OLSON: Right.

4 CHAIRMAN FESMIRE: Is that what we want to do?

5 COMMISSIONER OLSON: Well, I guess if there are
6 any plans coming up for the Division to look at --

7 CHAIRMAN FESMIRE: Yes.

8 COMMISSIONER OLSON: -- Rule 19 and 116?

9 CHAIRMAN FESMIRE: When that would happen would
10 be --

11 COMMISSIONER OLSON: Uh-huh, which could be a
12 couple years down the road or so.

13 CHAIRMAN FESMIRE: Right.

14 COMMISSIONER OLSON: Well, that may be the time
15 to address it, just to maybe note that this is a potential
16 issue for consistency in the surface waste management, that
17 should be addressed as these Rules are reviewed.

18 CHAIRMAN FESMIRE: As it is, remediation under 19
19 or 116 is exempt from the requirements of the Rule 53 --

20 COMMISSIONER OLSON: Uh-huh.

21 CHAIRMAN FESMIRE: -- and that's deliberate. I
22 mean, that's a specific -- a new requirement, a new
23 definition. They haven't in the past been exempted from
24 the -- at least not by this definition.

25 MS. BADA: Well, you'd have to look at Rule 701

1 and 702 and see.

2 CHAIRMAN FESMIRE: And like I said, I think --

3 COMMISSIONER OLSON: I think this is new

4 language, that I recall.

5 CHAIRMAN FESMIRE: Yeah.

6 COMMISSIONER OLSON: This may be the -- maybe one
7 suggestion would be to say that those issues should be
8 addressed in the review and that maybe the Division should
9 look to Rule 53 for guidance in landfarming activities that
10 occur under Rule 19 and 116, but I don't know if you need
11 to put that in the actual Rule.

12 CHAIRMAN FESMIRE: Okay.

13 COMMISSIONER OLSON: It doesn't say that the --
14 you know, they're all site-specific, you're having
15 different things that are going on in each spill. But I
16 would think if you're using similar types of materials, you
17 should be at least kind of looking to this Rule for some
18 guidance on how you're going to do the landfarms.

19 CHAIRMAN FESMIRE: Okay.

20 COMMISSIONER BAILEY: Specifically the
21 performance standards.

22 COMMISSIONER OLSON: Yeah. I would think it
23 would be more -- especially, you know, operational and --
24 issues that would go on, disking, a lot of things like
25 that, maybe moisture additions.

1 CHAIRMAN FESMIRE: Well, that could be put under
2 current law -- under current rules, that could be put in
3 the corrective action plan --

4 COMMISSIONER OLSON: Uh-huh.

5 CHAIRMAN FESMIRE: -- that has to be approved by
6 the Division. So I think that is the solution, to
7 incorporate that by -- in the -- if it's necessary, in the
8 corrective action plan.

9 COMMISSIONER OLSON: I agree.

10 CHAIRMAN FESMIRE: So -- but we do need to flag
11 it and address it when we get to 19 and 116.

12 Anything else? Is that --

13 COMMISSIONER OLSON: No, that's all I had on
14 the --

15 CHAIRMAN FESMIRE: -- definitions?

16 COMMISSIONER OLSON: -- definitions.

17 CHAIRMAN FESMIRE: When we get to Rule 51, I had
18 two small, very small, concerns. First of all, in 51.A we
19 exempt small samples from the requirements for a C-133.
20 But down here in C we don't: No owner or operator shall
21 permit produced water, drilling fluids or other liquids to
22 be removed from its leases or field facilities by motor
23 vehicle except by a person possessing an approved C-133.

24 Don't we need that same exception so that the
25 operator is not liable under this? If somebody takes -- or

1 if they send small samples?

2 COMMISSIONER OLSON: Uh-huh --

3 COMMISSIONER BAILEY: Yeah.

4 COMMISSIONER OLSON: -- I would agree.

5 CHAIRMAN FESMIRE: And the second sentence in C
6 is, If an owner or an operator demonstrates that it has
7 checked the Division's posted website list of currently
8 approved C-133s, authorization to move liquid waste, less
9 than 30 days prior to any shipment, there shall be a
10 rebuttable presumption that the owner or operator had
11 notice [sic] of any suspension or cancellation first posted
12 on the Division's website subsequent to the date when the
13 operator last checked the list.

14 I think that's kind of an awkward way to say, if
15 you check the list within 30 days we can't hold you liable
16 for knowing that they -- if we didn't post it, if we didn't
17 post the -- if the OCD didn't post the -- or remove their
18 C-133 from the list.

19 Is there an easier way to say that? And there
20 may not be. It just -- I knew what it was supposed to say,
21 and it took me three readings to get to it.

22 COMMISSIONER BAILEY: But how is an operator
23 going to demonstrate that it has checked a website? I
24 mean, it's not like they can print off a list and have a
25 date --

1 CHAIRMAN FESMIRE: Uh-huh.

2 COMMISSIONER BAILEY: -- if there's no date
3 affixed, even if they print off whatever they see on the
4 website --

5 CHAIRMAN FESMIRE: Uh-huh.

6 COMMISSIONER BAILEY: -- necessarily. So I mean,
7 just the fact that they cannot demonstrate makes it very
8 awkward.

9 CHAIRMAN FESMIRE: If an owner or an operator
10 demonstrates that it has checked the Division's posted
11 website. Yeah.

12 COMMISSIONER OLSON: I guess all they just do,
13 they say they looked at it. And how do you verify that? I
14 don't know.

15 CHAIRMAN FESMIRE: Perhaps you should put the
16 burden on the OCD, because one of the things that we can
17 track is the date that we posted or, more accurately, took
18 the C-133 off.

19 COMMISSIONER BAILEY: So if the OCD posts a new
20 list on the first business day of every month that would
21 incorporate all changes made during the previous month?

22 CHAIRMAN FESMIRE: Basically the operator is not
23 responsible for knowing that a C-133 has been revoked if
24 that has not been posted on the website for 30 days.

25 COMMISSIONER BAILEY: Right.

1 COMMISSIONER OLSON: Because the way this is kind
2 of reading now, essentially the operator would have to look
3 at the list every single day --

4 CHAIRMAN FESMIRE: Right.

5 COMMISSIONER OLSON: -- and that seems kind of a
6 burdensome thing to have to keep track of.

7 CHAIRMAN FESMIRE: But something to the effect
8 that if an owner or an operator -- an owner or an operator
9 shall be deemed to have been notified of the revocation of
10 the C-133 30 days after it's posted on the OCD website?

11 COMMISSIONER BAILEY: They'd still have to check
12 every single day.

13 CHAIRMAN FESMIRE: That's -- We want them to
14 check.

15 COMMISSIONER BAILEY: Yes, but --

16 COMMISSIONER OLSON: Yeah, but every day --

17 CHAIRMAN FESMIRE: But they wouldn't have to
18 check every 30 days. If they had checked within the last
19 30 days and it wasn't there, they would know. This means
20 that -- you know, if they're using a certain company, they
21 have to check every 30 days that they're still -- have a
22 current C-133.

23 COMMISSIONER OLSON: It almost seems simpler what
24 Jami was mentioning about maybe the Division would post it
25 once a month at a certain time so folks know when to look

1 at it, you know, first of the month or something like that.

2 COMMISSIONER BAILEY: And then they would know
3 that there were -- if there were any changes to be made,
4 they would be posted on the first business day of the
5 month.

6 COMMISSIONER OLSON: Uh-huh. I guess, how soon
7 after the Division takes an action that it actually gets
8 posted, though? I don't know how -- I'm sure it's not the
9 same day or anything.

10 CHAIRMAN FESMIRE: Okay, how about the OCD shall
11 post a list of approved C-133s?

12 COMMISSIONER OLSON: On the first business day of
13 each month?

14 CHAIRMAN FESMIRE: Well, what I'm trying to say
15 is, whether they post it or not the operator ought to be
16 able to rely on one posted the first business date for that
17 entire month.

18 COMMISSIONER BAILEY: Uh-huh.

19 CHAIRMAN FESMIRE: How does that sound?

20 COMMISSIONER BAILEY: Uh-huh.

21 COMMISSIONER OLSON: Uh-huh.

22 CHAIRMAN FESMIRE: But then does that keep the
23 OCD from, once is revoked, posting it and it can go -- it
24 would automatically be less than 30 days to notification
25 after every revocation, right?

1 COMMISSIONER BAILEY: Yes.

2 CHAIRMAN FESMIRE: Okay, so how do we word that?

3 COMMISSIONER OLSON: Might start with that first
4 part you were talking about, the posting, and just have a
5 sentence saying that the OCD shall post a listing on its
6 website of currently approved C-133s by the first business
7 day of each month.

8 CHAIRMAN FESMIRE: Well --

9 COMMISSIONER OLSON: Or on the first business day
10 of each month.

11 CHAIRMAN FESMIRE: -- how about the list as
12 posted on the first day of each month shall be deemed to be
13 valid for the entire month?

14 COMMISSIONER OLSON: Okay.

15 CHAIRMAN FESMIRE: Now, that could potentially
16 give an operator 30 days -- up to 30 days after a C-133 is
17 not approved, or not extended or -- where they could
18 operate without the -- without it being the responsibility
19 of the operator, but they are already violating A, which is
20 -- you know, if they don't have an approved C-133 they're
21 still violating it, but it doesn't become a problem for the
22 operator until up to 30 days after the --

23 COMMISSIONER OLSON: Right.

24 CHAIRMAN FESMIRE: Okay.

25 MS. BADA: How did you want to word that?

1 CHAIRMAN FESMIRE: Let me --

2 COMMISSIONER BAILEY: So scratch that second
3 sentence of C.

4 CHAIRMAN FESMIRE: The list as posted on the
5 first business day of the month shall be -- I want to make
6 sure that -- it's not deemed valid, but it's notice to the
7 operator, so that we don't interrupt with A -- interrupt --
8 don't conflict with A.

9 List of currently approved C-133s on its website.
10 The list as posted on the first business day of the month
11 shall be deemed --

12 COMMISSIONER BAILEY: -- may be used by an
13 operator for the entire month, or that month, or something
14 like that.

15 MS. BADA: May be relied upon?

16 COMMISSIONER BAILEY: Yeah.

17 COMMISSIONER OLSON: Or shall be relied upon,
18 maybe?

19 CHAIRMAN FESMIRE: No, we don't want to make a
20 mandatory --

21 COMMISSIONER BAILEY: May, because they may hear
22 that it's been --

23 COMMISSIONER OLSON: Okay.

24 CHAIRMAN FESMIRE: Right.

25 COMMISSIONER OLSON: Okay.

1 CHAIRMAN FESMIRE: May be --

2 MS. BADA: Okay, maybe what we can say is, owner
3 and operator may rely on the currently --

4 CHAIRMAN FESMIRE: This is rough, but OCD shall
5 post a list of currently approved C-133s on its website.
6 The list as posted on the first business day of the month
7 may be deemed notice to the owner/operator of a valid C-133
8 for --

9 COMMISSIONER OLSON: What's that second sentence
10 again?

11 CHAIRMAN FESMIRE: The list as posted on the
12 first business day of the month may be deemed notice to the
13 owner/operator of a valid C-133 for the remainder of that
14 month.

15 COMMISSIONER OLSON: Can I see that?

16 CHAIRMAN FESMIRE: So it would read, No owner or
17 operator shall permit produced water, drilling liquids or
18 other liquid oilfield waste to be removed from its leases
19 or field facilities by motor vehicle except by a person
20 possessing a valid Form C-133.

21 And we need to put that sample exception in
22 there.

23 MS. BADA: Right.

24 CHAIRMAN FESMIRE: OCD shall post a list of
25 currently approved C-133s. The list as posted on the first

1 business day of the month may be deemed notice to the
2 owner/operator of a valid C-133 for the remainder of that
3 month.

4 MS. BADA: I think we should probably say shall
5 be deemed.

6 CHAIRMAN FESMIRE: Shall be deemed?

7 MS. BADA: Yeah.

8 CHAIRMAN FESMIRE: Okay. Do we need to exclude A
9 specifically, or is that language excluded?

10 MS. BADA: I think that's fine, because you're
11 only giving notice to the owner and operator, not to the
12 person that has the --

13 CHAIRMAN FESMIRE: What about the difference
14 between the owner/operator and the transporter? Is there
15 any chance that owner or operator could be construed to
16 include the transporter?

17 COMMISSIONER OLSON: I thought A was referring to
18 the transporters, not to the owner-operator.

19 CHAIRMAN FESMIRE: It is, but I just wanted to
20 make sure that, you know, owner/operator refers to the
21 lease owner or operator or the facility owner or operator,
22 and not the owner/operator of the trucks or vehicles,
23 transporter.

24 MS. BADA: I'll let you define that.

25 COMMISSIONER OLSON: Because you have to go back

1 and look at the definitions of owner or operator.

2 CHAIRMAN FESMIRE: Uh-huh. Is there anything in
3 the general definitions under 7? We've got 0 here:
4 Operator shall mean any person who, duly authorized, is in
5 charge of the development of a lease or operation of a
6 producing property. Owner shall mean the person who has
7 the right to drill.

8 Nope, no chance. Okay? That's all I had on 51.
9 Jami --

10 COMMISSIONER OLSON: I had one other item, just
11 for clarification.

12 On B it says a person who [sic] may apply for
13 authorization to move liquid waste, but up above it's
14 produced -- in the first sentence it's also the same way,
15 it's produced water, drilling fluids or other liquid
16 oilfield waste.

17 MS. BADA: Do you want to replace liquid waste
18 with that?

19 COMMISSIONER OLSON: Yeah, I think we just add to
20 it. So in front of liquid waste put -- under 51.B, put
21 produced water, comma, drilling fluids or other than liquid
22 oilfield waste --

23 CHAIRMAN FESMIRE: Okay.

24 COMMISSIONER OLSON: -- so it's consistent.

25 And that's all I had.

1 COMMISSIONER BAILEY: And I have nothing.

2 CHAIRMAN FESMIRE: Okay, Rule 52, disposition of
3 produced water and other -- Ten minutes, and we're already
4 a third of the way through.

5 I didn't have anything in 52, after reading all
6 the comments and everything that raised a flag with me.

7 Did you?

8 COMMISSIONER BAILEY: I have nothing.

9 COMMISSIONER OLSON: I have nothing on 52.

10 CHAIRMAN FESMIRE: Two-thirds of the way through.
11 Okay, I think -- Something we need to check on?

12 COMMISSIONER OLSON: Counsel was just looking at
13 one of the citations under 52 in A.

14 CHAIRMAN FESMIRE: Anything we need to address?

15 MS. BADA: I was just trying to remember whether
16 there is a reason that 52 only applied to produced water
17 and other oilfield waste, and 51 applies to drilling
18 fluids.

19 CHAIRMAN FESMIRE: No, we may want to -- I think
20 we ought to make it consistent all the way through.

21 COMMISSIONER OLSON: I mean, the definition --
22 There's a definition existing for oilfield waste, which is
23 pretty broad. It seems to me that it would cover --

24 CHAIRMAN FESMIRE: It would, I think you're
25 right.

1 COMMISSIONER OLSON: -- everything. It says
2 oilfield waste shall mean waste generated in conjunction
3 with the exploration for, drilling for, production of,
4 refining of, processing of, gathering of or transportation
5 of crude oil, natural gas or carbon dioxide. This also
6 includes oilfield service company wastes, remediation
7 wastes, abatement wastes.

8 CHAIRMAN FESMIRE: Do we want to make it that
9 consistent, or should we --

10 COMMISSIONER BAILEY: No, I don't think so --

11 COMMISSIONER OLSON: I don't think we need it.

12 COMMISSIONER BAILEY: -- because 51 concerns only
13 liquids, 52 can involve solids.

14 CHAIRMAN FESMIRE: Okay.

15 COMMISSIONER OLSON: Uh-huh. I think it's okay.

16 CHAIRMAN FESMIRE: Okay, starting with 53,
17 definitions specific to 53. Centralized facility. Any
18 problems with that?

19 COMMISSIONER BAILEY: No.

20 CHAIRMAN FESMIRE: Okay, commercial facility?

21 COMMISSIONER BAILEY: No.

22 COMMISSIONER OLSON: Maybe we just want to look
23 at them by page and see what we've got on the --

24 CHAIRMAN FESMIRE: Okay --

25 COMMISSIONER OLSON: -- page or --

1 CHAIRMAN FESMIRE: -- we might build up velocity.

2 MS. BADA: Did you want to look at the comments,
3 or do you want to back through those separately?

4 CHAIRMAN FESMIRE: Each one of the comments?

5 MS. BADA: Yeah, because you'll need to address
6 why or what can you accept or don't accept, so...

7 CHAIRMAN FESMIRE: Okay. Well, you know, there
8 are comments that are made on each one of the -- I mean,
9 there's hardly a provision that doesn't have some comment
10 on it.

11 MS. BADA: Right.

12 CHAIRMAN FESMIRE: I guess it would be best to
13 address the major ones.

14 COMMISSIONER OLSON: Would it maybe be easier
15 just to go through the Rule first and maybe --

16 CHAIRMAN FESMIRE: -- and then go through the
17 comments?

18 COMMISSIONER OLSON: -- address the changes that
19 we have to this, and maybe we'll be discussing why we think
20 those changes are necessary, and then go back and look at
21 the comments? Because the comments -- a lot of them are
22 reflected to and through the findings of fact --

23 CHAIRMAN FESMIRE: Uh-huh.

24 COMMISSIONER OLSON: -- that were presented, and
25 then maybe we can review through the findings of fact in

1 support of what we looked at through the Rule.

2 CHAIRMAN FESMIRE: Okay, is that satisfactory --

3 MS. BADA: Whichever way you want to do it.

4 CHAIRMAN FESMIRE: Okay, so we'll go ahead and go
5 through, and then specifically address each one of the
6 comments --

7 COMMISSIONER OLSON: Because that was kind of the
8 way I went through this. I used this as the base document,
9 then, and worked through all the comments to put the things
10 onto this document that I thought were appropriate.

11 CHAIRMAN FESMIRE: Okay. The first one that I --
12 is one of changes that the committee recommended. It's
13 A.(1).(e), A small landfarm is a centralized facility of
14 two acres or less that has a total capacity of 2000 cubic
15 yards or less, remains active for a maximum of three years
16 from the date of its registration, and that receives only
17 petroleum hydrocarbon-contaminated soils (excluding drill
18 cuttings) that are exempt or nonhazardous.

19 One of the things that we discussed, and I think
20 the math shows, is that if we're going to cover two acres
21 and 2000 cubic yards or less, two acres times 43,560, times
22 the lift thickness, divided by 27 -- is that --

23 MR. BURROWS: Yeah, it's for cubic yards.

24 CHAIRMAN FESMIRE: Yeah, 27. Does anybody have a
25 calculator? Two times 43- -- That ought to be about eight

1 inches, if I was correct.

2 MR. BURROWS: Want to go through that calculation
3 again?

4 CHAIRMAN FESMIRE: Two times 43,560, divided by
5 27, ought to be about .67, .7, somewhere in there.

6 MR. BURROWS: About 3226.

7 CHAIRMAN FESMIRE: 3226, and that's cubic yards
8 per acre?

9 MR. BURROWS: Yes.

10 CHAIRMAN FESMIRE: So -- Cubic yards per acre.
11 Did we -- One of the testimonies that we had was in 8-inch
12 lifts. Did we want to put that limit in here? That would
13 reduce the total small -- I guess what I'm saying is, the
14 2000-cubic-foot restriction over the thirty- -- I mean
15 cubic-yard restriction over the 3226 would restrict it to
16 about an 8-inch lift, which we have testimony to support.
17 Do we want to include that in here, or allow 2000 cubic
18 yards concentrated in thicker lifts, in a smaller area?

19 COMMISSIONER BAILEY: I believe that we should
20 have the 8-inch-lift restriction, because in order to
21 enhance breakdown of the hydrocarbons, to remediate those
22 soils, to allow moisture penetration throughout the entire
23 pile of material, we need to ensure that all of the factors
24 that can -- that do play into remediation of those soils
25 have an opportunity to affect all of it. So that 8-inch

1 lift restrict may be very worthwhile, rather than just
2 having a large dump.

3 COMMISSIONER OLSON: I think the restriction is
4 already back in H.(3) where does require for waste
5 management standards for small landfarms that they be
6 spread in 8-inch lifts or less --

7 CHAIRMAN FESMIRE: Do we need to include it in
8 the definition?

9 COMMISSIONER OLSON: -- or 1000 cubic yards per
10 acre.

11 CHAIRMAN FESMIRE: Well, see, the -- H.(3)?

12 COMMISSIONER OLSON: Yeah, H.(3) --

13 COMMISSIONER BAILEY: Yes.

14 COMMISSIONER OLSON: -- it's page 22 --

15 COMMISSIONER BAILEY: Page 22.

16 CHAIRMAN FESMIRE: I guess what I'm saying is
17 that we've got the -- you know, we've got the yardage
18 restriction --

19 COMMISSIONER OLSON: Uh-huh.

20 CHAIRMAN FESMIRE: -- we've got the total area --

21 COMMISSIONER OLSON: And you can only put down,
22 under H.(3), 1000 yards per acre.

23 CHAIRMAN FESMIRE: 1000 yards per acre. Does
24 this apply to small landfarms?

25 COMMISSIONER BAILEY: Yeah --

1 COMMISSIONER OLSON: Yeah, this is small
2 landfarms.

3 CHAIRMAN FESMIRE: Okay. We -- One of the things
4 that we discussed was that in a small landfarm we would
5 only want a single lift, and that single lift would be up
6 to eight inches thick --

7 COMMISSIONER OLSON: But I guess somebody could
8 put down a 4-inch lift if they wanted to, and disk it.

9 CHAIRMAN FESMIRE: Well, that's not what I'm
10 worried about. I'm worried about a thicker lift.

11 COMMISSIONER BAILEY: Yeah.

12 CHAIRMAN FESMIRE: We're setting a maximum --

13 COMMISSIONER OLSON: Right.

14 CHAIRMAN FESMIRE: -- and, you know, we're not
15 talking about biopiles here, we're talking about -- in one
16 lift of eight inches or less, I think.

17 COMMISSIONER OLSON: Uh-huh.

18 CHAIRMAN FESMIRE: A small landfarm is a
19 centralized facility of two acres or less that has a total
20 capacity of 2000 cubic yards or less, remains active for a
21 maximum of three to four -- I mean, a maximum of three
22 years from the date of its registration, and that receives
23 only petroleum hydrocarbon-contaminated soils (excluding
24 drill cuttings) that are exempt or nonhazardous waste.

25 Should we add 2000 cubic yards or less in one

1 lift of eight inches or less? That restricts the number of
2 lifts that we discussed. Because we don't want these to be
3 ongoing, continuous facilities. If it takes three years to
4 remediate the lift, then we just want the one lift out
5 there.

6 COMMISSIONER BAILEY: Uh-huh.

7 CHAIRMAN FESMIRE: So do we want to include that
8 in the --

9 MS. BADA: Whatever you do, you need to make
10 H.(3) in your definition --

11 COMMISSIONER OLSON: It needs to be consistent.

12 CHAIRMAN FESMIRE: Right.

13 COMMISSIONER BAILEY: I agree with your addition.

14 CHAIRMAN FESMIRE: Okay. So that would be
15 somewhere -- 2000 cubic yards or less in one lift of eight
16 inches or less. And then H.(3) on page 22 --

17 COMMISSIONER OLSON: So there's no additional
18 lifts for a small landfarm --

19 CHAIRMAN FESMIRE: Right --

20 COMMISSIONER OLSON: -- just a single lift.

21 CHAIRMAN FESMIRE: -- that's -- that's always
22 been the...

23 Now where should we put it? In H.(3)?

24 COMMISSIONER OLSON: Well, that's what I was
25 wondering, if you even need it in A.(1).(e). Couldn't you

1 address it under the waste management standards and just --
2 it's all -- it's just in one place.

3 COMMISSIONER BAILEY: There's a potential
4 conflict in H.(3) because it says the maximum thickness of
5 treated soils in any landfarm cell shall not exceed two
6 feet.

7 COMMISSIONER OLSON: Right.

8 COMMISSIONER BAILEY: So that sentence is
9 automatically deleted.

10 CHAIRMAN FESMIRE: For a small landfarm --

11 COMMISSIONER BAILEY: For small landfarms in
12 H.(3). And the first sentence would read, The operator
13 shall biopile or spread and disk all contaminated soils in
14 a single eight-inch lift.

15 CHAIRMAN FESMIRE: Okay, where was that other
16 correction then?

17 COMMISSIONER BAILEY: Down -- the very next to
18 the last --

19 COMMISSIONER OLSON: About two-thirds of the way
20 down.

21 COMMISSIONER BAILEY: Two-thirds of the way down.

22 COMMISSIONER OLSON: Where it says, The maximum
23 thickness of treated soils in any landfarm cell shall not
24 exceed two feet.

25 COMMISSIONER BAILEY: And that would be deleted.

1 CHAIRMAN FESMIRE: And this is just for the small
2 landfarms, the --

3 COMMISSIONER BAILEY: Yes --

4 CHAIRMAN FESMIRE: -- the two feet applies to all
5 other facilities --

6 COMMISSIONER BAILEY: Uh-huh.

7 CHAIRMAN FESMIRE: -- all other landfarms?

8 COMMISSIONER OLSON: I think you keep that.

9 MS. BADA: Eight-inch --

10 COMMISSIONER OLSON: The eight-inch.

11 CHAIRMAN FESMIRE: Okay.

12 COMMISSIONER OLSON: So the first sentence would
13 just read, The operator shall biopile or spread and disk
14 all contaminated soils in a single eight-inch lift --
15 eight-inch or less lift.

16 MS. BADA: Uh-huh.

17 CHAIRMAN FESMIRE: Do we need the word biopile in
18 there?

19 COMMISSIONER OLSON: I don't see how you biopile
20 eight inches.

21 CHAIRMAN FESMIRE: So it should be, shall spread
22 or disk all contaminated soils in a single lift of eight
23 inches or less, 1000 yards per --

24 COMMISSIONER BAILEY: Would we eliminate, or 1000
25 cubic yards?

1 CHAIRMAN FESMIRE: Yes --

2 COMMISSIONER BAILEY: Okay.

3 CHAIRMAN FESMIRE: -- because again we're --

4 COMMISSIONER OLSON: -- uh-huh, just doing a
5 single eight-inch lift.

6 COMMISSIONER BAILEY: And this sentence after the
7 deleted one two-thirds down would also be deleted when that
8 thickness is reached?

9 CHAIRMAN FESMIRE: Yeah, if we -- single up
10 there.

11 COMMISSIONER BAILEY: Okay, we'll revisit H.(3)
12 later --

13 COMMISSIONER OLSON: Uh-huh.

14 COMMISSIONER BAILEY: -- when we talk about --

15 COMMISSIONER OLSON: So that way we don't need to
16 have any change to A.(1).(e) then.

17 CHAIRMAN FESMIRE: Well, the change we made is
18 simply conforming to that.

19 MS. BADA: Yeah, I think that's fine.

20 COMMISSIONER OLSON: Okay, so you want to --
21 total capacity of 2000 cubic yards or less in a single --

22 CHAIRMAN FESMIRE: -- or a single lift of eight
23 inches or less.

24 COMMISSIONER OLSON: Okay.

25 CHAIRMAN FESMIRE: Anything else?

1 COMMISSIONER OLSON: I have one down at the
2 bottom of the page on a major modification definition --

3 CHAIRMAN FESMIRE: Okay.

4 COMMISSIONER OLSON: -- and on the second line
5 there, where it talks about a change in the nature of the
6 permanent waste stream I was going to add that it would be
7 a change in the volume, location or nature. That's the way
8 we do -- consider major modifications for discharge
9 permits, for example. Somebody could change the location
10 radically, and that would be a major modification.

11 COMMISSIONER BAILEY: Location of the source
12 material or location of the --

13 COMMISSIONER OLSON: Of where the disposal is
14 occurring at, that's what I'm thinking of. So it would be
15 a change in the location, and the qualifier at the end
16 there is, of the permitted waste stream. So if the
17 permitted waste stream is going to a different location,
18 then they are allowed in their permit, which could be
19 extended -- you know, a different portion of the property
20 -- in the permit that might be closer to somebody's
21 residence or something like that. It could be considered a
22 major modification.

23 If it is -- if the Division determines it's
24 significantly substantial, then public notice -- public
25 participation in the application process are appropriate.

1 And it may not be either, so it's -- the Division has some
2 discretion there in what is a major modification.

3 I was just trying to clarify some of the types --
4 instead of just in the nature -- I see the nature as being
5 more the chemical makeup of the --

6 CHAIRMAN FESMIRE: Composition.

7 COMMISSIONER OLSON: -- the composition.

8 CHAIRMAN FESMIRE: Okay, and you're suggesting we
9 add location?

10 COMMISSIONER BAILEY: Volume.

11 COMMISSIONER OLSON: I mean, maybe it's covered
12 in that first part, because it does say that it involves an
13 increase in the land area.

14 MS. BADA: I think -- your location.

15 COMMISSIONER OLSON: So that might cover
16 location. I don't know, is volume necessary? I guess --
17 I'm thinking in terms of discharge permits where you're
18 dealing with more of a liquid waste than a solid thing
19 that's being applied to an area. I think volume is
20 appropriate, though.

21 CHAIRMAN FESMIRE: The nature or volume of the
22 permitted waste stream.

23 COMMISSIONER OLSON: Uh-huh.

24 CHAIRMAN FESMIRE: Okay.

25 COMMISSIONER OLSON: Maybe just leave it at that.

1 MS. BADA: So when you write the permits, is a
2 specific volume included in the permit?

3 CHAIRMAN FESMIRE: Sometimes but not often, is
4 it?

5 COMMISSIONER OLSON: I know we do them for
6 discharge permits. They're listed for specific volumes, so
7 if they get a large increase in the facility it would be
8 considered a major modification that, you know, would
9 require a modification.

10 CHAIRMAN FESMIRE: I think it might be
11 appropriate there. What do you think?

12 COMMISSIONER BAILEY: I can accept it.

13 CHAIRMAN FESMIRE: I've got a question back up a
14 little way: A landfarm lift is an accumulation of soil and
15 drill cuttings predominantly contaminated by petroleum
16 hydrocarbons which is placed into a landfarm cell for
17 treatment.

18 Do we want to include the eight inches or less
19 there? This is applicable to all landfarms, not just small
20 ones.

21 COMMISSIONER BAILEY: Is there any situation
22 where a larger lift would be appropriate?

23 CHAIRMAN FESMIRE: Not unless we've approved a
24 biopile, and that's --

25 MS. BADA: It's already in G.(4)

1 COMMISSIONER BAILEY: Where?

2 CHAIRMAN FESMIRE: G.(4) on page -- again, 22,
3 right?

4 MS. BADA: Uh-huh. And also (3).(d) --
5 G.(3).(d).

6 CHAIRMAN FESMIRE: G.(3).(d)?

7 MS. BADA: Page 18.

8 COMMISSIONER OLSON: I don't know if you need it
9 in the definition.

10 COMMISSIONER BAILEY: Right.

11 CHAIRMAN FESMIRE: Okay.

12 COMMISSIONER OLSON: That's all I have on that
13 page.

14 CHAIRMAN FESMIRE: Next page. I have no problem
15 until C.(1).(e).

16 COMMISSIONER OLSON: I had just on C. I guess I
17 was -- the permitting requirements -- maybe you can explain
18 this to me -- do they come in for -- I mean, the permit is
19 good for a 10-year term, right?

20 CHAIRMAN FESMIRE: Right.

21 COMMISSIONER OLSON: And you have to renew the
22 permit at that point?

23 CHAIRMAN FESMIRE: Uh-huh.

24 COMMISSIONER OLSON: So I was thinking there
25 might be an addition, then, to this where it says on that

1 third line that -- except for the small landfarms, and then
2 it goes on, all new commercial or centralized facilities
3 prior to commencement of construction, and all existing or
4 centralized facilities prior to modification or renewal.
5 Shouldn't renewal be in there as well?

6 COMMISSIONER BAILEY: Or permit renewal?

7 COMMISSIONER OLSON: Yeah, because I'm thinking
8 you have to renew the permit, and then you need to do it in
9 accordance with these provisions.

10 COMMISSIONER BAILEY: So C.(1), first line, would
11 say application requirements for new facilities, major
12 modifications or permit renewal?

13 COMMISSIONER OLSON: Uh-huh.

14 CHAIRMAN FESMIRE: Okay.

15 COMMISSIONER OLSON: And also in the second line
16 of C.(1).

17 COMMISSIONER OLSON: And permit renewals is --
18 yeah.

19 CHAIRMAN FESMIRE: Okay.

20 COMMISSIONER BAILEY: And then it would also be
21 down in that second line where it talks about major
22 modification.

23 CHAIRMAN FESMIRE: Anything else?

24 COMMISSIONER OLSON: No.

25 COMMISSIONER BAILEY: No.

1 CHAIRMAN FESMIRE: Okay, I do have a suggestion
2 on (1).(e). It's probably not valid to assume that they
3 would violate the law -- and the law may have changed since
4 I was -- but under engineering design, certified by a
5 registered professional engineer, do we need to put
6 licensed to practice in New Mexico, or are we willing to
7 accept a registration from out of state, even though that's
8 a gray area in the registration law?

9 COMMISSIONER OLSON: I guess what happens to them
10 if under the professional registration somebody from out of
11 state that does something, how do you prevent them from
12 doing something in the future?

13 CHAIRMAN FESMIRE: I don't know.

14 COMMISSIONER BAILEY: And many companies have
15 offices, headquarters out of state.

16 COMMISSIONER OLSON: Uh-huh. Because if there
17 were something that was done fraudulently, I would assume
18 that, you know, the Division would report it to the --
19 whatever board for engineers.

20 CHAIRMAN FESMIRE: Uh-huh, who have the authority
21 to regulate that, but --

22 COMMISSIONER OLSON: Do they regulate out of
23 state? Can they? An engineer that practices in the state?

24 CHAIRMAN FESMIRE: They can regulate it to the
25 extent that they can fine them for unauthorized practice of

1 engineering in the state.

2 COMMISSIONER BAILEY: If it's a gray area, maybe
3 we should just leave it alone.

4 COMMISSIONER OLSON: Uh-huh.

5 CHAIRMAN FESMIRE: Okay.

6 Okay, I went through page 8 and the comments to
7 the information on page 8. I have no changes. Did you
8 have something?

9 COMMISSIONER OLSON: I have no changes.

10 COMMISSIONER BAILEY: I just need to point out
11 that under (4) where the notice to the surface owner of
12 record within one mile is in conflict with Rule 1210 where
13 for adjudicatory hearings notice only needs to go to
14 surface owners within a half mile. Rule 1210.7, surface
15 disposal of produced water or other fluids, the applicant
16 shall notify any surface owner within one-half mile of the
17 site. So it's in direct conflict with the Rule that we
18 just passed less than a year ago.

19 CHAIRMAN FESMIRE: Okay.

20 COMMISSIONER OLSON: But for -- this is for a
21 permitting action, vers- -- yeah.

22 CHAIRMAN FESMIRE: And that's a surface waste --

23 COMMISSIONER BAILEY: Surface disposal of
24 produced water or other fluids, adjudicatory hearing.

25 CHAIRMAN FESMIRE: I think we need to make them

1 consistent. Is that the only --

2 COMMISSIONER OLSON: Because I hate to make this
3 less than a mile, myself, for a major facility like this.

4 CHAIRMAN FESMIRE: Well, we end up with two
5 conflicting --

6 COMMISSIONER BAILEY: If we put it to a half
7 mile, the Division Director always has the opportunity to
8 require one mile. I mean, there is an out there. But I
9 hate to have built-in conflict.

10 COMMISSIONER OLSON: Uh-huh.

11 CHAIRMAN FESMIRE: Yeah. Notice to the
12 application -- of the application by certified mail to the
13 surface owners of record within --

14 COMMISSIONER BAILEY: -- one-half.

15 CHAIRMAN FESMIRE: Do we leave the rest of them
16 one mile?

17 COMMISSIONER BAILEY: Where do you mean the rest
18 of them?

19 CHAIRMAN FESMIRE: Do you want the city limits
20 within one mile, or affected tribal and government agency
21 within one mile?

22 COMMISSIONER BAILEY: I think one-half mile is
23 consistent.

24 CHAIRMAN FESMIRE: Okay.

25 COMMISSIONER OLSON: Could I see 1210, just to

1 take a look at that?

2 COMMISSIONER BAILEY: Up at the top left. That's
3 the whole 1200 series, I --

4 COMMISSIONER OLSON: Uh-huh.

5 COMMISSIONER BAILEY: -- made copies of.

6 COMMISSIONER OLSON: But then some of this --
7 this is for surface -- for produced water or other fluids.
8 Because a lot of this is not going to be fluids --

9 CHAIRMAN FESMIRE: That's right.

10 COMMISSIONER OLSON: -- which might have more of
11 a tendency of a problem with blowing dust, things like
12 that, that there might be a reason for --

13 CHAIRMAN FESMIRE: But it's still --

14 COMMISSIONER OLSON: -- larger distance. But I
15 agree, it's not consistent. Because you could have a
16 facility that is just purely a surface waste management for
17 a pond for produced waters --

18 COMMISSIONER BAILEY: Uh-huh.

19 COMMISSIONER OLSON: -- so...

20 CHAIRMAN FESMIRE: If we do that, there are three
21 places in that paragraph we're going to have to change: the
22 end of the fourth line, the middle of the sixth line, and
23 about 20 percent in on the eighth line. And I completely
24 -- Let's start over.

25 The end of the third line, the middle of the

1 fifth line and about 30 percent in on the last line in
2 (4).(a).

3 COMMISSIONER OLSON: I can go within half a mile
4 with this. I mean, it's a real conflict to have one say
5 one, and then we come to an adjudicatory thing and, oh,
6 it's a different distance, you know.

7 COMMISSIONER BAILEY: Yes.

8 CHAIRMAN FESMIRE: Right.

9 COMMISSIONER OLSON: So the references to one
10 mile will be changed to a half?

11 CHAIRMAN FESMIRE: Yeah, and there are three
12 places.

13 COMMISSIONER BAILEY: And on the next page we
14 have the same issues for halfway down (g) that begins, Any
15 person, whether or not such -- Okay, I think we need to put
16 in any person with standing. Because if you look at 1206
17 it's very clear that it says, or any other person with
18 standing may file an application with the Division for an
19 adjudicatory hearing.

20 CHAIRMAN FESMIRE: Uh-huh.

21 COMMISSIONER OLSON: And how is that defined,
22 having standing?

23 COMMISSIONER BAILEY: That's one of those legal
24 definitions.

25 MS. BADA: I think the other thing you need to

1 remember is that adjudicatory hearings and permit hearings
2 are not --

3 COMMISSIONER OLSON: Uh-huh.

4 MS. BADA: -- one and the same.

5 CHAIRMAN FESMIRE: Right.

6 MS. BADA: You can have a lot more interest in a
7 permit hearing than you might in an adjudicatory.

8 COMMISSIONER OLSON: I think this provides a
9 little more clarity of what has standing. If you've
10 submitted comments and you're actually participating in the
11 process, you know, you can request a hearing.

12 COMMISSIONER BAILEY: 1208 does discuss parties
13 to adjudicatory proceedings and who has entered an
14 appearance and who has properly intervened. So the 1200
15 series, I think, does give good guidance for what standing
16 means for this section of (g).

17 COMMISSIONER OLSON: But this is just to be able
18 to request a hearing on the application.

19 COMMISSIONER BAILEY: Uh-huh, and that's what the
20 1200 series does address, initiating an adjudicatory
21 hearing. The Division attorney general, any operator or
22 producer or any person with standing may file an
23 application with the Division for an adjudicatory hearing.

24 COMMISSIONER OLSON: Because the way this is
25 working is that if it goes out to notice, anybody can file

1 for a hearing on it. That's the way this --

2 COMMISSIONER BAILEY: So my suggestion is that we
3 put any person with standing, whether or not such person
4 has previously submitted comments, may file comments or
5 request a hearing.

6 COMMISSIONER OLSON: I don't know whether I like
7 that because it sounds to me like it's trying to limit
8 who -- because of the way this is reading, anybody -- if
9 you have a problem with a permit, you can file for a
10 hearing, any public member can file for a hearing.

11 COMMISSIONER BAILEY: Which is what we went
12 through less than a year ago when we went through the 1200
13 series. And I hate to see, again, conflict between OCD's
14 Rules.

15 MS. BADA: I think the decision you have make, do
16 you -- is it your understanding that your permit hearings
17 fall under your adjudicatory rules or not? If they do,
18 then those would apply. If they don't, then...

19 COMMISSIONER OLSON: Because I guess I don't see
20 them as an adjudicatory, because the permit is not issued
21 yet, there is no permit. And I think if you're going
22 adjudicatory after the permit is issued and appealing a
23 permit, yeah, then you'd need to have standing, and the
24 fact that you participated in the prior action -- or else
25 you wouldn't have standing to take it forward from there.

1 But anybody can participate in something that's
2 not a final action at this point, because this -- Actually,
3 I don't think this is an adjudication, because -- I think I
4 would agree, then, because it's not -- the permit is not
5 final. All you're doing is doing -- you're having a
6 hearing on a tentative decision, it's not a final decision
7 of the Division.

8 COMMISSIONER BAILEY: But if it's a renewal, does
9 that throw it into a different light?

10 COMMISSIONER OLSON: No, because it's still a
11 tentative decision. It's not a final decision until a
12 hearing has been held, if there's a hearing, a hearing is
13 held, and the final permit is issued. And I wouldn't think
14 it's adjudicatory until that permit is actually issued.

15 CHAIRMAN FESMIRE: Cheryl, why wouldn't it be
16 adjudicatory? Or what's your opinion?

17 MS. BADA: I think you can choose to make it
18 whichever you want, but lots of times permit hearings are
19 not viewed necessarily the same as an adjudicatory hearing
20 between two distinct parties.

21 COMMISSIONER OLSON: Because that's the way they
22 work under the discharge permits. The discharge permits,
23 if you have a permit hearing it's on a draft permit, and we
24 don't follow -- we've been having a lot of hearings on
25 discharge permits, and we don't follow the adjudicatory

1 procedures of the WQCC until it's appealed from that point.
2 We file hearing procedures, but it's not considered a -- it
3 is not considered an adjudicatory hearing at that point.
4 It's just a permit hearing, is what it is.

5 COMMISSIONER BAILEY: Are permit hearings
6 overseen a Division Examiner? Who is the --

7 COMMISSIONER OLSON: For the Environment
8 Department they're heard by a hearing office, which would
9 be analogous to a Hearing Examiner of OCD. But it isn't
10 considered -- I know it's definitely not considered
11 adjudicatory at that point, until it's appealed to the
12 Commission. It's actually just a permit hearing on a draft
13 permit that hasn't even been issued yet, so there's nothing
14 really to adjudicate because it's not a final action of the
15 Division.

16 COMMISSIONER BAILEY: I can see that.

17 COMMISSIONER OLSON: Uh-huh.

18 COMMISSIONER BAILEY: But if OCD has a process
19 where it goes before a Division Examiner --

20 COMMISSIONER OLSON: Right.

21 COMMISSIONER BAILEY: -- who determines whether
22 or not the permit should have certain restrictions on it,
23 does that not become an adjudicatory hearing at that point?

24 COMMISSIONER OLSON: I guess I don't think of it
25 that way, because there's not a -- that is the final

1 decision of the Division and the Director at that point.

2 CHAIRMAN FESMIRE: Well, when we made the 1200
3 series rules we divided it into adjudicatory and
4 rulemaking.

5 COMMISSIONER BAILEY: Uh-huh.

6 COMMISSIONER OLSON: Right.

7 CHAIRMAN FESMIRE: So now we're introducing a
8 third type of hearing --

9 COMMISSIONER OLSON: Right.

10 CHAIRMAN FESMIRE: -- subject to a third set of
11 rules --

12 COMMISSIONER BAILEY: Uh-huh.

13 CHAIRMAN FESMIRE: -- and that would be my major
14 argument that it would be adjudicatory, is that it falls
15 closer than that to the rulemaking.

16 COMMISSIONER OLSON: Right.

17 CHAIRMAN FESMIRE: I see your point. I don't
18 like lessening that standard.

19 COMMISSIONER OLSON: But when you go for a permit
20 hearing, who has standing? It's just a matter -- It's a
21 Director decision as to significant public interest, is the
22 real key factor that comes into it, because it's qualifying
23 down below when there will be a hearing. It doesn't -- you
24 don't want to limit anybody from submitting comments or
25 filing for -- filing for a hearing. Then the Division has

1 discretion whether they grant the hearing in -- under page
2 9 there, under (g).(i) through (iv).

3 COMMISSIONER BAILEY: But if the permit hearing
4 is assigned a case name and number --

5 COMMISSIONER OLSON: Right.

6 COMMISSIONER BAILEY: -- with a hearing time and
7 place, set before the Commission or a Division Examiner,
8 notice is given, there's an application to adopt, revoke or
9 amend rules, units, orthodox well locations, et cetera,
10 statutory unitization, compulsory pooling. Those are all
11 considered adjudicatory hearings.

12 The public at one of these has every opportunity
13 for comment, because parties include people to whom notices
14 were sent, who has entered an appearance, by making
15 comments and making an appearance in the hearing, who
16 properly intervenes. A person entitled to notice may enter
17 an appearance at any time by filing a written notice of
18 appearance, by oral appearance on the record at the
19 hearing. So it's not --

20 COMMISSIONER OLSON: Yeah, but here there's not a
21 hearing, here somebody is just coming in to provide
22 comments or request a hearing. And then it seems to me the
23 discretion as to whether or not the Division actually
24 grants it is another issue down below.

25 COMMISSIONER BAILEY: Well, that comes under Rule

1 1206, which says the Division attorney general, any
2 operator or producer or any other person with standing may
3 file an application for an adjudicatory hearing. And the
4 Division Director may dismiss

5 CHAIRMAN FESMIRE: Did we define standing in
6 there anywhere, or did we leave it deliberately vague?

7 COMMISSIONER BAILEY: We left it --

8 CHAIRMAN FESMIRE: I remember talking about it a
9 lot.

10 COMMISSIONER BAILEY: -- who has entered an
11 appearance, who has properly intervened, who has standing
12 with respect to the case's subject matter. Late
13 intervenors can be participants if they file written
14 notice. It's not exactly --

15 MS. BADA: We drafted it fairly broadly, I think,
16 because we didn't separate the two. That was an option we
17 could have done.

18 CHAIRMAN FESMIRE: Okay.

19 MS. BADA: Because that was one of the
20 recommendations that we --

21 CHAIRMAN FESMIRE: I see your concern, Bill, and
22 I share it, but I don't want to diverge from the 1200
23 series Rules either.

24 COMMISSIONER OLSON: Well then it seems like all
25 the rest of it is in conflict with it, then, too.

1 CHAIRMAN FESMIRE: Why is that?

2 COMMISSIONER OLSON: Whether or not the Division
3 grants it.

4 CHAIRMAN FESMIRE: Why is that? I guess I don't
5 see what your point is?

6 COMMISSIONER OLSON: Well, it seems to me you've
7 got to have standing, and the standing isn't mentioned in
8 any of these items.

9 CHAIRMAN FESMIRE: Well, you've got to have
10 standing to file, and then the Division Director has these
11 rights and obligations once it's been filed.

12 COMMISSIONER OLSON: It just sounds really weird
13 to me to have -- to have standing to be able submit
14 comments. I'm just looking at the way it reads. It's any
15 person, whether or not he's submitted comments, may file
16 comments or request a hearing.

17 Are you saying it would be any person with
18 standing can file comments? I wouldn't think -- It sounds
19 like you're trying to limit public comment, and that's the
20 perception, I think, that would be there with that language
21 in there.

22 COMMISSIONER BAILEY: What about if it said any
23 person, whether or not such person has previously submitted
24 comments, may file comments, or any person with standing
25 may request a hearing? Because that would track 1206.

1 MS. BADA: I'm not sure that they -- May I look
2 at 1206?

3 CHAIRMAN FESMIRE: You guys ready for a break?

4 COMMISSIONER OLSON: Yeah.

5 COMMISSIONER BAILEY: Hey, it's almost noon.

6 COMMISSIONER OLSON: Uh-huh.

7 CHAIRMAN FESMIRE: While counsel looks at that,
8 we'll let the record reflect that it's a quarter to noon.
9 We're going to break for lunch now until one o'clock, at
10 which time we'll resume these exciting deliberations.

11 (Thereupon, a recess was taken at 11:45 a.m.)

12 (The following proceedings had at 1:00 p.m.)

13 CHAIRMAN FESMIRE: Okay, let's go back on the
14 record. Let the record reflect that it's 1:00 p.m. on
15 Thursday, September 21st. We were discussing -- we were
16 deliberating on the Surface Waste Management Rule proposed
17 changes. At the time we left we were discussing a change
18 to C.(4).(g), whether or not to use the phrase with
19 standing in the -- any person, whether or not such person
20 has previously submitted comments.

21 Has anybody got a --

22 COMMISSIONER BAILEY: I have a suggestion.

23 CHAIRMAN FESMIRE: Okay.

24 COMMISSIONER BAILEY: Second-hand, but it works
25 for me.

1 CHAIRMAN FESMIRE: Okay.

2 COMMISSIONER BAILEY: If we say in (g) any
3 person, whether or not such person has previously submitted
4 comments, may file comments or request a hearing pursuant
5 to Rule 1206, however you want to cite that, then we don't
6 create a conflict with the 1200 series, we could eliminate
7 (i), (ii), (iii) and (iv) from (g), and just maintain the
8 same application requirements as 1206 has, if you would
9 like to look at 1206.

10 CHAIRMAN FESMIRE: Commissioner Olson?

11 COMMISSIONER OLSON: Yes, I just wondered where
12 the (i)'s come in.

13 COMMISSIONER BAILEY: Well, they would be
14 eliminated, and we would simply rely on 1206 --

15 MS. BADA: Yeah, essentially the only -- what it
16 would do is, it would eliminate your ability to not have a
17 hearing based on those requirements, and that's a decision
18 you'll have to make, but --

19 COMMISSIONER OLSON: I was just wondering if it
20 has a similar direction for having hearings just
21 withstanding. That's the only --

22 MS. BADA: Yeah. I mean, if they request it and
23 they have standing, they have a hearing so that you don't
24 get to deny it based on -- I don't know if discretion, that
25 -- it would eliminate that, so that would be something

1 you'd want to decide whether you wanted or didn't want.

2 COMMISSIONER OLSON: Because one thing I see that
3 kind of gets away from that idea that the Director is
4 making a -- you know, a determination if the thing has got
5 technical merit or significant public interest. So if it's
6 got no technical merit and there's somebody from out of
7 state that wants it just because they don't like or
8 something, is that standing? I don't know.

9 COMMISSIONER BAILEY: 1206 does address -- or
10 1207 -- some of those 1200 series do address that.

11 MS. BADA: It address whether -- if you have
12 standing. Some of the other -- there are specific rules on
13 some of the others.

14 COMMISSIONER OLSON: Because it almost sounds
15 like you made a broader requirement -- I mean, need for
16 hearing than would be under this, you know? That you're
17 even more likely to have a hearing here than you might
18 under the requirements that you've got here.

19 MS. BADA: The other thing you could do, if you
20 want to keep those -- that discretion, is to state that any
21 hearing would be conducted pursuant to 1206 series.

22 COMMISSIONER OLSON: Right.

23 MS. BADA: That's another option.

24 COMMISSIONER OLSON: Because I mean, I like this,
25 this sounds more focused towards the hearing itself than

1 just if you have standing. You know, you've got to have
2 something that's got some technical merit, or there would
3 be significant public interest.

4 COMMISSIONER BAILEY: So what was that second
5 suggestion, Cheryl?

6 MS. BADA: That you could add a provision that
7 any hearing would be conducted pursuant to the procedures
8 and the requirements of 1206.

9 COMMISSIONER OLSON: Because there's -- the next
10 one here for (h), it talks about if they schedule a hearing
11 they shall give this notice.

12 MS. BADA: Yeah, your notice provisions in 1206
13 are actually broader.

14 COMMISSIONER OLSON: Uh-huh. So would that
15 replace this, then, where it talks about --

16 MS. BADA: It could.

17 COMMISSIONER OLSON: Because I think that sounds
18 like a good way to go, if it's looking at the procedural
19 aspects of how it goes. But I like this decision here of
20 keeping it focused towards the issues of the hearing and
21 not just the standing issue, you know? Which makes it
22 focused so that they've got to have some kind of a -- it's
23 at least got to be significant, or it's got to have some
24 kind of technical merit, to be able to actually have a
25 hearing.

1 So where would we place that? Would it be in --

2 MS. BADA: We could replace (h) with that.

3 COMMISSIONER OLSON: (h)? Does 1206 -- does it
4 also provide for --

5 MS. BADA: I believe so.

6 COMMISSIONER OLSON: -- the notice to people who
7 requested hearings and anybody who's provided written
8 comments? Because this also included anybody who submitted
9 written comments.

10 MS. BADA: Maybe what we can do is -- file an
11 application --

12 COMMISSIONER OLSON: Because the first part is
13 the same --

14 CHAIRMAN FESMIRE: Do we have an option?

15 MS. BADA: Maybe Florene can correct us if we're
16 wrong, but isn't notice normally mailed to anybody who's
17 submitted comments?

18 MS. DAVIDSON: (Nods)

19 CHAIRMAN FESMIRE: Yes.

20 COMMISSIONER OLSON: Is it?

21 CHAIRMAN FESMIRE: Yes.

22 COMMISSIONER OLSON: Well if you wanted, you
23 just put -- replace that in there, and it will be done
24 according --

25 MS. BADA: Just say any hearing --

1 COMMISSIONER OLSON: Right.

2 MS. BADA: -- shall --

3 COMMISSIONER OLSON: If the Division schedules a
4 hearing on an application, any hearing shall be conducted
5 in accordance with -- what reference?

6 MS. BADA: 19.15.14.1206. Okay.

7 CHAIRMAN FESMIRE: So we're going to keep the
8 subsections under (g)?

9 COMMISSIONER OLSON: 1205 is the rulemaking,
10 right.

11 MS. BADA: Yeah.

12 COMMISSIONER OLSON: Okay. So it would be in
13 accordance with 19.15.14.1206 through 19.15.14. --

14 MS. BADA: -- 1215.

15 COMMISSIONER OLSON: -- 1215, NMAC. Does that
16 work?

17 COMMISSIONER BAILEY: Works for me.

18 CHAIRMAN FESMIRE: Okay, so we're going to keep
19 all the subsections under (g), right?

20 COMMISSIONER OLSON: Yeah, (g) would stay the
21 same --

22 CHAIRMAN FESMIRE: Okay.

23 COMMISSIONER OLSON: -- and (h) would change to
24 after -- you'd keep the first part, If the Division
25 schedules a hearing on an application, and everything after

1 that under (h) would be stricken.

2 CHAIRMAN FESMIRE: Okay. Then we have one other
3 thing that we need to address, and this is kind of
4 picayunish but I don't want to leave it in there.

5 Under (g).(iv), the Division shall schedule a
6 public hearing on the application if determination of the
7 application requires that the Division make a finding
8 pursuant to paragraph (3) of subsection F of 7, whether any
9 fresh water has been -- has a reasonably foreseeable
10 beneficial use.

11 Anybody want to put potentially impacted in there
12 or something? Because otherwise we'll just be -- spend all
13 our time determining fresh water has a reasonable
14 beneficial use.

15 COMMISSIONER OLSON: Wouldn't it be whether it
16 does not have a reasonably -- Because I would think it's
17 assumed to have a reasonably foreseeable beneficial use
18 until proven at a hearing, right? That's the idea?

19 CHAIRMAN FESMIRE: Right, whether any potentially
20 impacted fresh water does not have a beneficial -- a
21 foreseeable beneficial use.

22 COMMISSIONER OLSON: Okay, potential --

23 COMMISSIONER BAILEY: Yes, that makes sense. The
24 Division shall schedule a public hearing on the application
25 if determination of the application requires that the

1 Division makes a finding. See, I'm going from the last
2 sentence of --

3 CHAIRMAN FESMIRE: Uh-huh.

4 COMMISSIONER BAILEY: -- in paragraph (g) down to
5 that.

6 CHAIRMAN FESMIRE: On the application, if -- if
7 the Division determines that pursuant to 19.15.1.7 NMAC
8 potentially impacted water has no reasonably foreseeable
9 beneficial use.

10 MS. BADA: But if you've made that -- Somebody
11 have that rule?

12 CHAIRMAN FESMIRE: That's the definitions of
13 impacted -- I looked it up once, it's the definition of
14 fresh water, I think. You know, the reasonably foreseeable
15 beneficial use.

16 Did you have --

17 COMMISSIONER OLSON: Current rules.

18 CHAIRMAN FESMIRE: Okay. Yeah.

19 COMMISSIONER OLSON: Yeah.

20 CHAIRMAN FESMIRE: I guess we need to make sure
21 about that. What are we trying to accomplish here?

22 (Ms. Bada left the room.)

23 COMMISSIONER OLSON: I think what it's trying to
24 accomplish is that there will be a hearing if the Division
25 is --

1 CHAIRMAN FESMIRE: -- makes that finding.

2 COMMISSIONER OLSON: -- makes that finding, yeah,
3 or agrees with the applicant that there isn't a foreseeable
4 beneficial --

5 CHAIRMAN FESMIRE: -- has no reasonably
6 foreseeable --

7 COMMISSIONER OLSON: Right.

8 CHAIRMAN FESMIRE: -- beneficial use.

9 COMMISSIONER OLSON: Right.

10 Is that the full transcript?

11 CHAIRMAN FESMIRE: Yeah, that's the 1700-page
12 version.

13 Well, while we're waiting for that, the next
14 page, is there anything that you --

15 COMMISSIONER OLSON: Well, I had something else
16 on that page, up on (e).

17 CHAIRMAN FESMIRE: (e)?

18 COMMISSIONER OLSON: Yeah. I guess in looking at
19 the form of the notice, I mean, part of the testimony of
20 the Division was being consistent with -- looking at
21 consistency with other sister agency rules and regulations,
22 and I'm thinking that that's actually some that the
23 Commission -- I mean that the Division enforces, is the
24 WQCC regulations, and their notice under (i) is a little
25 bit different than that.

1 This has been through -- gone through for about
2 five years of -- to get to the point of getting a change in
3 the regulations, in the WQCC regulations, and under that
4 they look at publishing a display ad instead of a legal ad,
5 and that the publication is also in English and Spanish.

6 So I propose making some changes to it to be then
7 -- to look at that consistency, and then I have an under --

8 CHAIRMAN FESMIRE: Wouldn't that be in the form?

9 COMMISSIONER OLSON: So yeah, I was looking at
10 what I had written down from bringing that -- those ideas
11 over, would be that -- (e), and then (i) would be -- read,
12 publishing a display ad in a form approved by the Division
13 in a newspaper of general circulation in the state and a
14 newspaper of general circulation in the county where the
15 facility is or will be located. And -- Oh, and that should
16 also be, yeah, in English and Spanish. I think I said
17 that, publish it in English and Spanish.

18 And that the display ad shall be at least three
19 inches by four inches and shall not be published in the
20 classified or legal advertisement sections.

21 And that's consistent, then, with the WQCC
22 regulations and also is using the direction as well that
23 was given to the agencies in the Governor's Environmental
24 Justice Executive Order.

25 CHAIRMAN FESMIRE: Does it have to be duplicated

1 in Spanish?

2 COMMISSIONER OLSON: Yeah, that's the way we've
3 been doing with our WQCC right now.

4 Now those are -- the ones we've done, we've done
5 as summary-type ads that are not giving as much of the
6 detail as you're probably giving now in the current legal
7 notices, because of the amount of information that you can
8 fit in something like that. What it's really giving is,
9 it's telling them that there's an application that's been
10 submitted and it's telling them where to get more
11 information, is basically what it is.

12 CHAIRMAN FESMIRE: Okay. I've got, Publishing a
13 display ad a minimum dimension of three inches by four
14 inches, in English and Spanish, notice in a form approved
15 by the Division, in newspaper of general circulation in the
16 State --

17 (Ms. Bada returned to the room.)

18 CHAIRMAN FESMIRE: What do you think? Subsection
19 F, fresh water, yeah.

20 MS. BADA: I think what you want to add is, that
21 would be impaired by contamination.

22 CHAIRMAN FESMIRE: Okay. So how is it going to
23 read?

24 MS. BADA: I think it would read, Determination
25 of the application requires that the Division make a

1 finding, pursuant to paragraph (3) of subsection F of
2 19.15.17 [sic] NMAC, whether any fresh water has a present
3 or reasonably foreseeable beneficial use that would be
4 impacted by contamination.

5 CHAIRMAN FESMIRE: Okay, but determination, we
6 just -- we come out -- the Division shall schedule a public
7 hearing on the Application if a determination is made --

8 COMMISSIONER OLSON: -- a determination --

9 MS. BADA: -- that it would be impaired, instead
10 of impacted. Impaired by contamination.

11 CHAIRMAN FESMIRE: So we're just complying with
12 F.(3) --

13 MS. BADA: Yeah.

14 CHAIRMAN FESMIRE: -- in 7? Okay. Did you talk
15 to her about the notice?

16 COMMISSIONER OLSON: Yeah, what I was proposing
17 while you were gone --

18 MS. BADA: Uh-huh.

19 COMMISSIONER OLSON: -- was some changes to --
20 it's on page 9, I guess it's under -- I think we're still
21 in C, aren't we, C.(4). And then (e).(i), so that would be
22 looking at some changes which -- based on testimony from
23 the Division and being more consistent with --

24 MS. BADA: Okay.

25 COMMISSIONER OLSON: -- other regulations, going

1 towards the WQCC regulations, would be publishing a display
2 ad in English and Spanish in a form approved by the
3 Division in a newspaper of general circulation in this
4 state and in a newspaper of general circulation in the
5 county where the facility is or will be located.

6 MS. BADA: Okay.

7 COMMISSIONER OLSON: And there will be a second
8 sentence --

9 MS. BADA: Okay.

10 COMMISSIONER OLSON: -- the display ad shall be
11 at least three inches by four inches and shall not be
12 published in the classified or legal advertisement
13 sections.

14 CHAIRMAN FESMIRE: Okay, is that all on that
15 page?

16 COMMISSIONER OLSON: And that's all on that page.

17 CHAIRMAN FESMIRE: Commissioner Bailey, do you
18 have anything else?

19 COMMISSIONER BAILEY: I just don't know what
20 financial impact this could have on the application. I
21 mean, I don't know how much these ads cost, and there was
22 no testimony about it at all, English and Spanish -- I
23 mean, do you have a handle on what kind of impact this
24 would have?

25 COMMISSIONER OLSON: It's variable, it can be --

1 in some papers it runs around \$50, \$60 to -- depends on
2 where it's at. It could be \$100 to, you know, maybe \$150,
3 depending on the newspaper ad rates.

4 COMMISSIONER BAILEY: Yeah, compared to -- What
5 is it now?

6 COMMISSIONER OLSON: I don't know what the --
7 Maybe our --

8 MS DAVIDSON: For a legal ad it's 56 cents a
9 line. And that -- as Bill says, it varies from paper to
10 paper. Some are much more expensive, \$40, and some run up
11 to \$100. But we only advertise in the counties.

12 COMMISSIONER BAILEY: Just because I think we
13 need to say something about that and then say it's not
14 going to break them.

15 CHAIRMAN FESMIRE: Okay.

16 COMMISSIONER OLSON: I guess the main reason -- I
17 was just looking at it for consistency between different
18 permitting regulations, actually, that the Division is
19 already doing. Exactly where the Division is standing on
20 those right now -- they were just adopted -- they were
21 finally adopted by the WQCC and published in this summer,
22 so...

23 COMMISSIONER BAILEY: Okay.

24 CHAIRMAN FESMIRE: Okay, I have nothing on page
25 10 until the last paragraph, and that is the change that is

1 -- comes out of task force recommendation 4, I believe.
2 Does anybody have anything else before we get to that?

3 COMMISSIONER OLSON: Yeah, I had something on
4 (c). I think this came out of some clarifying language
5 that was in NMOGA's hearing proposal.

6 CHAIRMAN FESMIRE: (6).(c)?

7 COMMISSIONER OLSON: Yeah, (6).(c), page 10. And
8 it looks like that fourth line down where it talks about
9 the Division may authorize withdrawals from the account,
10 and what I would say is, put a period after account, and
11 then start with the sentence, In the event of forfeiture
12 under paragraph (3) of subsection J of 19.15.2.53 NMAC, the
13 Division may at any time, and from time to time -- It goes
14 on from there.

15 But they want just to clarify that the Division
16 can't at any time just start doing it, they have to do it
17 in the event of a --

18 CHAIRMAN FESMIRE: Right.

19 COMMISSIONER OLSON: -- of a foreclosure. And
20 then there is some language that would go right to the end
21 of that paragraph as well, which would read, or its
22 designee for closure of the facility. So I think they just
23 had concerns to make sure that the money is actually being
24 spent to close the actual facility, that comes up out of
25 the foreclosure.

1 And that was from, I think -- I had it here, page
2 11 of NMOGA's hearing proposal. Just a clarification of
3 the intent of it.

4 COMMISSIONER BAILEY: I'll agree with that.

5 CHAIRMAN FESMIRE: Me too.

6 Okay, the next --

7 COMMISSIONER OLSON: I have a question, though.
8 I guess maybe some of you remember that better than me.
9 Why was the term on the letter of credit five years instead
10 of 10 years, to be consistent with the term of the permit?
11 Just kind of -- more of a question.

12 CHAIRMAN FESMIRE: We asked that question at the
13 hearing.

14 COMMISSIONER OLSON: Yeah, I thought we did, I
15 just didn't remember it.

16 CHAIRMAN FESMIRE: I don't remember the response
17 either.

18 COMMISSIONER BAILEY: Could be the bank won't do
19 it for --

20 COMMISSIONER OLSON: Well, that's -- kind of was
21 my thought, that they won't give one for that kind of term
22 because it's too far out there.

23 CHAIRMAN FESMIRE: Right.

24 COMMISSIONER BAILEY: Yeah.

25 COMMISSIONER OLSON: Okay.

1 CHAIRMAN FESMIRE: Okay.

2 COMMISSIONER OLSON: I just wondered.

3 CHAIRMAN FESMIRE: Then we get to proposal 4 from
4 the task force: Additionally, the Division may review the
5 adequacy of a landfarm or the landfarm operator's financial
6 assurance without regard to the date of its last review
7 whenever the Division determines that the operator has not
8 achieved the closure standards specified in subparagraph
9 (b) of paragraph (7) of subsection G of 19.15.2.53.

10 That's a little convoluted way to say it, but I
11 agree with the principle. Division may review the adequacy
12 of a landfarm operator's financial assurance...

13 How about we put, Additionally, without regard to
14 the date of its last review, comma, the Division may review
15 the adequacy of a landfarm operator's financial assurance
16 whenever the Division determines that the operator has not
17 achieved the closure standards specified in subparagraph
18 (b) of paragraph (7)?

19 Just move that one phrase.

20 COMMISSIONER OLSON: That would be a good answer.

21 MS. BADA: Okay, how do you want to --

22 CHAIRMAN FESMIRE: Just take that, without
23 regards to the date of its last review, and place it after
24 the comma after additionally: Additionally, without regard
25 to the date of its last review --

1 MS. BADA: Okay, moved up -- okay.

2 CHAIRMAN FESMIRE: And that was the only problem
3 I had with that.

4 Anybody have anything else on page 10?

5 COMMISSIONER BAILEY: No.

6 COMMISSIONER OLSON: No.

7 CHAIRMAN FESMIRE: Page 11.

8 COMMISSIONER OLSON: No comments.

9 CHAIRMAN FESMIRE: No comments from me either.

10 COMMISSIONER BAILEY: No comments.

11 COMMISSIONER OLSON: Wow.

12 CHAIRMAN FESMIRE: Page 12?

13 COMMISSIONER BAILEY: No.

14 CHAIRMAN FESMIRE: I had one question on 12.

15 E.(2).(f), within any seismic impact zone. I don't know
16 what that means. I'm assuming they mean, you know, any
17 zone that is susceptible to earthquakes, but I don't know
18 what seismic impact zone means.

19 COMMISSIONER OLSON: I thought that was New
20 Mexico.

21 (Laughter)

22 COMMISSIONER BAILEY: The entire Rio Grande rift.

23 CHAIRMAN FESMIRE: I'm pretty sure that's what
24 they were saying. How does that differ from an unstable
25 area?

1 COMMISSIONER BAILEY: An unstable area may
2 include everything from landslide-prone areas to...

3 CHAIRMAN FESMIRE: Okay --

4 COMMISSIONER OLSON: I don't know.

5 CHAIRMAN FESMIRE: So the seismic impact zone may
6 be a subset of any unstable area. But seismic impact zone
7 -- is that a term of art that I missed when I was in
8 geology, some -- many, many, many years ago?

9 COMMISSIONER BAILEY: Not one that I know has a
10 definition.

11 COMMISSIONER OLSON: Yeah, I'm not familiar with
12 it. I'm wondering if that's something that they took from
13 the solid waste regulations.

14 CHAIRMAN FESMIRE: If it was, they just spelled
15 seismic right.

16 MS. BADA: I think the danger is, without knowing
17 what they meant we could do damage by --

18 CHAIRMAN FESMIRE: Well, they -- It's obvious
19 from the Rule that that's what was proposed, because which
20 is that they're designed to resist the maximum expected
21 horizontal acceleration in lithified earth material for the
22 site.

23 COMMISSIONER OLSON: So I guess if you locate it
24 on a major fault, I'm assuming, then you have to account
25 for that.

1 COMMISSIONER BAILEY: But that would be the
2 unstable area, not the seismic impact zone.

3 COMMISSIONER OLSON: Uh-huh.

4 CHAIRMAN FESMIRE: I would think that that's
5 covered -- everything in (f) is covered in (g).

6 COMMISSIONER BAILEY: I agree with you.

7 CHAIRMAN FESMIRE: Isn't that exactly what
8 they're saying? The systems need to be engineered to
9 withstand the expected design loads -- I mean the expected
10 loads.

11 COMMISSIONER BAILEY: So integrity will not be
12 compromised.

13 COMMISSIONER OLSON: Seems pretty broad in (g),
14 so...

15 COMMISSIONER BAILEY: Yeah.

16 CHAIRMAN FESMIRE: Let's strike out?

17 COMMISSIONER BAILEY: Strike out?

18 I would like to comment that my agreement with 50
19 feet for a siting requirement is conditional on other later
20 discussions that we will have about chlorides.

21 COMMISSIONER OLSON: Yeah, I was going to say,
22 because I have an issue with this that I was thinking that,
23 you know, with the way that landfarms are designed to
24 remediate material with treatment zone monitoring, I don't
25 really have a problem with the 50 foot there, but I was

1 thinking for landfills -- and they were talking about, you
2 know, again, part of that issue of being consistent with
3 the other agencies' landfilling regulations -- it seems to
4 me that the landfill should be 100 feet from groundwater.
5 But I would make that distinction that it just apply to the
6 landfills, not to the landfarms.

7 MS. BADA: Why would you have a difference
8 between landfarms that aren't lined, and landfills which
9 are?

10 COMMISSIONER OLSON: Because landfarms are
11 designed to remediate material, and landfills are not.
12 They're permitted waste disposals and repositories. So
13 you're not remediating material in a landfarm, you're just
14 accumulating it and stockpiling it essentially in --
15 underground. So I see that distinction --

16 COMMISSIONER BAILEY: But with landfarm,
17 bioremediation requires the addition of copious amounts of
18 water --

19 COMMISSIONER OLSON: Uh-huh.

20 COMMISSIONER BAILEY: -- which would provide
21 higher pressure for transport downward of any contaminants
22 within the landfarm.

23 CHAIRMAN FESMIRE: But with the landfarm you're
24 able to monitor that zone --

25 COMMISSIONER BAILEY: That's true.

1 CHAIRMAN FESMIRE: -- and with a landfill you --

2 COMMISSIONER OLSON: Yeah.

3 CHAIRMAN FESMIRE: -- wouldn't be able to get
4 under it.

5 COMMISSIONER OLSON: Yeah, that's my rationale,
6 is that you have a treatment zone, so you're showing early
7 detection of any type of migration. If that's occurring,
8 then they -- under the Rules they have to implement their
9 contingencies, then, to take some action to correct what's
10 going on.

11 COMMISSIONER BAILEY: But with the chlorides at
12 1000, as presently written --

13 COMMISSIONER OLSON: Right.

14 COMMISSIONER BAILEY: -- there's a greater
15 potential for migration of those chlorides.

16 COMMISSIONER OLSON: I agree, it may be -- to
17 link it to the --

18 COMMISSIONER BAILEY: Maybe this is conditional
19 50 feet, then?

20 COMMISSIONER OLSON: Right.

21 COMMISSIONER BAILEY: Okay.

22 CHAIRMAN FESMIRE: Where is that, Commissioner
23 Bailey? I don't --

24 COMMISSIONER BAILEY: Number (1) -- E.(1) in
25 this --

1 CHAIRMAN FESMIRE: Yeah, okay.

2 COMMISSIONER OLSON: Yeah. And so I was looking
3 at potentially adding a sentence to it that says that no
4 landfill shall be located where groundwater is less than
5 100 feet below the lowest elevation at which wastes will
6 placed at the facility.

7 CHAIRMAN FESMIRE: Okay, we --

8 COMMISSIONER OLSON: The distinction between
9 disposed -- with the distinction being, there's a big
10 difference between disposal and remediation.

11 CHAIRMAN FESMIRE: We'll come back and revisit
12 that --

13 COMMISSIONER OLSON: Yeah.

14 CHAIRMAN FESMIRE: -- when we get into the --

15 COMMISSIONER BAILEY: Okay.

16 CHAIRMAN FESMIRE: -- siting requirements, or the
17 other...

18 Page 13, anybody have any issues with that?

19 COMMISSIONER BAILEY: No.

20 COMMISSIONER OLSON: I think I just had a minor
21 -- it looks like a typo on item number (10) towards the top
22 of the page. It probably should read, All surface waste
23 management facilities, instead of just waste management.

24 CHAIRMAN FESMIRE: I agree with that.

25 COMMISSIONER OLSON: I think it also appears in

1 number (9) there, the last sentence of number (9), it just
2 waste management, instead of surface waste management.

3 And that's all I have.

4 CHAIRMAN FESMIRE: All on page 13?

5 Page 14?

6 COMMISSIONER OLSON: I don't have any comments.

7 COMMISSIONER BAILEY: No.

8 CHAIRMAN FESMIRE: No? Page 15?

9 COMMISSIONER BAILEY: No.

10 COMMISSIONER OLSON: I had one item on number
11 (2), and I see in there they have the monitoring program
12 not -- they're not really including, though, a plan for
13 reporting of the results. It talks about they'll conduct
14 groundwater monitoring, sample analysis and the monitoring
15 systems, but I would just add in there -- After the third
16 line at the end of it, it starts, a sampling and analysis
17 plan, comma, and then insert, a plan for the reporting of
18 groundwater monitoring results, comma.

19 CHAIRMAN FESMIRE: Just groundwater monitoring,
20 or do you want to --

21 COMMISSIONER OLSON: That's -- It's all about the
22 groundwater, this is just the groundwater monitoring
23 program, so I wanted to make sure that there's some kind of
24 -- some mechanism, whether it's annual or however they do
25 it, they should be reporting on the actual results to the

1 Division at some frequency that can be determined under the
2 permit what the frequency is.

3 CHAIRMAN FESMIRE: Jami, are you --

4 COMMISSIONER BAILEY: That's fine with me.

5 COMMISSIONER OLSON: And then I guess maybe that
6 they'll have to save this one, because I think I had this
7 under (3).(a), I think it links back to that hundred feet
8 again. That third line under (a) it talks about where
9 depth to groundwater is greater than 100 feet, because
10 under what I would propose there wouldn't be one less than
11 100 feet, so if that's -- We may have to revisit that, if
12 we're going to still come back to the siting criteria.

13 CHAIRMAN FESMIRE: Anything else on page 15?

14 COMMISSIONER BAILEY: No.

15 COMMISSIONER OLSON: No.

16 CHAIRMAN FESMIRE: Page 16?

17 COMMISSIONER OLSON: Might just be a typo here
18 under (h), the fourth line from -- fourth full line from
19 the bottom, right at the end of that line it talks, with
20 date. It should be probably, with the date. Does that
21 make sense to you?

22 CHAIRMAN FESMIRE: Say that again. (h), fourth
23 line down.

24 COMMISSIONER OLSON: In the fourth line from the
25 bottom, coming up from the bottom of that paragraph --

1 CHAIRMAN FESMIRE: The date.

2 COMMISSIONER OLSON: -- and it says -- with the
3 date, shouldn't it be, instead of just -- it says, with
4 date.

5 CHAIRMAN FESMIRE: Do we need the -- Do we need
6 the "the"?

7 COMMISSIONER OLSON: I don't know, that was my
8 question, I thought --

9 MS. BADA: I would put it in there.

10 COMMISSIONER OLSON: -- it kind of read better.
11 So maybe -- I'll suggest we just put the word "the" between
12 with and date.

13 Right there. Up one more. There. That's all I
14 had.

15 CHAIRMAN FESMIRE: Okay, page 17?

16 COMMISSIONER OLSON: No comments from me.

17 COMMISSIONER BAILEY: No.

18 CHAIRMAN FESMIRE: No?

19 CHAIRMAN FESMIRE: 18, this is -- The big one on
20 here is the committee recommendation, number (5). I think
21 it was (5). Yes.

22 COMMISSIONER OLSON: I didn't have a problem with
23 the proposed task force language.

24 CHAIRMAN FESMIRE: There was one in the CRI
25 recommendation on this that's sort of in addition to

1 theirs. They suggested that we give them, or other EPA
2 method approved by the Division, in the testing.

3 COMMISSIONER OLSON: For TPH?

4 CHAIRMAN FESMIRE: For 418.1, yeah.

5 COMMISSIONER OLSON: I see that in here already.

6 CHAIRMAN FESMIRE: Oh, that's right, that's
7 right.

8 COMMISSIONER OLSON: Although I had to do a lot
9 of comparison, because there's a big difference between the
10 version we saw at the hearing and then the June 8th version
11 that incorporated a lot of things.

12 CHAIRMAN FESMIRE: Okay.

13 COMMISSIONER OLSON: But I've got maybe a
14 question farther up, I guess, if that's okay, the task
15 force language?

16 CHAIRMAN FESMIRE: Okay.

17 COMMISSIONER OLSON: Under that language about
18 tankbottoms under G.(1) there's an "or", or it says, or
19 that no treatment plant capable of extracting any
20 recoverable petroleum hydrocarbon exists within the
21 reasonable proximity.

22 I was wondering if you even need that. If it
23 says there's not economically recoverable hydrocarbons,
24 doesn't that cover -- it's not economical if you've got to
25 haul it all the way to Hobbs from Farmington. Isn't

1 that --

2 CHAIRMAN FESMIRE: That would come under
3 economic. Operator demonstrates that the tankbottoms do
4 not contain economically recoverable petroleum
5 hydrocarbons.

6 COMMISSIONER OLSON: I think that's always been
7 the intent, I thought, of the tankbottoms issues, was to
8 try to recover as much petroleum as possible --

9 CHAIRMAN FESMIRE: Right.

10 COMMISSIONER OLSON: -- not just that there's not
11 something nearby. So just strike -- we just strike
12 everything from "or" on and just end the sentence where it
13 says the tankbottoms do not contain economically
14 recoverable hydrocarbons, period.

15 CHAIRMAN FESMIRE: So you're making the only test
16 the economic test?

17 COMMISSIONER OLSON: Yeah.

18 CHAIRMAN FESMIRE: Okay.

19 COMMISSIONER OLSON: Because it seems like that's
20 part of it.

21 CHAIRMAN FESMIRE: Commissioner Bailey?

22 COMMISSIONER BAILEY: I'll go with that.

23 CHAIRMAN FESMIRE: Okay.

24 COMMISSIONER OLSON: And the only thing left on
25 that page is just the -- you know, our question about the

1 chloride levels in that G.(1) as well, so I'm not sure
2 where we want to start kind of getting into that.

3 (Laughter)

4 COMMISSIONER BAILEY: Or we could cut to the
5 chase. Are you good with 1000, or do you want 500?

6 COMMISSIONER OLSON: Well, I was thinking of a
7 conditional-type thing myself. I don't know if it's the
8 same that you were considering.

9 CHAIRMAN FESMIRE: Where did I lose control?

10 (Laughter)

11 COMMISSIONER OLSON: What's that?

12 COMMISSIONER BAILEY: Cut to the chase is what we
13 did.

14 (Laughter)

15 CHAIRMAN FESMIRE: Cut to the chase, right out
16 from under Mark.

17 (Laughter)

18 COMMISSIONER OLSON: Because I was looking at the
19 concept of -- for small landfarms, which are usually not
20 going to be located on some other landowner's property, and
21 there could end up being a large number of them, to start
22 looking at --

23 CHAIRMAN FESMIRE: They are probably going to be
24 located on some other landowner's property.

25 COMMISSIONER OLSON: Right, that's what I'm

1 getting at, is that -- plus the fact that each -- the way
2 I'm reading this, each operator could have one in a
3 section, so you could have multiple landfarms in one
4 section, and it's kind of a proliferation of all landfarms,
5 which I don't really have a problem with in terms of trying
6 to keep things close by to where they're being done. But
7 it seems to me in that circumstance, then, they probably
8 should be looking at 500 versus --

9 COMMISSIONER BAILEY: Yes, yes.

10 COMMISSIONER OLSON: -- 1000.

11 COMMISSIONER BAILEY: Here I had developed a
12 full, constructed argument for just that.

13 (Laughter)

14 COMMISSIONER BAILEY: So yes, small landfarms
15 500, and I'll go buy off on 1000 for the permitted,
16 regulated larger landfarms.

17 COMMISSIONER BAILEY: Yeah, that was what I was
18 thinking too.

19 CHAIRMAN FESMIRE: Well, I don't guess my opinion
20 matters then.

21 (Laughter)

22 CHAIRMAN FESMIRE: Okay.

23 COMMISSIONER OLSON: Yeah, I think -- you know, I
24 don't recall anybody really contradicting Dr. Neeper much
25 when he was talking about, you know, the re-vegetation

1 coming in at around 500, and considering that it was just a
2 number that you could have in a section, and it could be --

3 COMMISSIONER BAILEY: Dr. Neeper --

4 COMMISSIONER OLSON: Yeah.

5 COMMISSIONER BAILEY: -- CRI --

6 COMMISSIONER OLSON: Yeah.

7 COMMISSIONER BAILEY: -- and Dr. Sublette --

8 COMMISSIONER OLSON: Yeah.

9 COMMISSIONER BAILEY: -- and Dr. Sublette was
10 very clear that 500 is essential for plant regeneration and
11 plant growth, re-vegetation.

12 MS. BADA: Okay, can I play the devil's advocate
13 then? Then why is 1000 okay for larger landfarms?

14 COMMISSIONER OLSON: Well, I was looking at it
15 more like these are more of an industrial-type facility
16 that could be allowed to have a higher --

17 MS. BADA: But as far re-vegetation, why is that
18 okay?

19 CHAIRMAN FESMIRE: Well, you're not going to be
20 re-vegetating the -- You're going to have a layer of non-
21 contaminated materials over a landf- -- well, wait a
22 minute.

23 COMMISSIONER BAILEY: No, we'll talking landfarm.

24 CHAIRMAN FESMIRE: Landfarm, aren't we?

25 COMMISSIONER OLSON: Landfarm, yeah. You know, I

1 was thinking of it more as an industrial-type facility, and
2 you look at a lot of those things -- EPA does that a lot,
3 you'll have different cleanup criteria for an industrial
4 facility versus if something happens on a residential
5 property. And for things that could proliferate around an
6 area that are on other people's property, those could be
7 re-developed for essentially housing or other purposes,
8 whereas an industrial facility has more of a potential to
9 be -- I won't say that it couldn't happen, but it has more
10 of a potential for controls or some type of institutional
11 control that could be placed upon --

12 MS. BADA: Right --

13 COMMISSIONER OLSON: -- the use of the land.

14 MS. BADA: -- the intent of a landfarm to
15 remediate it, how are you remediating it if you have to
16 have an institutional control?

17 COMMISSIONER OLSON: Uh-huh, I agree.

18 CHAIRMAN FESMIRE: Say that again.

19 MS. BADA: The intent of -- Assuming the intent
20 of a landfarm is to remediate the soils, if you have to
21 have an institutional control how are you remediating
22 anything?

23 COMMISSIONER OLSON: Well, I think the testimony
24 is there that you're not remediating chlorides. That was
25 pretty much the testimony of --

1 COMMISSIONER BAILEY: All of the witnesses.

2 COMMISSIONER OLSON: -- all of the witnesses.

3 COMMISSIONER BAILEY: All of them. And as Dr.
4 Sublette says, the only way you get rid of chlorides is
5 by --

6 COMMISSIONER OLSON: -- dilution.

7 COMMISSIONER BAILEY: -- dilution, to increase
8 water penetration, which forces the chlorides down and out.

9 COMMISSIONER OLSON: Uh-huh.

10 COMMISSIONER BAILEY: So it's just movement of
11 the chlorides.

12 COMMISSIONER OLSON: Uh-huh.

13 COMMISSIONER BAILEY: Do you want to go with 500
14 for big landfarms too? Is that what you're --

15 COMMISSIONER OLSON: I mean, I don't have a
16 problem with 500 for all, because I know it's going to be
17 adequate for re-vegetation. I was looking at this as
18 somewhat of a concession for --

19 CHAIRMAN FESMIRE: But we have to apply a
20 balancing to this, and we do want to encourage people to
21 use the landfarms. The evidence, I think, is clear that
22 500 is the -- may be, you know, a good re-vegetation
23 standard, but that we will get some re-vegetation above
24 that. And I think that we have to balance the need to
25 encourage landfarming, as opposed to the --

1 COMMISSIONER BAILEY: -- landfilling.

2 CHAIRMAN FESMIRE: -- yeah, landfilling, and I
3 think that we would -- if we were to cut the chloride limit
4 down to the 500 on even large farms, we would be
5 essentially closing out an awful lot of our market. I'm
6 not in favor of doing the -- you know, the small landfarms
7 with the 500 parts limit, but I do see the rationale behind
8 it.

9 I do see that, you know, these larger facilities
10 with the higher chloride concentration limit are probably
11 necessary and are marginal enough that we will be able to
12 regenerate some if not most of the vegetation at the higher
13 concentration, whereas in the small landfarms maybe your
14 argument is correct, we want to be able to totally re-
15 vegetate that, bring that back to nearly pristine, and that
16 may be a reason to use that limit.

17 MS. BADA: Do you think having the 500 -- the
18 1000 chloride limit will allow you to meet your re-
19 vegetation standard? I mean, that's the real question.

20 CHAIRMAN FESMIRE: The 500 chloride limit?

21 MS. BADA: No, the 1000.

22 CHAIRMAN FESMIRE: The 1000. I'm of the opinion
23 that it will.

24 MS. BADA: And based on what evidence that was
25 presented --

1 CHAIRMAN FESMIRE: Yes.

2 MS. BADA: -- do you think it will allow --

3 CHAIRMAN FESMIRE: Yes, based on the early
4 evidence in these hearing, I think that there is some -- I
5 mean, it's not going to be re-vegetated to virgin
6 condition, but I think there's a very high probability that
7 the re-vegetation will meet the standards that we've set.

8 COMMISSIONER BAILEY: The 1000 will eliminate
9 clover of all kinds; foxtail, meadow, orchard grass; corn;
10 lovegrass; blue grama; side oats grama. Many of the native
11 perennial grasses are eliminated at 1000. As Dr. Stevens
12 brought out, you're not going to have protection of
13 groundwater if you don't have the re-vegetation that's
14 successful, because his testimony explained the role of
15 vegetation in prevention of contamination of that
16 groundwater.

17 And that goes to the questions that I asked him.
18 Is it a house of cards? And he denied it was a house of
19 cards, but yet the testimony shows that it is, that if you
20 don't have the vegetation you don't have protection of
21 groundwater, you don't have protection of the environment.

22 CHAIRMAN FESMIRE: I see your point. But again,
23 you know, we have to look -- We're dealing in that -- in an
24 area where we don't want to discourage the use of
25 landfarms. I mean, every cubic yard that we can remediate

1 in a landfarm is material that doesn't have to go into a
2 landfill which, you know, is basically a permit
3 sequestration that -- you know, it's not fixed, it's just
4 put away.

5 And I think that the compromise that you all
6 started with, with the 500 for the small landfarms and the
7 1000 for the larger landfarms is probably appropriate in
8 that it will not prevent the operators from landfarming in
9 commercial facilities or in centralized facilities material
10 that would otherwise end up in the landfill.

11 MS. BADA: But if you can't re-vegetate, what use
12 is it?

13 COMMISSIONER OLSON: I guess I see a distinction
14 too in that the small landfarms are a short-term activity,
15 and the landfarms themselves are a long-term managed
16 facility.

17 MS. BADA: But are you looking -- if you aren't
18 going to re-vegetate them, then what is their end use? Is
19 it just the disposal facility on the surface, or does it
20 actually have another use?

21 CHAIRMAN FESMIRE: No, it -- unfortunately, the
22 end use is that it is a disposal facility, whereas small
23 landfarms -- I'm sorry, landfills -- is a disposal
24 facility. Landfarms are not meant to be a disposal
25 facility, but on the other hand we can't discourage the use

1 of those landfarms.

2 MS. BADA: But shouldn't you ensure that they can
3 actually meet the re-vegetation standard? And how do you
4 address what Commissioner Bailey has brought up where she
5 read off the list of things that wouldn't grow there? What
6 will grow there, then, that makes you believe that it will
7 meet the re-vegetation standard?

8 CHAIRMAN FESMIRE: Commissioner Bailey, do you
9 have that exhibit?

10 COMMISSIONER BAILEY: It's from the CRI exhibit
11 -- Where did I put it? Right here -- which is taken from
12 the IPEC website, which was referenced also by Dr.
13 Sublette.

14 CHAIRMAN FESMIRE: Well, I can't tell from this
15 which ones are native to New Mexico and the areas that we
16 would be talking about.

17 COMMISSIONER OLSON: You go to the next page and
18 there's blue grama and side oats grama. That's native
19 to --

20 CHAIRMAN FESMIRE: Yeah, but blue grama is one of
21 them that would have a -- well, that correlates to their
22 salt-strip reading. What is the 500? Is it four?

23 COMMISSIONER BAILEY: You look at the graph here.

24 CHAIRMAN FESMIRE: Yeah. So four is the 50-
25 percent reduction, right? And again, those aren't absolute

1 elimination, those are just significant reductions, aren't
2 they, in the population of the --

3 COMMISSIONER BAILEY: Right, you have half the
4 growth, half the germination, half of the soil coverage,
5 half of the productivity of the land.

6 CHAIRMAN FESMIRE: Okay, but that's not saying --
7 How does that correlate to our re-vegetation requirements?
8 Is it -- The requirement isn't that they get back 100
9 percent of the native concentration, is it?

10 COMMISSIONER BAILEY: It is equal to what the
11 requirements of J.(1) --

12 COMMISSIONER OLSON: I believe it's 70 percent.

13 COMMISSIONER BAILEY: Seventy percent of the
14 native perennial vegetative cover, unimpacted by
15 overgrazing, fire and other intrusion damaging to --
16 et cetera. You have that here to read.

17 CHAIRMAN FESMIRE: Okay.

18 COMMISSIONER BAILEY: -- consisting of at least
19 three native plant species, including at least one grass,
20 but not noxious weeds.

21 COMMISSIONER OLSON: I guess I just see it,
22 there's a higher probability of being able to achieve re-
23 vegetation at that higher level, because it's a long-term
24 managed facility where they're going to have to have the
25 bonding to back it up as well, that they will achieve these

1 levels. So they're going to have to work at it more,
2 versus a small landfarm which is something that's just kind
3 used and then goes back to the landowner, essentially,
4 after a short period of time.

5 COMMISSIONER BAILEY: Plus another point, Bill,
6 is that when it's time for closure of a landfarm, there's
7 nothing to prevent them from bringing in fresh topsoil
8 similar to the requirements for a landfill --

9 COMMISSIONER OLSON: Uh-huh.

10 COMMISSIONER BAILEY: -- that would enable them
11 to meet the re-vegetation standards.

12 COMMISSIONER OLSON: That's correct.

13 CHAIRMAN FESMIRE: In this exhibit, the threshold
14 is the first point at which they start seeing an effect,
15 right? Okay.

16 COMMISSIONER OLSON: Uh-huh.

17 CHAIRMAN FESMIRE: So when we start talking about
18 a 50-percent reduction at level 6, we're talking about 1000
19 to get to the level 6, right?

20 COMMISSIONER BAILEY: According to that graph.

21 CHAIRMAN FESMIRE: Okay. So according to this,
22 you know, 6 means -- a reading of 6 on the test strip means
23 about 1000 parts per million, a reading of 4 means about
24 500. But we don't achieve the 50-percent reduction on any
25 of these until we get down to 1000. So is that the way you

1 were reading it?

2 COMMISSIONER BAILEY: Uh-huh.

3 CHAIRMAN FESMIRE: So you know, at 500 parts per
4 million the test strip 4, we don't have a 50-percent
5 reduction in any of these indicator species, do we?

6 COMMISSIONER BAILEY: Right, which means that 500
7 is acceptable for plant germination and growth and land
8 productivity.

9 CHAIRMAN FESMIRE: Well, you're saying that
10 because 500, or the strip reading of 4, is significantly
11 less than any of these, that it would be available at 4, at
12 500. But we're not going to see a 50-percent reduction in
13 most of these until you get into the neighborhood of, you
14 know, 1500; is that correct?

15 COMMISSIONER BAILEY: Six, for quite a few of
16 those.

17 CHAIRMAN FESMIRE: Uh-huh, but that takes 1000.
18 And if our standard is 70, 70 percent, I don't see how this
19 exhibit forecloses achieving the re-vegetation standard.

20 COMMISSIONER BAILEY: If you go to the native
21 grasses --

22 CHAIRMAN FESMIRE: Okay.

23 COMMISSIONER BAILEY: -- 6, that's --

24 CHAIRMAN FESMIRE: Now, are these native
25 grasses --

1 COMMISSIONER BAILEY: -- the label that says --

2 CHAIRMAN FESMIRE: Okay, but --

3 COMMISSIONER BAILEY: -- native grasses.

4 CHAIRMAN FESMIRE: -- but in New Mexico, are
5 those -- are just the highlighted ones New Mexico grasses?

6 COMMISSIONER BAILEY: I don't believe we had
7 testimony on that. This is from an IPEC, Integrated
8 Petroleum Environmental Consortium, publication.

9 CHAIRMAN FESMIRE: Isn't that Dr. Sublette's
10 organization?

11 COMMISSIONER BAILEY: That's Dr. Sublette.

12 CHAIRMAN FESMIRE: Okay.

13 COMMISSIONER OLSON: Blue grama and side oats
14 grama are New Mexico native grasses.

15 COMMISSIONER BAILEY: Alkali sacaton, I know, is
16 also --

17 COMMISSIONER OLSON: Okay.

18 COMMISSIONER BAILEY: -- Indian rice grass I
19 believe is, western wheat grass I know is --

20 CHAIRMAN FESMIRE: Less than five, so somewhere
21 between 500 and 700. So for those grasses, you know, we're
22 talking a 50-percent reduction at about 700, less than 700
23 probably.

24 COMMISSIONER BAILEY: Uh-huh.

25 CHAIRMAN FESMIRE: Less than 700.

1 COMMISSIONER BAILEY: But Dr. Neeper, Dr.
2 Sublette, both indicated that in reading of less than 4
3 micromhos was the standard, and that was equivalent to 500
4 milligrams per kilogram of chlorides.

5 CHAIRMAN FESMIRE: Right. But we're talking
6 about an EC value, as opposed to their strip reading,
7 aren't we?

8 COMMISSIONER OLSON: Well, they said there's not
9 a real direct correlation --

10 COMMISSIONER BAILEY: Right.

11 COMMISSIONER OLSON: -- so it's an approximate --

12 COMMISSIONER BAILEY: So they have to convert the
13 4 micromhos, which is an equivalent of 500 milligrams per
14 kilogram --

15 CHAIRMAN FESMIRE: Right.

16 COMMISSIONER BAILEY: -- and even the task force
17 recommended 4 micromhos after bioremediation.

18 COMMISSIONER OLSON: Or bioremediation endpoint.

19 COMMISSIONER BAILEY: Uh-huh.

20 CHAIRMAN FESMIRE: So our standard is 70, and we
21 don't know how to -- 70 percent, for the grasses? What is
22 that, J --

23 COMMISSIONER BAILEY: J.(1), down at the bottom.

24 COMMISSIONER OLSON: I just think the 500 for the
25 small ones, just because you have a margin of safety for

1 these kind of short-term facilities that after that will
2 really be unmanaged, you know. I know that's --

3 COMMISSIONER BAILEY: And I --

4 COMMISSIONER OLSON: -- part of our --

5 COMMISSIONER BAILEY: -- with that.

6 COMMISSIONER OLSON: It might be harder for them
7 to achieve it at 1000 than they may -- you know, it seems
8 to be some conflicting testimony whether they can or can't
9 at 1000. But it's -- They have more of a potential for
10 achieving it at a more physically managed long-term
11 facility than at a short-term thing where they want to walk
12 away --

13 CHAIRMAN FESMIRE: Okay.

14 COMMISSIONER OLSON: -- at that point.

15 CHAIRMAN FESMIRE: Okay. I can understand it
16 with that reasoning. So are we still in agreement, 500 for
17 the small landfarms and 1000 for the larger facilities?

18 COMMISSIONER OLSON: Uh-huh, I am, yeah.

19 CHAIRMAN FESMIRE: Okay. And the reason for that
20 being that the -- we know that the threshold and the edge
21 of our ability to achieve the re-vegetation standard is
22 somewhere between the 500 and 1000, and we know that at 500
23 we'll be able to re-vegetate the smaller facilities, and
24 with the management inherent in the operation of the larger
25 facilities, that the 1000 is fully acceptable for those

1 facilities.

2 COMMISSIONER OLSON: (Nods)

3 CHAIRMAN FESMIRE: Okay.

4 COMMISSIONER OLSON: And the 500 is just kind of
5 providing us a margin of safety for those smaller, less
6 managed facilities.

7 CHAIRMAN FESMIRE: Okay. So on page 18, G, does
8 G apply to all landfarms?

9 COMMISSIONER OLSON: Uh-huh.

10 COMMISSIONER BAILEY: Not the small landfarms.

11 COMMISSIONER OLSON: Not small landfarms.

12 CHAIRMAN FESMIRE: Okay, so leave the 1000
13 milligrams per kilogram the way it is under G.(2). That is
14 -- what did we decide? That's change 5 recommended by the
15 stakeholder task force.

16 COMMISSIONER BAILEY: I'm okay with that.

17 COMMISSIONER OLSON: Yeah, I didn't have a
18 problem with the proposed --

19 CHAIRMAN FESMIRE: Okay.

20 COMMISSIONER OLSON: -- task force language.

21 CHAIRMAN FESMIRE: Okay. Okay, so is that all on
22 page 18?

23 COMMISSIONER BAILEY: Yes.

24 CHAIRMAN FESMIRE: Let me check with counsel just
25 a second.

1 (Off the record)

2 CHAIRMAN FESMIRE: Okay, page 19, this was --
3 change 6 is the first one that they recommended. Did you
4 all have any others that you wanted to address before we
5 started down their list?

6 COMMISSIONER OLSON: Yeah, item number (4) at the
7 top of the page.

8 CHAIRMAN FESMIRE: Okay.

9 COMMISSIONER OLSON: The end of that paragraph,
10 the -- CRI had just recommended that -- there's a few
11 places in the document, it talks about soils being removed
12 but it doesn't say where to, you know? It says they'll be
13 removed. And so I just suggest maybe at the end there, add
14 after the word "removed", to an OCD-approved facility, so
15 that OCD is having to somehow give some direction in where
16 these materials are going to.

17 CHAIRMAN FESMIRE: Okay, where is that? The
18 last --

19 COMMISSIONER OLSON: The last -- the end of the
20 paragraph where it says, or the contaminated soils have
21 been removed, and then add, to an OCD-approved facility.

22 COMMISSIONER BAILEY: I agree.

23 CHAIRMAN FESMIRE: Okay. Then let's address --

24 COMMISSIONER OLSON: And one more, just on (5),
25 looks like just a clarification. At the end there it talks

1 about four feet below the cell's original surface. Just to
2 clarify, it probably should be the cell's original ground
3 surface. That's (5).(a).

4 And there's another one that looks like it's a
5 typo on (5).(b), towards the bottom of that paragraph, the
6 last line where it talks about background soil
7 concentrations to determine whether release -- it should be
8 a release has occurred. Add the word "a".

9 COMMISSIONER BAILEY: In that same line, should
10 we have a definition or explanation what practical
11 quantitation limit is?

12 MS. BADA: That would be a good idea.

13 CHAIRMAN FESMIRE: Do we need it here or in the
14 definitions?

15 COMMISSIONER BAILEY: Somewhere, because that's
16 not a common term.

17 COMMISSIONER OLSON: That's kind of a laboratory
18 term. I'm not sure -- Do we have something that defines
19 it?

20 CHAIRMAN FESMIRE: We don't in our -- well, we
21 use it one, two -- two times in this.

22 COMMISSIONER BAILEY: And then earlier on, in
23 early notations.

24 CHAIRMAN FESMIRE: Do we need to add the
25 definition of PQL to 7?

1 COMMISSIONER BAILEY: If you have a definition.

2 CHAIRMAN FESMIRE: It is a term of art. It's the
3 minimum limit at which a given test will provide an
4 accurate reading.

5 COMMISSIONER OLSON: Right, and that you have
6 confidence in the -- that you've actually detected the
7 material.

8 CHAIRMAN FESMIRE: Right.

9 COMMISSIONER OLSON: That's going to be at some
10 level usually higher than the detection limit for a
11 constituent.

12 CHAIRMAN FESMIRE: Do we have any evidence to
13 that effect, or do we need to -- How would we go about
14 doing that, Cheryl?

15 MS. BADA: I think, given that you don't have one
16 on hand, we'll just have to rely on the commonly
17 understood --

18 COMMISSIONER BAILEY: Rely on what?

19 CHAIRMAN FESMIRE: The commonly understood
20 meaning. Okay, given this we can't do that, what's the
21 next one?

22 COMMISSIONER OLSON: Well, I guess we're coming
23 up to a major point of contention, which is the 3103
24 standards that are in there, if that's -- Are you looking
25 at something before that?

1 CHAIRMAN FESMIRE: They first appear in (5).(e).
2 Let's get down to (5).(e), take an afternoon break, and
3 then we'll tackle the 3103 constituents.

4 Is there anything above (5).(e) that we need to
5 address?

6 COMMISSIONER BAILEY: Not for me.

7 COMMISSIONER OLSON: Other than the ones I
8 brought up, no.

9 CHAIRMAN FESMIRE: Okay. We do have the --

10 COMMISSIONER OLSON: Oh, there's another one
11 here, I guess another typo with that. Under (5).(c) it's
12 whether a release has occurred, again, at the end of that
13 paragraph (c).

14 CHAIRMAN FESMIRE: Okay. The committee
15 recommendations are in 4, about the sixth line down: The
16 operator shall collect and analyze at least one composite
17 soil sample consisting of four discrete samples from the
18 treatment zone at least semi-annually, using the methods
19 specified for TPH and chlorides.

20 Anybody have -- I agree with that one.

21 COMMISSIONER OLSON: No problems.

22 COMMISSIONER BAILEY: No problem.

23 CHAIRMAN FESMIRE: I think that will cut the
24 costs of compliance down pretty drastically.

25 The next one is in (5).(a), to strike: to ensure

1 that the contaminants do not migrate to the underlying
2 native soil or to the groundwater.

3 I agree with that, that's a clarification that
4 probably needed to be done.

5 (5).(b), they go from representative to -- in the
6 second line, representative to randomly selected, and then
7 add the phrase at the end of the sentence: and shall
8 compare each result to the higher of the practical
9 quantitation limit or the background soil contaminations,
10 to determine whether release has occurred.

11 COMMISSIONER BAILEY: Concentrations.

12 CHAIRMAN FESMIRE: -- concentrations, I'm sorry,
13 to determine whether release has occurred.

14 The next one in (5).(c) changes the monitoring
15 program from annual to five-year, again changes from four
16 representative samples to four randomly selected samples.
17 And here we start getting in to 3103 constituents, which
18 we'll talk about.

19 So why don't we take a 10-minute break. We'll
20 reconvene just after 3:30 and tackle the 3103 question.

21 COMMISSIONER BAILEY: At 2:30.

22 CHAIRMAN FESMIRE: 2:30, I'm sorry. It just
23 seems like it's 3:30.

24 (Thereupon, a recess was taken at 2:22 p.m.)

25 (The following proceedings had at 2:37 p.m.)

1 CHAIRMAN FESMIRE: Let's go back on the record.
2 We were about to tackle the 3103 standards.

3 I think the first thing we have to do is
4 address -- before we get into the specific recommendations
5 of the committee, the first thing we probably have to do is
6 address their general statement, and I think the major
7 concern that the committee had, that the task force had,
8 was that the natural soil concentrations of some of the
9 proposed regulated constituents may exceed the proposed
10 closure standards, and how do we address that? Because if
11 the closure standards prevent what -- essentially, we could
12 come to the situation where the closure standards would
13 prevent us from ever closing the facility, because the
14 background is higher than the closure standards. That's
15 probably a question that we need to consider.

16 Commissioner Olson, you've probably got more
17 experience with this than anybody. What are your feelings
18 on the issue?

19 COMMISSIONER OLSON: Well, I mean there is going
20 to be a problem. You're going to have a lot of variability
21 in -- especially in the metals results, from any particular
22 site, which could be widely different than what's at the
23 disposal facility. So I don't know. I mean, I don't know
24 that I'm real comfortable with some of the justification of
25 the limits that are in here. You know, maybe it needs

1 additional analysis. That's kind of my -- just my first
2 impression of a lot of the overall standards that are
3 presented in -- I guess that's (6).(e), G.(6).(e).

4 That's just my -- was my first impression, now,
5 is looking at a lot of this, and a lot of these numbers,
6 you know, admittedly are quite low. And I don't think -- I
7 don't know to what extent those are even achieved at, say,
8 a superfund site.

9 Admittedly -- I understand, you know, the intent
10 of this is to prevent contamination versus remediation
11 where something has already occurred. There's a big
12 distinction there.

13 But some of these levels at the same time -- I'm
14 looking at like the lead level -- kind of allow some
15 contamination to occur, because typically you're not going
16 to see lead at 400 milligrams per liter at most natural
17 soils.

18 So here you've got one instance of a contaminant
19 here that's going to allow for some degradation, while
20 others seem to be so low that they're effectively not
21 allowing any contamination, and the PQL becomes the
22 enforceable level. Because some of these -- especially
23 down in the solvents, they're in -- the concentration
24 levels are in, you know, parts per trillion, and they're
25 not going to be measuring those at that level at the

1 laboratories, and the PQL effectively becomes an
2 enforceable level. So if you detect it, it's an
3 enforceable action, detected at the PQL.

4 But I don't know, I just am not real comfortable
5 with it myself.

6 CHAIRMAN FESMIRE: Well, within the testimony
7 presented to the Commission, what should we be looking for
8 then?

9 COMMISSIONER OLSON: Well, overall you shouldn't
10 have a lot of these solvents, even though I guess -- you
11 know, the testimony of the Division is, according to some
12 studies that have been done in the past, there has been
13 detections of some of these constituents, and that is why
14 they put that forward, and I understand that.

15 I guess -- I mean to me, you know, the obvious
16 ones -- that these aren't designed to be petroleum
17 remediation facilities, so your main contaminants of
18 concern are going to be your benzene, toluene,
19 ethylbenzene, xylenes, some of your salts, the chlorides,
20 as we've talked about, and then metals are another
21 potential item. But overall, the main issues are the
22 petroleum constituents, and you may see some of these other
23 contaminants, depending on where the -- what the source of
24 these soils are and what they've used at a particular site.

25 I'm not sure -- you know, chlorinated solvents in

1 the past, whether those, you know, had been used as part
2 of, you know, oil treatment. I think that's where the
3 potential waste characteristic came from, most likely, in
4 those circumstances, is probably some type of a treatment
5 process, because they're not going to be naturally found
6 with the crude oil.

7 CHAIRMAN FESMIRE: Would TPH, BTEX and chloride
8 closure standards be sufficiently protective of public
9 health and the environment if we were to perhaps not use
10 the 3103 standards in this Rule and ask the OCD to clarify
11 some of the questions that you have about it?

12 COMMISSIONER OLSON: Yeah, I think that -- I
13 would -- I believe, you know, we definitely need the
14 benzene, BTEX, TPH and chloride levels. I don't think
15 there's any real question amongst any of the parties that
16 testified that those are major contaminants of concern that
17 need to be addressed. And I think, if I remember right,
18 out of that the only one that was really in contention was
19 the -- well, two items, was -- out of those was the TPH
20 level, which the task force has made an alternate
21 recommendation on, and then the chloride level, which we've
22 been discussing already.

23 So I think out of what we have presented to us,
24 we have ample evidence for dealing with those issues. I
25 think -- I kind of like your suggestion that we --

1 CHAIRMAN FESMIRE: That was a question.

2 COMMISSIONER OLSON: -- or question, excuse me,
3 of maybe directing this back to the agency for some
4 additional study on what the appropriate levels for these
5 constituents would be.

6 CHAIRMAN FESMIRE: Okay, there's been some
7 question about the eight heavy metals, whether a standard
8 that didn't include them would be sufficiently protective.
9 Do either of the Commissioners have a feeling on that?

10 COMMISSIONER BAILEY: I liked Marbob's third
11 suggestion, which was for the OCD to prepare new language
12 accepting the risk based site-specific approach that would
13 proposal closure standards in the permit application
14 process based upon individual site conditions that also
15 protects human health and the environment, and I think that
16 suggestion should be used for those metals.

17 We heard some discussion from one of the experts
18 in the field, Dr. Thomas. Was that his name? But I would
19 feel comfortable sending it back to the OCD for additional
20 review and site-specific approaches for those.

21 CHAIRMAN FESMIRE: Well, if we send it back, we
22 would basically be using the TPH, BTEX and chloride
23 standards as closure standards and wouldn't be addressing
24 any metal contamination or chlorinated solvents
25 contamination. Is that something we can do in this -- I

1 mean, without addressing -- without addressing, especially,
2 the eight heavy metals?

3 COMMISSIONER OLSON: And which metals are you --

4 CHAIRMAN FESMIRE: Arsenic, barium, cadmium,
5 chromium, cyanide, fluoride, lead and mercury.

6 COMMISSIONER OLSON: I was just thinking of the
7 eight metals. I don't know if fluoride is actually one of
8 the RCRA eight metals. I believe it's selenium instead.

9 CHAIRMAN FESMIRE: Is it?

10 COMMISSIONER OLSON: I can't -- I'm just trying
11 to recall. So are you also suggesting that we might keep
12 the --

13 CHAIRMAN FESMIRE: No, I'm not --

14 COMMISSIONER OLSON: -- chlorinated solvents
15 or --

16 CHAIRMAN FESMIRE: I'm not suggesting anything
17 yet --

18 COMMISSIONER OLSON: Okay.

19 CHAIRMAN FESMIRE: -- I'm just trying to find a
20 solution. I mean, I see the problem. We don't want to put
21 people in a situation where they won't open the facility
22 because they could never close it. But at the same time, I
23 want to protect the environment from some of these
24 contamination levels and these constituents, some of these
25 constituents.

1 COMMISSIONER OLSON: And I'll also maybe think
2 out loud a little bit that, looking at some of the
3 chlorinated solvents -- I mean, technically these
4 substances really shouldn't be there. You know, this is
5 for remediation of petroleum hydrocarbons, not chlorinated
6 solvents. So if they are detecting some of those
7 constituents they've got a problem in what they've accepted
8 at the facility, because they shouldn't be getting some of
9 those materials in, in the first place.

10 CHAIRMAN FESMIRE: That's true, but some of these
11 solvents were used to treat for different problems in the
12 oilfield many, many years ago and are going to show up.

13 COMMISSIONER OLSON: Also, just another
14 interesting note, because I was looking through here at --
15 If you look at the benzene level that's given at .2 --

16 CHAIRMAN FESMIRE: Uh-huh.

17 COMMISSIONER OLSON: -- then if you'll look
18 through the individual constituents, and you'll see toluene
19 at, you know, .35 and ethylbenzene at 1 and total xylenes
20 at .67, you don't -- the total BTEX, looking at this, is
21 less than 2, but then over in (6).(b) it's allowing total
22 BTEX to be 50.

23 So there's a little bit of a conflict between --
24 you have to meet all of this, you have to meet the total
25 BTEX listed over here at 50 parts per million in G.(6).(b),

1 and then at the same time you have to meet the standards
2 over here for individual constituents, as well as (6).(a),
3 which is benzene at .2. If you total all those up, you're
4 coming up to less than 2 parts per million.

5 So it seems to me that this -- I didn't even
6 understand why you have this total BTEX number even here,
7 if you have to meet the standards, the way this is
8 proposed. It seems like there's a conflict in the proposed
9 regulation. Just something else I've noted.

10 It also lets you know for nitrate at 17, we deal
11 with a lot of the discharge permits on a lot of nitrogen
12 loading with the dairies and land application of nitrogen,
13 and under the WQCC regulations what we look at is, you can
14 look at applying up to 200 pounds per acre per year on
15 nitrogen, which doesn't necessarily equate out to the 17
16 part per million level that you may be limited to here. I
17 mean, obviously at 17 parts per million you're most likely
18 not going to cause exceedence of the groundwater standard,
19 I would agree.

20 But I guess that could be one way of looking at
21 this, would be to adopt the benzene, BTEX, TPH, chloride
22 levels and potentially look at the heavy metals which are,
23 you know, fairly toxic, the toxic metals, listed through
24 here, and potentially direct some of the remaining
25 constituents back to the agency to study further.

1 CHAIRMAN FESMIRE: Okay, so the evidence
2 sufficiently supports the agency's TPH, BTEX and chloride
3 concentration limits for closure. The heavy metals in the
4 3013 standards are -- there is evidence to support the fact
5 -- their toxicity and the fact -- and their need to be
6 addressed and that these levels are protective of human
7 health and the environment; is that correct? Is that what
8 you are --

9 COMMISSIONER OLSON: Uh-huh.

10 CHAIRMAN FESMIRE: And that the eight heavy
11 metals are arsenic, barium, cadmium, chromium, cyanide,
12 lead, mercury and selenium?

13 COMMISSIONER OLSON: That's what I recall.

14 CHAIRMAN FESMIRE: And that the rest of the 3103
15 standards, we would ask the OCD to further evaluate the
16 need and the limits that ought to be placed on those.

17 Okay, the evidence in the record supports the --
18 I don't think there's any doubt that the benzene, BTEX, TPH
19 and chloride levels are well established. Is there
20 sufficient evidence in the record to support the heavy
21 metals standards in the 3103 list?

22 COMMISSIONER OLSON: I don't think anybody argued
23 that these were not protective of public health. I think
24 industry might have argued that they were -- overall -- I
25 don't know if they got into specifics about just those

1 metals themselves, but I think their point of contention
2 was, is that these were overly stringent but that they are
3 protective. I don't think there's any doubt of that.

4 I didn't hear anybody say that it should be lower
5 than that, only that potentially it should be higher,
6 especially -- I think they're looking at a lot of argument
7 based upon what dilution/attenuation factors should be
8 used. The Division used one in their calculations, and
9 industry said that is conservative.

10 CHAIRMAN FESMIRE: Okay.

11 (Off the record)

12 CHAIRMAN FESMIRE: Commissioner Bailey, what's
13 your thoughts on that?

14 COMMISSIONER BAILEY: I agree with Commissioner
15 Olson. I think we could eliminate fluoride and (xi), all
16 the way through zinc, silver through zinc, from this
17 particular order and remand it back to the Division for
18 further study --

19 CHAIRMAN FESMIRE: Okay.

20 COMMISSIONER BAILEY: -- on those constituents.

21 CHAIRMAN FESMIRE: And the reason being that the
22 constituents that we are not excising are highly toxic and
23 in need of being part of the closure standards; and the
24 others, while we have concerns, the evidence presented a
25 need to -- and the recommendations of the committee,

1 presented a need to further explore the potential closure
2 standards based on those constituents; is that correct?

3 COMMISSIONER BAILEY: Yes.

4 CHAIRMAN FESMIRE: Okay, so starting in (5).(3),
5 release response, the committee recommendation has some
6 changes in there: If any vadose zone sampling results show
7 that the concentrations of TPH, BTEX or chlorides exceed
8 the higher of the PQL or the background soil
9 concentrations, then the operator shall notify the
10 Division's Environment Bureau of the exceedence and shall
11 immediately collect and analyze a minimum of four randomly
12 selected, independent samples for TPH, BTEX, chlorides and
13 the constituents listed in subsections A and B of
14 20.62.2.3101 NMAC.

15 That's not marked on my copy. Do we have a copy
16 of the 3103 so we know which ones are the A and B sections?

17 COMMISSIONER OLSON: These are all the A and B.

18 CHAIRMAN FESMIRE: So A section is --

19 COMMISSIONER OLSON: A is the human health
20 standards of the WQCC regulations, B is the other standards
21 for domestic water supplies. So I think if we're going to
22 try to change it like this, we most likely will probably
23 have to come back and say the constituents listed in
24 G.(6).(e), because we're -- we're saying those are the
25 elements of concern at this point; is that correct?

1 CHAIRMAN FESMIRE: Yes, that there's testimony
2 that they are -- May I see the 3103 list? Basically, those
3 are the --

4 COMMISSIONER OLSON: I guess I'm trying to think
5 of the circumstances where we have soils generated from
6 spills of non-exempt wastes that could contain some of
7 these other substances, and that could be a spill at an
8 oilfield service company --

9 CHAIRMAN FESMIRE: Uh-huh.

10 COMMISSIONER OLSON: -- because they have -- as
11 the Division know, they have definitely used chlorinated
12 solvents in the past. Not too many of them do today, but
13 they have used them and have been found at OCD inspections
14 in the past.

15 So the problem is, I guess, what do you with
16 those types of spills, where you may have something that is
17 characteristically nonhazardous and needs to be cleaned up
18 pursuant to Rule 116? Do you just not -- just not regulate
19 those? I don't -- at the landfarm?

20 CHAIRMAN FESMIRE: At closure?

21 COMMISSIONER OLSON: Uh-huh. Because as it is
22 now, you could have a cleanup going on, they'll have to
23 test it for hazardous characteristics. If it's
24 characteristically nonhazardous, it can go to an OCD-
25 permitted landfarm.

1 CHAIRMAN FESMIRE: So maybe we should just test
2 on closure for TPH, BTEX, chlorides and hazardous
3 characteristics?

4 COMMISSIONER OLSON: The tricky part to that is,
5 hazardous characteristics aren't cleanup levels, they're
6 just a measure of whether it's classified under EPA/RCRA
7 regulations as a hazardous waste. Doesn't mean it's not
8 hazardous, just means it's not classified as a hazardous
9 waste, and therefore it ends up falling back up under the
10 regulation of the Division. It still needs to be regulated
11 and disposed of properly.

12 CHAIRMAN FESMIRE: Okay.

13 COMMISSIONER OLSON: And right now they cannot
14 accept anything that's characteristically hazardous at a --
15 even under these rules as well, at an OCD-permitted
16 facility. But if it is not hazardous and still contains
17 some of these constituents, it could be accepted.

18 CHAIRMAN FESMIRE: Uh-huh. So we know TPH, BTEX,
19 chlorides and the heavy metals -- there's testimony before
20 us that they are toxic or can exhibit toxic
21 characteristics, correct? Or are harmful?

22 COMMISSIONER OLSON: I'm sorry, could you repeat
23 that?

24 CHAIRMAN FESMIRE: TPH, BTEX, chlorides and the
25 heavy metals.

1 COMMISSIONER OLSON: I'd say if you dropped the
2 chloride, the chloride wouldn't be considered a --

3 CHAIRMAN FESMIRE: -- a toxic.

4 COMMISSIONER OLSON: -- a toxic.

5 CHAIRMAN FESMIRE: But it is a contaminant that
6 we need to --

7 COMMISSIONER OLSON: It is a contaminant that
8 affects the taste of water, essentially, a salty taste, but
9 it's not a toxic in itself.

10 COMMISSIONER BAILEY: To plants it is.

11 CHAIRMAN FESMIRE: Anybody got a solution?

12 COMMISSIONER OLSON: I mean, one of the
13 recommendations that came from NMOGA was that you look at
14 the soil screening levels that are consistent with the
15 Environment Department and use -- they're developed using
16 EPA area -- they say area-weighted numbers. I don't know
17 if they actually ever presented actual numbers that should
18 be used as part of that, or just -- that was just their
19 recommendation as an approach.

20 COMMISSIONER BAILEY: The stakeholder
21 recommendations for G.(5).(e), I think, can solve some of
22 our problems here.

23 CHAIRMAN FESMIRE: Which stakeholders? Oh, the
24 committee?

25 COMMISSIONER BAILEY: Yeah, they had suggested

1 language.

2 COMMISSIONER OLSON: I mean, this would be
3 similar to -- one idea you might look at would be sampling
4 for these constituents, and if they are above the PQL maybe
5 they -- the operator themselves -- put the burden upon the
6 operator to perform a risk assessment, site-specific risk
7 assessment. I mean, that's what EPA does through the
8 superfund program, they do it through the RCRA program.
9 The burden at that point is on the operator to determine
10 the appropriate cleanup level.

11 The difference is, that is for remediation of a
12 release versus -- the intent of these regulations is
13 overall prevention. But if you're seeing something where
14 it's detectable, I guess maybe they need to address that
15 themselves --

16 CHAIRMAN FESMIRE: -- individually.

17 COMMISSIONER OLSON: -- individually. That would
18 be a -- actually an alternative to this. The Division is
19 going to have a mechanism to review that and approve of it.

20 CHAIRMAN FESMIRE: Okay, so instead of --

21 COMMISSIONER OLSON: And that way you're not just
22 throwing them all out at that point.

23 CHAIRMAN FESMIRE: Okay, so instead of component-
24 specific targets, goals, maximums, we just test for -- test
25 for these components, and if they are above the PQL,

1 require operator to perform a site-specific risk
2 assessment?

3 COMMISSIONER OLSON: Uh-huh.

4 CHAIRMAN FESMIRE: And propose a plan?

5 COMMISSIONER OLSON: It would be similar to what
6 the task force recommended for release response, but it
7 would be part of the closure plan that they would submit if
8 they are seeing some of these constituents at the site.
9 They could do a risk assessment as part of the closure to
10 demonstrate that what they have is not going to pose a
11 threat to groundwater or to human health and the
12 environment. And it still leaves a mechanism for dealing
13 with them.

14 And that could be -- you know, I think that would
15 be adequate to go for now, and the Division could re-look
16 at this again if they wanted to and see if they wanted to
17 actually -- they really wanted exact numbers.

18 CHAIRMAN FESMIRE: So we really wouldn't have to
19 make any changes to the proposed until we got down to
20 (6).(e) -- I mean --

21 COMMISSIONER OLSON: Right, you could keep
22 (5).(e) the same, because you still would analyze four --
23 those constituents, and that -- the criteria with the PQL,
24 everything, could still read correctly.

25 CHAIRMAN FESMIRE: And then when we get to

1 (5).(e) --

2 COMMISSIONER OLSON: Or (6).(e)?

3 CHAIRMAN FESMIRE: (6).(e), I'm sorry, the
4 concentration of the constituents listed in sections A and
5 B, as determined -- require a report, once they did the
6 analysis, of any of these 3301 -- or 3103 constituents that
7 exceeded the PQL, report to the OCD and generate a site-
8 specific action plan.

9 COMMISSIONER OLSON: I don't know if they'd have
10 anything to report, because I think they'd be reporting
11 that up above, I believe, in (5).(e), because here you're
12 looking at -- (6) is the treatment zone closure -- you're
13 looking at a performance standard. So the performance
14 standard would be that if --

15 CHAIRMAN FESMIRE: Well, we'd still have
16 performance standards for TPH, BTEX, chlorides --

17 COMMISSIONER OLSON: Right, but the performance
18 standards here would be based upon a risk assessment.

19 If -- if there are constituents -- you know, the
20 constituents listed in subsection A and B of 20.6.2.3103
21 NMAC, then a site-specific risk assessment would be
22 performed to demonstrate that the remaining contaminants do
23 not pose a threat to fresh waters, public health and the
24 environment.

25 CHAIRMAN FESMIRE: Do not exceed background

1 levels or --

2 COMMISSIONER OLSON: Right.

3 CHAIRMAN FESMIRE: Okay.

4 COMMISSIONER OLSON: You'd have to add in that,
5 that if they exceed those, then that risk assessment would
6 need to be performed.

7 CHAIRMAN FESMIRE: Okay.

8 COMMISSIONER OLSON: Does that sound reasonable?

9 CHAIRMAN FESMIRE: Yeah. How do we word that?

10 We're good down to (e); is that --

11 COMMISSIONER BAILEY: Uh-huh.

12 CHAIRMAN FESMIRE: Okay. And they do the
13 analysis under (6), (6).(e). And then where it says shall
14 not exceed background soil concentrations, we start
15 striking it there, and if any of those analyses exceed
16 PQL -- and I'm just talking theoretically here, I'm not
17 wording it -- if they exceed the PQL --

18 COMMISSIONER OLSON: -- or the background soil
19 concentrations, which would be important for metals --

20 CHAIRMAN FESMIRE: Yeah, or the background soil
21 concentrations, the operator will perform a site-specific
22 risk assessment --

23 COMMISSIONER OLSON: I'd say using EPA-approved
24 methods, that's pretty common.

25 CHAIRMAN FESMIRE: Do we have a -- any testimony

1 as to what those methods would be?

2 COMMISSIONER OLSON: No, but they're commonly --
3 risk assessments are commonly done under EPA's superfund
4 program and under RCRA regulations, and EPA has guidance
5 for conducting risk assessments.

6 CHAIRMAN FESMIRE: Okay. And then we -- we take
7 out the concentrations over here and simply leave the A and
8 B list, as published here, as a list of --

9 COMMISSIONER OLSON: I don't even think you need
10 that if you just say the -- you have a reference to the
11 reference to the WQCC regulations of A and B, I don't think
12 you even need it in the --

13 CHAIRMAN FESMIRE: Okay.

14 COMMISSIONER OLSON: -- in this regulation.

15 CHAIRMAN FESMIRE: Okay.

16 COMMISSIONER OLSON: The abatement regulations do
17 a similar thing, they don't list the standards for 3103,
18 they just incorporate those standards by reference.

19 CHAIRMAN FESMIRE: Okay. Then how did they get
20 approval -- how do we get a closure plan and approval in
21 here?

22 COMMISSIONER BAILEY: The proposed closure
23 standards, based upon individual site conditions that also
24 protect human health and the environment.

25 CHAIRMAN FESMIRE: Okay. Have you got that?

1 COMMISSIONER BAILEY: That's Marbob number 3.

2 CHAIRMAN FESMIRE: Okay.

3 COMMISSIONER OLSON: Fresh waters, human health
4 and the environment.

5 CHAIRMAN FESMIRE: Okay, so that's how we'll
6 handle that one.

7 COMMISSIONER OLSON: Can we read that back again?
8 Our counsel didn't quite get --

9 CHAIRMAN FESMIRE: The concentration of the
10 constituents -- This is starting with (6).(e). The
11 concentration of the constituents listed in subsections A
12 and B of 20.6.2.3103 NMAC, as determined by EPA SW-846,
13 method 6010B or 6020 and any other methods approved by the
14 Division. If the concentration of these constituents
15 exceed the PQL or background concentrations, the operator
16 shall perform a site-specific risk assessment using EPA-
17 approved methods --

18 MS. BADA: Okay, back up. So are you going to
19 have a period right after 20.6.2.3103 NMAC?

20 CHAIRMAN FESMIRE: Right. Well, as determined by
21 -- that's already in (e).

22 COMMISSIONER OLSON: That's already here, he's
23 keeping this.

24 CHAIRMAN FESMIRE: We're going to follow (e)
25 until the first word on the -- on page 20 --

1 MS. BADA: Okay.

2 CHAIRMAN FESMIRE: -- after which, Division,
3 period.

4 If the concentration of those constituents exceed
5 the PQL or background concentrations, the operator -- is
6 that how we're referring to them in this?

7 MS. BADA: Okay, for some reason mine isn't
8 tracking yours.

9 COMMISSIONER OLSON: Missing that, yeah.

10 CHAIRMAN FESMIRE: No, it's not.

11 MS. BADA: It's not tracking it.

12 COMMISSIONER OLSON: Because there's --

13 MS. BADA: Yeah.

14 COMMISSIONER OLSON: -- part of your language
15 missing.

16 CHAIRMAN FESMIRE: Where do you have (e)?

17 MS. BADA: (e) at the bottom, but it doesn't --

18 CHAIRMAN FESMIRE: The concentrations of the
19 constituents listed --

20 MS. BADA: Okay, all right.

21 CHAIRMAN FESMIRE: Got it? I'll start over with
22 (6).(e): The concentrations of the constituents listed in
23 subsections A and B of 20.6.2.3103 NMAC, as determined by
24 EPA SW-846 methods 6010B or 6020, other methods approved by
25 the Division. If the concentration of those constituents

1 exceed the PQL for any given constituent --

2 MS. BADA: Okay, just a minute. If the
3 concentrations of those constituents exceed --

4 CHAIRMAN FESMIRE: -- the PQL or the background
5 concentrations for any given constituent, the operator
6 shall perform --

7 MS. BADA: Okay.

8 CHAIRMAN FESMIRE: -- a site-specific risk
9 assessment --

10 MS. BADA: Okay.

11 CHAIRMAN FESMIRE: -- using EPA-approved
12 methods --

13 COMMISSIONER BAILEY: -- and will propose closure
14 standards --

15 CHAIRMAN FESMIRE: -- and will propose closure
16 standards in the permit application -- in --

17 COMMISSIONER BAILEY: -- based upon --

18 CHAIRMAN FESMIRE: -- based upon individual site
19 conditions that also protect human health --

20 MS. BADA: Okay, wait a minute, based upon
21 individual --

22 COMMISSIONER BAILEY: -- and also protect fresh
23 water --

24 COMMISSIONER BAILEY: -- site conditions that --

25 CHAIRMAN FESMIRE: -- protect fresh water, human

1 health and the environment.

2 MS. BADA: And you would take out the --

3 CHAIRMAN FESMIRE: Take out the list.

4 COMMISSIONER OLSON: Take out the whole list.

5 MS. BADA: Take out --

6 COMMISSIONER OLSON: Take out the list from here.

7 MS. BADA: And that's a period, or a comma?

8 COMMISSIONER OLSON: Yeah, you might need to
9 wordsmith that just a little bit. That's not really kind
10 of a complete sentence there at the --

11 CHAIRMAN FESMIRE: Well, I'm damn sorry.

12 (Laughter)

13 COMMISSIONER OLSON: Shall be as follows, maybe,
14 because if you come here, it talks about or other methods
15 approved by the Division --

16 CHAIRMAN FESMIRE: Period.

17 COMMISSIONER OLSON: -- and then it -- if --

18 CHAIRMAN FESMIRE: Okay, if the concentration of
19 those constituents exceed the PQL --

20 MS. BADA: The second sentence is complete, it's
21 the first --

22 COMMISSIONER OLSON: Yeah, this one, then, become
23 incomplete, so -- unless you put here -- at the end here,
24 shall be as follows.

25 CHAIRMAN FESMIRE: No, shall be determined.

1 Concentrations of those constituents shall be determined.

2 Well, you can wordsmith it, but --

3 MS. BADA: Shall be determined by --

4 COMMISSIONER OLSON: Yeah, that's --

5 CHAIRMAN FESMIRE: They're going to do one
6 analysis of all the 3103 --

7 MS. BADA: All right.

8 CHAIRMAN FESMIRE: -- constituents. If any of
9 them exceed the PQL --

10 MS. BADA: That makes sense if we do that, that
11 takes care of it. That fixes it. Now it is.

12 COMMISSIONER OLSON: You can wordsmith it.

13 MS. BADA: No, I think it's fine.

14 COMMISSIONER OLSON: Okay.

15 CHAIRMAN FESMIRE: Okay, we're on page 21. We're
16 on change 9 from the stakeholder task force, (7).(c). Does
17 anybody have any proposed changes prior to (7).(c)?

18 COMMISSIONER BAILEY: Yes, the citations in A and
19 B should be 19.15.2.53. And in C the citation, the first
20 one, also needs to be .2.

21 CHAIRMAN FESMIRE: Okay, (6)(g) is -- (c) is
22 the -- we're going to have a little bit of a translation
23 problem here, because it starts talking about the closure
24 standards that we have just turned into a risk assessment.
25 So we're going to have to put in there a procedure whereby

1 the OCD approves the risk assessment or proposes an
2 alternative.

3 See, this is the -- This is the paragraph that
4 sort of gives them some wiggle room, the way it's written
5 now. Then the Division may review the adequacy of the
6 operator's --

7 COMMISSIONER OLSON: Well, this is wiggle room
8 for the Division to increase or --

9 CHAIRMAN FESMIRE: Right.

10 COMMISSIONER OLSON: -- adjust the financial
11 assurance --

12 CHAIRMAN FESMIRE: Right.

13 COMMISSIONER OLSON: -- correct.

14 CHAIRMAN FESMIRE: But we've got a procedure here
15 where they come in and -- you know, all we've done so far
16 is test for the constituents, see whether those
17 constituents exceed the PQL or the background number, and
18 then they come -- if they do, they come in with a site-
19 specific risk assessment.

20 MS. BADA: Okay, somehow you need to deal with
21 their -- I don't know if (c) is the place to do it, but...

22 CHAIRMAN FESMIRE: If there is no exceedence --
23 if there's no exceedence, we'll want to go one direction,
24 won't we?

25 MS. BADA: I think what you need to address is if

1 there is.

2 CHAIRMAN FESMIRE: Well, we'll have to address
3 both, don't we?

4 MS. BADA: Yeah, but you could do it by saying
5 what happens if there is a determination of --

6 CHAIRMAN FESMIRE: So (c) should read something
7 like --

8 COMMISSIONER OLSON: Well, I guess I'm not
9 understanding. Why is that a problem?

10 CHAIRMAN FESMIRE: Okay, they've come in --
11 they've got -- they've tested the soil --

12 COMMISSIONER OLSON: All right.

13 CHAIRMAN FESMIRE: -- they've found that there's
14 either an exceedence of the PQL or of the background.
15 Okay, then what happens?

16 COMMISSIONER OLSON: Then they do the risk
17 assessment.

18 CHAIRMAN FESMIRE: Okay, they've done the risk
19 assessment --

20 COMMISSIONER OLSON: Right.

21 CHAIRMAN FESMIRE: -- then what happens? Upon
22 approval of the --

23 COMMISSIONER OLSON: And now they're trying to
24 achieve whatever closure limits they came up with in the
25 risk assessment under (G).(6).

1 CHAIRMAN FESMIRE: So that's what we need to say.

2 COMMISSIONER OLSON: I think that's already -- I
3 was thinking that was already covered, just because it's --
4 it's just listing (G).(6) as a generality. The closure
5 standard for that is going to be set when they submit their
6 plan, get it approved by the Division, and I would think
7 they'd be kind of --

8 CHAIRMAN FESMIRE: So instead of --

9 COMMISSIONER OLSON: Wouldn't that be five years
10 down the road from once they get to that point? Because if
11 they're trying to close out the facility --

12 CHAIRMAN FESMIRE: Well --

13 COMMISSIONER OLSON: -- they're going to have
14 done some kind of sampling to identify these things.

15 CHAIRMAN FESMIRE: Do we have a -- do we -- Okay,
16 they've tested the constituents, they've done the risk
17 analysis, they come to us with the site-specific risk
18 analysis --

19 COMMISSIONER OLSON: Uh-huh.

20 CHAIRMAN FESMIRE: -- then we have to approve the
21 risk analysis and a closure plan, correct?

22 COMMISSIONER BAILEY: Uh-huh.

23 COMMISSIONER OLSON: Uh-huh.

24 CHAIRMAN FESMIRE: Okay.

25 COMMISSIONER BAILEY: If you just re-arrange

1 those words, if the operator cannot achieve the performance
2 standards of the approved closure plan --

3 CHAIRMAN FESMIRE: Perfect.

4 COMMISSIONER OLSON: Uh-huh.

5 CHAIRMAN FESMIRE: And not reference -- Did you
6 get that?

7 MS. BADA: I couldn't hear it.

8 CHAIRMAN FESMIRE: Okay. Do you want to -- She
9 didn't catch it.

10 COMMISSIONER BAILEY: If the operator cannot
11 achieve the performance standards of the approved closure
12 plan specified through paragraph (6) of subsection G, blah,
13 blah, blah --

14 CHAIRMAN FESMIRE: Have we required a closure
15 plan anywhere?

16 COMMISSIONER OLSON: That's what I was just
17 thinking.

18 COMMISSIONER BAILEY: Well, yeah, that's what you
19 did with --

20 CHAIRMAN FESMIRE: They've come in with the
21 sample, and they performed a risked assessment.

22 COMMISSIONER BAILEY: And then it says, or
23 background operations, perform site-specific risk
24 assessment --

25 CHAIRMAN FESMIRE: Right, after the risk

1 assessment we're going to need them to propose a plan.

2 COMMISSIONER BAILEY: Okay.

3 CHAIRMAN FESMIRE: Okay? A closure plan.

4 COMMISSIONER BAILEY: Well, they're -- they are
5 proposing closure standards --

6 CHAIRMAN FESMIRE: Right --

7 COMMISSIONER BAILEY: -- based upon --

8 CHAIRMAN FESMIRE: -- they'll need a plan to
9 reach those standards, won't they?

10 COMMISSIONER BAILEY: Yeah.

11 CHAIRMAN FESMIRE: Propose the closure plan. And
12 they're going to need a closure plan whether there's been
13 an exceedence or not, aren't they?

14 COMMISSIONER OLSON: Not necessarily.

15 MS. BADA: Is one required? Let's go back and
16 look.

17 COMMISSIONER OLSON: I don't recall one being
18 required.

19 MS. BADA: Yeah, they have to have a closure
20 plan.

21 CHAIRMAN FESMIRE: Okay. They have done a
22 closure plan. Whether there's been an exceedence or not,
23 they've done a closure plan?

24 MS. BADA: They have to do a closure plan,
25 C.(1).(i) on page 7.

1 COMMISSIONER BAILEY: On page what?

2 MS. BADA: Page 7, it's C.(1).(i).

3 COMMISSIONER OLSON: Well, that's a plan as part
4 of the permanent application --

5 CHAIRMAN FESMIRE: This is a -- you know, now
6 we --

7 COMMISSIONER OLSON: -- which might not
8 anticipate that they find --

9 CHAIRMAN FESMIRE: Right.

10 COMMISSIONER OLSON: -- these things, so that
11 financial assurance most likely is not going to be based
12 upon them finding the 3103 constituents. That's what I
13 would guess. It's going to be based upon the BTEX, TPH and
14 chloride achieving those levels, and the re-vegetation,
15 whatever else they need to do for a final closure.

16 CHAIRMAN FESMIRE: Okay.

17 COMMISSIONER OLSON: Because they -- we've kind
18 of set up with (6).(e), is almost a contingency, if this is
19 occurring this is what you will do.

20 MS. BADA: Okay, and in J.(1) you have -- the
21 Division required them to revise the closure plan. That's
22 on page 25.

23 CHAIRMAN FESMIRE: Okay, we've gone off on a
24 tangent here.

25 COMMISSIONER OLSON: Yeah, it's a little

1 confusing.

2 CHAIRMAN FESMIRE: Because we no longer have
3 treatment zone closure performance standards, but -- Oh,
4 no.

5 COMMISSIONER OLSON: Yeah, we do.

6 CHAIRMAN FESMIRE: Yeah, we do.

7 COMMISSIONER OLSON: Uh-huh.

8 CHAIRMAN FESMIRE: Yeah, we do. So we can just
9 leave it --

10 COMMISSIONER OLSON: It's almost like you could
11 just leave it the way it was written, myself, but --

12 CHAIRMAN FESMIRE: Right.

13 COMMISSIONER OLSON: -- because you --

14 MS. BADA: -- what you say for closure standards
15 are subject to Division approval --

16 CHAIRMAN FESMIRE: Yes, and --

17 MS. BADA: -- so right after saying human health
18 and the environment, comma, which shall be subject to --

19 COMMISSIONER OLSON: Uh-huh.

20 CHAIRMAN FESMIRE: Okay. So we're talking
21 about --

22 COMMISSIONER OLSON: Because I was thinking (c)
23 read okay the way it was, because the performance -- that
24 contingency for the 3103 constituents is built into the
25 closure performance standards that are in G.(6). And see,

1 the difference is here, they may not necessarily be closing
2 the facility, they may just be closing out a cell within
3 the facility.

4 CHAIRMAN FESMIRE: Right.

5 COMMISSIONER BAILEY: So we leave the language of
6 7.(c) the way it was except for the reference changing it
7 to .2?

8 COMMISSIONER OLSON: That's what I was thinking.

9 CHAIRMAN FESMIRE: Okay.

10 COMMISSIONER OLSON: I think it still works with
11 -- especially the way -- with our counsel's suggestion to
12 add in the Division approval to -- our prior language on
13 3103 standards.

14 CHAIRMAN FESMIRE: Okay, so in (6).(e),
15 subparagraph -- okay, (6).(e), they've done all this and
16 they've come to -- they've come to us with the analyses,
17 and they have proposed closure standards then, right? Is
18 that --

19 COMMISSIONER BAILEY: Yes.

20 CHAIRMAN FESMIRE: Okay. Then (b). Okay --

21 COMMISSIONER OLSON: So this is after they've
22 gotten those approved, if they can't meet it within five
23 years then the Division could always change their financial
24 assurance.

25 CHAIRMAN FESMIRE: Right, whether it's cell or

1 facility.

2 COMMISSIONER OLSON: Right.

3 CHAIRMAN FESMIRE: All right. The next one is
4 change 9, which is just the addition of the EPA -- I'm
5 sorry, change 10. Yeah. And I didn't have any problem
6 with that.

7 COMMISSIONER BAILEY: I'm fine with the rest of
8 the page.

9 COMMISSIONER OLSON: I'm fine. Uh-huh.

10 CHAIRMAN FESMIRE: The whole rest of the page?

11 Okay. Now 22, page 22, we've already made some
12 changes to H.(3). Are they still valid? Yes.

13 COMMISSIONER OLSON: Well, I guess we'd have a
14 change to H.(2).(b) then, if we're looking at the concept
15 here of changing 1000 to 500. Correct?

16 COMMISSIONER BAILEY: Yes.

17 CHAIRMAN FESMIRE: Yeah, because this is a small
18 landfarm.

19 COMMISSIONER OLSON: 1000 chlorides to 500
20 chlorides.

21 COMMISSIONER BAILEY: Will there be any posting
22 on OCD's website --

23 CHAIRMAN FESMIRE: -- of?

24 COMMISSIONER BAILEY: -- of any of these
25 registrations of small landfarms?

1 CHAIRMAN FESMIRE: What would be the -- I'm
2 worried about a chilling effect of -- The operators have to
3 get surface owner approval, right?

4 COMMISSIONER BAILEY: Uh-huh.

5 CHAIRMAN FESMIRE: What would be the advantage of
6 posting the locations?

7 COMMISSIONER BAILEY: Public information, so the
8 public is aware of how many of these small landfarms have
9 been registered and are under a three-year time limit.

10 CHAIRMAN FESMIRE: Good point, it would help us
11 make sure they didn't exceed the three years, right?

12 COMMISSIONER BAILEY: Right. So if there's
13 posting of the location, the date, the registration --

14 COMMISSIONER OLSON: That doesn't need to be in
15 the Rule though, does it?

16 COMMISSIONER BAILEY: Oh, yeah.

17 COMMISSIONER OLSON: Does it? Okay.

18 CHAIRMAN FESMIRE: Okay, like say (4).(a), OCD
19 shall post the date -- or the location of the small
20 landfarm, the date it was registered, and the operator on
21 its website within 30 days of that registration.

22 COMMISSIONER BAILEY: Uh-huh.

23 CHAIRMAN FESMIRE: How's that?

24 COMMISSIONER OLSON: What was that, the location?

25 CHAIRMAN FESMIRE: We'll want the location,

1 operator and the date it was registered, the idea being,
2 that will help us keep track of the three years and not let
3 them run on forever.

4 COMMISSIONER OLSON: Uh-huh, okay.

5 MS. BADA: Where was that?

6 COMMISSIONER OLSON: I'm actually thinking of
7 putting it in (a).

8 CHAIRMAN FESMIRE: Under (4)?

9 COMMISSIONER OLSON: Under (4).

10 CHAIRMAN FESMIRE: OCD shall post on its website
11 the location, the operator and the registration date of
12 each small landfarm.

13 Then we've got the closure --

14 COMMISSIONER OLSON: -- of each small landfarm.

15 CHAIRMAN FESMIRE: Right.

16 COMMISSIONER OLSON: Okay.

17 CHAIRMAN FESMIRE: And then we've got the closure
18 standard at 1000 on page 23. Do we want to reduce that to
19 500?

20 COMMISSIONER BAILEY: Yes.

21 COMMISSIONER OLSON: Uh-huh.

22 CHAIRMAN FESMIRE: That's about the fourth line
23 down.

24 COMMISSIONER BAILEY: Are we through with page
25 22?

1 CHAIRMAN FESMIRE: I'm sorry, I just went on.
2 Have we got another one we need to address?

3 COMMISSIONER BAILEY: Do we need to review
4 paragraph (3)?

5 COMMISSIONER OLSON: I thought we already --

6 CHAIRMAN FESMIRE: We've already made changes to
7 it.

8 COMMISSIONER BAILEY: Okay.

9 COMMISSIONER OLSON: Oh, wait, there's also
10 another 1000 listed there.

11 COMMISSIONER BAILEY: Yes, shall not exceed --

12 COMMISSIONER OLSON: Uh-huh.

13 COMMISSIONER BAILEY: But we're allowing
14 additional lifts either.

15 CHAIRMAN FESMIRE: Huh-uh.

16 COMMISSIONER BAILEY: So we scratch prior to
17 adding an additional lift.

18 COMMISSIONER OLSON: And it's also up above
19 there, it says of each lift as well.

20 COMMISSIONER BAILEY: Uh-huh.

21 MS. BADA: Of the lift?

22 COMMISSIONER OLSON: And you're saying strike
23 prior to making -- to adding an additional lift?

24 CHAIRMAN FESMIRE: Right. Did you get that?

25 MS. BADA: (Nods)

1 CHAIRMAN FESMIRE: Okay. So that paragraph
2 should read -- H.(3) should read, Waste management
3 standards. The operator shall spread and disk all
4 contaminated soils in a single eight-inch lift -- eight-
5 inch or less lift within 72 hours of receipt. The operator
6 shall conduct treatment zone monitoring to ensure that TPH
7 concentrations of each lift -- TPH concentrations, scratch
8 of each lift, as determined by EPA SW-846 method 8015M or
9 EPA method 418.1 or other EPA method approved by the
10 Division, does not exceed 2500 milligrams per kilogram and
11 that chloride concentration, as determined by EPA method
12 300.1, does not exceed 500 milligrams per kilogram. The
13 operator shall treat the soils by disking at least once a
14 month and by watering and addition of bioremediation
15 enhancing materials as needed.

16 COMMISSIONER OLSON: Uh-huh.

17 COMMISSIONER BAILEY: Okay.

18 CHAIRMAN FESMIRE: Anything else on 22?

19 COMMISSIONER BAILEY: No.

20 CHAIRMAN FESMIRE: 23, I had not issues with --

21 COMMISSIONER BAILEY: I do. (ii), remove
22 landfarmed soils that have not been or cannot be remediated
23 to the closure performance standards within three years,
24 because it's a three-year time limit for these small
25 landfarms.

1 CHAIRMAN FESMIRE: Did you want to --

2 COMMISSIONER BAILEY: Closure performance
3 standards within three years, or that the operator
4 determines to return to the original site or with Division
5 permission recycle and re-vegetate the cell filled in with
6 native soil, to the same standards as J.(1) -- as paragraph
7 (1) of section J of Rule 53, however you want that
8 reference to be.

9 COMMISSIONER OLSON: And that would be at the end
10 of the paragraph, that final part there?

11 COMMISSIONER BAILEY: End of that sentence --

12 COMMISSIONER OLSON: End of the sentence.

13 COMMISSIONER BAILEY: -- filled in with native
14 soil to the same standards as J.(1).

15 MS. BADA: Okay, I have a question. Since they
16 can't be for more than three years, why do we have within
17 five years up in (7).(c) on page 21? Is that in regular
18 landfarms? Okay, that's in regular, never mind. Confusing
19 myself.

20 COMMISSIONER OLSON: I think you should also add
21 to that that they remove it to an OCD-approved facility.

22 CHAIRMAN FESMIRE: On which -- on --

23 COMMISSIONER OLSON: On (b).(ii) of page 23.

24 COMMISSIONER BAILEY: Uh-huh.

25 CHAIRMAN FESMIRE: So read that to me. Remove

1 landfarm soils to an OCD facility?

2 COMMISSIONER OLSON: I think you have to put it
3 farther on down in the sentence. I think that would be,
4 remove landfarm soils that have not been or cannot be
5 remediated to the closure performance standards within
6 three years --

7 CHAIRMAN FESMIRE: Yes.

8 COMMISSIONER OLSON: -- to an OCD-approved or
9 Division-approved facility.

10 MS. BADA: So we want to be a surface waste
11 management facility?

12 COMMISSIONER OLSON: Or that the operator
13 determines to return to the original site or with the
14 Division permission recycle and re-vegetate the cell,
15 filled in with native soil to the --

16 CHAIRMAN FESMIRE: -- same standards as --

17 COMMISSIONER OLSON: -- same standards -- or the
18 standards of -- are consistent with subparagraph (1) of
19 section J, I guess. Consistent with the requirements of
20 subparagraph (1) of section J.

21 CHAIRMAN FESMIRE: Yeah.

22 COMMISSIONER BAILEY: Works for me.

23 COMMISSIONER OLSON: And it also needs that --
24 that language will need to be up above too, in (b).(i) --

25 COMMISSIONER BAILEY: Yes.

1 COMMISSIONER OLSON: -- re-vegetate soils
2 remediated to the closure performance standards of
3 subparagraph (1) of Section J.

4 CHAIRMAN FESMIRE: Okay, any other concerns on
5 page 23?

6 COMMISSIONER BAILEY: No.

7 COMMISSIONER OLSON: Huh-uh, that's it for me.

8 CHAIRMAN FESMIRE: Page 24?

9 COMMISSIONER BAILEY: No.

10 COMMISSIONER OLSON: I have one thing, just
11 organizationally, the way -- down on number 3, under
12 (3).(a), the last sentence talks about spray evaporation
13 systems, and it's under a section that's dealing with oil
14 and discharge of fluids. It seems to me that that last
15 sentence should just be removed and placed down under
16 (3).(d).

17 And what I would propose is, just strike the last
18 sentence of (3).(d) that talks about, spray systems shall
19 be operated such that spray-borne salt does not leave the
20 pond area. Strike that and move the sentence from (3).(a)
21 down so that sentence would read, Spray evaporation systems
22 shall be operated such that all spray-borne suspended or
23 dissolved solids remain within the perimeter of the pond's
24 lined portion.

25 It didn't make sense where it was placed up in --

1 CHAIRMAN FESMIRE: Yeah, no, that's --

2 COMMISSIONER OLSON: -- (3).(a).

3 COMMISSIONER BAILEY: That's good.

4 CHAIRMAN FESMIRE: Page 25. We've got in the
5 middle of the page -- this is --

6 COMMISSIONER OLSON: And this is the task force
7 language for changes to J.

8 CHAIRMAN FESMIRE: Right.

9 COMMISSIONER BAILEY: I'll agree with it.

10 COMMISSIONER OLSON: They are missing a word that
11 they had in there, in their memorandum. They had
12 scientifically documented ecological site description in
13 the memorandum.

14 CHAIRMAN FESMIRE: Is there a difference?

15 COMMISSIONER OLSON: I don't know, it's just the
16 way they had it in the -- on page 6 of the task force
17 memorandum.

18 COMMISSIONER BAILEY: What does that mean?

19 COMMISSIONER OLSON: I'm assuming they're just
20 trying to clarify what type of site description that
21 they're trying to do. They're trying just to evaluate the
22 ecological conditions of the native species.

23 COMMISSIONER BAILEY: In paragraph 2 -- are we
24 okay with --

25 COMMISSIONER OLSON: Is that okay?

1 COMMISSIONER BAILEY: Yeah.

2 CHAIRMAN FESMIRE: Yeah.

3 COMMISSIONER BAILEY: In paragraph 2, if we go
4 down six lines to the line that begins, remainder of the
5 financial assurance if the monitoring wells show no
6 contamination and the re-vegetation, and insert the
7 language, in accordance with subparagraph (1) of Section J,
8 and also use that same language like the second to the last
9 line of that same paragraph where it says, determines that
10 the operator has successfully re-vegetated the site in
11 accordance with subparagraph (1) of Section J.

12 COMMISSIONER OLSON: Could you do that again? I
13 got the first part, I think.

14 COMMISSIONER BAILEY: Okay, and then the line
15 that begins, determines --

16 COMMISSIONER OLSON: Okay.

17 COMMISSIONER BAILEY: -- that the operator has
18 successfully re-vegetated the site in accordance --

19 COMMISSIONER OLSON: Okay, the same language.

20 COMMISSIONER BAILEY: Same language.

21 And that's all I have on that page.

22 CHAIRMAN FESMIRE: Anything else?

23 COMMISSIONER OLSON: I don't have anything else.

24 CHAIRMAN FESMIRE: Page 26.

25 COMMISSIONER BAILEY: Same language in paragraph

1 (d), the third or fourth line up from the bottom, the line
2 that begins, applicable, reserving such amount as may be
3 reasonably necessary for post-closure monitoring and re-
4 vegetation in accordance with subparagraph (1) of J.

5 And also at the very end of that paragraph where
6 it references re-vegetation, in accordance with J.(1).

7 And that's all I have on that page.

8 CHAIRMAN FESMIRE: Okay, page 27.

9 COMMISSIONER BAILEY: Same language, (d).(ii),
10 soils remediated to the foregoing standards and left in
11 place are re-vegetated to standards of J.(1).

12 MS. BADA: Okay -- All right, we have a different
13 standard up in (b).(ii).

14 CHAIRMAN FESMIRE: (b).(ii)?

15 MS. BADA: Yeah, it's right at the top of page
16 27.

17 CHAIRMAN FESMIRE: That is a different standard
18 than J.(1)?

19 COMMISSIONER BAILEY: Yes.

20 CHAIRMAN FESMIRE: Oh, yes, let's change that to
21 the J.(1) standard.

22 MS. BADA: And I think they had some --

23 COMMISSIONER OLSON: There's some --

24 MS. BADA: -- concern about the rooting, and if
25 you use perennial plants the roots can be pretty deep. I

1 think that's why the standard was different from landfills.

2 COMMISSIONER OLSON: Yeah, because you don't want
3 something that's going to penetrate your cover.

4 CHAIRMAN FESMIRE: Right. So we don't need to
5 change it to the J.(1) standard.

6 MS. BADA: I think we just need to reference it
7 to (b).(ii).

8 CHAIRMAN FESMIRE: What do you mean?

9 MS. BADA: I think if we just reference it to the
10 standard above -- Okay, this is landfarm closure. Okay,
11 now I am getting confused. Landfill, okay, we are --

12 CHAIRMAN FESMIRE: Yeah, this is landfill, so --

13 MS. BADA: We do need to say J.(1).

14 CHAIRMAN FESMIRE: Pardon?

15 MS. BADA: We do need to say J.(1). It's getting
16 late and I'm not tracking well.

17 COMMISSIONER OLSON: In (d).(ii).

18 MS. BADA: Yeah.

19 COMMISSIONER BAILEY: Are we ready for (d).(iii)
20 yet?

21 MS. BADA: Uh-huh.

22 COMMISSIONER BAILEY: Landfarmed soils that have
23 not been or cannot be remediated to the above standards are
24 removed to a Division-approved disposal site, comma, and
25 the landfarm remediation area is filled in with native soil

1 and re-vegetated in accordance with J.(1).

2 COMMISSIONER OLSON: Would you repeat that again?

3 COMMISSIONER BAILEY: Landfarmed soils that have
4 not been or cannot be remediated to the above standards are
5 removed to a Division-approved disposal site, and the
6 landfarm remediation area is filled in with native soil and
7 re-vegetated in accordance with J.(1).

8 And then paragraph (5) at the bottom of the page,
9 if nobody else has anything.

10 CHAIRMAN FESMIRE: I don't.

11 COMMISSIONER BAILEY: Okay --

12 COMMISSIONER OLSON: Huh-uh.

13 COMMISSIONER BAILEY: -- I think paragraph (5)
14 needs to reference the owner, not the operator, because
15 it's the owner of the land who determines the ultimate use
16 of that land.

17 CHAIRMAN FESMIRE: We had this discussion at one
18 time. What if it's leased land?

19 COMMISSIONER BAILEY: Then it's still the
20 owners --

21 COMMISSIONER OLSON: Uh-huh.

22 COMMISSIONER BAILEY: -- who determines what the
23 end use of that surface should be.

24 CHAIRMAN FESMIRE: Speaking for one of the bigger
25 owners in the State, huh?

1 COMMISSIONER BAILEY: Yeah.

2 CHAIRMAN FESMIRE: Okay.

3 (Laughter)

4 COMMISSIONER BAILEY: So on that first line
5 delete the words "operator or", and on the second line
6 delete the words "operator or".

7 COMMISSIONER OLSON: The second one, do you want
8 to keep "operator"? Because that's where they're going to
9 implement alternate treatment, so you might want to keep
10 that one. Because most likely the operator, I would think,
11 would be doing it because the owner wants to do something
12 different. Or maybe not.

13 CHAIRMAN FESMIRE: Well, I think that emphasizes
14 that the owner has the decision, not the operator.

15 COMMISSIONER BAILEY: Uh-huh.

16 CHAIRMAN FESMIRE: The operator can do it with
17 the owner's consent, but the owner gets to make the
18 decision.

19 COMMISSIONER BAILEY: Uh-huh.

20 COMMISSIONER OLSON: Okay.

21 CHAIRMAN FESMIRE: Anything else on 27?

22 COMMISSIONER BAILEY: No.

23 CHAIRMAN FESMIRE: Okay, the last two, changes 12
24 and 13 -- no, change 13.

25 COMMISSIONER BAILEY: The controversial

1 grandfathering.

2 CHAIRMAN FESMIRE: And the objection was to the
3 10 years, right?

4 MS. BADA: I think the objection was to the
5 exception, but certainly to the 10 years.

6 COMMISSIONER OLSON: I mean, CRI and OGAP both
7 made the comment that there's no evidence in the record to
8 support this addition.

9 MS. BADA: Essentially what it does, it would
10 allow your landfarm to keep accepting chlorides above your
11 limit.

12 CHAIRMAN FESMIRE: I'm not predisposed to do
13 that. I don't think Commissioner Bailey is either.

14 COMMISSIONER BAILEY: To what, accept 10 years?

15 CHAIRMAN FESMIRE: Yeah, allow them 10 years to
16 continue to do what they've been doing.

17 COMMISSIONER BAILEY: A permit is for five years,
18 isn't it?

19 CHAIRMAN FESMIRE: Under this system, yeah.

20 COMMISSIONER OLSON: A permit is for 10 years.

21 COMMISSIONER BAILEY: Ten years.

22 COMMISSIONER OLSON: The financial assurance is
23 reviewed on a five-year basis.

24 CHAIRMAN FESMIRE: That's what I was thinking of.

25 COMMISSIONER OLSON: I think that was kind of the

1 main thing I was looking at. I kind of had to agree with,
2 you know, OGAP and CRI that it seems like -- There is no
3 real evidence, that was something new that was presented at
4 the hearing to support that.

5 Essentially, this has the effect of closing out
6 all landfarm cells -- all existing landfarm cells in 10
7 years. Am I reading that correctly? And then at that
8 point essentially -- does that effectively make everything
9 -- if they want to keep using it, they have to file for a
10 permit on it, almost like it's a removal or --

11 CHAIRMAN FESMIRE: Hang on just a sec.

12 COMMISSIONER BAILEY: Marbob makes a good point
13 in their paragraph, that third paragraph.

14 CHAIRMAN FESMIRE: Closure standards should be
15 completed according to the standards in place at the time
16 of the permit approval.

17 MS. BADA: I don't have a problem with the
18 closure standards, but what they want to do is make the
19 operational requirements also apply, so it also would apply
20 to your waste-acceptance standards.

21 COMMISSIONER BAILEY: Well, Marbob says, new
22 material received should comply with the new rules.

23 CHAIRMAN FESMIRE: Yeah, and that's not what this
24 will do.

25 MS. BADA: That's not what it does, because if

1 you read it, except as provided in paragraph 2.

2 COMMISSIONER OLSON: Uh-huh. And it says be
3 closed within 10 years. Well closed, does that mean it's
4 re-vegetated within 10 years, or just they stopped
5 operating it?

6 CHAIRMAN FESMIRE: Closed according to the
7 closure standards.

8 COMMISSIONER OLSON: Of its existing permits?

9 CHAIRMAN FESMIRE: Right.

10 COMMISSIONER BAILEY: Which essentially is what
11 Marbob is saying. If there has been a brand-new facility
12 approved, they have the 10 years. And the closure
13 standards of the existing permit continue throughout the
14 term of the existing permit.

15 Talking out loud, I can see where if a facility
16 is approved under one set of standards for a certain term,
17 that's almost a contract. I mean, you lawyers may not
18 consider it a contract, but financial commitments have been
19 made, plans have been made, business arrangements have been
20 made, based on that permit.

21 COMMISSIONER OLSON: Which currently has no
22 limit.

23 CHAIRMAN FESMIRE: It has no end.

24 COMMISSIONER OLSON: Uh-huh.

25 COMMISSIONER BAILEY: But it has a 10-year term,

1 doesn't it?

2 COMMISSIONER OLSON: Not the new -- not the
3 current ones.

4 COMMISSIONER BAILEY: The current ones don't have
5 a 10-year term? I thought you said they had to be renewed
6 every 10 years.

7 COMMISSIONER OLSON: Under this -- under --

8 CHAIRMAN FESMIRE: Under this --

9 COMMISSIONER OLSON: -- this rule, but the
10 current 711 --

11 CHAIRMAN FESMIRE: -- 711 --

12 COMMISSIONER OLSON: -- doesn't have a renewal or
13 term limit on it.

14 COMMISSIONER BAILEY: So the ones that were
15 permitted under 711 --

16 CHAIRMAN FESMIRE: Are in perpetuity.

17 COMMISSIONER OLSON: Uh-huh.

18 COMMISSIONER BAILEY: Oh.

19 CHAIRMAN FESMIRE: My thought on it would be
20 that, you know, the objective is to eliminate the -- for
21 lack of a better word, the abuses that occurred under 711.
22 If we do it this way, we could conceivably end up with two
23 classes of landfarms, ones that can accept salts and ones
24 that can't. The new ones can't. Which means that new,
25 well-prepared, well-run facilities would basically be

1 losing business to old facilities that are just
2 concentrating materials that they could dispose of under
3 711 and not under 53.

4 I think the option ought to be to close landfarms
5 under the existing permit.

6 COMMISSIONER OLSON: And that's what this would
7 do, but I guess --

8 CHAIRMAN FESMIRE: -- or --

9 COMMISSIONER OLSON: -- the key is that -- yeah,
10 that's what Marbob had suggested, that new material
11 received at these facilities should comply with the new
12 rules --

13 CHAIRMAN FESMIRE: Yeah.

14 COMMISSIONER OLSON: -- so that at the least
15 there's an even footing on waste acceptance, and it's
16 giving an allowance for closure under their existing
17 permit, but they have to do it within --

18 COMMISSIONER BAILEY: -- 10 years.

19 COMMISSIONER OLSON: -- 10 years.

20 CHAIRMAN FESMIRE: So give them 10 years to close
21 these old facilities under their permits?

22 COMMISSIONER OLSON: Yeah.

23 CHAIRMAN FESMIRE: But make them take material
24 under 53?

25 COMMISSIONER OLSON: Well, that's what Marbob

1 suggested.

2 CHAIRMAN FESMIRE: Is there any evidence in the
3 record that these people would need 10 years to close these
4 facilities?

5 MS. BADA: No evidence --

6 COMMISSIONER OLSON: No.

7 MS. BADA: -- in the record at all in this --

8 COMMISSIONER OLSON: I think that's the biggest
9 problem I have with this, that there isn't any record as to
10 what we should support on this.

11 I mean, Marbob, but there's, you know, kind of
12 some problems there, how to -- How do we address it without
13 any evidence?

14 MS. BADA: Well, they can request a waiver if
15 they need to.

16 CHAIRMAN FESMIRE: Yes, I -- This is the only one
17 that I've said this, but I think the best course of action
18 here is to not accept the committee recommendation and to
19 leave section L the way it was written, where all existing
20 facilities shall comply with operational, waste-acceptance
21 and closure requirements provided in this -- in 53. Major
22 modifications shall comply with the requirements of 53.
23 They continue -- Yeah, and allow them to close under their
24 original permit.

25 The only thing I might do is add a shorter length

1 of time to get that done. If they're operating under 53,
2 the maximum cell size is going to be -- 10 acres?

3 MS. BADA: I believe so.

4 CHAIRMAN FESMIRE: So it shouldn't take 10 years
5 to fill a 10-acre cell, so...

6 COMMISSIONER OLSON: See, there's another -- Let
7 me see if I got this right, then. If that was the case,
8 would they still be permitted in perpetuity like they are
9 now?

10 CHAIRMAN FESMIRE: Yes. Well, no, because they
11 would be operating under 53. The only thing that they
12 would be doing was closed under their permit.

13 COMMISSIONER OLSON: But they're subject to the
14 operational, the waste-acceptance and the closure
15 requirements, so I don't think that -- The permitting
16 requirements were separate, and I think that's where the
17 term limits come in, which is not here. So that might have
18 been the concession that they were looking at, that, look,
19 right now we're allowed to have this thing --

20 CHAIRMAN FESMIRE: -- forever.

21 COMMISSIONER OLSON: -- essentially forever,
22 except we've got to meet the closure requirements, you
23 know, and -- the operational, waste and closure
24 requirements.

25 But if we do this, technically all these things

1 will be closed out in 10 years and then will be on -- just
2 like everybody else, on renewals and -- or new permits,
3 whatever.

4 Just trying to think this through. I mean, it's
5 problematic that we don't have evidence on it, because --
6 but I'm just wondering, if we kept that one the way it is,
7 does it allow them just to continue in perpetuity, without
8 any renewals, then, at that point?

9 CHAIRMAN FESMIRE: If they're allowed to operate
10 under 711, I don't believe that there is a re-permitting
11 requirement.

12 COMMISSIONER BAILEY: Except they will fill up
13 their cells, and they'll have to have new cells.

14 CHAIRMAN FESMIRE: Yeah, but it's --

15 COMMISSIONER BAILEY: -- which are major
16 modifications.

17 COMMISSIONER OLSON: But you could have a pretty
18 big facility. It might take them a long time to fill up
19 their cells.

20 COMMISSIONER BAILEY: More than 10 years?

21 COMMISSIONER OLSON: I don't know.

22 CHAIRMAN FESMIRE: It's not going to change, the
23 longer we stare at it. I've made my recommendation. I
24 don't think there's any need to change what was originally
25 written in this one.

1 COMMISSIONER BAILEY: Okay.

2 COMMISSIONER OLSON: Yeah, I'd probably have to
3 go and just say we don't have the evidence in the record to
4 support that at that point.

5 CHAIRMAN FESMIRE: Okay.

6 COMMISSIONER BAILEY: Okay.

7 CHAIRMAN FESMIRE: Are you available tomorrow?

8 COMMISSIONER BAILEY: Yes.

9 CHAIRMAN FESMIRE: Are you available tomorrow?

10 COMMISSIONER OLSON: Yes.

11 CHAIRMAN FESMIRE: Okay.

12 COMMISSIONER OLSON: Do you want to try to --
13 There's that one thing left that I had on, you know,
14 whether landfills should be 100 feet to groundwater. I
15 think that's the only thing we had left in there, but we --
16 do you want to save that and think about that till
17 tomorrow?

18 CHAIRMAN FESMIRE: Let's think about that one --

19 COMMISSIONER OLSON: Okay

20 CHAIRMAN FESMIRE: -- and start tomorrow.

21 What I intend to do now is to adjourn until nine
22 o'clock tomorrow morning. We will at that time take up a
23 couple of remaining issues and then proceed through the
24 comments and the documents that were filed in this case.
25 I'm assuming that we will be at least functionally done

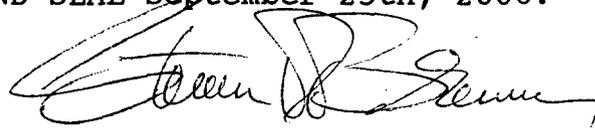
CERTIFICATE OF REPORTER

STATE OF NEW MEXICO)
) SS.
 COUNTY OF SANTA FE)

I, Steven T. Brenner, Certified Court Reporter and Notary Public, HEREBY CERTIFY that the foregoing transcript of proceedings before the Oil Conservation Commission was reported by me; that I transcribed my notes; and that the foregoing is a true and accurate record of the proceedings.

I FURTHER CERTIFY that I am not a relative or employee of any of the parties or attorneys involved in this matter and that I have no personal interest in the final disposition of this matter.

WITNESS MY HAND AND SEAL September 25th, 2006.



STEVEN T. BRENNER
 CCR No. 7

My commission expires: October 16th, 2006