

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:)

CASE NO. 13,586

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)

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

COMMISSION HEARING

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

Volume IX - September 22nd, 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-22nd, 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.

2006 OCT 5 PM 3:15

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I N D E X

SEPTEMBER 22nd, 2006 (VOLUME IX):
Commission Hearing
CASE NO. 13,586

APPEARANCES	1885
DISCUSSION OF GLOBAL ISSUES:	
Chloride concentration	1888
Depth to water and siting considerations	1897
DISCUSSION OF SPECIFIC COMMENTS RECEIVED:	
New Mexico Oil and Gas Association	1903
Gandy Marley, Inc.	1905
Industry Committee	1906
Oil and Gas Accountability Project	1911
Independent Petroleum Association of America	1911
Controlled Recovery, Inc.	1913
New Mexico Citizens for Clean Air and Water	1915
Marbob	1915
REPORTER'S CERTIFICATE	1919

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* * *

1 WHEREUPON, the following proceedings were had at
2 9:00 a.m.:

3 CHAIRMAN FESMIRE: Okay, let the record reflect
4 that this is a continuation of Cause Number 13,586, the
5 Application of the New Mexico Oil Conservation Division for
6 repeal of existing Rules 709, 710 and 711 concerning
7 surface waste management and the adoption of new Rules
8 governing surface waste management.

9 The record should also reflect that Commissioner
10 Bailey, Commissioner Fesmire and Commissioner Olson are all
11 present, therefore a quorum is present.

12 I believe where we left of yesterday afternoon
13 was, we were -- we had gone through the proposals, the
14 proposed Rules, made some changes, looked at some of the
15 recommended changes from constituents, specifically the
16 task force, the stakeholders' task force. And we're
17 getting ready to do two things this morning.

18 We're going to address two sort of global issues,
19 the first one being the chloride concentration, the other
20 one the depth to water and the siting considerations.

21 And then I intend to go through some of the
22 comments that we received. Many of them were redundant and
23 I don't expect to spend an awful lot of time going over
24 issues that we've already addressed, but I would like to go
25 through some of the individual comments.

1 I think we ought to start with the two issues,
2 the two global issues, and see if we can come up with a
3 process for handling that. Commissioner Olson, I know you
4 and Commissioner Bailey had concerns. Do you have anything
5 you'd like to address before we get into it?

6 COMMISSIONER OLSON: I think we can just address
7 it as we start discussing it.

8 CHAIRMAN FESMIRE: Okay, Commissioner Bailey, do
9 you have anything you want to say before we start?

10 COMMISSIONER BAILEY: No, I'm ready to get
11 started.

12 CHAIRMAN FESMIRE: Okay. One of the issues that
13 came up yesterday was the 1000 parts-per-million chlorides,
14 as opposed to the 500 part-per-million chloride limit, and
15 that appears several places in the proposed regulations.
16 Commissioner Bailey, did you have something you wanted to
17 propose about that?

18 COMMISSIONER BAILEY: We all have concerns about
19 the 1000-milligram-per-kilogram concentrations of
20 chlorides, as far as the impact to groundwater and to
21 vegetation. We talked yesterday that the larger landfarms,
22 not the smaller landfarms, would be more managed than
23 smaller landfarms, would be able to use the bioremediation
24 techniques that were given to us by several expert
25 witnesses, but particularly by Dr. Sublette.

1 Yesterday we talked that maybe 1000 would be an
2 appropriate amount for chloride concentrations, but when we
3 talk to depth to groundwater as one of the siting
4 requirements I mentioned that my agreement to 50 feet to
5 depth to groundwater was provisional. Reflection leads me
6 to propose a compromise where if 50 feet is the depth to
7 groundwater for a landfarm, that the chloride concentration
8 should be kept at 500 milligrams per kilogram because of
9 the proximity of the water. But with 100 feet as the depth
10 to groundwater, if a facility is located in an area where
11 groundwater is not found above 100 feet, then possibly the
12 1000-milligram-per-kilogram concentration may be
13 appropriate.

14 I just wanted to throw that out as a potential
15 way of dealing with the realities of waste disposal or
16 waste remediation. The safety concerns for protection of
17 groundwater and acknowledgement that the bioremediation
18 endpoint as recommended by the task force and by -- and
19 included in our Rule, was for a concentration of EC less
20 than 4 and an SAR of -- what was it, less than 13? --

21 CHAIRMAN FESMIRE: Thirteen, yes.

22 COMMISSIONER BAILEY: -- which would ensure re-
23 vegetation for those landfills that use bioremediation, no
24 matter what the depth to groundwater.

25 CHAIRMAN FESMIRE: So your reasoning is that the

1 preferential pathways testimony that we've heard, you know,
2 and the modeling, but probably more likely the preferential
3 pathways and the risk of preferential pathways to the
4 groundwater, would justify the reduction in the chloride
5 concentration in our Rules and allow us to, within the
6 confines of the testimony that we've heard, accept higher
7 chloride concentrations where there's a greater depth of
8 water, as opposed to a lower chloride concentration with
9 the shallower depth to water, and that that's based
10 entirely on the probability and the -- continuousness? for
11 lack of a better word; I'm sure there's a better word -- of
12 the preferential pathways that would put that groundwater
13 at risk; is that -- ?

14 COMMISSIONER BAILEY: Sure.

15 (Laughter)

16 CHAIRMAN FESMIRE: Commissioner Olson, do you
17 have -- You're the hydrologist.

18 COMMISSIONER OLSON: Well, I agree. I think -- I
19 like the concept of it, because 50 feet to groundwater is
20 relatively shallow. And there are large numbers of areas
21 down there with shallow groundwater, a lot of them -- you
22 get down in the Monument area, a lot of that is down around
23 25 feet, 20, 25 feet, so it's quite shallow. In some of
24 those areas they might not be able to have them, but just
25 the idea that the groundwater is that shallow and highly

1 susceptible to groundwater contamination -- there's a lot
2 of preferential pathways with the caliche down there, and I
3 think it's a reasonable assumption on our part that there's
4 a high likelihood for groundwater contamination in those
5 areas when it's 50 -- in the range of, you know, less than
6 100 feet, essentially 100 to 50 feet. So I would support
7 that.

8 I think -- One thing I was wondering, would that
9 apply to small landfarms, or that's just for --

10 COMMISSIONER BAILEY: Just for the larger --

11 COMMISSIONER OLSON: For the larger, the land --

12 COMMISSIONER BAILEY: -- the small landfarms --

13 COMMISSIONER OLSON: -- farms --

14 COMMISSIONER BAILEY: -- would be -- retain that

15 500 --

16 COMMISSIONER OLSON: Uh-huh.

17 COMMISSIONER BAILEY: -- limit.

18 COMMISSIONER OLSON: Okay. I think I agree with
19 that and the rationale that you're putting forward.

20 CHAIRMAN FESMIRE: And the likelihood of
21 preferential pathways reaching all the way down to the
22 water table is a function of the depth to groundwater, and
23 therefore you're looking at this as sort of a compromise
24 based on the reality of the potential of preferential
25 pathways and the contamination that would result; is that

1 correct?

2 COMMISSIONER OLSON: Yeah, in a lot of areas down
3 there you have pretty extensive caliche zones, and those
4 are highly fractured, and a lot of times they're in the
5 range of, you know, 20 to 30 feet thick. So with those
6 preferential pathways you're leaving a small distance of
7 actual vadose zone to be encountered before the groundwater
8 zone itself, so...

9 CHAIRMAN FESMIRE: And any attenuation that would
10 occur wouldn't occur in the preferential pathways; it would
11 have to occur in the vadose zone, and the probability of
12 the vadose zone being sufficient to get those chloride
13 concentrations to something acceptable would be --

14 COMMISSIONER OLSON: Uh-huh.

15 CHAIRMAN FESMIRE: -- rather limited, right?

16 COMMISSIONER OLSON: That's correct.

17 CHAIRMAN FESMIRE: Okay.

18 COMMISSIONER OLSON: And I think also some other
19 areas -- you know, you get up in the San Juan Basin and you
20 may not have those preferential pathways, but you still
21 have a relatively shallow depth to deal with in that
22 circumstance, and I think there it's still warranted for
23 protection of groundwater.

24 CHAIRMAN FESMIRE: Okay. So we would be asking
25 counsel to make the changes necessary to coordinate the

1 depth to groundwater and the chloride concentrations in
2 both siting standards and in the closure standards?

3 COMMISSIONER BAILEY: Yes.

4 COMMISSIONER OLSON: Uh-huh.

5 CHAIRMAN FESMIRE: Okay. And the -- I'd like to
6 revisit just a minute the 500-parts-per-million standard
7 for small landfarms. That is well within what the evidence
8 before us shows would be -- re-vegetatable? I didn't
9 stumble on that word; I was surprised.

10 And the larger landfarms with the depth to
11 groundwater of 100 feet or greater, we still have the
12 question of the ability to re-vegetate to standards in the
13 Rule at 1000 parts per million, but I think the evidence
14 shows that it would be achievable, or at least there's a
15 high likelihood that it would be achievable under these
16 standards. Is --

17 COMMISSIONER OLSON: Well, I'd also say that
18 there is -- as an assurance, there is financial assurance
19 in place to guarantee that they meet those closure
20 requirements.

21 CHAIRMAN FESMIRE: Okay.

22 COMMISSIONER BAILEY: And the bioremediation
23 endpoint is equivalent to the 500 parts of chloride.

24 COMMISSIONER OLSON: That's correct.

25 CHAIRMAN FESMIRE: Okay.

1 MS. BADA: How do you address those landfarms
2 that don't use bioremediation?

3 COMMISSIONER OLSON: For the bioremediation
4 endpoint?

5 COMMISSIONER BAILEY: They have the 1000.

6 MS. BADA: And are you okay with the difference
7 between the two?

8 COMMISSIONER OLSON: I know I am. I think they
9 have the ability to actively manage the facility, and they
10 have the ability to work to achieve those levels, and an
11 incentive to do it because of the financial assurance that
12 they have posted with the facility. I believe it's capable
13 for them to work on the facility and achieve those re-
14 vegetation requirements of J.

15 CHAIRMAN FESMIRE: The two standards aren't
16 mutually exclusive.

17 COMMISSIONER OLSON: Right.

18 CHAIRMAN FESMIRE: I mean, they have two
19 standards that they have to achieve. If they can achieve
20 one at the higher chloride concentration, that would be
21 acceptable to the Division. If they can -- I mean, if they
22 can achieve both at the higher standard, that would be
23 acceptable. If they can't achieve the re-vegetation
24 standard, then they've got to do something about
25 remediating some small portion or some portion of the

1 chloride contamination to the point that they can reach the
2 second.

3 MS. BADA: Okay, since chloride is not
4 remediable, what --

5 CHAIRMAN FESMIRE: There may be some need to
6 remove a portion of the soil that's in there.

7 MS. BADA: Are you concerned that they may dilute
8 it using fresh soil?

9 COMMISSIONER OLSON: Actually, I'm not. I mean,
10 they may be able to go and try -- almost like a cover
11 system, they may be able to come back and put some material
12 back into it to re-work back into the landfarm to help
13 encourage the re-vegetation.

14 CHAIRMAN FESMIRE: I believe that the evidence
15 shows that there is a substantial likelihood that they will
16 be able to re-vegetate to the standard in the large farms,
17 at the higher chloride standard, and if they are able to do
18 that, that's entirely acceptable. Like I said, the two
19 standards are not -- in my mind they're not mutually
20 exclusive. I mean, they're two targets that they have to
21 meet, and if they have to make some sort of slight
22 remediation to reach the re-vegetation standard, that may
23 be what's necessary. That's a risk that the operator can,
24 and I think is -- will probably be willing to take.

25 MS. BADA: And so what makes you comfortable with

1 that is that the large landfarms have financial assurance
2 and the small don't?

3 CHAIRMAN FESMIRE: Right. And the large
4 landfarms with the financial assurance will have the
5 incentive to continue to work that soil and, if anything,
6 work harder to achieve the re-vegetation standard. And
7 they have people in place, people on site every day.

8 And while, you know, there is some risk to the
9 operator, I believe that these standards make it an
10 acceptable risk, and that the data shows that in most cases
11 they will be able to achieve both standards.

12 Again, the larger size, the fact that it's
13 manned, more regularly worked, more attention is paid to
14 it --

15 MS. BADA: And how do you address the comments
16 that you are concentrating more soil on a larger landfarm,
17 so therefore actually your chloride concentration
18 increases, compared to a small landfarm?

19 CHAIRMAN FESMIRE: Well, it's going to be mass-
20 dependent, of course, but the concen- -- the sampled
21 concentrations, in the scheme that we've devised here,
22 shouldn't be appreciably different, except for the factors
23 that we've already identified.

24 You're referring to the dilution/attenuation
25 factors?

1 MS. BADA: I'm referring to the comments from CRI
2 and Dr. Neeper, raising that concern.

3 CHAIRMAN FESMIRE: Yes. Counsel, do you
4 understand the wish of the Commission to make those
5 changes?

6 MS. BADA: Uh-huh.

7 CHAIRMAN FESMIRE: And I think that's --
8 basically the idea is, we would correspond the 500-parts-
9 million chloride level in large land- -- in commercial
10 facilities and centralized facilities, to the shallower
11 depth to water, 500 to 50, and then the higher chloride
12 concentrations to the 100 foot to water. Okay?

13 MS. BADA: (Nods)

14 COMMISSIONER OLSON: Based on protection of
15 groundwater.

16 And then I have the other issue on depth to
17 groundwater of landfills. Because they are permanent
18 disposal facilities and are not remediating material, it
19 would seem appropriate, based upon the testimony that we
20 had given to us, that that -- those facilities be sited in
21 areas where the depth to groundwater is 100 feet or
22 greater.

23 And that is consistent as well, according to the
24 testimony that was presented to us, with the New Mexico
25 Environment Department's solid waste regulations. So it

1 gives us consistency within the state for landfills.

2 COMMISSIONER BAILEY: I agree with you. The
3 permanent disposal of materials that cannot be remediated,
4 that need to just be isolated, should be, in truth,
5 isolated. And the 100 feet provides a much greater
6 assurance of that isolation and protection of the
7 groundwater at whatever depth, 100 feet is more acceptable.

8 COMMISSIONER OLSON: I'm probably -- maybe like
9 to add that in all likelihood these are going to be
10 contaminants that are highly contaminated. They can't go
11 to a landfarm to be remediated, so these are materials that
12 are, like I said, in all likelihood highly contaminated,
13 and there is a high probability for groundwater
14 contamination from these type of constituents.

15 COMMISSIONER BAILEY: Yes.

16 MS. BADA: May I ask how you want to word E.(1)?
17 Right now it says that no surface waste facility shall be
18 located where groundwater is less than 50 feet below.

19 COMMISSIONER OLSON: I could make a suggestion
20 that we add a sentence in front of that that says that no
21 landfill shall be located where groundwater is less than
22 100 feet below the lowest elevation at which waste will be
23 placed at the facility. And then the current sentence
24 there now becomes the second sentence and would read, no
25 other surface waste management facility --

1 MS. BADA: But you --

2 COMMISSIONER OLSON: I guess we'll have to work
3 that in --

4 MS. BADA: Right.

5 COMMISSIONER OLSON: -- with what we've done --

6 MS. BADA: Right, I was just --

7 COMMISSIONER OLSON: -- right.

8 MS. BADA: -- wondering, do you want to say
9 except for small landfarms there, which can be 50 feet, or
10 do you want a sentence in your regular landfarms that the
11 depth can be 50 if the chloride level is 500 or 1000 if
12 it's a hundred?

13 CHAIRMAN FESMIRE: Counsel, I think you
14 understand what we're trying to achieve --

15 MS. BADA: Right, I just --

16 CHAIRMAN FESMIRE: -- we'll probably leave it up
17 to you to --

18 MS. BADA: Okay --

19 CHAIRMAN FESMIRE: -- draft the --

20 MS. BADA: -- as long as you don't have a --

21 CHAIRMAN FESMIRE: -- exact language.

22 COMMISSIONER OLSON: Yeah, I'm almost wondering
23 whether you'll need to have maybe a -- under (1), a
24 category maybe for depth to groundwater, and then different
25 categories for the different facilities within that. I'm

1 thinking that's probably the best way, so it doesn't get
2 all muddled up in one -- couple sentences.

3 MS. BADA: So it would only be the landfarms?
4 Are there any type of tanks or anything I'm not thinking
5 of?

6 COMMISSIONER OLSON: Well, you could have a pit-
7 only facility. But, you know, those aren't permanent
8 facilities, I guess. You know, they're used for a period
9 of time for a specific purpose to evaporate contaminants,
10 evaporative ponds essentially.

11 MS. BADA: Okay.

12 COMMISSIONER OLSON: And I think what I was
13 thinking was, they have adequate protections in place with
14 the double lining, leak-detection, and once they go to
15 closure there's not a source left to contaminate
16 groundwater as long as they don't contaminate it during
17 their operation. And I think that's probably consistent
18 with, you know, what's going on with the pit rules
19 themselves, so...

20 MS. BADA: Okay, so if I divide it into
21 landfills, small landfarms and landfarms, I won't be
22 leaving something out, but --

23 COMMISSIONER OLSON: Well, I think you'd probably
24 need to somehow address other --

25 MS. BADA: -- other facilities.

1 COMMISSIONER OLSON: -- other facilities, which
2 could be the evaporative ponds, which could be permitted
3 under 711.

4 MS. BADA: And you want to keep --

5 COMMISSIONER OLSON: Well, I guess -- well, are
6 they permanent? Would they come under there, just solely
7 evaporative ponds, or would that be under the pit rule?

8 CHAIRMAN FESMIRE: No, that's one of the comments
9 from one of the stakeholders, that they are addressed here,
10 starting about page 23.

11 COMMISSIONER OLSON: I guess my question, then,
12 is it for pit-only facilities, or is that just pits that
13 are associated with these types of facilities? Actually, I
14 believe, considering what CRI's facility is, you know, they
15 have a variety of activities. They have landfilling, they
16 have landfarming, they have evaporative ponds. So I guess
17 it would -- I believe it does cover, actually -- think of
18 Southwest Disposal that we used to have up there in the
19 northwest, was a pit-only facility which was under Rule
20 711.

21 CHAIRMAN FESMIRE: Uh-huh.

22 COMMISSIONER OLSON: And the idea was that those
23 types of facilities, or commercial centralized facilities,
24 should be bonded and have the appropriate measures for
25 assurance that they meet environmental protection

1 standards.

2 CHAIRMAN FESMIRE: So I guess the answer is that,
3 yes, we're going to have to address those facilities in
4 this --

5 COMMISSIONER OLSON: Yeah.

6 MS. BADA: Okay, and do you want it to be at 50
7 -- I'm just asking whether you want those to remain at 50
8 or --

9 CHAIRMAN FESMIRE: They're not temporary
10 facilities.

11 COMMISSIONER OLSON: I mean, I guess my thought
12 is, I'm not sure that I have a big problem with them
13 being -- as long as they're at least 50 feet above water,
14 just because they've got a multiple-line system, leak-
15 detection, and the distinguishing thing is, it's not a
16 permanent disposal in the place, it's an operational
17 activity that's trying to evaporate water, essentially.

18 CHAIRMAN FESMIRE: Yeah.

19 COMMISSIONER OLSON: And then at closure there is
20 a large mass that's left for burial at that point. Does
21 that sound reasonable?

22 COMMISSIONER BAILEY: Yes, because the landfarms
23 are not lined --

24 COMMISSIONER OLSON: Right.

25 COMMISSIONER BAILEY: -- and the pit has -- the

1 pond has the double liner --

2 COMMISSIONER OLSON: Right.

3 COMMISSIONER BAILEY: -- with the leak-detection.

4 COMMISSIONER OLSON: And the landfills are
5 permanently encasing --

6 COMMISSIONER BAILEY: They're isolated.

7 COMMISSIONER OLSON: -- isolating wastes for
8 long-term disposal, whereas a pit is not doing that,
9 evaporative pit is not.

10 MS. BADA: I just wanted to make sure before I
11 drafted it that I didn't leave something out.

12 COMMISSIONER OLSON: Thank you.

13 CHAIRMAN FESMIRE: Have we covered that issue?

14 COMMISSIONER OLSON: Uh-huh.

15 CHAIRMAN FESMIRE: Commissioner Bailey?

16 COMMISSIONER BAILEY: Yes.

17 CHAIRMAN FESMIRE: Okay. At this time I'd like
18 to start through some of the specific comments we've
19 received, the first one being the New Mexico Oil and Gas
20 Association proposed findings of fact.

21 Their -- the main crux of their argument was the
22 no-degradation policy where no discharge is allowed and
23 therefore there's no degradation of groundwater. Their
24 argument is that under the WQCC, which does in some
25 circumstances allow degradation, that OCD's policy is not,

1 for lack of a better word, appropriate for the conditions
2 that we operate under.

3 I don't support this idea. I believe that it is
4 within the prerogative of the OCD and this Commission to
5 adopt standards that are stringent enough to comply with
6 our statutory mandate, which includes the protection of
7 water and the protection of public health and the
8 environment. Therefore the argument that the no-release
9 standard that we've tried to achieve in much of this, but
10 after yesterday's -- some of yesterday's changes, not all
11 of this rule, is fully appropriate.

12 I think that -- especially when siting surface
13 waste management facilities that are not already
14 contaminated, that it should be our objective to maintain
15 the integrity, the environmental integrity of those sites,
16 to the ability that we can and still function as an
17 industry, as a profitable industry, and still meet our
18 statutory mandates. Therefore the arguments that the New
19 Mexico Oil and Gas Association makes that that is not a
20 proper objective and is not -- is outside of our mandate, I
21 believe is incorrect.

22 They do make a point in that proposed Rule 53.I
23 that we were just talking about addresses evaporation ponds
24 and that this Rule should be included in the Division's pit
25 rule. That may be a decent point, but I don't see it as

1 definitive or dispositive. I think we have the alternative
2 to do -- the ability to decide to do either one, and at
3 some point in the future we may want to change that, but I
4 think it's fully appropriate to leave it where it's at now.

5 Commissioners, do you have any other comments
6 on --

7 COMMISSIONER BAILEY: I have nothing to add to
8 that.

9 CHAIRMAN FESMIRE: Commissioner?

10 COMMISSIONER OLSON: Well, especially with regard
11 to the issue of evaporation ponds, a major concern with
12 especially large commercial and centralized ponds is
13 appropriate closure of those, and these rules allow for
14 financial insurance to the State that they will be closed
15 properly.

16 The pit rule does not include mechanisms for
17 financial insurance, to ensure that they are closed. And
18 the State has past experience with that, with an operator
19 going out of business and leaving the State to do a cleanup
20 which -- I don't know, I thought it was in the range of --

21 CHAIRMAN FESMIRE: -- two million dollars.

22 COMMISSIONER OLSON: -- you know, half million
23 dollars or something like that, so...

24 CHAIRMAN FESMIRE: Okay. The next comments I'd
25 like to address are from Gandy Marley, Inc. They were

1 specifically addressed to G.(6).(e), the provision that we
2 spent so much time on yesterday. Basically we've, I
3 believe, addressed that, especially with respect to the
4 numerical standards for the 3103 constituents, and if we
5 did not comply with their recommendation we came very close
6 to complying with it.

7 They also had some comments on the transitional
8 provisions that we have taken out. They were in support of
9 them. But I think the reasons for taking them out were
10 adequately expressed in the record yesterday, and we've
11 decided against doing that.

12 The next --

13 COMMISSIONER OLSON: Well, I guess maybe I'd add
14 that if they're -- I think, you know, part of the rationale
15 that we had problems with there was there wasn't any
16 evidence as well to support that in the record. And if,
17 you know, Gandy Marley or any other operator sees a problem
18 there, they have that ability to come back and petition the
19 Commission for a change to the Rule as well, to try to
20 address their concerns and provide evidence that would
21 support the reasons for a change.

22 CHAIRMAN FESMIRE: Okay, Commissioner Bailey?

23 COMMISSIONER BAILEY: I agree.

24 CHAIRMAN FESMIRE: The next proposed findings of
25 fact that I'd like to address are those from the industry

1 committee. The record will reflect that the industry
2 committee is a subset of the members of NMOGA, including
3 Burlington Resources Oil and Gas Company -- which I assume
4 since this was filed is acting as Conoco -- BP America
5 Production Company; Chesapeake Operating Company, Inc.;
6 ChevronTexaco; ConocoPhillips; Devon; Dugan; Energen;
7 Marathon; Marbob; OXY USA, Inc.; Occidental Permian, Ltd.;
8 OXY USA Limited Partnership; V.J. Simons; Williams
9 Production Company; XTO Energy, Inc.; and Yates Petroleum
10 Corporation.

11 They too object to the no-degradation policy and
12 the no-discharge limits that we set on as many of these
13 facilities as we thought was feasible. They urge a risk-
14 based decision-making process, they -- especially with
15 respect to landfarming. They suggest a three-tier
16 regulation of the landfarming process.

17 Again, I think the record will adequately reflect
18 that the process proposed by the Commission has been well
19 vetted. We've considered the industry committee's proposed
20 findings and prior comments, but I think that the
21 Commission has established a -- through this Rule is
22 establishing a procedure that is more aligned with its
23 goals. And again, I think a major part of the disagreement
24 with the industry committee is that our objectives are
25 slightly different than what the industry committee

1 believes would be achievable, especially with respect to
2 the no-degradation policy in a significant portion of the
3 Rules as proposed.

4 So again, while we understand the industry
5 committee's arguments and wishes, there are places where we
6 just are going to disagree because of our disagreement on
7 the objectives.

8 Again with respect to the no-release, no-
9 degradation policy, where the technology exists and it's
10 not an economic hardship -- and we don't believe that
11 there's any evidence in the record that shows that the no-
12 release, no-degradation policy is an economic hardship --
13 there's no reason to design waste management facilities
14 where you have, in essence, a deliberate release into the
15 environment when it's not necessary.

16 COMMISSIONER OLSON: I might add that the intent
17 of the Rule is prevention of pollution, especially
18 groundwater pollution. And as far as the economics go, the
19 economics of prevention far outweigh the economics that
20 would be involved if the resource is contaminated and also
21 the loss of the resource and our groundwater resources to
22 the State where approximately 90 percent of our state
23 population relies on groundwater as a source of drinking
24 water.

25 CHAIRMAN FESMIRE: The industry committee also

1 recommended a more flexible approach to the Division's
2 chloride limit. I think that's been well vetted yesterday
3 and today, and the reasons for making the decision we made
4 are clearly in the record.

5 One of the points that the industry committee
6 makes is that New Mexico discharges are allowed to
7 discharge to groundwater up to the groundwater quality
8 standards at a point of reasonably foreseeable future use
9 as established in Section 3103 of the New Mexico Water
10 Quality Control Commission regulations.

11 It's ironic that they would be arguing for
12 inclusion of part of the 3103 regulations and at the same
13 time arguing that we can't accept the standards in the 3103
14 regulations.

15 My thought on this is that, knowing the producers
16 the way I do, I don't think if -- I don't think they want
17 to make deliberate discharges part of their pollution
18 plans. I think the liability, future liability, for
19 discharges is such that the prudent operators would not
20 want to discharge where it were technically and
21 economically feasible, and I think these Rules have taken
22 that into account.

23 There are some technical arguments. Again, the
24 Commission has simply had to weigh the evidence with
25 respect to dilution/attenuation factors at certain

1 concentrations and has decided after review of that
2 evidence to implement the Rules that we have, especially
3 with respect to the bioremediation endpoint.

4 This is a technology that is relatively new, is
5 extremely new to New Mexico. We have made provisions in
6 these Rules to use that on larger, well-controlled
7 landfarms. We've left that option up to the operator, and
8 I think at some point when we get a better database and
9 it's -- these proposals are based on truly sound science
10 with significant data to support it, we may review those
11 provisions.

12 But as of right now, we still consider -- I, at
13 least, still consider these experiments, especially with
14 respect to New Mexico and the extremely arid environment
15 that we have and the need to acquire significant amounts of
16 water to do that -- so while we are allowing the operators
17 the option of doing it on large landfarms, we don't think
18 that at this time -- I don't think that at this time we're
19 able to mandate that remediation process in landfarms in
20 New Mexico.

21 They also had some problems with the 3103
22 constituents, and I think we've addressed their concerns in
23 that.

24 And I believe that those are the parts of the
25 industry committee's comments and proposed findings that --

1 most in need of being addressed.

2 The Oil and Gas Accountability Project also sent
3 in some recommendations. We have through our process
4 addressed many of their concerns. The major concern that
5 we did not address was changes number 8, 11 and 13 with
6 respect to the task force recommendations. And again, I
7 believe that the record is sufficient on those issues to
8 justify what we did do.

9 The Independent Petroleum Association of America
10 again complained of the non-degradation standard. I think
11 we've explained the reason that OCD proposed and that I
12 supported the non-degradation standard where we did.
13 Again, I want to point out that we have deviated from that
14 with respect to the 3103 -- the decision that we made in
15 3103. We will be looking at that on a risk basis, but I
16 think for the most part there is a significant
17 justification for the non-degradation standard.

18 They are also concerned that the proposed Rule
19 has an adverse effect on small business. I believe that
20 the record is complete in that the OCD and this -- the OCD
21 testified to and this Commission examined the effects on
22 small business and found that it did comply with the laws
23 currently written.

24 MS. BADA: Would you address that just a little
25 bit more? Do you think there's an impact on small

1 businesses? And if so, were we able to mitigate those, or
2 why couldn't they be mitigated?

3 CHAIRMAN FESMIRE: I believe that any -- first of
4 all, that there's no disproportional impact on small
5 business, that the effects of this Rule on small business
6 have been mitigated to the maximum extent possible, while
7 still maintaining our duty, our statutory duty and our
8 statutory mandate, to protect water, human health and the
9 environment.

10 Also, there is nothing in this Rule that, like I
11 said, would adversely affect small business. I think the
12 effect on small business is the same as it would be on
13 large business; it's simply to ensure that the costs of
14 producing oil and gas in New Mexico are borne by the party
15 that produces that product and is able to sell that product
16 on the market. The small business does that, the large
17 business does that, and I don't think that there's any
18 disproportional or unnecessary or mitigatable expenses
19 involved in the regulations that we've examined today and
20 yesterday.

21 MS. BADA: Anybody else have anything?

22 CHAIRMAN FESMIRE: The Independent Petroleum
23 Association also took some issue with the process by which
24 this Rule was promulgated. This Rule was promulgated
25 according to the 1200-series rules. There were, prior to

1 the hearing, a series of at least five -- for lack of a
2 better word, formal meetings, and many informal meetings,
3 and the ability for essentially informal meetings anytime
4 an interested party raised the issue.

5 After the hearing, the stakeholders were again
6 given another opportunity to comment, as, if you've been
7 present for the last two days, you probably understand that
8 many of those comments were adopted. So I don't think that
9 there is any problem with the process involved in
10 formulating this Rule, and I think all stakeholders were
11 represented.

12 The record will show that comments were adopted
13 from, if not all, most stakeholders, and that all of the
14 comments received by the Commission were evaluated by
15 Division staff and read by at least one of the
16 Commissioners, I know. I've read all of them, and I
17 believe that the other Commissioners have read and
18 commented on almost all of them.

19 The next one was CRI's position. CRI proposed
20 suggested findings and provided a redline with their
21 proposed changes in the Division proposal. Many of those
22 changes -- all of those proposals were considered, many of
23 them were addressed, the specifics being the 50-foot-to-
24 groundwater siting requirement, and the re-vegetation
25 chloride standard. And like I said, I believe most of

1 those were addressed.

2 Those comments were indeed representative of all
3 the comments we got.

4 MS. BADA: Did you get the comments from Gary --
5 I can't say the last name -- and Marlyn Waltner from Raven
6 Industries?

7 CHAIRMAN FESMIRE: I've seen the comments
8 concerning the different types of membrane.

9 MS. BADA: Right.

10 CHAIRMAN FESMIRE: Again, there was no evidence
11 presented to -- in my memory, I don't remember evidence
12 being presented to support the recommendation. But I
13 believe that there is enough flexibility in the Rule as
14 written to allow the OCD to approve equivalent liner
15 materials, and I believe that everything that they're
16 proposing would be considered equivalent. So without
17 evidence I don't think we can put it into the Rule.

18 The thing I need to point out is, again with
19 respect to the process, there have been the OCD-proposed
20 rules, they received comments on those rules, and in a
21 number of iterations they reviewed those comments and often
22 incorporated some of those comments into the next iteration
23 of the Rule. I believe that was done a total of four
24 different iterations. The resulting proposed rules were
25 then the subject at a hearing, and then again we received

1 comments on September 6th on the final proposed rules.

2 So this has been a well-vetted, well-commented,
3 extremely participative process. I'm pretty happy with the
4 Rule that came out, I believe it's well supported in the
5 record.

6 Are there any other comments from the
7 Commissioners?

8 COMMISSIONER BAILEY: There are comments from the
9 Citizens for Clean Air and Water that were addressed,
10 particularly having to do with the depth to groundwater for
11 the landfarms and the chloride concentration limits. We
12 considered all of their comments in our deliberations.

13 Also Marbob. We did take into account and
14 discuss their suggestions, particularly taking -- using
15 their third concern, which proposed closure standards based
16 on individual site conditions in substitution for the 3103
17 document that we have considered before.

18 CHAIRMAN FESMIRE: Anything else, Commissioner?

19 COMMISSIONER BAILEY: I only have additional
20 comments and the OCD proposed findings.

21 CHAIRMAN FESMIRE: Okay.

22 MS. BADA: A couple questions on Citizens for
23 Clean Air and Water's proposed findings. Back in May they
24 suggested changes to the financial assurance requirements.

25 COMMISSIONER BAILEY: But those did not come in

1 in the September 6th comments.

2 CHAIRMAN FESMIRE: They were evaluated and
3 considered prior to the final draft.

4 CHAIRMAN FESMIRE: Commissioner Olson, did you
5 have any other comments?

6 COMMISSIONER OLSON: No, I just add to -- I know
7 Commissioner Bailey was talking about the Citizens for
8 Clean Air and Water, that we considered their comments, and
9 I'd also just like to add that we adopted several of their
10 issues that they have raised and addressed them adequately,
11 I think, in the record that we have made here today.

12 CHAIRMAN FESMIRE: Okay. Commissioner Bailey,
13 you had some comments on the findings of fact?

14 COMMISSIONER BAILEY: The OCD-proposed findings
15 need to be revised in accordance with the work we've done
16 over the past two days, so I'll be looking for those.

17 COMMISSIONER OLSON: I'd like to add, from what I
18 saw here of the findings that were presented to us, the
19 findings presented by the Oil Conservation Division were
20 the most comprehensive towards the whole Rule. A lot of
21 the other comments dealt with the specific issues that a
22 party had with the Rule, so I think the Division's proposed
23 findings make a good basis for us to use with -- being
24 modified, I guess, with the discussions we've had here
25 today, that need to be reflected in this document as well.

1 I believe it's the most comprehensive set of findings that
2 were presented to us.

3 CHAIRMAN FESMIRE: Okay. Are there any other
4 comments from the Commissioners?

5 COMMISSIONER OLSON: And --

6 CHAIRMAN FESMIRE: I'll take that as a yes.

7 COMMISSIONER OLSON: I was just looking to see if
8 I had some editing things, that if I did I might just give
9 it to our counsel, because we'll be needing to review this
10 at the next --

11 CHAIRMAN FESMIRE: Right.

12 COMMISSIONER OLSON: -- at the next meeting.

13 CHAIRMAN FESMIRE: The way we intend to proceed
14 from here is to ask counsel to draft proposed --

15 MS. BADA: Proposed --

16 CHAIRMAN FESMIRE: Pardon?

17 MS. BADA: Proposed statement of reasons and
18 order for adopting the Rules.

19 CHAIRMAN FESMIRE: Right, and to revise the Rule
20 itself to conform with the changes that we've made.

21 And we will continue this hearing until the next
22 regularly scheduled hearing date, which I believe is
23 October 19th --

24 MS. DAVIDSON: (Nods)

25 CHAIRMAN FESMIRE: -- at which time the

1 Commissioners will have had the opportunity to review what
2 has been prepared by counsel, and we will take final action
3 -- hopefully take final action on that date.

4 Are there any other comments from the rather
5 sparse stakeholders present?

6 Okay, with that we will adjourn this cause until
7 October 19th, nine o'clock in this room.

8 Thank you.

9 (Thereupon, recess was taken at 9:55 a.m.)

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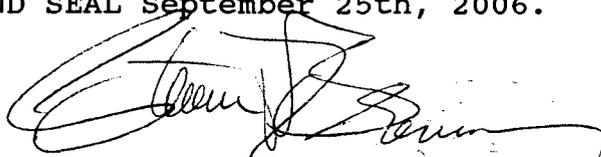
CERTIFICATE OF REPORTER

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