

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 REPEAL OF)
EXISTING RULE 50 CONCERNING PITS AND)
BELOW GRADE TANKS AND ADOPTION OF A)
NEW RULE GOVERNING PITS, BELOW GRADE)
TANKS, CLOSED LOOP SYSTEMS AND OTHER)
ALTERNATIVE METHODS TO THE FOREGOING,)
AND AMENDING OTHER RULES TO MAKE)
CONFORMING CHANGES; STATEWIDE)

CASE NO. 14,015

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

COMMISSION HEARING

BEFORE: MARK E. FESMIRE, CHAIRMAN
JAMI BAILEY, COMMISSIONER

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Volume I - October 22nd, 2007

Santa Fe, New Mexico

This matter came on for hearing before the Oil Conservation Commission, MARK E. FESMIRE, Chairman, on Thursday, October 22nd, 2007, 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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Commission Hearing
CASE NO. 14,015

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A P P E A R A N C E S

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FOR NEW MEXICO OIL AND GAS ASSOCIATION; CONOCOPHILLIPS COMPANY; DUGAN PRODUCTION CORPORATION; and ENERGEN RESOURCES CORPORATION; and an INDUSTRY COMMITTEE comprised of BP America Production Company, Inc.; Benson-Montin-Greer Drilling Corporation; Bowling Enterprises, Ltd.; Burlington Resources Oil and Gas Company; Chesapeake Energy Corporation; Chevron USA, Inc.; ConocoPhillips Company; Devon Production Company; Dugan Production Corporation; Energen Resources Corporation; Marathon Oil Company; Marbob Energy Corporation; Merrion Oil & Gas Corporation; Occidental Permian, which includes OXY USA, Inc., and OXY USA WTP Limited Partnership; Samson Resources Company; J.D. Simmons, Inc.; Williams Production Company, LLC; XTO Energy, Inc.; and Yates Petroleum Corporation:

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(Continued...)

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* * *

ALSO PRESENT:

MARVIN BURROWS
John H. Hendrix Corporation

CAREN COWAN
New Mexico Cattle Growers Association

DAN DOLAN
Allstate Environmental Services, LLC

(Continued...)

ALSO PRESENT (Continued):

JACK DUFFEY
AKOMA Pit Lining Co.

KARIN FOSTER
IPANM

REESE FULLERTON
Deputy Secretary
NM Department of Energy, Minerals and Natural Resources

RICK GASSER
WT Plastics

TIM W. GUM
District Supervisor
Artesia District Office (District 2), NMOCD

DAVE HENARD
City of Carlsbad

RACHEL JANKOWITZ
New Mexico Game and Fish Department

BRAD JONES
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GWEN LACHELT
Oil and Gas Accountability Project

MARK J. LARSON
Larson & Associates

LEONARD LOWE
NMOCD

KENNETH R. MARSH
Controlled Recovery, Inc.

EDWIN E. MARTIN
Environmental Bureau, NMOCD

LUKE OTERO
AKOMA Pit Lining Co.

(Continued...)

ALSO PRESENT (Continued):

WAYNE PRICE
Environmental Bureau Chief, NMOCD

STEPHANIE REID
New Mexico Oil and Gas Association

LARRY ROYBAL
State Land Office

JOSÉ DANIEL SANCHEZ
Compliance and Enforcement Manager, NMOCD

SONNY SWAZO
Assistant General Counsel, NMOCD

GLEN VON GONTEN
Senior Hydrologist, OCD

* * *

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

3 CHAIRMAN FESMIRE: Let's go ahead and start. At
4 this time we'll call this special meeting of the New Mexico
5 Oil Conservation Commission to order. Let the record
6 reflect that it is nine o'clock a.m. in Porter Hall on
7 Monday, October 22nd.

8 The sole purpose of this meeting is to consider
9 Case Number 14,015, the Application of the New Mexico Oil
10 Conservation Division for repeal of existing Rule 50
11 concerning pits and below grade tanks and adoption of a new
12 rule governing pits, below grade tanks, closed loop systems
13 and other alternative methods to the foregoing, and
14 amending other rules to make conforming changes; statewide.

15 At this time the record should reflect that
16 Commissioners Bailey and Fesmire are present. Commissioner
17 Olson is not present, however two Commissioners do make up
18 a quorum under the law. We will therefore continue with
19 the meeting.

20 And at this time we will ask for the appearance
21 of counsel:

22 MR. BROOKS: Mr. Chairman, Commissioner Bailey,
23 I'm David Brooks, of the Energy, Minerals and Natural
24 Resources Department, appearing for the Oil Conservation
25 Division.

1 CHAIRMAN FESMIRE: Mr. Carr?

2 MR. CARR: May it please the Commission, my name
3 is William F. Carr with the Santa Fe office of Holland and
4 Hart, L.L.P. We represent the New Mexico Oil and Gas
5 Association. And in case you have not met their new
6 Director of Governmental Affairs, she's with me here today,
7 Stephanie Reed. She started the first of the month and is
8 now the person to whom I report.

9 I also am entering our appearance for the
10 Industry Committee, and I'm appearing with Eric L. Hiser
11 who you know, who is with the firm Jordan, Bischoff and
12 Hiser in Scottsdale.

13 As the Commission is aware, the Industry
14 Committee is comprised of a number of companies who are
15 impacted by the proposal, and with your permission I'd like
16 to identify them. They are: BP America Production Company,
17 Inc.; Benson-Montin-Greer Drilling Corporation; Bowling
18 Enterprises, Ltd.; Burlington Resources Oil and Gas
19 Company; Chesapeake Energy Corporation; Chevron USA, Inc.;
20 ConocoPhillips Company; Devon Production Company; Dugan
21 Production Corporation; Energen Resources Corporation;
22 Marathon Oil Company; Marbob Energy Corporation; Merrion
23 Oil & Gas Corporation; Occidental Permian, which includes
24 OXY USA, Inc., and OXY USA WTP Limited Partnership; Samson
25 Resources Company; J.D. Simmons, Inc.; Williams Production

1 Company, LLC; XTO Energy, Inc.; and Yates Petroleum
2 Corporation.

3 That's the Industry Committee.

4 I also would like to separately enter appearances
5 for ConocoPhillips Company, Dugan Production Corporation
6 and Energen Resources Corporation, because these companies
7 have expressed an interest in providing testimony in
8 addition to that being provided by the Industry Committee.

9 This afternoon we'll file written proposed
10 modifications. We'll be calling people to support those,
11 both experts and industry representatives. These
12 modifications have been adopted by the Oil and Gas
13 Association.

14 And with your permission, I would request that I
15 be allowed to defer an opening statement until the hearing
16 actually commences in November. I know you'd like to hear
17 from me today, but I would prefer to defer that until
18 November if it meets with your approval.

19 CHAIRMAN FESMIRE: Mr. Brooks, would you have any
20 objection to that?

21 MR. BROOKS: No objection, Mr. Chairman.

22 CHAIRMAN FESMIRE: Would any of the other
23 attorneys who haven't yet entered an appearance have an
24 objection to that?

25 MS. BELIN: No objection.

1 MR. JANTZ: No objection.

2 MR. MOFFETT: No objection.

3 MS. FOSTER: No objection.

4 CHAIRMAN FESMIRE: There appearing to be no
5 objection, Mr. Carr, we'll allow you to defer your opening
6 statement till the beginning of your case.

7 MR. CARR: Thank you, sir.

8 CHAIRMAN FESMIRE: Ms. Foster?

9 MS. FOSTER: Yes, thank you, Mr. Chairman, Madame
10 Commissioner. My name is Karin Foster and I'm here today
11 representing the Independent Petroleum Association of New
12 Mexico.

13 CHAIRMAN FESMIRE: Who is next?

14 MR. MOFFETT: Mike Moffett with Huffaker and
15 Moffett on behalf of CRI. We'd also like to defer opening
16 statement.

17 MR. JANTZ: Mr. Chairman, Commissioner Bailey, my
18 name is Eric Jantz. I'm with the New Mexico Environmental
19 Law Center in Santa Fe, and I'm here on behalf of the Oil
20 and Gas Accountability Project.

21 CHAIRMAN FESMIRE: Lettie?

22 MS. BELIN: Lettie Belin with Belin and Sugarman.
23 I'm here on behalf of New Mexico Citizens for Clean Air and
24 Water.

25 CHAIRMAN FESMIRE: Are there any other attorneys

1 who wish to enter an appearance at this time?

2 Okay, the first order of business probably is a
3 housekeeping matter.

4 Mr. Brooks, how many witnesses do you intend to
5 present and how long do you think it will take?

6 MR. BROOKS: Mr. Chairman, I really wasn't
7 prepared to answer that question today. Let's see, we have
8 Mr. Price, Mr. Hansen, Brad Jones, Mr. Chavez -- We know
9 we'll have four witnesses. We may have one more.

10 CHAIRMAN FESMIRE: Okay, and I want --

11 MR. BROOKS: Oh, I forgot Mr. von Gonten.

12 CHAIRMAN FESMIRE: Five witnesses?

13 MR. BROOKS: We have five witnesses. We may have
14 one more.

15 CHAIRMAN FESMIRE: This is just for planning
16 purposes, so I --

17 MR. BROOKS: I really have --

18 CHAIRMAN FESMIRE: -- won't hold you to that.

19 MR. BROOKS: At this point I really have very
20 little idea how long it will take, Mr. Chairman. I will be
21 happy to furnish the Commission with that information by
22 next week, by the time when we file our opening statements,
23 and we will include that in that information, but we have
24 not timed anything with that degree of precision at this
25 point.

1 CHAIRMAN FESMIRE: Okay, Mr. Carr, same question.
2 And again, I won't hold you to it. This is just for
3 planning.

4 MR. CARR: Mr. Chairman, at this time the
5 Industry Committee intends to call Dr. Daniel B. Stevens,
6 Dr. Ben Thomas and Dr. Bruce Buchanan. Those will be, I
7 believe the experts.

8 We have at this point in time indications that
9 four members of the industry representing individual
10 companies may also want to appear and present testimony.
11 Again, I'm not able to tell you how long, and there may be
12 additions to that group when we meet today and tomorrow in
13 Albuquerque with our experts. But we will be able to, I
14 think, clearly define that when we file the prehearing
15 statement next Monday.

16 CHAIRMAN FESMIRE: Okay. Ms. Foster?

17 MS. FOSTER: Mr. Chairman, yes, I intend to call
18 Mr. Sam Small as the witness, plus four members of
19 industry.

20 CHAIRMAN FESMIRE: Okay. Mr. Moffett?

21 MR. MOFFETT: We have not identified witnesses
22 yet, Mr. Chairman.

23 CHAIRMAN FESMIRE: Do you think you will be
24 presenting witnesses?

25 MR. MOFFETT: I'm not sure at this time.

1 CHAIRMAN FESMIRE: Okay. Mr. Jantz?

2 MR. JANTZ: Thank you, Mr. Chairman. OGAP will
3 be presenting two witnesses. We estimate the time probably
4 wouldn't be more than three to four hours, inclusive of
5 cross-examination.

6 CHAIRMAN FESMIRE: Ms. Belin?

7 MS. BELIN: Yes, Mr. Chairman, we will be
8 presenting the testimony of Dr. Neeper, and I know he has
9 about 50 exhibits but I don't know at this time how long it
10 will take.

11 CHAIRMAN FESMIRE: Okay. Boy, that was
12 informative.

13 (Laughter)

14 CHAIRMAN FESMIRE: Mr. Brooks, do you wish to
15 give your opening statement at this time?

16 MR. BROOKS: Mr. Chairman, yes, I would like that
17 opportunity.

18 CHAIRMAN FESMIRE: Proceed.

19 MR. BROOKS: Mr. Chairman, Commissioner Bailey,
20 ladies and gentlemen, we are here to follow up on a long
21 history. The New Mexico Oil Conservation Division first
22 began regulating pits in, I believe it was 1958. So we're
23 right -- getting right close to 50 years of gradually
24 tightening the Rules, which in the first 50 years of the
25 oil industry in New Mexico did not exist, and then existed

1 in a very small area and have gradually increased to a
2 large part of the State. And we're going to ask your
3 Honors to increase them to the entire state, which require,
4 among other things, that all pits used for wastes and
5 process fluids in the oil and gas industry be lined.
6 That's just one of our objectives.

7 What we're basically trying to do in this
8 proceeding is bring pits within the intention and spirit of
9 the provision of the Federal Resource Conservation and
10 Recovery Act, better known as RCRA, which says that any
11 solid waste management practice or disposal of solid waste
12 or hazardous waste which constitutes open dumping is
13 prohibited.

14 A pit is simply, ladies and gentlemen, an open
15 dump. An open dump is defined in RCRA as any facility or
16 site where solid waste is disposed of, which is not a
17 sanitary landfill, which meets the criteria promulgated in
18 this Act, or which is not a facility for disposal of
19 hazardous waste.

20 Now we recognize that oil and gas process waste
21 is exempt from certain provisions of RCRA. But it's only
22 exempt from hazardous waste provisions of RCRA, it is not
23 exempt from those provisions of RCRA which require
24 management of that waste, and that includes the prohibition
25 against an open dump.

1 Not it is not the responsibility, of course, of
2 this Commission to enforce federal law. As a matter of law
3 it's not, and this Commission is not under any contract or
4 agreement with EPA to do that.

5 But the United States Congress, in enacting this
6 provision, has enacted a law which applies to all kinds of
7 waste that it must be managed and that it must be properly
8 managed. And in directing EPA how to distinguish those
9 facilities that are proper for disposal of solid waste --
10 and we're talking about solid waste, and I'm steering clear
11 of hazardous waste because the wastes in the oil and gas
12 industry are exempt from the hazardous waste rules. We're
13 talking about disposal of solid waste.

14 Congress has directed EPA that at a minimum such
15 criteria, the criteria that it adopts for disposal
16 facilities for solid waste, shall provide that a facility
17 may be classified as not an open dump only if there is --
18 and this is what is important -- no reasonable probability
19 of adverse effects on health or the environment from
20 disposal of solid waste at such facility.

21 In other words, the spirit and intent of RCRA is
22 not to manage these solid waste disposal facilities so that
23 they don't just obviously cause a problem, it's to manage
24 them so that there is no reasonable probability of adverse
25 effects on human health or the environment.

1 Now as I say, there's no legal obligation for
2 this Commission to enforce RCRA. But let us see where the
3 ball is with regard to oil and gas waste.

4 When Congress enacted RCRA, Congress exempted oil
5 and gas waste from the hazardous waste provisions of RCRA.
6 And they directed EPA to study that matter, and EPA
7 subsequently confirmed that exception. But Congress did
8 not say that oil and gas industry waste did not need to be
9 regulated. Congress determined instead that state and
10 federal regulation, apart from the hazardous waste
11 provisions, were adequate to deal with oil and gas industry
12 waste.

13 Well, under RCRA, oil and gas industry waste is
14 solid waste, so that the provisions of RCRA that deal with
15 solid waste apply to oil and gas industry waste. But
16 there's no enforcement procedure, specifically, because in
17 the State of New Mexico, in our Solid Waste Act, oil and
18 gas industry waste is not included. And the reason it's
19 not included, ladies and gentlemen, is simply that the
20 State of New Mexico has decided to delegate not to the
21 Department of the Environment under the Solid Waste Act,
22 but to this Commission under the Oil and Gas Act the
23 responsibility for regulating oil and gas waste disposal.

24 That authority is found in three provisions of
25 Section 11 of the Oil and Gas Act -- I'm sorry, Section --

1 Section 11.B, yes of the Oil and Gas Act, the laundry list
2 provisions of powers of the Oil Conservation Commission
3 where this Commission has the power to control the disposal
4 of produced water, to control the disposal of nondomestic
5 wastes from oil and gas production, and to control the
6 disposal of nondomestic wastes from oil and gas processing.

7 And so the responsibility, we argue, to assure
8 that the facilities in which oil and gas waste is disposed
9 of present no reasonable probability of adverse effects on
10 the health -- on human health or the environment, and
11 therefore do not constitute simply open dumps, is a
12 responsibility that falls directly on this Commission under
13 New Mexico law.

14 Now in 2003, which is only a short time ago, this
15 Commission adopted a comprehensive rule regulating pits.
16 Although that was only four years ago, that four years of
17 experience has shown that that rule was not adequate. And
18 indeed, it became very obvious that that rule was not
19 adequate within the first year after its adoption when
20 several successive efforts to adopt guidelines to implement
21 that rule ran into objections from industry that the
22 guidelines did not -- or imposed things that were not
23 required by the rule, and objections from the environmental
24 community that the guidelines were not adequate to
25 implement the performance standards that were set forth in

1 that rule.

2 And we -- pursuant to the Commission's direction,
3 we in the Division implemented a process to try to come up
4 with a better rule, a rule that would obviate the problems
5 that we had encountered with the previous rule.

6 That was an extensive process. We began with
7 public meetings in every producing sector of this state,
8 and we heard what the public thought ought to be included
9 in rules on this subject.

10 And then under the auspices of the Department and
11 the Governor's Office, a task force was established,
12 including highly respected members of industry, of --
13 representatives of the environmental community,
14 representatives of political subdivisions, and others
15 having an interest in this subject. And we spent several
16 months trying to hammer out a rule.

17 We began with the assumption that most things
18 could be determined by agreement, agreement being defined
19 as unanimous agreement of the members of the task force.
20 But we also began with the assumption that not everything
21 was going to be decided by agreement, and in fact that
22 proved to be the case.

23 And Mr. Jones, Mr. Brad Jones, in his testimony
24 will outline for you in detail everything that was agreed
25 upon and everything that was not agreed upon. And that in

1 itself will probably take a day, but that's going to be the
2 longest, but not perhaps the most important part of our
3 testimony.

4 Anyway, somebody -- if there's not agreement,
5 somebody has to make a decision. And it was contemplated
6 from the beginning that we the Division would make
7 recommendations to this Commission which would make a
8 decision on those matters that were not agreed upon. So we
9 have come before you with a rule that incorporates those
10 things that the task force agreed upon and incorporates
11 also the recommendations of the Division on the issues that
12 the task force did not agree on.

13 Now we're going to go into this Rule in great
14 detail at the hearings in November, but I just want to hit
15 the high spots, and then I will sit down and let everybody
16 get back to their business. But there are a few very
17 important things. There's a lot of detail. Most of the
18 detail is not, I think, going to be really controversial.
19 I think most of the issues in this hearing are going to hit
20 on a few high spots. Let me tell you what those high
21 spots, in my opinion and the opinion of the Division, are.

22 First of all, unlined pits. As I said, we have
23 been through a 50-year process of going from all pits being
24 unlined 50 years ago, to increasingly extensive
25 requirements that pits be lined.

1 I have to stop at this point and tell an anecdote
2 that -- I have to tell anecdotes every now and then in
3 speeches. They get too dull if I don't.

4 I remember my dad saying -- commenting one time
5 on the observation in the book of *Revelation* that at the
6 beginning of the millennium the Lord confined the devil in
7 the bottomless pit so that they could have a thousand years
8 of peace. My father said, well, he thought the Lord wasn't
9 very smart about that. The Lord should have put the devil
10 in a pit with a bottom so the devil wouldn't leach out.

11 (Laughter)

12 CHAIRMAN FESMIRE: A parable with a point, Mr.
13 Brooks?

14 MR. BROOKS: Indeed. We're asking this
15 Commission to prohibit -- to adopt a general prohibition of
16 all unlined pits statewide. One reason we're doing this is
17 because we now have a rule that says that pits must be
18 lined except in the vulnerable areas of the northwest or
19 the exempt areas of the southeast. And when we did that --
20 when we made that proposal four years ago, we thought those
21 were areas where groundwater was not an issue.

22 We've since discovered that you can't say that as
23 a general proposition. There may be areas in this state
24 where groundwater is not an issue, but the State Engineer
25 really doesn't think so, because the State Engineer has

1 designated groundwater basins in every part of this state.

2 So we are going to ask you to adopt a general
3 rule that says no unlined pits.

4 Now we recognize there's a distinction between
5 production pits on the one hand and drilling pits on the
6 other hand. And we know that production pits -- there are
7 relatively few of them that present major problems. So
8 we're saying, No more unlined production pits ever,
9 anywhere.

10 With drilling pits we're going to say, No unlined
11 drilling pits anywhere, but we're going to reserve to -- or
12 we propose to reserve to the Division the right to grant
13 exceptions to that rule, for specific cases, because in a
14 specific case, in a specific place, we can assess the
15 actual risk on particular facts.

16 Next, we're going to talk about liners. We have
17 discovered in our study of the liners -- of pit liners in
18 use in this state, that they're not doing their job in a
19 lot of instances. Liners are tearing, liners have
20 defective seaming, liners are slipping out from their
21 moorings and falling into the pit so they don't do any good
22 because the waste can seep through in the areas that aren't
23 covered by the liners.

24 And we're going to show you pictures -- pictures
25 and pictures and pictures. You're going to get tired of

1 looking at all these pictures of defective liners that
2 we're going to bring before you.

3 In order to cure that problem we have adopted --
4 or have proposed that you adopt detailed liner
5 specifications. And I won't go into what they are. We're
6 going to have a witness that's going to describe them in
7 great detail.

8 Another rule we're going to propose is, we're
9 going to adopt more rigorous limits -- or we're -- I
10 apologize, Mr. Chairman, Commissioner Bailey, I say we're
11 going to adopt. We're not going to adopt anything. We the
12 Division are proposing. You the Commission will or will
13 not adopt any of these things as your wisdom and discretion
14 dictates.

15 We are proposing new and more extensive
16 restrictions on where pits can exist. The present rule
17 permits pits pretty much anyplace a person wants to, except
18 in a watercourse or a lakebed or a playa.

19 Now we had a provision that has not been very
20 successful here, because nobody seems to know exactly what
21 it means, about wellhead protection areas that's in our
22 present rule. And what it says basically is that within a
23 defined wellhead protection area a certain distance from a
24 water well the Division can put additional restrictions on
25 pits for protection of the well if it decides that's

1 necessary. Our enforcement people have not been able to
2 figure out how that's supposed to be enforced, nor has
3 industry been able to figure out how they're supposed to
4 comply with that, and so it hasn't worked very well.

5 What we are going to propose is setbacks for
6 pits, setbacks from watercourses, setbacks from lakebeds
7 and playas, setbacks from developed areas, houses,
8 commercial buildings, et cetera. And perhaps most
9 important of all, we're going to propose a distance from
10 groundwater, which we've never had before. We're going to
11 propose that there be no pits in any place where
12 groundwater is at a depth of less than 50 feet from where
13 -- from the bottom of the pit.

14 Now we recognize that this is going to require
15 the use of closed loop systems in a significant part of our
16 state. And frankly we believe that's a good thing, and we
17 think that once industry gets accustomed to it, they will
18 think it's a good thing too. It probably does cost some
19 money up front, more money than use of a pit.

20 We're not going to present you any evidence on
21 what costs money because that's not our area of expertise.
22 We believe that we have heard evidence through the task
23 force that indicates that this is not an undoable thing.
24 There are many places in the world where closed-loop
25 systems are used in the oil and gas industry, including all

1 offshore operations. You can't dig a pit in the ocean. So
2 we don't believe we're requiring industry to do something
3 that is undoable.

4 And we think that if -- to the extent that
5 industry converts to closed loop systems, they will be
6 saving money with waste disposal, they will be saving money
7 with fewer remediations and abatements, and they will be
8 saving money in the long run by not leaving legacies of
9 improperly managed waste that will have to be addressed
10 by -- primarily by industry, but perhaps ultimately by the
11 State of New Mexico in the future.

12 Finally, I will go to the biggest issue of all,
13 the one that I anticipate will be the focus of the most
14 controversy, and this is the issue of what to do with pit
15 waste after the -- or at the time of the closure of the
16 pit. Now we've put some detailed rules on how pits are
17 closed, and much of that was by consensus, and I won't talk
18 about.

19 The biggest issue is, can pit waste be left in
20 place, onsite disposal, or must it be removed to a proper
21 disposal facility?

22 The norm has always been onsite closure. That
23 has caused a lot of problems. When I went through the
24 stakeholder process for the 2003 pit rule, I heard a great
25 deal of talk about pit waste and liner material coming up

1 to the surface, causing bare areas on the surface, cattle
2 eating liner plastic, all kinds of things like that, that
3 have caused problems in this state in the past.

4 We believe they'll cause problems in the future.
5 We believe onsite disposal, even with a liner, will
6 eventually impact the irreplaceable groundwater resources
7 of this state. And our witnesses are going to testify that
8 it is not a question of when pit waste will reach -- of
9 whether pit waste will reach groundwater, it is merely a
10 question of when. And that is true even if it's buried
11 with a liner.

12 Well, so you say, well, it doesn't help to take
13 it to a disposal facility because that's just a lined
14 facility. Well, of course one alternative would be to make
15 every pit closure a landfill. But that's probably not a
16 feasible proposal because of the extensive construction
17 requirements that a modern landfill involves.

18 But even if it is -- and we are going to require
19 for any onsite closure that it be lined, subject to an
20 exception requirement, that it be lined in a very rigorous
21 manner that will be defined. But we believe that it is
22 irresponsible for this Commission, even with liners, to
23 allow disposal of waste at random in any place in the state
24 where it is convenient to dispose of.

25 We believe instead that waste disposal should be

1 concentrated in certain areas where we can assess the
2 effects, where we can monitor it, and it won't be just
3 spread around everywhere like the lumps in a tapioca
4 pudding.

5 And for that reason, we are going to recommend to
6 this Commission that you only allow onsite closure -- as a
7 general rule, subject to exceptions for case by case --
8 that you only allow onsite disposal in those circumstances
9 where there is no proper disposal facility available within
10 a reasonable distance.

11 And we're recommending that distance be a hundred
12 miles. We realize there's no particular magic to this
13 figure, and it's possible the Commission may want to
14 substitute a different figure. But we're going to explain
15 to you our reasons for recommending a hundred miles, and
16 that's our recommendation.

17 In any event we do recommend, and strongly
18 recommend, that onsite disposal be limited and -- somewhat
19 like Abraham Lincoln said about slavery, that it be put in
20 a situation where the public mind will rest in the
21 knowledge that it's in the course of ultimate extinction.

22 Those are our recommendations, and I hope I
23 haven't overstayed my time. We'll have a lot of evidence
24 for you, and thank you very much for your attention.

25 CHAIRMAN FESMIRE: Thank you, Mr. Brooks.

1 Mr. Carr, you've decided you wanted to wave
2 your --

3 MR. CARR: Yes sir --

4 CHAIRMAN FESMIRE: -- opening state- --

5 MR. CARR: -- not waive, reserve.

6 CHAIRMAN FESMIRE: Reserve, I'm sorry. Darn.

7 MR. CARR: I know, sorry about that.

8 CHAIRMAN FESMIRE: Ms. Foster, did you have an
9 opening statement?

10 MS. FOSTER: Mr. Chairman, in light of Mr.
11 Brooks' recent opening statement I would also ask to
12 reserve to open at the beginning of my case.

13 CHAIRMAN FESMIRE: Mr. Moffett, did you have
14 anything?

15 MR. MOFFETT: Sir, I will reserve as well.

16 CHAIRMAN FESMIRE: Mr. Jantz?

17 MR. JANTZ: I'm ready to go.

18 CHAIRMAN FESMIRE: You're going to make it longer
19 than a half-hour meeting this morning. I appreciate that.

20 MR. JANTZ: Mr. Chairman, Commissioner Bailey, my
21 name is Eric Jantz, I'm here on behalf of OGAP.

22 Since the earliest days of oil and gas
23 development in this country, the oil and gas industry has
24 disposed of its industrial waste in earthen pits.

25 Since that time, in the intervening century-plus,

1 society has changed, technology has changed, the oil and
2 gas industry has changed, but the method of waste disposal
3 really hasn't changed very much at all. That's why OGAP is
4 supporting the adoption of the proposed Pit Rule with one
5 exception. OGAP submits that the provisions allowing
6 onsite burial of waste at closure should be stricken in
7 their entirety.

8 Otherwise, OGAP believes that the proposed pit
9 waste rules are protective of human health and the
10 environment and a step in the right direction in bringing
11 the oil and gas industry into the 21st Century.

12 When this Commission reconvenes on November 5th,
13 you're going to hear a lot from OGAP about the kinds of
14 chemicals that end up in pits and the health effects of
15 those chemicals. You'll hear about chemicals like toluene,
16 ethylbenzene and naphthalene. You'll hear about the pit
17 wastes, heavy metals that end up in pits, like lead,
18 mercury and arsenic, and it sounds like a pretty nasty mix.
19 And it is.

20 That's why when OGAP presents testimony, we'll be
21 presenting testimony about the chemical data from pits,
22 both regionally and here in New Mexico, the kinds of
23 chemicals that end up in pits and their concentrations.

24 We'll also talk about the health effects of
25 chemicals, both acute and chronic.

1 We'll also be reviewing epidemiological
2 literature about long-term and chronic exposure to pit
3 chemicals, and particularly we'll be focusing on a 2007
4 study, published in 2007, a study that draws an association
5 between exposure to pit-waste chemicals and the disease
6 lupus in Hobbs, New Mexico.

7 Finally, we'll be talking about data that shows
8 that pit waste -- and this based on OCD data, Oil
9 Conservation Division data -- showing that pit waste has
10 leaked into soil and groundwater in New Mexico, presenting
11 a potential human exposure pathway.

12 Finally, we'll talk about the economics of pits.
13 We'll talk about -- we'll have an expert reviewing the
14 literature on the costs associated with traditional earthen
15 pits, as well as the costs associated with closed loop
16 systems and the comparison of the two. And we'll find that
17 ultimately, pits -- closed loop waste systems are
18 economically competitive with pits and under certain
19 circumstances can be more economically viable than pits.

20 Chairman Fesmire, Commissioner Bailey, it's time
21 to move the oil and gas industry into the 21st Century.
22 OGAP thinks that the proposed Pit Rule is a way to do this.
23 Based on the inherent dangers of chemicals that end up in
24 pits and the changing technologies of the oil and gas
25 industry, along with the availability of a cost-effective

1 waste alternative to pits -- that is, closed loop system --
2 the oil and gas industry's practice of using pits is an
3 anachronistic. Therefore, with the exception that I
4 mentioned before, OGAP supports the proposed Rule 50 on pit
5 waste.

6 Thank you.

7 CHAIRMAN FESMIRE: Thank you, Mr. Jantz.

8 Ms. Belin, did you have an opening statement?

9 MS. BELIN: I do, I have just a brief comments on
10 behalf of New Mexico Citizens for Clean Air and Water.

11 As with OGAP, NMCCAW is also generally supportive
12 of this proposed Rule with a few exceptions or proposed
13 revisions.

14 I think as Mr. Brooks made clear, the proposed
15 Rule would effectively prohibit onsite disposal of drilling
16 wastes in the major oil and gas producing parts of the
17 state, and we are strongly in favor of that. I think the
18 problem is not one area of disposal, the problem is
19 sprinkling these at 40-acre intervals throughout the state,
20 like lumps in tapioca, and that is the problem.

21 Plastic liners just are fallible. They don't --
22 they don't make for a safe permanent repository. And even
23 if they did, we wouldn't want those repositories, and we
24 don't want these repositories, sprinkled throughout the
25 state.

1 Dr. Don Neeper is a soil physicist who has
2 throughout his career studied the transmission of
3 contaminants through soil. He's done a significant amount
4 of field research in connection with this Rule, this
5 proposed Rule, and he will present testimony on that,
6 particularly on the -- how soluble wastes move through the
7 ground, and particularly how chlorides move both toward
8 groundwater and toward the biota near the ground surface.

9 I think it's important to bear in mind, as others
10 have said, this Rule would just bring the oil and gas
11 industry to a level of control of wastes that other
12 industries have long been doing.

13 There are some positive effects of this Rule.
14 One would be to encourage the industry to minimize its
15 waste, and also to encourage the industry to examine
16 options for treating a portion of the wastes to eliminate
17 the wastes' offensive properties, and those would also be
18 good effects of the Rule.

19 The only two areas where we will be suggesting
20 revisions would be in the areas of public notice and for
21 the granting of exceptions, and Dr. Neeper will get into
22 that with his testimony.

23 Thank you very much.

24 CHAIRMAN FESMIRE: Thank you, Ms. Belin.

25 Are there any other opening statements from

1 attorneys representing parties in the case?

2 Okay, at this time we'll go ahead and open the
3 floor for public comment. Our rules allow us to accept
4 public comment. We intend to do that at any time that's
5 convenient throughout the hearing.

6 Is there anybody present who would like to make a
7 public comment on the record?

8 (No response)

9 CHAIRMAN FESMIRE: Okay, is there any --

10 MS. FOSTER: Commissioner Fesmire, before you
11 actually close the hearing I actually have a statement that
12 I would like to make at this time.

13 CHAIRMAN FESMIRE: Okay, it's not an opening
14 statement, but it is a public --

15 MS. FOSTER: It's not an opening statement, it's
16 actually a motion.

17 CHAIRMAN FESMIRE: Okay.

18 MS. FOSTER: At this time, your Honor, I would
19 ask that the Commission, subsequent to statutory authority
20 under 14 section -- Section 14 -- Chapter 14, Section .45
21 of the NMSA 1978, the Small Business Regulatory Relief Act,
22 that you compel the Division -- based on their opening
23 statement it is clear that they have not done any economic
24 analysis, and the Small Business Regulatory Relief Act
25 mandates that the Division prior to the promulgation of a

1 new rule do some economic analysis to ensure that the new
2 rule does not affect or impact small businesses.

3 The Independent Petroleum Association of New
4 Mexico does represent 250 small businesses within the State
5 of New Mexico. We are primarily upstream oil and gas
6 producers, and we will be significantly impacted by this
7 Rule.

8 The Small Business Regulatory Relief Act mandates
9 that the agency go through this economic analysis prior to
10 the promulgation of a rule. And I would ask that if they
11 have done so, or if they have filed a letter with the
12 Commission as is required by statute, that we get a copy of
13 that letter and we also get a copy of that economic
14 analysis at this time.

15 CHAIRMAN FESMIRE: Okay. Ms. Foster, at what
16 point in time does that have to be done? Prior to the
17 promulgation of the Rule or prior to the hearing?

18 MS. FOSTER: It has to be done prior to the
19 hearing, is my understanding, because prior to the --
20 because if it is not done properly, then we do have the
21 right to go to the commission, the Small Business
22 Regulatory Relief Commission, to ask them to intervene in
23 this action.

24 CHAIRMAN FESMIRE: Okay. At this time -- Mr.
25 Brooks?

1 MR. BROOKS: Mr. Chairman, I was not prepared to
2 respond to this -- I'm not prepared to respond to this
3 motion at this time and would ask the opportunity to
4 respond to it at the hearing beginning on November the 5th.
5 We have given the notice to the Small Business Regulatory
6 Commission as required by the statute, but I will give a
7 detailed response on November the 5th.

8 CHAIRMAN FESMIRE: Okay. Mr. Brooks, I am going
9 to order you to comply with that provision of the law and
10 that that response will be done by the time we open the
11 hearing.

12 MR. BROOKS: We will have a response available as
13 to the state of our compliance at that time.

14 CHAIRMAN FESMIRE: Thank you, Mr. Brooks.

15 Ms. Foster --

16 MS. FOSTER: Thank you.

17 CHAIRMAN FESMIRE: -- is that sufficient?

18 MS. FOSTER: And I will file this motion for the
19 court, so this is a formal request on the record.

20 CHAIRMAN FESMIRE: Okay.

21 MS. FOSTER: Okay? I also at this time have an
22 additional request, and that would be -- since Mr. Brooks
23 indicated that they have only sent a letter to the
24 Commission and that there has not been any analysis done,
25 pursuant to his opening statement, at this time the

1 Independent Petroleum Association would formally make a
2 request of this Commission for alternate dispute
3 resolution. We under the Alternate Dispute Resolution Act
4 have the possibility of asking prior to a rulemaking
5 proceeding to have facilitated mediation with the
6 regulators on the rulemaking.

7 And since again the small business aspects of
8 this rule were not discussed, there was not a member
9 specifically assigned to the small business issues on the
10 task force or discuss before the Commission or with the
11 Commission prior to promulgation of this Rule we would
12 formally ask at this time for a facilitated rulema- -- a
13 facilitated adjudication in this matter.

14 CHAIRMAN FESMIRE: Mr. Brooks?

15 MR. BROOKS: Mr. Chairman, Ms. -- I'm sorry --

16 MS. FOSTER: Ms. Foster.

17 MR. BROOKS: Ms. Foster, I'm sorry, I apologize.
18 Ms. Foster has misstated what I said. I did not say there
19 was not any -- that anything was not done, I merely said
20 that the notices were given and that I was not prepared to
21 respond to a motion otherwise.

22 I do object to this request that she has made
23 this morning. We had no prior notice that any such request
24 would be made, and once again I'm not prepared to respond
25 to her request today, I had no notice it was going to be

1 made at this time.

2 CHAIRMAN FESMIRE: Mr. Brooks, at this time we'll
3 ask you to respond by the 29th of October, a week from
4 today, with a formal response, and the Commission will take
5 it under advisement.

6 MR. BROOKS: Yes, sir, I'm assuming you mean a
7 written response in this instance?

8 CHAIRMAN FESMIRE: I do, yes.

9 MR. BROOKS: We will do that.

10 CHAIRMAN FESMIRE: Thank you.

11 MS. FOSTER: Thank you, sir.

12 CHAIRMAN FESMIRE: Is there any other business
13 before the Commission.

14 Okay. At this time we will -- Mr. Carr?

15 MR. CARR: No, sir.

16 CHAIRMAN FESMIRE: Just getting ready to leave,
17 huh?

18 (Laughter)

19 MR. CARR: Can't wait.

20 CHAIRMAN FESMIRE: At this time we'll adjourn.
21 We will reconvene on November 5th in this room at nine
22 o'clock in the morning. Thank you all very much.

23 (Thereupon, recess was taken at 9:40 a.m.)

24 * * *

25

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 October 22nd, 2007.



STEVEN T. BRENNER
 CCR No. 7

My commission expires: October 16th, 2006