

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

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

COMMISSION HEARING

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

Volume IX - November 15th, 2007

Santa Fe, New Mexico

This matter came on for hearing before the Oil Conservation Commission, MARK E. FESMIRE, Chairman, on Thursday, November 15th, 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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MARLYN WALTNER (Raven Industries,
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* * *

A P P E A R A N C E S

FOR THE COMMISSION:

CHERYL BADA
Assistant General Counsel
Energy, Minerals and Natural Resources Department
1220 South St. Francis Drive
Santa Fe, New Mexico 87505

FOR THE DIVISION:

DAVID K. BROOKS, JR.
Assistant General Counsel
Energy, Minerals and Natural Resources Department
1220 South St. Francis Drive
Santa Fe, New Mexico 87505

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; Boling 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:

HOLLAND & HART, L.L.P., and CAMPBELL & CARR
110 N. Guadalupe, Suite 1
P.O. Box 2208
Santa Fe, New Mexico 87504-2208
By: WILLIAM F. CARR

(Continued...)

A P P E A R A N C E S (Continued)

FOR NEW MEXICO INDUSTRY COMMITTEE
and YATES PETROLEUM CORPORATION:

JORDEN, BISCHOFF & HISER, P.L.C.
7272 E. Indian School Rd., Suite 360
Scottsdale, AZ 85251
By: ERIC L. HISER

FOR INDEPENDENT PETROLEUM ASSOCIATION OF NEW MEXICO:

KARIN V. FOSTER
Independent Petroleum Association of New Mexico
Director of Governmental Affairs
17 Misty Mesa Ct.
Placitas, NM 87043

FOR CONTROLLED RECOVERY, INC.:

HUFFAKER & MOFFETT, L.L.C.
155 Grant
Santa Fe, New Mexico 87501
P.O. Box 1868
Santa Fe, New Mexico 87504-1868
By: GREGORY D. HUFFAKER, Jr.

FOR NEW MEXICO OIL AND GAS ACCOUNTABILITY PROJECT:

New Mexico Environmental Law Center
1405 Luisa Street, Suite 5
Santa Fe, New Mexico 87505
BY: ERIC D. JANTZ
and
BRUCE BAIZEL

(Continued...)

FOR THE CITY OF LOVINGTON:

PATRICK McMAHON
Heidel Law Firm
Lovington, New Mexico

* * *

ALSO PRESENT:

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

* * *

1 WHEREUPON, the following proceedings were had at
2 9:11 a.m.:

3
4 CHAIRMAN FESMIRE: Okay, let's go back on the
5 record.

6 This is Case Number 14,015 -- I guess I should
7 read the style again -- the Application of the New Mexico
8 Oil Conservation Division for repeal of existing Rule 50
9 concerning pits and below grade tanks and adoption of a new
10 rule governing tanks [sic], below grade tanks, closed loop
11 systems and other alternative methods to the foregoing, and
12 amending other rules to make conforming changes; statewide.

13 Why don't we go ahead and let the record reflect
14 that Commissioners Bailey, Olson and Fesmire are present,
15 we therefore have a quorum present.

16 We're going to start again with the announcements
17 of counsel and make sure that the record reflects everybody
18 that's present.

19 Mr. Brooks, would you --

20 MR. BROOKS: David Brooks for the Oil
21 Conservation Division.

22 MR. HISER: Eric Hiser appearing for the New
23 Mexico industry committee and Yates Petroleum Corporation.

24 MR. CARR: William F. Carr for the New Mexico
25 industry committee, for the New Mexico Oil and Gas

1 Association, BP, ConocoPhillips and Dugan.

2 MS. FOSTER: Karin Foster for the Independent
3 Petroleum Association of New Mexico, and I do apologize to
4 the Commission for being late this morning.

5 CHAIRMAN FESMIRE: Thank you, Ms. Foster.

6 MR. JANTZ: Eric Jantz for the Oil and Gas
7 Accountability Project.

8 MR. HUFFAKER: Good morning, Mr. Chairman, I'm
9 Greg Huffaker for Controlled Recovery, Inc.

10 CHAIRMAN FESMIRE: I guess that's it.

11 Where we were by agreement last night was that we
12 would proceed with the OCD case, beginning with their field
13 people.

14 Mr. Brooks, are you prepared to do that?

15 MR. BROOKS: Yes, Mr. Chairman. With the
16 Commission's indulgence, at this time we would call Brandon
17 Powell.

18 CHAIRMAN FESMIRE: Okay. Mr. Powell, would you
19 come forward, please?

20 Mr. Powell, you haven't been sworn yet, have you?

21 MR. POWELL: Would you be so kind as to raise
22 your right hand and be so?

23 (Thereupon, the witness was sworn.)

24 MR. BROOKS: May it please the Commission?

25 CHAIRMAN FESMIRE: It may, sir.

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BRANDON POWELL,

the witness herein, after having been first duly sworn upon his oath, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BROOKS:

Q. Good morning, Mr. Powell.

A. Good morning.

Q. Would you state your name, please, for the record?

A. Brandon Powell.

Q. And Mr. Powell, by whom are you employed?

A. The New Mexico Oil Conservation Division.

Q. In what office?

A. In the Aztec District 3 office.

Q. And in what capacity are you employed?

A. I'm the environmental specialist.

Q. Are you rather recently employed in that capacity?

A. I am. I believe I've been there approximately a year and a half.

Q. And who was your predecessor in that position?

A. Mr. Denny Foust.

Q. And he'd been there quite a while, hadn't he?

A. I believe when he retired he had 16 years.

Q. What are your duties as environmental specialist

1 at the Aztec office?

2 A. Approving pit permits, approving spill reports,
3 going out to spills, site investigations, usually anything
4 in the environmental capacity.

5 Q. Mr. Powell, have you reviewed a number of records
6 -- in addition to the cases that you've had -- that you've
7 dealt with since you've been there, have you also reviewed
8 records on cases that were handled by Mr. Foust?

9 A. Yes, I have.

10 Q. I'm going to ask you some questions about some
11 specific cases that you have worked on, and I'll be asking
12 you to answer the questions from your personal knowledge
13 and from your review of OCD's business records, and I would
14 like you to specify in each instance when you respond
15 whether you're responding based on your own personal
16 experience or on the examination of business records. Is
17 that understood?

18 A. It is.

19 Q. Very good. The first case I'm going to ask you
20 about is the Coleman Oil and Gas, Inc., Payne Number 221S.

21 A. That was based on a record review.

22 Q. Yeah, if you could go ahead and put the first --
23 slide number 1 up here. I'm sorry, that was based on a
24 record review, you said?

25 A. Yes, it was.

1 Q. Okay, and could you summarize for us what was
2 involved in that case, just very briefly here, and then
3 we'll go through these and then we'll go on to the exhibits
4 about them. Just tell us briefly what was the nature of
5 that case?

6 A. The nature of that case, Coleman had a pit permit
7 that was approved that says when they were done with pit
8 they were going to stabilize the material, after they
9 removed the fluids, and haul the material off to a
10 disposal.

11 We received a complaint from the public that they
12 had ripped the liner below the fluid level during that
13 process, that they had not removed the fluids, and the OCD
14 responded to that public complaint and went to that
15 location and inspected it. They split samples with
16 Coleman, and our -- the OCD's samples showed the TPH above
17 what would be the limit at that location.

18 And then Coleman subsequently removed the fluids
19 and then also removed the cuttings. Due to them ripping
20 the liner below the fluid level, the OCD pursued
21 enforcement action.

22 Q. Okay. Would you put up slide number 3, Mr. von
23 Gonten?

24 Is this -- are these photographs shown here
25 photographs that appear in the Oil Conservation Division's

1 file with regard to this site?

2 A. Yes, they are.

3 Q. But you did not take these photographs?

4 A. No, I did not.

5 Q. Now do the OCD's files reflect the data on which
6 this location was suspected?

7 A. The original -- Yes, they do.

8 Q. And what was that date?

9 A. The original complaint was received on October
10 24th, and that's when the original response occurred.

11 Q. When was the on-site inspection?

12 A. On October 24th.

13 Q. Were you here when Ms. Blancett showed some films
14 of a well site?

15 A. I was not here. I've been informed that it was
16 on the same location.

17 Q. Okay. What was eventually done with this pit? I
18 think you've already told us, but --

19 A. The pit was -- the cuttings were stabilized --
20 the fluids were removed, the cuttings were stabilized and
21 they were removed and hauled to a disposal. And then we
22 issued a notice of violation on it.

23 Q. Okay, before you get to that, was the site
24 cleaned up after the contents were removed?

25 A. Yes, it was.

1 Q. Now you said that a notice of violation was
2 issued?

3 A. Yes, there was.

4 Q. And was there a penalty associated with that, or
5 was that resolved by the operators payment of the penalty?

6 A. Yes, it was. There was a \$2000 penalty assessed
7 to it, and it was resolved with an agreed compliance order.

8 Q. Very good. Was this a drilling pit?

9 A. From what I've seen, yes, it was.

10 Q. Okay. Well, let us then go on to the
11 ConocoPhillips San Juan 31-6.

12 CHAIRMAN FESMIRE: Hang on, Mr. Brooks --

13 MS. FOSTER: Mr. Chairman --

14 CHAIRMAN FESMIRE: -- I think we've got an
15 objection coming.

16 MS. FOSTER: -- yes, I would like to register an
17 objection to this complete presentation. If these are not
18 drilling pits that do not contaminate groundwater, then
19 frankly -- and this is just to demonstrate how the Aztec
20 office is good at enforcement actions, then I don't see the
21 relevance to this case, why we're here today.

22 I also have some letters from some of these
23 companies who obviously would like to defend their names on
24 the record, because the implications made here is that
25 somehow they're bad operators. And obviously, after the

1 testimony that's being given here, there was no
2 contamination to the groundwater, and he -- this gentleman,
3 Mr. -- Brandon, I'm sorry, I don't remember your last
4 name --

5 THE WITNESS: Powell.

6 MS. FOSTER: -- didn't even know if it was a
7 drilling pit. So I don't understand the relevance here,
8 other than dragging Coleman Oil and Gas's name through the
9 mud.

10 CHAIRMAN FESMIRE: Okay. Ms. Foster, this
11 hearing is on the pit rule, it's not on pits-that-
12 contaminate-groundwater-rule. And I think it's relevant to
13 what we're discussing here, and so I'm going to overrule
14 the objection.

15 MS. FOSTER: Well, if I could just say one more
16 thing, I think this goes towards Commissioner Bailey's
17 question at the beginning of this case where -- Is there
18 adequate enforcement?

19 CHAIRMAN FESMIRE: And I'll bet Commissioner
20 Bailey may ask some questions on that subject too.

21 MS. FOSTER: I just would like to register an
22 objection --

23 CHAIRMAN FESMIRE: Okay, it's --

24 MS. FOSTER: -- thank you.

25 CHAIRMAN FESMIRE: -- it's noted and overruled.

1 MR. BROOKS: Thank you, your Honor.

2 Q. (By Mr. Brooks) Okay, we will ask again, then,
3 about the ConocoPhillips Company -- Now just to clarify, I
4 asked you on the Coleman Payne 221, I asked you if that was
5 a drilling pit, and I believe you -- What was your response
6 to that question?

7 A. That from what I've seen, it was, which includes
8 the pit permit, the pit closure. All of it indicates it
9 was a drilling pit.

10 Q. Yeah. Now permits do specify that, do they not?

11 A. Yes, they do.

12 Q. Thank you. Let us talk, then, about the
13 ConocoPhillips Company San Juan 31-6 Number 50.

14 A. Okay. On that one, one of our inspectors had
15 gone out --

16 Q. Okay, these are archival -- these photographs --
17 Let's put up slide number 4, please, Mr. von Gonten. Thank
18 you.

19 These photographs that appear on slide number 4,
20 are those archival photographs that appear in the OCD's
21 records?

22 A. Yes, they are.

23 Q. And do the records reflect when they were taken?

24 A. The records reflect that they were taken on
25 October 28th, 2005.

1 Q. And do the records reflect who took these
2 pictures?

3 A. Yes, they do, Monica [sic] Kieling.

4 Q. Was she an inspector employed by OCD?

5 A. Yes, she is.

6 Q. Okay. Now go ahead and tell us about what these
7 pictures show.

8 A. The pictures show a reserve pit where the liner
9 is below the fluid level. My records indicate that they
10 were running the flow back into the pit, so there was
11 personnel on site when the inspector arrived. They were
12 using the pit when this circumstance was found, so Conoco
13 had sampled that pit and it was below OCD remediation
14 requirements.

15 Q. Do the photographs there show any problems with
16 that pit?

17 A. Yes, they do, they show the fluid level above the
18 top of the liner -- or above the liner.

19 Q. And does it appear that the liner has -- Well,
20 what does it show about the condition of the liner or its
21 installation?

22 A. I -- In the inspection record it shows that it
23 was a tear.

24 Q. Okay. Was there any enforcement action taken on
25 that case?

1 A. Yes, there was.

2 Q. And what was that?

3 A. There was a notice violation issued, which was
4 resolved with an agreed compliance order.

5 Q. And was there a penalty paid?

6 A. Yes, there was.

7 Q. And how much was that?

8 A. Let me check. That, I believe, was \$2000.

9 Q. Now this question was allowed in court, but the
10 way we've been doing our presentations it makes sense to
11 say it, so I will say it and see what happens. Is there
12 anything else you would like to say about this case,
13 ConocoPhillips San Juan 31-6 Number 50?

14 A. I think I've covered the --

15 Q. Very good. Then let us proceed to slide number 5
16 and the Devon Northeast Blanco Unit Number 465A. Is this
17 again -- is this again a case -- well, is your testimony
18 about this case based on your own knowledge or records?

19 A. No, it's based on the records.

20 Q. And are these photographs -- were these
21 photographs taken -- Let me go in the right order. Are
22 these photographs in the files of the OCD as business
23 records?

24 A. Yes, they are.

25 Q. And do the files reflect who took the photographs

1 and when?

2 A. Yes, they were, the were taken by Monica Kieling
3 on March 21st, 2006.

4 Q. Okay, can you tell us about this site?

5 A. Inspector Kieling arrived on site. They were
6 cavitating the Fruitland Coal. The company had noticed a
7 tear in the liner, and they had water trucks emptying out
8 the fluids below the tear in the liner when she arrived.

9 Q. So the -- they'd already begun repair efforts at
10 the time that --

11 A. Yes, they had.

12 Q. Now did the company call the OCD about this?

13 A. The inspector showed up when that happened, so I
14 don't know if the company had called it in.

15 Q. So you don't know if this was self-reported or if
16 the inspector just discovered it?

17 A. I'm not sure.

18 Q. Okay. Was there any enforcement action taken?

19 A. No, there was not, because the company had
20 initiated efforts to resolve the issue.

21 Q. Do the photographs show any problems with the
22 liner?

23 A. Yes, the do. In the top right corner of the
24 second photo they show the tear in the liner.

25 MR. BROOKS: May Mr. Price approach to give the

1 witness a laser pointer?

2 CHAIRMAN FESMIRE: Sure, if Mr. Hiser will
3 promise to duck.

4 MR. HISER: Well, I've been trying to duck.

5 MR. BROOKS: We've trying for days to catch Mr.
6 Hiser in the eye. Someday we'll do it.

7 THE WITNESS: Right in here is the tear in the
8 liner that was observed.

9 Q. (By Mr. Brooks) Thank you. Has this pit been
10 closed?

11 A. I would assume that it has been, but I have not
12 received a closure report on this pit.

13 Q. Now as you understand the existing pit rule, does
14 it provide a time within which closure reports must be
15 filed with OCD?

16 A. No, it does not.

17 Q. And has it been your experience that some
18 companies -- Have you had issues with some companies about
19 filing the closure reports?

20 A. I don't know about the specific companies without
21 doing a record search, but I have had -- since I've been
22 with the OCD I've approved pit closures dating back to
23 2004.

24 Q. And you've been with the OCD since when?

25 A. April of 2006.

1 Q. Thank you. Anything else you would like to say
2 about this location?

3 A. No, I believe that will cover it.

4 Q. Now I forgot to ask you about the last one, so
5 I'll go back briefly. We don't need to go back to it on
6 the slide, but I'll briefly ask you about the
7 ConocoPhillips San Juan 31-6 Number 50. Was that a
8 drilling pit?

9 A. It was a workover pit.

10 Q. Okay. Now about the Devon Northeast Blanco Unit
11 Number 465A, what kind of pit was that?

12 A. A drilling pit.

13 Q. Very good. Let us proceed, then, to Energen
14 Resources Corporation's Santa Rosa 5 Number 3. Now is this
15 a case that you personally handled, or are you testifying
16 about this one based on business records?

17 A. Based on records.

18 Q. This is slide number 6, and you have it up. Are
19 these photographs that appear as slide number 6, are they
20 -- on slide number 6, are they photographs that are in the
21 business records of the Oil Conservation Division?

22 A. Yes, they are.

23 Q. And looking at those slides, it appears that they
24 have the date of 3-1-2005.

25 A. Yes.

1 Q. Do the records verify that that was the date that
2 that location was inspected?

3 A. Yes, it does.

4 Q. And who do the business records of OCD indicate
5 took those photographs?

6 A. Darrell Davis.

7 Q. Now can you summarize for us what the business
8 records of the OCD show about this location?

9 A. The inspection shows that there was a large film
10 of heavy produced hydrocarbon floating on the pit surface,
11 that the pit liner is torn, allowing fluid to overlap the
12 liner.

13 Q. Very good. And do the photographs show any
14 problems with this liner?

15 A. Yes, they do.

16 Q. Can you point them out for us?

17 A. Right -- I think the battery is almost dead in
18 this pointer. Right in that area shows where the liner is
19 torn below the fluid level.

20 Q. Okay, and this is a liner tear, as opposed to
21 just a slippage, right?

22 A. Yes.

23 Q. Let's see, was enforcement action taken on this
24 case?

25 A. It was. Part of the enforcement action is, we

1 required Energen to sample the soil that was in contact
2 with the fluid. It tested below OCD requirements, but due
3 to the liner being torn below the fluid level and the
4 hydrocarbons on the pit, a notice of violation was issued
5 and included with an ACO.

6 Q. And was there a fine paid?

7 A. Yes, there was.

8 Q. And how much was that?

9 A. That was \$2000. It was a penalty that was paid
10 for \$2000.

11 Q. Penalty. You have corrected me that these are
12 not fines, they are penalties, and that is a correct legal
13 point and I thank you.

14 I forgot to ask you a question that Mr. Price
15 just reminded me of. Do the records show in these cases
16 the type of liner that was installed in these pits?

17 A. I would have to look at it again. I believe
18 they're all 12-mil liners.

19 Q. Would you review your recollection on that for
20 us?

21 A. All of them have 12-mil except for the Devon on
22 the pit permit, and it says it will be constructed with
23 their general plan, and I believe that says 12-mil, but I
24 can't testify to that as a matter of fact.

25 Q. Very good. Is there anything else you would like

1 to say about Energen's Santa Rosa 5 Number 3?

2 A. No, I believe that covers it.

3 Q. Then let us go on to Roddy Production Company's
4 Yockey Number 7. That's slide number 7, and you've got it
5 up there. Was this a case that you handled?

6 A. Yes, it was.

7 Q. So in this case would you be testifying from your
8 personal knowledge?

9 A. Yes, I would.

10 Q. If you look at the pictures that appear on slide
11 number 7, do these fairly and accurately represent the
12 condition of this location at the time you inspected it?

13 A. Yes, it would.

14 Q. And did you --

15 A. The one -- the photo on the right shows when I
16 inspected it originally, the photo on the left is the
17 follow-up inspection.

18 Q. Okay, did you take those pictures?

19 A. Yes, I did.

20 Q. And what were the dates when you took those
21 pictures?

22 A. I was trying to look here for my inspection
23 report. I took the original photo on July 24th, and I took
24 the follow-up photo on August 2nd.

25 Q. Okay, what happened at this location?

1 A. This location, there was a -- When I arrived on
2 site, the production manager for Roddy was there, and I
3 observed a tear in the pit liner, and the fluid extended
4 above the tear. I informed the production manager that it
5 was in violation and he needed to remove the fluid below
6 the tear in the liner.

7 Q. If you can get Mr. Price's pointer to work, can
8 you show us the tear in the photograph?

9 A. Right there.

10 Q. Thank you. Was there any enforcement action
11 taken in this case?

12 A. Yes, there was.

13 Q. And what was that?

14 A. There was a notice of violation issued due to the
15 lack of a pit permit on this location and also the tear in
16 the liner.

17 Q. And has that enforcement action been resolved?

18 A. Yes, it has, it was resolved with an agreed
19 compliance order.

20 Q. Was there a penalty?

21 A. Yes, there was.

22 Q. And how much was the penalty?

23 A. It was \$2000.

24 Q. Thank you. Is there anything else you would like
25 to say about Roddy Production Company's Yockey Number 7?

1 A. I believe that covers it.

2 Q. Okay. Then let us go to XTO's CA McAdams D
3 Number 2G. Was this your case?

4 A. Yes, it was.

5 Q. So you're testifying from personal knowledge,
6 right?

7 A. Yes, I am.

8 Q. Do the photographs that appear on slide number 7
9 -- I'm sorry, slide number 8. Do the photographs that
10 appear on slide number 8 fairly and accurately represent
11 the conditions at that location at the time you inspected
12 it?

13 A. Yes, it does.

14 Q. And when was that, that you inspected it?

15 A. I inspected it on January 29th, 2007.

16 Q. And I believe there are actually dates on those
17 photographs, although I cannot read them from here.

18 A. Yes, there are.

19 Q. And do they confirm that date?

20 A. Yes, they do.

21 Q. What happened here?

22 A. I received a report of a spill from XTO on
23 January 28th at approximately 4:00 p.m., that there was a
24 release from the drilling pit. I arrived on the location
25 and observed pump trucks -- the next morning on the 29th,

1 observed pump trucks removing the drilling fluid and
2 cuttings and hauling them away.

3 What I observed -- if Mr. Hiser would move to the
4 side just a moment. I believe the tear was in this area --
5 I don't have the picture showing the tear in this slide --
6 and it went through the berm -- and the pad was built up --
7 and went sideways and actually came out of the ground in
8 this area here and flowed into a drainage.

9 Q. Okay. Would this be -- would this flowing into a
10 drainage, would that be a potential problem for surface
11 water?

12 A. It was reported by XTO that it had reached a
13 watercourse.

14 Q. Very good. Was there any enforcement action
15 taken in this case?

16 A. No, there was not. XTO properly reported the
17 release and was properly handling the release.

18 Q. Okay. Is this -- Where is this pit located in
19 relation to the watercourse?

20 A. The pit is located -- I would estimate it 15 to
21 20 feet away from the watercourse.

22 Q. Under your review of the new rules, have you --
23 Are you familiar with the proposed rules?

24 A. Slightly.

25 Q. Well then, you may not know the answer to this,

1 but if you do you can ask it -- you can answer it. Under
2 the proposed siting requirements in the proposed rules,
3 would a pit have been allowed at this location, at this
4 precise location?

5 A. I don't know the exact distance that's in the
6 rule. I don't believe so, but I don't know the exact
7 distance.

8 Q. Very good. Well, we can go back to that in
9 another context.

10 Is there anything else you would like to say
11 about this location?

12 A. That would be all.

13 Q. Now I haven't asked you about each one of these,
14 but are all of these pits either drilling or workover pits?

15 A. Yes, they are.

16 Q. Are all of them -- You answered that some of them
17 were 12-mil liners, and I asked you that in the middle so I
18 don't know if that applied to the others. What kind of
19 liners were used in the last three, the Energen, Roddy and
20 XTO?

21 A. Those were all reported to be -- have 12-mil
22 liners used.

23 Q. Very good, thank you.

24 Mr. Powell, is Exhibit 33, OCD Exhibit Number 33,
25 is that -- was that -- I'm sorry, we had a confusion

1 about --

2 A. We just went over 32.

3 Q. This is 32 in the official book. Was OCD Exhibit
4 Number 32, was that prepared by you or compiled by you from
5 OCD business records?

6 A. Yes, it was.

7 MR. BROOKS: Mr. Chairman, we're going to offer
8 Exhibit 32, and I wanted to add that I was prepared for the
9 possibility that we might have a best-evidence objection
10 here, and therefore we have 12 copies of all the incident
11 files on these cases, but they were not designated as
12 exhibits so we're not offering them.

13 However, if anybody wants us to offer them in
14 evidence we have them available.

15 At this time I offer Exhibit 33.

16 CHAIRMAN FESMIRE: Is there any objection to
17 Exhibit 32?

18 MR. BROOKS: Or 32, I'm sorry.

19 CHAIRMAN FESMIRE: 32 being admitted into
20 evidence?

21 MS. FOSTER: My only objection would be what I
22 stated previously.

23 CHAIRMAN FESMIRE: Okay, your objection was
24 noted.

25 MR. HISER: No objection.

1 CHAIRMAN FESMIRE: Seeing no further objection,
2 Exhibit 32 will be admitted into evidence.

3 MR. BROOKS: Very good, pass the witness.

4 CHAIRMAN FESMIRE: Mr. Hiser, do you have any
5 questions of this witness?

6 CROSS-EXAMINATION

7 BY MR. HISER:

8 Q. I guess I have only one question, and that would
9 be -- You stated that these were 12-mil liners. Were any
10 of these liners reinforced, or were they all just straight
11 12-mil liners?

12 A. I couldn't comment on what type of 12-mil liners
13 they all were. I wasn't there for all of them, so I
14 couldn't make that comment.

15 Q. On the two that you did, which I think were the
16 -- if I remember correctly, were the Roddy and the XTO
17 sites, these were the two that you personally supervised?

18 A. Yes.

19 Q. Do you remember on those two?

20 A. I believe both of those were the 12-mil woven
21 liners.

22 Q. Woven, but not reinforced?

23 A. No.

24 MR. HISER: Thank you.

25 CHAIRMAN FESMIRE: Mr. Carr?

CROSS-EXAMINATION

1
2 BY MR. CARR:

3 Q. Mr. Powell, what is your title with the Oil
4 Conservation Division?

5 A. I'm the environmental specialist.

6 Q. And what are your duties?

7 A. I supervise the permitting of pits, review the
8 spill reports, go out in the field if there's an
9 environmental concern. Occasionally when I'm out in the
10 field I perform inspections as well.

11 Q. And your responsibilities would include the
12 enforcement of current Rule 50, would they not?

13 A. Yes, it would.

14 Q. In this role are you required to, on virtually a
15 day-by-day basis, work with operators in the San Juan
16 Basin?

17 A. Yes.

18 Q. And when a leak or release occurs, what is an
19 operator supposed to do?

20 A. They're supposed to repair the leak, we -- and
21 report it, depending on the quantities that was released.

22 Q. Are all releases to be reported to the OCD?

23 A. No, they're not.

24 Q. And what releases are to be reported, and which
25 ones are not?

1 A. Releases between 5 and 25 barrels have to have
2 written notification, releases 25 barrels and above have to
3 have 24-hour notification, or any release that enters a
4 watercourse, endangers the public, or if there's a fire,
5 have to be reported within 24 hours.

6 Q. And what kind of notification is required? Do
7 they do that verbally?

8 A. Verbal notification within 24 hours on major
9 releases, and then also written notification.

10 Q. And you're the person to whom they send those
11 concerns?

12 A. Yes, I am.

13 Q. Once that happens, what is the process at the
14 OCD? What do you do?

15 A. Depending on the circumstances, like the XTO
16 site, I went out the next morning. When I talked to them
17 it had not entered a flowing watercourse, so I inspected it
18 the next morning.

19 Q. Is the type of corrective action that an operator
20 is required to undertake something that you prescribe?

21 A. Yes.

22 Q. And is it -- does it -- It varies --

23 A. Well --

24 Q. -- site by site, does it not?

25 A. -- let me clarify that. The type of prescriptive

1 action is usually something that the operator says they're
2 going to do, and I either approve or deny that.

3 Q. Okay. And when is testing required, analytical
4 testing?

5 A. Depending on the circumstances, if hydrocarbons
6 reach the soil, then we require testing.

7 Q. And is that a decision you make, or do you just
8 approve or disapprove the --

9 A. If --

10 Q. -- operator decision?

11 A. -- hydrocarbons have impacted the soil and the
12 company hasn't said they're going to test, then I require
13 testing.

14 Q. Can you require a company to treat material?

15 A. I guess I'm confused with your question.

16 Q. To do something to treat the site? I mean, are
17 you able to tell an operator they have to -- remove the
18 soil?

19 A. If it's needed, yes.

20 Q. Can you order them to mix it or require other
21 types of corrective actions or --

22 A. The other types of corrective action, usually
23 they propose and I can approve those.

24 Q. Do you have authority to require that they dig
25 and haul it to a landfill?

1 A. If they don't come up with a reasonable
2 corrective action, yes.

3 Q. What releases are handled by -- at the district
4 level, as opposed to a release that would come to the Santa
5 Fe office?

6 A. The Santa Fe office would get anything that
7 endangers public health or anything that reaches
8 groundwater.

9 Q. That reaches groundwater?

10 A. Yes. Contaminates groundwater.

11 Q. And do you make the decision if, in fact, it is a
12 matter that ought to go to Santa Fe?

13 A. Yes.

14 Q. Most of these spills -- and correct me if I'm
15 wrong here -- really are better handled by somebody who is
16 close in proximity to the site; isn't that correct?

17 A. The spills that we -- the liner failures that we
18 went over, the rule states that the district person would
19 be the one going to the site.

20 Q. And you're the person who can quickly get out and
21 respond if needed --

22 A. Yes.

23 Q. -- isn't that fair to say?

24 So this is a proper district office function --

25 A. Yes, it is.

1 Q. -- on a day-to-day basis?

2 Most of these spills and releases have come to
3 your attention, and I know they're all different, but are
4 you able to handle them fairly quickly, and I mean in terms
5 of days and weeks?

6 A. Yes.

7 Q. They don't take months or years to get resolved?

8 A. Normally not.

9 Q. Now you selected the sites that are included in
10 your exhibit that you presented here today?

11 A. Yes, I did.

12 Q. And most of them really were from record review?

13 A. Yes, they were. Four of them were record review,
14 and the --

15 Q. And when --

16 A. -- were personal inspection.

17 Q. -- when you were going about this, how many
18 records did you have to plow through to select these?

19 A. I don't have that exact count.

20 Q. A lot of them?

21 A. A fair amount?

22 Q. Fifty?

23 A. I don't have an exact count.

24 Q. Are the sites in the -- that you have selected
25 representative of problems that you have personally

1 experienced with pits in this area?

2 A. They're representative to pit liner failures that
3 I've observed.

4 Q. In your summary of the presentation you stated,
5 There has not been a large number of pit liner cases that I
6 found in District 3 during my record search.

7 A. I haven't gone over that slide yet. Can you go
8 to the next slide?

9 MR. VON GONTEN: Next slide? One of the first
10 slides.

11 THE WITNESS: Okay.

12 Q. (By Mr. Carr) At the bottom under comments,
13 There has not been a large number of pit liner failure
14 cases that I found in District 3 during my record search.

15 A. Correct.

16 Q. What records were you searching?

17 A. I was searching through our environmental files
18 and through our violation files.

19 Q. And in those files, you didn't find a large
20 number of pit failures, that's what you're saying?

21 A. Correct.

22 Q. "Very few pit-liner failure cases have required
23 analytical testing." That's also your --

24 A. Correct.

25 Q. -- general comment?

1 And I think you said that you required analytical
2 testing when -- what?

3 A. When there are hydrocarbons present, because
4 that's what the guidelines have a criteria for.

5 Q. So of the pit liner failures that you found, very
6 few of those had hydrocarbons?

7 A. Correct.

8 Q. Then you state, In most cases the only corrective
9 action that was required was removal of the drilling fluids
10 below the liner failure. And that is what was required or
11 proposed and accepted by the OCD --

12 A. Correct.

13 Q. -- in most of those cases?

14 And then you finally say, All of the above
15 mentioned pits were lined with 12-mil thickness liners.

16 A. Correct.

17 Q. When you say that, you're saying that you have
18 had not a large number of failures using 12-mil; is that
19 correct?

20 A. The -- What I said in there, that all of the ones
21 I have presented were 12-mil.

22 Q. Okay. Now when you say 12-mil you're talking
23 about the thickness of a liner. Were these woven liners?
24 Do you beyond just the thickness in reporting this? Do you
25 look at the liner material and know whether you've got

1 woven or --

2 A. All that's required in the pit permit, the way
3 it's written now, is the thickness.

4 Q. If we go to your -- I think it's your slide
5 number 3, the Coleman Payne 221S -- Do we have another
6 picture that's --

7 A. Where'd the other picture go?

8 Q. -- missing?

9 A. Okay.

10 Q. Now when we look at these pictures, when in the
11 process -- at what time were these photographs taken? Can
12 you tell?

13 A. I guess -- Would you clarify?

14 Q. These are pictures during pit removal and
15 remediation; isn't that correct?

16 A. I believe they were there during pit closure,
17 yes.

18 Q. And what we have here is photographs of the
19 efforts that Coleman undertook to excavate the site?

20 A. On the right-hand side is the excavation of the
21 site.

22 Q. And on the left-hand side you can see a bunch of
23 heavy equipment and -- Would it be fair to say that this
24 was also during the process of trying to address this
25 pit --

1 A. Yes, in there it states that they've removed the
2 liner in a process to start closure, but they had not
3 removed the fluids before removing the liner.

4 Q. And this was in response to Ms. Blanchett's [sic]
5 letter?

6 A. Yes, it was.

7 Q. And after this was done, she thanked you for the
8 OCD's...

9 A. I'm not sure on that.

10 Q. Did not she --

11 A. It was a response to a public complaint. I don't
12 know if Ms. Blancett was the one that had called in.

13 Q. In your files do you not have an e-mail from her
14 thanking you for your attention to the well?

15 A. I would have to look, but I don't know if I
16 have -- I don't know if I brought any e-mails with me.

17 MR. CARR: Mr. Chairman, I pulled off the web
18 page last night an e-mail from Ms. Blanchett thanking the
19 Division. It's part of your record and I'd just like that
20 to be noted, that it's in the file.

21 CHAIRMAN FESMIRE: Mr. Carr, if you'll tell us
22 exactly where to find it, we'll take administrative notice
23 of that.

24 MR. CARR: Well, it's in the well file under API
25 Number 30-45-32517.

1 CHAIRMAN FESMIRE: Do you by any chance have a
2 copy of --

3 MR. CARR: I have one copy of it, and I can
4 provide other copies later. I made notes all over this
5 one, I'd just as soon that --

6 CHAIRMAN FESMIRE: Why don't you make
7 arrangements for us to get one this afternoon.

8 MR. CARR: I will.

9 Q. (By Mr. Carr) But my question, Mr. Powell, is
10 that under current rule, if a landowner has an issue with
11 the pit they can call the OCD; isn't that correct?

12 A. That is correct.

13 Q. And to address these problems you don't have to
14 change the rule, do you?

15 A. To address the problems that we observed here,
16 it's currently covered under Rule 50.

17 Q. And when you get a complaint like this, do you
18 try and determine whether or not the person who is lodging
19 the complaint is in fact the landowner?

20 A. Normally when we receive a public complaint we
21 don't go as far as determining who the landowner is. We
22 receive it as a public complaint and we respond to it.

23 Q. And you respond to it -- Whether or not Ms.
24 Blanchett is the landowner, you would respond to her --

25 A. Correct.

1 Q. And that's all done under the current rule?

2 A. Correct.

3 Q. If we go to the ConocoPhillips pit, exhibit
4 number 4, in this case no analytical testing was required
5 so there were not hydrocarbon shows; is that right?

6 A. Actually, I believe analytical testing was
7 performed, and I would have to check to see if it had been
8 required.

9 Q. No, actually your slide says that the company
10 decided to have analytical testing performed. The question
11 here is that the results of that -- there was no
12 contamination established above your remediation
13 requirements, correct?

14 A. Correct.

15 Q. And there was no contamination of groundwater at
16 this site?

17 A. We didn't investigate groundwater, but since
18 there was no contamination above OCD levels I would assume
19 that there was not.

20 Q. If we look at the Devon Energy Northeast Blanco
21 Unit 465A, has this pit been closed at this time?

22 A. I do not have on record whether or not it's been
23 closed.

24 Q. No analytical testing was required?

25 A. There was not analytical testing required.

1 Q. No evidence of groundwater contamination here?

2 A. No.

3 Q. As to the Energen Resources Santa Rosa 5 Number
4 3, again you don't know what type of 12-mil lining we had
5 at this site, do you?

6 A. I do not.

7 Q. And in this situation an agreed compliance order
8 was entered?

9 A. Yes, there was.

10 Q. Has this site been -- this pit been closed?

11 A. We have received a pit closure on this.

12 Q. And so under current rule, you collected a fine
13 and the site has been closed?

14 A. We collected a penalty under an agreed compliance
15 order.

16 Q. On the Roddy Production Company Yockey Number 7,
17 again, no analytical testing was required?

18 A. Correct.

19 Q. So there was no hydrocarbon show?

20 A. Correct.

21 Q. And the pit -- has this pit been closed?

22 A. I have -- I don't have that record here, but I --
23 My recollection, I remember that I had received a pit
24 closure on this.

25 Q. And then we have the XTO McAdams D Number 2G.

1 This is, in fact, an example of what an operator ought to
2 do; isn't that right?

3 A. As far as Rule 116 on the spill release, yes.

4 Q. They called you as required?

5 A. Yes.

6 Q. And then they took corrective action as required?

7 A. Correct.

8 MR. CARR: That's all I have, thank you.

9 THE WITNESS: Thank you.

10 CHAIRMAN FESMIRE: Ms. Foster?

11 MS. FOSTER: Thank you.

12 CROSS-EXAMINATION

13 BY MS. FOSTER:

14 Q. On the XTO slide, did the XTO company -- did they
15 receive a penalty for this case?

16 A. No, they did not.

17 Q. Okay. So they reported it within 24 hours, that
18 it had impacted a watercourse?

19 A. Yes, they did.

20 Q. All right. And as an inspector, what is the
21 definition of impacting a watercourse? How would you
22 determine --

23 A. It entered a watercourse --

24 Q. Okay, but by --

25 A. -- the release entered a watercourse.

1 Q. -- by visible hydrocarbons in the watercourse, or
2 how do you determine --

3 A. The material released entered a watercourse --

4 Q. How do you know that?

5 A. -- and XTO reported that on a C-141 --

6 Q. Okay, so you're going --

7 A. -- and they also reported that verbally.

8 Q. Okay, I don't want to interrupt you, so...

9 You're going off of the XTO report that there was -- that
10 it impacted the watercourse, not what your observations are
11 as to --

12 A. When I arrived on site, it appeared to be a
13 watercourse.

14 Q. Okay, did you actually sample the watercourse to
15 determine if there was contamination?

16 A. XTO sampled the watercourse.

17 Q. But you didn't?

18 A. I did not personally.

19 Q. Okay. Now in your review of the records or in
20 your personal experience, have seen any good visits -- I
21 mean good pits in your field visits, what you'd consider a
22 good pit?

23 A. I have seen pits that the liner was intact, yes.

24 Q. Okay, and I want to make sure I understand what
25 the -- why is it that some companies got penalties and some

1 did not?

2 A. Depending on the reporting requirements, when we
3 find a tear in the liner it comes -- if an inspector finds
4 it, it comes to the environmental specialist and also the
5 district supervisor. We review it to see if it's a
6 possible violation that should be followed up with a notice
7 of violation. From there, the legal staff is consulted,
8 and they deal with this from there.

9 Q. And so when you go out and you see a tear above
10 the water line, for example --

11 A. Right.

12 Q. -- a tear in the liner, is that an automatic
13 penalty for the operator because you've seen it and they
14 didn't report it?

15 A. Not necessarily.

16 Q. Okay, if you have the instance where you go out
17 to a location and you see a tear in the liner, do you give
18 them an opportunity to repair it before they would get a
19 fine from you?

20 A. It would depend on the circumstances of that
21 individual case.

22 Q. Okay, so what I'm hearing is that there is some
23 subjectivity here?

24 A. Well, one example is, we have a pit that on an
25 inspection was torn. Before we contacted the company -- I

1 believe a day or -- a couple days had passed, we went back
2 to the site, but it had been repaired. And there was not
3 a penalty assessed on that.

4 Q. Okay, and there was not a penalty assessed on
5 that because the tear had been repaired?

6 A. Correct.

7 Q. Okay, so you had given them the opportunity to
8 repair and then --

9 A. They had gone out there and repaired the liner.

10 Q. Okay, and is that the instance why Devon, for
11 example, in your cases here did not get fined, because they
12 were -- they had repaired the tear --

13 A. They were in the process of removing the fluid
14 below the tear in the liner when we arrived on location.

15 Q. Okay. Now when you receive a public complaint
16 about a location -- I believe that on the Coleman location
17 the public complaint was that there was a tear in the
18 liner?

19 A. I can't go off exactly what the complaint was. I
20 can go off of what the inspection records say.

21 Q. Now, do you know a Mr. Bruce Taylor with
22 production construction? He's with production construction
23 foreman with Coleman Oil and Gas.

24 A. I do not know him personally.

25 Q. Okay. Are you aware that as it relates to the

1 Coleman picture here, I believe on slide 3 that's shown
2 right there -- are you aware that there was a major snow
3 event prior to the closing of this pit?

4 A. I was not aware of that.

5 Q. And are you aware that there was actually
6 discussion between their foreman and your office concerning
7 closure of the pit because -- or a request for an extension
8 because of all the snow that was on top of the location?

9 A. I do not have that in my records.

10 CHAIRMAN FESMIRE: Ms. Foster do you intend to
11 present evidence of these facts?

12 MS. FOSTER: Mr. Coleman would like to come in
13 and testify this, yes, and he will --

14 CHAIRMAN FESMIRE: Okay, so Mr. Coleman will --

15 MS. FOSTER: -- testify on --

16 CHAIRMAN FESMIRE: -- be presented as a rebuttal
17 witness --

18 MS. FOSTER: No, he will not, Mr. Chairman.

19 CHAIRMAN FESMIRE: -- in that respect?

20 MS. FOSTER: As I stated earlier -- you know,
21 these are attacks on --

22 CHAIRMAN FESMIRE: Ms. Foster, the other day you
23 got onto me for testifying, for doing essentially what
24 you're doing here. Now I would allow that if you intended
25 to present evidence that these facts were true. This

1 witness is not an expert and cannot testify on
2 hypotheticals. He's here as a fact witness.

3 MS. FOSTER: I'm not asking him hypotheticals,
4 Mr. Chairman, I'm asking him based on his knowledge of
5 working in the office and records on this case whether he's
6 aware that there were conversations with the OCD prior to
7 these pictures taken.

8 CHAIRMAN FESMIRE: Mr. Brooks?

9 MR. BROOKS: Well, my objection was going to be
10 that the -- although frequently asked, the question "Are
11 you aware that...", which then proceeds to state facts,
12 assumes facts not in evidence because -- It is a valid
13 question only if those facts are true. There's no evidence
14 of those facts, and I think your Honor's ruling would be
15 acceptable to the Division that if they intend to present
16 evidence to that fact, then it would be admitted with that
17 understanding. Otherwise, I don't think it's admissible.
18 I think it's an improper question.

19 CHAIRMAN FESMIRE: Yeah, Ms. Foster, that's my
20 inclination too. If you intend to present evidence that
21 these facts are true, that's a valid question. I think you
22 can ask him if he's aware. But to follow up with what is
23 essentially testimony is, I believe, objectionable.

24 So would you please be careful when you phrase
25 your questions and not state facts as facts unless you

1 intend to present evidence that they are facts?

2 MS. FOSTER: Okay, well then I would like to have
3 him review a complete record for the court, then, and he
4 can tell us what's in the record. I'm just trying to speed
5 things up and ask him if he's aware of what's in the
6 records.

7 CHAIRMAN FESMIRE: And --

8 MS. FOSTER: If -- if -- you know, then I would
9 ask that all these records, the record concerning the
10 Coleman well, be put into evidence and then we can review
11 that page by page.

12 CHAIRMAN FESMIRE: The record on this well is, as
13 Mr. Carr has amply demonstrated, public record and
14 available to anyone. You could have presented that as a
15 rebuttal -- rebuttal exhibit.

16 As it is right now, if you're going to ask him, a
17 fact witness, questions as fact, I would request that you
18 either intend to present a rebuttal witness that would
19 testify to those facts, or limit your questions to the
20 facts on the record, please.

21 MS. FOSTER: So what you're saying is that I
22 can't elicit any other facts that are already not on the
23 record?

24 CHAIRMAN FESMIRE: No, I'm not saying that at
25 all. If you have knowledge that they're facts and are

1 capable of presenting evidence that they are facts, you can
2 ask him about them. You can also ask him about his
3 knowledge. But you can't testify and go on the record
4 making statements of fact that aren't -- that you don't
5 intend to present.

6 MS. FOSTER: Well, that is why I'm asking my
7 questions as, Are you aware of? And he has the opportunity
8 to say yes or no. If he is not aware of it, then my line
9 of questioning is done.

10 CHAIRMAN FESMIRE: The question, Are you aware
11 that there was a snow event prior to this date? is a valid
12 question. The question, Are you aware that there was a
13 snow event that caused this, that will be, you know,
14 treated as a fact, is not a valid question.

15 You can ask him -- If you have evidence, if you
16 have a belief that these facts are true, you can ask him
17 the question. But you can't continue if you're not going
18 to present evidence that these are facts. Okay?

19 MS. FOSTER: Okay.

20 CHAIRMAN FESMIRE: Where are we at?

21 MS. FOSTER: Sorry?

22 CHAIRMAN FESMIRE: What was the last question?

23 MS. FOSTER: I don't remember.

24 CHAIRMAN FESMIRE: Would you like it read back?

25 MS. FOSTER: No, I'll just plow on, if that is

1 okay.

2 CHAIRMAN FESMIRE: Thank you, Ms. Foster.

3 Q. (By Ms. Foster) Based on your review of the
4 records, were there conversations between the OCD and the
5 Coleman Oil and Gas Company concerning closure of this
6 well?

7 A. Based on the records I reviewed, there were
8 conversations. I don't have those exact conversations with
9 me.

10 Q. And based on your review of the records, was
11 there an extension that was requested and denied by the OCD
12 office?

13 A. I do not have that. I know a 103 was denied. I
14 believe that was a request to bury it in place, if I
15 remember correctly, instead of digging and hauling it as
16 originally requested.

17 Q. Okay. Well, are there requests -- on a sundry
18 notice, can an operator make a request for an extension to
19 evaporate a pit?

20 A. Yes, they can.

21 Q. Okay, and that would be on a sundry notice?

22 A. Yes, it would.

23 Q. And how many sundry notices does your office
24 receive, say, on a weekly basis?

25 A. I wouldn't know the exact count on -- I wouldn't

1 know the count on that.

2 Q. Okay, is it --

3 A. I'm not the only one that receives the sundry
4 notices.

5 Q. All right, but are there quite a few requests for
6 sundry notice, or would you say they're very rare based on
7 your experience?

8 A. I don't know all the sundry notices that come in,
9 and I wouldn't be able to testify on a day-by-day basis how
10 many that come in.

11 Q. Okay. Now this Coleman Oil and Gas Payne
12 location, are you -- You're familiar with Ms. Tweetie
13 Blancett, correct?

14 A. I have not met her personally, no.

15 Q. Okay, have you seen her tape from -- that she did
16 with the BLM?

17 A. No, I have not.

18 Q. You have not, okay. All right.

19 Now I believe you stated that all these cases
20 that you looked at were actually drilling pits?

21 A. Drilling and workover pits.

22 Q. And -- But none of these cases, since they
23 remained with the district office, were actually
24 contamination-to-groundwater cases?

25 A. I do not find where any of these cases

1 contaminated groundwater, no.

2 Q. Okay. And contamination to groundwater, is that
3 usually something that's reported by the operator, or is
4 that something that --

5 A. I believe the operator is required, but we also
6 report to the Santa Fe office when there's groundwater
7 impact --

8 Q. Right, but my question was --

9 A. -- to make sure that Santa Fe is aware of that.

10 Q. -- my question was getting at, if there is a
11 report of suspected contamination to groundwater, do you
12 actually verify that by any testing that you do, or do you
13 just --

14 A. If we suspect groundwater impact, we notify the
15 Santa Fe office and they can require further investigation.

16 Q. Okay, but the district office does not -- you
17 just basically -- if there is the word groundwater,
18 possible contamination, in the thing, it automatically goes
19 to the Santa Fe office?

20 A. Correct.

21 Q. All right. Now when there is a public complaint
22 about a ripped liner, do you go talk to the operator?

23 A. Usually we go inspect the location.

24 Q. You inspect the location. And the only thing
25 that you're looking for is that there actually was a ripped

1 liner?

2 A. The validity of the complaint, correct.

3 Q. All right. Well, when you said the validity of
4 the complaint, do you find out what the circumstances were
5 on the --

6 A. Usually we go to the site and make sure there's
7 an issue, and while we're at the site we talk to the --
8 call the operator, have them come out, correct the issue if
9 possible, and go from there.

10 Q. Okay. And what if the operator were to say to
11 you that they are not aware of how the tear occurred? In
12 other words, they didn't -- they don't think that they did
13 it in their operations?

14 A. We would find out if they inspect the location,
15 if they're properly maintaining the liner.

16 Q. But if there's still a tear in there, then there
17 would be -- at least it would be on the pathway towards
18 getting a penalty?

19 A. It would be possible, yes.

20 MS. FOSTER: Okay. I have no further questions
21 of this witness.

22 Again for the Commission, I would state that I
23 believe that Mr. Hanson will be coming in and giving sworn
24 statement concerning this location.

25 CHAIRMAN FESMIRE: Mr. Hansen or Mr. Coleman?

1 MS. FOSTER: Actually it's Coleman Oil and Gas.
2 Chris Coleman, I believe, is out of the country. Michael
3 T. Hanson is the operations engineer who wrote me a letter
4 concerning this issue.

5 CHAIRMAN FESMIRE: And he would be a rebuttal
6 witness for you at the end of --

7 MS. FOSTER: No, I believe he has the opportunity
8 to come in and make public -- a public statement.

9 CHAIRMAN FESMIRE: He can come in as a witness.
10 That was the question. Is he going to be a witness for
11 you? Is he going to come testify on his own?

12 MS. FOSTER: No, I don't have him on my witness
13 list. I don't intend to put him on as a rebuttal witness.
14 I just -- He has stated that based on the OCD presentation
15 that he would like to have the opportunity to place his
16 rendition of the facts on the record for the Commission so
17 that in his mind things are clear.

18 CHAIRMAN FESMIRE: Okay, that's part of the
19 rules, he's allowed to do that.

20 MS. FOSTER: Okay.

21 CHAIRMAN FESMIRE: Mr. Jantz?

22 MR. JANTZ: Thank you, Mr. Chairman.

23 EXAMINATION

24 BY MR. JANTZ:

25 Q. I just have a quick few questions for you, Mr.

1 Powell. With respect to the Coleman Oil and gas liner
2 tear, that was reported by a member of the public; is that
3 right?

4 A. That is correct.

5 Q. Okay. The ConocoPhillips tear was found by an
6 inspector; is that correct?

7 A. That is correct.

8 Q. The Devon Energy liner tear was found by an
9 inspector as well, right?

10 A. The inspector arrived on location. I would
11 assume that Devon found it prior to that, since they were
12 removing the fluids when the inspector --

13 Q. Was it reported?

14 A. It was not reported, that I am aware of.

15 Q. The Energen Resources Corporation, do you know
16 who discovered the tear in that case and whether it was
17 reported?

18 A. Let me check the records. I show that Darrell
19 Davis, a previous inspector of the OCD, found that tear.

20 Q. So in that case, Energen Resources, the tear was
21 found by an inspector as well?

22 A. Correct.

23 Q. Roddy Production, the liner tear was found by an
24 inspector?

25 A. Yes, it was.

1 Q. Not reported?

2 A. Not reported.

3 Q. XTO, of the cases you've cited, only this one was
4 reported by the operator; is that correct?

5 A. I believe so.

6 MR. JANTZ: Thank you, Mr. Powell.

7 CHAIRMAN FESMIRE: Mr. Huffaker?

8 MR. HUFFAKER: Nothing, Mr. Chairman.

9 CHAIRMAN FESMIRE: Okay. Mr. Brooks, do you have
10 a redirect on this witness?

11 MR. BROOKS: I do. Do you wish me to go ahead or
12 do so after the Commission's questions?

13 CHAIRMAN FESMIRE: I apologize to the
14 Commissioners. Commissioner Bailey?

15 EXAMINATION

16 BY COMMISSIONER BAILEY:

17 Q. How many wells were drilled in your district last
18 year?

19 A. I don't have that count. I don't deal with the
20 APDs or how many wells are drilled.

21 Q. Did it seem pretty busy?

22 A. It seems so, yes.

23 Q. I looked through these photos trying to see
24 dates. Only two of these are dated in 2007; is that
25 correct?

1 A. My recollection off -- I can check each one, but
2 my recollection is, only two of them are in 2007.

3 Q. Out of a pretty busy year for drilling.

4 A. Yes. These were the only two from 2007 that I
5 brought.

6 Q. Okay, which tells me that it's a small percentage
7 of drilling and workover pits that you've presented as
8 having issues?

9 A. It's a -- the six is -- in comparison to all the
10 drilling and workover pits, it would be a small percentage.

11 Q. Okay. How many groundwater contamination cases
12 did you send to Santa Fe this year?

13 A. I'm not -- I don't know exactly how many cases
14 I've sent to Santa Fe.

15 Q. Maybe more than one or zero or --

16 A. Total groundwater cases, it would definitely be
17 more than one.

18 Q. But due to contamination from drilling and
19 workover pits?

20 A. No, I --

21 Q. Zero?

22 A. -- I have -- zero.

23 Q. So you've been enforcing under Rule 50. Have
24 there been issues or lack of coverage under Rule 50 for
25 your environmental cases that you've dealt with?

1 A. There has been arguments that state that they
2 were not covered under Rule 50. I'm trying to think of
3 some offhand, but there have been cases where there were
4 certain circumstances on those, the general comments were
5 arguable.

6 Q. Okay. But it appears as though you've been able
7 to write NOV's and have legal action and fines --

8 A. Correct.

9 Q. -- penalties for violations of Rule 50.

10 A. Correct.

11 Q. The pictures of visible layer of oil, that could
12 have been enforced under Rule 50?

13 A. Correct.

14 Q. The breach of liners enforced under Rule 50?

15 A. (No response)

16 Q. None of these cases that you've brought had
17 actual contamination of groundwater, except maybe one?

18 A. None of them, I believe, had -- from my record
19 search, had contamination of groundwater.

20 Q. So from these drilling pits and workover pits, no
21 harm, no foul?

22 A. They all had tears in the liners and had
23 releases.

24 Q. Yes, but no contamination of groundwater?

25 A. Not of groundwater, no.

1 COMMISSIONER BAILEY: That's all I have. Thank
2 you.

3 THE WITNESS: Thank you.

4 CHAIRMAN FESMIRE: Commissioner Olson?

5 COMMISSIONER OLSON: Yes, I just had a couple
6 questions.

7 EXAMINATION

8 BY COMMISSIONER OLSON:

9 Q. Mr. Powell, I guess maybe I'll follow up on a
10 question of Commissioner Bailey. What was the time frame
11 of your record review?

12 A. The time frame of the files?

13 Q. Yes.

14 A. I was looking for pits that had failures and --
15 Rule 50 -- it's essentially from when Rule 50 was enacted
16 to current.

17 Q. So it's just a record review of the last several
18 years, then?

19 A. Yes.

20 Q. Okay. And going to the Coleman case, I guess in
21 your slide you were saying that there was soil
22 contamination above the OCD requirements. To what depth
23 did that contamination go?

24 A. We tested the sludge after the fluid was removed
25 of the actual drilling -- drill cuttings, and that's what

1 showed above OCD limits. And since the liner had been
2 compromised, we showed that it had to be removed.

3 Q. And was there any sampling depth below the pit to
4 see what the extent of the contamination was?

5 A. I do not have that. I don't -- I'm not sure at
6 this time if there was, to make sure they got out of it.
7 I -- all the pit -- 3000 yards of soil had been excavated,
8 and I would assume they had an environmental consultant on
9 site that they removed all of it.

10 Q. So you don't know if they sampled to the base of
11 the excavation to see -- after the excavation, if they had
12 met their contaminant levels that the were allowed?

13 A. At this point I do not. I would have to look
14 into it further.

15 Q. Okay. And I think I just have -- want to clarify
16 something for myself. I guess I was just trying to
17 understand what the purpose of this presentation is. Is
18 this just to show that there is potential problems with pit
19 liners and siting locations? I just want to make sure I
20 was --

21 A. The examples I brought were to show failures of
22 the pit liner.

23 Q. That can occur?

24 A. Yes.

25 COMMISSIONER OLSON: Okay, that's all I have.

EXAMINATION

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BY CHAIRMAN FESMIRE:

Q. Okay Brandon, Mr. Carr asked you about pit liner failures. How many of the pits up in your area are not lined at all?

A. Very few.

Q. Very few?

A. Well, depends on the type of pit you're asking. Production pits, there are more unlined pits. For drilling and workover there's very few --

Q. Okay.

A. -- if any.

Q. But there are some unlined pit still in use up there?

A. Due to the exemption in Rule 50, I have signed permitted -- or have signed pit permits for unlined pits.

Q. Okay. Now you said that there was no analytical testing required because there were no hydrocarbons visible; is that correct?

A. Correct.

Q. That's your policy? What about salts?

A. At this time we haven't been testing for salts. It's not -- since we don't drill through brine sections and brine muds, it's something that we have felt in the current -- until this -- some of the samples came out, that there

1 wasn't a high constitence of chlorides in the drilling
2 fluids.

3 Q. Okay, and you sat through some testimony here
4 that sounds like it might have changed your mind; is that
5 correct?

6 A. I saw that it's possible to have higher chlorides
7 than we expected.

8 Q. Okay. And if you start testing for salts, do you
9 think you'll find some more contamination?

10 A. It is possible.

11 Q. Now this is a sort of elaboration of something
12 Mr. Carr and Commissioner Bailey asked you, but not all the
13 violations resulted in penalties; is that correct?

14 A. That is correct.

15 Q. But you -- they were violations, you could have
16 given them penalties, didn't you -- couldn't you?

17 A. You could show that they had not maintained the
18 liner due to the tear in the liner. They weren't
19 violations because they had put it on themselves to take
20 corrective action and self-reported.

21 Q. Okay, so you're sort of using a carrot instead of
22 a stick approach; is that right?

23 A. Correct.

24 Q. So if you start testing for salts -- I may have
25 asked this question, this may be slightly redundant, but if

1 you start testing for the salts, there might be other cases
2 of groundwater contamination due to drilling and workover
3 pits that you would find; is that correct -- is that
4 reasonable?

5 A. It may be possible.

6 CHAIRMAN FESMIRE: That's all the questions I
7 had. Mr. Brooks -- Oh, I'm sorry.

8 COMMISSIONER OLSON: Could I just follow up on
9 something that Mr. Powell --

10 CHAIRMAN FESMIRE: Sure.

11 COMMISSIONER OLSON: -- was just saying

12 FURTHER EXAMINATION

13 BY COMMISSIONER OLSON:

14 Q. Did I hear you correctly, you're saying that
15 there's still some operators still installing unlined pits
16 in those exempt areas, new ones today?

17 A. I have received pit permits showing that they
18 were asking for unlined pits.

19 COMMISSIONER OLSON: Okay.

20 CHAIRMAN FESMIRE: Mr. Brooks, you said you had
21 some redirect?

22 MR. BROOKS: Thank you.

23 REDIRECT EXAMINATION

24 BY MR. BROOKS:

25 Q. Are a lot of the pits in your district closed

1 without removal of the liner?

2 A. Without the removal of the liner?

3 Q. Yes.

4 A. Correct, most of them are closed in place, if
5 that's what you're asking.

6 Q. Does the current rule require any testing
7 underneath the pit at the time it's closed?

8 A. No, it does not.

9 Q. At any other time?

10 A. Underneath the pit, no.

11 Q. So if there were a leak that you -- that was not
12 reported and your inspector did not discover it, how would
13 you ever know about it?

14 A. If it wasn't reported and we didn't find out
15 about it, we wouldn't know about it.

16 Q. Since you don't require testing, you didn't --

17 A. Correct.

18 Q. -- it didn't come to your attention?

19 You might find out about it from impacted
20 groundwater, though?

21 A. Correct.

22 Q. Okay. The requirement that you have for testing
23 if there are hydrocarbons involved, is that in Rule 50 or
24 is that just -- is that a current policy?

25 A. Under Rule 50 they're not allowed to have

1 hydrocarbons in the pit after the rig is released. And
2 under the spill release guidelines there's hydrocarbon
3 limits set in there, so we follow the spill release
4 guidelines when it comes to hydrocarbons.

5 Q. Thank you. Now are you familiar with whether or
6 not Rule 50 contains any express provision requiring the
7 operators to report liner failures if there is not a
8 release coming under Rule 116?

9 A. I believe so --

10 Q. Okay, Rule 116 --

11 A. -- I'm not sure, I haven't gone over it.

12 Q. Okay, the rule will speak to that issue. Thank
13 you.

14 One other thing. You've used -- In connection
15 with enforcement actions you mentioned, I believe, the
16 acronym ACO?

17 A. Correct.

18 Q. Do you know what that stands for?

19 A. That's an agreed compliance order.

20 Q. Okay, are you familiar with the process by which
21 those are put into effect?

22 A. Partially, yes.

23 Q. And does that process involve the agreement by
24 the operator, as the name would suggest?

25 A. Yes, it does.

1 Q. And are the penalties that you have mentioned,
2 are they provided in the agreed compliance orders?

3 A. Yes, they are.

4 MR. BROOKS: I believe that's all my questions,
5 Mr. Chairman.

6 CHAIRMAN FESMIRE: Any recross on those subjects?

7 MR. CARR: No.

8 CHAIRMAN FESMIRE: Ms. Foster?

9 RE-CROSS-EXAMINATION

10 BY MS. FOSTER:

11 Q. On the agreed compliance orders, I think Mr.
12 Brooks just asked you if that is something that the
13 operators agreed to.

14 A. Yes.

15 Q. Yes. Does that mean that they accept
16 responsibility for everything that happened out on the
17 location?

18 MR. BROOKS: Mr. Chairman, I --

19 CHAIRMAN FESMIRE: Wouldn't you say that one
20 calls for a legal conclusion?

21 MR. BROOKS: -- object on two grounds. First,
22 that requires a legal conclusion, and second the best
23 evidence of it would be the agreement itself.

24 CHAIRMAN FESMIRE: Okay, I'll grant that
25 objection on the first grounds, Ms. Foster.

1 MS. FOSTER: Well, I believe the witness said
2 that he was familiar with an ACO, so I -- I think he was
3 very compliant in answering Mr. Brooks' questions about
4 them.

5 MR. BROOKS: My question was, was he familiar
6 with the process by which they were put into place, and he
7 said somewhat, and I don't think that qualifies him to
8 testify to the substantive provisions, much less to their
9 legal effect.

10 CHAIRMAN FESMIRE: Ms. Foster, I think you are
11 asking him to interpret the legal effect of that agreement.
12 You can rephrase your question and try again, if you'd like
13 to.

14 MS. FOSTER: Well, I would just like
15 clarification of the last question that Mr. Brooks asked
16 the witness, then.

17 CHAIRMAN FESMIRE: I think Mr. Brooks restated
18 his question.

19 MS. FOSTER: No, I believe the last question
20 that he asked the witness was, does that mean that the
21 operators agree?

22 THE WITNESS: I guess my interpretation of the
23 last question is if they agree to the agreed compliance
24 order.

25 MR. BROOKS: That was the intent of the question,

1 Mr. Chairman.

2 CHAIRMAN FESMIRE: Thank you, Mr. Brooks.

3 MS. FOSTER: Okay, and I --

4 CHAIRMAN FESMIRE: Ms. Foster, would you like to
5 rephrase the question, perhaps?

6 Q. (By Ms. Foster) Okay, Mr. Powell, I would just
7 like clarification on your statement that when you said an
8 operators agree to a compliance order, what does that mean?

9 A. They agree to the penalty and to the compliance
10 -- agreed compliance order.

11 Q. Okay, so they agree to comply with the order
12 that's given to them?

13 A. Correct.

14 Q. In other words, it's an agreement between the OCD
15 and the operator that something needs to be done on a
16 location?

17 A. Not always is there something that needs to be
18 done on the location. It's -- My understanding, it's an
19 agreement of the agreed compliance -- they sign the agreed
20 compliance order, agreeing with the order.

21 Q. Okay. Is it an agreement to pay a penalty
22 pursuant to a violation?

23 A. I don't know if all agreed compliance orders
24 contain penalties.

25 Q. Okay, so you don't know if they generally don't?

1 I mean, is that -- is that --

2 CHAIRMAN FESMIRE: Ms. Foster, why don't you go
3 ahead and sit down to finish your question?

4 Q. (By Ms. Foster) The agreed compliance order,
5 then, what I understand you're saying, and your
6 understanding of a compliance order, is that sometimes
7 there is an agreement to pay a penalty and sometimes there
8 is not?

9 A. That's my interpretation, correct.

10 Q. And I believe there was a question about unlined
11 pits. I believe you stated they were production pits?

12 A. They are production, and I have approved unlined
13 drilling pits.

14 Q. Okay. So if they're coming to you, since you're
15 the OCD, are they asking for registration of that unlined
16 earthen pit, or is it a -- for a permit of the unlined
17 permanent pit?

18 A. I have signed permits for unlined drilling pits.

19 Q. Okay, so it's a permit, it's not a registration?

20 A. Correct.

21 MS. FOSTER: Okay, I have no further questions.

22 CHAIRMAN FESMIRE: Any further recross on this?

23 Okay, let the record reflect that there was none.

24 Why don't we go ahead and take a 13-minute break
25 and reconvene at 20 to 11:00?

1 (Thereupon, a recess was taken at 10:27 a.m.)

2 (The following proceedings had at 10:41 a.m.)

3 CHAIRMAN FESMIRE: Let's go back on the record.

4 For the record, this is a continuation of Case
5 Number 14,015. The record should also reflect that
6 Commissioners Bailey, Olson and Fesmire are present. We
7 therefore have a quorum. I believe, Mr. Brooks, you were
8 getting ready to present your next witness?

9 MR. BROOKS: Yes, Mr. Chairman, we call Mike
10 Bratcher.

11 CHAIRMAN FESMIRE: Mr. Bratcher, would you step
12 forward, please?

13 Let the record reflect that I didn't know Mr.
14 Bratcher had a sport coat.

15 (Laughter)

16 MR. BRATCHER: I have two of them.

17 CHAIRMAN FESMIRE: Mr. Bratcher, would you raise
18 your right hand and be sworn, please?

19 (Thereupon, the witness was sworn.)

20 MIKE BRATCHER,

21 the witness herein, after having been first duly sworn upon
22 his oath, was examined and testified as follows:

23 DIRECT EXAMINATION

24 BY MR. BROOKS:

25 Q. Good morning, Mr. Bratcher.

1 A. Morning.

2 Q. Would you state your name for the record, please?

3 A. Mike Bratcher.

4 Q. And by whom are you employed?

5 A. By OCD.

6 Q. And in what capacity?

7 A. Currently I'm field supervisor for District 2.

8 Q. And where are you located?

9 A. In Artesia.

10 Q. Could we get Exhibit 33, page 1, up on the
11 screen? Before we go into the contents of it, Mr.

12 Bratcher, did you do a review of OCD files related to
13 problems with the drilling pits?

14 A. On this?

15 Q. Well, there are several of them here we're going
16 to ask you about --

17 A. Yes.

18 Q. -- so just generally.

19 A. Yes.

20 Q. And some of these you have observed and some not;
21 is that correct?

22 A. Yes.

23 Q. And so I'm going to ask you to state when you are
24 giving testimony about these incidents whether or not
25 you're testifying from your personal knowledge or whether

1 you're testifying from OCD business records.

2 Let us begin with the Chi Operating Footjoy 14
3 State Number 1. Mr. Bratcher, did you personally inspect
4 this site?

5 A. Yes, sir, I believe I did.

6 Q. Okay, there are some pictures in your -- in
7 connection with your exhibit -- I'm sorry, there is a
8 picture in connection with your exhibit. Would you put
9 that up, slide 2, for a moment? And then we'll go back to
10 slide 1.

11 Did you take that picture?

12 A. Yes, sir, I believe so.

13 Q. The picture has a date on it, what appears to be
14 a date on it, 10-9-2007. Was it taken at about that time?

15 A. Yes.

16 Q. Does it fairly and accurately represent the
17 condition of that site at the time you took that photo?

18 A. Yes.

19 Q. Okay, let's go back to slide number 1 then.
20 Would you summarize the situation with that pit?

21 A. This is a pit that's kind of typical of one that
22 hasn't been closed in a timely manner.

23 Q. Is this a drilling pit?

24 A. A drilling pit, yes.

25 Q. Continue.

1 A. You can tell by the condition of the liner that
2 it's been breached. I believe this pit was probably flared
3 into. I believe the -- well, the spud date on this was
4 3-9-05, so this pit would have been constructed in early
5 2005.

6 Q. Now when you say flared into, what does that
7 mean?

8 A. That means that during completion that they had a
9 flare line run into the pit, and they actually had a fire
10 that went into the pit.

11 Q. Okay. So it was used as a flare pit?

12 A. Probably, yes.

13 Q. Okay. Let's go, then, on to exhibit 2 -- page 2,
14 and can you with your pointer indicate where the problems
15 are with this pit, on the photograph shown on page 2?

16 A. Okay, these are pretty obvious, but right there
17 and basically right in there are going to be the problem
18 areas. And then it looks like this is actually -- Well, we
19 may have to put a gunsight on this pointer.

20 Q. It's not been working real well, so...

21 A. No, it's not working well at all. But you can
22 look like -- It looks like it's breached back down the top
23 right there at the top of the pit there.

24 Q. Does the breach appear to go below the water
25 line?

1 A. Looking at this picture, it doesn't appear to be
2 currently below what the cuttings are, but I would say at
3 some point in time it probably did go below the fluid
4 level.

5 Q. Very good. What action has been taken in regard
6 to this pit?

7 A. This pit, an LOV has been issued on it, and I
8 believe right now they're currently closing this pit.

9 Q. Okay, has there been an agreed compliance order
10 entered into on this pit?

11 A. It hasn't gone to -- I don't think this is
12 covered under an agreed compliance order. I believe an LOV
13 was issued.

14 Q. And what is an LOV?

15 A. A letter of violation.

16 Q. Sometimes called a love letter?

17 A. A love letter, yes. I've had operators call me
18 and tell me they got my hate mail, so it's been referred to
19 as hate mail, love letter...

20 Q. Now you said this was a pit that had not been
21 closed. What date was this pit permitted?

22 A. I'm not sure when it was permitted. It would
23 have been constructed in -- early of 2005.

24 Q. Go back to slide 1, please. It says there spud
25 date is 3-9-05?

1 A. Right.

2 Q. And do you know when the drilling was completed?

3 A. Typically these wells are 20 to 30 days.

4 Q. And as we're sitting here today, this pit has not
5 yet been closed?

6 A. I believe they're in the process of closing this
7 pit now.

8 Q. Okay. Then let's go on to slide number 3. Is
9 that another picture of this pit?

10 A. Yes.

11 Q. Does it show anything of significance that we
12 haven't already seen?

13 A. I shot myself -- You can see this right here is a
14 rock, and right there is probably another one that's come
15 through the liner.

16 Q. Very good. Is there anything else you would like
17 to tell us about this Chi Operating Footjoy 14 State Number
18 1 site?

19 A. I don't believe so.

20 Q. Very good. Then let's go to slide 4, to the
21 Crawford Number 26-2. Now is this also -- was this also a
22 drilling pit?

23 A. Yes, sir.

24 Q. And was this a case that you worked or that
25 someone else worked?

1 A. I was in on it. We had a couple other inspectors
2 that were involved in this also.

3 Q. Did you take the pictures that are in the files
4 on this?

5 A. I believe the pictures that we have on file were
6 actually taken by Richard Inge.

7 Q. And what is the issue with this pit?

8 A. This is another pit that stayed open for quite
9 some time. This pit was actually drilled by one operator,
10 and then another operator bought them out, and in the
11 process they bought quite a few pits that were already
12 opened, and this was one of them. When they did get around
13 to closing it, we found quite a bit of impact underneath
14 the liner on this pit.

15 Q. So you tested -- when you -- When it was closed,
16 was the liner removed?

17 A. Yes.

18 Q. And did you test underneath the liner?

19 A. Yes.

20 Q. And what did you find?

21 A. Chloride impact.

22 Q. Would you briefly review the three slides that
23 are number 5, 6 and 7, so you can tell us about them?

24 Well, first of all, I don't want to have to go through each
25 one individually for this purpose only, so if you just go

1 on to slide 6 and then 7, please.

2 Okay. Now looking at all three of those, Mr.
3 Bratcher, were you on the location?

4 A. I was on this location, but it was after they had
5 already started closing the pit.

6 Q. Okay, so you know about these pictures only from
7 their being in the file?

8 A. Right.

9 Q. Are these pictures that are in the business
10 records of the Oil Conservation Division under this
11 location?

12 A. Yes.

13 Q. Very good. Then let's go back to slide number 5.
14 What does slide number 5 show?

15 A. Okay, this shows the -- The browning on the pits
16 here is usually indicative of a pit that's been flared
17 into. Once again, this -- I think this pit was drilled in
18 -- or this well was drilled in 2004 and, you know, that was
19 typical standard industry practice with the flare into the
20 drilling pit. Probably part of the breaches in these
21 liners are due to the actual flaring into this pit.

22 Q. Okay, would you then go on to slide number 6?
23 And what do you see there that's of significance?

24 A. What we see here is a lot of trash that's been
25 placed into the pit. And you can see some fluid standing

1 back here. Through the age of this pit and where it's at,
2 this is probably going to be rainwater-defective.

3 Q. Okay, let's go on to slide number 7, then. What
4 of significance appears in this photograph?

5 A. Okay, this -- the side of this pit just appears
6 to have deteriorated. I don't believe the flare would have
7 reached this slide of the pit. And you know, as you can
8 see, it's just -- the liner is not there.

9 Q. Is there anything else you would like to tell the
10 Commission about this pit?

11 A. This pit was very involved in closure. The
12 operator met up here in Santa Fe with the Environmental
13 Bureau. We hashed this thing out over a long period of
14 time to get it closed. We suspected groundwater impacts,
15 and monitor wells were drilled. I think the groundwater
16 impact was inconclusive on this one, and basically due to
17 the fact that the groundwater is typically fast moving in
18 this area, and any impact probably would have been
19 dispersed pretty rapidly.

20 Q. Then let us go on to the Polaris B Federal Well
21 Number 8, slide number 8 coincidentally. Did you
22 participate in this case?

23 A. Okay, now on this Polaris -- this operator has an
24 environmental company that comes out and does their
25 analytical -- does their testing whenever they're closing

1 their closing their pits. And one of these slides will
2 show the format that they e-mailed me. Once they quadron
3 [sic] off the pit and take their samples, they'll e-mail me
4 the results of those samples. And then they'll call me and
5 we'll discuss what needs to be done as far as closure. And
6 this is just one that happened to be laying on my desk when
7 I was asked to put this together.

8 Q. So you were involved in this pit?

9 A. I was involved in the closing of it. As far as
10 being on location, I was never on location on this
11 particular site.

12 Q. And I believe we do not have any pictures?

13 A. No, there are no pictures on this.

14 Q. Okay. Tell us what happened on this site.

15 A. Okay, if we could go to the analytical sheet.

16 Okay, this is just the C-144. It was permitted a 12-mil
17 liner, and --

18 Q. And I forgot to ask you, was this a drilling pit?

19 A. This is a drilling pit, yes.

20 Q. Continue.

21 A. If you could go back up, I know something that
22 came up before -- when these are permitted, they're --
23 right here is how these are permitted. They don't tell us
24 whether they're using -- what type of liner they're going
25 to use. They just indicate the mil thickness on these

1 permits --

2 Q. Okay.

3 A. -- and that's generally what we get.

4 Q. Okay. Then continue telling us what happened in
5 this case.

6 A. Can we go to the analytical --

7 MR. VON GONTEN: That's all we have.

8 THE WITNESS: See if there's another slide.
9 There you go.

10 Okay, then this is the form that they use. And
11 if you scroll down, there will be a diagram.

12 This shows how they've quadroned off the pit,
13 northwest, northeast, southwest, southeast and center.
14 Depth of the pit is 10 feet. Typically they'll take the
15 liner out, take out about two feet, and then start pulling
16 samples.

17 And then if we'll go back up to the analytical,
18 you can see in the northeast at two feet -- and this is
19 below pit bottom -- analytical was 200. These are field
20 analyses, by the way. The northwest was 240, southeast was
21 120. Southwest is where we had a chloride impact at two
22 foot; it was 10,480. At five foot it was 5600, 10 foot
23 was 400, at 15 foot it was 160, center was 200.

24 Now what this indicates to me is that we have one
25 quadrant in this pit that has impact. Can I say it was a

1 liner breach that caused this? No, because I can't show
2 you a hole in the liner. I can say that in all likelihood,
3 since we have impact in one spot, it probably was a breach
4 in the liner.

5 Q. (By Mr. Brooks) Adding up those figures, what is
6 the total depth down to the impact?

7 A. Down to 15 feet is where we delineated it to.
8 And we'll typically have them delineate down to 250, is our
9 target goal.

10 Q. Okay, and is that -- Where do they start? Is
11 that the bottom of the pit? You said -- is that from --
12 going from the bottom of the pit?

13 A. Yeah, these are all two foot below pit bottom.
14 And typically what they'll do is take the liner out, take
15 about two feet of soil out and then start pulling samples.

16 Q. Okay, continue with your narrative then.

17 A. Okay, yeah, that's basically -- basically it.

18 Q. Was any enforcement action taken at this -- in
19 regard to this site?

20 A. No, this was just a typical pit closure.

21 Q. Just one where you discovered environmental
22 impact?

23 A. Just what we see right there.

24 Q. Yeah, thank you.

25 Going on, then, to slide number 11, the Dodd

1 Federal Unit Number 110, was this a case that you worked?

2 A. Yes, I was on site on this one. And this was
3 actually one that Marbob was gracious enough to allow the
4 OCD Environmental Bureau to go out and pull some samples
5 on. We kind of picked it at random. When we got out
6 there, we discovered a visible hole in the liner. I don't
7 believe that the Marbob representative actually knew about
8 this, or he probably wouldn't have taken us out there,
9 but --

10 Q. Okay --

11 A. -- but this is one of the few that we can say for
12 sure that there was a hole in the liner because we have a
13 picture of it.

14 Q. Okay, hold on a minute. Would you -- Were you on
15 the location before the repairs were made?

16 A. Yes --

17 Q. Okay --

18 A. -- there was a repair made in the liner that
19 you're referring to?

20 Q. Yeah.

21 A. Yes.

22 Q. Would you look at the photographs that appear on
23 slides 12 through 17? Did you take some of these
24 photographs?

25 A. No, sir.

1 Q. Okay. Do these photographs represent conditions
2 you observed at the site?

3 A. I didn't observe this personally. This was taken
4 after we were out there by Ron Harvey, one of our field
5 inspectors.

6 Q. Did you observe any of the -- I'd ask you to
7 review 14 through 17 -- no, 12 through 17. Have you looked
8 at all of them?

9 A. Yes.

10 Q. And can you identify the conditions shown in any
11 of these photographs of things that you saw?

12 A. Yes.

13 Q. And which ones would those be?

14 A. Well, most of them are -- all -- with the
15 exception of the patch are basically the same as conditions
16 whenever we were out there with the environmental group.

17 Q. Okay. Then the one with the patch, which is
18 slide number 17, is that a photograph that's in the files
19 of the Oil Conservation Division relating to this --

20 A. Yes.

21 Q. Then let's look at slide number 12. What does
22 this show that's of significance?

23 A. I think what -- I think what this picture is
24 actually showing is this berm back here. I know whenever
25 this pit was open, we were having an abnormal amount of

1 rainfall, and I know that the operator came out and did a
2 lot of dirt work around this pit to try to reduce the
3 influx of rainwater that was coming in.

4 Now I know this may look like a breach, but I
5 think that's actually just dirt that was kicked over on top
6 of that liner. I don't think -- What we're looking at
7 there, I don't think that is a breach.

8 Q. Okay, now let's go on to slide number 13. Now
9 what does that slide show?

10 A. Okay, this is one of the corners where they were
11 having the influx of rainwater, and that is a rip in that
12 liner right there. And then you can see where they've done
13 some berming back here to alleviate the problems they were
14 having with the rainwater coming into this pit.

15 Q. Now was that breach -- did that go below the
16 water line? Is there some evidence in that photograph to
17 show if it did or not?

18 A. Yes, you can see the water mark up here above the
19 breach.

20 Q. Okay, then let's look at slide number 14. Is
21 that a close-up of the breach?

22 A. Yes.

23 Q. Does it show anything new that you haven't
24 already talked about?

25 A. Not really, just a little closer shot.

1 Q. Okay, then let's go on to slide number 15. What
2 does that show?

3 A. Okay, that's -- This is another breach, and this
4 would have been -- I believe this was on the south side of
5 that pit, if I remember right.

6 Q. Did this --

7 A. It would have been on the side that the well was
8 actually drilled on.

9 Q. Does this extend below the water line?

10 A. It would have at some time, yes.

11 Q. Okay, then let's go on to slide number 16, and
12 what does that show?

13 A. That's another tear in the liner. And I'm not
14 exactly sure where this one was at in reference to the pit.

15 Q. Okay. Then let's go on to slide number 17. What
16 does that show?

17 A. I believe that this was a patch that was placed
18 over the hole that we saw in the previous -- not the --
19 second previous slide before this one.

20 Q. But you did not personally observe this patch?

21 A. No.

22 Q. Very good. Is there anything else you would like
23 to tell us about this particular location?

24 A. I believe whenever the operator went to close
25 this, I believe contaminants were chased down to about 35,

1 40 feet.

2 Q. Okay. And that would be 35 or 40 feet from what
3 reference?

4 A. This was -- would have been below -- this would
5 have been below the location grade. BGS, below grade
6 surface.

7 Q. How far would it be -- would have been -- how far
8 would it have been below the bottom of the pit?

9 A. It probably would have been 28 to 30 feet,
10 something like that.

11 Q. Okay, was this a drilling pit?

12 A. Yes.

13 Q. Okay, let us go on, then, to the Moore Federal
14 Com Number 4. Was this a location that you personally
15 observed?

16 A. Yes.

17 Q. And the pictures that are in here regarding to
18 this location, were they pictures that you took?

19 A. Yes.

20 Q. Could you tell us what happened at this location?

21 A. Whenever they went to close this pit, they pulled
22 the contents out and pulled the liner back, and after they
23 got the contents out on the discharges side of the pit they
24 had a spot where fluids were re-entering the pit. They
25 pulled a sample on these fluids, and they came back in the

1 85,000 milligram-per kilogram range of chlorides.

2 Q. Now Mr. Bratcher, when you say fluids were re-
3 entering the pit, where were they coming from?

4 A. Percolating up from the bottom, bottom of the
5 pit.

6 Q. Does that indicate that fluids had been released
7 from the pit prior to removal of the liner?

8 A. That would be an indication, yes.

9 Q. Go ahead, continue what happened. Or have you
10 completed --

11 A. Well, yeah, the water kind of continued to
12 percolate back up for over about a week.

13 Q. And what was eventually done with this pit?

14 A. They eventually got this one closed.

15 Q. And do you know how they closed it?

16 A. It was a trench burial.

17 Q. Okay. Was any enforcement action taken?

18 A. No.

19 Q. And I don't know, did you tell us what the
20 concentration of chlorides found in the returning waters
21 was?

22 A. It was eighty- -- I believe it was 87,000, is
23 what I was told. I've got the 85,000 range up here, but I
24 actually had that called in.

25 Q. Okay. When will you go ahead to slide number 19?

1 What does that show?

2 A. Okay, right there is where the water was coming
3 back in on it, and this is the discharge side of the pit
4 after they removed the contents. Part of the burial trench
5 is back here, some of the cuttings have been stacked over
6 -- it would be on the left, out of the frame of this
7 picture.

8 But you can see this is a real rocky are, the
9 bottom of the it had a lot of rocks in it. This area up
10 here is in the hills back behind Black River Village
11 outside of Carlsbad, and it's typically known for being
12 rock and fractured formations just directly under surface.

13 Q. And do you know what the depth to groundwater was
14 in that location?

15 A. I believe depth to groundwater here is about 130
16 to -40 feet, I believe. Now it drops dramatically. From
17 here you go off into the Black River Valley, and you get
18 into some pretty shallow groundwater.

19 Q. Let's go to slide number -- One other question
20 about this slide, number 19. It has a date on it of 12-13
21 of '06. Was that the date when this photograph was taken?

22 A. Yes.

23 Q. Let's go on, then, to slide number 20. Same
24 date?

25 A. Yes. This is just another picture looking back

1 from a different angle. This is actually that little water
2 body that we were looking at earlier. But it just shows
3 some of the structure, you can kind of see some of the
4 salts and stuff that were forming on the side of this pit.

5 Q. Okay, then let's go on to slide number 21. Same
6 date?

7 A. Yes.

8 Q. And does it show anything additional --

9 A. Yes.

10 Q. -- we need to point out?

11 A. Yeah, that's our -- that's our little
12 infiltration.

13 Q. Okay, let's go on then to slide number 22. Do we
14 have an analysis on the -- taken under the pit here?

15 A. Yeah, and I believe that's what this is.

16 Q. And you've already testified to the results.
17 Does this show anything more?

18 A. No, and actually what this is going to be is some
19 soil samples. I don't think that we have -- I don't think
20 I actually got an analytical on that -- on the water that
21 was tested; it was just called in. But here's a southwest
22 corner. The pit bottom was 43,500. Bottom northwest
23 composite was 10,000. We had pretty significant impact in
24 this pit.

25 Q. Anything else you want to say about this

1 location?

2 A. No, I don't think so.

3 Q. Mr. Bratcher, in your district is it the
4 customary practice to remove pit liners at the time of
5 closure?

6 A. Yes.

7 Q. Now does Rule 50 actually require that in every
8 case?

9 A. Require the removal of the pit liner?

10 Q. Yeah.

11 A. No, Rule 50 allows for different types of
12 closures.

13 Q. When -- Have you had a lot of experience -- had
14 considerable experience of instances of cases where pit
15 liners were closed -- pits were closed by removal of the
16 liner?

17 A. Quite a few.

18 Q. And is it frequent that you find that there's
19 been chloride impact underneath the pit?

20 A. Very large number.

21 Q. Do you have an estimate of what percentage of
22 cases?

23 A. I'd say a conservative estimate would be 80
24 percent.

25 Q. Does that indicate there have been a lot of liner

1 failures?

2 A. Once again, I -- you know, I'd have to go back to
3 -- I know there's been some instances where we've closed
4 pits that we were -- they were in the middle of closures,
5 and they may have a large pile of impacted material stacked
6 up on the edge of the pit, and we get a big rainstorm. So
7 I know there's been impact due to improper closure methods.
8 Can I say every one of these was because of a liner? No,
9 because I can't show you a hole in that liner.

10 Like I said at first, the one that we looked at
11 there where we've got a picture of the hole in the liner,
12 I'm pretty sure that was from a hole in the liner. The
13 others, we're speculating that, yeah, we probably had a
14 liner failure. But unless I can show you a hole in that
15 liner, I can't stand up here and testify that we had a hole
16 in that liner. I could say we had impact under the liner
17 when we pulled samples.

18 Q. And you're correct to the extent that -- you have
19 not been designated an expert witness, so you're testifying
20 to your observations, correct?

21 A. Right.

22 Q. Have there been some issues with -- in your
23 district, with leaks from tanks?

24 A. Below-grade tanks?

25 Q. Yes, sir.

1 A. Fiberglass, yes.

2 Q. Can you tell us a little bit about that, about
3 those incidences?

4 A. As far as the number, I couldn't give you a
5 number. I know there's one operator that uses it that has
6 quite a few below-grade fiberglass tanks. They're
7 currently removing those as they close batteries out.
8 Sometimes they're going in there and just pulling them out
9 anyway. We've found some of them have had some significant
10 leaks.

11 Q. Very good. Just in case I didn't ask it about
12 one of the specific ones, are all of these locations that
13 you specifically discussed drilling pits?

14 A. Yes.

15 Q. And do you have information before you as to what
16 type of liners were used in those pits?

17 A. No, other than just the 12-mil liner is how they
18 were permitted. Now what type of liner, no, I don't.

19 Q. But these were all 12-mil liners.

20 A. Uh-huh.

21 Q. Thank you. I have one more question and that is,
22 what has been marked as OCD Exhibit Number 33, which is all
23 of the slides that you've just examined, were these
24 prepared by you or assembled by you from OCD business
25 records?

1 A. Yes.

2 MR. BROOKS: Mr. Chairman, we'll tender OCD
3 Exhibit 33 into evidence with the same understanding that
4 we have with the actual business records available if
5 anyone wishes to inspect them.

6 CHAIRMAN FESMIRE: Okay. Is there any objection
7 to the admission of Exhibit 33?

8 MR. HISER: No objection.

9 MR. CARR: No objection.

10 MS. FOSTER: My objection would be the same as I
11 have with Exhibit 32.

12 CHAIRMAN FESMIRE: That's on record and noted.

13 MS. FOSTER: Thank you.

14 CHAIRMAN FESMIRE: Mr. Jantz?

15 MR. JANTZ: No objection.

16 CHAIRMAN FESMIRE: Mr. Huffaker?

17 MR. HUFFAKER: Nothing, Mr. Chairman.

18 CHAIRMAN FESMIRE: With that, Exhibit Number 33
19 is admitted into the record.

20 MR. BROOKS: Pass the witness, your Honor.

21 CHAIRMAN FESMIRE: Mr. Hiser, do you have
22 questions of this witness?

23 CROSS-EXAMINATION

24 BY MR. HISER:

25 Q. Mr. Bratcher, I think that you said that you'd

1 been personally out at the Marbob site, at least, of these;
2 is that correct?

3 A. Yes.

4 Q. And so on that liner, did you have an opportunity
5 to look at the liner when you were out there evaluating the
6 site?

7 A. Yes.

8 Q. And do you recollect from that evaluation of the
9 liner whether it was just a standard 12-mil liner, or was
10 it a woven one, or was it a -- reinforced with string?

11 A. I don't recall.

12 MR. HISER: That completes my questions.

13 CHAIRMAN FESMIRE: Mr. Carr?

14 CROSS-EXAMINATION

15 BY MR. CARR:

16 Q. Mr. Bratcher, you're field supervisor; is that
17 your title in the Artesia office?

18 A. Yes, sir, it is now.

19 Q. That's a different title than what Mr. Powell has
20 up in Aztec so my question is, do you perform similar
21 functions to what Mr. Powell testified to?

22 A. Well, I had his title up until a couple months
23 ago. And I still actually retain that title. I guess I'm
24 the environmental/field supervisor, if you want to get
25 technical.

1 Q. So you're the person -- or a person in Artesia
2 that would approve pit applications?

3 A. Yes.

4 Q. And you have --

5 A. I'm one of them, there's -- one of the three, it
6 just depends on who's --

7 Q. And you have --

8 A. -- in the saddle that day.

9 Q. And you also have environmental responsibilities?

10 A. Yes.

11 Q. If an operator has a release, are you one of the
12 people who would be notified of this release?

13 A. Yes.

14 Q. How many people in your office could be notified
15 of a release?

16 A. Actually, any field inspector could be notified
17 of a release. We prefer -- there's three of us now that
18 could be notified.

19 Q. If you get a call and someone says, We've had a
20 release, what do you do? Do you record that somewhere?

21 A. Yes --

22 Q. You --

23 A. -- it goes into our database.

24 Q. Is there any particular form or any procedure
25 that you follow to record these notices from operators?

1 A. Well, the operators are required to file a C-141
2 under Rule 116 if it's a reportable --

3 Q. So you would have a record of the telephone
4 report, plus the C-144?

5 A. Typically, yes. Now in District 2 we've been
6 sorely understaffed for the last couple years, so sometimes
7 some of this stuff might not get recorded. It may be
8 recorded in a notebook somewhere.

9 Q. And the 24-hour notice provision, it only kicks
10 in if there has been a release of more than 25 barrels;
11 isn't that right?

12 A. Under Rule 116, yes. And that's called immediate
13 verbal notification, and that's -- the definition of
14 immediate verbal notification is 24 --

15 Q. If you have less than 25 barrels, there's a
16 larger time period within which to provide written
17 notification?

18 A. I didn't --

19 Q. If you have less than 25 barrels in the release,
20 you do have a longer time period of time to notify the OCD,
21 do you not?

22 A. Right, you have 15 days --

23 Q. Right.

24 A. -- to submit the C-141.

25 Q. And you're one of the people that has day-to-day

1 contact with the operators?

2 A. Yes.

3 Q. Did you select the slides that you presented here
4 today?

5 A. Yes.

6 Q. And these were chosen to identify problems in
7 current pit violations; is that right?

8 A. Just to show some typical pits that we see day to
9 day, yes.

10 Q. Okay. Let's take a look at these individually,
11 and I'm not going to go through them in a lot of detail.
12 If we look at -- go back to the Chi Operating photographs
13 -- All right, when we look at this photograph, if we look
14 over on the right-hand side there is a large area where the
15 liner seems to have been pulled down or blown down?

16 A. Uh-huh.

17 Q. Could this be an example of wind damage?

18 A. Yes, it could be.

19 Q. And when we look at this pit, this pit is no
20 longer being used. Is that -- Would that be your view of
21 the pit?

22 A. We hope that this pit is no longer being used.

23 (Laughter)

24 Q. Does it look like the liquids have been removed
25 from it and it would be --

1 A. Yes.

2 Q. -- ready for closure?

3 A. Yes.

4 Q. All right, let's go to the Crawford, the Cimarex
5 pit. This pit was acquired by Cimarex when they acquired a
6 number of properties?

7 A. Yes, this was actually drilled by Tom Brown, Inc.

8 Q. Do you know, was this discovered by the agency
9 during an inspection, this situation --

10 A. Yes.

11 Q. -- or was it reported?

12 A. No, it was discovered by inspection.

13 Q. Okay. And did you have a meeting with Cimarex
14 concerning this particular pit?

15 A. I believe on this one an LOV was actually sent to
16 the operator.

17 Q. And was that on July 24th, 2006?

18 A. I believe so, yes.

19 Q. And doesn't it say that corrective action is
20 required by August 24th of that year?

21 A. I don't have that copy in front of me.

22 Q. I thought that's what you were looking at.

23 A. No, I'm looking at an inspection history.

24 Q. Okay. Once you met with Cimarex, didn't they
25 respond and get this pit closed?

1 A. Oh, absolutely. Yeah, otherwise it would have
2 went to an NOV.

3 Q. And there was no NOV?

4 A. There was no NOV issued, right.

5 Q. Again, on the Polaris Federal B that is COG
6 Operating's well --

7 A. Yes.

8 Q. -- the procedure that you described where they
9 have a consulting firm come out and provide information to
10 you and then get the site cleaned up, is that the kind --
11 does that approach to one of these pit remediations work
12 well for your office?

13 A. Yes, I like this real well.

14 Q. And this site has also been cleaned up?

15 A. Yes. Yeah, this has been closed.

16 Q. Now on the Marbob well, you were out doing -- on
17 the pit sampling effort, were you not?

18 A. Right.

19 Q. And it was during that visit that Marbob agreed
20 to let the OCD go just look at --

21 A. Yes.

22 Q. -- a pit in the area, and that's what this was?

23 A. Yeah.

24 Q. And that occurred in May of this year?

25 A. Yes, sir.

1 Q. Following the discovery of these issues with this
2 pit, did Marbob meet with you and others in the Artesia
3 office to determine what sort of a response there should be
4 to this?

5 A. Yes, I believe so.

6 Q. If we look at the photographs and go to the first
7 one, this photograph you indicated showed some sort of a
8 berm in the upper right-hand corner that you thought was
9 because of -- trying to prevent run-on because of --

10 A. Right --

11 Q. -- heavy rains?

12 A. -- that's -- yeah.

13 Q. Is that correct?

14 A. Yes, sir.

15 Q. If we look at the pit itself, and in the center
16 of the pit there's dirt piled on the liner that comes over
17 the liner into the pit --

18 A. Uh-huh.

19 Q. -- isn't that the way to correct wind damage
20 while waiting to close the pit? Isn't that what that is?
21 It's just re-anchoring the soil being put on the liner?

22 A. That would be a method to, yes.

23 Q. Let's go to the next slide. Now this slide was
24 offered as evidence of a breach in the corner of this pit.

25 A. Uh-huh.

1 Q. Did you actually find a breach, a tear, or did
2 you just see the dirt over the corner of the pit?

3 A. Well, you can see a tear in the liner, I mean,
4 it's --

5 Q. Can you show me where that is?

6 A. Right there.

7 Q. Have you established that the liner isn't intact
8 under that, and that isn't just dirt that spilled over when
9 they were trying to prevent run-on?

10 A. No, that's a tear in the liner.

11 Q. And you --

12 A. I believe we've got a close-up of this, if you --

13 Q. Let's look at the close-up. Where in that
14 photograph is the tear, other than just dirt over crumpled-
15 up in the corner? Did you move any of that around and
16 look?

17 A. Okay. No, you have me on that one.

18 Q. All right, let's go to the next slide.

19 A. Okay.

20 Q. That is clearly a tear in the liner?

21 A. Right.

22 (Laughter)

23 A. Right.

24 Q. Now let me ask you, I mean, we don't know when
25 that tear occurred, do we?

1 A. No, we don't.

2 Q. And we don't know if it was before or after there
3 were fluids at that level in the pit?

4 A. That's true.

5 Q. Could this kind of a tear be the result of using
6 a suction hose to remove fluids from a pit?

7 A. Could it be?

8 Q. Yeah.

9 A. Yeah, sure, it could be.

10 Q. And isn't it possible that you also can have
11 releases during the effort to remove fluids from a pit?

12 A. Say it again?

13 Q. Just the actual process of using a suction hose
14 to remove fluids from a pit, at that time you can have a
15 release into the soil during that operation --

16 A. Sure.

17 Q. -- can you not?

18 A. Yes.

19 Q. So I mean, we're not disputing there was a
20 release here, but we're not -- we can't tell from this
21 whether it was because of this hole or something else; we
22 just know we have a hole?

23 A. Right.

24 Q. Okay. Next picture, clearly another hole in the
25 liner?

1 A. Right.

2 Q. Again, do we know if this is above the high-water
3 mark in that pit?

4 A. No, because I'm not real sure where this one was
5 at in the pit. We --

6 Q. And the next photo, this is an attempt to patch
7 the pit?

8 A. I believe so.

9 Q. And you said you thought this was in the --
10 potentially in the same area where that two-slide-back hole
11 was?

12 A. I think that's where this was at, I believe.

13 Q. And when you look at this, using some sort of a
14 tape, is that what that is? Are you familiar with that
15 kind of a patch?

16 A. I'm not -- this is the first time I've seen one
17 patched like this. This is not something that you
18 typically see out there. I think the operator was just
19 using due caution in patching this up, and -- you know,
20 because we were having a lot of rain events, and I think
21 the just wanted to make sure this was covered before they
22 closed the pit in case we did have some more rain and did
23 have some more influx.

24 Q. Sure.

25 A. Listening to testimony from the gentleman who

1 gave testimony on the pit liners yesterday, I don't know if
2 this is actually a proper way to patch a pit. I mean, he
3 gave some testimony about these pits -- about these liners
4 being -- this type of patch not being an acceptable patch
5 for this type of liner.

6 Q. In your experience, do you know if this is an
7 improper way to patch?

8 A. No, I don't.

9 Q. This site has been closed, has it not?

10 A. Yes.

11 Q. And the pit has been remediated?

12 A. Yes.

13 Q. And is it fair to say that Marbob has been
14 cooperating with the OCD to get these pits cleaned up in
15 line with the current rule?

16 A. Yes.

17 Q. Let's go to the next well, the Moore Federal Com.
18 We have a number of pictures. Do you know at what time
19 these pictures were taken in terms of the effort to remove
20 this pit? Is this during the closure process? Would this,
21 Mike, look like that to you?

22 A. Yes, uh-huh.

23 Q. And has this pit been cleaned up?

24 A. Yes.

25 MR. CARR: That's all I have, thank you.

1 CHAIRMAN FESMIRE: Ms. Foster?

2 MS. FOSTER: Yes, thank you.

3 CROSS-EXAMINATION

4 BY MS. FOSTER:

5 Q. If we go back to the Chi locations, this picture
6 is dated October 9th, 2007.

7 MR. BROOKS: What slide number?

8 MS. FOSTER: I'm sorry, page 2 is the first,
9 okay?

10 Q. (By Ms. Foster) And I believe that you stated
11 that this is in NOV status, this well?

12 A. Yes, I believe that they've gone to an NOV on
13 this one.

14 Q. Okay. Now when you say it's in NOV status, what
15 does that mean, as opposed to an LOV status?

16 A. An LOV is a letter of violation. That's
17 essentially an operator identifying a violation of OCD
18 rules. We usually ask an operator to perform specific
19 objectives to correct whatever the violation was.

20 If we don't get a response or if they don't
21 perform what we requested, then it goes to an NOV, which is
22 a notice of violation, and that typically will carry a
23 fine.

24 Q. Okay. And when an operator receives an LOV I
25 would imagine you would generally get a phone call. I

1 think you said he got --

2 A. Pardon?

3 Q. You generally get a phone call where people say,
4 We received your hate mail, from operators?

5 A. That's -- We hope we get some kind of response,
6 yes.

7 Q. Okay. And did you get a response at all from Chi
8 Operating as it relates to this well?

9 A. No.

10 Q. Okay. Did you not meet with them on October
11 23rd, just a few days ago?

12 A. Yes.

13 Q. Okay. And at that time did you not give them
14 LOVs on this?

15 A. I'd have to look and see what was given. This
16 may be one that was given as an LOV. I know we had an NOV
17 that covered three wells, I believe, and then LOVs were
18 issued on some others, and this may be one that was given
19 as an LOV.

20 Q. Okay. And did you have a meeting on Monday with
21 Chi Operating on this well? I'm sorry, on Tuesday?

22 A. I had -- Yeah, we had a meeting with Chi, yeah.

23 Q. Okay.

24 A. I don't know whether -- if this well was
25 discussed or not.

1 Q. And at that time did they give you any
2 documentation concerning proposals to correct?

3 A. Documentation? I don't think they gave me any
4 documentation on that last meeting, no.

5 Q. Okay, have they sent any proposals that you're
6 aware of, for -- in order to correct, either to you or to
7 Mr. Harvey in your office?

8 A. Not that I'm aware of. I'd have to look. I get
9 a lot of paperwork through so, you know, going off of
10 memory on this stuff. I've got a phone here that's been
11 vibrating the last two days. I'm going to have a permanent
12 limp in this leg.

13 (Laughter)

14 Q. Well, let's talk about that. Operators generally
15 try and have a communication with the OCD when issues occur
16 out on site, generally?

17 A. Most of the time, and that's what we hope for.
18 Now in a situation like this, this pit should have been
19 closed a long time ago.

20 Q. Okay.

21 A. Chi had a lot of pits that they just -- they let
22 go. They had some pits that were opened in 2005.

23 Q. Okay, and were NOV's issued for the fact that
24 these pits were still open, or --

25 A. The NOV that was issued was -- yeah.

1 Q. Okay.

2 A. It had covered three wells. Now to tell you
3 which three, I couldn't do that right now off of memory.

4 Q. Okay, but you're not sure if an NOV was actually
5 issued on this well for being beyond the exemption --

6 A. I'm not sure, this may have been one that we
7 handed them the LOV on.

8 Q. An LOV, okay.

9 A. Yeah.

10 Q. Well, it sounds like you're very busy, and
11 operators need to file sundry notices when they're filing
12 for a new pit, for example, right? With your office?

13 A. Correct.

14 Q. And they need to respond to you -- or the hope is
15 that they would respond to you when you're sending out
16 LOVs?

17 A. Right.

18 Q. And they need to call you when they find something
19 out on location and they're going to do some self-
20 corrective action?

21 A. Right.

22 Q. Right? How many calls would you say you get from
23 operators a week?

24 A. A week?

25 Q. A week, or if you can break it down to a day, you

1 know, that number.

2 CHAIRMAN FESMIRE: Put your phone on the desk and
3 let it ring.

4 (Laughter)

5 THE WITNESS: I will. Let's see, I have six
6 missed calls on here right now, and I know some of these
7 are doubling up as they keep trying to -- I probably field
8 10 to 40 phone calls a day, easily.

9 Q. (By Ms. Foster) Okay, and being a field
10 supervisor you also handle permitting?

11 A. Yes.

12 Q. All right. And when an operator needs to file
13 for a permit currently, under the current Rule 50, there is
14 extra documentation that needs to come with that permit
15 application, right?

16 A. For the pit application?

17 Q. Uh-huh.

18 A. It's filed under C-144. Now under the current
19 rule you can file it on a C-101 or a C-103.

20 Q. Right, but under current rule if someone is, for
21 example, going to do a workover, they would file what's
22 called a sundry notice?

23 A. Sundry notice, right.

24 Q. And in fact, if different -- over the life of a
25 well they don't always use the same workover pit, they

1 would have to apply for a sundry notice for every time they
2 didn't have to do a workover, to open a new pit?

3 A. Correct.

4 Q. And you -- and your office processes those?

5 A. Yes.

6 Q. Do you know -- Could you estimate for us how many
7 sundry notices you might get in a week?

8 A. I wouldn't even attempt to guess at that.

9 Q. Okay. Well, are we talking one or are we talking
10 hundreds?

11 A. I really would hate to attempt to guess. We're
12 not talking one.

13 Q. Well, it sounds like you're very busy, so I would
14 imagine it's --

15 A. Yeah, we're extremely busy --

16 Q. -- probably on the higher end.

17 A. -- extremely busy. My in box was about this tall
18 when I left.

19 Q. Okay, that would be about two feet tall?

20 A. It's probably about this tall now, so...

21 Q. Okay, so in your in box it's sundry notices,
22 responses to LOVs.

23 Do operators generally respond verbally or
24 written to LOVs?

25 A. Both.

1 Q. And that would end up in your in box as well,
2 that you need to process?

3 A. Some would and some won't. I'm not the only one
4 down there, so I don't get every piece of paper that comes
5 through there.

6 Q. Okay. I believe also in your testimony that you
7 stated -- and I think it was in relation to the Marbob
8 location -- that you had them delineate down to 250
9 milligrams per kilogram.

10 A. Correct.

11 Q. Is -- That delineation standard, is that
12 currently in Rule 50?

13 A. I don't believe so.

14 Q. Okay, so where are you getting the guidance to go
15 down to 250?

16 A. Under the guidelines we -- there's a provision in
17 the guidelines that allow us to have an operator perform
18 certain standards that -- if we think there may be a threat
19 to the environment, we can have them do certain things.
20 And I'd have to get the guidelines in front of me to show
21 you exactly where that's at, but it is in the guidelines
22 that allow us that --

23 Q. All right.

24 A. -- that leverage.

25 Q. And similarly, I think you talked about how, you

1 know, operators are asked to pull up the liner and test two
2 feet below the liner in field testing.

3 A. No, I said that's typically what they do.
4 They're not asked to do that, but that's -- Typically,
5 they'll pull the liner up and take about two feet off --

6 Q. Okay.

7 A. -- and start pulling --

8 Q. And they do chloride field tests?

9 A. Yes.

10 Q. And do you know why it is that they test only for
11 chloride?

12 A. That's just -- that's what we've been asking them
13 to test for in our district. Typically on these pits, if
14 you have some hydrocarbon impact, I think the chlorides are
15 going to outrun the hydrocarbons on pits that are closed
16 earlier. And if we address the chloride impact we're
17 generally going to get any hydrocarbon impact that may be
18 there.

19 Q. Okay, so --

20 A. But typically what we're -- what we see down
21 there is broad impact.

22 Q. Okay. And so for your initial testing as a field
23 supervisor, the operators can give you chloride field
24 testing results, they don't have to go to a lab to give you
25 chloride testing?

1 A. No, we request -- we require the final set to go
2 to the lab, the ones that tell us that we have -- yeah,
3 we've cleaned this -- we've delineated this down to 250
4 ballpark. Now we're not holding everybody's feet to the
5 fire on this 250.

6 Q. Right, but you only require final lab testing if
7 they actually have to go through the actual delineating?

8 A. Right.

9 Q. Right. I believe in the example that you showed
10 us, there were three corners on that pit that were not
11 anywhere near the 250 level, so therefore they don't have
12 to delineate those areas at all?

13 A. Right. Yeah, those are a non-issue.

14 Q. Right. Do you have any idea of the cost of doing
15 a full test -- full suite of testing, cost to the operator?

16 A. Not really.

17 Q. Not really?

18 A. I know one of the reasons we allow field testing
19 is that it keeps things moving.

20 Q. It's faster?

21 A. Yeah -- well, if -- you know, if an operator has
22 to shut down and wait for analyticals to come back from the
23 lab, then, you know, they pull samples. And then they sit
24 there with a half-million-dollar piece of equipment sitting
25 on location doing nothing, so --

1 Q. Okay.

2 A. -- so we allow field samples to keep things
3 going.

4 Q. Okay, so you -- as a regulator, you do take into
5 account that you don't want to slow operators down?

6 A. Right.

7 Q. Which I'm sure they appreciate.

8 A. Hope so.

9 Q. Okay. About the Moore Federal location --
10 Actually, before we get to that I just wanted to ask you
11 about the Marbob picture which is on 16, slide 16.

12 Do you know -- are all these locations that
13 you've highlighted, are they also 12-mil-liner locations?

14 A. Yes.

15 Q. All right. And based on your expertise and
16 experience, would you be able to tell us what type of liner
17 this is? Not in terms of thickness, but in terms of woven
18 or reinforced?

19 A. I think that was woven, I think.

20 Q. Okay, so this is a 12-mil woven, based on your
21 past testimony?

22 A. I think so. Now I'm guessing, looking at the
23 shreds that are coming off the edge there. I think this is
24 probably a woven liner.

25 Q. Okay. And are you currently aware of any

1 operators currently using 20-mil reinforced?

2 A. Yes.

3 Q. And based on your field experience, have you seen
4 as many tears in liners as what you're seeing at 12 mils?

5 A. I think we're seeing less impact under these 20-
6 mil liners than we are under the 12-mil liner.

7 Q. Okay. Moving on to the Moore Federal Com, I
8 believe you stated that this -- in this particular case --
9 I'm sorry, 18, slide 18? Thanks. -- you stated that there
10 were fluids that were re-entering the pit?

11 A. Yes.

12 Q. Could that -- and I believe that you stated it
13 was percolating back up, as one of the explanations,
14 possibly, for the --

15 A. Yes, and I don't know if that's maybe the proper
16 verbiage or not. But you know, you -- you soak the water
17 up, and the next day it's there again. So I guess --

18 Q. Okay.

19 A. -- percolating would be --

20 Q. Okay, is it -- could there have been a rain
21 event, for example, as another reason for --

22 A. No.

23 Q. -- water on the location?

24 A. I wouldn't think so, no.

25 Q. Okay, you don't recall, or you don't --

1 A. You mean a rain event overnight from -- No.

2 Q. No?

3 A. No.

4 Q. Okay. And I believe that you stated that the
5 chloride levels that were found in there were 85,000
6 milligrams per kilogram?

7 A. Yes.

8 Q. But that is the analysis of fluids?

9 A. That's a fluid analysis, right.

10 Q. Okay.

11 A. Well, it would have been milligram per liter, is
12 what it would have been.

13 Q. So is --

14 A. And I apologize, yeah, it should have been
15 milligrams per liter.

16 Q. Okay, so that's a misstatement on these slides?

17 A. Yeah.

18 Q. Okay, but in this instance you say that you
19 believe the depth to groundwater was 130 to 140 feet?

20 A. I believe so. I'm going off of memory again, so
21 that's pretty scary.

22 Q. Okay. And do you know what the background levels
23 of chlorides are in that area as well? Since you stated
24 that, you know, you know that the area is very rocky, and I
25 believe in some of the other pictures you showed...

1 A. Let's see, I believe if we go to the analyticals,
2 I believe there's some background data in the analyticals
3 on this.

4 Okay, background north side is 6.73.

5 Q. 6.73 milligrams per kilogram?

6 A. Yeah.

7 Q. Okay, and then the pit bottom, you said, was
8 43,500?

9 A. 43,500 and then the -- it would have been the
10 southwest composite.

11 Q. Okay. Now if you were to translate that 43,500
12 to liters, would that number go up or down?

13 A. Well, that's a -- milligrams per kilogram is a
14 soil measurement, and milligrams per liter is a water
15 measure. So I mean, that's two different --

16 Q. All, right --

17 A. -- two different --

18 Q. -- but this -- What I'm trying to get at was,
19 this location you actually -- you issued a permit or
20 allowed them to do deep-trench burial on this location?

21 A. Yes.

22 MS. FOSTER: Yes, okay. Okay, I have no further
23 questions, thank you.

24 CHAIRMAN FESMIRE: Mr. Jantz?

25 MR. JANTZ: Thank you, Mr. Chairman.

EXAMINATION

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BY MR. JANTZ:

Q. Mr. Bratcher, during your testimony you said you could only speculate about the sources of chloride contamination in instances where that occurred; is that right?

A. Yes.

Q. Is that because the Division wasn't notified about leaks or breaches in liners?

A. No, my speculation is because I can't see a hole in that liner.

Q. Was the Division notified about these breaches in the liners that could have caused contamination, by the operators?

A. Well, I guess you'd have to -- specifically which instance are you talking about?

Q. Well, let's go through. Chi Operating?

A. Okay, no, Chi didn't notify us because we wrote an LOV on it.

Q. Okay, the Crawford well?

A. Yes, we were notified on that.

Q. Okay, you were notified on that?

A. Uh-huh. Yeah, as soon as they did the sample on the water -- Matter of fact, as soon as the water came back in, I got a call on it, and then we got the analyticals

1 back in the next day or two --

2 Q. Okay.

3 A. -- and then discovered what we had coming back
4 in.

5 Q. The Polaris B?

6 A. The Polaris B is -- Like I said, I get those
7 e-mailed to me. So if you want to count that as an
8 operator notification, I get -- And this is just in the
9 general course of business on closing these pits.

10 Q. Okay, the Dodd Unit?

11 A. Yeah -- Now the Dodd Unit was -- once again, that
12 was one that we picked at random --

13 Q. Okay.

14 A. -- when the Environmental Bureau came down to do
15 sampling -- general sampling of pit contents.

16 Q. So it reported accidentally?

17 A. Right.

18 Q. Okay, and what about --

19 A. And once again, I don't believe the operator --
20 operator's representative was really aware of the hole in
21 the liner.

22 Q. And the Moore Federal Unit, notification of the
23 breach there?

24 A. Well, that's the one where you're talking about
25 the water coming in, right?

1 Q. Right, yeah.

2 A. Yes.

3 Q. So there was notification of a breach, or no?

4 A. Yes, the operator's -- well, the operator's
5 contractor notified me when they had water coming back into
6 the pit.

7 Q. So only a closure.

8 A. And now we're -- you know, I didn't -- I'm not
9 saying that there was a breach in the liner there, I'm just
10 telling you the facts --

11 Q. Sure, sure, but you're speculating that --

12 A. -- that presented themselves as we were closing
13 that pit.

14 Q. Right.

15 A. When I got out there, the liner was already out
16 of there. So if I didn't see a hole in the liner, I'm not
17 going to stand up here and testify that there was a hole in
18 the liner if I didn't see it.

19 Q. Sure, and I don't want you to.

20 A. And I'm not going to.

21 (Laughter)

22 MR. BROOKS: Whether he wants you to or not.

23 Q. (By Mr. Jantz) Okay. In terms of Mr. Carr's
24 cross-examination, you testified that you -- with respect
25 to one of the breaches in the liner, you weren't sure

1 whether it was above or below water level; is that right?

2 A. I believe so.

3 Q. Would the proposed rule requirement regarding
4 requiring an operator to report breaches above water line
5 have solved that problem?

6 A. Would it have solved the problem about the breach
7 in the liner?

8 Q. About your -- Would it have solved the problem
9 about whether you know whether or not it was above or below
10 water line? Let me rephrase it.

11 A. Yeah, let's ask that again.

12 Q. If there was a requirement as the proposed rule
13 suggests -- as the proposed rule will require, that an
14 operator report to you a breach above water line, would you
15 then be sure about where the breach is?

16 A. Well, I would assume -- I guess we -- you know,
17 we would probably be more apt to go out and look at it
18 then, if it was --

19 Q. Sure.

20 A. -- if it was reported to us.

21 MR. JANTZ: Thank you, that concludes my cross-
22 examination.

23 CHAIRMAN FESMIRE: Mr. Huffaker.

24 MR. HUFFAKER: Nothing, Mr. Chairman.

25 CHAIRMAN FESMIRE: Mr. McMahon?

1 MR. McMAHON: Nothing.

2 CHAIRMAN FESMIRE: Commissioner Ols- -- Bailey?
3 Notice I caught it that time?

4 COMMISSIONER BAILEY: Thank you.

5 EXAMINATION

6 BY COMMISSIONER BAILEY:

7 Q. Since Rule 50 requires closure of drilling pits
8 within six months, could OCD have required closure at any
9 time since 2005?

10 A. Yes, ma'am.

11 Q. The longer a pit stays open, the greater the
12 chances of illegal dumping into that pit; is that correct?

13 A. Absolutely. That's -- absolutely.

14 Q. And the longer a pit stays open, the greater
15 potential for windwhip or other tears in the liner that
16 could allow chloride contamination of the lands?

17 A. Absolutely.

18 Q. So it's in the best interest of everyone for the
19 pits to be closed in a timely manner?

20 A. Yes.

21 Q. Even according to Rule 50 with the six-month --

22 A. Yes.

23 Q. Do you have the same protocol that when it's a
24 groundwater contamination case you send it to Santa Fe?

25 A. Yes.

1 Q. So how many in the past year have you sent to
2 Santa Fe?

3 A. I don't think we've had any confirmed groundwater
4 impact from drilling pads -- pits. We've -- Like the
5 Crawford, we speculate, and I could go through some of the
6 data here that shows there was probably an impact to the
7 groundwater there, but since it wasn't a static water body,
8 the analytical data showed that chloride impact was
9 minimal.

10 But just the depths that they were finding
11 chloride in the pit, it would indicate to me that there
12 probably was groundwater impact out there.

13 But to answer your question, I guess none.

14 Q. None. You mentioned you're understaffed now.
15 How in the world are you going to handle the additional
16 responsibilities if this proposed rule is passed?

17 A. Actually, what I've read of the proposed rule,
18 it's going to make my job a little easier.

19 Q. In what way?

20 A. Well, for one thing it requires the operators to
21 submit their closures with the APD, everything comes in up
22 front, it requires them to pull samples out of the pits.
23 The 100-mile radius is going to do away with a lot of pits,
24 I think. I think it's going to be a cheaper alternative to
25 go to closed-loop.

1 Q. Do you think that you will take a longer time to
2 approve APDs when you have to go through a hydrogeologic
3 analysis for every well?

4 A. I'm not sure how that's going to work. I really
5 don't. I've thought about that some, and I really would
6 hesitate to answer that question because I'm not sure how
7 that's going to affect our ability to process APDs, with
8 everything coming in up front.

9 Q. Right. So possibly it could really delay
10 approval of APDs in drilling?

11 A. Possibly it could, but if we have people that are
12 relieved from doing something on the back end, they would
13 be moved to doing it on the front end. So hopefully it
14 won't slow down the APD process. But that's purely
15 speculation right now. And I have thought about it some,
16 and I'm not sure how that's going to work.

17 COMMISSIONER BAILEY: Thank you, that's all I
18 have.

19 CHAIRMAN FESMIRE: Commissioner Olson?

20 COMMISSIONER OLSON: Yeah, Mr. Bratcher, I just
21 had a couple of questions.

22 EXAMINATION

23 BY COMMISSIONER OLSON

24 Q. Going to -- I guess on the slides you were
25 talking about -- I guess I'm looking at slide 4, and I

1 think you were talking about this a little bit in response
2 to some of the other questioning. You mentioned at the
3 Crawford site that you had downward leaching of the
4 chlorides into the soil. To what depths and what levels
5 did that -- what kind of contaminant levels were observed?

6 A. Okay, inside the pit we went down to 30 feet, and
7 we had levels at 30 feet of 2760 in one area and 4370 in
8 another one. And we were hesitant to go any further at
9 that point in time, because we believe groundwater was
10 going to come in right around 32, 35 feet on us.

11 Q. So you're pretty much right about at groundwater
12 level, roughly?

13 A. Yes.

14 Q. And so where was the monitor well placed? Was it
15 placed downgradient from the --

16 A. There was one placed upgradient and one
17 downgradient.

18 Q. Okay. And what kind of concentrations did you
19 see in the groundwater there? Was it below 250 MCF?

20 A. Yeah, I think they were like in the 40s.

21 Q. Okay.

22 A. I think they were really low.

23 Q. And then maybe you could clarify on -- I guess
24 I've got 22A. It looks like it's part of the summary
25 report of the analytical data you're presenting for the

1 Moore Federal Com Number 4. I just wanted to clarify what
2 this was representing.

3 I see you're listing samples for the pit bottom,
4 *in situ*. Is that the actual materials in the pit, or is
5 that from the soils below the liner?

6 A. Okay, ask me that again.

7 Q. I'm looking at -- well, just for example, I guess
8 there's the first one in the little summary portion that
9 says background, north side, and then there's one that says
10 pit bottom, *in situ*, southwest comp., which I'm assuming is
11 composite?

12 A. Uh-huh.

13 Q. Is that material pit material, or is that a
14 sample from the soils under the liner?

15 A. That's a sample from the soils under the liner.

16 Q. Under the liner?

17 A. Uh-huh.

18 Q. So it's showing that there was a leak then; is
19 that what it's supposed to be representing?

20 A. Uh-huh.

21 Q. Okay.

22 A. Well, they actually did hydrocarbons on these,
23 so... And that's what we're looking at right there, is
24 hydrocarbons --

25 Q. Right.

1 A. -- which were basically nondetect, so --

2 Q. Right.

3 A. -- so this wasn't just a chloride issue.

4 Q. Right, for where the pit -- So where it says pit
5 bottom, *in situ*, southwest composite, and the chloride
6 level of 43,500, that's the soils underneath the -- ?

7 A. Right, and I think *in situ* -- I believe that they
8 were going to use part of the drilling pit as their trench,
9 their -- for the trench burial, and that's where they took
10 that sample in the *in situ* pit, before they lined it --

11 Q. Okay.

12 A. -- to use as a burial trench, and I believe
13 that's what that's referring to.

14 I believe this pit was actually blasted, so I
15 mean, it was in hard rock, so they've had a lot of trouble
16 with this one --

17 Q. Okay.

18 A. -- getting the burial trenches dug and then
19 getting the impact out, so this was a long closure.

20 Q. Okay, I was just trying to understand what that
21 was representing, just for my own clarity.

22 And then you had some questions on reporting of
23 liner leaks. Are -- I guess most of the leaks that you
24 discover in the liners, are they discovered by the
25 operators or -- and reported? Or are they discovered by

1 the inspectors?

2 A. Typically what we discover is during closure
3 after we -- when we're doing sampling analysis. That's
4 when we discovered that there's an impact under the liner.

5 Now, I'd -- I'd venture to say I rarely get a
6 call from our operator that says, Hey, I've got a rip in my
7 liner. I don't think I've ever had a call from an operator
8 telling me he's got a rip in the liner.

9 Q. So when they're discovered, it's usually by an
10 inspector, OCD inspector?

11 A. Typically, yes.

12 Q. And there isn't any requirement in the OCD rules
13 right now to report tears in liners or leaks in liners?

14 A. No, there's -- Not to my knowledge, there isn't.
15 It is a violation of the rule, but I don't believe there's
16 any reporting requirements.

17 Q. Okay. And then you were mentioning about the
18 sampling of the soils under the drilling pit liners.
19 That's not required under the current rules, is it?

20 A. No.

21 Q. But operators are already doing that now in your
22 district?

23 A. Yes, and we're requiring it under the guidelines.

24 Q. So it's a current requirement of your -- at least
25 in the Artesia district for --

1 A. Correct.

2 Q. -- closure of drilling pits?

3 A. Yes, sir.

4 Q. And do you have any idea, I guess, on the current
5 cost of that, the operators, of their sampling programs?

6 A. I couldn't tell you. I know we're allowing field
7 samples. We cut that cost down quite a bit. You know,
8 they just have basically one set of samples that they send
9 to a lab. I'm not sure -- It costs something to have the
10 environmental contractor come out, but I don't know what
11 the actual costs are.

12 Q. And what types of samples are they performing
13 right now?

14 A. Chloride.

15 Q. Chloride field tests?

16 A. Yes.

17 Q. And then what do they submit to the lab? Do they
18 submit a confirmation sample, or -- ?

19 A. Right. Now what they'll submit to the lab is the
20 actual sample that tells us that they've delineated down to
21 the 250 ballpark range.

22 Q. But it's just for chlorides at this time, not for
23 organics or --

24 A. Correct.

25 Q. -- metals or any other constituents? Everything

1 is based on chloride as an indicator of a leak in the --

2 A. Yes.

3 Q. -- in the liner?

4 A. Now we would require hydrocarbons if we had
5 reason to suspect that there was hydrocarbon impact. But
6 so far among -- It's been my experience in put closures
7 that -- you know, at the depth of chlorides you're cleaning
8 up and we're not seeing any hydrocarbon -- visible,
9 identifiable hydrocarbon impact.

10 Q. Now in your district you've got a lot of -- most
11 of your pits have fairly high chlorides, don't they?

12 A. Yes.

13 Q. So do you know if the same applies, then, in the
14 northwest?

15 A. I have absolutely no dealings with the northwest.
16 I understand their chloride level -- I mean, their
17 situation up there is totally different from ours. But
18 could I answer a question about the northwest? Probably
19 not.

20 Q. Well, let me put it this way. I guess if their
21 chloride levels are lower in the northwest, is it possible
22 that chloride might not be a good indicator of a leak on
23 the drilling pits in the northwest?

24 A. I would say, yeah, probably.

25 COMMISSIONER OLSON: I think that's all I have.

EXAMINATION

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BY CHAIRMAN FESMIRE:

Q. Could we go to slide 10A, please, Mr. von Gonten?

Now, Mr. Bratcher, you indicated that the first thing they would do is take out two feet in a typical pit closure, and we're talking specifically about this; is that correct?

A. Yes.

Q. What do they do with that two feet of soil?

A. That usually goes in the *in situ* trench, the burial trench.

Q. So they don't have to haul that off, generally, unless it tests high?

A. Correct. Now these right here are all trench-burials. Now if they're hauling the contents, typically they'll haul that two feet, or they'll use that two feet for stiffening or something like that.

Q. Okay.

A. If it's a trench-burial, that two feet will typically go to the burial trench.

Q. Okay. Could we go to slide 13 for a minute, please?

Okay, the infamous ripped corner here.

A. Yeah.

Q. Maybe-ripped corner. You said that this

1 indicated an influx of rainwater. Is that a violation of
2 the current rules?

3 A. Yes.

4 Q. And is it a violation of the proposed rules also?

5 A. Yes,

6 Q. I'm going to go back to a couple of comments you
7 made here. We were talking specifically about slide 2.
8 You said, quote, we hope this pit is no longer being used.
9 And I'm afraid that Commissioner Bailey stole my thunder on
10 this, but what did you mean by that?

11 A. Well -- and this was brought up. You know, a pit
12 like this is ripe for midnight dumpers, and this is a prime
13 example of a pit in an isolated area and, you know, if
14 there's production around this, midnight dumpers love these
15 pits.

16 Q. Now if you throw a suction hose into this pit,
17 that's probably not going to be a -- I mean, is that going
18 to be a threat to the liner?

19 A. Probably.

20 Q. And normally midnight dumpers don't use a suction
21 hose, so I probably should ask about a discharge hose. Is
22 that a threat to the liner?

23 A. Yes, I would say that it is, yes.

24 Q. One of the statements you made was that in 80
25 percent of the cases where you evaluated under the liner,

1 where the liner had been removed, that there had been
2 contamination under the liner. Is that -- Was that an
3 accurate representation of your statement?

4 A. Yes, of my statement, yes.

5 Q. Okay, and that's a thumbnail average, you haven't
6 actually --

7 A. It's a -- yeah, a ballpark. I mean, I don't have
8 data to back that up. I'm just saying, you know, what --
9 off the top of my head, how many instances I see. I'd say
10 80 percent.

11 Q. Okay, so significantly more than half is what
12 you're telling us?

13 A. Yeah, and I've actually got -- I've got a folder
14 where I brought 19 cases of -- like the Polaris. And I got
15 to looking at them last night, and out of those 19 there
16 was two that had 250 or less throughout the whole pit. So
17 17 out of 19 had significant impact under the liner.

18 Q. Assuming the background was 250 or less, right?

19 A. Yeah.

20 Q. Okay. And those were liners that had been
21 breached or hadn't been breached, visibly?

22 A. Well, I didn't see those liners, so visibly I
23 don't know whether they were breached or not.

24 Q. Okay, but they weren't reported as breached to
25 you?

1 A. Right.

2 Q. Okay. So we can assume that those liners were in
3 fairly good shape?

4 A. We -- Yeah, an assumption.

5 Q. I guess the alternative assumption would be that
6 the operators aren't reporting breached liners to you,
7 right?

8 A. Well, you know, and the reason I threw this one
9 in there is that I think a lot of the breaches -- you know,
10 if we're having breaches of these liners, I think a lot of
11 it is not visible, it's not above the fluid level. I think
12 a lot of it is happening below the cuttings or below the
13 fluid level, and nobody's actually seeing this breach in
14 the liner. So you know, you can't report something you
15 don't see.

16 We don't find this out until we actually pull the
17 liner back and start taking samples, and that's when we
18 realize, you know, hey, we've got a problem here.

19 Q. Okay. By your experience, are these 12-mil
20 liners, or do you know?

21 A. The ones I've -- 12-mil liners.

22 Q. Okay. Would a 20-mil liner solve the problem.

23 A. 20-mil liner would help. Would it solve the
24 problem? I don't know. You know, you're always --
25 anything you do in the oilfield, or anything really, but in

1 the oilfield you're always going to have the roughneck
2 factor. You know, you're going to have the truck driver
3 that's been out there for 12 hours bouncing up and down
4 roads. You know, you're always going to have a human
5 factor involved in anything you do.

6 A 12-mil liner will help. Will it solve the
7 problem?

8 Q. "12-mil." 20-mil liner?

9 A. 20-mil. 20-mil liner would help. Would it
10 completely solve the problem? I don't think so.

11 CHAIRMAN FESMIRE: I don't think I have any
12 further questions.

13 Mr. Brooks, do you have a redirect on this
14 witness?

15 MR. BROOKS: I believe I have one question, your
16 Honor.

17 REDIRECT EXAMINATION

18 BY MR. BROOKS:

19 Q. The Crawford 26-2 location that's -- the
20 discussion starts on slide number 4. Was that case
21 referred to Santa Fe?

22 A. Well, it wound up in Santa Fe because Cimarex
23 requested a meeting with the Environmental Bureau in Santa
24 Fe to see what we needed to do to close this.

25 I was concerned that we had a groundwater impact

1 out there, so I contacted the Environmental Bureau to just
2 keep everybody on the same page on this thing. And then --
3 and I felt like it had kind of gotten out of my ballpark or
4 out of my realm of -- for being able to handle it.

5 MR. BROOKS: Thank you, that's all.

6 CHAIRMAN FESMIRE: Is there any recross on that
7 subject?

8 MR. HISER: No.

9 CHAIRMAN FESMIRE: Mr. Carr?

10 MR. CARR: No.

11 MS. FOSTER: One question?

12 CHAIRMAN FESMIRE: That's ironic, because he
13 asked one question.

14 MS. FOSTER: Okay.

15 CHAIRMAN FESMIRE: Okay.

16 RE-CROSS-EXAMINATION

17 BY MS. FOSTER:

18 Q. Is there a roughneck factor involved in closed-
19 loop drilling?

20 A. Pardon?

21 Q. Is there a roughneck factor involved with closed-
22 loop drilling?

23 A. Well, you've got roughnecks involved in closed-
24 loop drilling, so yeah, I guess you would have an --

25 Q. -- effect?

1 A. Yeah, and I guess it all depends on your
2 definition of the roughneck factor.

3 MS. FOSTER: Okay, well, that was your term. I
4 just wanted to ask for clarification.

5 No further questions.

6 CHAIRMAN FESMIRE: Mr. McMahon?

7 MR. McMAHON: No.

8 CHAIRMAN FESMIRE: Mr. Jantz?

9 MR. JANTZ: No, Mr. Chairman.

10 CHAIRMAN FESMIRE: Mr. Huffaker?

11 MR. HUFFAKER: Nothing, Mr. Chairman.

12 CHAIRMAN FESMIRE: Is there anything from the
13 Commission?

14 Okay. At this time, as is our custom, we're
15 going to go ahead and -- Before I start, I want to ask and
16 make sure everybody who's here has signed in today. Rand,
17 would you do that when you get a chance?

18 And also, as is our custom, we're going to open
19 the floor to public comment. Is there anyone who would
20 like to make a public comment on the record today?

21 Okay. With respect to scheduling, yesterday when
22 we left we were planning to take the rest of the afternoon
23 off. As at least the attorneys, and I hope most of the
24 people in this room are aware, we're not going to get to do
25 that, we're going to have to meet this afternoon.

1 I think that it has been decided that we're going
2 to continue with the cross-examination of Mr. Jones; is
3 that correct?

4 MR. HISER: Mr. Jones said he'd love to be cross-
5 examined on his birthday.

6 (Laughter)

7 MR. BROOKS: Mr. Chairman, that's what we agreed
8 to, and that's fine. I did want to make the offer, though,
9 that if Mr. Hiser is ready to do it, I would assume that
10 his supplemental examination of Mr. Hansen about his
11 substitute pages will be very brief, and if he wants to do
12 that cleanup it and get it out of the way, that would be
13 fine with us.

14 CHAIRMAN FESMIRE: You can make that decision
15 after lunch.

16 MR. HISER: After lunch.

17 CHAIRMAN FESMIRE: Okay. With that, and my
18 apologies for not being able to take this afternoon off, we
19 will break and reconvene in this room after lunch at 1:30
20 and continue with the cross-examination of Mr. Jones.

21 (Thereupon, noon recess was taken at 12:10 p.m.)

22 (The following proceedings had at 1:34 p.m.)

23 CHAIRMAN FESMIRE: Let's go back on the record.

24 Let the record reflect that this is the
25 continuation of Case Number 14,015. Let the record also

1 reflect that Commissioners Bailey, Olson and Fesmire are
2 present, we therefore have a quorum.

3 I guess we were in the middle -- or beginning to
4 -- beginning to start the recross-examination of Mr. Jones.
5 Mr. Jones, it's his birthday today, so I ask that the
6 cross-examination be -- reflect that.

7 (Laughter)

8 MR. HISER: Mr. Chairman, given Mr. Jones' added
9 experience, I will do my best.

10 CHAIRMAN FESMIRE: Mr. Hiser, why don't you
11 begin? I believe it was you, wasn't it?

12 MR. HISER: It is, and I guess the one clarifying
13 note I would have is, this is initial cross, not recross.

14 CHAIRMAN FESMIRE: Right, I'm sorry.

15 BRAD JONES (Resumed),
16 the witness herein, having been previously duly sworn upon
17 his oath, was examined and testified as follows:

18 RE-CROSS-EXAMINATION (Continued)

19 BY MR. HISER:

20 Q. Mr. Jones, good to see you again. I believe we
21 have been talking about the definition of a pit and what
22 types of pits might require permitting under the proposed
23 rule; is that correct?

24 A. Yes.

25 Q. Do you recall that?

1 A. Yes.

2 Q. And we'd been having a discussion about
3 stormwater, I believe, and whether that would require a
4 permit underneath the proposed rule?

5 A. Yes, that was -- First, we discussed the
6 permanent pit, if that would be considered, and I believe
7 when we ended Tuesday we were talking about temporary pits.

8 Q. Right. And so are you prepared to pick up with
9 the question of whether a temporary stormwater pit would
10 require a permit from the Division --

11 A. Yes.

12 Q. -- under the proposed rule?

13 A. Yes. Of course, part of this has to do with
14 existing rules as well --

15 Q. Correct.

16 A. -- and I believe we were -- the definition of a
17 pit, and --

18 Q. I'm looking for that definition right now.

19 A. And that's under part 1, section 7, subsection D,
20 paragraph (3). These are general definitions for all the
21 rules.

22 Q. Yes. I had it for a moment, and then my computer
23 jumped.

24 All right. And you are under the general
25 definition of a pit, okay, which is D.(3)?

1 A. Yes --

2 Q. Okay.

3 A. -- paragraph (3) of subsection D. Pit shall mean
4 any surface or subsurface impoundment, man-made or natural
5 depression or diked area on the surface. Excluded from
6 this definition are berms constructed around tanks or other
7 facilities solely for the purpose of safety and secondary
8 containment.

9 I'd just like to kind of start there, because
10 based on your question about these stormwater collection
11 ponds, they would in a general sense qualify as a pit. I
12 just want to make that clarification.

13 Where I would like to go next with this -- and
14 we've already discussed the definition of a temporary pit,
15 so I'll not go back into that, but what I would like to do
16 is go to page 7 --

17 Q. -- of the proposed rule?

18 A. -- of the proposed rule.

19 Q. Okay.

20 A. Let me get there so everyone can take a look at
21 this. I'm kind of driving myself today, as we call it
22 driving here.

23 And under F.(9) of section 11 of the proposed
24 rule for design and construction specifications, I would
25 like to say that paragraph (9), the language reads, The

1 operator shall design and construct a temporary pit to
2 prevent run-on of surface water.

3 With that statement, I believe a surface water or
4 stormwater collection pond would do the opposite of that.
5 Okay?

6 Q. Uh-huh.

7 A. I would also like to state -- I guess I should
8 have started up at the top under F.(1), The operator --
9 Make sure that's up here on the screen. F.(1) --

10 MR. PRICE: Mr. Jones, do you need some help?

11 THE WITNESS: If you don't mind --

12 MR. PRICE: Okay.

13 THE WITNESS: -- that might speed things up a
14 little bit.

15 The operator shall design and construct a
16 temporary pit to ensure the confinement of oil, gas or
17 water to prevent uncontrolled releases. Okay?

18 Q. (By Mr. Hiser) Uh-huh.

19 A. So I guess with this I'm looking at -- Initially,
20 a stormwater collection pond would not serve those
21 purposes.

22 If we go to page 11 of my exhibit, and this is
23 section 12, operational requirements. I'm looking under
24 subsection B, B.(1). Only fluids used or generated during
25 the drilling or workover process may be discharged into a

1 temporary pit.

2 Q. Okay, Mr. Jones, I think that probably answers my
3 questions. And so let me then pose the inevitable next
4 question, which is that given that the definition of a pit
5 is any natural impression that holds water or a fluid, and
6 that the definition of a temporary pit means that it's --
7 which is constructed with the intent that the pit will hold
8 liquids, how do we have a stormwater pond without being in
9 violation of the rules of the Division? Or if you construe
10 the rules of the Division to preclude us from having a
11 stormwater pit, how do we do it without being in violation
12 of the rules of the Environmental Protection Agency and the
13 Environment Division for stormwater control?

14 A. Well, I guess I'd like to go back to your
15 original question prior to this one, which I didn't get to
16 finish. I guess based on the intent of the use for
17 operation, the design, construction, it's clear that
18 there's a potential for a stormwater collection pond not to
19 be a temporary pit, especially since it's designed to -- or
20 supposed to be operated only to hold fluids used and
21 generated during the drilling and workover process that
22 would be discharged into that.

23 But I would like to clarify that if an operator
24 chooses to use that stormwater collection pond for
25 emergency action or emergency pit, then it would fall up

1 under the provisions of a temporary pit. If that
2 stormwater collection pond were to stop a release and
3 capture such fluids that came out of the original pit, it
4 could be considered a temporary pit.

5 So I would like to make those clarifications.

6 Q. Well -- and I appreciate those clarifications,
7 Mr. Jones, but I'm afraid that now the permit status of a
8 well site and a pad and what facilities at that pad require
9 a permit is now even less clear.

10 So we have the issue that I have as a compliance
11 person, reading the rule and trying to assess what my
12 obligations are, because I think -- don't we all agree that
13 the goal of a rule should be to clearly communicate to the
14 regulated community and the environmental community what's
15 expected of an operator?

16 A. Yes, and the initial intent of the use of that
17 pit is to collect stormwater, not as you would use it as a
18 temporary pit under this rule --

19 Q. Right, but is there --

20 A. -- so it would require a permit.

21 Q. -- is there anything in the definition of a pit
22 or the definition of a temporary pit that has -- makes
23 intent relevant?

24 A. Intent of what?

25 Q. The intent of the operator about the use of that

1 pit.

2 A. The intent of the use of the pit is up to the
3 operator. They would have to make that clear to OCD in
4 their permit application.

5 If they're to use it as a temporary pit as
6 described to be used under the operational requirement,
7 they'll fall up under part 17. That would be clear,
8 because their intent would be clear.

9 If they propose to use that pit for stormwater
10 collection, which is not the operational requirement as
11 stipulated under subsection B.(1), then it would be a
12 stormwater collection pond.

13 Q. Okay, and I'll make one more question and then we
14 may need to move on, but the definition of the temporary
15 pit means, and I quote, Temporary pit means a pit, comma,
16 including a drilling or workover pit, comma, but then
17 around the parenthetical it says, which is constructed with
18 the intent that the pit will hold liquids for less than six
19 months and will be closed in less than one year.

20 A. Yes.

21 Q. I don't see anything in that language which has
22 any element of intent.

23 A. I guess what I'm trying to clarify is that you
24 can have separate pits out there for different uses, such
25 as your emergency pit. Right now there's no provisions for

1 a permit for such a pit, but you can construct it.

2 Therefore it would fall up under, because it has to be
3 constructed, in that provision as a temporary pit. You
4 wouldn't need a permit for that.

5 Q. Isn't there an exclusion, though, that carries
6 out what you're talking to be as your intent in this rule,
7 or are we relying upon the enforcement discretion of the
8 Division's enforcement staff to keep us out of trouble?

9 A. I don't quite understand the question, because if
10 you look up under section 14 on page 19 of my exhibit,
11 subsection A says, Permit not required.

12 Q. Okay --

13 A. So it's not -- it's -- It's kind of clear in its
14 intent, the use of emergency pit. If someone chooses to
15 use their stormwater evaporation pond for an emergency pit
16 and they have it lined as a temporary pit, they could do
17 that.

18 Q. And I agree that the section 19.15.17.14 covers
19 the case of the creation of an emergency pit when I'm
20 having a problem that's suddenly erupted at the site.

21 A. Yes.

22 Q. My question continues to be, those other pits
23 that are carried out as part of the design of a proper pad
24 for stormwater control and other things like that, which --

25 A. Right, I think the rules speaks for itself in

1 those provisions for construction, design and the purpose
2 of it, that it's supposed to prevent runoff of surface
3 water. With that, that means that it wouldn't be
4 collecting surface water, it would be the preventing of
5 that.

6 So the -- what you're referring to, those other
7 pits, unless they are used -- or constructed in the same
8 fashion and then, under operation, they're constructed to
9 allow the discharge of fluids --

10 Q. But that's in --

11 A. -- user-generated during drilling process, then
12 they would be a temporary pit and require a permit.

13 Q. But that's in the construction and operational
14 design standards, but it's not in the applicability
15 requirement for what requires a permit, what requires a
16 permit.

17 A. Well, I guess what I'm trying to get at, if you
18 have a pit on site and you don't use it in the intent that
19 you planned to but use it as it stipulates a temporary pit
20 in the rest of the regulation, especially operational -- if
21 you use it as a temporary pit, it becomes a temporary pit.

22 Q. And we have no argument with that --

23 A. Yeah --

24 Q. -- our concern is with a pit that is not intended
25 to be used as a temporary pit but is used for other

1 purposes entirely such as stormwater control or diversion
2 control, or under the EPA or the NMED regulations. And
3 since that's associated with an oil and gas operation, it
4 would appear to require a permit from the Division as
5 well --

6 A. I guess --

7 Q. -- as this rule is presently drafted?

8 A. I guess the generic language of the temporary pit
9 leaves open and does not restrict OCD to only address
10 certain pits as they are presented to us in the
11 application.

12 If the status of a pit at a site changes, it
13 allows us to utilize the rest of the regulations to make a
14 determine that it's a temporary pit.

15 Q. So what you're telling me now is that I need to
16 include all of those pits in applications, and then let the
17 Division's permitting staff -- or the district's permitting
18 staff, rule as to whether or not they fall within the ambit
19 of Rule 50 as it's being proposed to be enacted?

20 A. If they're not planning on using it as a
21 temporary pit, no. But if they change the operation of
22 that pit on site during operation, which could be subject
23 to certain events at the site, at the time after an
24 operation has begun for drilling or workover, then that's
25 something to be considered.

1 Q. Okay.

2 A. But we have to make that determination based upon
3 the language provided in part 17, and this clearly defines
4 what will make that turn into a temporary pit.

5 Q. I think we'll just leave it at that. I think,
6 hopefully, everybody understands what our concern is.

7 If we move, then, to 19.15.17.8, which is the
8 permit requirement, is it in effect, Mr. Jones, the impact
9 of paragraphs A and B as the Division has proposed them
10 that all drilling operations are going to require a permit
11 under Rule 50?

12 A. All drilling operations...

13 Q. Is there any way that we can drill either without
14 a pit, below-grade tanks or closed-loop systems?

15 A. As far as I know there's also a Division approval
16 alternative method, so --

17 Q. That also requires a permit, does it not?

18 A. Yes.

19 Q. Okay. Now Mr. Jones, have you ever been out to a
20 drilling site when drilling is underway or after drilling
21 has been completed and you've seen the site?

22 A. I've seen sites where the rig has been released.
23 I've been out to closed-loop systems.

24 Q. Okay. Now when operators come to a site, do they
25 accept the natural topography as it is, or do they

1 sometimes take steps to smooth that out by digging down or
2 filling in?

3 A. I personally don't know whether they consider.
4 I've seen what they've done at the site.

5 Q. Okay. Well, from what you've seen at the site,
6 do they typically flatten the site out so they have a flat
7 working surface around the --

8 A. In some cases, yes.

9 Q. And that may be either by digging down or by
10 building up?

11 A. In most cases I've seen them building up than --

12 Q. Okay.

13 A. -- digging down.

14 Q. Now if we assume for the moment that in this case
15 they decided to dig down because it was a slope that the --
16 where the pad is partially on a hillside, so they're
17 digging in, in part, and they're filling in a little bit on
18 the other part, if I were to locate my closed-loop system
19 on the side where I had dug unto the hillside, that would
20 be a prohibited location, then, for that closed-loop
21 system, would it not?

22 A. I'm confused on two portions of this.

23 Q. Okay.

24 A. You're referring to a closed-loop system, and
25 you're talking about them digging a pit for a closed-loop

1 system, so they're --

2 Q. No, I'm --

3 A. -- using a pit?

4 Q. -- saying they're having a pad --

5 A. They're having a pad.

6 Q. I've dug in on part of the pad, and I've filled
7 in on part of the pad.

8 A. Uh-huh.

9 Q. And under the way that your rule is drafted, I
10 would be prohibited from locating my closed-loop system on
11 the section of the pad that was dug into the hillside,
12 would I not?

13 A. What provisions are you referring to that
14 prohibits that?

15 Q. Under the definition of a closed-loop system, it
16 means a system that uses above-ground steel tanks for the
17 management of drilling or workover fluids. And I believe
18 that it was your previous testimony that if a tank was
19 located below the previous ground surface, that it was a
20 below-grade tank, and so this would mean it would not meet
21 the definition of a closed-loop system?

22 A. Well, it's existing grade, so -- but you're
23 saying they're planning on digging down?

24 Q. Yes, that was --

25 A. It would be necessary --

1 Q. -- the example.

2 A. -- for them to dig down?

3 Q. Yes, because --

4 A. It would be --

5 Q. -- otherwise it's not flat enough --

6 A. To dig into the hillside they're digging down?

7 Q. Yes.

8 A. They're not digging horizontally, to --

9 Q. No, if you dig horizontally --

10 A. -- extend -- to extend the existing grade?

11 Q. Okay, that's going to be below the existing grade
12 when you're in this section here -- with my apologies to
13 the court reporter for the hand motions.

14 A. I guess with something to that extent, they're
15 modifying the site.

16 Q. Yes.

17 A. They are modifying the site. Much like if
18 someone were to build up a site and then place the tanks
19 below that existing grade. I guess the thing that hasn't
20 been defined is, what is the existing grade? Is it the
21 existing grade at the site, or the modified existing grade?
22 That hasn't been defined.

23 Q. Well, Mr. Jones, since you're the proponent for
24 the Division and I am merely a poor compliance attorney,
25 how would you define that?

1 A. In a circumstance like that, if they modified the
2 existing grade, I would consider that the new existing
3 grade.

4 Q. Okay, so you're now looking at the grade after
5 the site has been prepped --

6 A. After it's been --

7 Q. -- in preparation for --

8 A. -- modified and prepped.

9 Q. Okay. Now were you here for the montage of
10 slides that Mr. von Gonten and Mr. Price presented? I
11 think there were like 106, and then there were two
12 subsequent ones with like 15 each or something like that?

13 A. Yes.

14 Q. Okay, you saw a number of fairly typical pit
15 layout configurations on those slides?

16 A. Yes.

17 Q. Okay. In a number of those slides, did you see
18 more than one pit that was located as part of a single
19 drilling operation?

20 A. More than one pit, yes.

21 Q. And so under the rule as proposed, would I be
22 required to obtain two permits, one for each of those pits?

23 A. If I'm not mistaken, the operation of the pit,
24 based on -- and the ones I saw which required two pits,
25 actually they were side by side, so you could almost count

1 them as one pit. Sometimes there's pits within pits.
2 That's still considered one pit, and that's the way it's
3 currently permitted. I doubt that would change.

4 Q. Okay. And where in the rule would I find
5 something that would support me in the event that the
6 enforcement staff were to come out and say that we think
7 your two permits require two permits, and you only have --

8 A. Well, the second question should be posed on the
9 current rule, and is there a current practice that -- do we
10 require two permits to require that site to have those two
11 pits out there? And I do not believe we require two
12 permits for each of -- or a permit for each of those pits.

13 Q. Once again, would this seem to be something that
14 would be usefully clarified if we're preparing a new rule?

15 A. It -- I -- has it -- I guess the question is, has
16 it created a problem? And I haven't seen a district office
17 yet require two permits for -- or individual permits for
18 each of those pits.

19 Q. Does it become a problem when the first operator
20 receives the citation for two pits that are side by side
21 and they only have one permit?

22 A. Has that occurred? I don't know.

23 Q. I don't know that it has.

24 A. I don't know either. You're insinuating that
25 that has occurred.

1 A. I'm simply asking the questions about how the
2 rule as it's being proposed by the Division would be
3 interpreted.

4 A. I would assume it would be interpreted as it's
5 currently -- Rule 50 is being interpreted, which does not
6 require individual permits for those pits.

7 Q. Okay. Let's turn temporarily, then, to below-
8 grade tanks, and I believe that there is a new definition
9 that the Division is proposing, section 1.7, and you've
10 talked a little bit about this.

11 I want to start with the question of, what is the
12 consensus recommendation from the task force? And for
13 that, you testified that in your understanding the
14 consensus language from the task force is those things that
15 appeared in green in Exhibit -- which you may remember the
16 name of -- the number of, and I do not.

17 A. Yeah, I didn't number my personal exhibits.
18 Maybe Mr. Brooks can clarify.

19 Q. I was looking and I don't see it. The number for
20 the exhibit for the task force.

21 MR. BROOKS: Well, I know it's in here.

22 Q. (By Mr. Hiser) I know it too. Here it is, it's
23 Exhibit Number 24 --

24 A. Okay.

25 Q. -- which is the pit rule task force July 10th,

1 2007, consensus summary.

2 A. Okay.

3 Q. And you don't need to put it up, I'm not going to
4 actually ask you to go through it.

5 A. Oh, okay.

6 Q. I'm just asking that your convention was that
7 consensus language was being reflected in green lettering?

8 A. Yes.

9 Q. Okay. And in that you showed a certain consensus
10 language which was agreed to about below-grade tanks, and
11 that was on page 2; is that correct?

12 A. Yes. Actually, it's up on the screen as well.

13 Q. And in this thing, is there any consensus
14 language in this report as to what the definition of a
15 below-grade tank is, for purposes of the consensus report?

16 A. No. If you notice, the -- there's a section in
17 blue, and the blue was recommendations by the task force to
18 OCD to modify things after the consensus report was
19 submitted. If you notice it says, Fix definition to apply
20 to condition one.

21 Q. Right.

22 A. And neither did we in our submittal to part 1
23 indicate that the definition was in green and it was a
24 consensus item.

25 Q. Okay. But if the definition has changed and it

1 changed in a way different from what the task thought it
2 was going to change, would this really be a consensus
3 recommendation of the task force?

4 A. No, I don't think I stated that. I let the
5 language speak for itself and describe the --

6 Q. Yes, but you've changed the definition of below-
7 grade tanks from what had been in the existing rule at the
8 time the task force adopted this recommendation, did you
9 not?

10 A. We changed it afterwards. I think I've already
11 testified on this behalf, we provided within three weeks
12 after the task force convened, we also provided a draft
13 version of the proposed rule which included that
14 definition.

15 Q. But the definition of below-grade tank is not
16 part of the task consensus recommendations indicated by the
17 green lettering in this report?

18 A. No, it doesn't indicate that it is.

19 Q. And when they said, Fix definition to apply to
20 condition number one below --

21 A. Uh-huh.

22 Q. -- did not in fact you fix the definition to
23 apply to conditions number one, two, three and four?

24 A. How so?

25 Q. Well -- and I was not at the task force, and so I

1 will give my understanding.

2 My understanding is that the task force
3 distinguished in their discussions between what they call
4 below-grade tanks and another thing called tanks below
5 grade. Do you remember that discussion?

6 A. No, because I was only involved in the subgroup
7 committee, prior to the final meeting at -- the final
8 consensus meeting, and I was involved in the final
9 consensus meeting. So I was not present during the other
10 discussions.

11 Q. So perhaps this would be best something to take
12 up with the task force members, and they could talk about
13 that, and we'll switch to a different topic.

14 Going back to the definition of below-grade tank,
15 though, now, the one that the Division has proposed in its
16 proposal, you had stated before that it's your intention as
17 the Division to take any tank which is now located below
18 grade and subject that to the regulations for a below-grade
19 tank?

20 A. Yes. The way we actually saw it is that -- and
21 there's a reason why we had to make this move -- is because
22 we found that there was a loophole in the existing
23 regulation due to the definition. Okay?

24 Q. And by characterization of a loophole, will you
25 explain what you mean by that?

1 A. What we found out was -- under the current Rule
2 50, was that there was a provision to have unpermitted or
3 registered permanent pits require a permit. By requiring a
4 permit, they have to comply with the new requirements of
5 Rule 50, which means a double liner and leak detection
6 system.

7 What operators chose to do was to close those
8 pits and use tanks as the -- in the same operation that
9 they used those pits. Since those tanks were placed in the
10 existing pits, the sidewalls were visible.

11 Under the current definition of below-grade tank,
12 if I may read it, Below-grade tank shall mean a vessel,
13 excluding sumps or pressurized pipeline drip traps, where a
14 portion of the tank sidewall is below the ground surface
15 and not visible.

16 By utilizing that definition, having the
17 sidewalls visible, those tanks never fell up under Rule 50,
18 therefore they didn't require a permit. They don't fall up
19 under any of the requirements of the current Rule 50.

20 Q. And what's wrong with that?

21 A. They're used as permanent pits, in the same
22 operation as a permanent pit.

23 Q. But if it was an above-ground tank, there would
24 be no requirement for a permit, would there?

25 A. They're not above ground, they are below ground.

1 And therefore, since they're used in the same operation as
2 the existing -- the previous permanent pit, that permanent
3 pit, for a true replacement to fall into compliance, they
4 would have to be double-lined with leak detection.

5 Q. Well, let me ask you then, Mr. Jones, what is the
6 difference between an above-ground tank, which is located
7 above ground, which you can see all the sides, and a tank
8 which is located in a depression below the -- I guess it's
9 a site-engineered grade where there's significant space
10 around it and you can look at all the sidewalls there? Are
11 they not functionally the same?

12 A. Yes and no.

13 Q. Okay, I like the yes answer, but the --

14 (Laughter)

15 A. They are both tanks, they're both tanks. So yes,
16 they are similar. The difference is, one is placed below
17 ground, closer to groundwater.

18 The other position on this is that, as Mr.
19 Bratcher testified this morning, we have found below-grade
20 tanks that leak. So they do leak.

21 So right now my understanding is that in order to
22 get out of Rule 50, a lot of operators modify their tanks.
23 They put them in vaults with gravel underneath, which
24 facilitates drainage down below the tank. So if the bottom
25 of the tank is compromised in any form or fashion, it could

1 leak.

2 Since it doesn't fall up under Rule 50, it's not
3 governed for the annual integrity testing or any of that,
4 so you wouldn't know if it was leaking or not. There's no
5 provisions in any of our rules that would address the
6 monitoring of those type of tanks.

7 Q. Right, because your above-ground tank rules don't
8 require that?

9 A. They're not a -- by definition, they are not a
10 below-grade tank under our current rules.

11 Q. Correct. And so -- and I think you testified
12 that many of the operators had done that?

13 A. I've heard that in the northwest it became common
14 practice to do that.

15 Q. Right, and so the -- in this case you've created
16 a rule, the operator has responded to that rule, presumably
17 with a lot of investment, and now you're going to change
18 the rule to require them to re-do it again?

19 A. Investment not to comply with the rule, yes.

20 Q. So your testimony, then, is that there is no
21 preference as between a tank and a pit?

22 A. No. I mean, this -- if they have tanks presently
23 there to comply with the rule, all the would have to do is
24 put a liner underneath. They could place a tank within the
25 existing tank to comply with that.

1 Q. Yeah. And how easy is that to do after you've
2 already placed your tank?

3 A. Well, we have above-ground tanks at surface waste
4 management facilities that are required to have an
5 impermeable surface, and if those liners or that
6 impermeable surface is compromised, they have to replace
7 those. And those tanks are full of fluid, so -- Operators
8 do this all the time, I don't see where it's an issue.

9 Q. And so therefore it's just not an issue, and the
10 Division wants to proceed with the route that it's taken
11 here?

12 A. What we're trying to do is protect the vadose
13 zone and groundwater and make sure there's no leaks.

14 Q. Okay. Moving to...

15 I guess I do want to return to the definition of
16 the pit one more time, with apologies to the Commission. I
17 think everybody understands this, but I just want to make
18 sure.

19 The definition of a pit, we saw before, which is
20 something which is going to intend that the pit will hold
21 liquids, the Division is not taking the position that if I
22 have liquids inside another unit, like a below-grade tank,
23 as you're now defining them, within a pit, that I would
24 need to have a permit for the pit in addition to the tank
25 within which the --

1 A. I think if you look at the definition of below-
2 grade tank -- make sure I find it here. Or, I'm sorry, the
3 new proposed -- and I don't have that handy.

4 Q. I don't either, unfortunately.

5 A. Well, it basically says any sidewall being below
6 the existing grade. Below-grade tank means a vessel,
7 excluding sumps and pressurized pipeline drip traps, where
8 a portion of the tank sidewall is below the surrounding
9 ground surface elevation.

10 So that -- that's even -- the language that we
11 were discussing earlier about existing grade, it has
12 nothing to do with if you modify the site; it's the
13 surrounding ground surface elevation. So if you modified
14 that, that's pretty generic to make sure that's understood.

15 But --

16 Q. Now you've lost me in that --

17 A. That was --

18 Q. -- explanation.

19 A. Earlier you were talking about if you cut out --
20 if you modified an area and made a -- what an I trying to
21 think of?

22 Q. That was about a closed-loop system --

23 A. Well, a closed-loop system --

24 Q. -- in that particular --

25 A. Okay.

1 Q. Now, did you change your answer to my previous
2 question on closed-loop, if I now have my closed-loop in
3 the area which I had cut out, which is below the --

4 A. No, no. No.

5 Q. So you're still taking the position that we're
6 talking about the post-engineered --

7 A. Yes --

8 Q. -- surface --

9 A. -- the modified surface.

10 Q. Okay.

11 A. For below-grade tanks, can you ask your question
12 again?

13 Q. Yeah, my question is that if I place a tank,
14 which you're not construing to be a below-grade tank, in a
15 vault, below the engineered surface of the pad, do I need
16 to have a permit for both the pit and for the tank?

17 A. Well, I believe your question referred to a liner
18 beneath it, not a --

19 Q. I think I said the pit. Do I need a permit for
20 the pit in which the tank is placed if it's not filled up
21 around the edges --

22 A. I thought you were talking about the lined pit.

23 Q. No.

24 A. Well, if you go to design and construction
25 specifications for below-grade tanks, and that is --

1 subsection I is on page 9 --

2 Q. Yes.

3 A. -- if you look down -- and I believe it is
4 paragraph (6) --

5 Q. Uh-huh.

6 A. -- and paragraph (7) are going to be important
7 here --

8 Q. Uh-huh.

9 A. -- a below-grade tank system shall consist of a
10 double walled system with the capability to detect leaks or
11 a tank placed within a geomembrane collection system, or
12 alternative system.

13 Paragraph (7) goes on to define what's required
14 for an operator that's going to design a below-grade tank
15 system that requires a tank placed within a geomembrane-
16 lined collection system.

17 That -- what you're describing, if it was placed
18 in a pit that had a liner in it, would be such a system.
19 So it would be the below-grade tank system.

20 Q. Okay, and so your argument, then, would be that
21 that's a secondary containment system, and so there it
22 would not be a pit within the meaning of the definition of
23 a pit back in 1.7; is that correct?

24 A. Yes.

25 Q. Okay, thank you. That's what I anticipated was

1 the answer, I wanted to make sure.

2 A. Okay.

3 Q. Okay, in section -- I think it's B, the detailed
4 engineering plan, I think there was a previous discussion
5 about the hydrogeologic report in B.(1).(d). It says
6 sufficient information detail on the site's topography,
7 soils, geology, surface hydrology and groundwater
8 hydrology, to enable the Environmental Bureau to evaluate
9 the actual potential effects on soil and surface water and
10 groundwater.

11 And then you require for a temporary pit a
12 similar hydrogeologic report as well.

13 Is the hydrogeologic report in paragraph B.(2)
14 meant to include the same information as the hydrogeologic
15 report in paragraph B.(1)?

16 MR. PRICE: What page are you on?

17 MR. HISER: Page 3 of this exhibit.

18 THE WITNESS: Page 3 of the exhibit. I believe
19 it's the exact same language.

20 Q. (By Mr. Hiser) And so are you anticipating that
21 for a temporary pit that we would provide the same type of
22 detailed hydrogeologic report --

23 A. Yes.

24 Q. -- other types of pits?

25 A. There's some question about the detail of it, but

1 yes.

2 Q. Of what use is that report to the Division or the
3 district office beyond the depth to the groundwater and the
4 distance to the surrounding surface waters --

5 A. I think --

6 Q. -- and whether this indicates whether we're in an
7 unstable area or the siting -- and that it meets the siting
8 criteria?

9 A. Well, let's go with the first thing, topography.
10 Topography will determine if you need diversion measures to
11 divert stormwater, which is a requirement for design and
12 operation.

13 Soils and geology, once again this might give us
14 some insight about if there's additional measures
15 underneath, such as geotextile, to be used in the
16 construction and the design. So this is important stuff.

17 Subsurface hydrology and groundwater hydrology,
18 this right here is going to let us determine the depth to
19 groundwater. If there's a release -- and this goes for the
20 soil and the geology -- if a release is to occur, as Mr.
21 Bratcher discussed today, it will give us some insight,
22 especially if there's a rip in the liner below the liquid
23 limit, it would give us some indication if there's 20 feet
24 of sand, coarse sand, beneath that, how rapid that's going
25 to move and if we need to address that immediately if

1 there's a release from that pit during operation.

2 Q. And the question, I think, Mr. Jones, that comes
3 from -- that comes out of all that is that if we supply you
4 with that level of detailed information, how much time is
5 it going to take for us to have a hydrogeological firm go
6 out and determine that, and does subsurface hydrology
7 require us to fully characterize the vadose zone transport
8 characteristics that would be present there?

9 A. Well, I think you're stretching the length -- as
10 I went through my presentation, I discussed what would be a
11 good example for each of these and the sources of that
12 information.

13 Q. I recollect you doing that for the siting
14 criteria, I don't recollect you doing that for the
15 hydrologic report.

16 A. Well, with that, a lot of that, I referenced that
17 it would be in the hydrogeologic report and the importance
18 of it, because it would fall up under these provisions.

19 I can honestly say that -- my work here, I deal
20 with hydrostatic tests of pipelines, transportation
21 pipelines. I require the same information. This can be
22 put together very quickly. The information is available
23 via websites. The review of this information, 15, 30
24 minutes, to go through the information. It is brief, but
25 it is detailed. It's --

1 Q. Is this something that the Division might
2 consider putting out guidance, so that operators have a
3 sense of the level of detail that's being looked for?

4 A. Well, the issue of that is the site. Each site
5 is different. A lot of people want to make this a cookie-
6 cutter-type thing. To a certain extent your operational
7 plans can be, your closure plans can be to a certain
8 extent, if you implement certain closure methods.

9 When it comes to the site-specific information
10 such as the depth to groundwater, the soil information and
11 topography, all that is site-specific, and that is crucial
12 for the siting of these.

13 Q. And when you say it's crucial for the siting of
14 these, do you require that for above-ground tanks?

15 A. I don't deal with above-ground tanks --

16 Q. So you don't know?

17 A. -- I can't comment.

18 Q. Okay. And does it make any difference how much
19 information you have, whether this is a temporary pit that
20 will be present for a year or a year and a half, versus a
21 permanent pit that may be there for 40, 50 --

22 A. I think the degree of information could be
23 equivalent for both, meaning that it shouldn't be that
24 complex. The only difference is, maybe for a permanent pit
25 we may want some confirmation of that information,

1 especially depth to groundwater.

2 Q. Okay. I guess part of the reason that we're
3 troubled from a compliance perspective with this
4 requirement is it's generality and the practice in other
5 states, sometimes, where this term has been used to require
6 studies that take two years and multiple hundreds of
7 thousands of dollars in terms of trying to characterize the
8 subsurface hydrology of a site, which may require multiple
9 drilling and all that type of things.

10 And what I'm hearing is that that's not what the
11 Division's expectation is. I'm also not seeing anything
12 that rules that out from being a potential requirement,
13 should the Division decide that it wants to do that.

14 A. No, I think -- especially when I went through the
15 groundwater, I listed sources that were available, that the
16 information is public information and available.

17 Q. What's the recourse for an operator if they get
18 the request for the \$200,000 hydrologic study for their
19 temporary pit?

20 A. I'm sorry?

21 Q. What's the recourse we have if we send in our
22 application to the district office and they request a
23 \$200,000 hydrologic study?

24 A. That's not our intent.

25 Q. I know that's not your intent, but I'm asking

1 what's my recourse if I feel that I'm being asked to do
2 something which is beyond what the intent of this rule was
3 as you've explained it?

4 A. I believe I've only -- your -- as a hypothetical
5 -- I don't know, because that's not the intent that we've
6 expressed on record for this purpose.

7 Q. Okay. Hopefully that's not the grin-and-bear-it
8 response.

9 A. Well, you're asking something that we're saying
10 that we're not requesting, and -- but you're asking --

11 Q. I guess my question was --

12 A. -- what's the recourse --

13 Q. -- a procedural one in terms of do we talk to --
14 do we go to the district supervisor or -- I guess that's
15 what we would do if it's at the district level?

16 A. Well, I guess in that case, if it was for a
17 temporary pit, yes. If it was for a permanent pit, it
18 would be for the Santa Fe office. But what I'm stating is
19 that we're not asking for the \$200,000 assessment --

20 Q. I understand.

21 A. -- and I'm trying to make that clear --

22 Q. Okay.

23 A. -- so the recourse, I don't understand -- we're
24 not asking for -- Why would there be recourse?

25 Q. There wouldn't be a need to if things go as you

1 have said?

2 A. Yes.

3 Q. And I appreciate your clarification, I do.

4 Let's go on, then, to the provisions on below-
5 grade tanks in paragraph B.(4) on page 3 of your exhibit,
6 and I want to focus here on one particular section of this,
7 as soon as I find it.

8 Okay, in this second sentence of this, the one
9 that starts, An engineering design plan shall use
10 appropriate engineering principles and practices and follow
11 applicable manufacturers' recommendations, what does
12 applicable manufacturers' recommendations mean? And let me
13 ask -- let me give you the problem, and then you can tell
14 me what the Division's analysis of it is.

15 COMMISSIONER OLSON: Mr. Chairman -- I wonder if
16 you'd clarify where you're referring to. I'm not sure --

17 MR. HISER: Oh, I'm sorry, it's in section
18 17.9.B.(4), which is the Division's -- for below-grade
19 tanks on page 3 of the Division's exhibit.

20 COMMISSIONER OLSON: Thank you.

21 CHAIRMAN FESMIRE: Exhibit -- ?

22 MR. HISER: 23.

23 MR. BROOKS: I believe the same language is in
24 (2) also.

25 MR. HISER: Yes. And we'll wait a second for all

1 the Commissioners to get to that page. Everybody there?

2 COMMISSIONER OLSON: Uh-huh, thanks.

3 MR. HISER: You're welcome.

4 Q. (By Mr. Hiser) Okay, so this is saying, follow
5 applicable manufacturers' recommendations.

6 Many manufacturers in their recommendations have
7 the helpful habit of specifying that you may only use the
8 manufacturers' versions of pits, and is it -- by including
9 this provision that requires us to follow the
10 manufacturer's recommendations, is it the Division's
11 intention that we have to only use that manufacturer's
12 pits?

13 A. Well, it says the applicable ones. So I guess
14 what we're looking at -- this -- let's say for below-grade
15 tanks specifically. If that -- the manufacturer of that
16 below-grade tanks, their recommendations state that it is
17 not resistant to the contents you anticipate to use it in,
18 that would restrict the use of that tank.

19 Q. And we would agree with that.

20 A. And that's what we're looking at.

21 Q. Okay. So you're not meant -- it's not meant as
22 a, you must only use the manufacturer's --

23 A. No --

24 Q. -- parts?

25 A. -- no. And I thought I made that clear, I -- in

1 my testimony I also talked about the installation of
2 liners, how the installers use the recommendations,
3 especially regarding seaming of certain liners, and their
4 being resistant to certain chemicals that are used in the
5 application of those liners.

6 Q. And I think in part that that discussion would
7 allude to the fact that there really aren't manufacturers'
8 recommendations for those, whereas a tank may in fact have
9 an actual manufacturer, and so that's why I was asking that
10 question.

11 A. Yes.

12 Q. If we move the -- flip the page to page 4 of your
13 exhibit, now we're at C.(4), and I think we talked about --
14 I think we'll skip that part.

15 In D.(1) it says, Filing of permit applications.
16 It says, Permanent pits go -- and exceptions shall be filed
17 with the Environmental Bureau in the Division's Santa Fe
18 office to request approval or to request an exception. And
19 I think we talked a little bit about this, so it appears
20 that this provision says that if I need an exception I
21 actually send that to the Santa Fe office with a copy to
22 the district office?

23 A. Yes.

24 Q. And so then once the Bureau decides that it's
25 going to grant or deny that exception, you would forward

1 that to the district office, and I'd continue the process
2 at the district level?

3 A. Yes, I think we discussed this the other day.
4 It's only the exception that is required to be filed with
5 Santa Fe. If they're doing something that doesn't require
6 exception, they could probably pursue that through the
7 district office, which would speed up the process. It's
8 only the exception.

9 Q. Okay.

10 A. The recommendation I have was, if it's an
11 exception that would prohibit you to do the rest of your
12 operation, you may want to resolve that up front.

13 Q. Okay. What I'm trying to come -- That's what I'm
14 trying to resolve in my mind, is, is the application for a
15 pit or a below-grade tank or a closed-loop -- I guess it
16 would just be for a pit or closed- -- no, it would be any
17 of the three, temporary pits, closed-loop or below-grade
18 tanks that requires an exception require one or two C-144s?

19 A. It could be done on the same form. But for the
20 exception to be approved, the information -- you would
21 probably submit it in duplicate --

22 Q. Okay.

23 A. -- in that case.

24 Q. So you are envisioning a duplicate submittal?

25 A. Well, it actually tells you to submit a copy to

1 the district office, so it's required to be submitted in
2 duplicate, one to the Santa Fe and a copy provided to the
3 district office.

4 Q. Okay.

5 A. So you are submitting it in duplicate.

6 Q. But that could also be triplicate, couldn't it?
7 Because the paragraph below it says I have to submit my
8 application for the temporary pit to the district office.

9 A. Well, you've already submitted it by going
10 through the exception requirements --

11 Q. All right.

12 A. -- so this is the same. We're not asking you to
13 submit it again.

14 Q. Okay. We're now up to section 10, which is the
15 siting requirements. In (1).(a) you say that if we're
16 measuring the depth to groundwater from the bottom of the
17 temporary pit or below-grade tank, and so you're looking at
18 the -- if the bottom of my pit is five foot below grade
19 surface, then the groundwater would need to be 55 foot
20 below ground surface?

21 A. Yes.

22 Q. Okay. And then on the watercourse, you said
23 that if the operator has a question about that, that that's
24 an area that has been delegated by this rule to the
25 district office to make a conclusion as whether a

1 watercourse is a watercourse within the meaning, correct?

2 A. It's subject to administrative approval for
3 alternative distance, yes.

4 Q. Okay. And would we do -- would we do that by
5 filing an application, or how would you go about doing that
6 process?

7 A. It's part of the permit application, that you
8 would request that.

9 Q. And so if you're in an area that has a heavy
10 prevalence of erosional rills, which we've heard is
11 frequently the case, at least in the northwest, does that
12 mean that in effect it will be likely that there would need
13 to be a site visit from one of the district staff members
14 before you can proceed with that --

15 A. It would --

16 Q. -- application?

17 A. -- probably be recommended.

18 Q. And what happens, which can also be the case,
19 unfortunately, if the watercourse moves between the time
20 that you first submit your application and the time that
21 you're finished using your temporary pit?

22 A. I would hate to say it. If it actually moved
23 when you did that, you're probably in a floodplain or
24 something, and you wouldn't be subject to having that
25 either way. FEMA would have already determined that for

1 you.

2 Q. I'm sorry, you're --

3 A. FEMA would have already made that determination
4 for you.

5 Q. And so the hope is that by the 100-year
6 floodplain -- that by being out of that, that we wouldn't
7 have that issue?

8 A. You would prevent or reduce the risk of those
9 events happening.

10 Q. Okay, at least in the areas where there is a FEMA
11 floodplain --

12 A. Yes.

13 Q. -- delineation? Okay.

14 Where there is no FEMA floodplain delineation, is
15 it the intent of the Division that we have to get FEMA to
16 make one, or do we simply fall back on the 300- and 200-
17 foot distances?

18 A. I think the topographic map should be a good
19 indication of that, because you have your watercourse
20 setback, you have your wetlands setback, and I think
21 between the two you could make that assessment, and it
22 could be demonstrated through those, if there is no FEMA
23 assessment.

24 Q. So we do rely, then, on the setback for
25 watercourses and wetlands --

1 A. Yes.

2 Q. -- if there's not a FEMA determination. Okay.

3 Actually, I guess I do have one question on that.
4 If we're protecting for the floodplain where there is a
5 floodplain limitation, why isn't the floodplain delineation
6 adequate as a setback?

7 A. Can you ask the question again?

8 Q. Yeah, if we have -- Right now the rule proposes
9 both that we be outside the 100-year floodplain, if there
10 is one, and also away by 300 and 200 feet in the case of a
11 watercourse -- I think it's 300 or 500 for a wetland.

12 Putting aside the wetland question for the moment
13 and just looking at the watercourse question, if, as you
14 said, the floodplain determination took care of most of the
15 problems with the moving streambed, why are we also
16 concerned about the setback? Why do we need the additional
17 setback of 300 or 200 feet?

18 A. Well, I think there are two different things
19 you're looking at. Floodplain, there has been an event
20 that has taken place over -- you know, a 24-hour, 25-year
21 flood event that took place, that has been documented that
22 his area was impacted. It is fact --

23 Q. Uh-huh.

24 A. -- and that's why it has been designated as such,
25 plus they also looked at all the drainages that feed down

1 to that area and the impact they will have.

2 Q. That's usually primarily a theoretical
3 determination.

4 A. It can be.

5 Q. And -- but we -- Yeah, I mean, we, industry,
6 don't have a problem with being on the floodplain. I guess
7 the question is, if we have a floodplain delineation, what
8 additional benefit is there to the 300- or 200-foot setback
9 requirement?

10 A. Well, your assumption is that a watercourse and a
11 floodplain are the same, and I beg to differ because one
12 does put drainage into an area, the other is something that
13 could be active at any time of the year, which is
14 different.

15 Q. I guess I don't follow the distinction --

16 A. Well, the definition of a watercourse is what I'm
17 referring to, the state definition of a watercourse.

18 Q. So something which has defined bed and bank with
19 evidence of occasional flow of water?

20 A. Yes, which is not the same definition as a
21 floodplain.

22 Q. Well, don't floodplains typically surround
23 watercourses? Can you have a floodplain without a
24 watercourse?

25 A. It would depend. Based on certain drainages, it

1 may not be defined as a watercourse. If you notice, the
2 watercourse definition doesn't include floodplain.

3 Q. Does not?

4 A. It's not listed in the definition, is it? I
5 believe it has playa lakes, it has --

6 Q. Right.

7 A. -- other things, but it doesn't include a wetland
8 or a floodplain.

9 Q. Right.

10 A. There's a clear distinction between that, because
11 a certain event, a hundred-year event, could classify a
12 floodplain.

13 Q. Correct. And my question is, why, if we're
14 protecting for floodplains, and that's where the water
15 would be on a 100- -- say a once-every-100-year basis, do
16 we also need a setback from the watercourse --

17 A. Well, based upon your question, your assumption
18 is that every watercourse is part of a floodplain, and I'm
19 making a distinction that those two don't have to be the
20 same.

21 Q. Okay. But where there is a floodplain
22 delineation --

23 A. -- there may not be a watercourse, by definition.

24 Q. Okay, and then in which case I don't need to
25 worry about the watercourse setback because it doesn't

1 apply.

2 But where there is both a floodplain delineation
3 and a watercourse, what's the added benefit of the 300- and
4 200-foot setback?

5 A. So you're -- Now you're saying there is a
6 watercourse and a floodplain?

7 Q. Right.

8 A. And why is there a setback?

9 Q. Right.

10 A. Well, you have to meet both, meaning that if your
11 floodplain extends 400 feet from your watercourse on either
12 side, you have to meet the floodplain requirement --

13 Q. -- which we agree with.

14 A. -- which is greater.

15 Q. Right. But my question is that if the floodplain
16 is only 70 feet -- or say 150 feet wide, why do we need to
17 go to the 300-foot level in order --

18 A. Well, the 300-foot is for a continuously flowing,
19 200-foot for a watercourse.

20 Q. Or 200 foot then?

21 A. I think I discussed this -- during my
22 presentation I went to some great length of what we
23 consider about the operational -- operations of the pit,
24 the construction of the pit, the diversion measures that
25 are required for that pit. Once you start constructing all

1 these things that you discussed earlier, there's a
2 potential for a stormwater collection pond. That may be
3 present, so that's another feature you would add that could
4 be in that area, that 200-foot area.

5 And then with the anchor trenches that would have
6 to be constructed, that takes the widened -- I wouldn't say
7 the footprint of the pit, but at least the area not being
8 able to use for that purpose. And any type of stormwater
9 management type or erosional features to prevent runoff
10 from the site, from the operation, you start using up a lot
11 of space.

12 We have recommendations from 10 feet to 100 feet.
13 We chose 200 feet because we thought that was adequate to
14 allow the operation to take place, the practicality of the
15 operation to take place around the pit.

16 Q. So that's just a -- sort of a professional
17 judgment call on the part of the Division. I think the
18 industry recommended 100 foot.

19 A. It was a nonconsensus item. We had a
20 recommendation during --

21 Q. By industry, I'm talking about the industry
22 committee --

23 A. Yes --

24 Q. -- had recommended that 100 foot --

25 A. -- yes, they recommended that 100 feet, we

1 recommended 200 feet.

2 Q. Going to -- turning now out of the siting
3 requirements and moving to the design and construction
4 specifications, under section F we talked a little bit
5 about the 2-for-1 slope, I think -- was it with you or with
6 a previous witness? I can't remember. Anyway, the
7 rationale, though, I think that you've explained is a
8 safety consideration?

9 A. Yes. And I think there are some photos that have
10 been presented where they are straight up and down, and it
11 shows the stress and strain on the liner.

12 Q. Uh-huh.

13 A. That's another factor that you end up -- once you
14 start putting contents, drilling muds or fluids into that
15 liner, it ends up placing additional stress.

16 Q. Isn't that something, really, that's better
17 addressed by the manufacturers' and installers'
18 specifications and expertise?

19 A. I think we have some obligation to make our own
20 requirements that -- We've done it under part 36 for
21 evaporation ponds. It's nothing new under regulations that
22 we have currently in place.

23 The other issue is, are you violating OSHA
24 regulations, which are not our regulations, and we do not
25 want to be involved in that implementation or say that

1 we've allowed something that's in violation of a current
2 regulation.

3 And I think I've discussed the difference between
4 a trench and what's defined by OSHA as a trench.

5 Q. Right, although -- I mean, that discussion made
6 it sound like you believed that a trench wasn't a pit,
7 which I'm sure is not the intent that you wanted to give.

8 A. A trench is anything that's deeper than it is
9 wider, by definition. It doesn't state its use. A trench
10 -- that is the definition of trench by OSHA.

11 Q. Yeah, but that also meets the definition of a pit
12 under your definition of a pit, which is any natural or
13 manmade depressions at an oil and gas site, so --

14 A. No, it's very clear that if it's deeper than it
15 is wider at the surface, it's a trench.

16 Q. So your position is that a trench doesn't require
17 a permit under Rule 50.

18 A. I didn't say that. I'm just saying by OSHA's
19 standards and their requirements to either tier out or put
20 something in to support those sidewalls -- there are
21 requirements by OSHA. We're not trying to implement OSHA
22 regulations because they stand as they are by OSHA. But
23 what we're trying to do is prevent someone constructing
24 something that doesn't comply with those.

25 Q. So you're not trying to follow OSHA's

1 regulations, but you're trying to follow OSHA's regulations
2 in the extent that your regulations don't --

3 A. No, we're concerned about safety. I think I
4 stated that. The safety of entry -- or egress and ingress
5 into the pit.

6 Q. Okay. Well, isn't it true that, to switch
7 grounds, that most landowners would like to minimize the
8 size of their pit?

9 A. Yes.

10 Q. And that by specifying this setback you're going
11 to be increasing the size of these pits?

12 A. We think, based upon the safety factor of egress
13 and ingress into the pit, that it's prudent that we address
14 that.

15 Q. Okay, I'll ask my question again so I can get an
16 answer, which is, does the specification of the 2-to-1
17 slope potentially increase the size of the pit from what
18 might otherwise be placed there?

19 A. It depends on what you're -- if you are looking
20 at steeper slopes or not.

21 Q. Well, if I was it would --

22 A. Okay.

23 Q. -- make a difference, would it not?

24 A. For clarification and if you're looking --
25 comparing that to steeper slopes, possibly. I think I also

1 -- And the reason I say possibly, this discussion also went
2 to depth. So you can have --

3 Q. -- in the --

4 A. -- you can have steeper side slopes, and you can
5 have a shallow pit, and it can pick up the same footprint
6 as something that has more -- longer side slopes and
7 deeper. They could take up the same footprint.

8 Q. Well, if I build a deep, sharply sloped pit, it's
9 going to take up less space than a deep, shallowly sloped
10 pit?

11 A. A deep shallow -- ?

12 Q. Yes, a deep, shallowly sloped pit, which we --

13 A. Oh, okay, shallowly sloped.

14 Q. -- of your 2-to-1 offset --

15 A. Yes, yes.

16 Q. Okay. I believe that you also require two-foot
17 freeboard; is that correct?

18 A. Yes.

19 Q. Do you know what percentage of this area and pit
20 volume that you are now consuming with the freeboard and
21 2-to-1 offslope?

22 A. It would depend on the size of the pit --

23 Q. It does, but --

24 A. -- and the dimensions.

25 Q. -- do you know roughly what that percentage is --

1 A. No, I --

2 Q. -- it's fairly standardized?

3 A. I do not.

4 Q. Would you be surprised if it's 25 percent or
5 more?

6 A. Once again, it would depend on the depth and it
7 would depend on its side, so I would not say that it would
8 probably be the average. I --

9 Q. But you're not --

10 A. I don't know.

11 Q. Fair enough.

12 A. I would like to clarify, that was task force
13 recommendations, and there were people from industry
14 present that agreed with that language.

15 Q. Okay, in paragraph F.(1) you're requiring that we
16 design the pit to, quote, ensure the confinement of oil,
17 gas or water to prevent uncontrolled releases?

18 A. Yes.

19 Q. And why that requirement to ensure the
20 confinement of gas? I presume you're not requiring us to
21 make sure that gas in its gaseous form is confined within
22 the pit?

23 A. No, I think I clarified this in my testimony that
24 this was from a similar provision, I believe in Rule 50,
25 that talks about liquid gas.

1 Q. But once again, we're dependent upon the
2 enforcement discretion of the Division in that
3 interpretation?

4 A. Yeah, I would find it very difficult to -- for
5 them to make an assessment of the -- that assumption.

6 Q. Okay. I can't read my own handwriting.

7 CHAIRMAN FESMIRE: Mr. Hiser, you're not getting
8 old till you can't read your printing.

9 MR. HISER: No, Mr. Chairman, it's more when I
10 was a debater and I killed my handwriting when I was doing
11 that.

12 Q. (By Mr. Hiser) Now, I believe in your testimony
13 on F.(6), you stated that -- The requirement says,
14 Geotextile is required under the liner where needed to
15 reduce localized stress-strain or protuberances that may
16 otherwise compromise the liner's integrity.

17 In your narrative that you gave to Mr. Brooks,
18 you stated that this geotextile was always required. Did
19 you misstate when you said that?

20 A. Is this a direct reading from my --

21 Q. That's my notes, that you said it's always
22 required. I wrote that down in the margin. And that's not
23 how I read (6), and so I just wanted to clarify my
24 understanding or what your understanding is behind F.(6) on
25 page 7 of the Division's exhibit.

1 A. I think to clarify this, if you look at my note,
2 what I was referring to -- and that was kind of -- might
3 have been taken out of context -- is that the task force
4 suggested that the geotextile material -- and their
5 proposed language stated that it may be required. What
6 we're trying to do is not give them the option to choose,
7 if they want to expend extra money to use it or not and
8 make it optional. What we were trying to do is make it
9 required, especially when it's needed.

10 The earlier testimony this morning talked about
11 regions where there's -- they're having to blast, there's
12 rocks present and all that. That's the intent to address
13 those issues with this provision.

14 Q. Okay. Now once again, I'm a compliance guy, and
15 so I want to understand -- make sure I understand what my
16 compliance obligations are under the proposed rule.

17 You just said that you wanted to remove
18 discretion as to whether we do it. Is the only time that
19 our discretion is being removed is where it is needed to
20 protect, whatever the language is, or needed to reduce
21 localized stress-strain or protuberances?

22 A. I'll read the direct language to make sure it's
23 clear: Geotextile is required under the liner where needed
24 to reduce localized stress-strain or protuberances that may
25 otherwise compromise the liner's integrity.

1 So it states where needed. If you were in a
2 sandy soil where it's not needed, then this would clearly
3 indicate you would not need it.

4 Q. Okay, so it is, in fact, discretionary upon --
5 there is an element of discretion as to whether it's needed
6 or not --

7 A. Yes.

8 Q. -- if it is needed, then you have to have it?

9 A. Yes.

10 Q. Okay.

11 A. It would prevent a lot of the photos you saw this
12 morning where rocks were sticking out of the liner.

13 Q. Okay if we move to -- Now, you have a requirement
14 in F.(3) to go to the 20-mil string reinforced LLDPE or
15 equivalent liner; is that correct?

16 A. Yes.

17 Q. And that is in part meant to address the
18 testimony of Mr. von Gonten and then of your two district
19 personnel that testified today about rips, tears, windwhip
20 and similar occurrences?

21 A. Well, I don't see what it has to do with
22 windwhip, but --

23 Q. The anchor provisions and stuff.

24 A. Well, we're talking about what the material is.

25 Q. Aren't most of the issues that they address --

1 may be addressed more by the siting and design criteria
2 that you have listed here in paragraphs 4 through 9?

3 A. I would say no. I think a good example is Mr.
4 Bratcher's testimony this morning where sites where
5 groundwater was over 100 feet -- based upon his description
6 of the sites, they wouldn't have met the siting criteria.
7 They still have releases based on using a 12-mil liner.

8 Q. But that's not the 12- -- That was not a
9 reinforced liner, was it?

10 A. He did not testify if it was or wasn't, because
11 it wasn't indicated on the C-144.

12 Q. Right, but I think when he was asked about a
13 couple of the ones that were there, he stated that those
14 were not; is that correct?

15 A. I'm sorry?

16 Q. At least with the Marbob pit, he was able to say
17 that that was not a reinforced --

18 A. Just that one, based on the photo, his assessment
19 photo.

20 Q. And then would the previous inspector, the one
21 from the northwest, Powell -- Mr. Powell testified, he said
22 that those liners are not reinforced where he had seen
23 problems, correct?

24 A. I think he testified that he could not make that
25 determination because they only said 12-mil on the

1 application.

2 Q. And I think we then went on to talk about the
3 ones that he had personally visited.

4 A. I don't remember his statement.

5 Q. Okay, we'll let his testimony stand for what it
6 is.

7 A. Yes.

8 Q. Now, did you hear the -- I think it was -- Were
9 you here for the testimony regarding what happens if the
10 top liner fails prior to the bottom liner?

11 A. Which testimony is this?

12 Q. I'm trying -- I don't remember exactly who it
13 was, but I know that there was discussion about how that
14 might end up with liquids building up over the bottom
15 liner. Do you recall that?

16 A. When you say top liner and bottom liner, what are
17 you referring to?

18 Q. The cover, versus the liner in which the waste is
19 placed.

20 A. So you're talking about --

21 Q. A deep-trench --

22 A. -- a deep-trench burial.

23 Q. -- a deep-trench burial, you have the bottom
24 liner, which the waste is -- when you place the cover over
25 the top --

1 A. And what was the statement, again?

2 Q. The statement was that if you have the top liner
3 fail, then you have liquids building up a hydraulic head on
4 top of the lower liner --

5 A. That's a possibility.

6 Q. -- and all that.

7 From a design criteria, is that undesirable?

8 A. Design based on which design?

9 Q. Based on -- well, having water build up on top of
10 your lower liner in a single-liner system.

11 A. Well, if a deep trench is a single-liner
12 system --

13 Q. Correct.

14 A. What you're referring to is what you referred to
15 as enclosed or --

16 Q. No, I'm not talking about --

17 A. -- in-place closure, then.

18 Q. I'm not talking about closure in place. I'm
19 talking about a deep-trench burial at this point in time --

20 A. Yes.

21 Q. -- where I have a liner and I've got a cover over
22 it, and the situation came up where if the top cover had
23 failed, we might end up with having more liquid end up on
24 that lower single liner in the deep-trench burial
25 situation?

1 A. Yes, and what I'm stating is that that's similar
2 to what you proposed. Your in-place closure is basically
3 the same pit, or the existing pit --

4 Q. Right, but I'm not asking --

5 A. -- backfilled --

6 Q. -- you about my in-place closure --

7 A. Okay.

8 Q. -- I'm asking you a question.

9 A. Okay.

10 Q. My question is, is it generally undesirable to
11 put liquid inside this liner in the closure situation where
12 you build up a hydraulic head on the lower liner in deep-
13 trench burial?

14 A. Yes.

15 Q. Okay. From a rule-writing perspective, then,
16 would it not be desirable that if we're going to be putting
17 a liner in, that we would put in, if anything, a less
18 robust liner on the bottom and a more robust liner on the
19 top, so that you don't have a situation where you build a
20 hydraulic head in the waste system so that you then
21 mobilize whatever may be the constituents in that waste in
22 the event of a -- of liner failure?

23 A. Well, I would disagree, and the reason why is, if
24 we go to the provision it talks about the construction of
25 the deep-trench burial, and that is page 10.

1 We have additional provisions that you're not
2 addressing, and this is why I think the 20-mil is crucial.
3 Not only does it provide the equivalent of the cover, but
4 in our provision -- and I believe it is -- it is J --
5 paragraph (8) -- section J, paragraph (8), and it states,
6 The operator shall fold the outer edges of the trench liner
7 to overlap the waste material in the trench prior to the
8 installation of the geomembrane liner.

9 So when it means overlap, it means to cover --
10 one has to cover the other, which actually adds another
11 layer of protection to prevent water from entering into
12 that pit.

13 Q. So you're reading G.(8) [sic] to require that if
14 I have a -- that I need to have enough excess liner
15 material in the bottom geomembrane liner to be able to
16 fully wrap that waste and overlap the --

17 A. Yes, we're --

18 Q. -- two liners?

19 A. -- talking a deep -- deep-trench burial. We're
20 talking a trench once again. We're not talking a pit,
21 we're talking a trench, a separate constructed, lined
22 trench.

23 Q. Okay.

24 A. Yes, and the fact that it has to be able to
25 either be secured on the sidewalls, to prevent caving in

1 while putting the excavated waste in there, means that at
2 least that liner material has to go probably up to the
3 surface grade to some extent.

4 I think most of the demonstrations and the things
5 that we've seen is that maybe there's 10 feet of waste. It
6 has to be four feet below the existing grade in order for
7 the prescribed cover to be put on. So that gives you four
8 feet on each side right now.

9 So you know, I don't know -- You could make it at
10 least four feet wide, that trench. Or if you choose to
11 have five feet, so you have a foot sticking out on each
12 side it could be five feet wide. It's not that much more.

13 Q. Turning on to page 9, which is the definition of
14 closed-loop system and below-grade tanks, I take it that as
15 a result of this -- I'm going to ask one question which I
16 should have asked earlier -- I can't put -- if I've
17 prepared my pit, I can't put my below-grade -- my closed-
18 loop system in a lower section of my prepared surface,
19 right? Under the way you've defined the rule?

20 A. Can you ask that again?

21 Q. Yeah, if -- It's too bad we don't have a
22 chalkboard.

23 If I've made my -- I've made my flat pits with my
24 flat pad, and I can't make a lower area that sort of drains
25 towards an emergency pit or something like that and then

1 place my below-grade -- my closed-loop operating system in
2 that area, because then it would be below the surface as
3 you've defined it here, and I can't use below-grade tanks
4 as part of a closed-loop system; is that correct?

5 Let me start with --

6 A. You've thrown in --

7 Q. -- an easier question --

8 A. -- you've thrown in an emergency pit, I believe,
9 your closed-loop and --

10 Q. Let me make it easier for you.

11 A. I'm confused by your question.

12 Q. I can't use a below-grade tank with a closed-loop
13 system; is that correct?

14 A. Where does it state that?

15 Q. In the definition of closed-loop system --

16 A. Where --

17 Q. -- if you want to look back at that definition,
18 which is on page 1 of your exhibit, B, "Closed-loop system"
19 means a system that uses above ground steel tanks for the
20 management of drilling or workover fluids without using
21 below-grade tanks or pits.

22 A. Well, I guess my question to you is, what are you
23 using the below-grade tank for?

24 Q. Well, I was --

25 A. What are you putting in the below-grade tank?

1 Q. Whatever.

2 A. Let's say you're putting solids, you're putting
3 drill cuttings in it. Where does the definition restrict
4 the use of the below-grade tank for drill cuttings?
5 Because it only talks about the management of fluids.

6 We made that distinction --

7 Q. Okay.

8 A. --in our definition that we see closed-loop
9 systems only -- their operation that's different from the
10 current or common practice is the management of the fluids.

11 Q. But each of those tanks would still require a
12 permit for -- as a below-grade tank, would they not?

13 A. Which ones?

14 A. The ones that are associated with my closed-loop
15 system, even if I was placing solids in them.

16 A. Well, closed-loop system. Is it part of the
17 system?

18 Q. Yes.

19 A. Then we permit closed-loop systems.

20 Q. But you also permit below-grade tanks.

21 A. If the below-grade tank is part of the closed-
22 loop system, it is part of the closed-loop system.

23 Q. Okay, and does it say that anywhere?

24 A. Well, if you're using a pit in a closed-loop
25 system, we tell you to go to temporary pits.

1 Q. Right, and by analogy, then, if I'm using a
2 below-grade tank, I --

3 A. -- you would comply with the below-grade tank
4 regulations.

5 Q. And so then I would have to get multiple permits
6 for that below-grade -- that closed-loop system, one for
7 the closed-loop system, plus one for each of the below-
8 grade tanks that might be part of that system?

9 A. I don't see the distinction there. Currently we
10 do not require the permitting of those tanks.

11 Q. Well, right. Currently, we would agree with that
12 because you don't require that a tank which is below grade
13 is a below-grade tank, hence isn't subject to the permit
14 requirement.

15 But you're proposing to change the definition of
16 a below-grade tank so that if it's below the surface of the
17 land for whatever reason, it's now a below-grade tank. And
18 so what was before not requiring a permit now requires a
19 permit.

20 So I'm trying to ascertain my permit obligations
21 for my below-grade -- my closed-loop system or some of my
22 tanks from the below- -- from the closed-loop system are
23 located below the engineered land surface.

24 A. Well, this would be the same question of the
25 multiple pits.

1 Q. Right --

2 A. Do we currently require a permit for each of
3 these pits?

4 Q. -- but this rule is not presently in effect, and
5 so therefore I don't know what the answer to that is.

6 A. I think I clarified that --

7 Q. You did for pits --

8 A. -- it's not going to change.

9 Q. -- but not for tanks.

10 A. It would apply for tanks as well.

11 Q. Okay, so even though you -- the rule on its face
12 says I need to have a separate permit for each below-grade
13 tank --

14 A. I didn't state that.

15 Q. Oh, so I can have multiple tanks under a single
16 permit?

17 A. Well, you're getting a tank for a site for a
18 certain activity.

19 Q. So is this a site permit now, or an individual
20 unit permit?

21 A. Well, it's part of the operation related to that,
22 such as your -- your multiple temporary pits, if you have
23 two separate ones but it's for one drilling workover
24 operation, currently you're not required to get individual
25 permits for each of those pits.

1 Q. Right.

2 A. And we established that.

3 Q. Right. Wouldn't it be better --

4 A. And we also -- also established --

5 Q. -- wouldn't it --

6 A. -- and that has to do with the operation.

7 Q. Right. Wouldn't it be better, though, to in the
8 permit requirement section of 17.8 to specify that you need
9 a permit if you have any one of these things, and then that
10 one permit covers whatever mixture, then, that you're
11 using, as long as you meet the design and other standards
12 for each of those things?

13 Because right now as you read it, it says each
14 one requires a permit. That's why I keep coming back to --

15 A. Well, where does it say each one requires a
16 permit?

17 Q. A person shall not construct or use a pit or
18 below-grade except in accordance with a Division issued
19 permit.

20 A. It says without a -- a Division issued permit.

21 Q. Okay, and so --

22 A. So it's -- it indicates one permit. It could
23 indicate one permit.

24 Q. So we can apply just for a single permit for
25 everything at a site?

1 A. I don't know the answer to that question. I --
2 currently, I guess I -- I don't know if people have applied
3 for a permit in that fashion under the current rule,
4 because the current rule has the same language.

5 Q. Right. That would be, though, I think from our
6 perspective, a useful clarification of the rule, because
7 it would define for us more clearly what our permit
8 obligation --

9 A. Yeah, I think what we would need is an
10 understanding of the use of closed tanks.

11 Q. Okay. Going back to --

12 A. It's one of those case-by-case-type things,
13 because you're mixing things up, so that would be a
14 different scenario than -- my understanding, normal use at
15 any site that is -- has been permitted in the past.

16 Q. Where we're coming from, I guess, Mr. Jones, is
17 that in our life things are always all mixed up, and so
18 things are very rarely a pristine single pit, no tanks, or
19 tanks but no pits, or whatever. And so we're trying to
20 figure out how it would apply to the various mixtures of
21 equipment that we would use at a site so we properly permit
22 it from the Division's perspective.

23 A. Oh, yeah.

24 MR. HISER: Now -- This might be an appropriate
25 place, if you would like, or I can go through and do the

1 below-grade tank section and then stop after that, whatever
2 would be the Chairman's preference.

3 CHAIRMAN FESMIRE: Okay, why don't stop for a 14-
4 minute break, and we'll reconvene at five minutes after
5 three?

6 (Thereupon, a recess was taken at 2:52 p.m.)

7 (The following proceedings had at 3:12 p.m.)

8 CHAIRMAN FESMIRE: Okay, we'll go back on the
9 record in Case Number 14,015. The record should reflect
10 that all three Commissioners are present, we therefore have
11 a quorum, and we are continuing with the cross-examination
12 of one Brad Jones, the Lesser.

13 Mr. Hiser, I believe you were in the middle of
14 your -- I'll explain that to you later. You were in the
15 middle of your cross-examination.

16 MR. HISER: Thank you, Mr. Chairman.

17 Q. (By Mr. Hiser) Mr. Jones, we were getting ready
18 to talk about the construction and design standards for
19 below-grade tanks, and that's located on page 9 of your
20 exhibit, and it would be subsection I. Have you located
21 that section?

22 A. Yes.

23 Q. Thank you. Now in paragraph I.(1) you talk about
24 how the below-grade tank's sidewalls shall be open for
25 visual inspection for leaks, and then it should be equipped

1 with an underlying mechanism to divert leaked liquid to a
2 location that can be visually inspected, and if it can't
3 meet those conditions it has to be in a vault or have a
4 double wall that would contain any leaked liquids.

5 A. Yes.

6 Q. Okay. Now that appears to create an exemption
7 from leak detection if you put it inside a double wall that
8 will contain the leaked liquids; is that correct? Not an
9 exemption, but a provision. Exemption is a bad term.

10 A. Well, I disagree with that.

11 Q. Okay.

12 A. It says a below-grade tank not meeting the
13 conditions shall be in a vault or have a double wall that
14 will contain any leaked liquids. Therefore it creates a
15 secondary containment leak detection system.

16 Q. Okay, but if paragraph I.(1) requires secondary
17 containment, then what additional requirement is
18 established in paragraph I.(2)?

19 A. Well, I guess I.(1) is talking about existing.
20 I.(2) would be one that's permitted under this part.

21 Q. Where does it say that I.(1) is existing and that
22 I.(2) is for new?

23 A. Well, it would -- you have to go down to I.(3),
24 which states that, The operator of a below-grade tank
25 constructed prior to the effective date that does not have

1 secondary containment and leak detection shall test for the
2 integrity annually, and then -- other than that, they would
3 have to retrofit or replace it.

4 Q. Okay, so both I.(1) and I.(2), then, would apply
5 to a new tank, because I.(3) is making the provision for an
6 existing tank?

7 A. I.(3) tells you that you can retrofit an existing
8 tank with leak detection -- or secondary containment with
9 leak detection or close it.

10 I.(1) kind of gives you an option of how to
11 retrofit that if you have such items as the sidewalls where
12 the tanks are open for visual inspection for leaks.

13 Q. Okay.

14 A. It kind of directs you how you can do that. The
15 underlying mechanism would be your secondary containment.
16 The -- and with that mechanism it would divert leaked
17 liquids to a location that can be visually inspected,
18 therefore you have leak detection.

19 Q. Okay. Let me direct your attention, then, to
20 paragraph I.(6), which now talks about -- rather than a
21 below-grade tank, we now have something called a below-
22 grade tank system. And the below-grade tank system is then
23 required to have either a double wall system with
24 capability to detect leaks or a tank placed within a
25 geomembrane-lined collection system or an alternative as

1 approved by the district office.

2 A. Yes.

3 Q. Now, as a compliance attorney, I am, as you've
4 probably determined, lamentably linear in my thinking. Is
5 there any distinction between the secondary containment of
6 leak detection requirements of (1), (2) and (6), so that I
7 have multiple secondary containment requirements that apply
8 to the same thing, or is it the Division's intent to only
9 require a single leak detection and secondary containment
10 system?

11 A. Ask that again, I wasn't sure what you're asking.

12 Q. Okay. I think it's -- (1) says that tanks have
13 to be -- have -- be double walled or be in a vault and have
14 leak detection. (2) requires that they be in secondary
15 containment and have leak detection. And (6) requires that
16 the system has to have the double wall or an alternative
17 system that has -- or be within a geomembrane-lined
18 collection system.

19 I'm just trying to understand what the actual
20 design that the Division is looking for is.

21 A. Well, you can look at it two ways. You can look
22 at the retrofitting of existing tanks to come into
23 compliance with (1) and (2) --

24 Q. Okay, I don't want to talk about -- I just want
25 to talk about future now, not provision (3).

1 A. Well, future has to have, and it's clearly stated
2 in (3) -- well, I'll take that back, it's not clearly
3 stated in (3), but it's -- it has to have secondary
4 containment and leak detection.

5 (6) talks about different systems that can be
6 utilized to satisfy that requirement, and it lists two. It
7 lists the double -- the double wall system and the
8 geomembrane used for the tank and also references
9 alternative. It leaves it open for the operator to come up
10 with something that satisfies the requirements of (2).

11 Q. Okay.

12 A. It doesn't restrict them. If we -- if we started
13 defining the way you have to do it --

14 Q. And I understand that --

15 A. -- it places a restriction --

16 Q. -- and we appreciate --

17 A. -- on the operator, and we don't want that.

18 Q. -- and we appreciate that.

19 What my concern is, is that there's two systems,
20 or there are two different things that we now appear to be
21 talking about in provision I. In the first part, (1) and
22 (2), we seem to be talking about the below-grade tank, and
23 that's required to be in secondary containment and have
24 leak detection.

25 We then get down to (6), and now we have a below-

1 grade tank system, which to me means it would be the below-
2 grade tank and maybe piping that's attached to it, and that
3 that's also required to have secondary containment and leak
4 detection, and that can be a variety of forms as outlined
5 in this provision.

6 And so I'm just trying to make sure that the
7 secondary containment requirement for the system isn't an
8 additional secondary containment requirement for the system
9 beyond the one that's around the below-grade tank that's
10 required under --

11 A. Yeah, I --

12 Q. -- I.(1) and I.(2).

13 A. -- I think you're over-thinking it, and the
14 reason --

15 Q. That's my job.

16 A. Yes. And --

17 (Laughter)

18 A. -- and when you do that, you go 10 steps beyond.

19 The system itself, the double walled system,
20 which has already been identified in (1), serves the
21 purpose, speaks for itself.

22 Q. Okay, so your intention in writing this is just
23 that we have leak detection and secondary containment, and
24 just a single leak detection and secondary containment
25 system is adequate, we don't need to have multiple --

1 A. No.

2 Q. -- levels of this for each of the different
3 paragraphs?

4 A. No.

5 Q. And so if I were to have a tank, and the
6 secondary containment were to have been breached in that
7 and hence would not be in compliance with I.(2), for
8 example, would that also then -- also be a violation of
9 I.(1) and (6)?

10 A. Well, make sure I understand your question.
11 You're saying the secondary tank --

12 Q. Right.

13 A. -- has breached.

14 Q. Right.

15 A. Therefore you don't have secondary --

16 Q. -- secondary containment.

17 A. So you would be in violation, yes.

18 Q. Not only of one requirement, but actually three
19 requirements under this subset?

20 A. Which three are you referring to?

21 Q. (1), (2) and (6). Don't they all require
22 secondary containment?

23 A. Well, it depends if you've got a system compared
24 to a tank with secondary containment.

25 Q. So there is a distinction between the system and

1 the tank?

2 A. They can be the same.

3 Q. They can also be the same?

4 A. Yes.

5 Q. Hence my confusion, because if they're different,
6 then it would seem to me that the secondary containment
7 requirement for the system might be different from the
8 secondary containment requirement for the tank, which would
9 be a tertiary containment requirement for the tank, and
10 that's what I think we're trying to avoid.

11 A. Well, once again, if you go back to the
12 definition for a below-grade tank, it does say a vessel. A
13 vessel, meaning the primary tank.

14 Q. Uh-huh.

15 A. That primary tank can be part of a system. It
16 can also have secondary -- have some form of secondary-
17 containment of secondary containment leak detection.

18 So the below-grade tank itself, doesn't clearly
19 state that it -- or imply that it has secondary containment
20 or leak detection.

21 Q. But the Division's intention is in no way to
22 require tertiary containment, just secondary containment?

23 A. Yes.

24 Q. Thank you.

25 Now in condition I.(3), which is the -- sort of

1 the transitional provision for below-grade tanks --

2 A. Yes.

3 Q. -- you talked about that we need to do integrity
4 testing annually on a below-grade tank that doesn't have
5 secondary containment --

6 A. Yes.

7 Q. -- and leak detection.

8 In the Division's mind, how would we do integrity
9 testing on an open-top tank? What are you looking for us
10 to do as an operator?

11 A. Well, if you go -- I believe it's in operations,
12 it talks about integrity testing of the pits --

13 Q. Okay.

14 A. Is it that one? Where is it? I thought there
15 was -- I thought there was some provision. Is it in
16 operation? No, it's not in operation. Where is -- Oh, I'm
17 thinking about sumps. I apologize, I was thinking about
18 sumps, because sumps are under operations, stipulate what
19 they have to do for that.

20 Integrity testing is currently required under the
21 current rule, is it not?

22 Q. You've got me, I don't know off the top of my
23 head.

24 A. In Rule 50? I don't have the rule.

25 It states right here under C.(3), the operator of

1 any below-grade tank constructed prior to April 15th, 2004,
2 shall test its integrity annually and shall properly repair
3 or replace any below-grade tank that does not demonstrate
4 integrity.

5 So I guess my question is, how have they been
6 doing it since 2004?

7 Q. Well, I think our question -- our concern is that
8 perhaps we haven't been doing it in the way that the
9 Division would anticipate, and so we're trying to find out
10 what that is.

11 A. Have there been any violations for not --

12 Q. I can't speak to that, I --

13 A. -- properly testing --

14 Q. Once again, I'm coming from the question, this is
15 the rule, we'll try and ascertain what our compliance
16 obligations are.

17 CHAIRMAN FESMIRE: Mr. Jones, why don't we stick
18 to the traditional thing where the lawyer asks the
19 questions --

20 THE WITNESS: Okay.

21 CHAIRMAN FESMIRE: -- and you give the answers?

22 (Laughter)

23 THE WITNESS: I'm sorry. Sorry, it's the Lesser.

24 Q. (By Mr. Hiser) So to ask my question again, what
25 -- Does the Division have a method in mind that they're

1 thinking of doing for that integrity testing?

2 A. I don't enforce or implement these rules, so I
3 cannot comment on that.

4 Q. Okay, and let's move to operational requirements.
5 Now in section A.(2) -- now we're at the bottom of page 10
6 of the exhibit -- there's a new provision that the Division
7 has proposed that, The operator shall recycle, reuse or
8 reclaim all drilling fluids in a manner that prevents the
9 contamination of fresh water and protects public health and
10 the environment. Correct?

11 A. Yes.

12 Q. And do you agree that "shall" is generally meant
13 to be a mandatory condition?

14 A. It is if you're doing these activities, yes.

15 Q. Okay. And does this prohibit the disposal of
16 those drilling fluids during the operational phase?

17 A. Does it prohibit it? I guess I'm kind of
18 confused about the question, because we're talking about
19 operations once again.

20 Q. Well, would there never be a case where you would
21 need to remove liquids during the operational phase?

22 A. I don't know what the operators would choose to
23 do if they choose to do that. It's my understanding, at
24 the sites I've been, they either recycle or reuse or
25 reclaim those fluids so they don't have to continue to

1 bring more liquids or fresh water out to the site.

2 Q. Well, for example, to use one that we've heard
3 many instances of earlier today, a rock pokes a hole
4 through our liner, and now we need to remove liquids from
5 this pit. We don't have another site that we can take it
6 to reuse and recycle. Does this mean we have to apply for
7 an exception from the Santa Fe office in order to dispose
8 of those fluids, or what do we do in that case?

9 A. I believe the "shall" part talks about prevent
10 contamination of fresh water, protect human -- or protect
11 public health and the environment, is what the "shall"
12 alludes to. If you're doing the activities that follow,
13 such as recycling, reuse or reclaiming, you shall prevent
14 the contamination of fresh water and protect public health
15 and the environment.

16 Q. So you're saying that the "shall" applies to the
17 things after the "and" and not to the things that are
18 before the "and"? So we shall protect public health and
19 the environment?

20 A. We shall prevent contamination. That's before
21 the "and".

22 Q. Is this a part of the reason the industry
23 committee had recommended the language that it did, to give
24 the option for disposal?

25 A. Well, it's -- they didn't really explain about

1 the recommendation for disposal, so it wasn't clear why it
2 was recommended.

3 Q. Okay, but might that be a reason why they
4 recommended that?

5 A. I don't know what they were thinking when they
6 recommended it.

7 Q. But you wouldn't read this provision as
8 prohibiting an operator from taking an appropriate response
9 activity in an event like that?

10 A. I do not see it prohibiting, and if I'm not
11 mistaken there might be other provisions that talk about
12 the disposal of the waste, because it would be waste at
13 that point.

14 Q. Okay. Now am I correct that you also added in
15 your supplemental things a requirement that the appropriate
16 district office has to approve that reuse -- recycle,
17 recycle, reuse and reclamation?

18 A. Yes.

19 Q. What do you envision that we would do in order to
20 obtain that approval?

21 A. It could be as simple as an e-mail or a phone
22 call. What they were -- what their concerns were, were
23 that these activities are occurring, the recycling, reusing
24 and reclaiming of these without their knowledge --

25 Q. Uh-huh.

1 A. -- so when these fluids leave the site, they have
2 no knowledge if they're being properly handled or if
3 they're being dumped somewhere. They have no knowledge.
4 They just know they have left the site. So they wanted
5 some oversight on that, to have that knowledge.

6 Q. Okay, and what would be the -- If the district
7 was to approve this, what would their response be?

8 A. I don't --

9 Q. The procedural aspect of the response, not the
10 substance of it. How would they let the operator know that
11 it was okay to go from pit A to pit B?

12 A. I guess they would make a -- determine if there
13 is a pit B.

14 Q. Okay.

15 A. That would be the first assessment. If there is
16 no pit B, then there would be something odd about the
17 request.

18 Q. Okay, but let's assume that there is a pit B and
19 that I'm the operator and I want to move from drilling pit
20 A to drilling pit site B. And I call Mr. Bratcher, who's
21 very busy, and what response do I need to get from Mr.
22 Bratcher before I can move my liquids from site A to site
23 B?

24 A. Well, the rule states that you have to have some
25 type of written approval to be considered Division

1 approval, so --

2 Q. I would have to --

3 A. -- so you could probably get a telephone
4 confirmation with a follow-up written approval. It could
5 be as simple as one sentence.

6 Q. Right, but to fully comply with Rule 50 I would
7 have to wait until I've received written authorization from
8 Mr. Bratcher in this case, that I could move my liquids
9 from site A to site B?

10 A. Well, an e-mail response is the same as a written
11 response.

12 Q. And that's defined in your rules as a written
13 response?

14 A. We accept it as a written -- we give e-mail
15 approvals daily and consider those as written.

16 Q. Okay. But we would be -- to comply, we'd have to
17 wait for that -- either a fax or an e-mail or a snail mail,
18 not that they wouldn't do that --

19 A. That would be up to the district office. But if
20 there was any question --

21 Q. Well, your rule doesn't give the district office
22 any discretion, does it?

23 A. You could be waiting -- you could have a verbal,
24 and they could be faxing it to your office. It doesn't
25 mean that you necessarily have to have it in hand.

1 Q. At our risk.

2 A. Yes, at your risk.

3 Q. Okay. So before we can move, we would need to
4 have written approval from the district office.

5 How do we handle that in an emergency situation,
6 if they had to remove water --

7 A. Describe your emergency.

8 Q. -- from a pit?

9 By "emergency", I have a flowback or something of
10 that nature, and suddenly I have all sorts of liquid coming
11 out of my well and it's flowing into my pit, and my pit is
12 getting ready to overflow, and I'm now waiting for written
13 confirmation from the district office before I can take
14 further action. Or is it your recommendation we can void
15 those requirements?

16 A. Well, the -- our emergency actions don't address
17 that, that section?

18 Q. Well, they would allow me to build a pit --

19 A. Yes.

20 Q. -- but they wouldn't allow me to bring in trucks
21 and -- say, and take liquids out and move it someplace
22 else.

23 A. I believe it requires you to move the liquids in
24 48 hours.

25 Q. Well, but I have to have a written approval under

1 this provision --

2 A. That -- Does it state that you have to have for
3 the emergency action section written approval?

4 Q. No, you said this is probably during the
5 operational phase.

6 A. And you said it was an emergency.

7 Q. Well, that's still operation.

8 A. But there are provisions for emergency action,
9 basically an operation --

10 Q. So your position is that the emergency operation
11 provisions would supersede the approval requirements found
12 in section A of section 12 -- subsection A of section 12?

13 A. That's why we have them in there.

14 Q. Okay. That authorizes me to construct a pit. I
15 don't see that it authorizes me to do anything else.

16 A. Actually, under D it requires you to move all
17 fluids and solids within 48 hours after cessation of the
18 use --

19 Q. But that's --

20 A. -- unless the appropriate --

21 Q. -- of the emergency --

22 A. -- division extends the time period.

23 Q. Right, but that's of the liquids of the emergency
24 pit, it's not the liquids that were in the main pit. This
25 provision applies to an emergency pit, does it not?

1 A. Yes.

2 Q. And so if the problem is excess liquids in the
3 main pit, this wouldn't actually help then?

4 A. It -- Well, you're saying that you built the
5 emergency pit --

6 Q. No, I'm -- I don't want to --

7 A. -- to divert those.

8 Q. -- build an emergency pit, I want to haul this
9 stuff off to a disposal location, or do --

10 A. But you're -- are you saying that your current
11 pit is overflowing?

12 Q. Yes, hypothetically.

13 A. Then you have an option to build an emergency
14 pit, and you choose not to?

15 Q. Well, an emergency pit is not always desirable,
16 for a variety of reasons. It may be that we don't have a
17 good site for it, it may be --

18 A. It doesn't have to meet the siting criteria.

19 Q. That doesn't mean that it's necessarily a good
20 site --

21 A. Yeah.

22 Q. -- for an emergency pit.

23 A. I don't see anything in the proposed rule that
24 prohibits you from disposing of those fluids.

25 Q. Okay, other than the "shall recycle" language,

1 which we agreed is mandatory.

2 A. Well, if you read it that way, yes.

3 Q. If I read it that way, okay.

4 Moving on, then, to -- Now the A.(5) and --
5 actually in A.(4) and (5), you have a requirement that if
6 the pit liner is compromised or if penetration of the liner
7 occurs, we have to provide certain notices and/or repair
8 the liners.

9 And this is to some extent a facetious question,
10 but I will ask it anyway.

11 Were you here for Mr. Hansen's testimony?

12 A. Yes.

13 Q. And so you heard him testify that there would be
14 some number of holes that would develop during the
15 installation process?

16 A. Yes.

17 Q. How do we reconcile those holes with the
18 notification requirements here, particularly if they're
19 pinholes?

20 A. Well, we're talking -- a compromised liner or a
21 penetration of the liner, especially if it's above the
22 surface, a penetration would indicate that it's visible.
23 It wouldn't address any of the pinholes that you're
24 referring to.

25 Q. Okay --

1 A. Liner being --

2 Q. -- so you're really meaning to address visible
3 penetrations from like a rock or a peace of caliche or if
4 somebody threw a fencepost through the liner --

5 A. Yes --

6 Q. -- the types of things that we saw in the slides
7 that were presented by Mr. von Gonten and Mr. Price, and
8 then by the two Division --

9 A. Exactly, the pinholes actually do have something
10 to do with the HELP model, and I've run the HELP model
11 before, and they're default-type things that you apply to
12 it.

13 Q. Now it's someplace in this area that we have a
14 requirement, and I'm trying to remember where it is. It
15 talks about visible or measurable levels of oil. Do you --

16 A. There's B.(1), last sentence, and I believe --

17 Q. B which? I'm sorry.

18 A. It's B.(1), temporary pits. And then there's --

19 Q. Okay, this is the visible or measurable. And you
20 received a request from the industry committee to change
21 this to visible and measurable --

22 A. Yes.

23 Q. -- did you not?

24 A. Yes.

25 Q. And you gave your rational for that.

1 Now I guess that the concern from the industry
2 committee is that measurable is ambiguous. And let me give
3 you an example. Let me see if you construe this to be
4 measurable as well.

5 Theoretically, if I went out and took a sample
6 and discovered that I had five parts per million of oil,
7 that would be measurable, but it might not be visible. So
8 how would I comply with this requirement? Because that
9 would be measurable, and under the "or measurable" I would
10 need to have removed that, but I wouldn't know it's there
11 because it's not visible.

12 A. Well, good question. I don't see a requirement
13 that during operation you have to test your contents of
14 your pit.

15 Q. Okay. But it says, Immediately after cessation
16 of a drilling or workover operation, the operator shall
17 remove any visible or measurable layer of oil from the
18 surface of the drilling or workover pit.

19 A. Yes, and based upon your recommendation,
20 replacing the word "and" wouldn't change your
21 interpretation, is my understanding.

22 But I guess what I'm getting at, measurable,
23 we're not looking -- we don't have a limit, as you're
24 referring to. What we're talking about, something that
25 could be measured if you put a measuring stick onto the

1 surface of the water --

2 Q. So you're looking at some sort of -- you're
3 talking --

4 A. A layer --

5 Q. -- a layer thickness --

6 A. Yes.

7 Q. -- as opposed to measurable by part per million
8 or analytical measure?

9 A. Yes, we're talking about a thickness layer.

10 And --

11 Q. Is there -- go -- Do you want to -- ?

12 A. Yes, I'd like to finish.

13 And the reason we think "or" is important is
14 because something may be visible but not measurable.

15 Q. Well, Mr. Jones, what additional protection are
16 we getting from the measurable, and wouldn't this be simply
17 if we just put it back as the existing rule has it, which
18 is visible, which everybody understands and which isn't
19 ambiguous at all? We have no objection to visible, we
20 understand our obligations under there.

21 Our question is the measurable and what
22 additional obligation that's creating for us.

23 A. Do you know where it is under the current rule?

24 Q. Let me find it. Commissioner Bailey had referred
25 to it, so I know it's there.

1 COMMISSIONER BAILEY: It's 50.C.(e) --

2 THE WITNESS: (e), thank you.

3 COMMISSIONER BAILEY: -- disposal or storage
4 pits.

5 MR. HISER: 50.C -- ?

6 THE WITNESS: Actually, it includes measurable,
7 it says, No --

8 Q. (By Mr. Hiser) Does it say that?

9 A. It says, No measurable --

10 COMMISSIONER BAILEY: C.(2), it says visible or
11 measurable.

12 THE WITNESS: So it does include measurable.

13 Q. (By Mr. Hiser) Okay. Well, I would still raise
14 my question as we look at this new rule. What is
15 measurable showing for us, and doesn't that cloud, really,
16 the compliance obligation? Visible is, I think, well
17 understood.

18 A. Well, it makes a clarification, because if we
19 only had measurable, someone may not consider visible an
20 issue. So --

21 Q. We're --

22 A. -- you have to make a de- --

23 Q. -- where industry is coming from is, we don't
24 like measurable. We don't have a problem with visible.
25 We're trying to understand what -- the additional

1 protection that the Division thinks it's gaining from the
2 measurable, given what we think is the confusion in our
3 compliance --

4 A. I think the way it's currently stated, no
5 measurable or visible layer of oil, would indicate that --
6 a distinction, that it can be visible without measurable.
7 So we're making -- there are two separate things. They can
8 be two separate things, or they can be the same.

9 But it can -- if it's not measurable and it's
10 visible, it's only visible.

11 Q. Correct.

12 A. But if you were to limit it to measurable, then
13 it would be --

14 Q. You're trying to put it in the reverse of what
15 our concern is.

16 A. I realize, but I'm talking about the original
17 language.

18 Q. Right.

19 A. And we're just following that same distinction
20 there. We think it speaks for itself.

21 Q. Okay. So your understanding is that measurable
22 means that there's an invisible but yet measurable layer of
23 oil that's present?

24 A. It could be argued that I don't have -- it's not
25 an inch, and I can measure an inch, but it's visible.

1 Q. We accept visible, and we're happy to --

2 A. Yeah, I thought that's what you're referring to.

3 Q. Our question is, what's measurable and what we're
4 gaining from that. But let's move on.

5 A. I don't think you're losing anything by having it
6 in here.

7 CHAIRMAN FESMIRE: Mr. Hiser, may I ask a
8 question here?

9 MR. HISER: Yes.

10 CHAIRMAN FESMIRE: What about clear condensate?
11 Has that been included in this?

12 THE WITNESS: Yes.

13 CHAIRMAN FESMIRE: So is that what you mean by
14 measurable but not visible?

15 THE WITNESS: Yeah, and I thought in my testimony
16 I mentioned something about condensate.

17 Q. (By Mr. Hiser) I don't recollect that. So we
18 have -- Your testimony, then, from either the Commissioner
19 or from you would be that there sometimes would be an
20 invisible layer of condensate that we would be able to
21 measure?

22 A. Yes.

23 Q. How, if it's invisible, we can measure it I'm not
24 sure, but I will tussle with that and move on to the next
25 question.

1 Mr. Brooks has rolled his eyes at me, which means
2 it's time for me to move on.

3 (Laughter)

4 CHAIRMAN FESMIRE: Mr. Brooks, please refrain
5 from rolling your eyes. Mr. Hiser, please continue to move
6 on.

7 (Laughter)

8 Q. (By Mr. Hiser) Then you asked about a
9 clarification in D.(1) where you added the same visible and
10 measurable requirement; is that correct?

11 A. Yes.

12 Q. In 13, which is on the next page at the top of
13 page 12, these conditions A.(1) through (4), are these
14 closure approvals, as that term is sometimes used
15 throughout the rest of the rule?

16 A. Yes.

17 Q. Okay.

18 A. I'd like to correct that. (4) is an option to
19 retrofit, so it may not require closure.

20 Q. Okay. I'll try to get caught up with my notes
21 again. 13.B --

22 Now in B.(1) we have some provisions of 13, we
23 have some provisions that talk about waste excavation and
24 removal, and this first provision here is the start of what
25 I would call the dig-and-haul approach. This is what you

1 do under the pit to make sure it's clean. And right now
2 you're proposing to do both BTEX and chloride; is that
3 correct?

4 A. BTEX, TPH and chlorides.

5 Q. And you heard some testimony from -- I believe it
6 was inspector -- field supervisor Bratcher, about the use
7 of these chloride strips; is that correct?

8 A. Yes.

9 Q. And -- But I believe in the rule that you
10 actually are specifying that we use the SW-846 method for
11 that. What is the benefit from the full-scale lab method,
12 versus that chloride strip, for the closure here?

13 A. I have a different opinion of your statement
14 before your question.

15 Q. Okay.

16 A. Nowhere does it state that all soils must be
17 tested by the laboratory method.

18 Q. And chlorides then -- Let's see.

19 A. I guess what I'm getting at is, I've done
20 consulting work, we use a lot of screening methods to cut
21 down on laboratory analytical. But when we get things that
22 indicate that there are high levels, or if we're coming out
23 of a zone, we will run analytical -- or we have, when I did
24 it in the past, run analytical on those for confirmation.

25 I see nothing wrong with Mr. Bratcher's

1 recommendation except -- and I thought it was brought up by
2 one of the Commissioners -- what about the northwest?

3 Just using one type of field indicator --

4 Q. My question was only on chloride testing --

5 A. And --

6 Q. -- I wasn't asking about anything else.

7 A. Well, this is chloride, this is what I'm
8 referring to, because the discussion was using chloride
9 strips for an indicator for field testing. It may not be
10 appropriate in other parts of the state.

11 Q. My question had only to do with the analytical
12 methods for chloride detection and why we chose to use the
13 laboratory method as opposed to the chloride strips --

14 A. And I --

15 Q. -- for the final --

16 A. -- just discussed both of those.

17 Q. And you said that we could use it for preliminary
18 work but not for the final closure; is that correct?

19 A. If it's appropriate. It may not be appropriate
20 in the northwest. It may not. I -- you know --

21 Q. I'm now confused with where you're going. My
22 question only has to do with what benefit does the
23 Department see with the full-scale lab test versus the
24 chloride strips for chloride purposes only. I'm not
25 concerned about anything else.

1 A. Yes, but you prefaced it by, we would --

2 Q. Throw out my preface --

3 A. Okay --

4 Q. -- I withdraw --

5 A. -- I'm answering the question you initially
6 proposed.

7 Q. Okay, I want -- Let me ask my question --

8 CHAIRMAN FESMIRE: Mr. Hiser, why don't you go
9 ahead and rephrase your question?

10 Q. (By Mr. Hiser) My question is, what benefit does
11 the Division see from the use of the analytical method for
12 chloride, as opposed to the chloride strips for chloride?

13 A. Well, you're only referring to chlorides only
14 when there's other things that are required to be tested.
15 So I don't think the question is appropriate, because
16 there's BTEX and TPH that must be tested.

17 Q. I wouldn't use a chloride strip to test for
18 BTEX --

19 A. Exactly --

20 Q. -- and I don't suggest that I would. I simply
21 ask, what's the benefit of using the analytical method for
22 chlorides in the lab, as opposed to using the chloride
23 strip for the testing of the chlorides?

24 A. Okay, it's done in a controlled environment.

25 Q. Okay, and do you find the chloride strips to be

1 unreliable, that would draw into question their accuracy
2 for making the general decision as to whether the
3 delineation has been completed?

4 A. Well, I guess I'm going back to that there's
5 BTEX, TPH and chlorides required for testing. All of those
6 are required to be done in a lab under a controlled
7 environment. So in the recommendations that when you do a
8 composite, you let the lab do the composite. You submit
9 individual samples for them to composite within the lab so
10 they can reduce the volatilization, especially when you're
11 dealing with BTEX.

12 Q. I'm happy and I appreciate your wanting to
13 discuss BTEX in answer to my chloride question, but I'm
14 still looking for the rationale --

15 A. A controlled environment. I've said that three
16 times now.

17 Q. Okay, and I'm trying to understand what the
18 controlled environment advantage is that the Division has
19 seen as between those two. Do you get substantially
20 different numbers between what's seen in the field test and
21 what's seen in the lab environment, or what's --

22 A. They --

23 Q. -- causing that choice?

24 A. They are similar, and there's a lot of
25 questioning if one is more accurate than the other.

1 Depending on the company that you get your strips from, the
2 quality of that testing and the results that you get from
3 that may not be as accurate as the laboratory analytical.

4 Q. Thank you, that's helpful.

5 A. Okay.

6 Q. Okay. Now we had talked about the northwest
7 situation, and I think that Commissioner Olson had raised
8 the possibility that there might be lower chloride levels
9 and that the chloride test used in the southeast might not
10 be accurate.

11 What was the lowest chloride limit that was
12 detected on average in the northwest pits that you've seen
13 with Mr. von Gonten's presentation?

14 A. That was brought up the other day. It was maybe
15 1000.

16 Q. I know that. And what's the delineation level
17 that's being proposed by the Division?

18 A. 250.

19 Q. And so based on the evidence in the record, would
20 there be a case where there could be a leak from one of
21 these pits that would escape the 250 delineation criteria
22 proposed by the Division for chlorides?

23 A. Can you restate the question?

24 Q. In other words, if the average concentration of a
25 pit -- the lowest that was observed, is 1000, doesn't that

1 1000 exceed 250?

2 A. I'm sorry, ask that again.

3 Q. Doesn't the -- If the average chloride
4 concentration, even in a northwest pit, based on the
5 information assembled by Mr. von Gonten from the OCD and
6 from the industry committee sampling, was about 1000,
7 doesn't that mean that if you're delineating down to 250
8 you would still see the chloride from the northwest pit
9 when you were doing your evaluation, would you not?

10 A. Yes.

11 Q. And so in that case, is the BTEX really that much
12 needed in that -- where you would still see the chloride?
13 Or could you use the chloride test as the actual tracer?

14 A. Well, we've only sampled -- if I'm not mistaken,
15 we only sampled maybe half a dozen pits. That's not to say
16 that there's lower standards in other areas, based upon the
17 wastes that they generate.

18 So we're only making an assumption -- and I
19 believe -- If I'm not mistaken, there's over 1000 pits
20 drilled within the -- each year. And we're assessing --
21 comparing that to six analytical results in saying that is
22 the case across the state, is what your assumption is.

23 Q. Right, although --

24 A. We're not assuming that in our delineation.

25 Q. Okay. Let's move on to F, which -- or maybe it's

1 D. In a number of the closure requirements -- for example,
2 one is found in E.(4) which is for below-grade tanks -- you
3 have this reference to hot spots. How do we determine a
4 hot spot?

5 A. At one time we had discussed --

6 Q. Little infrared, you know, goggles and walk
7 across the -- and that's irreverent, but I mean, is it --
8 the serious question is, without doing the analytical
9 sampling how do we know where the hot spots are?

10 A. The hot spot is a common term used in consulting
11 that commonly refers to spots that indicate there might
12 have been some type of release or some signs that there
13 might be some contamination of some sort.

14 Q. So for purposes of the practical application of
15 this rule, are you anticipating that we would look for
16 either an unusual wet spot or a site with chloride staining
17 or something -- or hydrocarbon staining? Would those be
18 the hot spots --

19 A. Exactly, exactly.

20 Q. So it's meant to be a visual survey, and then you
21 use those?

22 A. A visual or tactile, because you may not -- you
23 may not realize that it's saturated or wet unless you touch
24 it.

25 Q. Okay, so -- but it's meant to be a fairly simple

1 site --

2 A. Practical.

3 Q. -- practical survey?

4 A. Yes.

5 Q. Does the Division have a position as to whether a
6 below-grade tank is preferable to a pit?

7 A. As far as I know, no.

8 Q. Do you have greater experience with releases from
9 pits or below-grade tanks?

10 A. Well, I think as an agency we've had experience
11 with both, and that was discussed today.

12 Q. Correct. But does there tend to be a greater
13 number from pits or tanks in the agency's experience, to
14 the extent you can speak to that?

15 A. Based upon Mr. Bratcher's comments this morning
16 and him requiring the testing beneath the pits in his
17 district, I would say from pits, since testing is --
18 they're not requiring that below tanks.

19 Q. I guess just a theoretical question that arises
20 is that is for a below-grade tank the Department has
21 proposed basically that we have a tank that's got
22 integrity, that we have leak detection and we have
23 secondary containment for.

24 Then we have pits, and under pits -- we really
25 don't know what happens under the pit. Under the tank, we

1 know what happens under the tank.

2 If a tank has gone through its life and it's been
3 appropriately leak-detected and secondary containment is
4 still intact at the end, why do we need to look underneath
5 it for signs of a release if all those steps have been met,
6 and doesn't by the fact of requiring secondary containment,
7 leak detection and all the same closure for the below-grade
8 as for a pit -- doesn't that sort of create a perverse
9 incentive to continue to use pits rather than more
10 protective tanks? And does the Division really want to
11 have that perverse incentive in its proposed rules?

12 A. Can you rephrase the last part of that question?
13 I understand your scenario of what's required --

14 Q. Okay, I guess my question is that, isn't one of
15 the effects of having fairly detailed prescriptive
16 requirements for the below-grade tanks and then requiring
17 those tanks to also meet all the same closure standards as
18 if they were a pit sort of create an incentive on an
19 operator not to go through the hassle of the tank and just
20 to put a pit in? Because it doesn't make any difference at
21 the end of the day whether they went to the extra expense
22 of the tank, versus just putting in the pit?

23 A. Well, I would say no because there's a
24 restriction for a temporary pit and its time in use.

25 There is not a restriction for a below-grade

1 tank, so you don't have to close it or discontinue use by a
2 certain timeline --

3 Q. Right.

4 A. -- if you remain there for a longer period of
5 time.

6 Q. Right, which would mean that as between a
7 permanent pit and the permanent tank, I might choose to do
8 a tank?

9 A. It depends on your volume, because you may run
10 into a problem that you need a larger area based on the
11 amount of liquid that you're trying to hold in it, that a
12 tank wouldn't be practical. It wouldn't make them big
13 enough.

14 Q. Right, that's true.

15 Under F.(1) you say that the operator shall
16 determine at this time of initial application for the
17 permit that the on-site closure method is not located with
18 a 100-mile radius of a Division approved facility or an
19 out-of-state waste management facility. And then you
20 have -- in the next sentence it talks about that facility
21 is available.

22 So if I demonstrate that the out-of-state
23 facility won't accept my waste, does that make it not
24 available within the meaning of this rule?

25 A. Yes.

1 Q. And I only have to make that demonstration at the
2 time I'm going in for a permit?

3 A. Yes, because we -- at that time we would be
4 considering approval of the closure plan.

5 Q. Closure plan. Would we be able to come in for a
6 modification if there was a change in, say, a local
7 ordinance that prohibited out-of-state waste from being
8 brought to that out-of-state facility? Say, perchance, the
9 La Plata County Commissioners were considering such an
10 ordinance?

11 A. Well, wouldn't that interfere with some type of
12 interstate commerce?

13 Q. It would.

14 (Laughter)

15 Q. But that doesn't mean they won't try.

16 (Laughter)

17 Q. But we would be able to come in for a mod if --
18 for our facility that we were going to take suddenly became
19 unavailable?

20 A. I think it states, as you read it, that if it's
21 not available then --

22 Q. Then we can come in for a mod --

23 A. Yes.

24 Q. -- if that changes --

25 A. Yes, we would probably have to have something

1 demonstrating that.

2 Q. Demonstrating that.

3 F.(1).(b) -- Never mind, I think we've already
4 covered that adequately.

5 Now when we get to F.(2), which is the on-site
6 deep-trench burial, which is the on-site option that's
7 being offered by the Division if certain criteria are
8 met --

9 A. It's one defined option.

10 Q. The one defined option.

11 A. Yes.

12 Q. -- you had said before that we have to use a
13 separate on-site deep trench for closure of each drying pad
14 or temporary pit.

15 A. Yes.

16 Q. Does that mean that if I have my two-pit scenario
17 that we talked about earlier, that I have to build two
18 deep-trench burial sites for -- one for each of those pits?

19 A. I think --

20 Q. Are these covered within the -- They're actually
21 only a single pit, and therefore they --

22 A. Yes, I think we distinguished that those pits
23 would be permitted under the same permit that would require
24 the approved closure plan, so they would be covered by
25 that.

1 Q. So what we're actually reading, this is the -- is
2 a separate on-site deep trench for closure of each deep --
3 each drying pad associated with a closed-loop system or
4 temporary pits -- temporary pit, under this permit, really,
5 is what you're talking about?

6 A. Possibly. It -- You do have transitional
7 provisions which may not --

8 Q. Okay --

9 A. -- that may not apply to --

10 Q. -- putting aside the transition, you know,
11 looking forward --

12 A. Yes --

13 Q. -- and applying the rule --

14 A. -- then the answer --

15 Q. -- which we meant to cover, that we only have to
16 build one deep trench for everything that was at --

17 A. Yes.

18 Q. -- this particular site?

19 Okay, I think that would be helpful.

20 And that's not the type of consolidation that
21 would trigger part 36 under the Division's understanding of
22 the --

23 A. The one or the --

24 Q. -- the two pits that are part of the same
25 drilling --

1 A. No.

2 Q. -- pad being put together.

3 A. No. What we're -- Our intent is to prevent
4 multiple pits from multiple sites --

5 Q. Correct.

6 A. -- that have different permits from being
7 consolidated.

8 Q. Now in (d) we were talking about the operator has
9 to collect a sample to determine whether the waste may be
10 left on site; is that correct?

11 A. Yes.

12 Q. And is it the Division's intent to not have a
13 background alternative here, or is there a background in
14 here that I'm just not seeing?

15 A. What are you referring to as a background?

16 Q. So for example, if I have 3103 constituents,
17 which I think are addressed in this provision, and I've
18 done sampling before I put my pit in place and I showed the
19 chance that manganese was present at a level higher than
20 the 3103 standard that's here, I couldn't use that higher
21 background concentration of manganese as a justification
22 for leaving a slightly higher manganese level within this
23 particular trench; is that correct?

24 A. That could be a consideration.

25 Q. But that would have to be done by an exception

1 proposal?

2 A. Not necessarily.

3 Q. Not necessarily?

4 A. Depends if the testing was done prior to the
5 pit's construction, meaning the pit -- or in this case, the
6 deep trench -- you'd probably want to do it at the time
7 that you constructed the pit or the drying pad --

8 Q. Right.

9 A. -- and find out what the background is at the
10 site.

11 Q. I'm just trying to discover where the background
12 opening is in this provision, that I would be able to make
13 that demonstration without going --

14 A. I guess what you --

15 Q. -- through the exception provision.

16 A. I guess what you should look for is what prohibit
17 -- what would prohibit it. And there's nothing that
18 prohibits it.

19 I think, as I discussed earlier, that even with
20 the delineation standards it would be recommended that you
21 go ahead -- and we've heard that companies are doing this,
22 they're actually taking background samples for constructing
23 their pits. So when they do their delineation, they use
24 either the background or the standards that we specify for
25 delineation, whichever is greater, to do their delineation

1 work, which may cut down on it.

2 Q. Okay. But Mr. Jones, once again, I'm a terribly
3 literal compliance attorney, and -- So you're saying that
4 we can do that, and I agree that would be prudent for an
5 operator to do. I'm just not seeing where your rule allows
6 for it, because it says I have to meet TPH, I have to meet
7 the chloride, and I have to meet the 3103 standards. I
8 can't meet the 3103 standard, and I don't see the out for
9 the background testing as this provision is written.

10 And I'm just trying to ascertain if that's a
11 deliberate decision by the Division, or if it's an
12 oversight by the Division, or if you're expecting us to go
13 through the exception provision for that type of case.

14 A. I would say that, you know, we're not -- one
15 thing we're not doing is making it mandatory that a person
16 does background at the site.

17 Q. Correct.

18 A. We're leaving it optional, so it's up to the
19 operator to make that choice. We're not stating that you
20 can't use background, so therefore we're not prohibiting
21 it.

22 Q. But, Mr. Jones, if you say that I have to meet
23 these standards and the background isn't an option, haven't
24 you in fact prevented me using background?

25 A. If we put background in there it could be implied

1 that we're requiring background, and we don't want to
2 create that confusion.

3 Q. Okay, so right now what I hear you telling me,
4 although you haven't said it in these words, is that I have
5 to go through the exception procedure to get an exception
6 to use the background standard in lieu of the standard
7 specified here in paragraph (d)?

8 A. Possibly.

9 Q. Okay. So we use the exception procedure,
10 possibly?

11 A. It goes back to equivalent and better protection.
12 If the background is higher than the 3103 constituents,
13 then you would be demonstrating that you're providing
14 equivalent or better protection of what currently exists.

15 Q. Right, but that's done through the exception
16 procedure, is it not?

17 A. Well, it's a general consideration to, I believe,
18 anything they even require as an administrative
19 consideration, to a certain extent.

20 Q. Okay, I -- I guess I'll accept that. I just
21 don't see where you're finding that.

22 A. It doesn't specifically state --

23 Q. Okay, it doesn't state that, that's what -- your
24 understanding of how it might be applied --

25 A. Yes.

1 Q. -- in practice? Okay.

2 Now if we move to the closure standards -- and I
3 guess we're still in that -- and we move back to section I,
4 which is now on page 19 -- and we're getting within
5 sniffing distance of the end of the rule -- J talks about a
6 closure report?

7 A. Yes.

8 Q. I have a timing question for you on this.

9 A. Okay.

10 Q. Do I file that report upon the completion of
11 closure operations, or do I file that report upon the
12 completion of the successful re-vegetation? Which time
13 does the Division intend for us to file this report?

14 A. Well -- Hm, that's a very good question. I guess
15 what we're looking at here, you've got to look at what's
16 stated to be in the report. So within 60 days of closure
17 completion, the operator shall submit a closure report on a
18 Form C-144 with necessary attachments to document all
19 closure activities including sampling results --

20 Q. -- the plot plan, the backfilling, capping and
21 covering. To me this sounds like it would be after the
22 completion of the construction phase and we've done the
23 seeding, but before we wait the season to see if the
24 seeding successfully re-establishes itself.

25 A. Exactly --

1 Q. Okay --

2 A. -- yes.

3 Q. -- so this is at the close of construction
4 operations?

5 A. Or closure.

6 Q. Closure.

7 A. Yes.

8 Q. Closure of construction?

9 A. Yes.

10 Q. Where we have the equipment on site --

11 A. Yes.

12 Q. Okay, thank you.

13 Let's go on, then, to section 17.16, which is the
14 permit approvals and conditions. Under B you say, The
15 Division shall issue a permit upon finding that the
16 operator has filed an acceptable application, and it lists
17 a number of different things that we have to do in order to
18 obtain a permit; is that correct?

19 A. Yes.

20 Q. What happens if we send in a permit and it never
21 comes back out? You said that you thought that time frames
22 were inappropriate, but what then is the remedy for an
23 operator if we've submitted our application and six months
24 have gone by and we still don't have our application back
25 that would authorize us to proceed with drilling, since we

1 now need to have a permit to drill?

2 A. I would imagine you could go in front of the
3 Commission.

4 Q. So we would file a request for review in front of
5 the Commission?

6 A. Or something -- I'm assuming that you would
7 probably call the Division first to enquire.

8 Q. I'm sure we would have done that several times --

9 A. Yes.

10 Q. Okay.

11 A. And you're stating that you still don't have it?

12 Q. Yeah, perhaps that might happen.

13 A. Perhaps.

14 Q. Perhaps, yes. Okay, but this doesn't -- the rule
15 itself doesn't really lay out a formal approach to
16 resolving that situation, does it? It's relying on other
17 parts of the Division's rules?

18 A. Yes.

19 Q. Okay. Now I think that you had someplace -- and
20 it may have been in the exceptions provisions -- you made a
21 provision, I think, that states that we can't use
22 exceptions to change a condition; is that correct? And
23 that's in the black language in section 17.15.A.(1) on page
24 20?

25 A. Yes.

1 Q. Okay. Now I just want to understand the intent
2 of that provision. Are you saying that we could not apply
3 to the Commission to get a change to a condition imposed by
4 the Division, and isn't that entrenching on the authority
5 of the Commission?

6 A. Can you rephrase that question?

7 Q. Does that mean that we can't come to the
8 Commission in order to seek a change in a condition that
9 the Division has imposed?

10 A. So I guess my question -- for clarification
11 purposes, would that be a modification to your approved
12 permit? Because you can only have a condition -- if you
13 have a permit with conditions.

14 Q. Right. We have a permit, you've issued the
15 permit, it has a condition, and we think the condition is
16 inappropriate.

17 A. So at that point you would be asking for a
18 modification to your permit?

19 Q. Well, we would prefer, of course, just to
20 challenge the issuance of that permit.

21 A. But there is a procedure for modification by the
22 operator, is there not? I'm sorry, I'm asking questions.

23 CHAIRMAN FESMIRE: You haven't quit yet, but at
24 least you recognize it.

25 (Laughter)

1 Q. (By Mr. Hiser) There may be a provision for
2 modification --

3 A. It's section 16 and it's subsection E.

4 Q. E.

5 A. The operator may apply to the Division for a
6 modification of a permit pursuant to 17.

7 Q. Okay, so does this mean, then, that under the pit
8 rule that we would not be able to appeal the initial grant
9 of a permit to the Commission if we disagreed with the
10 condition of it?

11 I'd be happy to hear a clarification from counsel
12 for the Division if he'd like to offer one.

13 MR. BROOKS: I really was going to ask, Mr.
14 Chairman, since I apparently missed something, exactly what
15 language is it that Mr. Hiser is asking about?

16 CHAIRMAN FESMIRE: English, I'm sure.

17 (Laughter)

18 CHAIRMAN FESMIRE: Mr. Hiser?

19 MR. HISER: Mr. Chairman, what I'm just trying to
20 do is ascertain whether we have a right to appeal
21 conditions imposed by the Division to the Commission and to
22 ensure that the limitation on the exceptions language in
23 section 15.A.(1) is not meant to prejudice that right,
24 although now that I ask that question I'm not sure I see a
25 right to appeal to the Commission in this rule at all.

1 MR. BROOKS: Well, there is a provision -- Since
2 you said that you would accept a clarification from
3 counsel --

4 MR. HISER: I would be happy to, thank you.

5 MR. BROOKS: There is a provision in the -- in
6 section 16, and I have to take a minute to read it here, to
7 find it here --

8 MR. HISER: Is it A where it says, shall set the
9 matter for hearing?

10 MR. BROOKS: Give me just a second. Yes, if the
11 Division denies an application or approves an application
12 subject to conditions not expressly provided by the Oil and
13 Gas Act, then the Division shall notify the applicant and
14 shall set the matter for hearing if the applicant so
15 requests.

16 MR. HISER: And so by setting the matter for
17 hearing, your position is that's in front of the
18 Commission?

19 MR. BROOKS: Well, not necessarily, but there is
20 a provision of the Oil and Gas Act, which we would contend
21 is the governing statute in this case, that says that a
22 determination by the Division Director after a hearing can
23 be appealed as a matter of right to the Commission.

24 MR. HISER: I appreciate that clarification.

25 MR. BROOKS: We believe that if the Division --

1 We believe that the Commission would not even have the
2 power to adopt a rule that would deny a person the right to
3 appeal from the Division to the Commission.

4 MR. HISER: I appreciate that clarification.

5 Q. (By Mr. Hiser) Which brings me back to my
6 question now about the exception -- the prohibition on
7 exceptions to the conditions requirement in 17.15.A.(1) and
8 whether that means that once a condition is adopted and put
9 into a permit, that that would mean then that that
10 condition would be beyond the reach of the Commission to
11 even -- or, I guess it would be the Division, to change
12 through the exception provision.

13 A. I guess -- Mr. Brooks, can I answer your
14 question? Because under 16 it gives a procedure or a
15 protocol to address those.

16 Q. So we would have to apply for a modifi- -- we
17 couldn't apply directly, we would have to apply for a
18 modification to the permit, have that denied, and then
19 appeal the denial to the Director and then the Director's
20 decision to the Commission?

21 A. Are you referring to the exception, or are you
22 referring to a condition?

23 A. Well, I can't do an exception to a condition,
24 apparently, under the proposed changes to section
25 17.15.A.(1).

1 A. Are we back to the original question --

2 Q. Yes, this --

3 A. -- about the Commission?

4 Q. -- is the original question about conditions.

5 A. So under A where it states that you have an
6 attempt to settle a matter in hearing if you do not agree
7 with the condition, you have a protocol of steps to be
8 taken to address it.

9 Q. I think maybe I should rephrase my question,
10 because I think we're confusing ourselves.

11 My real question is that the language that the
12 Division is proposing in 17.15.A.(1) is simply meant to
13 make sure that we don't short- -- go -- not go through the
14 procedures in 17.16, but not to say that conditions adopted
15 pursuant to that procedure are no longer changeable by the
16 Commission; is that correct?

17 A. The -- section 16 is protected under the
18 exceptions, because section 16 tells you how to address the
19 concerns that you're expressing, yes.

20 Q. All right. So we can still change conditions, we
21 just can't change the conditioning procedure?

22 A. Yes.

23 Q. Great, that's helpful. Okay.

24 And then I think on 17.16.G you say by written
25 statement, and it was your testimony today that the

1 Division accepts e-mail as a written statement?

2 A. Yes.

3 Q. And presumably also fax?

4 A. Yes.

5 Q. Okay. Now in E of 17.17, under E.(1), (2) and --
6 (1), (2) and (3), we have this reiteration of a continuing
7 phrase, operational and closure requirements. What are
8 the operational and closure requirements? Is this --

9 A. Okay --

10 Q. Is this meant to be a shorthand reference to the
11 things that are found in sections 12 and 13 of this rule?

12 A. Yes, because 12 is titled Operational
13 Requirements, and 13 is titled Closure Requirements.

14 Q. Okay. Would it not be better to actually simply
15 specify that that's to the operational and closure
16 requirements of Section 19.15.17.12 and 13, because that
17 removes any ambiguity as to whether there might be that
18 stray operational requirement in 16 or --

19 A. Well, you could go all the way down to the
20 subsection, but you may be missing the general provisions
21 that are required under those sections.

22 Q. I would just suggest that that might be some
23 useful ambiguity that can be sort of sweated out of the
24 rule.

25 A. Okay.

1 MR. HISER: And I believe that that may -- and
2 I'm sure much to your dismay -- end my questions.

3 And I thank the Commission for putting up with my
4 questions.

5 CHAIRMAN FESMIRE: Thank you, Mr. Hiser.

6 Mr. Carr, do you have any questions of this
7 witness?

8 MR. CARR: Yes, I do, Mr. Chairman. And I think
9 it's obvious at this point that in honor of Mr. Jones'
10 birthday, that Mr. Hiser and Ms. Foster might have come to
11 blow out his candles.

12 (Laughter)

13 MR. CARR: I have a few questions, they're not as
14 detailed as those that we've been going through this
15 afternoon.

16 CHAIRMAN FESMIRE: Okay, before you begin, I've
17 got to explain that this is Mr. Jones the Lesser. The
18 other Mr. Jones that we have working in our department is
19 about twice as tall as he is, and consequently the title.
20 So it is the birthday of Mr. Jones the Lesser, and we will
21 let you proceed to try to blow out his candles.

22 (Laughter)

23 MR. CARR: All right.

24 MR. BROOKS: Mr. Jones the Greater was born on
25 March the 14th. I know that because I was also born on

1 March the 14th, although it wasn't in the same year.

2 CROSS-EXAMINATION

3 BY MR. CARR:

4 Q. Mr. Jones, if I remember your testimony days ago,
5 I believe you testified you were present during all the
6 agency sessions to develop this proposed draft. Is that
7 accurate?

8 A. As far as I remember -- Let's put it this way, I
9 was present at the ones I was present at --

10 (Laughter)

11 A. -- and they had some on the days I was off. I
12 was not present on those and unaware of them.

13 Q. And were you unaware of them, did you say?

14 A. I would be unaware of those.

15 Q. Have you also had the honor of attending the
16 hearing so far day by day?

17 A. Yes.

18 Q. If I understand your testimony, you said one of
19 the general objectives of the proposed rule was to move the
20 agency from performance-based standards to prescriptive
21 standards; is that correct?

22 A. Yes, it is, to a certain extent. What we're
23 doing is, basically, if you notice, a lot of the proposed
24 language and concepts in our proposed rule, the basis of
25 them stems from the -- either the current rule or the

1 guidelines --

2 Q. Okay.

3 A. -- and it's a combination of both. So what we're
4 doing is really expanding on what currently exists, except
5 for the unlined pits.

6 Q. What do you mean by a performance-based standard?

7 A. I think I compared some of those in my testimony,
8 some of the statements. A good example would be -- find
9 one here.

10 The special requirements for pits, liners, and
11 we're talking about drilling and workover pits, Each
12 drilling pit or workover pit shall contain at a minimum a
13 single liner appropriate for the conditions at the site.

14 That could mean a lot of different things. It's
15 not really defined or specified. It could mean a 3-mil
16 liner, it could mean a 6-mil liner. And you know, based on
17 the other provisions that it must contain the liquids or
18 fluids, it might be capable of doing that to some extent --

19 Q. Okay.

20 A. -- but also it can be subject to being
21 compromised due to the thickness and the capability of that
22 liner material.

23 Q. When you are talking about performance-based
24 standards, are you talking about set numerical standards?

25 A. No, no, just general -- general performance-

1 based, meaning that -- such as to contain liquids or
2 fluids.

3 Q. Would to protect human health and the environment
4 be a performance-based standard?

5 A. I guess to a certain extent it could be, and I'm
6 not saying that ours doesn't have any of that language that
7 we're stating here. It states the same language, but it
8 expands beyond that.

9 Q. If I look at what you've come up with here, you
10 have defined in this new rule a role for the district
11 office, and you have given the district in certain
12 circumstances the ability to grant exceptions to provisions
13 in the rule?

14 A. Administrative approvals --

15 Q. Okay --

16 A. -- yes.

17 Q. -- now, administrative approval could be
18 administrative approval to locate a well other than as
19 required in the general rules; isn't that right?

20 A. These requirements have nothing about the
21 location of the wells, they're about pits and --

22 Q. Siting -- I'm sorry, siting a pit other than as
23 prescribed in the rule, you could come get an
24 administrative exception to that?

25 A. Based upon certain specifications, yes.

1 Q. You'd have to show that it -- another location
2 would be protective of human health and groundwater, things
3 of that nature; isn't that correct?

4 A. Well, they're more detailed than that. For each
5 one that allows it, there's some type of comparison to the
6 standard, and -- if I give an example of one. Such as the
7 separate -- setback from a continuous flowing watercourse
8 or watercourse, this approval would be based upon the
9 operator's demonstration that surface water or groundwater
10 will be protected.

11 Q. Okay.

12 A. So they're not --

13 Q. And --

14 A. -- they don't cover health in that case.

15 Q. Okay. And you would have perhaps a similar
16 requirement for an operator's showing to get an exception
17 from these slope requirements for temporary pits?

18 A. Yes.

19 Q. But in each of these cases the operator, to get
20 the administrative exception, as I call it, or variance,
21 has to make some showing to you that what they are
22 proposing is consistent with the objectives of the agency,
23 i.e., it's either protecting human health and the
24 environment or groundwater or the surface or something like
25 that?

1 A. Or it could be more, yes.

2 Q. Okay. But on the one hand, while we grant
3 those -- that authority to the districts, there are other
4 provisions in the rule that have a different standard. It
5 is that they can give you an exception if you can show that
6 what you're proposing will be equivalent -- will provide
7 equivalent or better protection than what is otherwise --

8 A. Yes, that's an exception.

9 Q. My concern is, some of these variances or, as I
10 call, exceptions to the rules, are based on some very
11 definite showings tied to human health, to protecting
12 groundwater.

13 And then we have this other one that's general,
14 equivalent or better protection.

15 Is there some underlying rationale for why you
16 sometimes told the operator you needed to show that you're
17 going to comply with our statutory goals, and other times
18 you just have to do the equivalent to what is otherwise
19 required by the rule?

20 A. There is a difference. Such as the siting
21 criteria, we've discussed in great detail about the
22 concerns of the northwest and how areas drain into certain
23 areas and what's a drainage feature and what's -- what's a
24 watercourse?

25 And so we're granting -- this is to assist the

1 operator of getting their permit approved by having people
2 in that region make those assessments.

3 Same if there's some issue about an unstable -- I
4 believe an unstable area -- well, unstable area, but
5 underlying surface mine, would be something that the field
6 office could go out and assessed.

7 So these things can be assessed at the site and
8 speed up the process.

9 The other ones, under exceptions, are things --
10 we're trying to achieve two things here with this. One,
11 that there is a standard to be compared against. The other
12 is, we've got a lot of complaints about consistency about
13 exceptions or consideration of exceptions of -- various
14 district office approaching it differently.

15 Q. Right.

16 A. And so we're resolving that because of complaints
17 from applicants about that. So by having it come to Santa
18 Fe, one office make that decision --

19 Q. And so that will provide consistency in
20 granting --

21 A. That's --

22 Q. -- exceptions?

23 A. -- our goal.

24 Q. I believe you testified that when it comes to
25 exceptions, that there really are no restrictions, it's

1 open for new technology, there are no limits on what are on
2 suggested exceptions to the rule; is that correct?

3 A. As long as they demonstrate equivalent or better
4 protection, yes.

5 Q. Okay. Now there are some limits on seeking an
6 exception. You can't get an exception if you're within 100
7 miles of a Division-approved landfill. I mean, you're
8 going to have to dig and haul, correct?

9 A. No, there's an exception, that's open to
10 exceptions, it's --

11 Q. You can get --

12 A. -- not protective.

13 Q. You can get an exception to dig and haul?

14 A. Yeah, I believe I testified on that.

15 Q. And you would have to get that to show that what
16 you're proposing provides protection equal to or better
17 than digging and hauling the material?

18 A. Yes.

19 Q. Now when we look at that, are -- there are
20 circumstances where there are things that would be
21 protective of human health, the environment and
22 groundwater, but wouldn't require digging and hauling the
23 material to a landfill?

24 A. Can you ask that again? Sorry. Didn't follow
25 the question.

1 Q. Dig-and-hauling is removing the waste?

2 A. Yes.

3 Q. Are there other things that could be done this
4 side of removing the waste that are protective of human
5 health?

6 A. There could be.

7 Q. And if I came in as an operator and showed you
8 that what I was going to -- was planning to do was
9 protective of human health, I still couldn't get an
10 exception, because it would be deemed to be not the
11 equivalent of totally removing the substance; isn't that
12 correct?

13 A. Well, I disagree. Let's say -- You've tested the
14 background and the soils at the site --

15 Q. Uh-huh.

16 A. -- and you know what the soils are at site.
17 Let's say your drilling contents are less than that. You
18 still have to get landowner -- or surface owner approval.
19 But that would be equivalent.

20 Q. That's equivalent to digging and hauling?

21 A. Yes.

22 Q. Okay.

23 A. That could be a consideration for equivalent.

24 Q. And so in that circumstance, that showing could
25 meet that test for an exception --

1 A. It could.

2 Q. -- is your testimony?

3 We also have, as you mentioned a minute ago, the
4 -- that you would also have to get landowner approval?

5 A. Yes.

6 Q. And if you can't get landowner approval, you --
7 there's no exception to that?

8 A. No, just surface owners.

9 Q. Why are you requiring written approval from a
10 landowner? What is the purpose in that?

11 A. I think in my testimony I explained that, you
12 know, we're not trying to enforce the Surface Owners
13 Protection Act, but what we're trying to do is protect
14 ourselves from those written agreements.

15 If there is an agreement that nothing would be
16 buried on site, and we approved burial on site, then the
17 operator comes back and buries it on site, then we've
18 approved something to compromise the agreement, and we
19 could be subject for legal recourse. So by -- We need to
20 know if we can grant that approval.

21 Q. And so your rule would be subject to that
22 contractual provision?

23 A. If there is one, yes.

24 Q. And would you review that contractual provision
25 for --

1 A. We're not asking to do that. We discussed this
2 in -- in task force. Industry said they want to share it
3 if we don't want to look at it. We -- we just want to make
4 sure what we're approving is approvable.

5 Q. Now --

6 A. If there is a contractual agreement that the
7 surface owner has agreed to it, there should be no issue of
8 them saying that it's written --

9 Q. -- are you assuming that the landowner is giving
10 its approval because of its concern for human health --

11 A. I'm not considering --

12 Q. -- or the environment?

13 A. -- that there's consideration if there is -- I
14 have no idea of why they've decided that.

15 Q. It could be because they've been able to extract
16 a sufficient sum of money to give their consent?

17 A. That's not what we're asking to find out, that's
18 no consideration of ours.

19 Q. But you are giving this person a veto over
20 disposal methods and don't even -- and it could be totally
21 unrelated to the protection of human health and the
22 environment or groundwater?

23 A. It could be viewed that way. But the method --
24 the thing that we're trying to get is some type of
25 mechanism to confirm that we can grant this approval.

1 Q. But isn't it your responsibility to protect human
2 health and the environment and groundwater under the Oil
3 and Gas Act?

4 A. Yes.

5 Q. And by just passing this to a landowner and
6 saying, If this person doesn't approve it for whatever
7 reason we're not going to do it, aren't you really
8 abdicating your jurisdiction to third parties?

9 A. No, because I believe our closure methods that we
10 have in place, if it is allowed, takes care of that. So we
11 are fulfilling our obligation.

12 Q. In discussing the development of this rule, did
13 you -- you discussed the requirement for landowner, written
14 approval, surface owner approval?

15 A. Written consent from surface owners.

16 Q. Written consent. Did you discuss in those
17 meetings how the withholding of this consent might impact
18 the development of oil and gas?

19 A. We discussed it in the fashion of what we needed
20 to make consideration of the approval, so we wouldn't be
21 approving something that would contradict a previous
22 agreement.

23 Q. Did you consider whether or not this provision
24 could increase the costs of developing oil and gas?

25 A. I was not privy to those discussions if they were

1 -- if they took place.

2 Q. If they took place?

3 A. I don't know if they took place. I was not part
4 of that discussion.

5 Q. Did you discuss how -- Were you present at any
6 discussions where this approval or this veto you're giving
7 a landowner would impact the rights of an operator to
8 develop resources?

9 MR. BROOKS: Mr. Chairman, objection to the
10 extent that Mr. -- I won't have an objection if Mr. Carr
11 limits his discussion to meetings or conferences at which
12 opinions of counsel regarding this matter were not given,
13 but I would like to make sure we're excluding anything that
14 would be subject to attorney-client privilege.

15 Q. (By Mr. Carr) I'm certainly not asking the
16 details of any conversation --

17 A. Yeah.

18 Q. -- but your jurisdiction includes a lot of
19 things, and I just was wondering if any of those things --
20 we talked about all these meetings about prevention -- or
21 protecting human health, the environment and groundwater --
22 were these other things discussed? That's the only
23 question.

24 A. I would like to clarify something --

25 CHAIRMAN FESMIRE: Brad, let me --

1 THE WITNESS: Yeah.

2 CHAIRMAN FESMIRE: -- get in here.

3 Mr. Carr, I understand your question, and I also
4 understand --

5 MR. CARR: Right.

6 CHAIRMAN FESMIRE: -- counsel's objection. Would
7 you make sure that your question is limited so that it
8 doesn't interfere with the conversations between the
9 attorney --

10 MR. CARR: I'm not asking for any detail on any
11 conversation whatsoever. I just was asking --

12 CHAIRMAN FESMIRE: Between the attorney --

13 MR. CARR: -- whether or not the topic was
14 considered.

15 CHAIRMAN FESMIRE: Which -- But I think you need
16 to limit it to any conversations between Mr. Jones and
17 members of the OCD staff --

18 MR. CARR: All right.

19 CHAIRMAN FESMIRE: -- and their attorney.

20 MR. CARR: And their attorney?

21 CHAIRMAN FESMIRE: And their attorney. Limited
22 to not include those conversations.

23 THE WITNESS: Can I clarify something?

24 CHAIRMAN FESMIRE: Yeah.

25 THE WITNESS: Okay --

1 MR. CARR: Well -- And I didn't understand your
2 ruling, I guess. I can't ask if these conversations were
3 with OCD staff members?

4 CHAIRMAN FESMIRE: No, you can't ask if they were
5 with the attorney.

6 MR. CARR: Okay, I thought you said not the staff
7 members or their attorney, and I thought we were trying to
8 avoid their attorney.

9 CHAIRMAN FESMIRE: Yeah -- No, no, but as long as
10 -- as long as Mr. Brooks' objection about the privileged
11 communications are upheld, you can go ahead and phrase that
12 question.

13 Q. (By Mr. Carr) Okay. Were you involved in any
14 discussions with anyone other than Mr. Brooks or another
15 attorney --

16 (Laughter)

17 Q. -- who wasn't present, that was not conducted in
18 the course of this hearing --

19 (Laughter)

20 Q. -- where these considerations were -- where these
21 matters were discussed?

22 A. Well, I'd like to clarify something.

23 You -- your -- if I understood the last part of
24 your question about the prohibited -- it would --
25 discussions about prohibiting access to the resources --

1 and maybe I'm stating this wrong, but this is about
2 closure, this is not about drilling. It doesn't talk about
3 anything about surface owner approval to have a pit, a
4 closed-loop system, anything related to accessing any
5 resources on the site.

6 This is closure and burial on-site, is what
7 we're --

8 Q. Correct.

9 A. -- discussing, which is -- I -- are you stating
10 that -- I'm trying to get a clarification. Are we saying
11 that these are the same things?

12 Q. I'm saying that if I'm trying to drill an oil
13 well, closure is part of what I have -- and the costs of
14 closure, I have to consider, along with other things.

15 A. But it doesn't -- You're saying it would restrict
16 them access to the resources.

17 Q. No, I'm saying would it increase the costs?

18 A. I think we've had a lot of testimony here.

19 Q. Uh-huh.

20 A. It would depend on the method that you use.

21 There's been a lot of testimony on closed-loop systems due
22 to recycling the water on-site, reducing the amount of
23 solids that you would have. There's some controversy --
24 It's been testified that it's a cost savings, compared to
25 using a pit.

1 So it would depend on your method that you choose
2 to use that would determine your outcome, if there would be
3 a cost increase or not.

4 Q. And did you discuss those with the other staff
5 members?

6 A. We did a preliminary assessment and comparison of
7 dig-and-haul, and Mr. Price testified on this, on 90
8 miles --

9 Q. Uh-huh.

10 A. -- compared to the cost of installing a liner and
11 increasing the volume of the waste by -- and we're talking
12 about pit closure -- increasing the volume of the waste
13 material to try to bury it on-site, yes, we did do that.

14 Q. And if -- I would also understand, then, that if
15 conversations with counsel about meeting statutory
16 obligations cannot be discussed here, they can't be used as
17 proof of that either; is that fair?

18 CHAIRMAN FESMIRE: I think, Mr. Carr, that you're
19 sort of asking for a pre-emptory ruling here, and I'm not
20 sure I'm capable of giving that until the --

21 MR. CARR: Well, then --

22 CHAIRMAN FESMIRE: -- issue arises. Maybe --

23 MR. CARR: -- I want you to know that, then -- I
24 just want to advise you, I intend to use it if I need to.

25 (Laughter)

1 CHAIRMAN FESMIRE: I guess the record can reflect
2 that we're put on notice.

3 MR. CARR: You're on notice.

4 Q. (By Mr. Carr) On the below-grade tanks -- and
5 everybody's beating this to death, but I have just a couple
6 of questions. The rule was changed in 2004?

7 A. Yes.

8 Q. There have been a number of operators who have
9 gone out and retrofitted a lot of tanks at substantial
10 expense to comply with 2004?

11 A. You said -- for clarification, you said retrofit
12 and to comply with Rule 50 in two thousand -- Can you
13 explain what you mean by retrofit and comply?

14 Q. To comply with the changes in 2004, they've gone
15 out and they have placed tanks so that the sides are not
16 covered by soil, so they're visible.

17 A. So they're not covered under Rule 50.

18 Q. Yes. So they're not under -- they are -- and now
19 the change in definition, which -- it's just several words
20 -- would put these tanks under Rule 50?

21 A. Yes.

22 Q. And we heard this morning from Mr. Bratcher some
23 conversations about problems with these below-grade tanks.

24 A. Yes.

25 Q. My question is, many of these tanks were placed

1 in existing pits.

2 A. Yes.

3 Q. Have you been able to go out and sample and
4 determine, or come up with evidence that shows that we have
5 problems from these tanks leaking, or is it because they
6 were placed in these pits in the first place? Do you know?

7 A. I think there's two issues where, and you've kind
8 of brought them to the forefront. Currently there's no --
9 these tanks do not require a permit, they don't fall up
10 under a regulation, they're outside of Rule 50. So there's
11 no documentation of how many of these tanks are currently
12 out there, because they don't require a permit.

13 Secondly, since they don't fall up under Rule 50,
14 there's no integrity testing, so we're unsure if they're
15 leaking or not. Because Rule 50 requires that for below-
16 grade tanks, and these are not below-grade tanks by
17 definition under Rule 50. So there would be no provisions
18 to test underneath.

19 And the second part of your question?

20 MR. CARR: I hate to ask --

21 CHAIRMAN FESMIRE: Would you like it read back,
22 Mr. Carr?

23 MR. CARR: Oh, I don't know. Steve, do you want
24 to do that for me?

25 COURT REPORTER: I don't know if I can find it in

1 time.

2 (Laughter)

3 MR. CARR: All right, all right, that's all
4 right.

5 Q. (By Mr. Carr) Do you have any statistical
6 information or any data collected that shows that you're
7 having problems with the tanks that have been retrofitted
8 to comply with the 2004 rule change?

9 A. Since they're not permitted, we have no number of
10 how many are there, so we would -- there would be no way to
11 make that assessment.

12 Q. And you have no personal knowledge, then, of it,
13 because you can't make that assessment?

14 A. You can't make that assessment.

15 Q. Is what you're saying?

16 A. I'm saying that we can't because they're not
17 permitted. There's no means to determine how many there
18 are.

19 Q. And you bring them under Rule 50 --

20 A. Yes.

21 Q. -- with this change?

22 A. Yes.

23 Q. And until that happens, there's no way to do any
24 integrity test?

25 A. I'm sorry, can you repeat the last question? I

1 want to make sure.

2 Q. With the change you're proposing, these below-
3 grade tanks now fall within Rule 50?

4 A. With the change that we're making, they would
5 fall under Rule 17, proposed Rule 17 --

6 Q. All right, but --

7 A. -- that's why I --

8 Q. -- but now, by virtue of that change, I think you
9 said until that happened there was no way to do any
10 integrity testing or anything?

11 A. No, because they're not considered a below-grade
12 tank by the definition in part 1.

13 Q. Aren't these open-top tanks?

14 A. They are open-top tanks --

15 Q. How do you integrity-test an open-top tank?

16 A. I would assume that you would check the water
17 level in that tank. If it had no water, you would put
18 water in it to see if it leaked.

19 Q. And you might have a small leak?

20 A. You might have a small leak.

21 Q. And how do you know if it's evaporation or a
22 leak?

23 A. You would have to make that assessment. What
24 we're trying to do -- and this is exactly the point, why
25 we're trying to pull these back under the proposed rule is

1 because of those, because it would have secondary
2 containment and a leak detection, which we would be able to
3 assess that.

4 Q. And you're recommending a plastic liner
5 underneath?

6 A. That is a possibility. It's not the only one.

7 Q. Are you aware that with plastic liners you get
8 static electricity?

9 A. That can occur --

10 Q. And --

11 A. -- but those tanks can be ground.

12 Q. And you -- but you have circumstances where
13 potentially you can have a tank with gas vapors in a hole
14 with static electricity, if you pull it under this rule.

15 A. Well, I permitted part 36 facilities, which they
16 extract crude and condensate, and they have above-ground
17 tanks with liners underneath, and we have yet to --

18 Q. And those are above ground?

19 A. Those are above ground, and they have lined
20 bermed areas with liners underneath, and we haven't seen
21 that be a problem.

22 Q. So these are above-ground surface tanks you're
23 talking about?

24 A. Yes.

25 Q. And I think in your testimony you said there were

1 other rules that governed above-ground surface tanks?

2 A. Yes.

3 Q. And if we have a tank battery of, say, six 300-
4 barrel tanks and we're just one foot below grade, then we
5 would be under this rule, correct?

6 A. Yes.

7 Q. And is that in lieu of being under other rules
8 that would -- it would no longer be under the rules that
9 apply to above-ground storage tanks or surface tank. Which
10 rule would we be under?

11 A. It would be a below-grade tank.

12 Q. And it would be under this rule and not the other
13 one?

14 A. If it's used as the -- as it's intended under the
15 objective, yes.

16 Q. You pointed out that if you were going to be
17 locating a pit over a municipal wellfield, you would need
18 to get the approval of the municipality.

19 A. Yes.

20 Q. And that's in addition to getting OCD approval?

21 A. Yes.

22 Q. Are these well fields easy to locate? Do you
23 know where they are?

24 A. Do I know where they are?

25 Q. Uh-huh.

1 A. Personally, no.

2 Q. I mean, I think you testified that some of the
3 ordinances are a little bit hard to find.

4 A. They can be.

5 Q. And my question is, do you know if it's easy or
6 even possible to know, just from public records, where
7 these municipal well fields are?

8 A. I would imagine someone would call the
9 municipality to confirm that.

10 Q. And do you know that some of them may be 50 miles
11 from a municipality?

12 A. Yes.

13 Q. And so would you recommend that operators call
14 every municipality within, say, 50 miles and ask them?

15 A. Well, I guess it's kind of like these
16 regulations. If I was in the business of drilling, I would
17 make sure I knew which regulations apply to me. It's my
18 responsibility. Ignorance is not bliss under regulatory
19 compliance.

20 Q. But it also seems to me that there ought to be
21 some requirement here, or some provision that we're charged
22 with knowledge of municipal well fields that are made a
23 matter of public record.

24 A. I think if they contact the municipality, a
25 simple phone call would clear that up, because they would

1 know where their well fields are and be able to identify
2 those to the party.

3 Q. If I'm drilling in Lea County, should I call
4 Carlsbad?

5 A. It would upon -- If you're drilling near
6 Carlsbad, you may want to call them. You also may want to
7 call the county too, since each entity --

8 Q. You know, my concern is this: We've had issues
9 where we've had operators 50 miles from Carlsbad, and after
10 they drill they discover they're in a municipal wellfield.
11 And it would seem to me that because some of them are not
12 in close proximity it might be helpful to, in the rule,
13 also provide that we have to identify -- or --
14 municipalities, if their wellfields are identified with a
15 published record.

16 A. That's -- My understanding is that that could be
17 subject to change, so if we identified those and they
18 change and more develop, then we -- the rule wouldn't be
19 current.

20 Q. I think the -- all you have to do -- I would --
21 wouldn't it be -- Wouldn't it be reasonable to say the
22 municipalities should do that and keep it current?

23 A. You're -- Hm. I thought that's what we were
24 doing by having them provide their approval.

25 Q. If you don't know where they are, you don't know

1 who to ask for approval; that's my point.

2 A. You're -- My understanding is that you're saying
3 the operator shouldn't call the municipality to find out --
4 to find out. The people that actually would be knowing
5 where their wellfields are, a phone call wouldn't be --
6 would be --

7 Q. I'm saying that as an operator, if, you know,
8 Tatum has a wellfield it should be public record, if
9 Carlsbad's wellfield is in Lea County it should be of
10 record, and if it isn't you ought to consider not having
11 the operator having to notify people when they can't tell
12 whose wellfield is where or if it's there at all. Just a
13 suggestion.

14 MR. BROOKS: Mr. Chairman, is this a question or
15 argument?

16 MR. CARR: It's -- it's --

17 (Laughter)

18 MR. CARR: -- Mr. Chairman --

19 CHAIRMAN FESMIRE: I'll overrule the objection.

20 MR. CARR: Mr. Chairman, it was a speech.

21 (Laughter)

22 CHAIRMAN FESMIRE: I guess I'll have to sustain
23 the objection, Mr. Brooks.

24 THE WITNESS: I'll try to stop asking questions
25 too.

1 MR. CARR: It's really late.

2 CHAIRMAN FESMIRE: Mr. Carr, speaking of that,
3 how much longer do you think you'll be?

4 MR. CARR: Oh --

5 CHAIRMAN FESMIRE: A while?

6 MR. CARR: A little while, yes.

7 CHAIRMAN FESMIRE: Ms. Foster, how long do you
8 think it will take you for cross-examination on this
9 witness?

10 MS. FOSTER: Well, you don't remember, I --

11 (Laughter)

12 MS. FOSTER: -- four hours the other day.

13 CHAIRMAN FESMIRE: Okay.

14 MS. FOSTER: Would you like me to go again?

15 (Laughter)

16 CHAIRMAN FESMIRE: No, I do not, and --

17 (Laughter)

18 CHAIRMAN FESMIRE: -- I'm invoking the Carr
19 defense, it's late.

20 Mr. Huffaker, Mr. Jantz, are you all going to
21 have anything of this witness?

22 MR. JANTZ: OGAP doesn't anticipate any cross-
23 examination, Mr. Chairman.

24 CHAIRMAN FESMIRE: Okay.

25 MR. CARR: It's a while.

1 CHAIRMAN FESMIRE: Okay.

2 MR. HISER: Mr. Chair, I do find that I've
3 deciphered one question which is very short, so with the
4 indulgence of the Commission I would like to get that one
5 in.

6 CHAIRMAN FESMIRE: Okay, why don't we start that
7 off first thing in the morning?

8 MR. HISER: I won't be here tomorrow.

9 CHAIRMAN FESMIRE: Oh, that's right. Okay, why
10 don't we go ahead and do that question, then we'll take
11 public comment, and then we'll break until tomorrow
12 morning.

13 The scheduling issue, Mr. --

14 MR. HISER: -- Hiser.

15 CHAIRMAN FESMIRE: -- Hiser, I'm sorry -- we will
16 -- It's only been two weeks straight. Can Mr. Carr handle
17 that for you tomorrow?

18 (Laughter)

19 MR. HISER: We may find out. I think Mr. Carr is
20 generally aware of what the restraints on the industry
21 committee are, so --

22 CHAIRMAN FESMIRE: Okay, we'll let you ask your
23 question, we'll talk just a minute about scheduling, then
24 we'll go to public comment, and then we'll break for the
25 day. Okay?

1 MR. HISER: Thank you.

2 CHAIRMAN FESMIRE: Mr. Carr, I hope you don't
3 mind if Mr. Hiser takes --

4 MR. CARR: It's certainly fine with me. I'm at
5 the point I can't distinguish between a well and a pit.

6 (Laughter)

7 FURTHER EXAMINATION

8 BY MR. HISER:

9 Q. Mr. Jones, I'd like to go back to Rule 17.17 and
10 to the provision in D, which talks about the operator of an
11 existing below-grade tank, and that's on page 24 of your
12 exhibit --

13 A. Yes.

14 Q. -- are you there?

15 This requires that the operator shall comply with
16 the permitting requirements within 90 days after the
17 effective date of this rule.

18 By complying with the permitting requirements, do
19 you mean that we have to have a permit, or merely that we
20 need to have an application in place?

21 A. An application in place.

22 MR. HISER: Okay, thank you.

23 CHAIRMAN FESMIRE: With that, are there any
24 public comments for the record this evening? That was too
25 easy.

1 Okay, the -- It looks like right now we don't
2 have an answer on the scheduling. It looks like we're
3 going to have Thanksgiving week off.

4 The week in question is the one after that. We
5 may end up meeting -- we don't know yet. Please do not
6 take this as a -- as set in stone until we discuss it
7 tomorrow, okay? So...

8 MS. FOSTER: While you're making scheduling
9 decisions, though, if I could just place on the record that
10 for the 26th I have serious child-care issues. My husband
11 is starting a homicide trial that day, and the kids are out
12 of school Thanksgiving day --

13 CHAIRMAN FESMIRE: So the caught him, huh?

14 (Laughter)

15 MS. FOSTER: -- so they're still on their
16 Thanksgiving break for Monday the 26th.

17 And I know that you, Mr. Chairman, you're
18 testifying before a legislative interim committee, and I'm
19 actually bringing the kids with me to the capitol that day.

20 CHAIRMAN FESMIRE: I am sympathetic to that. I
21 once took my four-year-old to a murder sentencing. He went
22 home and told his mama all about his new friend Tommy --

23 (Laughter)

24 CHAIRMAN FESMIRE: She wouldn't let me take him
25 again.

1 The 26th we may have to consider a late start
2 because, like you said, I am testifying that day. But
3 we're first -- I think we're first on the docket, so we may
4 consider a late start. We'll talk about that tomorrow.
5 Okay?

6 MR. JANTZ: And just for the record, Mr.
7 Chairman, I believe I mentioned this to you before, I am
8 unavailable due to prior commitments on the 26th, and Mr.
9 Frederick has the Tyrone hearing.

10 CHAIRMAN FESMIRE: Mr. Frederick may be free.

11 MR. JANTZ: No, he will not be here. He will be
12 engaged in his own lengthy hearing that day. So no one
13 from the law center will be available to represent OGAP on
14 the 26th.

15 CHAIRMAN FESMIRE: Let's talk about this
16 tomorrow. I really don't think it's going to be a problem.
17 But we will talk about it tomorrow.

18 MR. JANTZ: I appreciate that, Mr. Chairman.

19 MR. BROOKS: I want to raise one thing on that.
20 Since I know Ms. Belin on behalf of her client has a
21 concern about the week of the 26th, I think she should be
22 alerted that we're going to be discussing this tomorrow so
23 she can be present or let her desires be known to the
24 Commission.

25 CHAIRMAN FESMIRE: Would you take it upon

1 yourself to make sure she knows that we're going to --

2 MR. BROOKS: I will endeavor to do so, Mr.
3 Chairman.

4 CHAIRMAN FESMIRE: Okay. Mr. Jantz, do you talk
5 to Lettie regularly?

6 MR. JANTZ: I can certainly shoot her an e-mail
7 and give her a call as well.

8 MR. BROOKS: That's what I plan to do.

9 CHAIRMAN FESMIRE: Why don't you both do that, if
10 somebody can get ahold of her.

11 Any other questions? Anything else that the
12 Commission needs to take care of tonight?

13 Like I said, let me reiterate, we have not
14 decided anything about the scheduling. We will talk about
15 it tomorrow afternoon. Okay?

16 And with that we'll adjourn for the day and
17 reconvene tomorrow morning in this room at nine o'clock.

18 (Thereupon, evening recess was taken at 4:51
19 p.m.)

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CERTIFICATE OF REPORTER

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) 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 January 7th, 2008.



STEVEN T. BRENNER
 CCR No. 7

My commission expires: October 16th, 2010