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STATE OF NEW MEXICO  
ENERGY, MINERAL AND NATURAL RESOURCES DEPARTMENT  
OIL CONSERVATION DIVISION  
SANTA FE, NEW MEXICO

PUBLIC HEARING

9:00 A.M.  
MARCH 10, 2016  
PORTER HALL  
1220 S. ST. FRANCIS DRIVE  
SANTA FE, NEW MEXICO

OIL CONSERVATION COMMISSION  
PROPOSED AMENDMENTS TO RULES  
19.15.35, 19.15.36 AND 19.15.2 NMAC

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## 2 DIVISION EXHIBITS:

3	NO.	INTRODUCED	ADMITTED
4	1	11	200
5	2	11	200
6	3	11	200
7	4	11	200
8	5	16	200
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10	7	19	200
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19	16	91	200
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1 P R O C E E D I N G S

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3 CHAIRMAN CATANACH: Good morning. This is a  
4 meeting of the New Mexico Oil Conservation Commission. My  
5 name is David Catanach. I'm the chairman of the  
6 commission. The time is about 9:04 a.m. and today's date  
7 is March 10, 2016. This meeting is being conducted in  
8 Porter Hall in the Wendell Chino state building.

9 I'd like to take role at this time. Will  
10 the commissioners please introduce themselves for the  
11 record.

12 COMMISSIONER PADILLA: Patrick Padilla  
13 designated the Commissioner of Public Lands.

14 COMMISSIONER BALCH: Dr. Robert Balch,  
15 designated the Energy Bureau Secretary.

16 CHAIRMAN CATANACH: And also present today  
17 is Bill Brancard who is the general counsel for the  
18 Energy, Minerals and Natural Resources Department, and  
19 commission attorney.

20 Commissioners, in your packet you should  
21 have an agenda for this meeting today. Have you reviewed  
22 the agenda and do I hear a motion to adopt the agenda?

23 COMMISSIONER BALCH: I will make a motion  
24 to adopt the agenda.

25 COMMISSIONER PADILLA: I would second that.

1 CHAIRMAN CATANACH: All in favor?

2 COMMISSIONER BALCH: Aye.

3 COMMISSIONER PADILLA: Aye.

4 CHAIRMAN CATANACH: The motion to adopt  
5 today's agenda is passed.

6 Commissioners, also in your packet are the  
7 draft minutes from the February 11, 2016 commission  
8 meeting. Commissioners, have you -- do you have any  
9 changes to the minutes, and if not is there a motion to  
10 adopt the minutes?

11 COMMISSIONER PADILLA: I would so move.

12 COMMISSIONER BALCH: And I would second.

13 CHAIRMAN CATANACH: All in favor.

14 COMMISSIONER PADILLA: Aye.

15 COMMISSIONER BALCH: Aye.

16 CHAIRMAN CATANACH: The motion to adopt the  
17 minutes from the February 11, 2016 commission meeting is  
18 passed.

19 The next order of business is the approval  
20 and adoption of an Order in Case No. 15366. This case was  
21 on the docket for the February 11th commission, and a  
22 motion by Matador Production Company to dismiss the de  
23 novo application filed by Amtex Energy Company was heard  
24 on that date. Mr. Brancard, working in conjunction with  
25 the attorneys in this case, has finalized an Order in that

1 case, and I believe he submitted that for review of the  
2 Order prior to this hearing, and I believe that there's  
3 some additional changes that were made after that.

4 MR. BRANCARD: Mr. Chairman, I got comments  
5 back from two of the commissioners, yourself and  
6 Commissioner Balch, and I just changed a few of the words  
7 that you-all saw problems with.

8 CHAIRMAN CATANACH: Commissioners I presume  
9 you have reviewed the Order. Do we have any additional  
10 discussion with regards to that order?

11 COMMISSIONER BALCH: I have just one simple  
12 change, and I think...

13 CHAIRMAN CATANACH: I just had a couple of  
14 minor changes on page 1, I believe, and they were just  
15 minor, and I believe those were made, Mr. Brancard.

16 MR. BRANCARD: Right.

17 CHAIRMAN CATANACH: So with no further  
18 discussion, do I hear a notion to adopt and approve this  
19 Order?

20 COMMISSIONER BALCH: I will make a motion  
21 to adopt the Order.

22 COMMISSIONER PADILLA: I would second.

23 CHAIRMAN CATANACH: All in favor?

24 COMMISSIONER BALCH: Aye.

25 COMMISSIONER PADILLA: Aye.

1 CHAIRMAN CATANACH: Motion to adopt and  
2 approve Order No. 14097-A is hereby passed.

3 Just for information only, there was  
4 another case on the docket today, Case No. 15278, which I  
5 believe was the application of High Roller -- was a de  
6 novo application, High Roller Wells, LLC.

7 Prior to the hearing we had a request from  
8 Mewbourne Oil Company to continue the case to the  
9 commission docket scheduled for May 19th. All parties  
10 involved in that case agreed to the continuance, and as a  
11 result we issued Order No. R14091-A on March 2nd, 2016,  
12 and this Order simply continued this case to the May 19th  
13 docket.

14 So I believe that's all the direct business  
15 we have.

16 At this time we will call Case No. 15443,  
17 which is the application of the New Mexico Oil  
18 Conservation Division to amend certain provisions of Title  
19 19, Chapter 15, Part 36 of the New Mexico Administrative  
20 Code concerning surface waste management facilities;  
21 Part 35 of the New Mexico Administrative Code concerning  
22 waste disposal; and Part 2 of the New Mexico  
23 Administrative Code concerning the definition of oil field  
24 waste.

25 At this time I will call for appearances in

1 this case.

2 MR. WADE: Gabriel Wade on behalf of the  
3 Oil Conservation Division. I have two witnesses, Jim  
4 Griswold and Allison Marks.

5 MR. FELDEWERT: Mr. Chairman, members of  
6 the commission, Michael Feldewert and Adam Rankin of the  
7 Santa Fe office of Holland and Hart here on behalf of the  
8 New Mexico Oil and Gas Association. We do not have any  
9 witnesses here today.

10 CHAIRMAN CATANACH: Any additional  
11 appearances?

12 MS. FOSTER: Karin Foster on behalf of the  
13 Independent Petroleum Association of New Mexico. I did  
14 not file a prehearing statement in time but we would wish  
15 to make public comments. I intended to file a prehearing  
16 statement but I didn't do it in time, so I understand I am  
17 out. I wouldn't have any witnesses anyway.

18 CHAIRMAN CATANACH: Thank you, Ms. Foster.  
19 So I guess let's present the case first and  
20 then we will go to public comments after the testimony.

21 So will the witnesses please stand and be  
22 sworn in.

23 MR. WADE: I only have one witness  
24 available to be sworn in at this time, so Ms. Marks will  
25 have to be sworn in later.

1 (Note: The witness Jim Griswold was  
2 sworn.)

3 MR. WADE: So, Mr. Chairman, members of the  
4 commission, before you you have an application to amend  
5 three rules. That would be Rule 36, Surface Waste  
6 Management rule; 2.7 O(3) which, is the definition of oil  
7 field waste; and Rule 35 which is titled Waste Disposal.

8 You will see all three of these proposed  
9 rule changes in your exhibit binder. Rule 36 is  
10 Exhibit 1. And just to orient yourself, if you look  
11 through any of these proposed rule amendments you will see  
12 the new language underlined and current language that we  
13 want to remove struck out, boxed and struck out.

14 So 36 would be Exhibit 1, the definition  
15 change to 2.7 O(3) is Exhibit 2, and Rule 35 proposed  
16 amendments is Exhibit 3.

17 If you flip to Exhibit 4, what I tried to  
18 do is cross reference the proposed amendments to the  
19 current rules. And it's a real brief cross reference  
20 which basically shows what the proposed rule number is and  
21 how it relates to the current rule, so if there is a  
22 renumbering it will reflect that in this index.

23 We will go into much greater detail  
24 regarding this.

25 I also put before you copies of the current

1 Rule 35 and current Rule 36 in case you want to look at  
2 that complete rule for reference.

3 In general the amendment to 36 looks to  
4 create a more efficient method of making application that  
5 clarifies the administrative approval process and notice  
6 requirements. It defines -- another proposed amendment is  
7 to define the definition of operator of a surface waste  
8 management facility and to clarify certain provisions of  
9 the financial assurance requirements.

10 The amendment to 2.7 0(3) seeks to define  
11 oil field waste in accordance with the Oil and Gas Act  
12 definitions.

13 And the amendments to 35 clarify how oil  
14 field waste will be disposed of and also defines oil field  
15 waste to be consistent with the new proposed Rule 2.7 and  
16 the Oil and Gas Act.

17 I do have two witnesses today, Mr. Griswold  
18 and -- I think we can just call him and get into the  
19 proposed rule amendment change to 36 I'd like to take  
20 first.

21 JIM GRISWOLD,

22 having been duly sworn testified as follows:

23 EXAMINATION

24 BY MR. WADE:

25 Q. If you could state your name for the record,

1 please.

2 A. Jim Griswold.

3 Q. Where are you employed?

4 A. Here at the OCD. I'm the environmental bureau  
5 chief.

6 Q. Are what are your duties there?

7 A. Basically oversee the environmental aspects of  
8 our regulations in the oil and gas business in New Mexico.

9 Q. We're here today to talk about a proposed rule  
10 amendment to Rule 36 which deals with surface waste  
11 management facilities. Just for the benefit of the  
12 commission, can you tell the commission what surface waste  
13 management facilities are.

14 A. Yes. They are facilities primarily dedicated to  
15 the collection, storage, treatment and/or disposal of oil  
16 field waste. Things not included in the definition under  
17 regulation are: Produced water disposal wells, which are  
18 handled under Part 26 of the Oil and Gas Regulations; any  
19 disposal wells that are handled under the Water Quality  
20 Act; temporary pits; below-grade tanks; and clean-up sites  
21 where spills have occurred.

22 Q. And are you familiar with the current Rule 36?

23 A. Yes, I am.

24 Q. And have you applied the current Rule 36 to  
25 surface waste management facility applications and

1 permitting?

2 A. Yes. Personally been involved since I have been  
3 bureau chief in the last year and a half or so in the  
4 recent permitting of two facilities under what we refer to  
5 as Part 36 the surface waste management regs.

6 We also currently have in the works five  
7 new facility applications under consideration by the  
8 bureau.

9 Q. Have you identified any problems or issues with  
10 the current rule that affects the application permitting  
11 process?

12 A. Yes. The current rule is confusing both to the  
13 Division, as well as it appears to be confusing to the  
14 applicants.

15 These surface waste management facility  
16 applications are highly technical documents and extremely  
17 detailed. The proposed process places firm deadlines on  
18 the Division to determine if an application is approvable  
19 but still allow a dialogue between the Division and any  
20 applicant to take place.

21 If one of these applications is not readily  
22 approvable, either with or without conditions, the  
23 Division has the option of rev- -- or, excuse me, the  
24 applicant has the option of either revising or withdrawing  
25 their application, along with the ability to appeal that

1 decision by the Division to the Division, potentially  
2 through the commission, as well.

3           The current rule does not, in my opinion,  
4 provide the Division with sufficient flexibility at this  
5 point, because all we can do is either approve or deny an  
6 application. Furthermore, the transitional provisions of  
7 the current rule, which covers the vast majority of our  
8 operating facilities, have a cap on the financial  
9 assurance of \$250,000. That amount is, in my opinion  
10 again, woefully insufficient to properly close any  
11 facility in a manner which is protective of public health  
12 and the environment.

13           Q. And you helped to propose the amendments to the  
14 proposed Rule 36?

15           A. Yes, I did.

16           Q. And what was your role in drafting these  
17 amendments?

18           A. A working group was established last summer, the  
19 summer of 2015, and I actually headed up the working  
20 group, specifically to address the nontechnical portions  
21 of Part 36, the administrative process and financial  
22 assurance. The members of that working group were myself;  
23 representatives from the Department's Office of General  
24 Counsel, two individuals there; a senior vice president  
25 for engineering operations for R360 Environmental

1 Solutions, one of our largest surface waste management  
2 operations in the state; the president of Benson Disposal  
3 up in Northwest New Mexico, also in the surface waste  
4 management business; representatives from IPA, the  
5 Independent Petroleum Association of New Mexico; a  
6 representative from Concho Oil and Gas, their governmental  
7 relations person; as well as an associate from Holland &  
8 Hart, Adam actually, that is deeply involved in a number  
9 of permit applications both existing and proposed.

10 So OCD brought the initial proposal to this  
11 working group. We met on multiple occasions in person, as  
12 well as conversations as a group by email, and that ended  
13 up with the application the commission sees today.

14 Q. And that would be the three rules, not just 36?

15 A. Not just 36. We felt there needed to be  
16 clarifications in both Part 2 of the definitions and  
17 Part 35 dealing with waste in general, to get things  
18 consistent within the regulations.

19 MR. WADE: But we are going to talk about  
20 36 first, and for the commission's benefit, in your  
21 exhibit binder what we tried to do is, for the most part,  
22 break it down subsection by subsection to show you the  
23 proposed rule and the current rule. At some places that  
24 wasn't easy to do so the exhibits will look slightly  
25 different, but we will try to stay in number order as much

1 as possible and walk through each part of this.

2 So if you would turn in your exhibit books  
3 to Exhibit 5. I apologize it's coming up so small on the  
4 screen.

5 Q. What is the change that is proposed in  
6 Exhibit 5?

7 A. We wanted, the Division wanted clarification as  
8 to who the operator of the surface waste management  
9 facility is under Part 36. We will discuss this some more  
10 in a second here with one of the next exhibits.

11 But the definition of "operator" under  
12 Part 2 of the regulation is kind of broad, because it also  
13 gives an operator of oil and gas wells, and their role in  
14 that is completely different than the roles typically  
15 associated with what we refer to as an operator of a  
16 surface waste management facility. It's not spelled out  
17 well enough, in our opinion, in Part 2.

18 There is also a change to an incorrect  
19 internal rule reference here. Subsection S of 19.15.1.7  
20 will be corrected to 19.15.2.7.

21 MR. WADE: That particular change, it was  
22 an incorrect reference even in the current rule to  
23 definitions. The definitions are found in 2 not 1.

24 You're going to see in the future, and I  
25 will have them listed, a lot of changes to internal

1 references. As the proposed rules changed the current  
2 rules' ordering, we had to go back and make sure that  
3 everything was consistent within the rule. What I tried  
4 to do is more make a list of them so we don't have to  
5 discuss each one of them at length, but they will be in  
6 the record because they will be listed, if that's okay  
7 with the commission.

8 Q. So if you could turn to Exhibit 6, please.

9 What's the proposed amendment here?

10 A. We are adding the phrase post closure, which we  
11 will discuss further when we talk about the amendment to  
12 Part 36.18, closure/post closure.

13 But generally we are trying to get  
14 consistent language throughout the rules.

15 MR. WADE: And again just if you look at  
16 the proposed you'll see a strike-out where we remove  
17 language and the underlining where we added language. You  
18 will see that throughout all the proposed amendments.

19 THE WITNESS: Almost any time going forward  
20 in this application at least, when you see the current  
21 rule says "closure" the proposed new rule will say  
22 "closure and post closure". So we are adding a phrase  
23 multiple times.

24 MR. WADE: We will talk about why when we  
25 discuss it a little more later.

1 Q. So if you could turn to Exhibit 7.

2 What is the change proposed here?

3 A. Uhm, well, we are changing the definition of  
4 operator. The Division wants the owner of the facility to  
5 be the one who owns the permit. The owner can contract  
6 with another entity to undertake the day-to-day  
7 operations, however the owner, not the contracted  
8 operator, is ultimately responsible for what goes on at  
9 the facility, and they both together must ensure the  
10 facility remains compliant with our regulations, and the  
11 owner must provide the financial assurance.

12 Q. In the current rules that is not explicit, is  
13 it?

14 A. No, it's not.

15 Q. And you often find the situation where somebody  
16 owns the facility but its actually operated by somebody  
17 else?

18 A. By somebody else.

19 Q. If you will turn to Exhibit 8, please.

20 We will just discuss --

21 A. Would you like me to discuss it, Gabe?

22 Q. Yes. Go ahead.

23 A. This is the first of a large series of similar  
24 changes you are going to see throughout the proposed rule.  
25 And all we're doing here, this is the first time, we are

1 striking the word "safety". I'm not clear how this  
2 language originally got in the regulations, but the  
3 Division does not have authority over worker safety, OSHA  
4 does, so we want to make the change to make it consistent  
5 with the statutory language. And, like I said, we are  
6 going to see this a lot throughout the proposed  
7 application.

8 MR. WADE: And I'm assuming if any  
9 questions come from the commission, they will be asked as  
10 we go through, or...

11 CHAIRMAN CATANACH: Well, what is the  
12 pleasure of the commission in that regard? Is it more  
13 efficient to ask questions as we go through the changes?

14 COMMISSIONER BALCH: Well, I had a question  
15 on Exhibit 5.

16 COMMISSIONER PADILLA: So they don't all  
17 stack up at the end.

18 COMMISSIONER BALCH: But then you wouldn't  
19 see the importance of me changing the way I ask the  
20 questions.

21 So I'm not certain how you wanted to  
22 proceed on that. I'm not certain I'm comfortable either  
23 way.

24 CHAIRMAN CATANACH: Okay. Well, let's just  
25 wait till the end and we will just go back.

1 Q. (BY MR. WADE) So just staying on Exhibit 8 for  
2 one more minute, the language that the commission will see  
3 consistently throughout the rule will read "Protection of  
4 fresh water, public health or the environment" without  
5 "safety" being included?

6 A. Yes.

7 Q. If you will turn to Exhibit 9, please. Go  
8 ahead.

9 A. This is basically -- the reason for the change  
10 is the same as that in Exhibit 7 from just a moment ago.  
11 Again the Division wants the owner of the facility to be  
12 the one who holds the permit. That doesn't preclude the  
13 owner from contracting another third party to operate the  
14 day-to-day operations, but they are both responsible for  
15 the operation that goes on at the facility and that the  
16 facility remain compliant with our regulations.

17 Q. Just to be clear, the applicant also has to be  
18 the owner?

19 A. Has to be the owner, yes.

20 Q. If you will turn to Exhibit 10.

21 A. Okay. Here we have changed our reference in the  
22 current rule in terms of the notification provision from  
23 one mile to one-half mile. The reason for the change is  
24 to make Part 36 consistent within itself, and specifically  
25 19.15.36.9A, and other Notice requirements by the OCD in

1 other rules. For instance our injection rule, which is  
2 19.15.6 we use a half-mile radius in those rules, as well.

3 So we are just trying to make this consistent.  
4 Again I'm not clear as to why one mile got into existing  
5 Part 36, but there it is.

6 We have also included the phrase "based  
7 upon the records of the applicable county clerk or clerk's  
8 office," because the working group felt that the clerk's  
9 office was the most efficient way to find property  
10 records.

11 Q. You might want to catch yourself. I'm not sure  
12 how helpful the overhead is, but -- never mind I was on  
13 the wrong number.

14 A. Okay.

15 Q. So if we turn to Exhibit 11.

16 A. Well, again, for the first part you are going to  
17 see we are going to strike the word "safety," for the same  
18 reasons as before, but the larger change was to put in the  
19 regulations that a closure and post closure plan must be  
20 provided as part of an application for a surface waste  
21 management facility, make that clear. And that clarifies  
22 that the closure requirements in 36.18 are what is  
23 necessary to close a facility and is part of our  
24 application.

25 Q. And there is a small internal reference change,

1 as well. In the current language it refers back to D of  
2 36.18. Now it refers back to subsections A through F.  
3 Does that include all the requirements of closure and post  
4 closure?

5 A. Yes, it does.

6 Q. Turn to Exhibit 12.

7 A. Okay. In Exhibit 12 the change that we are  
8 proposing here is to add a minor modification form to make  
9 it easier for a permittee, because currently minor mods  
10 are subject to Part 36.8 notice requirements and other  
11 demonstrations that should not be necessary for a minor  
12 mod.

13 So this new form, which we refer to as  
14 C-137A -- currently form C-137 is the application form we  
15 use for a surface waste management facility, so proposed  
16 C-137A would be a briefer application more to the point of  
17 a minor modification for such a facility.

18 Q. Is that because major modifications have certain  
19 requirements?

20 A. Yeah, on the public notice in particular makes  
21 it a bit problematic. Again, the language of the current  
22 Part 36 is confusing both to a regulator and to an  
23 applicant as to what you may need to do in such a case, so  
24 we want to clear it up.

25 Q. If you will turn to Exhibit 13.

1           A.     Okay.  Here we are changing the entire  
2 administrative process and notice requirements to try to  
3 make things more efficient.  The existing administrative  
4 completeness determination under regulations will go away.

5                     We will lay out that administrative process  
6 here in the next two exhibits as to what we propose it  
7 should be.

8           Q.     And that's really the next exhibit?

9           A.     Right.

10          Q.     So if you will turn to Exhibit 14.  What does  
11 this specific exhibit show?

12          A.     Uh, what does it -- that's a long exhibit.

13          Q.     Well, we have Exhibit 14 and we break it down  
14 further in 15.

15          A.     In 15 we'll actually discuss --

16          Q.     So how do you want to discuss it?  Do you want  
17 to just note that Exhibit 14 shows a complete rewrite of  
18 36.9.  And yes it's a long exhibit, but the entire section  
19 of 36.9 we struck and rewrote?

20                     If you flip to Exhibit 15, we broke it down  
21 into smaller more hopefully digestible parts, including a  
22 flow chart.

23                     So depending on how you want to discuss it,  
24 Jim.

25          A.     The first page of that exhibit, the two-page

1 exhibit, is a summary, and we can go through that. But if  
2 you want to turn to the second page.

3 CHAIRMAN CATANACH: Which exhibit are we  
4 talking about?

5 THE WITNESS: Exhibit 15. I'm sorry.

6 But the second page of Exhibit 15 is  
7 actually a process diagram, and we can run through that.  
8 I just think visually people seem to grasp things more  
9 with flow charts rather than just reading kind of stuff.  
10 But I guess that's at the discretion of the commission as  
11 to which one you want to proceed on.

12 Q. (BY MR. WADE) Maybe we can take a step back and  
13 discuss the current rule.

14 Are there issues with the application  
15 process under the current rule?

16 A. Yes. There are multiple issues that we are  
17 trying to address here, one of which -- the working group  
18 felt was this administrative completeness determination  
19 process.

20 In actuality it shouldn't take too long for  
21 the agency to determine if an application is  
22 administratively complete or not. Less than an afternoon,  
23 really. Currently the administrative completeness  
24 determination process can take -- it's allowed to take as  
25 much as 30 days under the current regs, and that's just

1 not necessary. There's also a public notice provision  
2 that comes in that's incumbent both on the Division and on  
3 the applicant at that administrative completeness  
4 determination phase.

5           Again the language is not really clear in  
6 this regard sometimes as to what is required of both the  
7 Division and the applicant, and so we're trying to  
8 streamline that process. Again, put -- keep an onus on  
9 the Division to process an application in a timely fashion  
10 and to interact with an applicant, without necessarily  
11 denying the permit, to get issues addressed.

12           Q. Is the current rule very flexible in that  
13 back-and-forth process?

14           A. No, it's not. Basically when I've gotten an  
15 application in front of me and we find a significant  
16 deficiency in it, even if we talk with the applicant, we  
17 can come to a resolution, there's nothing in the  
18 administrative process now that effectively or efficiently  
19 allows that modification to occur. Either the Division  
20 has to incorporate the change itself into a condition of  
21 approval on the permit or it has to deny the permit.

22           Q. Okay. So do you want to go to the second page  
23 of Exhibit 15 and discuss the flow chart?

24           A. I would like to.

25           Q. And this of course is the flow chart for the

1 proposed...

2 A. Proposed change.

3 Q. As to 36.9.

4 A. So I'm going to -- maybe we can see on the T.V.  
5 the little cursor.

6 So the application comes in, is submitted  
7 to the Division. At that point the Division will post  
8 notice on our website that the application, that that  
9 application has reached our desk. That Division review  
10 process is proposed to be no more than 90 days long.  
11 Currently the review process is 60 days long but that  
12 administrative completeness determination process in front  
13 of the additional 30 days, we just put the two together to  
14 put it as 90 days, which is the same amount of time which  
15 we were really doing anyway in terms of the technical  
16 review. So we haven't added any additional time on here.

17 Two things can happen as part of that  
18 review. Either we can approve the application, with or  
19 without conditions, or we deem it's not approvable. If  
20 it's not approvable we see in that flow chart that's when  
21 we divert off to the right, and at that point the Division  
22 has 60 days after it's determined that the application is  
23 not approvable to write a very specific denial letter to  
24 the applicant saying your application is not approvable  
25 and here's explicitly why.

1                   Then that kind of puts the ball in the  
2 applicant's court as to whether or not they want to revise  
3 their application. And they've got up to 60 days to  
4 revise those issues that we found problems with and  
5 resubmit back to the Division. They can also decide to  
6 withdraw the application without prejudice.

7                   If the Division does not hear a response  
8 within actually 70 days, the 60 days that they had to  
9 revise the application plus 10 more, then the Division can  
10 deny the application or -- and it's not actually shown on  
11 that flow chart there. Excuse me for forgetting that.  
12 But if the applicant has a problem with the reasons given  
13 by the Division for saying this application is not  
14 approvable, and they disagree with them, they have the  
15 right to request a hearing.

16                Q.    So having that language explicit does a couple  
17 of things. It allows the applicant the ability to either  
18 address the issues that the OCD raised, or it allows the  
19 applicant the ability to go to hearing and have specific  
20 grounds to go to hearing on?

21                A.    Yeah. Because now they have got a piece of  
22 paper, decision by the Division that they can take to  
23 hearing.

24                Q.    Okay.

25                A.    And then the other option obviously for them is

1 to withdraw the application.

2 Q. So this is where the rule builds in some  
3 flexibility?

4 A. Right. There's nothing about what we are  
5 proposing here that wants to preclude an applicant from  
6 speaking with technical staff at the Division at any time.

7 Q. There's both formal flexibility and you're able  
8 to informally --

9 A. Informal flexibility, as well.

10 Q. Okay.

11 A. If the Division were to decide that the  
12 application is approvable then it's got an additional 30  
13 days to develop what we call a proposed decision, and at  
14 that point we start what would otherwise be referred to as  
15 the normal public notice process, and that's when the  
16 Division will renotice itself and the applicant will  
17 notice, per those provisions in the proposal, the proposed  
18 changes as to adjoining interest owner. But there is not  
19 just an application out there but what the Division's  
20 decision is on that.

21 And then that public notice time period is  
22 an additional 90 days at that point, and so either a  
23 hearing can be requested or no hearing is requested, in  
24 which case we could just go to a final decision on the  
25 permit at that point. But if a hearing is requested then

1 we have the option now under the proposed language to have  
2 it be an administrative hearing, potentially, within the  
3 Division.

4 There's also a provision within here, and  
5 we will talk about it in a bit, that if the Division puts  
6 a condition of approval on there that's outside our  
7 explicit regulatory authority that a hearing can be held  
8 in that regard. I think it has to be held in that regard.

9 Q. It would be the applicant requesting the  
10 hearing?

11 A. Well, I think -- if I read the language right,  
12 or if I remember the language right, that almost forces  
13 that a hearing be held. But again it doesn't necessarily  
14 have to be a commission hearing, it could be an  
15 administrative hearing within the Division.

16 So the hearing would occur, and there would  
17 be either an unfavorable outcome to the hearing in which  
18 the application would be denied, or a favorable outcome to  
19 the hearing wherein we go to final decision. At that  
20 point then, before the permit is actually issued it is now  
21 incumbent upon the applicant to provide the financial  
22 assurance instrument to the Division, and once we are in  
23 receipt of that and acknowledge and approve it, then the  
24 permit is actually issued.

25 So that's the new process as laid out.

1                   In the existing Part 36 actually the permit  
2 is issued and then it's basically stated within the permit  
3 that the applicant needs to provide the financial  
4 assurance to the Division, but we have kind of switched  
5 that now, we're saying: No, you have to have FA in hand  
6 before your permit is formally issued.

7           Q.    I know on your flow chart you went from Proposed  
8 Decision down to Final Decision. Did you go off to the  
9 right there for --

10          A.    That was the hearing, yeah.

11                   MR. WADE: Okay. Now, this is the biggest  
12 change within the rule by far, and maybe the most  
13 confusing, so this may be one area where if you have any  
14 questions we can talk about them immediately.

15                   Essentially what it does is we almost  
16 ignore the current rule, because this changes quite a bit,  
17 that trying to correlate between the two doesn't really  
18 make a lot of sense. There are some correlations but what  
19 we did is try to lay out what the new process is.

20                   THE WITNESS: If I may, the prior page in  
21 Exhibit 15 where it's got this actually in words written  
22 out, may be helpful in that regard, reading through that.  
23 I was trying to take those words and put it into a  
24 picture.

25                   COMMISSIONER PADILLA: I have a couple of

1 questions for you, Mr. Griswold.

2 EXAMINATION

3 BY COMMISSIONER PADILLA:

4 Q. The flow chart indicates that the revision of  
5 the application -- the arrows out of that box basically  
6 are to denial.

7 Would the revised application go back to  
8 the left there laterally to Division review again?

9 A. Yes. It comes -- That's where it says yes, and  
10 coming out the top and back around into the...

11 Q. There you go.

12 My second question is -- well, I'm just  
13 asking. I'm wondering if you could give us more  
14 clarification on the hearing process, the old versus the  
15 new.

16 A. Well, I'm sorry, Commissioner Padilla, I  
17 probably can't because I'm not aware of anybody going  
18 through a hearing under the current Part 36. That's part  
19 of the reason why we felt the changes were necessary, not  
20 just from the Division's point of view, but it was a  
21 cumbersome process. But we weren't getting applications  
22 from them, and it's only been most recently now -- like I  
23 said, I've got five applications pending, that we kind of  
24 developed a more workable -- we think is maybe a more  
25 workable situation there.

1                   But we felt like we really needed to clean  
2 the regulations up and make it easier.

3                   MR. WADE: I could speak to that some if  
4 you would like.

5                   COMMISSIONER PADILLA: Is there any real  
6 change?

7                   MR. WADE: I think that there is. During  
8 the work group discussions the issue was raised that we're  
9 not -- sometimes the OCD isn't even putting in reasons for  
10 denial for applications that are clear enough to take and  
11 go ahead and appeal, and it never seems to get to a final  
12 decision point. And applicants need a final decision to  
13 make an appeal.

14                   So sometimes these applications would just  
15 keep being worked and reworked and reworked but never got  
16 to a point where an applicant could say now it's time to  
17 take this to a higher level and appeal it.

18                   So this rule allows dates certain and gives  
19 the mechanism, including that language where a denial  
20 letter has to be explicit. That gives the applicant very  
21 specific information and a Final Order to where they can  
22 appeal.

23                   THE WITNESS: Something they can have a  
24 hearing about, Commissioner Padilla.

25                   Q. (BY COMMISSIONER PADILLA) Last question.

1                   You mentioned this is a streamlining of the  
2 process in some regards.

3           A.    We hope.

4           Q.    But you're still basically at 90 days.

5           A.    Yes.

6           Q.    Versus the old 90 days, 30 and 60.

7           A.    Right.

8           Q.    Uhm, so where do you see that streamlining  
9 coming in?

10          A.    BOY, it's almost a political question, isn't it.  
11 You know, if I have enough staff to do everything we've  
12 got to do.

13                   I just feel this process, almost regardless  
14 of what my staffing levels may be or the number of  
15 applications I've got in, it makes it explicit and puts  
16 the onus on the Division to process this darn thing and  
17 come to a decision one way or the other:  Either to  
18 approve it, with conditions or without, or deny the darn  
19 thing, and if you are going to deny it give it a reason.  
20 And it's got to be a reason based on the application  
21 itself, not actually because I don't have enough time or  
22 manpower to get something done.

23                   MR. WADE:  The way the current rule reads  
24 it broke down the time periods and then had certain  
25 requirements for the time periods.  So in other words if

1 we saw something was not complete, that was once process,  
2 and then it would break down, and I believe there is  
3 notice between the admin complete and the next step, which  
4 is what in the current rule is called a tentative  
5 decision.

6 So there was an additional notice in that  
7 there we didn't feel was really required, and by putting  
8 the notice where it really belongs on a proposed decision  
9 is really where a lot of streamlining comes in. We are  
10 hopefully knocking out a level of bureaucratic action.

11 THE WITNESS: Right. We were trained to at  
12 times take advantage of these kind of windows in there to  
13 give us more time to do a technical review on this  
14 document, and it was just not right.

15 Q. (BY COMMISSIONER PADILLA) I imagine the  
16 flexibility would give the ability to give -- actually  
17 feedback would allow to streamline, as well, rather than  
18 the black-and-white answer is yes or no.

19 A. Well, a significant --

20 Q. In other words, You spend less time going around  
21 in circles.

22 A. A significant change that we've implemented  
23 within the Division outside the regulations is we have  
24 actually identified some third-party engineering firms and  
25 the Division will contract with them to help assist us in

1 the review process.

2 I don't think that that process of  
3 third-party contracting or review is something that needs  
4 to be incorporated into the regulations.

5 MR. WADE: There is specific language in  
6 the proposed rule where, you know, nothing precludes  
7 informal discussion, and that is where the rubber hits the  
8 road. If we can see applications and help applicants work  
9 on their application without adhering to hard -- you know,  
10 hard-line timetables, then that does help quite a bit.

11 THE WITNESS: Because we could conceivably  
12 go around that upper loop as many times as it takes.

13 Q. (BY COMMISSIONER PADILLA) Actively working on  
14 it?

15 A. Just trying to let the word go out that if  
16 you're thinking about applying for a surface waste  
17 management facility, come talk to us before you ever  
18 submit an application and submit it in the draft process  
19 because then we don't have the time constraints on it and  
20 we will work back and forth on it. That is trying to work  
21 well, too.

22 But I mean I get any entities that  
23 necessarily wants a surface waste management facility they  
24 may not come to the Division first anyway, they may just  
25 file the application and then we are locked into a time

1 schedule and process that we don't think is very  
2 efficient.

3 COMMISSIONER PADILLA: Thank you.

4 EXAMINATION

5 BY COMMISSIONER BALCH:

6 Q. Good morning, Mr. Griswold.

7 A. Good morning.

8 Q. How many applications are we talking about in an  
9 average year?

10 A. Well, in my eight years here at the Division we  
11 only got applications for new facilities in the last two  
12 years. Right now we have currently got, say, five  
13 applications on the desk and two processed in the last --

14 Q. So five in the last two years?

15 A. Yeah.

16 Q. Will the changes to the rules overall, will that  
17 increase overall applications, do you think?

18 A. Our hope is that it would, actually.

19 Q. So --

20 A. Because I've asked some of the applicants now:  
21 Given the downturn, why am I seeing more applications now?  
22 And the general response I get is when there is actually a  
23 downturn in drilling is the time to get a surface waste  
24 management facility permitted so that you're ready to go  
25 when things go back up. So that has more to do with why

1 I'm seeing so many applications.

2 Q. Idle personnel, maybe.

3 I am having a little bit of a hard time  
4 will unraveling the timing. There is two ways I can look  
5 at the timing. I think what the intent is, and correct me  
6 if I'm wrong, is within 30 days you decide if it's  
7 complete. If it is and you're going to deny it, you have  
8 another 30 days to tell them why, or start that loop on  
9 the side where you're negotiating. If you are going to  
10 approve it then you have another 60 days going down the  
11 left-hand side of your chart to come up with your proposed  
12 decision. That would be 90 days from receipt to proposed  
13 decision.

14 That's one way I read it. The other way to  
15 read it is you have 90 days to do the revision review,  
16 then you have 30 days if you are going to want them to  
17 make changes, or 60 days if you are going to approve it  
18 with your modifications.

19 A. Well, currently under regulation that first 30  
20 days of administrative completeness process really doesn't  
21 have anything to do technically with the application. It  
22 can be a very poor technical application but nonetheless  
23 be administratively complete. And it's specific in the  
24 regulations what determines administrative completeness:  
25 names and addresses, those kinds of things.

1 Q. So I submit an application.

2 A. Right.

3 Q. Thirty days you are going to notice me that the  
4 application is complete?

5 A. No. Now when you submit the application there  
6 is no administrative completeness determination. No  
7 formal one.

8 Q. Under the new rule?

9 A. Under the new rule I've got 90 days to review  
10 it. And we are really looking for what's technically  
11 pertinent about the application: Where are you going to  
12 put it, how are you going to build it, how are you going  
13 to operate it?

14 Q. With regards to the Division, when are you going  
15 to evaluate the completeness of the application? Is that  
16 immediate?

17 A. Like I said, there is no formal completeness  
18 determination made. And during that 90-day process, once  
19 we got it under Division review if I see there's a blank  
20 is missing, you didn't fill something in, who are you, who  
21 are your officers, those kind of things that we will want  
22 to know, I simply call you up and ask you.

23 Q. So does that put that information of course for  
24 nonapprovable? That puts it in the nonapprovable  
25 category?

1           A.    It could if I don't get a response in a timely  
2 fashion.

3           Q.    So --

4           A.    If I don't hear within that 90-day period of  
5 time. If I don't get a response back, yes, then the  
6 application is nonapprovable. Then it would say in that  
7 nonapproving letter why it's not approvable.

8           Q.    So I turn in an application, it's deemed not  
9 approvable. At what time period -- is that the 90 days  
10 then that you can tell me it's not approvable?

11          A.    No longer than.

12          Q.    No longer than.

13          A.    Right.

14          Q.    So within that 90-day period you're going to  
15 evaluate for completeness. If it's not complete you are  
16 going to ask for feedback, which would cause a revised  
17 application; is that correct?

18          A.    Uhm, I'm not sure that I would actually issue a  
19 nonapprovable. If there's a dialogue going on between the  
20 applicant and the Division and we haven't reached the end  
21 of our 90 days then why would I -- I don't think I would  
22 disallow the application and deem it nonapprovable at that  
23 point.

24          Q.    Let me ask this a different way.

25                               From application to the completion of the

1 Division review, that is a maximum of 90 days?

2 A. Yes, sir.

3 Q. So it could be 90 days before you start even to  
4 negotiate revising the application.

5 A. No, sir. I would -- the Division should be  
6 negotiating -- that is probably not the best word --  
7 revision of the applications even within the 90 days, not  
8 wait.

9 Q. Somewhere in there you would be saying this is  
10 not approvable in this form, can you make these revisions,  
11 and they would either respond or not. Right?

12 So it -- I guess at least to me it's not  
13 clear in the way the rule is written the sequence of  
14 timing.

15 A. Okay.

16 Q. It looks like -- I mean, I really read it two  
17 different ways, and you just outlined a third way that I  
18 hadn't read it in yet. So looks like --

19 A. And the current regs are similar in that regard.  
20 You can read and come up with different --

21 Q. I understand that's probably confusing. I just  
22 want to make sure that what we end up with is also not  
23 confusing.

24 So I wonder if there needs to be some sort  
25 of notice of completeness of application.

1 I think that was tried, they tried to  
2 capture that in the original -- I'm not sure if that was  
3 captured in the original rule or not.

4 A. It was not, because, like I said, the current  
5 administrative completeness determination, those are not  
6 the issues that we have with typical applications, they  
7 are technical issues, and the administrative completeness  
8 does not deal with that.

9 Q. This is really just checking a bunch of boxes  
10 making sure that the right files are attached.

11 A. Right.

12 Q. So --

13 A. Well, actually the administrative completeness  
14 determination does not even really require that, that all  
15 the right technical pieces be a part of it.

16 Q. But it does sound like if you have 90 days to  
17 make that determination somebody could put in an  
18 application and they might wait three months to find out  
19 that their application was not complete in a worst-case  
20 scenario: You are very busy or you have other things  
21 going on.

22 MR. WADE: Conceptually the idea of  
23 complete exists in the current rule. That whole concept  
24 we are getting rid of "completeness" in this rule, which  
25 is what we maybe identified. But what we are saying is,

1 is the application approval or not approvable.

2 COMMISSIONER BALCH: Approvable or not  
3 approvable.

4 MR. WADE: And that's the end of the 90  
5 days.

6 So the OCD would have 90 days after the  
7 submittal of the application, and it could be not  
8 approvable because things were not submitted, that would  
9 go to completeness, or it could be that the technical  
10 information was not sufficient.

11 Q. (BY COMMISSIONER BALCH) Okay. So then the  
12 other part that is not necessarily clear to me is: When  
13 does the -- so if you make a determination and say it's on  
14 day 90, would it have to have been on day 60 for you to  
15 have 30 days to come up with the reason why it was not  
16 approvable or is it built into the 90 days?

17 A. No. The Division has -- as proposed has 90 days  
18 to review it. If we deem -- and hopefully there is  
19 discussion going on with the applicant, the applicant at  
20 the time. If we decide it's not approvable, we have got  
21 an additional 60 days after the 90 to develop that letter  
22 and say -- blame me for the flow chart not being explicit  
23 enough, but the language we are proposing says all this.

24 Q. I have the 60 in the not approvable. I just  
25 didn't know when that started.

1           A.     It started when the Division decides it's not  
2     approvable.

3                         COMMISSIONER PADILLA:    So any point in that  
4     90, within that 90-day period you can start the clock on  
5     60 if you notify an operator?

6                         THE WITNESS:    I don't even know necessarily  
7     I have to notify him.  I can decide, worst case, that the  
8     application was not approvable the day it arrived, and  
9     I've got 60 days -- well, no more than a total of 150  
10    days.

11           Q.     (BY COMMISSIONER BALCH) You would have 150 days.

12           A.     But I could do it right then and there and write  
13    that nonapprovable letter saying this application is not  
14    approvable.  It's a single the piece of paper or such and  
15    such.

16           Q.     I guess in the interests of timing the  
17    applications, and maybe that's the way I was trying to  
18    read it, it seemed like if a decision was made one way or  
19    another then it triggered the 60 days either to give the  
20    Approvable With Conditions letter or give the  
21    Nonapprovable letter.

22           A.     Well, what industry was saying in the working  
23    group, Commissioner Balch, was that they wanted a specific  
24    reason why something wasn't approvable, rather than a  
25    letter coming from us, one paragraph, one page that says

1 this is not approvable, and not a reason why.

2 Q. I understand that.

3 A. One, it lacked clarity to where the problems may  
4 be in the application. And two, if I was hearing the  
5 working group right, they wanted a decision that they  
6 could take to hearing potentially. Is the Division being  
7 unreasonable in the requests or the reasons given for not  
8 approving? That there would be something to speak about  
9 in that hearing specifically.

10 Q. And the way you described it, there is zero to  
11 90 days, plus 60 for either Approvable or Not Approvable  
12 response for the Division. Are they comfortable with that  
13 five-month calendar?

14 A. Yes.

15 MR. WADE: It's slightly different than  
16 that. You actually have a 30-day period if the Division  
17 find it approvable to send out that letter, versus the 60  
18 days for not approvable. And there's a reason for that,  
19 that the approvable generally has less issues and can be  
20 written sooner, whereas if we find a lot of issues we  
21 actually need a little bit more time to make it really  
22 clear what the problems are for the applicant to address.

23 THE WITNESS: Because in essence that  
24 proposed decision is a draft permit. This is what your  
25 permit is going to look like. So that's why we need at

1 least 30 days on an approvable one, is to make sure -- and  
2 we're probably never going to get a perfect application  
3 that we simply approve, because the application is  
4 incorporated into the permit itself by reference, but any  
5 specific conditions that we may put on.

6 Q. (BY COMMISSIONER BALCH) So I envision a scenario  
7 if somebody turns in an application, you look at it on  
8 Day 7 and determine it's approvable, you get caught up in  
9 other work and then nearly three months later you start  
10 the process of giving them an official response.

11 So really they are not going to get an  
12 official response until 120 or 150 days into the process.

13 A. Okay.

14 Q. And I'm not certain if that's the most efficient  
15 way to do it. It seems like there maybe ought to be a  
16 step where you tell them it's approvable and at that point  
17 the other timers start. Maybe you wait all the way to 90  
18 days if you are busy, but if you want to streamline the  
19 process and it's an easy application for you to approve --

20 A. Well, they're never easy to approve. I mean,  
21 the technical review to define approvable is -- these  
22 things -- a typical application printed out is at a  
23 minimum eight inches thick with engineered drawings. They  
24 are not small.

25 Q. Okay. So an approvable or disapprovable

1 decision is very much likely to occur much later in that  
2 90-day process.

3 A. Right.

4 MR. WADE: And if it helps, the current  
5 rule, if you add up all the timelines is 120 days anyhow.  
6 So we are really there, we just got to that number in a  
7 different way.

8 THE WITNESS: Yes. And commissioner, as  
9 representing the Division in the working group, wanting to  
10 give myself as much time to do these things, the oil and  
11 gas industry and risk management said, no, you still need  
12 to stay within something reasonable. So that's why the  
13 deadlines are still in there.

14 Q. (BY COMMISSIONER BALCH) So how is completeness  
15 going to be determined? Presumably you are going to do  
16 that completeness of the application study pretty early  
17 on? Or are you going to do it just before you evaluate  
18 it?

19 A. Well, like I, say it's part of it. And maybe  
20 it's a miscommunication between us now.

21 The current completeness determination is  
22 inadequate in terms of is this application complete.

23 Q. That's why you're striking completeness in this  
24 new version of the rule?

25 A. I guess that is why they used the phrase

1 "administratively complete". It doesn't speak to the  
2 quality of the application. It says there's four or five  
3 boxes that need to be checked, all nontechnical, and you  
4 make an administratively complete determination at that  
5 point. It still may be an application that has serious  
6 problems with it technically that need to get resolved,  
7 and that's what chews up the time: One, identifying them;  
8 and two, rectifying them.

9 Another problem that we have seen going  
10 through our review is consistency throughout the  
11 application because they are so large.

12 COMMISSIONER BALCH: We will see if I'm the  
13 only person confused by the timing, but thank you for the  
14 clarifications.

15 MR. FELDEWERT: Can I ask a question here?

16 CHAIRMAN CATANACH: Go.

17 EXAMINATION

18 BY MR. FELDEWERT:

19 Q. So I'm understanding, Mr. Griswold, I'm  
20 looking at your flow chart, that the line you've got from  
21 Division review, that is the 90-day -- that is the first  
22 90-day period, right?

23 A. Within that box, that rectangle, there's 90  
24 days. No more than 90 days.

25 Q. So from the application down to Division review

1 is 90 days?

2 A. No. Division review essentially starts when the  
3 application shows up at your door, but you've got no more  
4 than 90 days to complete your review.

5 Q. Got it. So that is the first 90-day period.  
6 Then if you go to the right, it's not approvable for some  
7 reason, there's a built-in additional 60 days before you  
8 get notice to the applicant.

9 A. Right.

10 Q. At the worst-case scenario.

11 A. Right. And that is at basically the surface  
12 waste management -- well, the other members of the working  
13 group's request was because they wanted the Division to  
14 develop a specific document saying why something wasn't  
15 approvable.

16 Q. So there was a reason behind it.

17 A. Right.

18 Q. In other words that was a trade. We get this  
19 timeline but at the end of the process you get a written  
20 decision.

21 A. Uh-huh.

22 Q. Right? Okay. Whereas if you go down, if it's  
23 approvable so you go from that Division review down that  
24 line, that's a 30-day period at most where it's  
25 approvable, right?

1           A.    Right.

2           Q.    And if I'm understanding you, the concern was if  
3 you have any kind of administrative completeness  
4 determination within that time frame there's two problems  
5 there. One is that people's interpretation of what is and  
6 is not administratively complete can be a little fuzzy,  
7 right? It's not well defined sometimes.

8           A.    And potentially an answer could be provided that  
9 in truth is not correct but is still, to the Division's  
10 opinion, administratively complete.

11          Q.    And isn't the administrative completeness  
12 determination that was in the existing rule, isn't it safe  
13 to say that that is where some of the problem was, getting  
14 hung up in that administrative completeness cycle.

15                        Is that fair?

16          A.    It's not unfair. The reason it gets caught up  
17 in there are varied sometimes, though.

18          Q.    Is that why, then, the work group sat down and  
19 said: Okay. Let's eliminate the administrative  
20 completeness determination. Let's get a set time frame.  
21 And while it appears initially to be somewhat long, the  
22 benefit of that is that at the end of that time frame you  
23 get a written decision and you can proceed accordingly  
24 either to hearing or you can address the issues in the  
25 written decision?

1           A.     That is correct with one addition, is that there  
2     is a public notice portion that is currently in the  
3     regulations regarding that administratively complete  
4     determination.

5                         COMMISSIONER BALCH:   That's another 90-days  
6     notice?

7           A.     (Continued)   So there is actually no more time  
8     in this process than currently maximally exists in the  
9     regulations.   It's just clearer what you're doing, and  
10    you're eliminating that notice process on the applicant's  
11    part when all you're telling the people that you notice is  
12    that an application has been submitted and it's been  
13    deemed administratively complete, whatever that may mean.  
14    Whereas now we are actually noticing, the Division is  
15    noticing on their website immediately as soon as we get  
16    the application, but the applicant is not required to do  
17    notice until a decision has been handed down by the  
18    Division.

19           Q.     A written decision.

20           A.     Written decision.   Not only what the application  
21    is but what the decision of the Division is, including any  
22    additional conditions that the Division may be putting on  
23    that application.

24                         MR. FELDEWERT:   Thank you.

25                         CHAIRMAN CATANACH:   Couple of questions,

1 Jim.

2 EXAMINATION

3 BY CHAIRMAN CATANACH:

4 Q. After your 90-day review period, why do you feel  
5 it's necessary to have an additional 60 days to issue a  
6 denial or a letter?

7 A. Because potentially that denial letter -- well,  
8 one, it provides guidance to the applicant as to what  
9 needs to be fixed, what needs to be revised; and second,  
10 that letter is potentially the basis for a hearing.

11 That being said, you need to get it right.

12 Q. Okay. Now, during your initial evaluation of  
13 the application, how are changes handled?

14 If you guys see a problem with an  
15 application or it's deficient in some way, you have  
16 dialogue with the applicant?

17 A. There's nothing that precludes that. I think  
18 that's the best way that that would happen -- or be said.

19 Q. I guess my question is: At that point do you  
20 ask the applicant for the additional information, is he  
21 able to submit that, and would that require him to revise  
22 the application?

23 A. I would consider it to be a revision of the  
24 application but within that process, without it having to  
25 be nonapprovable.

1 Q. So you are not going to go out of that 90-loop a  
2 that point --

3 A. There is no requirement that I do that.

4 Q. -- back to the beginning.

5 A. No, sir. The clock starts the day that we  
6 receive the application.

7 Q. So during that 90-day period you're going to try  
8 to work with the applicant to get everything you need to  
9 approve that application.

10 A. Yes, sir.

11 Q. Without having to go back to the beginning --

12 A. Right.

13 Q. -- for them to submit a revised application.

14 A. And if that is not doable within the 90 days --  
15 no, actually the Division can't ask for an extension of  
16 time. If we can't get it done -- so there is an onus on  
17 both the Division's part and the applicant's part to get  
18 the application complete technically within a 90-day  
19 period and preclude this nonapprovable decision coming  
20 down.

21 Q. So the completeness review is actually part of  
22 the approvable review. I mean, you're going to be  
23 checking during that approvable review to make sure  
24 everything is there?

25 A. Right.

1 Q. So that's part of it. I mean, it's  
2 incorporated.

3 A. Yes. There are other portions of Part 36 that  
4 we are not proposing to change here that state explicitly  
5 what needs to be technically in an application. Those  
6 aren't being proposed to be changed as to what constitutes  
7 a full application. That's right.

8 Commissioner Balch earlier, when we say  
9 completeness versus administrative completeness, which is  
10 something that is spoken about in the current part 36,  
11 they are not the same thing.

12 COMMISSIONER BALCH: I'm beginning to  
13 understand the confusion with the current rule.

14 EXAMINATION

15 BY COMMISSIONER BALCH:

16 Q. So really during this 90 days, I think the  
17 intent is there's going to be a negotiation either to make  
18 the application approvable or define why it's not  
19 approvable if something can't be met.

20 Is there a reason at that 90-day tipping  
21 point to not simply notice them: Yes, we are preparing  
22 the 30-day letter; no, we are not preparing the 60-day  
23 letter; or will they already know because --

24 A. There should --

25 Q. -- of the negotiations?

1           A.     There should be a constant dialogue between the  
2 Division and the applicant as to what's going on with that  
3 application. But again, the reason that was stated within  
4 the working group, not by the Division, outside the  
5 Division, for that nonapprovable letter, is they needed  
6 something to specifically address in a potential revised  
7 application, or take to hearing. Or if they felt they  
8 couldn't meet those revisions, then they have the  
9 opportunity to withdraw the application.

10           Q.     If someone is submitting the applicant (sic) and  
11 it's going to be approved or not approved, they're going  
12 to make that determination within 90, and then you have  
13 the time to formulate that response, either 30 or 60 days,  
14 depending upon how it's going to proceed.

15                         So I think it would be nice in every case  
16 if the applicant knows which direction it's going to go,  
17 in just a memo. It doesn't have to be a document, just  
18 yes, we are going to work on an approval letter, no, we  
19 are going to work on a denial letter.

20           A.     I do not disagree with you, Commissioner, and I  
21 feel that that would be more of a policy or an internal  
22 working thing rather than something that need be codified  
23 in the regulation.

24                         COMMISSIONER BALCH:     Okay.

25                         CHAIRMAN CATANACH:    I'm going on back track

1 just a little bit on -- we might as well ask the  
2 questions.

3 EXAMINATION

4 BY CHAIRMAN CATANACH:

5 I had a question on the -- Is the C-137A, is  
6 that already in existence?

7 A. No, sir, it is not.

8 Q. When is it proposed to be developed?

9 A. If and when the commission decides to adopt  
10 these amendments, then we will get on it.

11 COMMISSIONER BALCH: In the past, before we  
12 finalized rules that had a new form, we reviewed the form  
13 before closing the record completely.

14 THE WITNESS: I do not believe that  
15 occurred in the most recent hearing on Part 34.

16 COMMISSIONER BALCH: Well, not every time,  
17 but that's something we have sometimes asked, to review  
18 the form before we finalize the Order.

19 THE WITNESS: Well, I do not have a draft  
20 Form C-137 to provide the commission today.

21 COMMISSIONER BALCH: If an Order is to be  
22 made in this case usually that's made within four to five  
23 weeks, and that would be enough time to make that  
24 C-137A --

25 THE WITNESS: Yes, sir, should be.

1                   COMMISSIONER BALCH:  -- and have that ready  
2 for review?

3           Q.     (BY CHAIRMAN CATANACH)  Jim, I'm going back to  
4 the minor modification.  And this may be kind of a little  
5 bit off the subject, but who determines what is minor and  
6 what is major modification of a permit?

7           A.     A great and horrible question.

8                   The regulations define what a major  
9 modification is, and the definition of a minor mod is  
10 anything that is not a major.

11          Q.     Okay.  So I was looking at Part D of 36.8, and  
12 there's no notice involved in a minor mod, right?

13          A.     No, there isn't.

14          Q.     Okay.  So you would make that determination, and  
15 then if it's minor you would not require notice.

16          A.     Yeah, would not require notice.  Yes, sir.

17                   COMMISSIONER BALCH:  So a minor  
18 modification is simply not a major modification.

19                   THE WITNESS:  Anything that's not defined  
20 as a major is a minor.

21          Q.     (BY CHAIRMAN CATANACH)  So a deficient  
22 application, the applicant has 60 days to resubmit.  
23 Right?

24          A.     Yes.  The revision part.

25          Q.     But can request an extension.

1                   Do you have any idea of how long the  
2 extension might be?

3           A.    I believe the language actually -- that  
4 extension of course would come to the Division director  
5 and they would have to give cause as to not only why they  
6 wanted an extension but I would think as to how long that  
7 extension should be.

8           Q.    Once an applicant submits a revised application,  
9 I think there is -- it's either approved or denied. I  
10 guess my question is: Can you keep submitting revised  
11 applications?

12          A.    If you went through that loop with that  
13 nonapprovable process, yes, you could.

14          Q.    So it's not just once. You can keep submitting  
15 revised applications until you get it to where it comes  
16 out?

17          A.    Yeah. And I can't -- well, it's hard to  
18 engender all possibilities in the regulations at times.

19                   COMMISSIONER BALCH: Just to be clear, a  
20 response to a revised application would then retoggle a  
21 new 90-day review period?

22                   THE WITNESS: Yes, sir.

23                   And I hate to say it is, because there may  
24 be an application that is absolutely not approvable  
25 because it's very, very lacking, and that revised

1 application could take that full 90 days go through  
2 technically.

3 COMMISSIONER BALCH: Presumably if it's  
4 repairable easily, you are going to take care of it during  
5 the 90 days.

6 THE WITNESS: Right.

7 Q. (BY CHAIRMAN CATANACH) Are we at this point  
8 talking about all of 9, Part 9?

9 A. Yes.

10 Q. All the way up to 10?

11 A. Yes, the wholesale replacement.

12 Q. So you haven't really talked about what happens  
13 after the applicant gets the notice that it's approvable.  
14 Are you going to go into more detail on that?

15 A. I did speak about it but I can speak about it  
16 again. But it's fairly straightforward thereafter.

17 Q. At that point they have to do notice?

18 A. There will be public notice. The public notice  
19 is 90 days. At that point if there's no request for  
20 hearing, or there's other -- I think there's four total  
21 provisions wherein a hearing could be called in that  
22 regard. We could turn to that exhibit and find the exact  
23 language.

24 Then that proposed decision becomes a final  
25 decision, is what I tend to call colloquially is a draft

1 permit would become a final permit. This is what your  
2 permit really is. Okay.

3 Then provide us the financial assurance and  
4 the permit is issued.

5 Q. Okay. I had a question on C Part 3 about  
6 mailing notice to certain parties, and in particular  
7 "parties who have requested notification of applications  
8 generally."

9 Who are those people?

10 A. Well, that's a phrase that you see throughout  
11 the oil and gas regulations and even WQCC.

12 Q. I'm kind of curious. That's not the persons who  
13 have requested a notice of docket, right?

14 Or something like that?

15 A. That is how we have interpreted it within the  
16 Division at times. And I go back to one specific instance  
17 that I recall on a surface waste management facility when  
18 we reached what is now known as the tentative decision  
19 phase, and they went to do the public notice and we  
20 provided that list. I got a lot of responses back from  
21 folks that are on the list of the docket saying, "Why am I  
22 getting this?"

23 Q. Isn't that a bit broad, though? I mean if you  
24 are requiring the applicant to mail out a copy of this  
25 application to everyone that is on the docket list, isn't

1 that kind of burdensome?

2 A. We are looking at current lists that are out  
3 there. And there's the list is that definition, and  
4 there's also a WQCC interested parties list.

5 MR. WADE: Jim, is this language in the  
6 current rule, as well?

7 THE WITNESS: Yes.

8 Q. (BY CHAIRMAN CATANACH) You're not changing it.

9 A. Yes.

10 Q. It just concerns me that that could be a lot of  
11 parties that you require the notice to.

12 A. The more -- I guess one way of at least speaking  
13 to that, Director, was the working group there was more of  
14 a concern as to the radius notification than it was the  
15 interested parties list.

16 Q. Okay. In your notice, again Part D(5), a  
17 statement that the Division's proposed decision to approve  
18 the application with or without conditions is available on  
19 the Division's website, would it also be helpful to  
20 provide a sentence in there that says a copy of the  
21 application is also available on the Division's website?

22 A. That sounds easy enough, but like I told you  
23 these are thick applications and if I had to make that  
24 available on the website, it would be tens of megabytes,  
25 if not gigabytes worth of stuff, and I would surely get

1 more than one call that somebody had clicked on the button  
2 and started the download and realized it was going to be  
3 40 hours before they got all the way through.

4 Q. So we are not putting the full applications on  
5 the website?

6 A. No, we are not. We never historically have. If  
7 you want to see a whole application you can come to Santa  
8 Fe and I will give it to you.

9 Q. Okay. A person who receives notice has, under  
10 part G, 90 days -- is that right, 90 days -- to request a  
11 hearing?

12 A. The 90-day clock starts upon the issuance of the  
13 notice.

14 Q. Okay. So you you're the applicant, you're  
15 sending notice to me. Once I get the notice or once you  
16 send the notice --

17 A. Once I send the notice.

18 Q. -- I have 90 days --

19 A. Yeah, 90 days thereafter.

20 Q. -- to request a hearing.

21 Why is that such a long period?

22 A. That is the current language.

23 Q. It seems a bit long.

24 And I think the only thing I had left was I  
25 think there is a typo in that last citation in that Part

1 G. Shouldn't that read 36-11?

2 MR. WADE: We are on Exhibit --

3 CHAIRMAN CATANACH: I'm actually reading  
4 the whole rule as one.

5 MR. WADE: So Exhibit 14. And you are  
6 finding a type in G?

7 CHAIRMAN CATANACH: I think so.

8 MR. WADE: Because I did want to point out  
9 that in D(6) there is also a strike-out for internal  
10 reference change.

11 I just want to put that on the record.

12 CHAIRMAN CATANACH: You're citing financial  
13 assurance as provided in 19.15.36.10, and isn't that --

14 MR. WADE: The proposed rule -- it might  
15 have changed.

16 CHAIRMAN CATANACH: Financial assurance is  
17 36.11. I'm just saying that should be changed to 36.11.

18 MR. WADE: It might not be under the  
19 proposed rule. Let me just double check.

20 It is under the proposed rule, so it should  
21 be 11.

22 CHAIRMAN CATANACH: Okay. Just wanted to  
23 point that out.

24 I don't have any more questions.

25 COMMISSIONER BALCH: If it please the

1 chair, may I go back to address some of the earlier  
2 questions?

3 CHAIRMAN CATANACH: We might as well handle  
4 this all at once.

5 COMMISSIONER BALCH: Because I think some  
6 people might have some questions about the owner/operator  
7 provision.

8 EXAMINATION

9 BY COMMISSIONER BALCH:

10 Q. So in Exhibit 5 you have 36.2, Scope. I think  
11 you want to make it clear that the only person who can  
12 apply is the owner of the site. They may subcontract  
13 somebody to do their day-to-day operations but the owner  
14 is going to be the ultimately responsible person.

15 A. Yes.

16 Q. So in Exhibit 7, which appears to exist really  
17 just to define the operator as the owner, you could  
18 probably not have that section if you just say owner in  
19 36.2.

20 MR. WADE: I think that -- if I may.

21 The issue with what you're saying, are you  
22 saying we would strike this whole section as the operator  
23 being defined?

24 COMMISSIONER BALCH: And just say owner in  
25 36.2.

1                   MR. WADE: I think the reason we got to  
2 where we did is that this tracks the current rule the  
3 closest, and if you change "operator" you would have to go  
4 throughout the whole rule and change all of those  
5 references.

6                   COMMISSIONER BALCH: But I think it's a  
7 little bit -- there is a little bit of confusion that  
8 could be engendered because of the fact that you have an  
9 owner that then subcontracts the operations of the site,  
10 and they're going to call them an operator, but they are  
11 not responsible for the site. So the owner is responsible  
12 for the site.

13                   MR. WADE: That's right.

14                   COMMISSIONER BALCH: Then you have defined  
15 operator here as the owner.

16                   MR. WADE: The second issue -- I'll check  
17 the complete rule book -- I think operator is defined in  
18 part 2 of the OCD rules and then used throughout the  
19 rules.

20                   COMMISSIONER BALCH: And how is operator  
21 defined there?

22                   MR. WADE: I don't have that in front of  
23 me.

24                   THE WITNESS: In my opinion that's the  
25 bigger issue, Commissioner, is that the operator is

1 defined under Part 2 of the Oil and Gas Act, and it's used  
2 throughout the balance of the Act nonsurface waste  
3 management, nonenvironmentally related.

4 It's very specific. You can have a lot of  
5 owners out there, whereas the operator of an oil and gas  
6 well has a lot of regulatory responsibility that the owner  
7 does not have. But under the Surface Waste Management  
8 Act, that is not the case.

9 COMMISSIONER BALCH: But I think you are  
10 creating conflict with the way you set this up.

11 COMMISSIONER PADILLA: Right. It seems to  
12 be a contradiction.

13 COMMISSIONER BALCH: Because then you have  
14 two different definitions of operators. Here you  
15 specifically say the owner.

16 THE WITNESS: I think that was actually the  
17 path we took. Rather than trying to redefine what an  
18 operator was, we said the operator was the owner. We  
19 didn't have to redefine operator.

20 COMMISSIONER BALCH: What about when you  
21 said "the site operator" and then you had a definition for  
22 site operator in 36.7(B) (11). Separate the definition of  
23 those two types of operators.

24 MR. WADE: So essentially you would be  
25 defining the person who owns the facility --

1 COMMISSIONER BALCH: As the site operator.

2 MR. WADE: -- as the site operator, versus  
3 the definition of operator that we find through out the...

4 COMMISSIONER BALCH: It's a little bit  
5 broad.

6 Just something I think needs to be  
7 considered. We might run into conflict there.

8 Q. My next question would be: Since now you are  
9 going to take applications only from the owner of the  
10 site, what does that do to existing facilities? Are they  
11 going to be grandfathered? Because I presume there is  
12 some renewability in these site applications.

13 A. Yes, once every ten years.

14 Q. So when those come up that may cause issues if  
15 they have somebody operating the site, or they have a  
16 partnership that's operating the site and it's owned by  
17 some party or some group of parties. I mean you can have  
18 a split estate.

19 A. The Division wants that group of parties,  
20 however it's configured, to be responsible.

21 COMMISSIONER PADILLA: Retroactively.

22 Q. (BY COMMISSIONER BALCH) Retroactively?

23 A. Yes. I mean we have only got one active -- I  
24 shouldn't say active. I have only got one approved and  
25 active Part 36 facility, and it's not even under

1 construction.

2 Q. So there is only one in existence?

3 A. And it doesn't really exist. Like I say, the  
4 permit's been approved.

5 Q. What is the ownership status of that site?

6 A. I believe, but again they haven't turned ground  
7 out there, that their intent is to have a third party  
8 operate the facility.

9 Q. I think that is probably going to be the most  
10 common scenario.

11 A. But we wish for the owner of the facility, the  
12 permittee, to have the responsibility.

13 Q. To be responsible?

14 A. Especially on the financial concerns portion of  
15 it. Because these FA things are large, they are millions  
16 of dollars.

17 Q. So under the current single permit that is out  
18 there -- it's not been constructed, I understand that  
19 part -- do you think that is going to have a third-party  
20 operator?

21 A. I believe so but I can't guarantee it.

22 Q. So currently -- you want to make sure these  
23 rules are clear, and I think that makes it even more  
24 important to make the definition of operator for this  
25 particular rule perhaps a little more clear.

1           A.     And maybe we were being a little too clever by  
2 half here, Commissioner, in that we were saying, you know:  
3 I'm the owner. Okay. Now the Division is not becoming  
4 into that business relationship, but we are pointing out  
5 and saying: I don't care who the third-party contractor  
6 is, you're the operator and you're responsible.

7           Q.     But I think my point remains that the current  
8 definition of operator which is seen throughout a variety  
9 of rules is too broad, and maybe you have to make  
10 something specific for this.

11                   MR. FELDEWERT: Mr. Chairman, I have the --  
12 I'm sorry. Mr. Commissioner, if you want to take a look  
13 at the definition of operator I can show it to you.

14                   MR. BRANCARD: It's actually one of the  
15 exhibits.

16                   COMMISSIONER PADILLA: "Operator" under  
17 Part 2?

18                   MR. BRANCARD: Yeah, it's on Exhibit 2. If  
19 you look at Exhibit 2.

20                   COMMISSIONER PADILLA: Oh, yes.

21                   THE WITNESS: See, that definition of  
22 operator doesn't fit surface waste management facilities.

23                   MR. WADE: There's a couple of different  
24 concepts that are coming together when you talk about the  
25 owner/operator. What we want is the applicant to be the

1 owner, ultimately liable for any issues, and that that  
2 person holds the financial assurance. That is really the  
3 important thing, that we can close these things safely  
4 through that financial assurance, but we need to have the  
5 correct party posting that financial assurance, and that  
6 has to be the applicant and the owner.

7 COMMISSIONER PADILLA: I don't think there  
8 is any dispute on that. I think it's just really the  
9 contradiction between historically what the operator is in  
10 oil and gas operations and the operator here where you're  
11 trying to distinguish between that third-party  
12 relationship that you as the agency, the Division,  
13 wouldn't recognize for purposes of financial assurance.

14 MR. WADE: We do -- if you go to Exhibit 9,  
15 we do expand on it a little bit outside of the definition,  
16 and that's where it's the permit and application  
17 requirements, and that's where the all the language  
18 underlined is added.

19 It makes clear the applicant has to be the  
20 owner. Then it says the operator is responsible for the  
21 operator's officers, employees, et cetera, et cetera, and  
22 that any person involved in the facility's operation has  
23 to comply with Rule 36.

24 So we do recognize that there is likely  
25 going to be a third-party relationship in there, but we

1 are making clear that one person is ultimately liable, and  
2 maybe everyone else is, as well.

3 COMMISSIONER PADILLA: But by making the  
4 financial assurance something that the owner is directly  
5 responsible -- even here just reading it, you're already  
6 making two distinctions, in my mind: the owner in the  
7 first sentence, and the operator in the second.

8 And it's a little ambiguous. I realize  
9 that Exhibit 5 or whichever one --

10 MR. WADE: 7 defines it.

11 COMMISSIONER PADILLA: Right. 7 defines  
12 it, but reading this it's kind of unclear that there's --  
13 that these things are the same. Because you have got the  
14 owner on one side and immediately followed by the  
15 operator.

16 MR. WADE: Which is the owner.

17 COMMISSIONER PADILLA: Right. Right.

18 COMMISSIONER BALCH: Which is the owner.

19 COMMISSIONER PADILLA: So why would you not  
20 say the owner, the owner, the owner, the owner here.

21 COMMISSIONER BALCH: Right.

22 MR. WADE: I think that the consideration  
23 at the time, and this has now been a while, was that we  
24 would have to -- I guess we would define, make a whole new  
25 definition for owner, and then replace operator throughout

1 this whole rule with owner.

2 COMMISSIONER PADILLA: But then you have  
3 "operator" right here.

4 MR. WADE: In this particular paragraph I  
5 agree -- of course I've been living and breathing this for  
6 a while, but yes, the second sentence says owner, the  
7 second sentence says the operator, which means the owner.  
8 And then the operator's officers, blah, blah, blah after  
9 that, are essentially operator as used commonly.  
10 Third-party operator.

11 COMMISSIONER BALCH: So I agree with  
12 Commissioner Padilla that it might be cleaner to just talk  
13 about the owner and let them worry -- and then you define  
14 in Exhibit 9 how that relationship is impacted by the  
15 rule. Basically the owner is responsible for their  
16 operator.

17 COMMISSIONER PADILLA: Could you just make  
18 it owner throughout, keep your definition for operator --  
19 as far as making that distinction that it's the same  
20 entity but refer to the owner throughout the rule.  
21 Because that's really who you want.

22 MR. WADE: I think that's a possibility. I  
23 would have to start trying to plug it in to see how that  
24 works.

25 THE WITNESS: I was wondering -- one of the

1 concerns, Commissioners, at the time was that if the word  
2 or the phrase "operator" wasn't in there, that it could  
3 potentially be read by potential applicants that they  
4 could not hire a third-party operator.

5 COMMISSIONER BALCH: I think you could  
6 explain that to them during negotiations.

7 COMMISSIONER PADILLA: You could put a the  
8 stipulation in there that they could hire a third party  
9 but they are still the one on the financial hook, so to  
10 speak.

11 THE WITNESS: Well, I think the way the  
12 regulations, even if they are not perfect, I think they  
13 make that clear that they're still on the hook. Or the  
14 proposed revisions, that the owner is.

15 A potential other scenario would be say you  
16 have owners of two different facilities that had a common  
17 operator and the operator was doing things at one facility  
18 that were not in compliance with regulations, but  
19 potentially the Division could say, "This operator is not  
20 operating appropriately," and it could affect both.

21 COMMISSIONER PADILLA: You don't care about  
22 the operator, though, because that's the third-party  
23 contract between the owner and the operator, which does  
24 not involve the Division, and the Division would be  
25 concerned with the owner of that second facility where the

1 operations were not up to spec.

2 THE WITNESS: But I would also be concerned  
3 with that operator. He's showing a history of bad  
4 practice, and so now his other facility that at this point  
5 appears to be up and up, it may not be. Or, you know, why  
6 is he doing things one way at one facility and not at  
7 another?

8 COMMISSIONER PADILLA: But the  
9 responsibility ultimately lies with the owner.

10 THE WITNESS: It does.

11 COMMISSIONER BALCH: And then that operator  
12 loses the --

13 THE WITNESS: It does. But I want to be  
14 able to action against the operator, potentially the  
15 Division --

16 COMMISSIONER BALCH: If the operator loses  
17 their ability to operates at one site, that may affect  
18 their ability to operate at the other site.

19 THE WITNESS: But it wouldn't be the  
20 Division making that decision, it would be only the  
21 contractual relationship between the owner and the  
22 operator.

23 COMMISSIONER PADILLA: But wouldn't the  
24 Division take --

25 THE WITNESS: The Division couldn't take

1 any action against the operator if potentially we change  
2 it.

3 COMMISSIONER PADILLA: But you could take  
4 action against the owner, though.

5 THE WITNESS: Right. But not the operator.

6 COMMISSIONER PADILLA: Essentially -- well,  
7 by taking action against the owner, you are taking action  
8 against the operator.

9 MR. BRANCARD: Mr. Chairman, may I suggest  
10 that I think part of the problem here is we're used to a  
11 different world view with oil and gas operations at the  
12 production level. This is a rule about permits. Okay?  
13 And so really the only entities that exist are an  
14 applicant for a permit, and after you are granted a permit  
15 the permittee. And the permittee is the responsible  
16 party. So who owns or operates is relevant. Whose name  
17 is on the permit is what matters.

18 And if we want to say we want the permittee  
19 to be the owner, that's perfectly fine, just say "owner".

20 COMMISSIONER BALCH: Just say "owner".

21 COMMISSIONER PADILLA: Right.

22 MR. BRANCARD: But once you get into the  
23 rule and say the person running the facility has to do X,  
24 Y and Z, what you're saying is the person who holds the  
25 permit has to do X, Y and Z.

1 COMMISSIONER PADILLA: Right.

2 MR. BRANCARD: And so really it's "the  
3 permittee" that should be the operable term here, not  
4 owner/operator, which has a totally different meaning at  
5 the wellhead.

6 THE WITNESS: Right. In the oil and gas  
7 Idea.

8 MR. BRANCARD: So instead of replacing  
9 "operator" with "owner", I guess I would suggest replacing  
10 "operator" with "permittee".

11 COMMISSIONER BALCH: And then define the  
12 permittee.

13 MR. BRANCARD: Then define  
14 applicant/permittee as owner of the facility.

15 COMMISSIONER BALCH: That would do it.

16 CHAIRMAN CATANACH: Are you okay with that?

17 COMMISSIONER PADILLA: Yeah. Give you a  
18 lot of --

19 MR. WADE: I think that would be the  
20 cleanest change.

21 CHAIRMAN CATANACH: Is there any more?

22 COMMISSIONER BALCH: That was everything I  
23 had.

24 MR. BRANCARD: Mr. Chairman, you asked the  
25 question I wanted to ask but you didn't get the answer

1 that I thought it was, so maybe I need to clarify.

2 EXAMINATION

3 BY MR. BRANCARD:

4 Q. So let's go back to this -- to Rule Section 9  
5 and your flow chart here. Okay?

6 I'm really confused now. Okay?

7 So you have an application. It comes in,  
8 you get 90 days to review it, and you make two choices:  
9 either it's approvable or it's deficient?

10 A. Not approvable is the phrase we use.

11 Q. Not approvable. Not approvable you go to the  
12 deficiency letter option, right? Which is shown here on  
13 the flow chart.

14 When the applicant then resubmits a revised  
15 application -- you are still in the same application  
16 process, right -- you're now under Subsection B(4) of 9,  
17 okay, which then gives you another 90 days to review the  
18 revised application, okay, and then determine if it's  
19 approvable, approvable with conditions, or not approvable.

20 A. Just like the original application.

21 Q. Right. But after that there's no mention of  
22 deficiency letter. It says the Division shall mail notice  
23 of denial or the proposed approval. Okay?

24 A. So the way the language is crafted, you're  
25 saying there's a two-strike rule or one-strike rule.

1                   CHAIRMAN CATANACH: It's kind of a dead  
2 end, I think at that point, is what I'm thinking.

3                   MR. BRANCARD: That's the way I read it,  
4 that you get, the applicant is given a deficiency letter  
5 and is given one chance to revise that application, and  
6 the next time it comes back to the Division the Division  
7 has got to say we approve it or we deny it.

8                   COMMISSIONER BALCH: And I think your  
9 intent, the way you described it, was the three options  
10 from the revised application is: No, and it's withdrawn  
11 without prejudice; no response, in which case it's  
12 automatically denied at some point, which maybe is not  
13 defined in time; and then the third option is they  
14 basically submit a whole new application and restart the  
15 entire process.

16                   So your arrow from the top, uhm, revised  
17 application, should go back to the application box at the  
18 top.

19                   THE WITNESS: Okay.

20                   COMMISSIONER BALCH: Not how it's in the  
21 text.

22                   THE WITNESS: That would be my comment, is  
23 to pay more attention to the text than my flow chart,  
24 because the proposed text is what would become the  
25 regulation, not the flow chart.

1                   COMMISSIONER BALCH: But I think the flow  
2 chart is useful, particularly if the times are put into  
3 it, as an exhibit for people following this rule later on.

4                   You may want to revise that.

5                   THE WITNESS: As part of the administrative  
6 record of the hearing.

7                   COMMISSIONER BALCH: Right.

8           Q.     (BY MR. BRANCARD) Well, but that's a --

9           A.     Didn't address your question.

10          Q.     That is a different process. I mean, I think  
11 you have in here that any time they can withdraw their  
12 application and start all over again. Right?

13                   But you're trying to avoid that. You're  
14 trying to keep them in the process with a revised  
15 application.

16          A.     Well, but then --

17          Q.     So now you are just looking -- you're not  
18 looking at the whole application again, you are just  
19 looking at how they are addressing the deficiencies you  
20 provided to them. Right?

21          A.     Yes. But we are looking at the whole  
22 application again to make sure the applicant didn't revise  
23 something else. Because they are so large, something  
24 could get slipped in underneath her.

25          Q.     But --

1           A.     So that's is why we are not shortening the time  
2 period.

3                         But I think what is really important about  
4 this is that when the Division comes to a decision about  
5 something that it put it in writing, that it codify why  
6 it's coming to that decision, which it's not required to  
7 do now. Not required to do that.

8           Q.     Okay. Well, I think there is a clear difference  
9 between a new application and a revised application, okay?  
10 And revised application deals with the deficiencies and  
11 triggers B(4), which then forces you to say after 90 days  
12 it's either approvable or denied. You don't go back to  
13 the loop again.

14          A.     Okay. So that would --

15          Q.     That's the way I'm reading the language.

16                         COMMISSIONER BALCH: You're right.

17                         CHAIRMAN CATANACH: That is the way I...

18                         THE WITNESS: I guess it's -- and when you  
19 go then to the commission's intent, maybe in that regard,  
20 but if you agree that that's it and wanting to put the  
21 flow chart as part of the administrative record, there's,  
22 you know, maybe an asterisk or footnote on that arrow,  
23 Commissioner Balch, that says: One time only.

24                         COMMISSIONER BALCH: I don't know if you  
25 need to say one time only, I think that you just need to

1 make it clear that a revised application will be treated  
2 as a new application.

3 THE WITNESS: In essence. Okay.

4 MR. BRANCARD: Well, no. No, it's not.

5 THE WITNESS: There's a difference of  
6 opinion between the two of you.

7 MR. BRANCARD: I guess I'm kind of  
8 disagreeing with you, Commissioner Balch. I think if they  
9 want to submit a new application, fine.

10 COMMISSIONER BALCH: Okay.

11 MR. BRANCARD: But that puts you all the  
12 way back at the top of the flow chart.

13 COMMISSIONER BALCH: I think that is what  
14 they have intended.

15 MR. BRANCARD: Then we would just cross out  
16 (4) here. All right?

17 COMMISSIONER BALCH: That's quite --

18 MR. BRANCARD: And isn't that the process  
19 that has been happening?

20 THE WITNESS: In reality we have been  
21 dealing with things as a draft application, so you go back  
22 and forth and back and forth and back and forth, and  
23 you're in any kind of real regulatory loop, because a  
24 formal application has not been submitted at this point.  
25 And that is not necessarily good for the applicant to do

1 that, to be stuck in that. He needs to be able to count  
2 on the Division to make a decision in a timely fashion,  
3 and if the Division makes the decision and it's not to  
4 approve, the Division elucidates why.

5 COMMISSIONER BALCH: And then they have the  
6 choice to either come up with a new application or appeal  
7 it.

8 THE WITNESS: Yeah.

9 COMMISSIONER PADILLA: Would the entire  
10 application have to be reviewed again? I mean,  
11 conceivably these things are in sections similar to an APD  
12 where you have your case and design, your surface program,  
13 all the different components. Do you not have the ability  
14 to approve 80 percent of it and send back --

15 THE WITNESS: The way I would like to see  
16 it, Commissioner Padilla, is if a section was being  
17 revised that that is what's submitted is the section.

18 COMMISSIONER PADILLA: Right.

19 THE WITNESS: That way the Division still  
20 retained the balance of the application.

21 COMMISSIONER PADILLA: Right.

22 THE WITNESS: And then in that way ensure  
23 there was no other changes made.

24 COMMISSIONER PADILLA: Right. When you  
25 said the concern is they put something else in there that

1 hadn't been in the original, would they even have the  
2 chance to do that? Because you could just say Section B.

3 I don't know how you have these things  
4 built, but section B --

5 THE WITNESS: Sure.

6 COMMISSIONER PADILLA: -- is deficient. Can  
7 we just work on that one? The rest is fine. We will take  
8 that as it stands.

9 I mean, I realize there may be some  
10 interplay between the various parts of the application,  
11 but...

12 THE WITNESS: When I look at this process  
13 there is nothing in what's being proposed that does not  
14 allow that to happen in the first 90 days.

15 COMMISSIONER BALCH: That is part of the  
16 negotiation process.

17 COMMISSIONER PADILLA: It would seem that  
18 that would be a better use of the Division's resources.  
19 You have already looked at something, found it  
20 approvable, --

21 THE WITNESS: Oh, yeah, certainly.  
22 Certainly.

23 COMMISSIONER PADILLA: -- why go through the  
24 entire application again, reinvent the wheel from the  
25 beginning.

1                   COMMISSIONER BALCH: Mr. Griswold, is your  
2 intent really, and this would be for Mr. Wade, also,  
3 really to work hard to make most applications approvable.

4                   THE WITNESS: As long as the applicant is  
5 desirous in that regard.

6                   COMMISSIONER PADILLA: As long as they are  
7 willing to meet whatever requirements are put forth by the  
8 Division during this 90-day negotiation period.

9                   THE WITNESS: Uh-huh.

10                  COMMISSIONER BALCH: So really if they do  
11 end up with a denial letter they have to start over from,  
12 you are going to treat the application as new in  
13 Section --

14                  THE WITNESS: Like I said, it was the  
15 working group's desire again that if the Division was  
16 going to find something not approvable, an application not  
17 approvable and the clock was ticking or had run out, even,  
18 that the Division be explicit as to why it was not  
19 approvable.

20                  COMMISSIONER BALCH: Right. Then if the  
21 applicant thinks that that one thing is a point that needs  
22 to be discussed further they have the right of a hearing.

23                  THE WITNESS: Right.

24                  COMMISSIONER BALCH: Or they can start a  
25 whole new application process.

1 THE WITNESS: Yes.

2 COMMISSIONER BALCH: So again Section 4  
3 is --

4 THE WITNESS: That was more the protection  
5 that was trying to be built into the new proposed process.

6 COMMISSIONER BALCH: It may need to be  
7 reworded, then, to more clearly state the intent.

8 THE WITNESS: Well, and I'm speaking for  
9 the Division's intent and my recollection of the  
10 industry's intent as reflected by the balance of the  
11 working group --

12 COMMISSIONER BALCH: I mean the intent of  
13 the rule.

14 (Note: Pause.)

15 MR. WADE: It says specifically -- I'm  
16 sorry. Specifically you would like to see something that  
17 speaks to the intent of 36.9 as a whole?

18 COMMISSIONER BALCH: Well, it sounds like  
19 you're going to do everything you can to negotiate the  
20 application. You may come to a point where there's some  
21 strong disagreement that cannot be resolved in those  
22 negotiations. At that point the parties can continue with  
23 that same application and go through a hearing process, or  
24 they can withdraw it, or they could start over. So it  
25 doesn't sound like -- the only out for a denial is a new

1 application, withdrawing it, or going to a hearing. So  
2 that application only survives in one of those cases when  
3 it goes to new hearing. Anything else would be treated,  
4 as Mr. Griswold said, as a new application.

5 MR. WADE: Well, again I don't think that  
6 is what B(4) is actually stating. I think you have  
7 another shot at making a revised application. I think  
8 Mr. Griswold, speaking as a practical matter, because  
9 these are huge applications that a lot of times you got to  
10 make sure that whatever revision that you have received  
11 doesn't affect everything else within the application, and  
12 in that regard it feels like a new application, but  
13 according to the rule we are calling it a revised  
14 application.

15 COMMISSIONER BALCH: Well, they might be  
16 able to review it more quickly, because a lot of it would  
17 be familiar materia.

18 MR. WADE: Should be.

19 COMMISSIONER BALCH: But he already said  
20 it's going to be treated as a new application. It has to  
21 be, because other parts may have been changed.

22 THE WITNESS: May have been changed.  
23 Unless as, Commissioner Padilla, as we had spoken, if  
24 perhaps just a portion was submitted as the revision but  
25 the balance of the application --

1 COMMISSIONER BALCH: Would it --

2 THE WITNESS: -- be assured it remained  
3 unchanged because we retained it.

4 COMMISSIONER BALCH: Would it be possible  
5 as a stipulation or as part of the nonapprovable letter to  
6 say this section is not approvable, we would give you 30  
7 days, 60 days or something, to revise only that portion.

8 But that would be a whole different path  
9 than what's described here in your flow chart.

10 MR. WADE: There's actually --

11 THE WITNESS: Well, I don't know why it  
12 would be necessarily a different path.

13 COMMISSIONER BALCH: Because the  
14 application would survive. It wouldn't be denied, and not  
15 the hearing.

16 THE WITNESS: But they did respond.

17 The only way you go to denial upon a  
18 nonapprovable declaration by the Division is if you don't  
19 respond.

20 MR. WADE: There's the --

21 COMMISSIONER BALCH: I think Mr. Brancard  
22 and Chair Catanach's question still remains, then: What  
23 happens in that case?

24 THE WITNESS: That they do not respond?

25 COMMISSIONER BALCH: It looks like you're

1 basically going to continue the negotiations after a  
2 formal letter of nonapprovable is filed.

3 THE WITNESS: As I said earlier, that  
4 declaration of nonapprovability with reasons was what the  
5 surface waste management industry wanted.

6 COMMISSIONER BALCH: I think it's really so  
7 they understand the deficiency of their application, and  
8 then choose to withdraw it or revise, or take it to a  
9 hearing.

10 THE WITNESS: Challenge, right.

11 CHAIRMAN CATANACH: Do you have a comment  
12 Mr. --

13 MR. FELDEWERT: Well, I think my only  
14 comment is that as I understand the working group and the  
15 position that they took, what we call a dead-end there in  
16 section 36.9.4 does not appear to be a problem. I mean,  
17 if you think about it, you have to file your application,  
18 they have 90 days to review, 60 days to get a letter, so  
19 that's five months. Then you submit your revised  
20 application. There's another three months there. So now  
21 you are talking eight or nine months. If at the end of  
22 eight or nine months you haven't gotten an application  
23 that meets their needs, or they have conditions that cause  
24 an issue for you, you are going to go to hearing. Or  
25 your alternative is put it all aside and start over.

1                   So my understanding is that was not a  
2 problem with committee. We didn't mind having that  
3 end-of-the-loop, so to speak.

4                   So I think Mr. Brancard is right there is a  
5 dead-end there, but we don't perceive that as a problem.

6                   CHAIRMAN CATANACH: That would preclude an  
7 operator from submitting multiple revised applications.  
8 They could only do it once and then they would be at that  
9 dead end and either approved or denied at that point.

10                  COMMISSIONER BALCH: Or most likely  
11 hearing.

12                  MR. FELDEWERT: Or most likely hearing.

13                  THE WITNESS: Well, you know, I don't have  
14 a problem with the one-loop pass, because again it still  
15 requires the Division then to review the entirety of the  
16 application, rather than reviewing it until they got to a  
17 bump in the road, so to speak, decided it wasn't  
18 approvable, using that as a means to get to go kick back  
19 around again, and then start reading thereafter. Say,  
20 "Well, you know what? I didn't catch this problem until  
21 the second pass through."

22                  That is not fair to the applicant. The  
23 Division needs to review the entirety of an application  
24 and if it decides to not approve it provide all the  
25 reasons for not approving it.

1                   So industry did not have an issue with  
2     that.

3                   MR. FELDEWERT:   (Note:  Shakes head.)

4                   THE WITNESS:  It looks like Adam is coming  
5     up with one.

6                   CHAIRMAN CATANACH:  Seems to me if you have  
7     the initial 90 days for the initial application, then the  
8     next 90 for the revised application, if you guys can't  
9     come up with an agreement in that period of time, maybe it  
10    should be denied or set to hearing.

11                  THE WITNESS:  For whatever reason.  If the  
12    problem resides either with the Division or the applicant.

13                  CHAIRMAN CATANACH:  I guess I'd be  
14    comfortable with the language as is.

15                  MR. FELDEWERT:  I do have some other  
16    questions while we are on this topic.  Won't take very  
17    long but I do have some questions, if I may.

18                  THE WITNESS:  Can I ask that we take a  
19    break?

20                  CHAIRMAN CATANACH:  Fifteen minutes.

21                  (Note:  In recess from 10:53 a.m. to 11:10 a.m.)

22                  CHAIRMAN CATANACH:  Okay.  We will call the  
23    hearing back to order.

24                  MR. WADE:  I would like to move on to  
25    Exhibit 16 if there are no other questions.

1                   MR. FELDEWERT:  If I may, I had a couple of  
2 questions while we are on this subject.

3   EXAMINATION

4 BY MR. FELDEWERT:

5           Q.    Mr. Griswold, let's look at Exhibit 1, page 5,  
6 just so we're all on the same document.  And this is 36.9,  
7 which is what we have been talking about.  Okay?

8                                   And I'm looking at 36.9B, and as I read  
9 through it, that's that initial 90-day provision, and at  
10 the end of that there's a determination.  There's three  
11 categories:  Approvable, approvable with conditions, and  
12 not approvable.  Right?

13           A.    Yes, sir.

14           Q.    Okay.  Then the next sentence says -- and this  
15 is my question.  "Upon completion of the Division's review  
16 if the Division determines the application is approvable,  
17 the Division shall within 30 days..."

18                                   Does that word approvable -- I'm assuming  
19 that includes approvable with conditions.

20           A.    Yes, sir.

21           Q.    So takes into account both categories?

22           A.    In essence that's what -- I guess more to the  
23 point why the 30 days is to right those conditions.

24           Q.    So then we have the notice process start at that  
25 point?

1 A. Yes, sir.

2 Q. So then if I go over to the next page, page 6.  
3 And I'm at subparagraph C:

4 (Reading) Upon receipt of the proposed  
5 decision to approve...

6 So that would be approve with or without  
7 conditions.

8 A. As it says.

9 Q. (Reading) "The applicant shall..."

10 And then it lays out that they are supposed  
11 to do a written notice they are supposed to lay out.

12 A. Yes, sir.

13 Q. It says, "...written notice by certified mail."

14 And it identifies who it's to.

15 Then what I found curious was I went down  
16 then to subparagraph E, and it says, "The applicant shall  
17 mail the notice that is required to be mailed on or before  
18 publication of the notice" -- in the newspaper, as I read  
19 that. Right?

20 A. Yes, sir.

21 Q. Okay. Then getting to a question that  
22 Mr. Catanach had: When do you file -- if you get this  
23 notice, when do you file your request for a hearing?

24 And I go over to the next page, page 7, and  
25 under subparagraph A it says: A person who wishes to

1 comment or request a hearing shall file comments, et  
2 cetera, within 90 days after the date of the newspaper  
3 publication.

4 A. Yes, sir.

5 Q. So it's not 90 days after they receive notice  
6 but 90 days after the newspaper publication?

7 A. Based on that reading, yes.

8 Q. Is that what you intended?

9 A. Yes.

10 Q. It is. So how does the individual receiving  
11 notice, how do they know when the newspaper publication  
12 has occurred?

13 A. I understand your question.

14 Q. That's my...

15 A. And I don't know if I really have any answer for  
16 it, Mr. Feldewert.

17 Q. Is there a reason why you tied their request  
18 period to after the newspaper publication when they  
19 received mailed notice? I mean, normally, as you know --

20 A. It was the intent for them to try to be  
21 simultaneous.

22 Q. Yeah.

23 A. It's to not allow somebody to submit written  
24 notice and then wait for some period of time before they  
25 put the notice in the newspaper.

1 Q. Which is addressed by the prior page, right?

2 A. Yes, sir.

3 Q. When you say you have to mail out your notice --

4 A. On or before.

5 Q. -- on or before publication.

6 So wouldn't it make more sense if I'm  
7 mailing out written notice that they got to respond 90  
8 days after they receive written notice?

9 A. Well, then that could be addressed in the fact  
10 that if you go back to that prior section that the notice  
11 must be approved by the Division, that the Division -- it  
12 would become incumbent upon us to include that similar  
13 kind of language, 90 days upon receipt of this notice.  
14 That was the letter notice rather than the newspaper  
15 publication.

16 Q. I guess my point is I'm not sure exactly -- if I  
17 was giving notice, I'm not sure exactly what I would say  
18 in my letter to the mailed parties, whether I would tell  
19 them 90 days after receipt of this letter or 90 days after  
20 newspaper publication which took place on X, Y, or Z.

21 I mean, to me it's not entirely clear what  
22 the applicant should say in that letter.

23 A. Again I would go back to my prior response. I  
24 think it would be incumbent upon the Division, because we  
25 have to preapprove said notice, to ensure that that is

1 clarified.

2 Q. Okay. All right. Then I had one other comment  
3 on page 7, or one other question, and that is: I look at  
4 subparagraph C, and this is when the applicant has an  
5 opportunity to get the hearing.

6 Under C(1), right? It says, "The  
7 Division's proposed decision to approve the application  
8 includes conditions not expressly required by the rule and  
9 the applicant requests a hearing."

10 So this is one hearing path for the  
11 applicant.

12 A. Yes.

13 Q. What did you mean by conditions -- why do you  
14 have the phrase in there "conditions not expressly  
15 required by the rules"?

16 A. Again I guess it was more for an applicant's  
17 protection, that if they felt that the Division was  
18 placing a condition upon their application that the  
19 applicant did not feel that the Division had jurisdiction  
20 over, that they had had the opportunity to go to hearing  
21 and question that decision.

22 MR. WADE: We are also going to discuss  
23 this language in the next exhibit, as well.

24 Q. (BY MR. FELDEWERT) I guess my question is, I can  
25 foresee a circumstance where an applicant may file an

1 application.

2 A. Okay.

3 Q. And in that application they seek a variance or  
4 an exception to one of the conditions within the rule.

5 A. Uh-huh.

6 Q. And you then approve that application with  
7 conditions, but they may not be conditions that are  
8 expressly required by the rule. So I'm just wondering why  
9 you wouldn't just say -- take that phrase out, take out  
10 the phrase "not expressly required by the rule."

11 In other words if you approve an  
12 application and it has conditions, then you have an  
13 opportunity to go to hearing no matter what the conditions  
14 are.

15 A. Section C, my recollection was this was  
16 requested by the industry members of the working group.

17 MR. WADE: Actually, can we -- this is on  
18 point on Exhibit 16. Can we flip to Exhibit 16 and start  
19 discussing that?

20 CHAIRMAN CATANACH: Okay.

21 MR. WADE: At this point, then, we are done  
22 with 36.9?

23 MR. FELDEWERT: Yes.

24 CHAIRMAN CATANACH: Not quite. I have just  
25 a couple of things.

1                   In paragraph B on page 7 there is a citing  
2 is again wrong. It's 19.15.39.9. It should be 36.9.

3                   MR. WADE: That was paragraph?

4                   CHAIRMAN CATANACH: B. I'm sorry.

5                   THE WITNESS: I see it, director.

6                   CHAIRMAN CATANACH: Yeah, the new paragraph  
7 B.

8                   THE WITNESS: (Reading) If the Division  
9 denies an application pursuant to paragraphs (3) or (4)  
10 of Subsection B of 19.15. -- currently says 39.9.15 NMAC.

11                   CHAIRMAN CATANACH: Right. It should be  
12 36, correct?

13                   MR. WADE: Right. That is a typo.

14                   CHAIRMAN CATANACH: Just pointing that out.  
15 And just one more question on standing.

16   EXAMINATION

17                   Q. (BY CHAIRMAN CATANACH) Is the Division director  
18 going to determine whether a protester has standing to  
19 request a hearing? Is that the intent?

20                   A. If you look at A, and maybe that's what you're  
21 referring to, on 10A (Reading) "The director may deny a  
22 request for hearing if the director determines the person  
23 requesting the hearing lacks standing."

24                   Q. So that decision is going to rest in the hands  
25 of the director --

1 A. Of the director, yes.

2 Q. -- to determine that?

3 Do we have a definition for -- I guess I  
4 would have to talk to legal about that to see what  
5 standing means.

6 A. I was glad you didn't say you were going to ask  
7 legal what director meant.

8 CHAIRMAN CATANACH: Okay. That's all I  
9 have.

10 MR. WADE: And that typo that you did catch  
11 is in 36.10 and you'll see it again as we start discussing  
12 this.

13 CONTINUED EXAMINATION

14 BY MR. WADE:

15 Q. You are on 16?

16 A. So then turning over to Exhibit 16, we hope that  
17 this lays out a much clearer process to the public to  
18 request a hearing.

19 The current rule is definitely unclear and  
20 subject to interpretation. And we have come across this,  
21 so we are again attempting -- we feel that current 36 is  
22 flawed. We were attempting to make it less flawed,  
23 hopefully perfect in that regard, and that's why we  
24 proposed to change it.

25 It continues to provide the applicant the

1 option for hearing if the Division denies their  
2 application, and also continues to provide the applicant  
3 the option for hearing if the Division proposes a  
4 condition not expressly required by the rule.

5           There is some numbers in there. C(2)  
6 through C(4) is the same as current A (2) through A (4),  
7 so no change has been made there even though you see it  
8 being underlined, it's because it's placed in a different  
9 portion.

10           As well as proposed D is now currently B.  
11 We've inserted C in there. And new B and C, so what was B  
12 now becomes D.

13           Q. And going back to Mr. Feldewert's question, he  
14 was referring to in the proposed rule what would be C(1)  
15 and the language "conditions not expressly required by  
16 rule". If you cross reference it to the current rule  
17 right next to it, is that language also in A (1)?

18           A. I'm sorry. Could you ask again, please.

19           Q. If you look at the proposed rule C(1), you'll  
20 see language that says "The Division's proposed decision  
21 to approve the application includes conditions not  
22 expressly required by rule."

23           A. Yes.

24           Q. If you cross reference it to the current rule,  
25 do --

1           A.    The language is the same with the addition of --  
2 the time period.

3           Q.    So that language exists in the current rule.

4           A.    But we are now providing a maximal time limit.

5                    COMMISSIONER BALCH:  Perhaps a better  
6 question is should it have existed in either version of  
7 the rule.

8           Q.    (BY MR. WADE)  That question is being now raised  
9 and discussed in the work group?

10          A.    As I say, I recall it was a desire from industry  
11 that that be retained.  They wanted that ability that if  
12 they felt the Division was applying a condition that it  
13 may not have regulatory authority to, that they clearly be  
14 able to go to hearing in that regard.

15                    COMMISSIONER BALCH:  They would not  
16 otherwise be able to under hearing rules that are defined  
17 in Section C?  Are they only allowed to appeal things that  
18 are expressly in the rule?

19                    I don't have that in front of me.

20                    THE WITNESS:  Well, we have got current A  
21 in there, those four provisions, which now becomes  
22 Proposed C.

23                    So I guess when you said C before, were you  
24 talking about the proposed rule?

25                    COMMISSIONER BALCH:  I'm talking about C(1)

1 here.

2 THE WITNESS: But of the proposed rule?

3 COMMISSIONER BALCH: In A where you were  
4 pointing to where they can now appeal a decision, are they  
5 limited in what they can appeal, I guess.

6 THE WITNESS: Well, the language is the  
7 same.

8 COMMISSIONER BALCH: I haven't read that  
9 recently.

10 THE WITNESS: No, it's not. What we have  
11 now down is put a maximal time limit on it but not change  
12 those other requirements, because the language is the  
13 same.

14 MR. WADE: As I understand your question, I  
15 don't think that the rule has a limitation of what can be  
16 appealed.

17 COMMISSIONER BALCH: So C(1) is really  
18 extraneous?

19 MR. WADE: I am guessing that the reason it  
20 made it into the original rule is probably something  
21 similar to as Mr. Griswold referred.

22 COMMISSIONER BALCH: Because it --

23 MR. WADE: People don't want conditions  
24 placed on them that have no basis in law.

25 THE WITNESS: For example, we discussed

1 before and we'll see it again the inclusion of the word  
2 "safety" in our regulations. It's there but perhaps it  
3 never should have been there in the first place. These  
4 things appear to just kind of crop up, sprout from the  
5 ground in regulations sometimes.

6 COMMISSIONER BALCH: So part of the problem  
7 that I have with the language is who determines whether  
8 it's expressly required by the rule or not. Someone has  
9 to make that interpretation.

10 THE WITNESS: Well, I would think if one is  
11 requesting a hearing then it would be incumbent upon the  
12 director to see if that was a cogent argument to be made:  
13 Is this condition outside the rule?

14 MR. WADE: At least the argument would have  
15 to be put forward by the person requesting the hearing.

16 MR. FELDEWERT: If I may, the problem I see  
17 is if someone determines that this is a condition that is  
18 expressly required by the rule then this doesn't give me  
19 the right to seek a hearing. That is the concern I have.

20 So I'm just wondering why you wouldn't just  
21 say "conditions".

22 MR. WADE: Well, looking at the language in  
23 general, I also wondered if it is redundant, because you  
24 have the ability to request a hearing within 36.9.

25 CHAIRMAN CATANACH: The applicant does?

1 THE WITNESS: If I may, it says current  
2 10A, which is going to be proposed to me, as well.

3 It's the second sentence. (Reading) "A  
4 request for hearing shall be in writing and shall state  
5 specifically the reason why a hearing should be held."

6 The next sentence goes on to say that a  
7 hearing must occur -- "shall occur", "shall schedule" if  
8 any of those four conditions are met.

9 So in Mr. Feldewert's question, he could  
10 still request a hearing but he's not necessarily granted a  
11 hearing. It's again at the discretion of the director.

12 But if the applicant's or their counsel's  
13 decision is that a condition is not expressly required by  
14 the rule, then that forces the hearing.

15 COMMISSIONER BALCH: I suppose my question  
16 would be, Mr. Wade, if we took that out does that change  
17 the rule in any way?

18 MR. WADE: If you took out the phrase  
19 "expressly required by rule" and just left "subject to" --

20 COMMISSIONER BALCH: Conditions.

21 MR. WADE: -- conditions"?

22 I don't think it changes the overall  
23 effect.

24 MR. WADE: Well, my worry would be then any  
25 type I put a condition on an application it's forcing the

1 hearing.

2 COMMISSIONER BALCH: No, it allows a  
3 hearing. It doesn't enforce a hearing.

4 THE WITNESS: When I read that, its says  
5 "Division shall schedule..."

6 MR. BRANCARD: If the applicant requests.

7 MR. WADE: If the applicant requests.

8 I'd suggest that the language would read  
9 more like "The Division has proposed to deny the  
10 application" or "grant subject to conditions proposed by  
11 the Division", or you know, it should make clear that  
12 these are Division conditions.

13 CHAIRMAN CATANACH: Would that work,  
14 Mr. Griswold, if you just inserted "includes Division  
15 conditions"?

16 THE WITNESS: In C(1)?

17 CHAIRMAN CATANACH: Yes, sir.

18 THE WITNESS: And strike "not expressly  
19 required by rule"?

20 CHAIRMAN CATANACH: Uh-huh.

21 THE WITNESS: Well, I guess I'm at a point  
22 of disagreement, then, because if I read that fully  
23 through, if I read Proposed C as being discussed it be  
24 modified, it would read "In addition to the request for  
25 hearing provided in Subsection, the Division shall

1 schedule a hearing on the application if the Division's  
2 proposed decision to approve the application includes  
3 conditions."

4 CHAIRMAN CATANACH: And the applicant  
5 requested a hearing.

6 It's not going to be automatically set.  
7 The applicant would have to request a hearing if they  
8 didn't agree with the conditions.

9 MR. BRANCARD: Or if they wanted  
10 clarification.

11 MR. WADE: Which is the end game. That's  
12 what we're trying to get at. We're trying to make it  
13 explicit as to what we require, and allow the applicant  
14 the ability to appeal those.

15 THE WITNESS: Well, I mean it's retaining  
16 language that was already in 36, or is already in 36.

17 COMMISSIONER BALCH: I asked Mr. Brancard  
18 whether that kind of language doesn't exist in other rules  
19 specific to the original 36. If we are modifying it to  
20 streamline it, we have the ability to take out things that  
21 aren't efficient or don't work.

22 THE WITNESS: And I appreciate that,  
23 commissioner.

24 CHAIRMAN CATANACH: That's all I have.  
25 So we will strike that.

1 Agree on that?

2 COMMISSIONER BALCH: The language change.

3 THE WITNESS: Point of clarification for  
4 me.

5 At least at this point the commission does  
6 not have a problem with the 90-day clause in proposed  
7 C(1)? Just the request --

8 COMMISSIONER BALCH: That is pretty normal.

9 THE WITNESS: Just the request. Because  
10 the current rule does not have a time limit.

11 COMMISSIONER BALCH: Does not have a time  
12 limit?

13 THE WITNESS: No. It just simply says in  
14 the --

15 COMMISSIONER PADILLA: I thinks 90 days is  
16 sufficient.

17 MR. BRANCARD: It's quite generous.

18 CHAIRMAN CATANACH: Quite.

19 MR. BRANCARD: It's normally 30 days.

20 CHAIRMAN CATANACH: Okay.

21 THE WITNESS: Because that would be  
22 basically -- I guess as it is proposed it would be  
23 coincident with the time frame associated with the public  
24 notice. Because that's when both clocks would start.

25 COMMISSIONER BALCH: Does that --

1 THE WITNESS: Well, I guess not exactly,  
2 but fairly close.

3 MR. BRANCARD: Because there's a different  
4 noticing process for a hearing, right?

5 THE WITNESS: Right.

6 COMMISSIONER BALCH: So you can't have  
7 those overlap.

8 THE WITNESS: But that particular clock and  
9 the clock for public request for hearing both are  
10 triggered when the proposed decision is issued. So there  
11 would be some lag in time, I guess, between the time that  
12 the applicant received the tentative proposed decision and  
13 the time the public notice actually did occur, but it's in  
14 their interest to -- if they are desirous of getting an  
15 approved permit at the end of the process to do that as  
16 quickly as possible.

17 MR. WADE: Are there any further questions  
18 on this exhibit?

19 (Note: No response.)

20 So I'd like to move on to Exhibit 17, which  
21 gets us into the financial assurance portion of the rule.  
22 Allison Marks is here to speak to that, so if I could call  
23 Ms. Marks and have Mr. Griswold available to recall.

24 Ms. Marks, you need to be sworn.

25 ALLISON MARKS



1                   Can you discuss the proposed amendments  
2 that are found within 17.

3           A.     Sure.  I'll just go with all the -- step-by-step  
4 with every amendment.

5                   The first proposed amendment is to be  
6 consistent within the proposed rule.

7                   The second proposed change is to be  
8 consistent with Section 36.18 which Mr. Griswold lists --

9           Q.     Specifically the first that you refer to in the  
10 first amendment, those underlying portions start,  
11 "...pursuant to Paragraph (9)..."

12           A.     Correct.

13           Q.     The second starts, it's underlined, "...to  
14 implement the closure or post closure plan."

15           A.     Correct.

16           Q.     That would be discussed by Mr. Griswold later?

17           A.     Correct.

18           Q.     The third would be to strike the "tentative" and  
19 underline "proposed"?

20           A.     Correct.  And the third is to be consistent with  
21 36.9, and the fourth is to the strike "application" and  
22 replace it with "proposed decision," and that would be  
23 consistent with 36.9.

24           Q.     So these are really just changes, amendments  
25 that will make the rule consistent with itself.

1           A.     Correct.

2           Q.     If we could turn to Exhibit 18, seven amendments  
3 in here. Can you discuss those, please.

4           A.     Sure. The first proposed amendment states  
5 "...or forms otherwise acceptable to the Division."

6                     This change will allow greater flexibility  
7 to both applicants and the Division. Sometimes we  
8 receive -- the Oil Conservation Division has certain forms  
9 for financial assurance documents. Sometimes, in  
10 particular for letters of credit, especially with national  
11 banking associations, certain banks may not like the OCD's  
12 forms and they choose to write their own letters of  
13 credit. They include the OCD's terms but sometimes will  
14 change those. They are not substantively different, and  
15 we will approve those forms. So we wanted to allow that  
16 flexibility.

17                     The second change replaces "State of New  
18 Mexico" with "the Energy, Minerals and Natural Resources  
19 Department, Oil Conservation Division."

20                     This change is necessary from an accounting  
21 perspective. If the monies are payable to the State of  
22 New Mexico that is generally into the general fund. If we  
23 specify the Energy, Minerals and Natural Resources  
24 Department, Oil Conservation Division, that would ensure  
25 the funds are placed into the oil reclamation fund.

1                   The third change is to strike "monitoring"  
2 and replace it with "operations". That is to be  
3 consistent with 36.18, which Mr. Griswold will speak to.

4                   The fourth change is to include "applicable  
5 Division orders," which will make certain that any  
6 financial assurance also covers any Division orders that  
7 any operator may be subject to.

8                   The fifth change strikes, "The applicant  
9 shall notify the Division of a material change affecting  
10 the financial assurance within 30 days of discovery of  
11 such change." The strike through -- we have a more  
12 comprehensive provision in part (F)3, which I will discuss  
13 later.

14                   The sixth change is to add, "The Division  
15 may require proof that the individual signing for an  
16 entity on a financial assurance document or any amendment  
17 thereto has the authority to obligate that entity."

18                   We want to certainly make sure that any  
19 persons signing any financial assurance document has the  
20 authority to obligate a surety company, bank, or the  
21 operator. We want to, obviously, not condone fraud.

22                   The seventh change states, "All forfeitures  
23 the Division demands pursuant to 19.15.36 NMAC shall be  
24 payable to the Energy, Minerals and Natural Resources  
25 Department, Oil Conservation Division upon demand by the

1 Division," which is what I already just spoke to,  
2 regarding the oil reclamation fund and not getting money  
3 into the general fund.

4 MR. WADE: Any questions as to this  
5 exhibit?

6 CHAIRMAN CATANACH: Just a quick one.  
7 What kind of proof does the Division  
8 require that would show that they have authority to  
9 obligate? Would that be just a letter?

10 THE WITNESS: We usually have a Power of  
11 Attorney from, say, a surety company signed by the  
12 president or whomever is the officer for the surety  
13 company.

14 Sometimes we'll have -- yeah, it's usually  
15 a Power of Attorney or some sort of designation from the  
16 corporate, or -- from the corporation. Or we will request  
17 a document who the general manager is of an LLC or of a  
18 partnership.

19 CHAIRMAN CATANACH: And that's going to at  
20 the discretion of the Division? We are not going to  
21 require that in every case, or what would...

22 THE WITNESS: We have about five surety  
23 companies we deal with regularly. If we receive five  
24 surety bonds on the same day we don't usually require --  
25 uhm, her name is Hope, I forget her last name to send in

1 the Power of Attorney every single time. We save some  
2 trees that way.

3 CHAIRMAN CATANACH: All right.

4 Q. (BY MR. WADE) So if we can turn to Exhibit 19.

5 A. Sure.

6 Q. We can discuss -- I think we identified 11  
7 changes.

8 A. Yes. The first change we have added is that  
9 surety bonds shall be executed and notarized. We want --  
10 again this is a fraud reduction measure to make certain  
11 that the signatures themselves are whoever they say is  
12 signing these documents, that we have a person notarizing  
13 the signature to make sure that the signature is true and  
14 correct.

15 The second change is to require corporate  
16 surety is licensed by the Superintendent of Insurance.  
17 The Superintendent of Insurance, this falls under Chapter  
18 the 59A, Article 5 of New Mexico statutes. The  
19 Superintendent of Insurance regulates insurance companies  
20 in the State of New Mexico. Insurance companies don't  
21 have to be registered with the Secretary of State. This  
22 falls under the domain of the Superintendent of Insurance.  
23 He makes sure all surety companies/insurance companies  
24 follow the laws applicable in the State of New Mexico.  
25 And when we go to collect on a surety bond we serve the

1 Superintendent of Insurance. If they are not registered  
2 in the State of New Mexico collection will be registered  
3 with the Superintendent of Insurance. Collection would be  
4 a problem and we would have to serve the equivalent of the  
5 superintendent in a different state. So making certain  
6 they are registered with the Superintendent of Insurance  
7 is essential, and we do check the Office of Superintendent  
8 of the Insurance's website with any unknown surety  
9 companies.

10                   The third change, a noncancelable  
11 strike-through is included in the following addition. We  
12 say, "All surety bonds shall be non cancelable and payable  
13 to the Energy, Minerals and Natural Resources Department,  
14 Oil Conservation Division within 45 days after demand is  
15 made by the Division. All surety bonds shall be governed  
16 by the State of New Mexico."

17                   Again, which I spoke to earlier, we want to  
18 make certain that the funds are deposited into the oil  
19 reclamation fund, and we've added the provision to make  
20 the funds payable within 45 days after demand is made by  
21 the Division. We don't want an outstanding debt for  
22 months or possibly years, so we would like to make certain  
23 those funds are collectable within a certain time frame,  
24 and make that time frame 45 days here.

25                   The fourth change, we strike "bank

1 organized or authorized to do commercial banking business  
2 in the United States," and replace that with, "a national-  
3 or state-chartered banking association."

4 The language we strike really doesn't make  
5 sense under the law. It's not really worded well.  
6 Organizing a bank is kind of how you -- you have officers.

7 And we want a bank to be chartered.  
8 National banks are chartered by the Office of the  
9 Comptroller of Currency, and regulated by the Office of  
10 the Comptroller of Currency. State banks are chartered by  
11 the appropriate state agency. In New Mexico that's the  
12 Financial Institutions Division, and they would regulate  
13 state chartered banks along with the FDIC. So that gives  
14 us more protection to make sure they actually have a  
15 charter, and if it's an unknown bank we will certainly  
16 look them up on the FDIC's website.

17 The fifth change, we have allowed for more  
18 time, from 90 days to 120 days after the Division receives  
19 a notice of nonrenewal of a letter of credit. Letters of  
20 credit are for a term of five years and they automatically  
21 renew. When we receive a notice of nonrenewal from the  
22 banking institutions -- and it's incumbent upon the  
23 operator to replace the financial assurance within, as it  
24 currently sits 90 days. We want to allow for more time,  
25 120 days, to find substitute financial assurance.

1                   This goes to probably the seventh change,  
2 and it will be more clear as to why we want to allow some  
3 more time.

4                   The sixth change is again that we want to  
5 strike that "letters of credit are payable to the State of  
6 New Mexico," and want to make certain they are payable to  
7 ENMRD.

8                   The seventh change, uhm, (Reading) All  
9 letters of credit are governed by the laws of the State of  
10 New Mexico. If a letter of credit is not replaced by an  
11 approved financial assurances within 30 days of notice of  
12 nonrenewal provided to the Division, the Division may  
13 demand and collect on the letter of credit.

14                   This language is identical, or at least  
15 near identical, I think it's identical, to rule 19.15.8,  
16 which I presented to the commission. And letters of  
17 credit, unlike an assignment of cash collateral or surety  
18 bond, when that money is -- when the letter of credit is  
19 not renewed that money is not collectable whatsoever, and  
20 so we would lose any financial assurance that is in place.

21                   So this gives us a means to collect on the  
22 letter of credit if the letter of credit isn't renewed or  
23 substitute financial assurance isn't put in place by the  
24 operator. By extending the time from 90 to 120 days the  
25 Division has more time to work with an operator to allow

1 them to find substitute financial assurance, work with  
2 banks or find a surety or find sufficient funds to do an  
3 assignment of cash collateral.

4 The eighth change, the term "applicant" is  
5 replaced with "operator", and that is to be consistent  
6 within the proposed rule.

7 The ninth change, Subsection C of  
8 19.15.36.18, is replaced with 19.15.36, and this is more  
9 broad to allow for the forfeiture of a financial assurance  
10 person through the entire rule and not just a subsection,  
11 so if an operator violates any portion of Rule 36 we have  
12 the right to collect on the financial assurance.

13 The tenth change is the addition of the  
14 words "and post closure," and this is to allow for  
15 consistency within the proposed rule.

16 The eleventh change -- and I'd like to  
17 actually add some additional language in the rule here.  
18 We have, "Any assignment of cash collateral shall be  
19 governed by the laws of the State of New Mexico and shall  
20 be on Division-prescribed forms." And I would like to add  
21 at the end of that sentence, "...or forms otherwise  
22 acceptable to the Division."

23 And this is again to allow for the  
24 flexibility, in particular for letters of credit that we  
25 receive.

1 Q. Is that consistent with language also proposed  
2 in 36.11(C), allowing that same flexibility? That's the  
3 very first sentence in 11(C). That would be Exhibit 18.

4 A. Yes, it is. (Note: Pause.)

5 I think we are done with Exhibit 19.

6 MR. WADE: We Are. Are there any questions  
7 on Exhibit 19?

8 CHAIRMAN CATANACH: We are just adding that  
9 last part to that?

10 THE WITNESS: Correct. "...or forms  
11 otherwise acceptable to the Division"

12 COMMISSIONER PADILLA: Ms. Marks, Part 2  
13 there you're striking "payable to the State of New  
14 Mexico," and you said that was in favor of the "payable to  
15 ENMRD" language, but I don't see the ENMRD language in  
16 there.

17 MR. WADE: I'm sorry, which part?

18 COMMISSIONER PADILLA: 36.11 Part 2.

19 THE WITNESS: My apologies, Mr. Chairman  
20 and Commissioner Padilla. I believe I misspoke there.  
21 It's just not necessary, the State of New Mexico language  
22 there. The remainder of that sentence is incorporated,  
23 with the on-demand, is incorporated in the following --  
24 the second sentence that follows.

25 COMMISSIONER PADILLA: Without the specific

1 reference to ENMRD? Is that still as applicable here?

2 THE WITNESS: We just haven't specified to  
3 whom the financial assurance is payable. But if you refer  
4 down to Subsection 3 there's no entity to whom the cash  
5 accounts are payable, nor in the first -- the first  
6 section does, the third section doesn't. So if we add it  
7 to the second section I would suggest we probably add it  
8 to...

9 COMMISSIONER PADILLA: Seems like it should  
10 be consistent throughout.

11 THE WITNESS: The third section, I guess,  
12 has "of the account to the Division," so I think we could  
13 probably...

14 Yeah, maybe at the end we can just say,  
15 copy that language.

16 MR. WADE: Letters of credit?

17 THE WITNESS: All letters of credit shall  
18 benefit the Energy Minerals and Natural Resources  
19 Department, Oil Conservation Division.

20 COMMISSIONER PADILLA: Seems like you want  
21 to pay --

22 THE WITNESS: Or we can just add me.

23 COMMISSIONER PADILLA: That, too.

24 CHAIRMAN CATANACH: Did you make note of  
25 that change?

1 MR. WADE: I don't think I have the wording  
2 exactly 100 percent but I believe that the proposed  
3 language would be, "All letters of credit shall benefit  
4 the Energy Minerals and Natural Resources Departments,"  
5 and I believe you said "or Division"?

6 THE WITNESS: Comma, Oil Conservation  
7 Division

8 MR. WADE: Comma, Oil Conservation  
9 Division, period.

10 THE WITNESS: Yes. When they write their  
11 checks sometimes the Oil Conservation Division will get  
12 cut off but as long as it gets to ENMRD it will be fine  
13 and we can deposit it into the right account.

14 CHAIRMAN CATANACH: And being governed by  
15 the laws of the State of New Mexico, is that what you're  
16 doing here?

17 THE WITNESS: I think it was at the end  
18 of...

19 CHAIRMAN CATANACH: Okay. End of that  
20 sentence.

21 COMMISSIONER PADILLA: So Part 3, because  
22 of the language that says: The Division may, at any time  
23 and from time to time direct payment of all or part of the  
24 balance of such account excluding to itself or it's  
25 designee.

1 Do you think that is sufficient not to  
2 identify the Division?

3 THE WITNESS: Of the account.

4 COMMISSIONER PADILLA: Basically --

5 THE WITNESS: To the Division. We have "to  
6 the Division."

7 COMMISSIONER PADILLA: Right. And in your  
8 opinion that's sufficient?

9 THE WITNESS: I think that's fine.

10 COMMISSIONER BALCH: In regards to that  
11 definition of operator and owner, in Section 3 would it be  
12 more appropriate to say a permittee may provide financial  
13 assurance?

14 MR. WADE: I don't think that Ms. Marks was  
15 down here for that particular part of the testimony, so...

16 COMMISSIONER BALCH: Well, maybe I'm  
17 directing this to you, Mr. Wade.

18 MR. WADE: Okay. I believe when we start  
19 going through, if we define an applicant and a permittee  
20 as the owner, then we are going to have to go through and  
21 make all that languages consistent. So that would be  
22 inconsistent.

23 COMMISSIONER BALCH: Just wanted to make  
24 sure you catch all those.

25 MR. BRANCARD: Because financial assurance

1 is provided prior to actually getting the permit.

2 MR. WADE: So it would be the applicant  
3 still.

4 And could you give me the reference  
5 specifically?

6 COMMISSIONER BALCH: 36.11E(3).

7 MR. WADE: Okay.

8 COMMISSIONER PADILLA: One more question,  
9 Ms. Marks.

10 Is 45 days practical as a time frame to  
11 collect on a bond?

12 THE WITNESS: I usually receive payment  
13 within 15 to 20 days. We could extend it to 30 -- or 60  
14 days, but I've never had an issue.

15 COMMISSIONER PADILLA: You are getting them  
16 in that time frame.

17 I just don't have any idea what that  
18 actually takes.

19 COMMISSIONER BALCH: When will you not get  
20 it within 45 days?

21 THE WITNESS: During my time making demand  
22 on a surety bond I have never not received it within an  
23 allotted time. This is just to make certain that we  
24 protect ourselves, and if there is a surety company that  
25 wants to hold onto their monies for a longer period of

1 time that we don't have a liability outstanding for longer  
2 than necessary.

3 MR. WADE: Any further questions on Exhibit  
4 19?

5 (Note: No response.)

6 Q. If you can turn to Exhibit 20, please.

7 A. Sure.

8 Q. And we have identified five basic changes,  
9 but --

10 A. Six, maybe?

11 Q. Six, maybe.

12 A. Yeah. In F(3) of -- let me go through those  
13 sentence by sentence.

14 I'd ask for some language to be inserted  
15 there, as well, on the additional "otherwise acceptable  
16 forms". So I have a certain place that I think that  
17 wording should be inserted.

18 So -- this actually relates back to that  
19 strike-through in 36.11(C) where this new F(3) comes in.  
20 We struck the language, if you recall, in 11C and this is  
21 just more thorough language.

22 So we've added, "Any time an operator  
23 changes the corporate surety, financial institution, or  
24 amount of financial assurance, the operator shall file  
25 updated financial assurance documents on

1 Division-prescribed..." -- and then I would add a comma,  
2 "or otherwise acceptable, forms within 30 days."

3 COMMISSIONER BALCH: Division-prescribed  
4 could be, envision more and more of whatever they ask for.  
5 In other words, "prescribed" covers that case, doesn't it?  
6 It could be a Division form or whatever else they ask for.

7 THE WITNESS: I guess. I mean, earlier --

8 COMMISSIONER BALCH: You might go back  
9 earlier and change the word there to "prescribed" and  
10 simplify it.

11 MR. WADE: I think just as a common matter  
12 in usage of forms what happens is we have forms, they are  
13 available, posted, and we just expect that they use those  
14 forms. So I -- if you're looking at Division-prescribed,  
15 I think that's what we mean by Division-prescribed. They  
16 are forms that we've already put out there.

17 Although I do take your point. As long as  
18 we're prescribing them, they're ours.

19 THE WITNESS: I do believe if there is any  
20 ambiguity this would clear up any ambiguity to add in that  
21 language. Sometimes I do have banks that call me and  
22 think they are required to use our forms, and it has  
23 raised issues and our bond administrator has to deal with  
24 them sometimes. And then I get the calls, and then we go  
25 back and forth on language.

1                   COMMISSIONER PADILLA: Just say Division  
2 forms or forms acceptable to the Division. Take out  
3 prescribed.

4                   COMMISSIONER BALCH: Use common language in  
5 all sections.

6           A.     So, "on Division-" strike "prescribed."

7                   "On Division, or otherwise acceptable,  
8 forms within 30 days."

9                   And we just want to make certain here that  
10 if there are any changes that we have updated financial  
11 assurance documents. That's the intent of adding this  
12 first sentence.

13                   Then the second sentence, "Notwithstanding  
14 the foregoing, if an operator makes other changes to list  
15 financial assurance documents, the Division may require  
16 the operator to file updated financial assurance documents  
17 on Division" -- get rid of prescribed -- "or otherwise  
18 acceptable forms within 45 days after notice to the  
19 operator from the Division."

20                   This addresses the idea that we often will  
21 receive a number of riders when financial assurance -- the  
22 amounts will increase, decrease, and we sometimes will  
23 have six riders, seven riders, eight riders. If a rider  
24 goes missing that obviously is a problem from an  
25 administrative standpoint.

1                   Or sometimes it's tracking the actual  
2 provisions or conditions in the financial assurance  
3 documents themselves can be sometimes pretty difficult,  
4 and we want to allow the Division to require the operator  
5 to submit renewed financial assurance documents, and we  
6 have given an additional 15 days over the 30 days to do  
7 this, because this is just a Division decision here, and  
8 it will ease an administrative burden.

9                   The next change we have, we've added a  
10 review of -- and the language "and at least once during  
11 every successive five-year period."

12                   This is simply to make certain that the Oil  
13 Conservation Division reviews financial assurance every  
14 five years and that the financial assurance requirement --  
15 just because the financial assurance requirements may  
16 change over time.

17                   The fourth change, we have -- we strike  
18 "monitoring" and replace it with the word "operations".  
19 This is to be consistent within the rule.

20                   Next we strike, "provided that the  
21 financial assurance required of a commercial facility  
22 permitted prior to the effective date of 19.15.36 NMAC  
23 shall not exceed \$250,000 except in the event of a major  
24 modification of the commercial facility. If such a  
25 commercial facility applies for a major modification, the

1 Division shall determine the applicable financial  
2 assurance requirement based on the total estimated closure  
3 and post closure cost of the commercial facility, as  
4 modified, without regard to the \$250,000 limit."

5 We strike this to be consistent with 36.20,  
6 the transitional provision, which Mr. Griswold will speak  
7 to.

8 And the last change, we have added the duty  
9 to report, and "Any operator who files for bankruptcy  
10 shall provide notice to the Division through the process  
11 provided for under the rules of the United States  
12 Bankruptcy Court and the New Mexico Attorney General."

13 And we have now added the Division on the  
14 list of governmental agencies that register with the  
15 United States District or Bankruptcy Court in New Mexico,  
16 and has specifically added surface waste facilities. And  
17 this is giving operators and their attorneys, making it a  
18 requirement to notice the OCD of any bankruptcy  
19 proceeding, and this would simply put in the rule that  
20 requirement, as well, and it's an additional reminder to  
21 any operator.

22 MR. WADE: Any questions regarding this  
23 exhibit?

24 (Note: No response.)

25 MR. WADE: Then we would --

1 MR. BRANCARD: Actually I do have one  
2 question. It's more of a clarification. It's review of  
3 adequacy of financial assurance.

4 So the way I read that is after the first  
5 five years they can make a review any time they want.

6 MR. WADE: I'd have to --

7 COMMISSIONER BALCH: Financial assurance.

8 COMMISSIONER BALCH: Review of financial  
9 assurance.

10 MR. WADE: So within the first five years,  
11 you're saying.

12 COMMISSIONER BALCH: (Reading) The Division  
13 may at any time, not less than five years after initial  
14 acceptance.

15 So if five years passes, then they may  
16 perform a review?

17 MR. WADE: Yes.

18 COMMISSIONER BALCH: I guess whenever they  
19 want.

20 THE WITNESS: Well, at least once during  
21 every five-year period thereafter the Division should  
22 review the adequacy of the financial assurance.

23 COMMISSIONER BALCH: That's the language  
24 that is added, the "at least once," meaning they can do it  
25 20 times if they want to.

1 THE WITNESS: Yes. If we would have the  
2 FTEs to do that, it would be fantastic, but I don't know  
3 that that would certainly happen.

4 But yes, the review to make certain that  
5 they have the adequate financial assurance and that -- I  
6 think once every five years would be a lofty goal for the  
7 Division, but I...

8 COMMISSIONER BALCH: So you're really  
9 trying to put your own feet on the fire here to make sure  
10 you do it at least every five years.

11 THE WITNESS: Correct.

12 MR. WADE: I guess I did have one more  
13 question, just in general.

14 Q. Do you think that these amendments will help  
15 strengthen the Division's ability to use or require the  
16 FA, if needed?

17 A. Yes.

18 MR. WADE: At this point Ms. Marks, her  
19 presentation is over. We will be going back to Mr.  
20 Griswold. I don't know what you want to do given the  
21 time.

22 CHAIRMAN CATANACH: Are there any other  
23 questions of Ms. Marks?

24 MR. WADE: Anyone have a question?

25 MR. FELDEWERT: No.

1 MR. WADE: May she be excused?

2 CHAIRMAN CATANACH: Yes.

3 THE WITNESS: Thank you, Mr. Chairman.

4 CHAIRMAN CATANACH: So I guess this would  
5 be a good point to break for lunch now. I guess we will  
6 reconvene about 1:15.

7 MS. FOSTER: Mr. Catanach, if I may?

8 I do have to leave from Santa Fe. I have  
9 to leave by 2:30 this afternoon, and I did sign up for  
10 public comment. So I don't know if you would to do it now  
11 or after you come back from lunch.

12 CHAIRMAN CATANACH: How long do you think  
13 it would take?

14 MS. FOSTER: Ten minutes.

15 COMMISSIONER PADILLA: Let's go ahead and  
16 do it now.

17 MR. PRICE: Mr. Catanach, I also have some  
18 public comments. I didn't sign up when I first come in,  
19 but I would like to have to the opportunity on public  
20 comments. I can hold mine off to the end.

21 CHAIRMAN CATANACH: Why don't we do it  
22 right after lunch. We will have public comments right  
23 after lunch.

24 MR. PRICE: Both of them?

25 CHAIRMAN CATANACH: How long is yours,

1 Mr. Price?

2 MR. PRICE: Four hours.

3 MR. CATANACH: Don't you have to be in  
4 Oregon?

5 MR. PRICE: Ten or 15 minutes, sir.

6 CHAIRMAN CATANACH: Okay. We will do that  
7 after lunch, then.

8 MS. FOSTER: Thank you.

9 (Note: In recess from 12:07 p.m. to 1:20 p.m.)

10 CHAIRMAN CATANACH: Call the hearing back  
11 to order at this time.

12 And I think at this time we had agreed  
13 before lunch that we would do public comments at the  
14 moment, so which one of you want to go first?

15 MS. FOSTER: Okay. Thank you

16 Mr. Commissioners, my name is Karin Foster.  
17 I am the executive director and attorney for the  
18 Independent Petroleum Association. These comments are on  
19 behalf of the 350 members of the Independent Petroleum  
20 Association.

21 I also represent T-n-T Environmental, LLC,  
22 which is a surface waste management facility, and these  
23 comments I am also making on behalf of them.

24 So the first thing that I would like to say  
25 is -- and I don't know if Jim is in the room, but I do

1 want to thank Jim for all the work that he did on the  
2 stakeholder group. I personally was a member of the  
3 stakeholder group; we had several meetings. We had some  
4 very good discussions about a lot of these issues, but the  
5 thing is that please understand that the conversations  
6 that industry had in relation to this hearing and in  
7 relation to the rule as it is now proposed apply to  
8 nontechnical aspects of the rule only. The members of the  
9 Independent Petroleum Association, as well as T-n-T are  
10 very concerned about the technical aspects of this rule,  
11 the surface waste management waste acceptance criteria and  
12 the operational requirements that possibly could change,  
13 the monitoring requirements that could possibly change.

14 So I look forward to working with Mr.  
15 Griswold in having that second stakeholder process to talk  
16 about the second half of this rule.

17 This rule does not apply to existing  
18 surface waste management facilities. There are very many  
19 of them. Most of them have been permitted under Rule  
20 7.11, which causes a problem, even in the way that this  
21 proposed rule is now written, and I'll get to that in a  
22 minute.

23 The good things about the proposed changes  
24 are that operators need flexibility, and we need to be  
25 encouraged to have additional communication with the

1 department. I think this rule does that. I think that  
2 the current Rule 36 as written with these provisions does  
3 not give the operators as much flexibility as needed.

4 I would also thank the Division for  
5 striking the word "safety". That was kind of one of my  
6 pet peeves, I've been on that band wagon for a couple of  
7 years now, concerning the statutory authority of the Oil  
8 Conservation Division, and it does not include safety.  
9 And so I'm glad they finally heard me.

10 I would ask that the form, the 137-A form  
11 for minor modifications is something that we could look at  
12 before the finalization of this rule. The situation that  
13 we have, and it's not just T-n-T but several other  
14 operators that I'm aware of, is that there's certain  
15 personnel at the Division now that believes that any sort  
16 of modification needs to be considered a major  
17 modification not a minor modification.

18 So I would ask that the Division, and you  
19 as the commission, keep that in mind. I'm not happy with  
20 the way that those two terms are defined in the rule,  
21 because it is subject to abuse. It's currently being  
22 abused.

23 The way that the rule is written with the  
24 administrative completeness I think is a good change. It  
25 will allow for better communication between the applicant

1 and the Division and ultimately result in better hearings.  
2 If we need to come in front of you, at least the applicant  
3 will be aware of what is required of them. And if there's  
4 concerns about a few things in the application such as an  
5 ultimate denial results, at least you can focus those  
6 hearings to those few items, instead of the process that  
7 we have now, which is we come to the hearing and  
8 everything is put out on the table, and it becomes a much  
9 larger process than necessary.

10 But all that said, I am concerned with the  
11 provision that you have in the rule that requires notice,  
12 that the operators must give notice to persons on the OCD  
13 list that have indicated that they want to be notified,  
14 that large generalized email list that you-all have. And  
15 we did have discussions in the stakeholder group, and I  
16 guess the issue was not resolved, and I think it needs to  
17 be resolved; and that is, as written the rule requires us  
18 to give notice to all those people on that list, but we as  
19 operators do not have that list. The OCD maintains that  
20 list, and I can't imagine that the OCD is going to give us  
21 that list for us to notify all those people as is required  
22 in the rule.

23 Mr. Griswold also mentioned in his  
24 testimony that there is a list that's maintained by WQCC,  
25 the Water Quality Control Commission, who might also have

1 some affected people, or people who might be interested in  
2 a surface waste management application, and those people  
3 need to be notified, as well.

4 Again operators do not have that list, and  
5 I can't imagine that the agency, either the WQCC or the  
6 environment department, who manages that list, would give  
7 it to us.

8 So in terms of that notice provision, that  
9 needs to be clarified, in terms of who we notify, whether  
10 it be the at OCD that gives the notification or not.

11 In response to the question, and I forgot  
12 who it was that asked why is it that we have applications  
13 coming in, more applications coming in, and I would  
14 maintain that the reason that you have more applications  
15 coming in now is because yes, commodity pricing is down,  
16 but you do have the side of the industry, the service side  
17 of the industry does have money, and they are trying to  
18 figure out what are the needs going to be for the future  
19 when commodity pricing comes back.

20 The other thing is that this Rule 34 that  
21 got passed by this commission only applies to company  
22 facilities, it does not apply to commercial facilities,  
23 and we are hearing very loud and clear from the BLM that  
24 they want us to start recycling more and more water. And  
25 because the BLM will not allow us to locate those

1 facilities on BLM land, we have to come to the OCD, and  
2 there are service company people that are looking at  
3 potential future recycling facilities which would need to  
4 come under Rule 36.

5 I also would ask the commission to look  
6 very carefully at the notice provision in Section 36.9D  
7 which seems to state that the only exception that you can  
8 ask for is under Section F, which applies to revegetation  
9 requirements only. So that provision basically says that  
10 you as an operator when you any give your notice provision  
11 you need to say in the notice what changes you're asking  
12 for in the rule. If you're asking for any exceptions --  
13 the language says exceptions, waivers or alternatives.  
14 However, it points to -- the section of the rule that it  
15 points to only applies to asking for an exception or  
16 variance for revegetation. The other part of the rule,  
17 which I think is Part 19, does talk about exceptions and  
18 variances but it does not talk about alternatives.

19 So I think that that notice provision, that  
20 part, Section D, needs to be rewritten, as well.

21 Section 36.9B(6) was the provision that is  
22 once an operator gets to the point that they are going to  
23 submit a revised application. I'm very concerned that, as  
24 general counsel mentioned, Mr. Brancard mentioned, that  
25 this is a dead end, it does result in a dead end.

1                   I agree with Counsel Feldewert that, you  
2 know, we need to have an end date at some point so that if  
3 necessary we can push things to a hearing and we are not  
4 struck in an endless cycle, but I don't know if the  
5 language as written in that section, Section B(6) is  
6 adequate to address the needs of the industry, as well the  
7 Division.

8                   I am also concerned about this  
9 owner/operator distinction, and the reason I'm concerned  
10 is because of the point, the part of the rule that we are  
11 not discussing today, which is the technical aspects of  
12 it. There needs to be some provision in the rule that  
13 says the owner/operator can hire a third-party consultant  
14 to do what is necessary under this rule, because there are  
15 parts of this rule that say that the owner/operator has to  
16 go out and do testing and do monitoring and do all kinds  
17 of things. And obviously, T-n-T, the Schmitz family who  
18 owns T-n-T is not going to go out there and do the testing  
19 themselves, they are going to go hire a carbo labs, they  
20 are going to go hire a third-party contractor. And yes,  
21 they will sign off as per the OCD rules, they will provide  
22 a cover letter saying they reviewed the testing and that  
23 they'll sign off on it, but they're not specifically the  
24 ones that are going out and doing the testing.

25                   So I would respectfully ask somewhere it

1 says, yes, the owner is legally responsible for  
2 everything. He can hire a third-party operator, he can  
3 hire a third-party testing lab, whatever, it doesn't need  
4 to be that specific, but they should be able to hire  
5 third-party consultants and ultimately be responsible for  
6 those folks, as well.

7           And then I leave the best for last. I'm  
8 very concerned, and Mr. Griswold has not talked about this  
9 yet in his testimony, he'll talk about it this afternoon.  
10 The transitional provision that you have is very, very  
11 concerning for existing facilities that are out there.

12           As I mentioned before, most of the  
13 facilities that are out there are permitted under Rule  
14 7.11. What has happened is over the years with the  
15 Rule 36 that got passed after 7.11 is that when Rule 36  
16 was initially passed there was a grandfather clause in  
17 there, such that operations that were permitted under 7.11  
18 could continue the way they were going. However, there is  
19 an employee that you have at the OCD now who believes that  
20 if there is not a requirement that's specifically stated  
21 in Rule 7.11 but it is specifically stated in Rule 36,  
22 that the provisions of Rule 36 apply to the 7.11 operator.

23           There has been inconsistent enforcement  
24 with that provision, and operators are -- so for example,  
25 on the monitoring under this Rule 7.11 permit they are

1 only required to test for the eight heavy metals, but  
2 under Rule 36 they are required to test for the eight  
3 heavy metals plus everything else that is named under WQCC  
4 Rule 3103.

5           The timing of the testing is different.  
6 Under 7.11 they are required to monitor once a year and  
7 test that once a year. Under Rule 36 they are only  
8 required to test every five years. So what's happened is  
9 the OCD has picked and chosen whatever provisions are more  
10 stringent, and the operator, even though he is only  
11 permitted under 7.11, is finding himself stuck with  
12 provisions of Rule 36.

13           Your transitional provision as written here  
14 in Section 19.15.36.20 basically says that existing  
15 surface waste management facilities shall comply with the  
16 financial assurance, operational, monitoring, waste  
17 acceptance, closure and post closure requirements. I can  
18 tell right now that 7.11 permits do not address post  
19 closure requirements, and post closure requirements are  
20 something that I would maintain is a technical issue.

21           While this proposal here talks about yes,  
22 post closure requirements are going to be needed, the  
23 technical aspects are not being addressed in this hearing.

24           So I would respectfully ask this commission  
25 to revise this transitional provision to take out the

1 monitoring. Okay? To also take out the post closure  
2 provision in there until we have the opportunity to come  
3 back and talk about what we are going to do with 7.11  
4 facilities out there and this new Rule 36. If you are not  
5 going to require all 7.11 facilities to come in under Rule  
6 36; in other words you're limiting 7.11 permits and make  
7 everyone come in under 36, which I don't think you're  
8 going to do, you need to figure out something that is some  
9 kind of a hybrid for existing facilities but make it so  
10 that it's fair for all operators out there, regardless of  
11 the size.

12                   The other thing is that you are going to  
13 require the 7.11 facilities to comply with these new  
14 financial assurance provisions, which is fine, but how  
15 quickly do they need to apply to change all their bonding?  
16 Because now from what we heard from Ms. Marks' testimony,  
17 we have to go and change our bonds from just to the  
18 benefit of the State of New Mexico, now we need to  
19 specifically change those bonds to be to the benefit of  
20 the Energy and Minerals Department, and Oil Conservation  
21 Division. So we need to go and change those, and you need  
22 give us some time in order to do that.

23                   I would also request that transitional  
24 provisions apply equally to companies that are permitted  
25 under 7.11 or companies who have an Order or are operating

1 currently under settlement agreements. That needs to be  
2 even, because one of the biggest surface waste management  
3 operators in the state is operating under a settlement  
4 agreement, and therefore an Order and not a permit.

5 So we would ask that everything be equal.

6 I think that's all that I had. Again I  
7 want to thank the Division for allowing IPANM, and by  
8 extension T-n-T, to be at the table for these stakeholder  
9 meetings. I think it was very necessary. It was a good  
10 conversation that we had.

11 And these, as far as I'm concerned, are  
12 just minor points, but again because of the fact we are  
13 not dealing with technical aspects now, some of these new  
14 amendments and provisions do impact those technical  
15 updates that we've not had the opportunity to discuss and  
16 vet openly, I would ask that you just keep that in mind in  
17 terms of amending the proposals.

18 Thank you for the opportunity.

19 CHAIRMAN CATANACH: Thank you, Ms. Foster.  
20 Mr. Marley.

21 MR. MARLEY: I'm Bill Marley, Gandy-Marley,  
22 Incorporated. I'm not represented by anybody or anything.

23 We were permitted under 7.11. At the time  
24 of our permit we were told that those would be the rules  
25 we would adhere to from now on.

1                   And I couldn't hear a lot of what was said  
2 up here earlier. I just want to ask you gentleman to make  
3 sure that that's what we were told by this commission  
4 years ago, that's what we will be still under, that the  
5 rules of the game don't change halfway through the second  
6 quarter.

7                   COMMISSIONER BALCH: Would you be more  
8 comfortable with a transition to the new Rule 36 once it's  
9 completely in place at the termination or the next renewal  
10 period of your 7.11 contract?

11                  MS. FOSTER: There is no renewal on the  
12 7.11 contracts.

13                  COMMISSIONER BALCH: There is none?

14                  MS. FOSTER: No, there is not. It's  
15 basically subject to the review at the OCD itself, in  
16 terms of --

17                  COMMISSIONER BALCH: That is a one-time  
18 review or periodic?

19                  MS. FOSTER: It's anytime review.

20                  The other issue that we have with trying to  
21 do that is the signing requirements for 7.11 are  
22 significantly different than the Rule 36. So that would  
23 be a problem.

24                  COMMISSIONER BALCH: How many 7.11  
25 facilities are out there?

1 MS. FOSTER: I believe there's eight but  
2 I'm not speaking for the OCD.

3 COMMISSIONER BALCH: Thank you very much  
4 for bringing that issue up.

5 MS. FOSTER: Thank you again.

6 MR. MARLEY: Thank you, gentlemen.

7 MR. PRICE: Commissioners, my name is Wayne  
8 Price, and I'm here on behalf of Gandy-Marley. I'm a  
9 consultant for them.

10 I want to go through some history of this  
11 whole process. As most of you knew, or some of you know  
12 that I was the environmental bureau chief during the time  
13 that Part 36 was enacted. And just to cut to the chase, I  
14 can tell you that a lot of the interpretation of what's in  
15 Part 36 is not what we had intended for it to be, nor the  
16 commission had addressed it to be. And so I'll give you a  
17 little bit of history of the whole thing; I don't want to  
18 take up too much of your time.

19 But before I do that, I notice Mr. Catanach  
20 had questioned Jim Griswold about the difference between a  
21 major modification and a minor modification. Major  
22 modification, if you read it -- and I think I will read  
23 it -- means, "A modification of a surface waste management  
24 facility, and involves an increase in land area that the  
25 permitted surface waste management facility occupies, a

1 change in the design capacity or nature of the permitted  
2 oil field waste stream, addition of a new treatment  
3 process, an exception to, a waiver of, or change to a  
4 numerical standard, or any other modification the Division  
5 determines sufficiently substantial that public notice and  
6 public participation in the application process are  
7 appropriate."

8 Now, I can tell you with experience working  
9 with a certain OCD employee that you cannot get a minor  
10 modification. It's impossible. Everything you do,  
11 everything, is a major modification. And that major  
12 modification means a lot. On the existing 7.11 facilities  
13 it requires that basically you're not grandfathered  
14 anymore. It kicks you out of the grandfather clause.

15 Now, I'm not here to say that if you have a  
16 major modification -- it should be something where the  
17 agency has the right to say if you are going to build a  
18 new permitted landfill cell or anything like that that  
19 goes outside the original footprint, that would be a major  
20 modification. But the way it is right now, working with  
21 one individual in the agency it's impossible, absolutely  
22 impossible, and our complaints and everything has fallen  
23 on deaf ears, is that everything you do is a major  
24 modification.

25 Now, having said that I also want to go to

1 what Mrs. Foster had talked about is transitional  
2 provisions.

3 David Brooks and I actually wrote that  
4 provision, and I can tell you right now that after I left  
5 the agency the total intent of that changed, and it was  
6 changed by an infamous letter that came out from this  
7 agency. And that letter was not vetted, that letter was  
8 not in a work group, that letter was not approved by  
9 anybody but that individual who wrote it. And therefore  
10 that letter basically more or less tells landfill and land  
11 farm op- -- primarily land farm operators that they are no  
12 longer grandfathered, and that all the conditions that  
13 apply to the new rule applies to them.

14 That is kind of a stab in the back, because  
15 during the original -- if you go back and you look at the  
16 preamble and you look at the testimony, and you go in  
17 there and look, you see the word "grandfathered" all  
18 throughout the transitional phase. And "grandfathered"  
19 meant grandfathered for the existing facilities. But yet  
20 once that was done and once I left this agency, then that  
21 meaning changed.

22 So therefore -- let me give you an example.  
23 My client Gandy-Marley had a consultant who was in  
24 conversation with this individual. This individual  
25 threatened that he was going to fine him, that they were

1 in violation, that they have to do all this stuff, even  
2 though they said, "Well, we have a 7.11 permit." He said,  
3 "It doesn't matter." HE said, "You have to do this."

4 This one sampling event, one sampling  
5 event, one corner, cost my client \$95,000.

6 You can't stay in business like that.

7 And so we complained about it. We came up,  
8 we talked to the director at that time, and the director  
9 at that time said, "Look, we're going to redo 36. We're  
10 going to have a couple of work groups."

11 So we said, "We would like to be part of  
12 that process."

13 They said, "We think you can be."

14 So after two work groups -- and we have  
15 sent letters in saying that we think we should be part of  
16 the process. Now, maybe it's because it was more of an  
17 administrative work group rather than a technical work  
18 group, I don't know, but if we had been involved in that  
19 we could have brought a lot of the deficiencies out in the  
20 work group and not waste your time.

21 But anyway, you know, it's water under the  
22 bridge, we weren't invited, and so therefore we think  
23 there's some glaring deficiencies in this rule.

24 If you pass this rule as it is, the way it  
25 looks like to me is that you're basically saying we are

1 getting rid of all grandfather conditions. And if you  
2 look at it, that's the way it is. You're getting rid of  
3 the grandfather conditions.

4 If you go back TO look at the transition  
5 where they added the word "monitoring," when we testified  
6 and we put this together, we told the original 7.11  
7 permittees that you will be grandfathered and that you  
8 will have a permit and you can continue to operate under  
9 that permit.

10 Well, then, like I said, this infamous 2010  
11 letter came out and swept everybody underneath the new  
12 Part 36. We tried to fight it, we tried to -- we pled our  
13 case. Nothing seems to help.

14 So all I'm telling you as commissioners is  
15 that the original Part 36 rule was written with the intent  
16 of allowing these existing operators to be grandfathered,  
17 period. That's it. And so the way it's written right now  
18 is you're basically taking that away from them. I'm not  
19 going to argue. We said then any new operations that come  
20 into effect will go under Part 36. That was clear cut.

21 And so I'm here telling you now that  
22 there's some glaring deficiencies in the grandfathering  
23 provisions and it's costing operators several, several  
24 thousands and thousands of dollars. And I can tell you  
25 right now, if you look at how the chemical parameters are

1 being applied to the existing land farms, you cannot, it's  
2 impossible to close the land farm. Because me tell you  
3 why.

4 A number of years ago the OCD encouraged  
5 land farms, encouraged and approved land farms to take  
6 drilling salts. Now, in the northern part of the state  
7 people like T-n-T, it didn't impact them near as much, but  
8 in the south where we have heavy, heavy salts, every land  
9 farm out there is inundated with salt.

10 Now you come in -- and by saying okay, now  
11 you have to come in -- and chlorides, salts, you can't  
12 remediate them. There's not a method that we know of out  
13 there that you can remediate a salt. That we know of  
14 right now. Okay.

15 So the only way that you can remediate is  
16 to dig it all up and haul it off.

17 If you take an average size of a land farm,  
18 40, 50, 60 acres and you dig up four feet of dirt and  
19 replace it with four feet of dirt, you're looking at \$10  
20 million. So there's not a land farm operator out there  
21 that can meet their new conditions, so they are simply  
22 going to hand you the bond and say goodbye.

23 So we don't think that's the appropriate  
24 way to go. There has to be something where we help these  
25 land farm operators.

1                   Now, I represent Gandy-Marley. Okay? From  
2 an ethical standpoint we believe it's unfair that our  
3 competitors would get hit with this. Now, we have a  
4 landfill, so it would behoove us, I guess, to say, "No,  
5 stick with this," and every land farm out there will have  
6 to dig up their land farm and bring to us. We make lots  
7 and lots of money.

8                   That's not ethical. We're not gonna do  
9 that.

10                   What I think you have done here is you've  
11 totally missed the point, and, like I said, we were  
12 promised that this transition and major modification would  
13 be looked at again, and evidently it just didn't happen.

14                   It might be just because -- I'm not sure if  
15 this was just strictly admin- -- and I like what you're  
16 doing on the administration part of the process, but you  
17 really missed it on the transitional part of the major  
18 modification.

19                   So I would suggest that we go back to the  
20 drawing board on this, because if you pass this the way it  
21 is, you basically -- you're gonna put 40 land farms out of  
22 business instantly, because they can't do it. It's  
23 impossible.

24                   So that's kind of what I wanted to say, and  
25 I apologize for actually not filing an appearance, but we

1 didn't really realize what was happening. We weren't part  
2 of the work group so we didn't know till kind of the last  
3 moment.

4 So anyway, I thank you for listening to us,  
5 and hopefully you will take that into consideration.

6 Thank you very much.

7 CHAIRMAN CATANACH: Thank you, Mr. Price.

8 Do we have any additional parties that wish  
9 to make comments at this time?

10 MR. SCHMITZ: Yes, sir. I'll be short.

11 I'm Craig Schmitz, T-n-T Environmental.

12 CHAIRMAN CATANACH: I'm sorry. What was  
13 the first name?

14 MR. SCHMITZ: Craig Schmitz.

15 We've got a land farm disposal at as  
16 technical district. It was 7.11, and I just kind of want  
17 to reiterate what Mr. Wayne said. We were under the  
18 impression we would be grandfathered, and it just -- yeah.

19 An individual has through the time just  
20 wrote letters on his own that -- trying to make supply to  
21 the Part 36 stuff that we thought was grandfathered. You  
22 know what I mean? It's a big concern. It's going to be  
23 tough. I mean, go all the way back to just the background  
24 sampling, for example. Background sampling of our 7.11 is  
25 nowhere near what it is now, so how is my sampling now

1 going to compare with my background samples in the past?  
2 It's two different samples. You can't even compare them.  
3 So It's a different -- I don't even know how to hybrid  
4 that part. I have to look at a whole new background  
5 sampling to comply with the 36. So how do you go  
6 background sampling in cells that already exist?

7 So I come up with a plan, but, you know,  
8 I'm -- yeah, I'm probably looking at, could be \$100,000 in  
9 sampling just to get a background sample.

10 So I just really want to express my concern  
11 that this is really looked at. The transitional part is  
12 really going to be tough on us, you know, and really look  
13 at that.

14 I appreciate that and I thank you for your  
15 time.

16 CHAIRMAN CATANACH: Thank you.

17 COMMISSIONER BALCH: Maybe I can just ask  
18 this one question, kind of the administrative side of this  
19 where you're making changes to bonds and a more frequent  
20 review period, or at least a reliable review for that.

21 So if I understood Ms. Foster correctly,  
22 they don't have closure requirements.

23 MR. SCHMITZ: Well, we have closure, but  
24 it's not anywhere near what they call for in 36. We have  
25 a closure plan, but it's kind of basic. It's what was

1 back then. You know, our last basically assessment that  
2 we had was 2001, so it's a lot different then it is now.  
3 It's a different world. You know what I mean?

4 And I agree with most of the administrative  
5 stuff is good, changes good things. You know, the bonding  
6 now I have to go back to my banks and make sure  
7 everything -- that's going to be another project but, you  
8 know, that's just some of the things, you know, if that  
9 goes through that's what we will have to do. You know  
10 what I mean? I am in the process of trying to update all  
11 that. I've got now they are working on a new closure/post  
12 closure plan, because I'm going to have to have it is how  
13 I see it, so I've already started that project. You know,  
14 I'm trying to work with it, I want to be the best I can,  
15 and I want the best and I want to do what's right, but  
16 just hope you will take us into consideration.

17 COMMISSIONER BALCH: You want to be able to  
18 stay in business.

19 MR. SCHMITZ: We would like to.

20 COMMISSIONER BALCH: Thank you very much.

21 MR. SCHMITZ: Thank you.

22 CHAIRMAN CATANACH: Are there any  
23 additional public comments at this time?

24 (Note: No response.)

25 Okay. There being none, Mr. Wade?

1 MR. WADE: May we proceed?

2 CHAIRMAN CATANACH: Keep going.

3 MR. WADE: OCD would like to call  
4 Mr. Griswold back to the stand.

5 CHAIRMAN CATANACH: I remind Mr. Griswold  
6 he is still under oath.

7 THE WITNESS: Yes, sir.

8 MR. WADE: At this time we -- prior to  
9 breaking for lunch we got through Exhibit 20, so if you  
10 can turn to Exhibit 21, which discusses 19.15.35.12,  
11 Permit approval, denial, revocation, suspensioN,  
12 modification or transfer.

13 And this is one of the exhibits that I  
14 mentioned earlier. Some of the changes are very minimal  
15 and it was easier just to list them rather than have them  
16 sitting, you know, in that cross-reference type form.  
17 This is one of them.

18 JIM GRISWOLD,  
19 having been previously sworn, testified  
20 further as follows:

21 CONTINUED EXAMINATION

22 BY MR. WADE:

23 Q. So Mr. Griswold, will you discuss the proposed  
24 amendments to 36.12.

25 A. Okay. As Gabe just mentioned, in Subsection 12,

1 which is the exhibit you've got in front of you, 21 there,  
2 the word "safety" is eliminated in five places.

3           Beyond that, the current rule requires a  
4 permittee to issue public notice when they submit a  
5 renewal application. The proposed change now would  
6 require the permittee to issue notice only after the  
7 Division has decided to approve the renewal. Or to --  
8 yeah, to approve the renewal.

9           Q. So to reiterate, "safety" is removed from five  
10 locations. There is a smaller change that is after --  
11 it's in the middle of this exhibit, and that's a change to  
12 36.12(A)(2)(c), and that change was made for consistency's  
13 sake.

14           And then the last part, (c), that  
15 Mr. Griswold referred to, I wanted to note that in the  
16 last sentence "safety" was also removed there.

17           If there are no questions, we would turn to  
18 Exhibit 22.

19           COMMISSIONER BALCH: In (c) you have to  
20 change the word operator to applicant.

21           MR. WADE: It sounds like we need to get a  
22 decision from the commission, but we will have to make all  
23 of those consistent throughout the whole rule, yeah. So,  
24 in other words, not just portions where we're seeking  
25 proposed amendments today. We will have to go through the

1 whole thing.

2 So Exhibit 22 is the proposed changes to  
3 part 36.13.

4 Q. Would you discuss those changes, please.

5 A. The only changes proposed for Subsection 13 are  
6 the removal of the word "safety" in six instances.

7 COMMISSIONER BALCH: These are all places  
8 that have essentially the same wording as the last  
9 sentence?

10 THE WITNESS: Yes.

11 MR. WADE: I just felt it was easier to  
12 list them and put them in the record rather than go...

13 Q. If you will turn to Exhibit 23 and discuss  
14 Subsection 36.14.

15 A. Actually there's only two real changes to  
16 Subsection 14, and it's just numeric internal referencing  
17 changes if the proposed changes are adopted. In  
18 36.14(A)(8) we changed subsection D to C, and in C(8) we  
19 do, as well, from D to C.

20 CHAIRMAN CATANACH: I don't have --

21 MR. WADE: We wanted to point out and I'm  
22 sorry I didn't, I should have printed this onto its own  
23 exhibit, but if you go to Exhibit 2 in the notebook and  
24 you go to 36.14 H(3) which is page 16 of Exhibit 2 -- I'm  
25 sorry, Exhibit 1. Page 16 of Exhibit 1 -- you'll see a

1 long underline under H(3). That was a typo, so we are not  
2 really proposing -- that's not new language. That's  
3 existing in the current rule, so we are not asking for any  
4 change there.

5 Q. If you will turn to Exhibit 25.

6 A. 24.

7 Q. I'm sorry.

8 A. Just quickly in 24, in Subsection -- or Exhibit  
9 24 refers to Part 36, subsection 15. Again we're just  
10 striking the word "safety" in two instances there.

11 Q. And now it's 25.

12 A. Similarly in Subsection 17 we are striking the  
13 word "safety" in two instances there, as well.

14 Q. And we did, as we were going through these  
15 exhibits, come across a typo --

16 A. In the exhibit.

17 Q. -- in the exhibit itself.

18 The first, it says 36.15 B(1). It actually  
19 should say 36.17 B(1). That's where "safety" is being  
20 removed from.

21 A. Well, as far as 36.15 B(4), it should be 36.17  
22 B(4).

23 Q. Exhibit 26.

24 A. Okay. Subsection 18 we are striking the word  
25 "safety" in two places, we are adding the phrase "post

1 closure" in eight places. Anywhere where it currently  
2 says "closure" it would now say "closer and post closure".

3 There is a reorganization of sections in  
4 five instances so that you have to change the numbering.

5 Current (C) is -- well, current (C) is  
6 deleted by moving the section so it is now referred to as  
7 (G), but it's the same language. And the reason for this  
8 in the working group was what is (C), what is proposed  
9 (G), deals with closure if the permittee flees the scene,  
10 so to speak, and we have got to cash in the bond. That is  
11 the least likely closure scenario, so that is why we put  
12 it as the last, moved it to the last.

13 Then finally adding the phrase in 36.18A  
14 (1), beyond just saying "current closure" now says  
15 "current closure and post closure," but parenthetically  
16 specifying that post closure is not required for oil  
17 treating plants.

18 Again it's just clarification. When 36  
19 apparently, as best I can tell, was originally drafted, it  
20 speaks about oil treating plants in terms of their siting,  
21 their construction, their operation, but it doesn't have  
22 any oil treating plant-specific closure requirements.

23 That being said, we are saying there  
24 shouldn't be any oil treating plant post closure  
25 requirements either at this point. If and when the

1 technical discussion occurs, we would revisit that issue  
2 at that time.

3 MR. WADE: Are there any questions  
4 regarding this exhibit? Even, you know, it may be worth  
5 referring back to Exhibit 1 to see exactly what we're  
6 doing, but what I did in here is just spell out what the  
7 changes are, because most of them are just removing  
8 "safety" or renumbering.

9 But if it's clear, we can move to Exhibit  
10 27.

11 A. In Subsection 19 we are striking the word  
12 "safety" once.

13 Q. Exhibit 28.

14 A. Subsection -- We are attempting to make clear  
15 that the transitional provisions apply to Part 36 in its  
16 entirety. Most specifically the financial assurance cap  
17 under those, under current rule for those facilities  
18 permitted prior to its adoption is like a quarter of a  
19 million dollars, and that's very likely insufficient to  
20 cover closure costs in the case where the facility was  
21 abandoned.

22 Under the proposed language now that  
23 financial assurance will hopefully be appropriately valued  
24 under two circumstances: When the Division conducts a  
25 review of the facility permitted prior to the adoption of

1 Rule 36; or whenever any facility applies for a major  
2 modification.

3           The route for that in the past, for that  
4 updated financial assurance, is that it be done by a  
5 thirty party. The Division reviews it. If the Division  
6 agrees with it, well then that would be the new financial  
7 assurance amount. If the Division, for whatever reason,  
8 disagrees with it, this language here in Subsection 20  
9 gives the operator the opportunity for hearing if they  
10 disagree with the decisions made by the Division regarding  
11 that financial assurance.

12           Q. So the major proposal within the proposed  
13 language to 36.20 really has to deal with financial  
14 assurance?

15           A. Yes, that was the intent at this point, and then  
16 really nothing else.

17           Q. And you heard some of the public comments that  
18 were made. Is it -- it's not necessarily true that  
19 provisions of 36.20 would apply to all prior 7.11 permits;  
20 it happens under certain circumstances. Is that correct?

21           A. Certain circumstances, right. And the Division  
22 is currently going through a process of reviewing all  
23 active facilities, most of which, or most almost all of  
24 which were permitted prior to 36, and on a case-by-case  
25 basis try to come to decisions as to what, if anything,

1 needs to change regarding the operations, the permitting  
2 of those facilities.

3 MR. WADE: And this may be useful, because  
4 it sounds like there is going to be some discussion  
5 regarding this Subsection. It may be useful, I did  
6 provide you with Rule 36 current. In this particular  
7 exhibit I didn't do the cross reference, so you may want  
8 to look at the current 36.20 to see what parts are  
9 actually being proposed and which parts are already in the  
10 rule, as questions and discussion goes on.

11 THE WITNESS: And I should also note, then,  
12 that under current Subsection 20C, that is proposed to be  
13 stricken simply because we are well past May 18th of 2006.

14 Q. (BY MR. WADE) So, Mr. Griswold, what I'd like  
15 you to do is read 36.20a as it's currently written and  
16 36.20A as it's proposed.

17 A. Currently Subsection 20A says: Existing surface  
18 waste management facilities shall comply with the  
19 operational monitoring waste acceptance and closure  
20 requirements provided in 19.15.36 NMAC, except as  
21 otherwise specifically provided in the applicable  
22 Permitting Order, or in a specific waiver, exception or  
23 agreement the Division has granted in writing to the  
24 particular surface waste management facility.

25 Q. So "as otherwise specifically provided," what

1 does that mean?

2 A. When I read it, what it says to me is basically  
3 that there was -- there was spoken to and their existing  
4 permit is still in effect.

5 Q. And if it wasn't spoken to?

6 A. Then it potentially would not be in effect and  
7 they would subject to Part 36.

8 Q. That language is not proposed language, that is  
9 what it already says?

10 A. That language is -- yes.

11 Q. So what was added to 36.20A under this proposal?

12 A. I can't -- and then I want to make sure I get  
13 this right, that we didn't change the ordering.

14 We simply added the phrase or phrases  
15 "financial assurance" "monitoring" and "post closure."

16 Q. Why did we add those phrases?

17 A. Because we felt they were lacking in the current  
18 rule to make, grant specificity. Again the primary intent  
19 was financial assurance, but again when we talk about  
20 closure we can't not talk about post closure.

21 Then the monitoring aspects of it, because  
22 maybe perhaps some of those facilities had no monitoring  
23 in their permit whatsoever. How could the Division ever  
24 come to a decision in that regard?

25 Q. So it's not expanding the scope of 36, it's just

1 including the parts of 36 that seem to have been left out  
2 in this list --

3 A. Yes, sir.

4 Q. -- initially.

5 MR. WADE: If there's any questions?

6 COMMISSIONER BALCH: I have a question.

7 CHAIRMAN CATANACH: Go ahead.

8 COMMISSIONER BALCH: Okay. I didn't want  
9 to get hit by the gavel.

10 EXAMINATION

11 BY COMMISSIONER BALCH:

12 Q. You heard Mr. Schmitz' comments about monitoring  
13 in particular.

14 A. Yes.

15 Q. In that if you change the baseline standard, you  
16 have to go back and then reestablish a new baseline, and  
17 that may be impossible in places that have already been  
18 processed and closed off in their facilities.

19 That's a pretty onerous requirement.

20 A. In terms of Mr. Schmitz' case in particular,  
21 that's one of the ones that is under review currently, and  
22 we are just getting started on that. But in terms of  
23 background sampling, if I heard Mr. Schmitz properly, it's  
24 not an area -- a background sample should not be coming  
25 from an area where waste has been emplaced.

1 Q. If you are trying to establish --

2 A. The difference is expanding the constituent list  
3 of potential things to monitor.

4 Q. If you are trying -- Okay. Granted that.

5 Say you collect a baseline monitor sample,  
6 establish it under Rule 7.11, and then you use that site  
7 where you had that baseline, put material there, close it  
8 off, maybe it's been in there for five years, I have no  
9 idea. If you change the constituents he has to monitor at  
10 that site, how is he going to get that sample?

11 A. Under the current rules and the current  
12 operations he would not be required to take a sample in  
13 such an area once he is in closure, only when he's in  
14 operation, and then it's not an issue of background  
15 anymore.

16 COMMISSIONER BALCH: I guess I would like  
17 to more broadly discuss this issue of grandfathering in  
18 7.11.

19 CHAIRMAN CATANACH: Yeah, I think that's  
20 appropriate.

21 COMMISSIONER BALCH: Because, you know, I  
22 think we do have an obligation to protect the environment,  
23 water, et cetera, but we also have an obligation to  
24 protect rights in the sense that if you change the game in  
25 the middle -- change the rules in the middle of the game,

1 it could have an impact on somebody's business model. And  
2 that's probably why people that applied under 7.11  
3 originally had received some assurance that they would be  
4 grandfathered.

5 So I don't know where to start that  
6 discussion as far as the transitional period goes. It  
7 sounds like there would be an additional discussion at  
8 some point on the technical aspects of Rule 36.

9 CHAIRMAN CATANACH: That's my  
10 understanding. That's the next step in this process. We  
11 will have a discussion of the technical aspects of Rule  
12 36.

13 THE WITNESS: Like I say, currently one of  
14 processes we're going through is looking on a case-by-case  
15 basis at each -- No, a lot of facilities, maybe not every  
16 facility.

17 Q. (BY COMMISSIONER BALCH) So we are at a little  
18 bit of at disadvantage because we don't yet have in front  
19 of us proposed modifications to the technical aspects of  
20 Rule 36.

21 A. What we're asking for here is modifications  
22 to the --

23 Q. But at the same time you're asking as part of  
24 this modification to Rule 36.2, all in the established  
25 transition for more people that are under a different

1 program and scheme, 7.11, without us having the benefit of  
2 knowing what those changes that may be made later on to  
3 those requirements.

4 A. Well, if the commission feels that the language  
5 proposed is a bit inartful in that regard, then obviously  
6 you have your discretion to modify it. But, as I said  
7 before, the intent of the working group, the intent of  
8 this proposal is to deal with these financial assurance  
9 aspects right now.

10 Q. Would it be possible maybe to just limit the  
11 transition right now to the financial part of it, kind of  
12 the administrative side, and put off the discussion of  
13 transition of those permits in a more broad sense until we  
14 have that .36 technical discussion?

15 MR. WADE: If I may?

16 I wanted to point out, and maybe I didn't  
17 get the point across as clear as I hoped. This  
18 transitional provision existed, so we are really only  
19 changing the financial assurance portion of it and a few  
20 phrases within the rest of it.

21 COMMISSIONER BALCH: But they are rather  
22 key phrases: monitoring and post closure.

23 MR. PADILLA: Monitoring.

24 COMMISSIONER BALCH: Those are two major  
25 aspects which are probably technical in nature.

1 MR. WADE: I guess my point earlier was  
2 those issues already exist in the rule. It's just that  
3 you had a list within this, and all we did was add more of  
4 what exists in the rule currently to the list.

5 So those issues --

6 COMMISSIONER BALCH: Rule 36 or 7.11?

7 MR. WADE: Rule 36.

8 COMMISSIONER BALCH: Rule 36.

9 MR. WADE: Yes.

10 COMMISSIONER BALCH: So I think I have  
11 heard from the public comments that there are issues with  
12 the current process of transitioning from 7.11 to the  
13 existing 36, and some of those might be more easily  
14 resolved after Rule 36 is in its final form, not just the  
15 administrative side but also the technical side.

16 MR. WADE: I understand.

17 COMMISSIONER BALCH: Personally, and I'm  
18 not speaking for anybody else, I might feel more  
19 comfortable in making sure that those 7.11 operators can  
20 use their current permits until Rule 36 is fully  
21 established and modified.

22 THE WITNESS: Including the aspects of  
23 financial assurance?

24 COMMISSIONER BALCH: Financial assurance, I  
25 didn't hear anybody complaining about that.

1 THE WITNESS: I thought they did, but...

2 CHAIRMAN CATANACH: I think they mentioned  
3 maybe needed more time to get the financial assurance in  
4 place.

5 THE WITNESS: I don't know what the time  
6 frame is associated therein with normal changes  
7 regulations might be in that regard, but I'm sure the  
8 Division is reasonable. We're not going to say you're in  
9 violation two minutes after the new rule is promulgated.

10 COMMISSIONER BALCH: Financial assurance  
11 makes good business sense, but when you're changing the  
12 technical aspects of the monitoring programs, of closure  
13 of your site, I think that has a larger impact on your  
14 business model. Most anybody --

15 THE WITNESS: The intent of the working  
16 group was to address the financial assurance aspects of  
17 it, of older permits. That was the intent at this point.

18 CHAIRMAN CATANACH: So, Jim, do you think  
19 it's a good idea to hold off on the remaining discussion  
20 until the work group addresses the technical issues?

21 THE WITNESS: I'm not opposed to it.

22 CHAIRMAN CATANACH: Do you think that is an  
23 appropriate place to deal with this situation?

24 THE WITNESS: Yeah. Yes, I do.

25 I guess I'm concerned that based on some of

1 the comments made in the comment period that maybe someone  
2 is reading -- some people are reading too much in there.  
3 And I guess that I could be understanding of that, given  
4 at least some of the history I'm aware of with these  
5 facilities and the Division historically; they may very  
6 well -- they would potentially be concerned with any  
7 change in the language we talked about.

8 COMMISSIONER BALCH: For me it feels  
9 premature to change a previous rule that is supposedly  
10 grandfathered until the new rule is completely done over.  
11 We might change something today here and then have to  
12 change it again, and then you have to reopen this side of  
13 the rule.

14 THE WITNESS: To reiterate for probably the  
15 too-many-eth time, though, today's concern is the  
16 financial assurance.

17 COMMISSIONER BALCH: The other issue I  
18 thought, and maybe this is not the right place to talk  
19 about it, we mentioned earlier the differentiation between  
20 major and minor modifications.

21 THE WITNESS: Yes, sir.

22 COMMISSIONER BALCH: Apparently there is a  
23 short list of list of things that qualify as a major  
24 modification.

25 THE WITNESS: Yes, sir.

1                   COMMISSIONER BALCH: It might not hurt to  
2 establish, at least in the interim, a list of things that  
3 would qualify as a minor modification.

4                   THE WITNESS: Okay.

5                   COMMISSIONER BALCH: People have a little  
6 bit of a clearer picture of what they can do in both of  
7 those scenarios, because one is a much more involved  
8 process to make a major modification.

9                   THE WITNESS: Well, I don't want to speak  
10 to things that may have happened before I was the bureau  
11 chief or things that might happen once I leave, but I'm a  
12 fairly literal person. Today when I read the definition  
13 that tells me what a major mod is, and if you're not one  
14 of those things then you're a minor mod. It's fairly  
15 clear.

16                   COMMISSIONER PADILLA: Isn't there a  
17 catch-all at the end of that definition, though, that  
18 gives the Division discretion?

19                   COMMISSIONER BALCH: I think that is why  
20 you need a list of minor modifications, because there is a  
21 catch-all.

22                   COMMISSIONER PADILLA: There were some very  
23 clearcut examples, but then at the end of that description  
24 there was something that said "...or any other..."

25                   MR. FELDEWERT: Are you on page 2 of

1 Exhibit 1?

2 THE WITNESS: My concern in that regard is  
3 that it may be a never-ending process, and, as I have  
4 found here in the Division, regulations fit the situation  
5 at hand less than a majority of the time. We don't cover  
6 all contingencies. We don't cover even most  
7 contingencies, it seems like.

8 The world moves fast.

9 COMMISSIONER BALCH: The problem is when  
10 you have a statement such as, "...or other modifications  
11 that the Division determines is sufficiently substantial,"  
12 that basically includes anything that may be interpreted  
13 by an individual or an administration.

14 THE WITNESS: I would not disagree, but I  
15 could understand why those might be in there, given the  
16 mandate to, you know, protect public health and the  
17 environment. These are serious things, and there may be  
18 those situations that are not clearly elucidated in the  
19 regulations that will come up that action needs to be  
20 taken. And it's an argumentative point.

21 COMMISSIONER BALCH: So it's not a bad idea  
22 to have that language, though, but if there are a certain  
23 category of things that would be minor modifications  
24 explicitly, that would provide some guidelines.

25 COMMISSIONER PADILLA: Right.

1                   COMMISSIONER BALCH: I think, at least for  
2 me, the goal in all these rulemaking procedures is to make  
3 something that is fair to everybody, gives everyone the  
4 protections that are promised by the Oil and Gas Act, and  
5 aren't really subject to excessive interpretation just  
6 because, you know, the director changes or a new bureau  
7 chief is hired.

8                   I want your job to be easier because of the  
9 rule that we put in place.

10                  MR. WADE: If I am understanding correctly,  
11 then, this is direction for future rulemaking. This, in  
12 particular major mod and minor mod, doesn't seem to  
13 affect -- adding a list doesn't seem to affect anything  
14 that we are proposing today.

15                  THE WITNESS: Because we are not proposing  
16 that major and minor mod, their definitions be changed.

17                  COMMISSIONER BALCH: I sort of understand  
18 the legal side of it where you can only change the things  
19 that you are addressing.

20                  THE WITNESS: And the working group did have  
21 representation -- maybe not from every surface waste  
22 management facility operator, not even most of them, but  
23 it did have representation, and had representation from  
24 the oil and gas industry, as well, and this was not an  
25 issue at that point during those discussions.

1 I'm not trying do diminish what has been  
2 said and how people feel, but it was the process that was  
3 adhered to.

4 COMMISSIONER BALCH: I got a sense that  
5 people felt that things have not always been measured the  
6 same way. So a measure of consistency should be something  
7 that is the gift of any rule.

8 THE WITNESS: Well, certainly something one  
9 should strive for.

10 COMMISSIONER BALCH: So anyway, going back  
11 to transitional provisions, I think that since we are  
12 dealing in this particular regulatory hearing primarily on  
13 the financial side and a little bit of clean-up of the  
14 document, that transitional provisions should be limited  
15 to those areas.

16 And that's just my opinion, and we will  
17 have a deliberation at some point, I'm sure.

18 MR. WADE: I'm sure Mr. Feldewert would  
19 like to have an opportunity to speak to this, as well.

20 MR. FELDEWERT: If you're finished. Only  
21 when you're finished.

22 COMMISSIONER BALCH: I'm done. These guys  
23 might not be done.

24 COMMISSIONER PADILLA: I just have one  
25 quick question.

1 EXAMINATION

2 BY COMMISSIONER PADILLA:

3 Q. Can you, as briefly as you can, tell us what  
4 kind of grandfathering assurances were given to the 7.11  
5 operators when those assurances were discussed?

6 A. Commissioner, I was not here in those days, and  
7 so I'm not sure exactly what was said.

8 MR. WADE: Perhaps if you refer again to  
9 what the rule says.

10 THE WITNESS: Well, okay.

11 MR. WADE: Specifically if I understand  
12 it --

13 A. I mean, we just -- rereading Subsection 20:  
14 Existing Permitted Facilities.

15 "Surface waste management facilities in  
16 operation prior to the effective date of 19.15.36 NMAC  
17 pursuant to Division permits or Orders may continue to  
18 operate in accordance with such permits or Orders subject  
19 to the following provisions:

20 "A. Existing surface waste management  
21 facilities shall comply with the operational waste  
22 acceptance and closure requirements provided in 19.15.36  
23 NMAC, except as otherwise specifically provided in the  
24 applicable permit or Order, or a specific waiver,  
25 exception or agreement that the Division has granted in

1 writing to the particular surface waste management  
2 facility."

3                   That is already saying right there, I guess  
4 to my mind, that the commission at that point was almost  
5 tacitly admitting some of those prior permits said nothing  
6 about operational or waste acceptance or closure criteria,  
7 and it's telling them right then: You have to comply with  
8 36 if your permit doesn't say anything in that regard.

9           Q.     (BY COMMISSIONER PADILLA) I guess a follow-up  
10 question would be: In your opinion is this the entirety  
11 of grandfathering that we're talking about from the  
12 viewpoint of the OCD?

13           A.     No, because one of the -- one case in  
14 particular, when it says, I just am rereading it, "Those  
15 exceptions as otherwise specifically provided in  
16 applicable permit or Order or in a specific waiver,  
17 exception..."

18                   I guess maybe the word "agreement", I would  
19 have to turn to Mr. Brancard if a settlement, a civil  
20 action, or a court action, does that constitute agreement?

21                   MR. WADE: The answer -- if I may, the  
22 answer is yes. Even pursuant to the rule we have  
23 agreements that we have that do not bound us -- bind us,  
24 I'm sorry, and we can reach those agreements even pursuant  
25 to this rule.

1                   So this rule -- I believe your question was  
2 does this rule limit the promises given or the agreements  
3 with permits. I think it does.

4                   COMMISSIONER BALCH: With the possible  
5 exception of adding in the monitoring and post closure,  
6 which may be addressed later on in the technical area.

7                   THE WITNESS: If that's the wish of the  
8 commission.

9                   CHAIRMAN CATANACH: So if we took out of  
10 your proposed rule, if we took out "monitoring" and "post  
11 closure," do you think that would take care of the  
12 concerns that have been expressed here today?

13                   THE WITNESS: Well, it would -- the post  
14 closure has an impact on the financial assurance, and if  
15 you don't require it then your FA is going to be short.

16                   COMMISSIONER BALCH: Well, it looks like  
17 the Division would have the ability when they estimate  
18 their closure and post closure costs, if there is a 7.11  
19 facility that doesn't have a post closure plan, they could  
20 put that post closure estimate into their closure costs.

21                   THE WITNESS: Or not, and tell me I don't  
22 have the right to ask for it.

23                   MR. WADE: I guess to follow up on your  
24 question, if I may.

25                   I was trying to point out that these

1 addition, monitoring and post closure and financial  
2 assurance, they are already in the rule.

3 COMMISSIONER BALCH: In Rule 36.

4 THE WITNESS: In Rule 36. They just  
5 weren't specifically listed here.

6 So I think we have to address them. If the  
7 time comes on a specific permit we are attempting to apply  
8 36, this is going to come into it because it's in the  
9 rule.

10 COMMISSIONER BALCH: It occurred to me, I  
11 think during the public comment, that when the technical  
12 part of Rule 36 is brought before the commission that  
13 there will be significant discussion.

14 THE WITNESS: Yeah. And there should  
15 hopefully be significant discussion before it ever is  
16 brought to the commission. If it's a cogent working group  
17 the issue will come up and it will hopefully have been  
18 resolved between all parties. Hopefully.

19 MR. WADE: I would like to point out, as  
20 well, as you're considering these phrases, that each  
21 permit is going to be somewhat different and it's going to  
22 be handled on a case-by-case basis. And I'm not sure how  
23 far along -- Jim can speak to this -- some of these  
24 reviews have actually happened. So I'm not sure we're  
25 talking about a problem that really exists yet.

1                   COMMISSIONER BALCH: But I would hate to  
2 create a problem by perhaps adding a few words that -- as  
3 you said, they may already be addressed in 36, but there  
4 appears to be dispute, at least between some parties,  
5 between the ability for 36 to address their existing 7.11  
6 permits.

7                   THE WITNESS: Well, there are -- I can  
8 think of at least two facilities that are permitted by  
9 Order that go way back, that there's no discussion  
10 whatsoever in their Order about any monitoring whatsoever.  
11 And I'm sorry, that's just -- I can see where it might --  
12 wanting to rectify this might potentially adversely affect  
13 somebody else, but there are these facilities that there's  
14 no monitoring required at all? How can you make a  
15 decision without facts? How can you get the facts without  
16 going out and grabbing them?

17                   COMMISSIONER BALCH: I certainly don't  
18 disagree with you. I just am not sure we are at a place  
19 in the discussion where we can adequately make that  
20 determination. There has to be a technical discussion of  
21 Rule 36 with the opportunity for parties to address how  
22 it's going to affect their 7.11 operations.

23                   And you're absolutely right, we do have an  
24 obligation to protect the environment and water, et  
25 cetera. We also have an obligation to protect people's --

1 THE WITNESS: Understood. Understood.

2 COMMISSIONER BALCH: So all of that has to  
3 be balanced. We kind of have half the story right now,  
4 and there's no direct testimony. All there is, is public  
5 comments that raised the issue.

6 MR. WADE: Is it the commission's wish,  
7 then, to consider any of the provision, transitional  
8 provision, or basically shelve it? Because it is my  
9 feeling that financial assurance is tied to the list that  
10 you see in A, and I'm not sure you can get to adequate  
11 financial assurance without considering these things.

12 CHAIRMAN CATANACH: Well, can we eliminate  
13 "monitoring" and "post closure" and still leave the  
14 financial assurance requirements in there?

15 COMMISSIONER BALCH: You might have to  
16 change the language slightly to make it flexible enough.

17 THE WITNESS: Well, as I said previously,  
18 financial assurance should cover post closure, not just  
19 closure. The monitoring part, there may be some post  
20 closure monitoring associated. Again you are not going to  
21 potentially cover those costs.

22 COMMISSIONER PADILLA: Couldn't the  
23 language after "post closure" also include "monitoring  
24 for"?

25 THE WITNESS: Post closure monitoring would

1 be the better phrase?

2 COMMISSIONER PADILLA: It's part of the  
3 post closure, as opposed to standalone monitoring where  
4 someone is doing ongoing monitoring.

5 MR. WADE: Can I point out one thing real  
6 quickly regarding closure and post closure before Jim  
7 answers the question?

8 If you go to 36.18 it's titled Closure and  
9 Post Closure. So adding "and post closure," all we were  
10 doing -- for whatever reason when this rule was drafted  
11 sometimes "closure" was put in when it should have been  
12 "closure pending."

13 THE WITNESS: Post closure.

14 MR. WADE: What we're really trying to do  
15 is make it consistent. Again, adding "and post closure"  
16 into the transitional provision is just being consistent  
17 within the rule, it's not adding anything new, and so I'm  
18 not even sure that removing that language makes sense when  
19 the title of 36.18 is Closure and Post Closure.

20 COMMISSIONER PADILLA: So if you were to  
21 leave post closure, what about monitoring?

22 MR. WADE: If monitoring is the biggest  
23 tripping point, I'm not certain that can't be discussed at  
24 a later...

25 COMMISSIONER PADILLA: Working group.

1                   COMMISSIONER BALCH: Monitoring the post  
2 closure and closure, in general, after having gone through  
3 this Rule 7, of course, which may provide guidance to  
4 whichever commission sees this, eventually the technical  
5 part of Rule 36 could have an impact, because if there  
6 were changes made to those rules in recent years, and  
7 depending upon which constituents you're going to  
8 categorize as important will have a big impact on baseline  
9 data on your monitoring and operational and  
10 postoperational environments.

11                   MR. WADE: It seems to me -- and I think  
12 this -- I think will be the last I say on it.

13                   It just seems to me, if I understand what  
14 you said correctly, the technical numbers will skew within  
15 whatever system you establish for financial assurance.

16                   COMMISSIONER BALCH: I'm getting the sense  
17 that the Division wants to be able to transition these  
18 7.11 permits to 36 permits, but until 36 is completely  
19 resolved I think that they ought to have some protection  
20 in order to keep operating the way they are, until they  
21 have a chance to bring that issue to the table in that  
22 technical discussion of Rule 36.

23                   MR. WADE: I totally agree. In general  
24 what we are really wanting to do is get adequate financial  
25 assurance that protects, you know, the environment.

1                   CHAIRMAN BALCH: And I believe that is  
2 prudent for not just the Division but also for the  
3 operators or owners, however we term them in the rule.

4                   THE WITNESS: Permittee.

5                   COMMISSIONER BALCH: Right. So I would  
6 definitely be comfortable in trying to sort of advance the  
7 financial assurance part in some way, maybe with a subtle  
8 change in language, but maybe now is not the time to add  
9 additional requirements to the existing 7.11 permits  
10 besides financial assurance.

11                   THE WITNESS: That's a technical  
12 discussion. I'm going to steer clear of it.

13                   MR. WADE: I just think they're are  
14 supposed to be tied.

15                   CHAIRMAN BALCH: They are. You're going to  
16 have to make a suggestion on a bond amount until those --  
17 it's going to be a case-by-case basis, as Mr. Griswold had  
18 said.

19                   THE WITNESS: Well, I guess perhaps I  
20 should be happy if the result of this whole exercise, at  
21 least in this aspect, is we get something more than a cap  
22 of \$250,000 on any facility. I should call it a win, at  
23 least for the day.

24                   CHAIRMAN CATANACH: Mr. Feldewert?

25                   MR. FELDEWERT: Mr. Chairman?

1                   CHAIRMAN CATANACH: Just one more question,  
2 Jim.

3   EXAMINATION

4 BY CHAIRMAN CATANACH:

5           Q. Does the Division have the capability to  
6 determine closure and post closure cost?

7           A. Manpowerwise currently no, and that's why the  
8 proposed revisions are asking that a third party do this,  
9 not the Division. Now, the Division has to review that,  
10 but not that we do undertake it.

11                                       So we are not eliminating our burden but we  
12 are lessening it.

13           Q. So the Division's determination would be a  
14 third-party determination. Is that what you're saying?

15           A. The Division's determination is whether or not  
16 we agreed with said third-party's determination.

17           Q. Right. But if we -- so if you disagree with the  
18 estimate, it says, "The Division shall determine the  
19 actual closure and post closure cost."

20           A. Correct.

21           Q. That's what I'm asking you. At that point does  
22 it go to a contractor we have on contract?

23           A. That could be an option, Mr. Chair, but then  
24 again the applicant, the permittee would have the right to  
25 disagree with whatever decision they had, have recourse to

1 take it to hearing.

2 EXAMINATION

3 BY COMMISSIONER BALCH:

4 Q. Hire their own expert?

5 A. Well, they would have hired the first expert,  
6 that third party.

7 Q. So the burden of determining the bond amount is  
8 going to be on the owner?

9 A. On a third party that they select.

10 Q. But the burden of paying for that evaluation.

11 A. Yes. Yes.

12 Q. That's not currently in anybody's existing  
13 permits, right?

14 A. Uhm, an instance that comes to mind right now,  
15 on Class III solution ground well permits, it's exactly  
16 that in their permit, and it's there for a reason of  
17 things that really did happen.

18 Q. I think that there was some nontechnical  
19 testimony from the public comments today that there were  
20 there roughly eight other 7.11 facilities and upwards of  
21 40 landfarms that might be affected by this, as well. So  
22 you're talking about 48 established permits, somewhere  
23 more or less?

24 A. My number, if I remember, is like 29 active  
25 facilities.

1 Q. Some of them may be --

2 A. It's a mix between landfarms and landfills.

3 COMMISSIONER BALCH: Okay.

4 CHAIRMAN CATANACH: Mr. Feldewert?

5 MR. FELDEWERT: Actually, I had a whole  
6 series of questions specifically on this transitional  
7 provision in part, because there was no consensus reached  
8 as to the language that they now want to add in sub Part  
9 A, and when I saw that and others saw that, it did raise  
10 some concern, and I think it does exacerbate a problem  
11 that has existed.

12 I hear Mr. Griswold here today testifying  
13 that as he reviews that provision, if that existing permit  
14 touches upon, if it discusses in any aspect of that  
15 particular subject, that it's grandfathered in. I think  
16 his words were, "This only applies if there is no  
17 discussion whatsoever."

18 That's how I think it should be viewed, but  
19 the problem is if there are certain people within the  
20 Division that have viewed it different and have expanded  
21 and taken advantage of language here to suggest that, yes,  
22 your permit may talk about monitoring but it doesn't  
23 address X, Y and Z which is in Rule 36.

24 And that has created problems.

25 And when they start adding language to this

1 sub Part A which is already creating problems, now you're  
2 adding language "financial assurance," now you're adding  
3 language, "monitor," now you're adding language "post  
4 closure," you are expanding those problems, in a  
5 circumstance where I don't think you should or are in a  
6 position to do that.

7 Mr. Griswold has a legitimate concern.  
8 Some permits out there they are concerned about. But it  
9 sounds to me, based on the testimony, they are examining  
10 those permits on a case-by-case basis. And that is the  
11 way it should occur, because then you have notice to the  
12 operator what you are trying to do, and that operator has  
13 an opportunity to respond with a hearing.

14 If instead, as it could be interpreted,  
15 that you're trying to incorporate those issues now into a  
16 rule by adding this language, operators out there aren't  
17 on notice that's what they are trying to do. Operators  
18 haven't had an opportunity to examine it.

19 So my suggestion, and I think you were  
20 right here, Commissioner Balch, if we have this issue with  
21 this transitional provision, we shouldn't be monkeying  
22 around with it now. It should sit as-is, and the issues  
23 they've got on existing permits should be handled, as they  
24 should be, on a case-by-case basis or when they get to  
25 specific technical problems.



1 that permit in compliance with this rule.

2 So are there permits out there that don't  
3 have any financial assurance?

4 A. I believe so.

5 Q. Okay. And are you trying to now impose on that  
6 permit, by virtue of this rule, a financial assurance that  
7 complies with this rule?

8 A. Yes.

9 Q. Because I'm sure that's clear from this  
10 language.

11 A. Well, and it's even --

12 Q. And I didn't understand that to be your intent.

13 A. And potentially -- I am going to be speaking for  
14 the working group even though I am also the bureau chief  
15 now.

16 It was also to look at those facilities  
17 whether there is indeed financial assurance. Not where  
18 there's just a lack of it but where there's an absolute --  
19 there's not adequate financial assurance there that needs  
20 to be updated.

21 Q. And that's what you're trying to do by adding  
22 financial assurance here in this rule?

23 A. Yes.

24 Q. And do you think the operators are on notice of  
25 that?

1           A.    I'm sorry?

2           Q.    You think the operators are on notice of that?

3                   MR. WADE:  I would object.  I don't think  
4 he is asking an appropriate question of Mr. Griswold right  
5 now.  That's a legal conclusion.  I think the simple way  
6 to ask --

7                   MR. FELDEWERT:  Well, wait.  It's my  
8 question.

9                   THE WITNESS:  Well, I heard he didn't  
10 understand it, Michael, so...

11                   CHAIRMAN CATANACH:  Can you clarify that  
12 question, Mr. Feldewert?

13           Q.    (BY MR. FELDEWERT)  Let me ask you:  If that's  
14 is what you're trying to do with the language "financial  
15 assurance," it sounds like that's also what you're trying  
16 to do by adding the word "monitoring" and that's also what  
17 you're trying to do by adding the words "post closure".  
18 And that's the problem.

19           A.    As Gabe said before, the word "monitoring" and  
20 the phrase "and post closure" were an attempt to try to  
21 get consistency throughout the rule.  Monitoring and post  
22 closure are already in the rule.

23           Q.    Okay.  But you're --

24           A.    And you're making that leap from saying if you  
25 want to talk about FA in this way then you must be talking

1 about these other things in this way, and I'm saying no,  
2 that's not true.

3 Q. Well, but that's how -- if you look at the  
4 language, you can interpret it that way. I don't  
5 understand how you can add "financial assurance" to this  
6 language and mean one thing, but then say, Well, when we  
7 added "monitoring" and "post closure," we don't mean to do  
8 that.

9 I mean, that is the problem that I see. My  
10 concern is that you are expanding the subject areas of  
11 concern here that have already created a concern, and it  
12 sounds like you're trying to something by adding the word  
13 "monitoring" that perhaps you don't intend but could  
14 occur.

15 Which gets me back to my primary point: We  
16 shouldn't be monkeying around with this transitional  
17 provision in this rule, because it is a rule, it's already  
18 creating problems, and that they should be addressing  
19 these on a case-by-case, site-by-site specific basis where  
20 there exists --

21 A. Commissioners, I don't hear a question in there,  
22 I hear a statement and maybe wishing for me to respond to  
23 the statement.

24 MR. WADE: Don't respond, please.

25 I would like the opportunity to ask a

1 question.

2 FURTHER EXAMINATION

3 BY MR. WADE:

4 Q. Is financial assurance regarding facilities  
5 permitted prior to Rule 36 addressed in Rule 36?

6 A. No, other than basically it says honor that cap.

7 Q. So there is a cap to financial assurance.

8 A. Uh-huh.

9 Q. So financial assurance is addressed in the  
10 current rule.

11 A. Yes.

12 Q. But it's capped, correct?

13 A. For those prior facilities.

14 Q. For the prior facilities there is a cap. So  
15 this rule already contemplates financial assurance --

16 A. Yes.

17 Q. -- but what it talks about is a cap.

18 If you can go to Exhibit 28.

19 COMMISSIONER PADILLA: Did you say 20,  
20 Counsel?

21 MR. WADE: 28, which is going back to  
22 36.20.

23 Q. What is B really saying, 36.20B, if you just  
24 read the language?

25 A. (Reading) The Division shall not require

1 financial assurance for a commercial facility permitted  
2 prior to the effective date of 19.15.36 NMAC that exceeds  
3 \$250,000 until such time as:"

4 Q. Then it lists those times?

5 A. Correct.

6 Q. So what is this really saying? It's not saying  
7 that there is no financial assurance in the current rule,  
8 it's saying that there's a cap. Isn't that correct?

9 A. And almost acknowledging that perhaps that -- by  
10 putting a requirement that there may come a time, there  
11 will come a time after one of these instances below  
12 occurs, it's almost an acknowledgement that the  
13 \$250,000 -- because it's an artificial cap, it's just a  
14 number that the commission pulled out, decided on years  
15 prior. It's not necessarily reflective of what its intent  
16 was.

17 Why was the financial assurance in there in  
18 the first place?

19 And an assessment is going to have to be  
20 made under the proposed transitional provisions as to what  
21 that new financial assurance amount would be. And it  
22 would be a third-party estimate with Division concurrence.

23 CHAIRMAN CATANACH: Let ask you this: In  
24 the absence of this rule change for financial assurance  
25 under provisional provisions, can you now look at an

1 existing permit and require more financial assurance?

2 THE WITNESS: I don't believe I can.

3 CHAIRMAN CATANACH: So you think you need  
4 this to go forward and -- for some of these that don't  
5 even have --

6 THE WITNESS: I can't require it, let me  
7 put it that way.

8 As part of the review with the permittee  
9 they may agree that their financial assurance needs to be  
10 modified and it would be in their best interest.

11 CHAIRMAN CATANACH: So you feel like you  
12 need this change right now to go ahead and increase some  
13 of these FAs for existing facilities?

14 THE WITNESS: Yes. And there was like -- I  
15 said earlier there was concurrence within the working  
16 group that this was an acceptable change, a desirable  
17 change.

18 MR. FELDEWERT: I'll just interject my  
19 comments are devoted towards Sub Part A, not part B.

20 MR. PRICE: Mr. Catanach, I know this is  
21 kind of irregular, but would I be able to make another  
22 comment pursuant to the financial assurance separate from  
23 the public comment. I realize it's really irregular, but  
24 I do have some -- I have some historical information about  
25 what Mr. Griswold said about a number picked out of the

1 air. It wasn't a number picked out of air. I could  
2 explain that.

3 MR. WADE: I would object to anything  
4 called historical information. It sounds like he is  
5 trying to put evidence onto the record.

6 CHAIRMAN CATANACH: Yeah, we -- we will go  
7 ahead and not let you do that, Mr. Price.

8 MR. WADE: If the commission wishes, we can  
9 keep going with the presentation. Now would be other  
10 rules. Come back to this to see if there's any more  
11 discussion, but I guess I'm asking that the commission  
12 consider this particular Subsection as proposed.

13 CHAIRMAN CATANACH: Mr. Feldewert --

14 COMMISSIONER BALCH: Maybe I can ask him a  
15 question real quick. It might help me later on.

16 It sounds like you would be okay with the  
17 modified transitional provision and --

18 MR. FELDEWERT: And the changes made?

19 COMMISSIONER BALCH: Yeah, changes made.

20 MR. FELDEWERT: Let me explain why.

21 If you look at Subpart B it says they are  
22 going to examine exceeding what he calls a cap now. B(1)  
23 says as part of their reviews of commercial facility's  
24 permit pursuant to Paragraph (3) of Subsection A of  
25 19.15.36.12. That's that five-year review.

1                   So all this is saying, as I understand it,  
2 what they are trying to do here, is say: Look, when we  
3 get around to our annual or our periodic reviews, we want  
4 to be able to increase the bond if it meets that specific  
5 facility and it's shown with respect to that specific  
6 facility it's needed. Okay.

7                   That I concede was something that the work  
8 group saw no problem with that.

9                   The issue involves A, which again has the  
10 words "financial assurance," "monitoring" and "post  
11 closure." Okay.

12                   Now, I hate jumping around but B is the  
13 only one that deals with commercial facilities, not any  
14 other facility. So are they trying to doing do something  
15 different with financial assurance in Subpart A? That was  
16 the gist of my questions.

17                   So it creates problems, and so  
18 fundamentally my point is we shouldn't be messing around  
19 with A.

20                   COMMISSIONER BALCH: Thank you.

21                   MR. WADE: Shall I move on?

22                   CHAIRMAN CATANACH: Yes.

23                   Q. (BY MR. WADE) Can you move to what is marked as  
24 Exhibit 30.

25                   Now we are shifting gears. We're out of

1 36, and this is the proposed amendment to 19.15.2.7  
2 (O)(3), which is the definition of oil field waste.

3 A. What we are proposing to do is delete the  
4 language in existing 2.7 that is inconsistent with the  
5 statutory definition of oil field waste and is --

6 Q. If I could stop you there. If you could just  
7 flip to Exhibit 31 real quickly and describe what that is.

8 A. That portion, that's currently the definition of  
9 waste in 35, and we are talking about striking it  
10 entirely.

11 Q. And we are going to talk about striking it  
12 entirely because?

13 A. Because we are going to replace it with "oil  
14 field waste" and make that definition consistent with oil  
15 field waste elsewhere in the regulations. Here Part 2.

16 Q. And is the proposed definition to 2.7 actually a  
17 combination of the existing oil field waste definition and  
18 the definition that's being proposed to be struck from  
19 35.7?

20 A. Yes, with one exception. The area that is  
21 underlined that's highlighted in yellow, again that is a  
22 typo. That is not new language where it says "including  
23 waste generated from oil field remediation or abatement  
24 activity, regardless of the date of release."

25 Q. And that's because it's already in the language?

1           A.     Right.  And we couldn't un-underline it, so we  
2 highlighted it.

3           Q.     So by removing the definition of waste from  
4 Rule 35, will oil field waste, as we are proposing it be  
5 referred to, that definition will now be completely found  
6 in 2.7?

7           A.     Yes.

8                     MR. WADE:  If there's no questions.

9                     THE WITNESS:  There's one other portion to  
10 that change, Gabe, that we wanted to make sure that -- to  
11 mention.

12                     The current rule -- the lawyers are telling  
13 me this is true in their reading of things.  The current  
14 rule regarding waste disposal does not explicitly say what  
15 one must do with oil field waste, and the definition of  
16 oil field waste is inconsistent within the rule, and it's  
17 also not consistent with the Oil and Gas Act.  So we are  
18 trying to fix all of that.

19           Q.     If you will turn to Exhibit 32.

20                     What is the proposed amendment?

21           A.     Here is the language we propose to broaden the  
22 scope of Part 35 to include all activities in the oil  
23 patch with respect to waste disposal.

24           Q.     So everything underlined is an expansion?

25           A.     Right.

1 Q. If there are no questions, if you would turn to  
2 Exhibit 33.

3 A. Here is the language we propose to the Objective  
4 portion of Part 35 to clearly require oil field waste to  
5 be properly disposed, as where there actually isn't a  
6 requirement now that waste be properly disposed. So I'm  
7 just clearing that up.

8 We added the phrase "oil field" before the  
9 word "waste" to be consistent with Part 2. We propose to  
10 strike the phrase "nondomestic." It's already been  
11 proposed to be included in Part 2, and therefore I would  
12 say it would be redundant to just say it again here.

13 So we are not really getting rid of  
14 nondomestic, it's just now, I think, incorporated into the  
15 definition.

16 Q. If you will turn to Exhibit 34.

17 A. And this is where that requirement to properly  
18 dispose of oil field waste is made explicit.

19 Q. And there are other avenues of waste disposal;  
20 is that correct?

21 A. Yes.

22 Q. And they are listed in the rule?

23 A. Yes.

24 Q. If you will turn to Exhibit 35.

25 A. Here we are striking old language because we

1 have that new definition of oil field waste in Part 2.

2 Q. And there is an internal reference change in  
3 this, as well.

4 A. Yes, from 19.15.35.8 to 19.15.35.9 because we  
5 just reordered things now.

6 Q. And if you will turn to Exhibit 36. Again this  
7 is one of those exhibits that didn't quite fit the pattern  
8 of the other ones. Essentially what I tried to put  
9 together is the changes to our proposed amendments, and  
10 just numbered them, just put them in list order, make them  
11 so you could see them and we can put them into the record  
12 quickly.

13 A. So we are adding the phrase "oil field". We are  
14 turning the current word "waste" to the phrase "oil field  
15 waste" in six spots in part 35, again for consistency.

16 We are also being forced to renumber  
17 Subsections (8) through (14).

18 Q. Actually it's a creation of a new (8), so it  
19 will be...

20 A. It pushed everybody else up. (8) became (9),  
21 (9) (10), (10) (11), all the way up to (14) became (15) by  
22 insertion of that one.

23 And then the third area is just to be  
24 consistent now with the propose amendments in 35 that we  
25 changed internal references. And that occurs -- actually

1 two pages. They are in 35, I think it's 17 different  
2 places.

3 And Exhibit 35 we just went over was one of  
4 those where we changed (8) to (9).

5 Q. So in general do you think that the granting of  
6 the amendments that you have discussed for all these  
7 proposed rules would be beneficial to the protection of  
8 water, public health and the environment?

9 A. Yes, but indirectly. The thought is if you make  
10 the process more efficient then we would hopefully have  
11 newer facilities come on line and therein be more  
12 protective of water, public health and the environment if  
13 there is more facilities out there, newer facilities,  
14 better facilities.

15 Q. And do you think that the granting of the  
16 proposed amendments would help prevent waste?

17 A. Yeah. But again that would be indirect, as  
18 well. The thought being again if there's sufficient  
19 numbers of facilities out there that are within reasonable  
20 distance to where expiration projects may be occurring,  
21 that that diminishes the cost potentially of dealing with  
22 wastes from the oil patch, therein making the whole  
23 operation more economical, making it more of an incentive  
24 to somebody to actually drill and develop the resource.  
25 We're cutting down on the overheard.

1                   COMMISSIONER BALCH: I think there's  
2 anecdotal evidence that people are disposing -- like sites  
3 in Texas that could be disposing in sites in New Mexico.

4                   THE WITNESS: A small number of them. And  
5 that came up in terms of the Part 35 stuff. We finally  
6 had access somebody requested was it okay to take New  
7 Mexico waste to a Texas facility, and it wasn't explicit  
8 in the rules. But in many instances just the internal  
9 drive distance in New Mexico. The closest facility is in  
10 New Mexico but still too far away. Well, not too far away  
11 but it's costly to get it there. Transportation is always  
12 a big cost.

13                   MR. WADE: Before I forget, I'd like to ask  
14 that Exhibits 1 through 36 be entered into the record.

15                   CHAIRMAN CATANACH: Any objection?

16                   MR. FELDEWERT: No objection.

17                   CHAIRMAN CATANACH: Exhibits 1 through 36  
18 will be admitted.

19                   (Note: Exhibits 1 through 36 admitted.)

20                   MR. WADE: And that concludes our  
21 presentation.

22                   CHAIRMAN CATANACH: Did you have anything  
23 further?

24                   MR. FELDEWERT: I had a couple of  
25 additional questions. Won't take very long.

FURTHER EXAMINATION

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BY MR. FELDEWERT:

Q. Mr. Griswold, if you take a look at Exhibit 1. Go to page 25 if you've got Exhibit 1.

I'm looking about halfway down under what is new Subpart D, as in dog.

Do see where it says Pond and Pit Closure?

A. Yes, sir.

Q. Okay. Am I -- now, you're aware of Rule -- Part 17, the pit rule.

A. Yes.

Q. Recently upheld by the Court of Appeals.

This does not in any way deal with ponds or pits under Rule 17. In here you're talking specifically about ponds or pits within a surface waste management facility?

A. Yes, sir.

Q. Okay. Because I was looking for something like that in the rule. It wasn't entirely clear to me because of the way the headings are set up, and I actually had someone within the Division suggest otherwise. But I'm assuming we can both agree that the pond and pit closure in this provision only applies to ponds and pits within the surface waste management facility.

A. Yes, sir, we can agree, but that doesn't mean

1 that now you've bound every other bureau chief.

2 Q. Then that gets me to my last subject, and if I  
3 may approach the witness.

4 I want to hand you the definition of  
5 surface waste management facility in our current rules.  
6 Okay?

7 And I hand you this only to get to the  
8 exact point you just made. Okay?

9 When I go to the definition of a surface  
10 waste management facility, which we've been talking about  
11 here today, it has the first sentence that defines it as  
12 "Any facility that receives oil field waste" et cetera,  
13 "including" -- see at the end there storage, right?

14 A. Uh-huh.

15 Q. Except.

16 A. Except.

17 Q. And then we got our exceptions.

18 And as I go to the exceptions I get to  
19 Subpart C. It says, "A temporary pit as defined in Rule  
20 17."

21 All right? We can agree with that.

22 Then I get to D. It says, "Below-grade  
23 tank part of a pit, that receives oil field waste from a  
24 single well permitted pursuant to 19.15.37."

25 Now, Part 37 is the refinery, right?

1 A. I'll wait for your question.

2 Q. Are you aware --

3 A. Yes, it is.

4 Q. Are you aware that Part 37 is a one-page rule  
5 dealing with refining?

6 A. Yes.

7 Q. Isn't that supposed to say 17?

8 MR. WADE: I'm going to object to this line  
9 of questioning. I'm not sure how it's relevant to the  
10 proposed amendment.

11 A. Well, I don't know if I can answer to what the  
12 commission meant when they wrote it.

13 Q. (BY MR. FELDEWERT) Well, the intent here is  
14 when you're talking about surface waste management  
15 facilities. We've been talking about a rule that is  
16 dealing with surface waste management facilities, and my  
17 concern is that when I looked at this yesterday, I  
18 thought, well, I'll start from the beginning, it seemed to  
19 me we had a problem with the very beginning, with the  
20 definition, and it appeared to me that we had a typo.

21 And would you agree with me when they talk  
22 about a below-grade tank or a pit in Subpart B they're  
23 talking about Rule 17?

24 MR. WADE: Still the same objection. I'm  
25 not sure how this is relevant to the proposed amendments.

1                   If Mr. Feldewert would like to bring future  
2 proposed amendments, he may.

3                   MR. FELDEWERT: Well, it seems to me, and I  
4 would defer to the commission's counsel, but if there is a  
5 clerical error in our rules, and if that clerical error is  
6 having an unintended consequence, and when you're dealing  
7 with the subject, that this commission is free to make  
8 changes that are germane to what they are looking at.  
9 Okay?

10                   All I'm suggesting is I see a couple of  
11 problems with the very definition, and that is my  
12 understanding of this is that it should be referring to  
13 Part 17, one, to bring all of those pits into -- to be  
14 excluded from what is a surface waste management facility.  
15 And the second problem I see, Mr. Griswold, is that you  
16 see how it talks about oil field waste from a single well  
17 within Subpart D?

18                   A. Yes.

19                   Q. You are aware in Part 17 under the revisions to  
20 the pit rule that they created a multi-well fluid  
21 management pit?

22                   MR. WADE: Same objection. I don't see how  
23 this is relevant to the proposed amendments.

24                   CHAIRMAN CATANACH: Mr. Brancard.

25                   MR. BRANCARD: Well, I agree. I think

1 there are other problems with the rules, and I think it  
2 would be going beyond the scope of this rulemaking to make  
3 changes to this section right now. Not that we shouldn't,  
4 but it would be going beyond the scope of this rulemaking  
5 to go there.

6 CHAIRMAN CATANACH: I agree.

7 COMMISSIONER BALCH: Is your goal for us to  
8 take administrative note of these errors?

9 MR. FELDEWERT: Well, I -- yes.

10 CHAIRMAN CATANACH: So noted.

11 MR. FELDEWERT: And I'll defer to your  
12 counsel.

13 That is all the questions I have. Thank  
14 you.

15 FURTHER EXAMINATION

16 BY MR. BRANCARD:

17 Q. And, Mr. Griswold, this new 19.15.35.8, it  
18 lists -- I know this is similar to a provision in Rule 34  
19 which is I assume why you phrased it the way you did.  
20 Correct?

21 MR. WADE: Could you go back to the  
22 reference?

23 MR. BRANCARD: I assume this is similar to  
24 a provision in Rule -- there's another rule that has a  
25 similar provision to this.

1 MR. WADE: Which exhibit?

2 THE WITNESS: Our Exhibit 34.

3 MR. WADE: Our exhibits.

4 THE WITNESS: I'm sorry, Mr. Brancard,  
5 could you repeat the question?

6 Q. (BY MR. BRANCARD) It's a very awkwardly phrased  
7 section, but I assume you phrased it awkwardly because  
8 it's similar to a provision we have in another rule.  
9 Correct?

10 A. Actually, another member, an attorney on the  
11 task force brought the language forth from another portion  
12 of the rule, yeah.

13 Q. And I'm looking at 19.15.34.20. It talks about  
14 "shall not dispose of produced water or other oil field  
15 waste," and then these same (A) (B), (C) is here.

16 Did you understand that's where this came  
17 from?

18 A. Prior to you asking the question? I would have  
19 to say I'm not sure that I knew.

20 Q. Okay.

21 (Note: The reporter requested a recess  
22 to adjust her machine.)

23 CHAIRMAN CATANACH: Why don't we take five  
24 minutes.

25 (Note: A brief recess was taken.)

1 CHAIRMAN CATANACH: Back on the record.  
2 Mr. Wade, you're done with your  
3 presentation?

4 MR. WADE: Correct.

5 CHAIRMAN CATANACH: Okay. Mr. Feldewert,  
6 do you have anything further?

7 MR. FELDEWERT: I just have one further  
8 point, kind of piggybacked on what Mr. Brancard was  
9 talking about.

10 FURTHER EXAMINATION

11 BY MR. FELDEWERT:

12 Q. I'm looking at Exhibit 3, and I'm looking at the  
13 page -- the first page of Exhibit 3. There's that  
14 additional language that you placed in Rule 35 at the  
15 bottom of the page: Disposition of Oil Field Waste.

16 Do you see that?

17 A. Yes, sir.

18 Q. And it lists a number of division rules within  
19 that first sentence.

20 A. Yes.

21 Q. Okay. The one thing I didn't see on there was  
22 Rule 29.

23 A. Yes, sir.

24 Q. Is it your opinion, Mr. Griswold, that any  
25 corrective action under Rule 29 actually occurs under

1 Rule 30 and therefore is captured within Rule 30?

2 A. Yes.

3 Q. So by listing Rule 30 here we are including any  
4 corrective actions or disposal that is authorized under  
5 Rule 29?

6 A. Any action that happens under Part 30 is  
7 initiated under Part 29.

8 Q. So you think that captures Rule 29 sufficient.

9 A. Now, those are two -- sufficient is a hard  
10 question to answer. It has become painfully obvious to  
11 everybody here that I'm not a lawyer, so...

12 Uhm, I'm comfortable.

13 Q. You don't think we need to list Rule 29 in  
14 there?

15 A. It would be perhaps redundant, but I wouldn't  
16 object if 29 was listed, as well as 30.

17 MR. FELDEWERT: Okay. Thank you.

18 CHAIRMAN CATANACH: Without rehashing some  
19 old material, I just have one more question for Jim.

20 EXAMINATION

21 BY CHAIRMAN CATANACH:

22 Q. Going back to the transitional provision, it's  
23 been suggested that we not change Part A, or leave Part A  
24 as it was?

25 A. It has been suggested, yes.

1 Q. What is the net effect of leaving it as it was,  
2 Jim?

3 A. My concern is, as stated before, leaving it  
4 there makes it ambiguous as to whether or not the division  
5 can require operators of current surface waste management  
6 facilities to have adequate bonding to cover closure and  
7 post closure.

8 Q. Would that include operators that don't have any  
9 bonding currently?

10 A. Yes.

11 Q. Okay.

12 A. The potential burden to the Division if that  
13 operator, that permittee decided to walk away from the  
14 facility would be significant. Could be significant.

15 COMMISSIONER PADILLA: I just have one  
16 follow-up on that.

17 EXAMINATION

18 BY COMMISSIONERS PADILLA:

19 Q. If an operator, owner, permittee, whoever we are  
20 calling that person, does not have bonding currently, is  
21 that because their current permit doesn't call for it  
22 specifically?

23 A. Whatever artifice, regulatory artifice, legal  
24 document, Order, any number of things, if it didn't  
25 require it then it could not exist, potentially.

1 Q. So wouldn't be a case --

2 A. Or at least it would be inadequate if it was  
3 capped at \$250,000.

4 Q. But inadequate and absent are two different  
5 things.

6 A. Yes, they are.

7 Q. And when we are talking about completely absent,  
8 wouldn't the current 36 or Proposed Rule 36 pull that into  
9 consideration, because they don't have any specific  
10 language or anything addressing bonding in their current  
11 permit, legal document, agreement, whatever it is.

12 A. Yes.

13 Q. So theoretically even without that language, you  
14 could still capture that if it was totally silent on that?

15 A. I'm not sure, Commissioner Padilla. I'm not  
16 sure. I suppose a legal argument could be made that in  
17 either case, either lack entirely of bonding or the  
18 inadequate level of bonding, "I've got a piece of paper.  
19 I've got a deal with you, OCD, that says this is all  
20 that's required of me, and a deal's a deal, even if it was  
21 a bad deal."

22 CHAIRMAN CATANACH: If we took out  
23 "monitoring" and "post closure", is that an acceptable  
24 compromise in your eyes, and left "financial assurance"  
25 in?

1 THE WITNESS: Yes.

2 CHAIRMAN CATANACH: Okay. All right.  
3 Anything further?

4 MR. WADE: I don't think I have anything in  
5 closing.

6 CHAIRMAN CATANACH: Okay.

7 What is the pleasure of the Commission at  
8 this time? Do we want to go straight into deliberations?

9 COMMISSIONER BALCH: Absolutely.

10 COMMISSIONER PADILLA: Love it.

11 MR. PRICE: Mr. Commission Chairman, would  
12 it be appropriate to have one more public comment?

13 CHAIRMAN CATANACH: Mr. Price I believe you  
14 already had your chance.

15 MR. PRICE: Thank you.

16 CHAIRMAN CATANACH: Thank you.

17 COMMISSIONER BALCH: Usually there's public  
18 comment -- well, "usually" is hard to say. But often we  
19 have given it before lunch and before the end of the day  
20 of testimony.

21 CHAIRMAN CATANACH: Are you saying we  
22 should?

23 COMMISSIONER BALCH: I don't know.

24 COMMISSIONER PADILLA: Yeah.

25 CHAIRMAN CATANACH: Mr. Price, we changed

1 our minds. We will allow you. Keep it brief.

2 COMMISSIONER BALCH: We often limit it to  
3 five minutes.

4 MR. PRICE: That's fine. I can go real  
5 quick.

6 We were just recently -- and I think Jim  
7 knows this, is that Rule 29 is the remediation rule, leak  
8 and spill remediation rule, and Rule 30 is called  
9 remediation, it was renamed that. But Rule 30 has always  
10 been only if you have impacted ground water, and once you  
11 have impacted ground water then you have to go through a  
12 whole series of hoops of things, including cleaning up  
13 ground water, investigations, public notice, the whole  
14 thing.

15 If we don't put 29 into the reference for  
16 oil field waste, then I can assure you it's going to be  
17 argued in the future that any leak and spill that you have  
18 is going to jump into 30, and people will -- you know, I'm  
19 sure there's going to be environmental groups who will  
20 say, no, no, you have to go through public notice and  
21 everything. This is for every leak and spill out there.

22 So I'm going to suggest that we add -- that  
23 you think about at some time, I don't know if this is  
24 appropriate time to do it, that you add Rule 29 in the  
25 definition, the exceptions for Rule 29 in the definition

1 for oil field waste. I think it's just appropriate, it's  
2 what we've done forever, and I believe it's going to cloud  
3 the issue if we don't do that.

4 One other comment. There was a comment  
5 about where did this magic \$250,000 number come from.

6 MR. WADE: Same objection that I stated  
7 earlier.

8 COMMISSIONER BALCH: This is starting to  
9 sound a lot like testimony rather than a comment.

10 MR. PRICE: Okay. Very good. Thank you  
11 very much.

12 CHAIRMAN CATANACH: Thank you.

13 All right. So, Mr. Wade, if we start at  
14 Exhibit 3, is that where your changes start?

15 MR. WADE: The exhibits. So Exhibit 1 is  
16 all the changes to 36. You will find all of them. So it  
17 includes the whole rule with the strike-outs and the  
18 proposed amendments.

19 Exhibit 2 is the shortest. It's just the  
20 change to the Definition 2.7.0(3), which is a definition  
21 of oil field waste.

22 And Exhibit 3 are all of the proposed  
23 amendments to Rule 35.

24 CHAIRMAN CATANACH: Well, does the  
25 commission want to take care of 3 and 4 -- or 2 and 3

1 first? These are fairly simple.

2 COMMISSIONER BALCH: Why not?

3 CHAIRMAN CATANACH: Okay. I know in a  
4 previous rule case, Mr. Brancard, you kind of walked us  
5 through this, but do you have any suggestions on the best  
6 way to do this?

7 MR. BRANCARD: You mean just going through  
8 the changes?

9 CHAIRMAN CATANACH: Yeah, I mean, I guess  
10 we could just -- we could read the changes and if we have  
11 any comments we can discuss it.

12 I mean, if would we just read it ourselves,  
13 not read it out loud, if that is acceptable.

14 MR. BRANCARD: Yeah. I mean, you may just  
15 want to go section by section through some of the other  
16 areas. A lot of -- in Rules, you know, 36 and 35 there  
17 really are not that many sections that are impacted here.

18 COMMISSIONER PADILLA: By sections do you  
19 mean starting on Exhibit 4?

20 MR. BRANCARD: Whichever way you want to  
21 go. Do you want to start on Rule 36 or Rule 35?  
22 Whichever way you want to go. I mean, Exhibits 2 and 3  
23 are obviously linked, oil field waste definition in the  
24 Rule 35 changes, and they are distinct in some ways from  
25 the Rule 36 changes.

1                   COMMISSIONER BALCH: Really a change to the  
2 definition of oil field waste to make it consistent with  
3 other parts of the rule.

4                   MR. BRANCARD: Well, it's pulling words  
5 from the Act. There is no actual definition of oil field  
6 waste in the Act. Instead it's referring to these two  
7 sections in the Act that establish the rulemaking  
8 authority of the Commission and the Division. So that you  
9 shall enact rules dealing with nondomestic waste. And  
10 then there's (B)(21), which is exploration, development,  
11 production and storage waste, and then 22, which is waste  
12 coming from the other areas.

13                   You know, these are not exactly the words  
14 from the Act. The B(22) does, you know, and it concerns  
15 me a little bit because the B(22) section does refer  
16 specifically to the Water Quality Act, which is not at all  
17 mentioned in here.

18                   And some of this waste is handled under The  
19 Water Quality Act, the Division's Water Quality Act  
20 authority, not the Oil and Gas Act authority, particularly  
21 refineries, pipelines, et cetera.

22                   (Note: Pause.)

23                   CHAIRMAN CATANACH: So do you have any  
24 suggestions on how we refine this language?

25                   MR. BRANCARD: I mean, I guess my concern

1 more is how it's applied. Once you have that definition,  
2 which is now really broad as to what oil field waste is --  
3 I mean, you are way beyond oil field; you are now into  
4 pipelines, refineries, et cetera -- and how is that  
5 applied now, particularly in Rule 35.

6 And actually it's oil field waste is  
7 already used in Rule 34 in a similar provision to this new  
8 provision 35.8 that's been put in here.

9 So it has -- it kind of has some ripple  
10 effects through the rules here.

11 COMMISSIONER PADILLA: Kind of sounds --

12 MR. BRANCARD: I mean, if I look at the  
13 current definition of oil field waste I don't know that it  
14 necessarily has expanded it.

15 COMMISSIONER BALCH: I think the real  
16 addition is the midstream component, refining and  
17 processing.

18 MR. BRANCARD: Yeah. But they are  
19 mentioned in the current definition, too.

20 COMMISSIONER BALCH: Okay. That's true,  
21 yeah, gathering and transportation. So not necessarily --  
22 well, refining and processing, yeah.

23 I guess the real question is: Is the new  
24 definition an improvement on the old definition?

25 CHAIRMAN CATANACH: Unless there's some

1 kind of legal issue with the new definition, I don't have  
2 a problem with it.

3 MR. BRANCARD: I mean, I think part of the  
4 goal here is that we have different definitions of waste,  
5 oil field waste, et cetera through the rules, and by  
6 deleting the definition of waste that's in, I think in  
7 Rule 35, we're avoiding -- we're getting rid of some  
8 contradictions between definitions here that are really  
9 unnecessary, so we are left with one definition that can  
10 then get applied.

11 COMMISSIONER PADILLA: So if the goal is  
12 consistency, I think it's --

13 COMMISSIONER BALCH: I don't really see any  
14 great problem. One of them just has more explicit players  
15 to the other parts of the regulation.

16 So I'm comfortable with the definition  
17 change.

18 CHAIRMAN CATANACH: I'm also comfortable  
19 with it.

20 COMMISSIONER PADILLA: Yeah, consistency, I  
21 think is the way to go.

22 COMMISSIONER BALCH: All right.

23 CHAIRMAN CATANACH: Then Exhibit 3, the  
24 first change is 19.15.35.2.

25 COMMISSIONER PADILLA: It looks like it

1 matches the definition of the previous exhibit.

2 CHAIRMAN CATANACH: Okay. I'm comfortable  
3 with that.

4 COMMISSIONER BALCH: I am.

5 CHAIRMAN CATANACH: 19.15.35.6, OBJECTIVE.

6 MR. BRANCARD: So okay. I guess what  
7 caught me off guard here is that we have these rules that  
8 have titles like Waste Disposal. In reality this rule,  
9 Rule 35, really only dealt with two fairly narrow issues  
10 which are set forth in this objective here in the original  
11 language, right, which is disposal of oil field waste at  
12 solid waste facilities permitted by the environment  
13 department.

14 Okay. What kind of oil field waste can go  
15 to what we think of as your municipal landfill. Okay?

16 And the second one is disposal of regulated  
17 NORM waste. That's a pretty narrow issue, too.

18 But now we are adding in this very broad  
19 statement "To establish requirements for the disposal of  
20 oil field waste," which is kind of embodied in this 35.8,  
21 which, as I said, 35.8 is an almost exact repeat of what  
22 you approved last year in Rule 34. Rule 34.20. This was  
23 sort of existing language in Rule 34 that got changed a  
24 bit. So this is almost exactly but not quite the same as  
25 Rule 34.20.

1                   COMMISSIONER BALCH: So the original rule  
2 was basically establishing procedures. Now we are adding  
3 to that, we are adding requirements.

4                   MR. BRANCARD: If you look at the rest of  
5 35 there's whole thing about 35.9, which is about what can  
6 you send to a regular landfill, right; and then the rest  
7 of 35 it deals with Naturally Occurring Radioactive  
8 Materials.

9                   Okay. And again, both of those are -- it's  
10 kind of nice to be in one rule, because they both deal  
11 with sort of intersection between oil field waste and  
12 facilities regulated by the New Mexico Environment  
13 Department.

14                   So that's why they kind of work together in  
15 this one rule. Seems like an awkward combination but  
16 that's really what's happening here.

17                   COMMISSIONER PADILLA: Are you saying going  
18 back to 35.6 that that's somewhat redundant, the new  
19 language, or overly broad?

20                   MR. BRANCARD: I mean I think you're  
21 dealing with disposal of oil field waste in a lot of other  
22 places and that's what 35.8 says. And you've said that  
23 already in 34.20. I don't know that you need to say it  
24 again.

25                   And again what concerns me a little bit is,

1 like I said, we have now defined oil field waste so  
2 broadly, are we capturing, as the point was just made  
3 here, all the various places that we deal with oil field  
4 waste, and are there things outside of what OCD does that  
5 we allow oil field waste to go to?

6           You know, if you are at a refinery you have  
7 hazardous waste that goes to a RCRA facility. You know.  
8 You have parts of a refinery that are governed by a Water  
9 Quality Act discharge permit. None of that is mentioned  
10 in here.

11           So I'm just a little concerned that we have  
12 thrown this section in which is sort of a copy of a  
13 section from somewhere else without really thinking about  
14 the implications of what all that means.

15           COMMISSIONER BALCH: If we stay with the  
16 original language, will it impact everything else we are  
17 looking at today?

18           CHAIRMAN CATANACH: I don't think so.

19           MR. BRANCARD: You said you are okay with  
20 the definition of oil field waste, and that's kind of the  
21 big change, really in some ways, and making that  
22 consistent to -- particularly in this rule get rid of this  
23 other definition of waste which is not quite the same.  
24 It's just not good having too many definitions of waste.

25           CHAIRMAN CATANACH: I guess my concern

1 would be in these other rules that are cited does it have  
2 this specific language in there about disposal of oil  
3 field waste? If it's already somewhere else then we  
4 probably don't need it here.

5 (Note: Pause.)

6 MR. BRANCARD: So I mean I guess I'm --  
7 just to keep the discussion going, my recommendation,  
8 being overly cautious here, is to, you know, not adopt  
9 that new phrase in 35.6 and not adopt the new 35.8. The  
10 rest of it I don't have any problems with the changes in  
11 35.

12 COMMISSIONER PADILLA: Call for eliminating  
13 redundancies and inconsistencies. So that sounds fine to  
14 me.

15 CHAIRMAN CATANACH: Well, again my concern  
16 is: Is this already somewhere else?

17 COMMISSIONER BALCH: Well, if you look at  
18 the original reading of the 35.8A, it says basically that  
19 you can only dispose in accordance with 19.15.35.8.

20 That's circular. That's scratching another  
21 definition.

22 MR. BRANCARD: Here. If you look at 34.20,  
23 it's almost identical to what's being proposed.

24 CHAIRMAN CATANACH: Okay. All right. I'm  
25 happy with that.

1 COMMISSIONER BALCH: Do you want to see  
2 35.20?

3 CHAIRMAN CATANACH: So then the suggestion  
4 is to not change 35.6, not change 35.8. Do we agree on  
5 that?

6 COMMISSIONER PADILLA: I'm comfortable with  
7 that.

8 COMMISSIONER BALCH: I'm comfortable with  
9 it, as well. Okay.

10 CHAIRMAN CATANACH: And Bill, are you going  
11 to keep notes on this?

12 MR. BRANCARD: Yes.

13 COMMISSIONER BALCH: So now we just erased  
14 a whole bunch of renumbering.

15 COMMISSIONER PADILLA: Until I get to the  
16 next page where it becomes apparent.

17 MR. BRANCARD: Computers. It's easy.

18 COMMISSIONER BALCH: We may actually want  
19 to go to later exhibits to look at the next sections,  
20 because the name --

21 CHAIRMAN CATANACH: So what, your  
22 suggestion is to go jump into 36? I think it's 36.

23 COMMISSIONER BALCH: Well, which is all the  
24 renumbering.

25 MR. BRANCARD: Well, that's lot of changes

1 that don't need to be made now.

2 COMMISSIONER BALCH: So I sense what we're  
3 doing is leaving 35 more or less alone.

4 MR. BRANCARD: Well, except for inserting  
5 the "oil field" waste concept all through there.

6 COMMISSIONER BALCH: That's right. "Oil  
7 field" before waste in all these sections. And everything  
8 else is renumbering, which will not occur.

9 CHAIRMAN CATANACH: So none of those cites  
10 would change.

11 COMMISSIONER BALCH: Yeah, Section 2 and  
12 Section 3 would not occur. In Exhibit 35, the proposed  
13 amendment to 19.35, the only thing changes in 19.15.35 is  
14 adding "oil field waste" in six sections.

15 CHAIRMAN CATANACH: Uh-huh.

16 COMMISSIONER BALCH: And then not  
17 renumbering because we didn't make the changes.

18 CHAIRMAN CATANACH: Okay. Can we place  
19 that additional burden on you, Bill, to check and make  
20 sure --

21 MR. BRANCARD: Oh, yeah. That's fine.

22 CHAIRMAN CATANACH: Because they think we  
23 are done with 35, right?

24 Then the latter changes are just citations.

25 Moving right along.

1 COMMISSIONER BALCH: 36?

2 CHAIRMAN CATANACH: Exhibit 6?

3 MR. BRANCARD: I think it's Exhibit 5.

4 COMMISSIONER PADILLA: Five. Yeah.

5 COMMISSIONER BALCH: This is the  
6 own-versus-operate question.

7 COMMISSIONER PADILLA: Could we say  
8 something like "hold and maintain the permit?" How would  
9 we define that prior to --

10 COMMISSIONER BALCH: Well, it seemed like  
11 the intent was to make the owner responsible.

12 COMMISSIONER PADILLA: Right. But the  
13 owner has to be the one getting the permit. I know that  
14 we had some back and forth on when they become the  
15 permittee, because prior to getting the permit they are  
16 the applicant.

17 I don't know that we ever came up with a  
18 good term for that.

19 COMMISSIONER BALCH: Probably the real  
20 place to -- I mean, I think if you could just change the  
21 words "own or operate" in the current rule to "own" and  
22 then in 36.6 -- wait a second.

23 CHAIRMAN CATANACH: 36.7.

24 COMMISSIONER BALCH: 36.7(B)(11),  
25 definition of operator.

1                   COMMISSIONER PADILLA: So would your  
2 proposal be that NMSA 19.15.36.2 where it says " persons  
3 or entities" replace with "persons or entities that own  
4 surface waste management facilities" and eliminate "or  
5 operate"?

6                   COMMISSIONER BALCH: I think so.

7                   We don't necessarily need a definition of  
8 operator. What we need is a definition of "owner" in  
9 36.7(B)(11) which will probably include the ability for  
10 them to subcontract operations to a third party.

11                  CHAIRMAN CATANACH: Okay. So 36.2 we are  
12 changing that to own, owner, or just...

13                  COMMISSIONER PADILLA: That's --

14                  CHAIRMAN CATANACH: Just scratch out  
15 "operate." Anyone that owns surface waste management  
16 facilities. That way there's no --

17                  CHAIRMAN CATANACH: Applies to persons or  
18 entities that own surface waste management facilities.  
19 Okay.

20                  MR. BRANCARD: I guess my thought would  
21 just be to leave it the way it is. Leave it as broad as  
22 what you want and then later clarify who you are applying  
23 this to.

24                  COMMISSIONER BALCH: The problem is right  
25 now the original rule says owner or operator and there's a

1 distinction between people that own the site and they are  
2 responsible for the permitting and for following the  
3 rules, but an operator could also be interpreted as  
4 someone who is running the day-to-day operations:  
5 subcontractor, solid waste management.

6 COMMISSIONER PADILLA: I do like that  
7 distinction, because I think that the owning entity should  
8 be financially responsible.

9 COMMISSIONER BALCH: I think they almost  
10 have to be.

11 COMMISSIONER PADILLA: What's that?

12 COMMISSIONER BALCH: I think they almost  
13 have to be.

14 COMMISSIONER PADILLA: Right. But if they  
15 have a third-party contract with an operator, that's  
16 between them and the operator, not the OCD and the  
17 operator.

18 COMMISSIONER BALCH: You could change  
19 36.7(5)(11) to say something like owner, and it's a person  
20 or entity who owns the surface waste management facility,  
21 irregardless of who is operating the facility under their  
22 direction. Something like that.

23 COMMISSIONER PADILLA: Right.

24 Going back a 36.2, are we okay with  
25 scratching "or operate"?

1 Do you want to talk about that one some  
2 more?

3 CHAIRMAN CATANACH: I think I'd be more  
4 comfortable again leaving both of them in there: own or  
5 operate.

6 COMMISSIONER BALCH: And the argument for  
7 that would be?

8 CHAIRMAN CATANACH: Well, I think if there  
9 was a problem we could go after either party. If we  
10 wanted to go after the operator or the owner, we could go  
11 after both of them if there was some kind of violation.

12 COMMISSIONER PADILLA: But then are you  
13 going to require the operator to also have financial  
14 assurance?

15 CHAIRMAN CATANACH: No.

16 COMMISSIONER BALCH: So 36.2 is the scope  
17 of people that are impacted by the proposed rule, by Rule  
18 36. So what I think the Division is looking for here is  
19 one clear chain of responsibility, that being the owner of  
20 the site.

21 COMMISSIONER PADILLA: If the operator is  
22 not bonded and this doesn't require the operator to be  
23 bonded because we want the owner to be bonded, you could  
24 go after them, but they wouldn't necessarily have any --  
25 there wouldn't be much recourse without any financial

1 assurance.

2 CHAIRMAN CATANACH: Well, I mean if the  
3 operator has some violations we could go after the  
4 operator for noncompliance and go after the owner for  
5 financial.

6 COMMISSIONER PADILLA: You can go after the  
7 owner for noncompliance, as well, because they are  
8 responsible for the operator.

9 MR. BRANCARD: If you have a permit with  
10 somebody's name on it, that's who you go after.

11 COMMISSIONER PADILLA: Right. Regardless  
12 of who is actually driving the heavy equipment or  
13 whatever, the owner is who you personally go after,  
14 because they are the permit holder and they have the  
15 financial assurance, to my mind.

16 COMMISSIONER BALCH: Perhaps the question  
17 is: If we change 36.2 to be the owner, do we need a  
18 36.7(B)(11) 11 definition at all? Just refer to the owner  
19 or applicant as permittee.

20 COMMISSIONER PADILLA: Then you are  
21 eliminating the operator altogether.

22 COMMISSIONER BALCH: So instead of revising  
23 the definition of operator we just eliminate the  
24 definition of operator.

25 COMMISSIONER PADILLA: Because it's

1 immaterial, based on the fact that the owner is the  
2 financial assurance and the permit.

3 CHAIRMAN CATANACH: This may be a little  
4 off the subject, but didn't we have some situations in the  
5 Dakotas where the owner contracted somebody to do  
6 something and then there was a disclaimer in the contract  
7 to where the owner didn't have any responsibility for what  
8 the operator did?

9 I don't know if that --

10 COMMISSIONER PADILLA: He wouldn't be a  
11 party to that contract.

12 CHAIRMAN CATANACH: But if -- okay. So  
13 you're saying we could still go after the owner in that  
14 case.

15 COMMISSIONER PADILLA: Right.

16 CHAIRMAN CATANACH: If you are guys want to  
17 put "owner" that's fine. Just have owner.

18 COMMISSIONER BALCH: I'd say "...NMAC  
19 applies to persons or entities that own surface waste  
20 management facilities as defined," and then not worry  
21 about "operator".

22 COMMISSIONER PADILLA: I mean, if really we  
23 are going off the change as financial assurance, it seems  
24 like that is the way to get it.

25 COMMISSIONER BALCH: It seemed to me what

1 the Division was hoping to achieve --

2 COMMISSIONER PADILLA: Right.

3 COMMISSIONER BALCH: -- was that one  
4 person, and that person is the owner.

5 COMMISSIONER PADILLA: Right.

6 COMMISSIONER BALCH: So then we strike the  
7 36.7(B)11.

8 CHAIRMAN CATANACH: I'm sorry. Where are  
9 you at?

10 COMMISSIONER BALCH: That is the definition  
11 of operator. Because it wouldn't ben in the rule anymore.  
12 We either refer to the owner, the permittee or the  
13 applicant.

14 COMMISSIONER PADILLA: Right.

15 COMMISSIONER BALCH: Since it's only the  
16 owner.

17 COMMISSIONER PADILLA: That is all the same  
18 entity.

19 MR. BRANCARD: So you kind of have to  
20 decide just generically how you want to do this. Clearly  
21 what the Division's proposal is, is to put the onus on the  
22 owner of the facility. The problem is that the rule all  
23 through it says the word operator. So they redefine  
24 operator to mean owner. That is their proposal.

25 And you don't disagree with having an owner

1 take responsibility, the question is what do you call him  
2 in the rule.

3 COMMISSIONER BALCH: I think you call him  
4 the owner, the applicant in the case of a permit that has  
5 not been yet established, and a permittee in the case of a  
6 permit that has been established.

7 COMMISSIONER PADILLA: I think it depends  
8 on where you are in that sequence timewise.

9 COMMISSIONER BALCH: So wherever there is a  
10 word "operator" you would say owner, applicant or  
11 permittee, depending upon the...

12 MR. BRANCARD: I hate to say this, but  
13 given how much that will change the rule, for that  
14 specific issue -- we can go through all the rest of these  
15 changes -- you may just want to request that the Division  
16 provide -- that we keep the record open for the Division  
17 to provide a new draft of this with that wording change.

18 COMMISSIONER BALCH: I would recommend  
19 that, that we keep it open until we look at it. At a  
20 final time, anyway. We haven't gotten yet to point of the  
21 C-137A, which I would like to look at before the rule is  
22 finalized.

23 MR. BRANCARD: I think we are just changing  
24 a term. The concept is the same that's been requested:  
25 The owner takes responsibility. It's just what do you

1 call him in the rule.

2 COMMISSIONER PADILLA: I think it's going  
3 to vary based on the temporal sequence.

4 COMMISSIONER BALCH: So then they're going  
5 to have to crawl through the document and figure out where  
6 it's an applicant, where it's a permittee or owner but  
7 they are all referring to the same person or entity.

8 CHAIRMAN CATANACH: So...

9 COMMISSIONER PADILLA: They will be  
10 applicant until they have a permit.

11 COMMISSIONER BALCH: I think Mr. Brancard  
12 is recommending we keep the record open until we can chase  
13 down all these...

14 CHAIRMAN CATANACH: Are we proposing not to  
15 do anything with (B)(11), or...

16 COMMISSIONER BALCH: I think strike -- the  
17 definition of operator won't be in there anymore, or the  
18 word operator won't be in there anymore.

19 CHAIRMAN CATANACH: Okay. Did we deal with  
20 36.6?

21 COMMISSIONER BALCH: 36.6.

22 CHAIRMAN CATANACH: And I guess -- well  
23 post closure comes into effect in this whole rule. I'm  
24 not opposed to post closure except maybe we might discuss  
25 it further in the transition area.

1                   COMMISSIONER BALCH: I think the discussion  
2 of what happened with 7.9(11) permits doesn't really  
3 matter what we say here. We discuss that area --

4                   CHAIRMAN CATANACH: But the changes, do you  
5 want to keep post closure in here in 36.6, because this is  
6 going to show up throughout the rule.

7                   MR. BRANCARD: It already is in the rule.

8                   COMMISSIONER PADILLA: So I think we keep  
9 it.

10                  COMMISSIONER BALCH: I think that's fine.  
11 I'm fine with this change.

12                  37(B)(14) is just an example of eliminate  
13 the word "safety," which is going to be listed in probably  
14 about 30 places total.

15                  CHAIRMAN CATANACH: Right.

16                  COMMISSIONER BALCH: So if we are  
17 comfortable with it here we will be comfortable with it  
18 everywhere.

19                  CHAIRMAN CATANACH: Seems to me we did this  
20 maybe in 23 and we didn't have any problem with it there.

21                  COMMISSIONER PADILLA: Yeah.

22                  COMMISSIONER BALCH: Good with 37(B)(14),  
23 then, I guess.

24                  COMMISSIONER PADILLA: Yes.

25                  This is the owner-operator.

1                   The next sentence: The owner is  
2 responsible for the actions of the operator's officers,  
3 employees, consultants, contractors and subcontractors as  
4 they relate..."

5                   That basically covers it. If there is an  
6 operator.

7                   COMMISSIONER BALCH: I think that nails it  
8 right there.

9                   COMMISSIONER PADILLA: All right.

10                  CHAIRMAN CATANACH: So just that one word?

11                  COMMISSIONER BALCH: Just change the word  
12 "The operator" in the second added sentence to "The  
13 owner."

14                  "The owner is responsible for the actions of the  
15 operator, officers, employees..."

16                  CHAIRMAN CATANACH: Well, it says the  
17 operator's officers.

18                  COMMISSIONER PADILLA: "The operator,  
19 comma, officers..."

20                  CHAIRMAN CATANACH: We could add "operator"  
21 to that.

22                  COMMISSIONER PADILLA: Right.

23                  CHAIRMAN CATANACH: But the intent...

24                  COMMISSIONER PADILLA: My --

25                  CHAIRMAN CATANACH: Is that okay with you?

1                   COMMISSIONER BALCH: So the wording would  
2 be, "The applicant for a permit shall be the owner of the  
3 surface waste management facility. The owner is  
4 responsible for the actions of the operator, the  
5 operator's officers, employees," etc.

6                   CHAIRMAN CATANACH: Yes.

7                   COMMISSIONER BALCH: I'm fine with that.

8                   COMMISSIONER PADILLA: Makes it clear.  
9                   The half-mile/mile. I believe this was  
10 another consistency issue for other permits.

11                   COMMISSIONER BALCH: It will fit Rule 17  
12 and Rule 34.

13                   CHAIRMAN CATANACH: And injection well  
14 rules, things like. I don't have an issue with that.  
15 There doesn't seem to be any controversy about it.

16                   COMMISSIONER PADILLA: I didn't hear  
17 anything too contrary, so I'm inclined to --

18                   CHAIRMAN CATANACH: And then, "based on the  
19 records of the applicable county clerk or the clerk's  
20 office," I mean that just helps them out to determine who  
21 owns the offset buildings or what have you. I'm fine with  
22 that.

23                   COMMISSIONER BALCH: For notice.

24                   COMMISSIONER PADILLA: Right.

25                   Eliminating "safety" in 36.8.

1 CHAIRMAN CATANACH: And all this does is  
2 change the citation of the closure and post closure  
3 requirements from 36.18 of Part D to A through F of 36.18.

4 MR. BRANCARD: It's going to be the list of  
5 closure requirements.

6 COMMISSIONER PADILLA: Okay. Expanded to A  
7 through F.

8 CHAIRMAN CATANACH: I think that's fine.

9 COMMISSIONER PADILLA: Doesn't touch on the  
10 transition issue, does it?

11 MR. BRANCARD: No. 36.13.

12 COMMISSIONER PADILLA: No.

13 MR. BRANCARD: I think that's fine.

14 COMMISSIONER PADILLA: I think it's fine.

15 CHAIRMAN CATANACH: Okay.

16 COMMISSIONER BALCH: So this is where I  
17 think we probably have to talk about.

18 I would encourage once we have drafted our  
19 ideal rule that the Division comes up with the C-137A form  
20 for us to review before we close the record.

21 COMMISSIONER PADILLA: Yeah.

22 COMMISSIONER BALCH: Then the other  
23 question really that I think we need to discuss at this  
24 point is going to be minor vs. major modifications.

25 COMMISSIONER PADILLA: It seems like a

1 catch-all, a lot of feedback. The catch-all on the major  
2 modifications was taking everything.

3 COMMISSIONER BALCH: Now, there's some  
4 limitations on the scope of what we can change.

5 MR. BRANCARD: Because that was really not  
6 a subject of this.

7 COMMISSIONER PADILLA: Right.

8 MR. BRANCARD: So we can't put in there  
9 that the subjective --

10 COMMISSIONER BALCH: The subjective  
11 decision whether it's a major or minor operations could be  
12 made at the discretion of the director, for example.

13 We can't add that, much as I would like to  
14 give you that power.

15 CHAIRMAN CATANACH: Yeah, thank you.

16 And I think, you know, we can't get into  
17 minor/major. That's a technical issue.

18 COMMISSIONER BALCH: No, don't want to  
19 touch that. That's technical.

20 COMMISSIONER PADILLA: So really that's  
21 C-137A. We should keep the record open to see it.

22 COMMISSIONER BALCH: I think so.

23 CHAIRMAN CATANACH: So it's saying minor  
24 modifications are not subject to Subsection C under --

25 That would be the whole requirement for --

1 COMMISSIONER PADILLA: For a major.

2 CHAIRMAN CATANACH: For a mod or --

3 COMMISSIONER BALCH: Right. So we can't  
4 really finalize this until we see the C-137.

5 COMMISSIONER PADILLA: And we can't have  
6 any impact on the rest of it, so...

7 CHAIRMAN CATANACH: So leave this.

8 But are you guys -- I mean do we have  
9 problems with the language, the other language?

10 COMMISSIONER BALCH: I think the language  
11 is fine. It's apparently the interpretation of the  
12 language which is giving people problems.

13 COMMISSIONER PADILLA: And I do like the --  
14 before making a "minor modification" language, I think  
15 that seems like maybe that's been a problem in the past  
16 when someone applies for forgiveness rather than  
17 permission.

18 COMMISSIONER BALCH: I think that owners or  
19 permittees or advocates, at that stage of the process  
20 would have the ability to come to hearing if they felt  
21 that their major modification was a minor modification,  
22 right? So it's not there is no out. It's just a  
23 complicated one.

24 COMMISSIONER PADILLA: Right.

25 COMMISSIONER BALCH: Would that be the

1 correct interpretation?

2 MR. BRANCARD: Uh-huh.

3 CHAIRMAN CATANACH: So pending the review  
4 of the C-137, we really don't have the problem with the  
5 language --

6 COMMISSIONER BALCH: Right.

7 COMMISSIONER PADILLA: Scratching  
8 "administrative completeness."

9 COMMISSIONER BALCH: They are replacing  
10 36.8(E) with 36.9, which is an entirely new process.

11 COMMISSIONER PADILLA: Yeah I have no  
12 problem with that.

13 COMMISSIONER BALCH: I'm okay with changing  
14 the process to make it more clear.

15 CHAIRMAN CATANACH: 36.9.

16 COMMISSIONER BALCH: You know, maybe I  
17 wasn't awake all the way this morning but I sure was  
18 scratching my head over the timing outlined here.

19 CHAIRMAN CATANACH: What was your concern?

20 COMMISSIONER BALCH: Trying to align the  
21 document with the supplied flow chart in Exhibit 16 -- or  
22 Exhibit 15.

23 COMMISSIONER PADILLA: Well, I think I'll  
24 take Mr. Griswold's word that it's better to take it out  
25 of the text than the flow chart, and the fact that

1 industry didn't have any problem with that timing.

2 COMMISSIONER BALCH: Once I understood the  
3 timing, I approved of it.

4 CHAIRMAN CATANACH: Well, and I think  
5 Mr. Griswold didn't want to put the timing on the flow  
6 chart, and I think --

7 COMMISSIONER BALCH: I'm just going to read  
8 through this real quick and make sure I follow it  
9 completely.

10 (Note: Pause.)

11 So there is a little bit of redundant  
12 language at the end of B(2), because in B(3) they are  
13 talking about the same process of putting a revised  
14 application in. So I'm wondering if we could truncate  
15 B(3) after "the deficiency letter shall identify and  
16 address all the Division's concerns regarding application  
17 in specific detail," and just put a period right there and  
18 scratch the rest of that sentence, because the very next  
19 sentence says, "If the Division issues a deficiency Letter  
20 the applicant shall have 60 days from the Division's  
21 issuance of the deficiency letter to submit a revised  
22 application."

23 It more or less says the same thing in a  
24 more formal manner.

25 COMMISSIONER PADILLA: Makes sense.

1 CHAIRMAN CATANACH: Okay.

2 MR. BRANCARD: After detail? Did you  
3 capture that?

4 COMMISSIONER BALCH: Yeah, after "specific  
5 detail." Sorry.

6 All right. So I think we can...

7 Section 4 is where we end up with the  
8 potential for a permanent loop. Well, maybe not.

9 CHAIRMAN CATANACH: To what?

10 COMMISSIONER PADILLA: What was your  
11 concern there, Bob?

12 COMMISSIONER BALCH: I want to make sure  
13 there is not a possibility for a permanent loop. It looks  
14 like it may not be.

15 And it's not. So I think it's fine. The  
16 revision that I would have asked Mr. Griswold to make to  
17 his flow chart, if he was in the room, to make it more  
18 clear if he were to share this with an applicant, for  
19 example would be to have a third block to the right of  
20 Revised Application that says Division Review. And that  
21 Division Review could then go either to Denial or Proposed  
22 Decision.

23 That would make the flow chart complete.

24 Maybe Mr. Wade will pass that on to him.

25 MR. WADE: I will try. (Note: Pause.)

1                   COMMISSIONER BALCH: Another thing that  
2 might crop up in this is the order of noticing.

3                   COMMISSIONER PADILLA: The mailing?

4                   CHAIRMAN CATANACH: Well, I did have an  
5 issue with the C(3), and I kind of tried to address it in  
6 my questions to Jim. They're required to notify persons  
7 who have requested notifications of applications generally  
8 and, I think how he explained that is people that are on  
9 our docket list to receive our hearing docket. And I  
10 think -- I checked with Florene, and I think she told me  
11 there was --

12                   MS. DAVIDSON: 75.

13                   CHAIRMAN CATANACH: 75 persons on our  
14 docket list.

15                   I guess to me that seems a little bit  
16 burdensome to have to mail this to persons who may not  
17 even have any interest at all in this type of application.

18                   COMMISSIONER PADILLA: Is it the OCD or the  
19 applicant that has to mail it?

20                   CHAIRMAN CATANACH: It is the applicant.

21                   COMMISSIONER BALCH: So one question  
22 brought up was, you know, the applicants didn't have  
23 access to any of the lists, which would make it very  
24 difficult for them to notice everybody on the list,  
25 because they don't have the list.

1 MR. BRANCARD: Well, but I mean the  
2 provision says here, "...as identified to the applicant by  
3 the Division." So the burden is sort of on the Division  
4 to give the applicant the list.

5 COMMISSIONER BALCH: It's my contention  
6 that a lot of people that are generally interested in  
7 activities of the commission would be interested in  
8 surface waste, so it might not be a bad thing to have a  
9 pretty broad mailing for these kinds of permits.

10 COMMISSIONER PADILLA: It does give a  
11 provision for email, not...

12 COMMISSIONER BALCH: Or email. You're  
13 right. Okay. This is not certified.

14 COMMISSIONER PADILLA: Yeah, but --

15 CHAIRMAN CATANACH: It does say First Class  
16 Mail or email. Okay.

17 COMMISSIONER BALCH: So there is nothing  
18 about certified, to have that huge stack of --

19 COMMISSIONER PADILLA: Green slips.

20 MR. BRANCARD: That's just the people who  
21 live within a half mile.

22 COMMISSIONER BALCH: As long as the  
23 Division is required to share the list of people that the  
24 applicant is supposed to mail them to, I think that's  
25 fine. The question is: Is the Division willing to do

1 that?

2 CHAIRMAN CATANACH: That's public  
3 information, I would think.

4 MS. DAVIDSON: It is, but we just have an  
5 email list.

6 CHAIRMAN CATANACH: Well, that would be  
7 okay. If they did the email list they could just send it  
8 out email. So yeah, I think we could provide that to the  
9 applicant without any issue.

10 COMMISSIONER BALCH: That would take care  
11 of the noticing problem, I suppose.

12 CHAIRMAN CATANACH: I still think it's a  
13 little bit too broad, but you're right, there may be some  
14 people who are interested generally.

15 COMMISSIONER BALCH: I'm just thinking  
16 about the amount of interest in, for example, Rule 17.

17 COMMISSIONER PADILLA: Is there any  
18 interest in that?

19 CHAIRMAN CATANACH: You didn't have to go  
20 through that.

21 COMMISSIONER BALCH: Oh.

22 COMMISSIONER PADILLA: That's why I asked.

23 CHAIRMAN CATANACH: Florene, are you the  
24 Division clerk?

25 MS. DAVIDSON: Yes.

1                   COMMISSIONER BALCH: I think I'm okay with  
2 the rest of 36.9.

3                   CHAIRMAN CATANACH: I think G was the one  
4 where we kind of decided that that was okay, because that  
5 was the dead-end paragraph.

6                   COMMISSIONER BALCH: Right.

7                   CHAIRMAN CATANACH: And we were okay with  
8 that, so...

9                   COMMISSIONER BALCH: After seven months  
10 it's not going to happen.

11                  CHAIRMAN CATANACH: So we're on 15?

12                  COMMISSIONER BALCH: Yes.

13                  COMMISSIONER PADILLA: Flow chart. And --

14                  MR. BRANCARD: 16 is the next. Rule 36.10.

15                  COMMISSIONER BALCH: It's just a  
16 description of the flow chart on 36.9.

17                  MR. BRANCARD: Exhibit 16 is the next  
18 change.

19                  CHAIRMAN CATANACH: You made a good point,  
20 Bob.

21                  COMMISSIONER BALCH: That is what I would  
22 add right there. So "Revised Division Review" and then  
23 it's either denied or Proposed Decision. There's only two  
24 outcomes.

25                  CHAIRMAN CATANACH: You had a good idea.

1 Maybe at some point -- not included in the rule, but maybe  
2 at some point include a flow chart and check list for the  
3 applicant which might help the applicant.

4 COMMISSIONER BALCH: Maybe as part of a  
5 preamble see C-137A.

6 CHAIRMAN CATANACH: We could recommend that  
7 to Mr. Griswold, probably.

8 COMMISSIONER BALCH: I would include the  
9 timelines on there, too.

10 CHAIRMAN CATANACH: But it won't be in the  
11 rule.

12 COMMISSIONER BALCH: No.

13 CHAIRMAN CATANACH: Okay. 16.

14 COMMISSIONER BALCH: C(1) seems to be...

15 (Reading) Division's proposed decision to  
16 approve the application includes conditions not expressed  
17 or required by the rule.

18 I think the question was that they could  
19 request a hearing irregardless of whether that language is  
20 there or not.

21 MR. BRANCARD: Right. They are a person  
22 under A.

23 COMMISSIONER BALCH: Right.

24 MR. BRANCARD: These are when you are  
25 required to give a hearing.

1 I think they would be required to get a  
2 hearing under A, period, anyway, because they have  
3 standing, and if they appeal it -- I would think an  
4 applicant can get a hearing at any point.

5 COMMISSIONER BALCH: So 1 is really  
6 redundant.

7 MR. BRANCARD: Yeah.

8 COMMISSIONER BALCH: You can probably just  
9 strike that section and renumber below there and be fine.

10 MR. BRANCARD: Yeah, because the other ones  
11 are ones where the situation where it's not necessarily a  
12 person of interest but the director can decide kind of on  
13 their own.

14 COMMISSIONER BALCH: So strike C(1) and replace  
15 it with a new C(1), (2) and (3), replacing (2), (3) and  
16 (4).

17 Would that work?

18 COMMISSIONER PADILLA: Right.

19 MR. BRANCARD: I have to go rescue a small  
20 child. You have gotten kind of gotten through most of  
21 this stuff.

22 CHAIRMAN CATANACH: Except for transition.

23 MR. BRANCARD: I think you know where  
24 you're going on that one.

25 COMMISSIONER BALCH: You're leaving us

1 without able guidance?

2 MR. BRANCARD: Yeah.

3 COMMISSIONER BALCH: Do you know how much  
4 trouble we're gonna to get into?

5 MR. BRANCARD: No.

6 MR. WADE: I'll --

7 CHAIRMAN CATANACH: Can you take notes on  
8 the changes?

9 COMMISSIONER BALCH: No conflict of  
10 interest there.

11 MR. WADE: I can attempt to, but I do have  
12 to go rescue children in a half an hour, so...

13 CHAIRMAN CATANACH: We better hurry. All  
14 right.

15 COMMISSIONER PADILLA: 36.11(B) just refers  
16 back to 9.

17 MR. BRANCARD: We found another lawyer.

18 COMMISSIONER BALCH: Oh, I forgot Cheryl  
19 was sitting over there.

20 Now we have our unbiased representation.

21 MS. BADA: I'm just taking notes.

22 COMMISSIONER BALCH: Possibly  
23 disinterested.

24 COMMISSIONER PADILLA: This also appears to  
25 be estimated costs that we talked about earlier and the --

1 COMMISSIONER BALCH: And there's an appeal  
2 process.

3 COMMISSIONER PADILLA: -- remedy if they  
4 don't agree, yeah.

5 COMMISSIONER BALCH: There is a process.

6 COMMISSIONER PADILLA: I'm okay with that.

7 COMMISSIONER BALCH: So I'm okay with the  
8 language change in 36.11(B).

9 CHAIRMAN CATANACH: Okay. This is only the  
10 initial forms and all that. We did --

11 COMMISSIONER BALCH: There is language.

12 CHAIRMAN CATANACH: -- have some language  
13 change in some places.

14 COMMISSIONER PADILLA: Forms acceptable to  
15 the Division.

16 Ms. Marks has --

17 CHAIRMAN CATANACH: It's here in the first  
18 one.

19 COMMISSIONER PADILLA: She had a couple of  
20 places where it hadn't been inserted.

21 COMMISSIONER BALCH: Those will be in the  
22 next couple of sections, so all we need to add "or forms  
23 otherwise acceptable to the Division."

24 MR. PADILLA: So this one is fine.

25 36.11(C) I think is fine.

1 COMMISSIONER PADILLA: Right. And (D).

2 COMMISSIONER BALCH: And (D).

3 COMMISSIONER PADILLA: This is the one  
4 where there's a payee listed for Part 2.

5 CHAIRMAN CATANACH: Yeah. And in my notes  
6 in paragraph 2, I think -- if you go down to where it says  
7 "All letters of credit..." I think I had written down  
8 "shall benefit the Energy, Minerals and Natural Resources  
9 Department, Oil Conservation Division."

10 Is that right?

11 COMMISSIONER PADILLA: Yes.

12 CHAIRMAN CATANACH: But that doesn't --

13 COMMISSIONER PADILLA: You could say "All  
14 letters of credit shall be governed by the laws of the  
15 State of New Mexico and shall benefit the..."

16 The language that's right at the top: New  
17 Mexico Energy and Minerals Department, Oil Conservation  
18 Division.

19 CHAIRMAN CATANACH: That works.

20 COMMISSIONER BALCH: Right.

21 COMMISSIONER PADILLA: Just add that after  
22 a comma, or and.

23 "All Letters of Credit shall be governed by  
24 the laws of the State of New Mexico" and language from  
25 above.

1 CHAIRMAN CATANACH: And benefit.

2 COMMISSIONER PADILLA: And benefit the  
3 ENMRD, OCD.

4 COMMISSIONER BALCH: So in Section 3 of  
5 36.11(E) it starts out with "Cash accounts" and  
6 applicant/operator/permittee.

7 At that stage of operation they are still  
8 an applicant, right?

9 COMMISSIONER PADILLA: Right. Because they  
10 have to post financial assurance prior to getting the  
11 permit.

12 COMMISSIONER BALCH: So I recommend we  
13 don't strike the word "applicant" and replace it with the  
14 word "operator," because we took out the definition of  
15 operator from the rule.

16 COMMISSIONER PADILLA: Scratch "operator"  
17 and leave "applicant".

18 COMMISSIONER BALCH: So we're not going to  
19 make this change.

20 COMMISSIONER PADILLA: That's fine, because  
21 there is language "Division... may direct payment of or  
22 all or part of the balance" to its designated...

23 Yeah.

24 CHAIRMAN CATANACH: Then on the next page  
25 that is where we add "or forms..."

1 COMMISSIONER PADILLA: Are we going to  
2 scratch "prescribed" all the way across?

3 COMMISSIONER BALCH: Well the word  
4 prescribed is used in the previous statement, so we just  
5 leave Division-prescribed.

6 COMMISSIONER PADILLA: So --

7 COMMISSIONER BALCH: So after "Division  
8 prescribed" we would add the language from "other forms  
9 acceptable to the Division."

10 And that's in two places in that section.

11 So I think I'm okay with the rest of  
12 language is there.

13 COMMISSIONER PADILLA: Yeah.

14 COMMISSIONER BALCH: My only concern was  
15 there's nothing in there to stop the Division from doing a  
16 new evaluation on the same owner every month.

17 COMMISSIONER PADILLA: I think that is  
18 going to be self limiting, based on resources.

19 COMMISSIONER BALCH: That is the way it was  
20 described by Mr. Griswold.

21 COMMISSIONER PADILLA: You never know, he  
22 could get carried away.

23 CHAIRMAN CATANACH: Trust me, there's not  
24 enough people to do that.

25 COMMISSIONER BALCH: So I'm not going to

1 worry.

2 MR. GRISWOLD: I'm sitting here.

3 COMMISSIONER BALCH: We're talking about  
4 you like you're not.

5 CHAIRMAN CATANACH: Are we on 36.11(F), (G)  
6 and (H)?

7 COMMISSIONER PADILLA: Yes. So here we  
8 have the same change, "forms acceptable to the Division."  
9 At the end of that Part 3, first sentence, "forms" -- at  
10 the end, in between "forms" and the end, put that language  
11 again.

12 That's is the only change I have here.

13 CHAIRMAN CATANACH: There was another place  
14 in there. Just further on if you go further on down there  
15 it has another Division.

16 COMMISSIONER BALCH: Section 3. It shows  
17 up twice.

18 COMMISSIONER PADILLA: That was twice.  
19 There it is, yeah.

20 CHAIRMAN CATANACH: So you have to add that  
21 twice.

22 COMMISSIONER BALCH: Cheryl's already on  
23 top of it.

24 CHAIRMAN CATANACH: Good job, Cheryl.

25 COMMISSIONER BALCH: I miss you as a

1 commission counselor.

2 COMMISSIONER PADILLA: Again we have "at  
3 least once during every successive five-year period."

4 Coming back to your comment, Bob, about  
5 multiple reviews.

6 COMMISSIONER BALCH: I suppose if it became  
7 excessive they could take it to a hearing.

8 COMMISSIONER PADILLA: Uh-huh.

9 COMMISSIONER BALCH: You go along with  
10 that?

11 CHAIRMAN CATANACH: They'll come see me and  
12 complain to me about it, I'm sure.

13 COMMISSIONER BALCH: So Exhibit 21, in  
14 19.15.36.12 we just remove the word "safety" from a number  
15 of instances. And then in Section C we are going to  
16 change the word operator to applicant.

17 COMMISSIONER PADILLA: Yeah.

18 COMMISSIONER BALCH: Exhibit 22 is removing  
19 the word "safety" from 19.15.36.13.

20 COMMISSIONER PADILLA: Fine with that.

21 COMMISSIONER BALCH: And then some internal  
22 referencing and a clerical error being fixed in 36.

23 COMMISSIONER PADILLA: Fine with that.

24 CHAIRMAN CATANACH: Uh-huh.

25 COMMISSIONER PADILLA: Same for Exhibit 24,

1 "safety" again.

2 COMMISSIONER BALCH: Okay.

3 COMMISSIONER PADILLA: 25. There's a typo  
4 in the exhibit, yeah. Other than that, fine with that.

5 COMMISSIONER BALCH: From 36.17(B)(1) (sic)  
6 and 36.17(B)4. Typo.

7 COMMISSIONER PADILLA: Question on 26?

8 COMMISSIONER BALCH: Seems all right.

9 CHAIRMAN CATANACH: I was just checking to  
10 see if 35.20 was in there, transition, but it's not.

11 COMMISSIONER PADILLA: Yeah.

12 COMMISSIONER BALCH: And then removing  
13 "safety" from 36.19(A).

14 COMMISSIONER PADILLA: Yeah.

15 COMMISSIONER BALCH: Probably sounded  
16 horrible on the record, "removing safety". The word  
17 "safety."

18 CHAIRMAN CATANACH: 28 is transitional...

19 COMMISSIONER PADILLA: This is an easy one.  
20 We are doing this knocking two words off.

21 COMMISSIONER BALCH: I think if we remove  
22 the words monitoring and post closure then the rest of it  
23 can stand.

24 CHAIRMAN CATANACH: I agree. I think that  
25 was the compromise that we were willing to settle for.

1                   So removing "monitoring" and "post  
2   closure".

3                   COMMISSIONER BALCH:   Right.

4                   CHAIRMAN CATANACH:   From Part A.

5                   COMMISSIONER BALCH:   Then the existing  
6   7.9(11) facilities will still be under case by case, which  
7   is probably the way it should be.

8                   COMMISSIONER PADILLA:   You could even take  
9   out monitor and post closure everywhere.

10                  COMMISSIONER BALCH:   I think the real issue  
11   was with the grandfathering in 7.9(11)s, 29 or so of them,  
12   out there.

13                  Just to make it explicitly clear that we  
14   want things to keep happening the same way except for in  
15   financial assurance.

16                  COMMISSIONER PADILLA:   I'm fine with that.

17                  CHAIRMAN CATANACH:   That's going to be a  
18   major discussion when we start talking about --

19                  COMMISSIONER BALCH:   The technical side.

20                  CHAIRMAN CATANACH:   The technical side, I  
21   think.

22                  COMMISSIONER BALCH:   Well, that was  
23   painless.

24                  Exhibit 29 is the same thing.

25                  COMMISSIONER PADILLA:   So A we are striking

1 monitoring and post closure?

2 COMMISSIONER BALCH: Yes.

3 COMMISSIONER PADILLA: We already talked  
4 about this.

5 COMMISSIONER BALCH: We already took care  
6 of 15.2.7 in Exhibit 31. And 35.7.

7 COMMISSIONER PADILLA: Didn't we already do  
8 all 35?

9 COMMISSIONER BALCH: I think so.

10 COMMISSIONER PADILLA: Yeah.

11 COMMISSIONER BALCH: Okay.

12 CHAIRMAN CATANACH: That can't be it.

13 We got to start over, do something. That  
14 was too easy.

15 COMMISSIONER BALCH: It's not over yet.

16 So I think we would just request that give  
17 yourself the revised version with the C-137A before we  
18 close the record.

19 COMMISSIONER PADILLA: Correct.

20 CHAIRMAN CATANACH: Do we want to have that  
21 before the next hearing or do we want them just to present  
22 it at the next hearing?

23 COMMISSIONER PADILLA: I think it would be  
24 beneficial to have it presented so you can see what the  
25 thought process behind it was.

1                   COMMISSIONER BALCH: I think the answer is  
2 both. We would like it, and then we would like, at least  
3 before presentation, in case any issues crop up with what  
4 we have proposed.

5                   MR. WADE: At this point am I allowed to  
6 ask a question for clarification?

7                   CHAIRMAN CATANACH: Sure. Bill's not here.  
8 We can do anything we want.

9                   MR. WADE: Cheryl is.

10                  COMMISSIONER BALCH: It's only  
11 deliberations.

12                  MR. WADE: I wasn't sure if I was still  
13 able to ask questions.

14                  Are we getting direction as to minor  
15 modifications? I guess I don't remember hearing some  
16 things that were said.

17                  COMMISSIONER BALCH: No.

18                  MR. WADE: So what would you like to see  
19 won't reflect anything other than what is in the rule?

20                  COMMISSIONER BALCH: Nobody presented  
21 testimony about differentiating what minor or major  
22 modifications are, so we can't address that in our  
23 deliberations.

24                  MR. WADE: I just wanted to make sure  
25 everybody understands that it's just going to reflect

1 what's currently in the rule.

2 COMMISSIONER BALCH: And the modifications  
3 that are proposed and our interpretations of those.

4 MR. WADE: Okay. And I was speaking  
5 specifically to the C-137A, which is that form, but  
6 otherwise, yeah, we will have that. We've taken notes and  
7 we can draft a new proposed amendment.

8 COMMISSIONER BALCH: Great.

9 CHAIRMAN CATANACH: So does that give you  
10 enough time to develop that form, Mr. Wade?

11 MR. WADE: I think the form is going to be  
12 very easy. But I shouldn't have just said that. I've got  
13 this guy next to me.

14 COMMISSIONER BALCH: I think we added  
15 several requests which were relatively minor in nature,  
16 you should be able to get it in a couple of weeks before  
17 the next hearing date?

18 MR. WADE: Is there any idea as to how full  
19 the next hearings are?

20 COMMISSIONER BALCH: That's the High Roller  
21 Water.

22 MS. DAVIDSON: That's May.

23 CHAIRMAN CATANACH: Is there anything on in  
24 April?

25 MS. DAVIDSON: No. We didn't get any --

1                   COMMISSIONER BALCH: So we can just  
2 continue this to that hearing.

3                   MR. WADE: When would we need to provide  
4 exhibits for you all?

5                   MR. GRISWOLD: Well, three weeks before  
6 that or --

7                   CHAIRMAN CATANACH: I think maybe a week  
8 before the actual hearing. As long as we have some time  
9 to review the actual rule that has been drafted and  
10 changed by us, and the form.

11                   I think we would be better prepared at the  
12 next hearing.

13                   COMMISSIONER BALCH: And I don't think you  
14 need to have this scale of a presentation next time, just  
15 if there is any unforeseen...

16                   MR. GRISWOLD: There was only two  
17 witnesses.

18                   CHAIRMAN CATANACH: Just half a day.

19                   COMMISSIONER BALCH: Any unforeseen  
20 consequences of what we've done, then you might want to  
21 direct those to us.

22                   MR. GRISWOLD: Yeah.

23                   COMMISSIONER BALCH: And you may have to  
24 coordinate this with Mr. Feldewert, as well.

25                   MR. GRISWOLD: In terms of the draft form,

1 it's takes C-137 that exists and removing from, not adding  
2 to.

3 COMMISSIONER BALCH: Okay.

4 MR. WADE: And probably I foresee the  
5 biggest change that is going to affect the whole rule is  
6 now referring to owner, applicant or permittee. And I had  
7 a brief discussion with Cheryl and it sounds like we are  
8 going to have to, at this point, ask for a...

9 MS. BADA: Like a repeal and replace.

10 COMMISSIONER BALCH: How does that change  
11 the process?

12 MS. BADA: It doesn't change process, it  
13 just won't show the edits. So you won't have the  
14 strike-throughs and the underlines.

15 COMMISSIONER BALCH: Okay. I suspect when  
16 we get to the technical part of this it will be repeal and  
17 replace anyway.

18 MR. WADE: He thought one hour.

19 CHAIRMAN CATANACH: You thought three  
20 hours. Okay.

21 So this case will be continued to April  
22 9th, to the April 9th commission meeting.

23 And again, if you can get that to us maybe  
24 a week before the hearing, that would sure be beneficial  
25 to us.

1 Is there anything further?

2 There being nothing further, do you have a  
3 motion to --

4 COMMISSIONER BALCH: Let's double check the  
5 docket real quick.

6 CHAIRMAN CATANACH: Oh, my God. I almost  
7 forgot.

8 COMMISSIONER PADILLA: All the way from  
9 Aztec and you're going to throw him out without his  
10 presentation.

11 CHAIRMAN CATANACH: It's been a long day,  
12 Mr. Perrin.

13 MR. WADE: Would that be April 7th, do you  
14 think, because April 9th is a Saturday.

15 MS. DAVIDSON: Maybe. Maybe the 7th.  
16 Maybe it is the 7th. Whatever Thursday.

17 MR. WADE: It would be either the 7th,  
18 14th, 21st. I'm guessing those that are three dockets --  
19 So the 7th?

20 MR. PRICE: When is it?

21 MR. WADE: April 7th.

22 MR. PRICE: Oh, good. That doesn't  
23 interfere with my turkey hunt.

24 CHAIRMAN CATANACH: So at this time the  
25 last remaining item on the agenda is a presentation by

1 Mr. Perrin, who is the chairman of the Gas Capture Work  
2 Group, and we appreciate his being here today and he's  
3 going to update us on the progress of the work group and  
4 what they are doing and how everything is going.

5 MR. PERRIN: They are going very well.

6 CHAIRMAN CATANACH: Thanks, Mr. Perrin.

7 MR. PERRIN: I'll keep this brief.

8 During the 2015 legislative session  
9 Memorial 29 was issued to study the economic and  
10 environmental impact of the increase in flaring and  
11 venting in New Mexico. One meeting was held and it was  
12 determined that additional information was needed, and so  
13 there were no further meetings.

14 A Directive from Governor Martinez was  
15 given to Secretary Martin for OCD to study the flaring  
16 issue and come up with some possible regulations to reduce  
17 flaring by requiring gas capture plans for all new  
18 drilling permits and implementing phased-in flaring  
19 targets by the end of 2015.

20 The gas capture plan committee was formed  
21 in July, consisting of OCD and industry members. The  
22 first meeting was held August 19th, and original members  
23 included OXY, Agave, Conoco Phillips, Synergy, Concho,  
24 WPX, Mac Energy, Devon, and OCD, Daniel Sanchez and  
25 myself.

1                   Later one of the Conoco representatives  
2                   retired and Mike Lane joined our committee.

3                   CHAIRMAN CATANACH:   Who did?

4                   MR. PRICE:   Mike Lane.

5                   The first thing we wanted to do is figure  
6                   out what we were doing and the question come up:   Why are  
7                   we flaring at all, and what seemed to be causing this  
8                   issue?

9                   So in working with the committee what we  
10                  found out was that the flaring is normally caused by  
11                  approximately three things:   Right-of-way timing  
12                  contributes, approval for right-of-way timing; permit  
13                  timing for equipment; and the pipeline quality of gas.  
14                  Those were the three main reasons it was determined for  
15                  flaring.

16                  So in that process we developed a gas  
17                  capture plan.   The gas capture plan outlines actions taken  
18                  by the operator to reduce well production facility flaring  
19                  for new completion, new drill recomplete to new zone, for  
20                  refracturing.

21                  COMMISSIONER PADILLA:   Let me interrupt you  
22                  for one second, Charlie.   Right-of way, pipeline quality  
23                  gas.   And what was the third one?

24                  MR. PERRIN:   Equipment permitting.

25                  COMMISSIONER PADILLA:   Equipment

1 permitting. Thank you.

2 MR. PERRIN: You're welcome.

3 The gas capture plan captures: well  
4 production facility, which is the name of the facility and  
5 the wells; the gathering system and pipeline notification;  
6 the flow-back strategy; the alternatives to reducing the  
7 flaring, which include power generation, compressed  
8 natural gas and NGL removal.

9 There is a plan attached to the back of  
10 your presentations if you decide to review that plan.

11 The Gas Capture Planning Committee also  
12 identified that the current OCD reporting has no means to  
13 differentiate between venting and flare. There was no  
14 place for the operators to report flaring volumes to the  
15 OCD, so one of the things the committee did was they  
16 reviewed the subject and determined that we would have to  
17 implement a new nondisposition flaring code for the  
18 flaring volumes to be reported.

19 This was done in November. In November,  
20 2015 we got that put in place. We determined that  
21 operators that reported, November production would be the  
22 first month it was reported, remembering November  
23 production is reported in January.

24 So in November of '15 the Gas Capture  
25 Planning Committee also expanded, adding new members from

1 agencies. We included Bureau of Land Management, the New  
2 Mexico Environmental Department, the State Land Office,  
3 and Energy Conservation and Minerals division.

4 This was to allow us to work with other  
5 agencies to ensure working together to achieve the same  
6 goal in the reduction, without duplication or conflicting  
7 with other agencies.

8 We anticipated that in February we would  
9 have two months of reporting for us to analyze and work  
10 with. In December we had the Ramsey plant explosion. The  
11 plant capacity prior to the explosion was estimated to be  
12 300,000 mcf. Due to the shutdown at the plant, many gas  
13 wells, main wells were turned to vent, they were shut in,  
14 or they were flared.

15 So we don't have adequate volumes starting  
16 with the December report. The plant explosion was early  
17 in the month.

18 But the agencies continue working hard to  
19 help each other. Yolanda Perez with OXY is a  
20 representative on the NMOGA, and she provided a brief  
21 summary of what New Mexico Oil and Gas Association, NMOGA,  
22 is working with NMED on as a result of MMED's involvement  
23 on the Gas Capture Plan Committee. As a follow up -- and  
24 I'm just going to read exactly what she said.

25 (Reading) As a follow up to an action item

1 by the Gas Capture Plan Committee, New Mexico Oil and  
2 Gas Association, NMOGA, members met with the New  
3 Mexico Environmental Department Air Quality Bureau on  
4 January 26th to consider a new general construction  
5 permit approach to authorize appropriate temporary  
6 flaring activities. Both NMED and NMOGA's approach  
7 is to keep the temporary flaring general construction  
8 permit scope focused and to addresses temporary  
9 flaring due to lack of infrastructure. The process  
10 to go with a general construction permit is  
11 anticipated to take approximately six to nine months  
12 to develop. This seemed to be the most effective  
13 process for both industry and NMED. NMED has not yet  
14 committed to the general construction permit option  
15 until NMED completes air quality modeling scenarios  
16 to defined what general construction permit flaring  
17 activities will be authorized. Once the modeling is  
18 completed the general construction permit will be  
19 drafted. We hope to have an update on the next steps  
20 by the end of March.

21           OCD plans to conduct an outreach training  
22 in the near future. We may do the outreach training  
23 either via Webinar or Power Point posted to our website.

24           The GCP, Gas Capture Plan Committee, has  
25 scheduled the next meeting for August, thus allowing time

1 for the plant to be brought back on and well activity to  
2 stabilize, hopefully providing the committee two months of  
3 reports to review.

4 Would you like me to go into specifics?

5 COMMISSIONER BALCH: No.

6 MR. PERRIN: In November of 2015 the volume  
7 of gas that was vented was 953,000 -- I'm sorry, vented  
8 was 1.197 million, and flared was 953,000.

9 In December we seen almost a flip-flop. In  
10 December the vented was 995,000 and the flared was 1.319.

11 CHAIRMAN CATANACH: So 1.31 million. So  
12 nearly a reverse of what we had seen previously.

13 MR. PERRIN: Some of the things that we did  
14 in the process in discussing with agencies was: Why is it  
15 taking a long time to get right-of-ways done? And the  
16 agencies are working to minimize that.

17 The same thing we found out -- in the  
18 northwest we had an operator come in, and they brought  
19 equipment in, and they captured some gas, some NGLs, and  
20 they were hauling it off. Well, whenever we got ready to  
21 move that equipment, the permitting process was going to  
22 take nine to twelve months to be able to move that  
23 equipment to minimize that flaring, that gas loss.

24 So that became very ineffective very quick.

25 So that's one of the things we focused with

1 the other agencies, is: What is the challenge, and why  
2 are we flaring, and how can we get out of the way, so to  
3 speak.

4 So right-of-way timing has come down. The  
5 New Mexico Environmental Department is willing to work  
6 with us, and we are looking at the gas capture -- this  
7 always confuses me -- general construction plan. So I  
8 can't call it GCP because that is what our GCP, gas  
9 capture plan is. So it gets kind of confusing.

10 COMMISSIONER BALCH: Is there a dialogue  
11 with BLM and the tribes also?

12 MR. PERRIN: We did not include the tribes.  
13 We have not included the tribes.

14 CHAIRMAN CATANACH: BLM is included,  
15 though?

16 MR. PERRIN: Yes.

17 CHAIRMAN CATANACH: They are on the  
18 committee?

19 MR. PERRIN: Yes. What we did is we  
20 started at a small committee, and there was a group of us  
21 and our deal was to find out why we were flaring and to  
22 identify those problems. And we -- there's always a  
23 chance if you bring everybody in that you can have one  
24 talking about the other. So in the process of doing that  
25 we identified the problems and then brought the other

1 agencies in and asked them how they could help us resolve  
2 those, or minimize those issues.

3 COMMISSIONER PADILLA: Was BLM receptive to  
4 that?

5 MR. PERRIN: Very receptive. They came in  
6 and sat with us, they committed to doing some visiting  
7 with their districts to find out what kind of differences.

8 COMMISSIONER BALCH: They have a challenge  
9 with permit turnaround.

10 COMMISSIONER PADILLA: Right. I would  
11 imagine you would see a lot of difference between the  
12 districts with the BLM, too, because the guys in the  
13 northwest move very differently than the guys in the  
14 southeast.

15 CHAIRMAN CATANACH: That's correct.

16 COMMISSIONER PADILLA: And the gals.

17 MR. PERRIN: Well, the deal of it is we  
18 were talking about specifics -- you know, the timing of  
19 the permits -- and lumped them all together, and that is  
20 what we were looking at. We weren't trying to insinuate  
21 one office was better or worse than others, just  
22 identifying the issue and looking for resolution.

23 COMMISSIONER PADILLA: And pipeline  
24 quality, is that mostly because of nitrogen or...

25 MR. PERRIN: Well, yes, mainly.

1           You know, the shale play in the northwest,  
2 they're having to use energized fractures and so they're  
3 using 70 percent nitrogen, so when they inject that in,  
4 then they have to get it back. And when the nitrogen  
5 comes in, pipeline quality has a minimum or a maximum 40  
6 percent nitrogen and it has a 10 percent oxygen, so to  
7 keep -- when they get through with their fracking, they do  
8 it in stages, and they have to go in drill those out, and  
9 they're using nitrogen mist to clean those out. So  
10 they're using nitrogen mist to clean those out, so we're  
11 introducing oxygen because it's 95 percent nitrogen. So  
12 we are using them to clean up. So we are using oxygen and  
13 getting nitrogen back, and we can't put it down the  
14 pipeline. So you see the big flares, and the majority of  
15 it is nitrogen coming back. It's a safety issues to put  
16 oxygen down the pipelines greater than 10 percent.

17           COMMISSIONER BALCH: Explosive?

18           MR. PERRIN: Yes, sir, very.

19           Any questions?

20           COMMISSIONER PADILLA: What is the next  
21 step?

22           MR. PERRIN: The next step, we are going to  
23 group back up and look at the numbers. In the meantime  
24 we're -- operators are already reducing. They're doing  
25 the things they can. We haven't visited with Legacy

1 because you've got the EPA Quad-0. So the main thing we  
2 are looking at is what exactly is going to happen with the  
3 drilling.

4 We are hoping to have some permits in place  
5 where we can get the units out there.

6 And the gas capture -- the general  
7 construction plan, we're hoping we'll be able to -- it  
8 will be a permit issued to a company, the Company will be  
9 able to move that unit, it will be a mobile unit. They  
10 will be able to move from well to well to well. So in  
11 that aspect that will minimize as it's going.

12 COMMISSIONER PADILLA: And that's through  
13 NMED?

14 MR. PERRIN: The permit will be through  
15 NMED. That's what NMOGA and NMED is working on right now,  
16 to minimize that.

17 COMMISSIONER PADILLA: How much are those?

18 MR. PERRIN: How much are the permits?

19 COMMISSIONER PADILLA: I have heard  
20 rumblings from the industry that it's a really expensive  
21 permit.

22 MR. PERRIN: I have heard -- well, don't  
23 quote me. I heard it's \$3,000 and then the annual renewal  
24 of \$800.

25 COMMISSIONER PADILLA: Yeah, I heard

1 four -- 4200. So it's right in line with that.

2 MR. PERRIN: One of the things we haven't  
3 really got into is cost. Our charge was to identify what  
4 it was, see if we can minimize where it was coming from.

5 COMMISSIONER PADILLA: So that is a movable  
6 permit? You can set it up at a flaring well and --

7 MR. PERRIN: It will be a portable piece of  
8 equipment, yes, that will move from well to well.

9 COMMISSIONER PADILLA: And the permit moves  
10 with the equipment.

11 MR. PERRIN: Yes, sir.

12 COMMISSIONER PADILLA: So you don't have to  
13 buy a new permit for each well.

14 MR. PERRIN: Right.

15 COMMISSIONER BALCH: So at some point  
16 something may come before us we need to address in the  
17 regulation. What's your time line for giving us another  
18 update?

19 MR. PERRIN: Well, it would be after  
20 August, because we are not meeting again till August. So,  
21 you know, maybe later in the year, unless something else  
22 goes on. We are not having an actual sit-down meeting  
23 until I think August 23rd. That would give us August  
24 15th's reporting, which will actually be June's reporting.

25 The plant is not expected to come back up

1 till April, so if we can get May and June and have it by  
2 August 15th, the committee meeting is August 23rd, we  
3 would be able to review that.

4 COMMISSIONER BALCH: Sometime in the fall?

5 MR. PERRIN: Sometime in the fall.

6 COMMISSIONER PADILLA: Do you think that  
7 plant will be up by April? We've heard several  
8 different -- are you talking about the Ramsey plant?

9 MR. PERRIN: Yes. I have heard it will not  
10 be up prior to April, so we are hopeful it will come back  
11 up.

12 COMMISSIONER PADILLA: First we heard  
13 February, then March. Hopefully April.

14 MR. PERRIN: Sooner the better.

15 COMMISSIONER PADILLA: Yeah, a lot of the  
16 wells down with no market.

17 MR. PERRIN: You're absolutely right.  
18 However, I think I saw it was over 40 today.

19 COMMISSIONER PADILLA: I haven't seen it.

20 CHAIRMAN CATANACH: It was yesterday.

21 COMMISSIONER BALCH: Apparently it was up  
22 to 40 a couple of days ago.

23 MR. GRISWOLD: \$38.67.

24 COMMISSIONER BALCH: That's good news.

25 CHAIRMAN CATANACH: Well, according to Dr.

1 Fein (phonetic) it will be 50 in June.

2 MR. PERRIN: Well, you know, Dr. Fein was  
3 talking about the cost of gas, also. But, Jim, what did  
4 you say gas was?

5 MR. GRISWOLD: Wholesale price of gas  
6 \$1.70 -- are you talking about natural gas?

7 COMMISSIONER BALCH: I think OPEC predicted  
8 49 or 50 by the end of the year, so that is my prediction.

9 COMMISSIONER BALCH: Well, they have a  
10 little bit of control, a mixed amount.

11 MR. PERRIN: Any questions, other  
12 questions?

13 CHAIRMAN CATANACH: I just want to say  
14 that I know Charlie and his group have worked really hard  
15 on this, and I want to commend them for the work they've  
16 done so far. They have done a really good job.

17 MR. PERRIN: Thanks. I'll share that with  
18 the group.

19 COMMISSIONER PADILLA: Thanks for taking  
20 the time.

21 CHAIRMAN CATANACH: We should have done  
22 this first thing.

23 MR. PERRIN: I was going to listen to the  
24 ruling, anyway, so of course that was when it was three  
25 hours not 13.

1                   But Jim has graciously offered to pay for  
2 my motel room again.

3                   MR. GRISWOLD: You can stay at my house.

4                   MR. PERRIN: I'm going home.

5                   CHAIRMAN CATANACH: Okay.

6                   Do I have a motion to adjourn?

7                   COMMISSIONER PADILLA: So moved.

8                   COMMISSIONER BALCH: And second.

9                   CHAIRMAN CATANACH: All in favor say aye.

10                  COMMISSIONER Padilla: Aye.

11                  COMMISSIONER BALCH: Aye.

12                  (Note: Proceedings adjournd at 4:56 p.m.)

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1 STATE OF NEW MEXICO )

2 : ss

3 COUNTY OF TAOS )

4 I, MARY THERESE MACFARLANE, DO HEREBY  
5 CERTIFY that I am a duly licensed Certified Court Reporter  
6 for the State of New Mexico;

7 that I reported stenographically to the  
8 best of my ability the proceedings had in the  
9 above-mentioned cause;

10 and that the foregoing transcript comprised  
11 of pages numbered 5 through 275, is a full, true and  
12 correct transcript of my stenographic notes so taken.

13 Dated at Taos, New Mexico this 29th day of  
14 April, 2016.

15 \_\_\_\_\_  
16 Mary therese Macfarlane  
17 NMCCR No. 122  
18 License Expires 12/31/2016

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